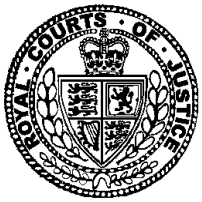

Neutral Citation Number: [2019] EWHC 1450 (Admin)

Case No: CO/3720/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2019

Before:

MR JUSTICE SWIFT

- -

BETWEEN

THE QUEEN

on the application of

ZK **Claimant**
By her mother and Litigation Friend HK

-and-

LONDON BOROUGH OF REDBRIDGE **Defendant**

- -
- -

STEPHEN BROACH and CIAR McANDREW (instructed by **Anthony Gold Solicitors**) for the **Claimant**
DEOK- JOO RHEE QC and TOM TABORI (instructed by London Borough of Redbridge) for the **Defendant**

Hearing dates: 23/01/2019 - 24/01/2019

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Approved Judgment

MR JUSTICE SWIFT

A. Introduction

1. The Claimant is 12 years old. She brings these proceedings by her mother who is her litigation friend. The Claimant is totally blind as a result of a brain tumour; she is also partially deaf, in consequence of the same tumour. She is now in her first year of secondary education in Redbridge, having transferred from primary school at the beginning of the 2018-2019 academic year. Her secondary school is a mainstream school.

2. Since 2017 the Claimant has been the subject of an Education Health and Care Plan (EHCP) which includes a statement of her special educational needs. The most recent version of the EHCP is dated 13th September 2018 and includes revisions to the plan required by a decision of the First-tier Tribunal, Special Educational Needs and Disability made on 16th May 2018. EHCPs are reviewed every 12 months. The Claimant's EHCP was due for review in March 2019.

3. The EHCP describes the Claimant as being within the average to higher / above average range for intellectual ability; her English and Maths skills are age appropriate; and she is making good progress learning Grade 2 Unified English Braille (UEB). The EHCP also records that she is learning to touch type on a Perkins Brailler which is a form of typewriter. Section F of the EHCP specifies the special education provision that must be made for the Claimant. This part of the EHCP is very detailed; it identifies the specific needs that the Claimant has in relation to her education and day to day school activities; and also identifies the resources that need to be provided to enable those needs to be met. These needs are identified by reference to outcomes which are to be achieved by the end of Key Stage 3 (i.e. Year 9, which for the Claimant will be the 2020-21 academic year).

4. The support is to be provided to the Claimant at the mainstream school she attends in Redbridge. This includes in-class learning support assistance from a teaching assistant, and support from a QTVI teacher (i.e., a teacher qualified to teach children and young people with visual impairment). The requirement in the EHCP is that a QTVI teacher be available to provide advice to the Claimant's teachers and teaching assistants for 13 hours each week. Section F of the EHCP requires 32½ hours support each week from one full-time teaching assistant, and with effect from September 2018 (i.e. on the Claimant's transfer to secondary education) has further required an additional 25 hours per week support from a second teaching assistant to allow Braille resources to be prepared for the Claimant in advance of lessons. The teaching assistants must be trained in contracted UEB. Contracted Braille is the Grade 2 UEB code, which is materially different from the Uncontracted, Grade 1 code. The teaching assistants must also be able to support teaching in Braille in the so-called STEM subjects, i.e. science, technology, engineering and mathematics.

B. The Claimant's challenge

5. The challenge in these proceedings is not directed to the specific provision made for the Claimant; it is not a challenge about compliance with the requirements arising from her EHCP. Compliance with the EHCP is secured through a series of specific legal obligations: by section 37 of the Children and Families Act 2014 a local authority is

obliged to maintain a EHCP that has been made; by section 42 of the 2014 Act it is required to secure for the child the education provision specified in the EHCP. Rather, the Claimant's challenge is directed to a generic matter, namely the arrangements made by Redbridge when it is necessary to provide specialist teaching assistants for pupils in mainstream schools who need a high level of special needs support. The Claimant is such a pupil.

6. The arguments in this case have been made by reference to the position of pupils in mainstream schools who, like the Claimant, have a severe visual impairment – for the purposes of this judgment "VI pupils". Such pupils typically need support from specialist teaching assistants, who are in turn, supported by QTVI teachers. Under the arrangements Redbridge has in place, Redbridge does not itself either employ the QTVI teachers, or employ or train the teaching assistants who work with VI pupils in mainstream schools. The teaching assistants are employed by the schools in which they work; Redbridge contracts with a specialist provider, the Joseph Clarke Educational Service – "JCES", to provide the services of QTVI teachers, and to train the specialist teaching assistants. The Claimant describes these arrangements as a "decentralised model". The Claimant's case is that the "decentralised model" has various limitations with the consequence that it is inherently unlawful, and at odds with Redbridge's compliance with statutory obligations owed to pupils with special educational needs who are the subject of an EHCP.

7. The Claimant contrasts the arrangements Redbridge has put in place with a situation where a local authority directly employs a pool of ready trained specialist teaching assistants, and also QTVI teachers, so that the teaching assistants are ready to be deployed into any mainstream school due to receive a VI pupil. The Claimant has provided evidence from Vic Gibson, who is a QTVI who, until his retirement in 2016, worked for Peterborough City Council. Peterborough had a "Sensory Support Service" which employed a number of QTVIs and specialist teaching assistants. Most worked in the "Secondary and Primary Base" – which Mr Gibson explains were schools which VI pupils were encouraged to attend. Mr Gibson also explains that when VI pupils chose not to attend those schools the Sensory Support Service provided an outreach service to the schools which they did attend. The Claimant contends that Redbridge should adopt this or some other type of "centralised model". The Claimant's case is that if a centralised model was in place, when a VI pupil moved from one mainstream school to another, a suitably trained teaching assistant could be deployed to the new school straight away. It appears that a number of local authorities do have centralised arrangements – in the sense that they employ specialist teaching assistants (there is no further information as to how those authorities organise their arrangements). But many local authorities do not, and instead have arrangements along the lines of those put in place by Redbridge. Figures published in 2015 by the RNIB, gathered from Freedom of Information Act requests directed to local authorities, indicated that 45% of local authorities did not themselves employ the teaching assistants provided to VI pupils. However, the 55% of local authorities that did employ teaching assistants directly only accounted for the employment of 495 teaching assistants. The vast majority of teaching assistants, some 2,600, worked in the areas of the remaining 45% of local authorities, and were directly employed by the mainstream schools in which they worked.

8. Logically, the Claimant's contentions in this case could be applied to arrangements required to be made for any other pupil in a mainstream school with high level special needs, if those arrangements included the provision of specialist teaching assistants.

9. The first matter the Claimant points to is that under Redbridge's arrangements, whenever a pupil with significant visual impairment moves to a mainstream school, that school must recruit a suitable teaching assistant, and arrange for the assistant to be trained. This takes time, and it is likely that there will be a time lag between when the pupil moves to the school, and when the teaching assistant's training is complete. If the pupil arrives at the school before the teaching assistant's training is complete that will adversely affect the pupil's education. The Claimant points out that in circumstances such as her own, when the teaching assistant needs to be trained to UEB Grade 2 level, the training period can be significant.

10. The Claimant's second point is that in practice a "decentralised system" reduces the choice of mainstream school available to pupils with significant visual impairment, because in the absence of readily available ready-trained teaching assistants, mainstream schools are less willing to offer places to VI pupils. She points to her own difficulties in finding a secondary school place in a mainstream school in Redbridge.

11. The Claimant's third and fourth points are that the lack of centralised provision and control by Redbridge brings with it the risk of further disadvantages to VI pupils. For example, because the specialist teaching assistants are employed by the schools, they are at risk of being redeployed by the school to other duties, for example to cover sickness absence elsewhere in the school. If that happens the VI pupil will be left without the specialist help she requires to be able to access education in a mainstream school. Similarly, if the specialist teaching assistant is off sick, because there is no pool of Redbridge specialist teaching assistants, the VI pupil will be left without assistance she needs for so long as the teaching assistant is away.

12. Based on these matters, the Claimant's legal challenge rests on the following grounds. *First*, Redbridge's maintenance of a "decentralised model" is contrary to *Wednesbury* standards – the arrangements are either irrational, or have been made without taking account of all matters relevant when it comes to making proper arrangements for the provision of education for VI pupils (in accordance with their EHCPs) who attend mainstream schools. *Second*, closely linked to the first ground, that Redbridge's decentralised arrangements are unlawful because they entail an unacceptable risk that Redbridge will fail to discharge the legal obligations it is subject to in respect of the provision of education to VI pupils. For the purposes of this ground, the Claimant relies on the principle stated by Sedley LJ in his judgment in *R(Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219, and subsequent cases where that principle has been applied. *Thirdly*, the Claimant relies on a number of discrimination arguments. The premise for each of these arguments is that a decentralised model has a disproportionate adverse impact on pupils in mainstream schools with severe special educational needs such as VI pupils, because those pupils depend on specialist trained teaching assistants, and without their support cannot access education in mainstream schools in the same way either as pupils with less severe special educational needs, or pupils who do not have special educational needs. The discrimination claims comprise (a) a claim that the arrangements Redbridge has in place amount to indirect discrimination against VI pupils such as the Claimant, contrary to Article 14 ECHR read together with Article 8 and/or Article 2 of Protocol 1 to the

ECHR; (b) a claim of indirect discrimination under Part 3 of the Equality Act 2010 (section 29(6) of that Act read with section 19); and (c) a claim under section 29(7) of the Equality Act 2010 read with sections 20 – 21 of the Act and Schedule 2 to the Act, that Redbridge's decentralised arrangements are a failure to comply with the obligation to make reasonable adjustments. *Fourth*, the Claimant argues that Redbridge has failed to comply with its duty under section 27 of the Children and Families Act 2014 by failing to review the sufficiency of the educational provision it makes for children and young people who have special educational needs. *Fifth*, she contends that by adopting and maintaining the "policy" of decentralisation, Redbridge failed to comply with the section 149(1) of the Equality Act 2010 – i.e. the public sector equality duty.

C. Redbridge's "decentralised model"

13. Before addressing each of these grounds of claim it is necessary to set out the substance of the so called "decentralised arrangements" that Redbridge has in place. The Claimant describes this as a "policy". Without further explanation that label may be misleading. What the Claimant describes as Redbridge's policy is a set of arrangements it has in place to obtain the resources necessary to meet the needs of VI pupils who attend mainstream schools within the borough.

14. A starting point is funding. Mainstream schools receive funding support to meet the cost of special needs education from the Department for Education. This funding meets the first £6,000 of support costs. When, as is the case for a pupil such as the Claimant, the cost of the support required exceeds that amount, the additional costs are met by the local authority.

15. The present position in Redbridge is that there are 168 pupils in mainstream schools in the borough who receive some form of support from JCES. This number includes those with special educational needs arising from visual impairment; it also includes a number of pupils who require support to access education but who are not the subject of an EHCP. There are 33 pupils whose primary need for special provision arises from visual impairment. However, there are presently only 3 pupils in mainstream secondary schools in Redbridge who use Braille (one learning Braille, the other two competent Grade 2 Braillists), and 3 pupils in primary schools (who are both learning Braille). Redbridge relies on these figures to describe the need for specialist Braille support in mainstream schools as a low-incidence need. The Claimant does not dispute that description.

16. Redbridge contracts with JCES to obtain the services necessary both for VI pupils in mainstream schools within the borough, and for other pupils in mainstream schools who have identified special educational needs in consequence of less severe forms of visual impairment. JCES provides what is described as a specialist outreach advisory service for children and young persons in mainstream schools. The services are provided under an annual contract. I have been provided with a copy of the contract dated 1st September 2018 which covered the period 1st April 2018 to 31st March 2018. The contract is made between Redbridge and the Whitefield Academy Trust – JCES being part of that Academy Trust. The contract includes a detailed service specification, and provision (at clause 3) for variation of the specification by agreement, and obligations of cooperation between JCES and Redbridge. One example of the variation provision is that the September 2018 contract was itself amended with effect from January 2019. Under the contract, JCES provides the services of a number of QTVI teachers; as

amended, the contract provides for provision of the equivalent of 2.6 full time QTVI teachers. JCES also provides the services of a habilitation specialist (equivalent to 0.25 of one full-time employee) and provides administrative support staff (again equivalent to 0.25 of one full-time employee).

17. One responsibility of the QTVI teachers is to train staff in the mainstream schools that VI pupils attend. This includes but is not limited to, training the specialist teaching assistants. The training concerns all matters relating to the teaching of VI pupils, including teaching Braille and how to use specialised equipment: see the contract specification at paragraph 5.2.2. Redbridge's evidence is that this part of the support includes providing annual courses for teaching staff, and INSET training at specific schools based on the particular needs of the VI pupils at those schools. Redbridge's evidence also points out that the training for teaching assistants is tailored to the specific needs of the child that teaching assistant has been recruited to support – for example, taking account of whether the child uses Braille, and taking account of what is needed by way of lesson preparation for that child. The QTVI teachers provided by JCES provide an outreach service, i.e. they visit relevant mainstream schools to provide on-site training and assistance to the relevant teaching staff. The habilitation specialist also provides advice and assistance to relevant schools designed to develop the pupil's independent skills. This advice includes audit of a school premises.

D. Decision

(1) Grounds 1 and 2. Are the arrangements Wednesbury unlawful; do they entail unacceptable risk that Redbridge will fail to comply with statutory obligations?

18. Both these two grounds of challenge rely on the four matters I have summarised above at paragraphs 9 – 11, which the Claimant contends are consequences of the so-called "decentralised model". I do not consider that any of the consequences asserted by the Claimant are inevitable consequences the arrangements Redbridge has put in place. The likelihood that such events could occur is not such either as to render irrational the decision to make provision in this way for specialist teaching assistants, or to require an inference that the decision to do so rests on a failure to take account of all relevant matters, or to make good a conclusion that the arrangements are such that it is inevitable that Redbridge will fail to comply with the statutory obligations to which it is subject when it comes to ensuring that provision is made to meet the assessed needs of VI pupils who are in its mainstream schools. I consider each of the matters relied on by the Claimant, in turn.

19. *The time-lag argument based on the time taken to recruit and train a teaching assistant.* The most obvious context (and the one which was the focus of the submissions made) will be when a pupil transfers from primary to secondary school, in the ordinary way at the end of Year 6. When this happens, and assuming that the specialist teaching assistant who has been with the VI pupil at primary school does not transfer her employment to the receiving secondary school, the secondary school will have to have sufficient time to recruit and train a suitably specialist teaching assistant. The time required – in particular the time required for training – is likely to depend on the circumstances and needs of the specific child.

20. I note that in June 2018 the Care Quality Commission and OFSTED undertook a joint inspection of Redbridge's provision for pupils with disabilities and special educational

needs for the purposes of assessing the extent to which Redbridge had responded to the reforms in provision of disability and special educational needs put in place by the Children and Families Act 2014. One of the conclusions reached was that Redbridge had in place "appropriate arrangements" to support the transition from primary to secondary education at the end of year 6, and that the "majority" of pupils were well supported at this stage.

21. Based on the evidence in this case, I am satisfied that the arrangements that Redbridge has in place are such that at the time of the annual review mid-way through Year 5 (i.e., the academic year prior to the final academic year in primary education), parents of children with high level special needs are asked to decide on a preferred secondary school. Parents are given two months to consider and reach a decision. Redbridge's evidence includes summaries of how this process has worked in two other cases. There is also evidence of how the process worked in the Claimant's case. So far as concerns the Claimant's position, I have seen a document dating from October 2017 which set out options for the way in which specialised teaching assistant provision would be made, depending on which of two schools the Claimant transferred. That document was then the subject of discussion at a meeting in November 2017.

22. Based on this evidence (both the generic evidence in the form of the inspection report, and the documents that evidence specific application of the general arrangements), I am satisfied that the "decentralised model" does not stand in the way of sensible arrangements being made to deal with the transition from primary to secondary education. Forward planning is required, but suitable arrangements are in place to permit time for the arrangements that need to be made at the receiving secondary school.

23. It seems to me that forward planning would also be needed even if Redbridge had a "centralised" model in place along the lines the Claimant advocates. The needs of any VI pupil may vary from child to child: for example whether the child uses Braille and if so to what level; this means that the skills required from each teaching assistant will also vary. I make this point only because a significant part of the argument before me relied on the time that would be needed to train a teaching assistant in UEB Braille either from scratch to Grade 1 or from Grade 1 to Grade 2. I have referred to the present position in Redbridge already. In Redbridge there are now five Braillists, but prior to these pupils there had been no pupils using Braille in mainstream schools in Redbridge for some twenty years. There was further evidence from JCES to the effect that although JCES provides services to four boroughs including Redbridge, there is only one pupil outside Redbridge who uses Braille. If there were a centralised system I suspect that that too would require recruitment by reference to anticipated or notified future needs, since it would be unrealistic to expect any local authority to retain as a matter of contingency, a number of teaching assistants covering a range of skills to address a low incidence but high level need such as VI.

24. A different factual scenario might be where a VI pupil moved into the Redbridge area and joined a mainstream school part-way through a school year. If this happened without prior notice, it is likely the receiving school might struggle to find a suitably qualified teaching assistant in short order. However, the present arrangements are not in my view unlawful because of the possibility that they may not be able to address such a set of circumstance without delay. For the reasons already indicated, I have significant doubts that any realistic centralised model would be able to fare much better in this set of circumstances. In any event, were such a situation to arise in Redbridge, it would

always be possible for Redbridge to bridge any gap in provision by seeking further services from JCES.

25. Overall Redbridge's present arrangements are not, as a set of generic arrangements, either irrational, or based on a failure to take account of relevant matters.

26. *The contention that choice of school for VI pupils is narrowed.* The evidence of ZK's mother is that when the time came for the Claimant to move schools, at the end of Year 6/beginning of Year 7, her school of choice was unable to accept the Claimant because it did not have an appropriately trained teaching assistant. ZK's mother also contends that when she approached other schools, some gave the same response.

27. Focusing on the position of the school of choice, ZK's mother's account of events is disputed in Redbridge's evidence: see the witness statement of Joena Stanley. Her evidence is to the effect that after the school of choice was identified (which was a school close to her home), an assessment was undertaken to determine whether its premises were suitable. The outcome of that assessment (referred to as an "environmental audit") was that the school site was not suitable for the Claimant. In addition, significant building works were due to commence at the school in September 2018. That too made it impracticable for the Claimant to attend that school. Thus, on Redbridge's account the problem was not the lack of a suitably trained teaching assistant; no such teaching assistant was in post, but a suitable teaching assistant could have been recruited and trained.

28. My conclusion is that the Claimant's ability to move to her school of choice was not affected by any matter inherent in the so-called decentralised model. I accept Redbridge's evidence as to the circumstances that prevailed at the school of choice. I do not accept the Claimant's contention that the decentralised model makes mainstream schools less willing (or less able) to accept a VI pupil. The arrangements that Redbridge has in place for managing school transfers between Year 6 and Year 7 do permit a lead time that ought to be long enough to allow time to recruit and train a specialist teaching assistant. Redbridge's evidence on the steps taken in the Claimant's case indicates that Redbridge has good lines of communication with its mainstream schools on special needs matters. I have no reason to think that schools are unaware of the assistance available to them when it comes to securing training for suitable teaching assistants.

29. *The risk that specialist teaching assistants could be redeployed to other duties by the schools.* At a theoretical level this is possible. Because specialist teaching assistants are employed by schools, the school could redeploy a teaching assistant to cover a need arising elsewhere in the school, for example the absence of another member of staff. However, what is important is the likelihood that this possibility will occur in practice, and the chance that that risk would be removed or substantially reduced if Redbridge adopted the Claimant's preferred centralised model.

30. The evidence I have seen satisfies me that under the present arrangements the risk of such an occurrence is low. The witness statement from Lesley Carty, the Special Educational Needs Co-ordinator at the school the Claimant attends explains the way in which the specialist teaching assistants at that school work. There are four Braille-trained teaching assistants at the school. They work specifically to support the VI pupils at the school. There is no suggestion that they have been called away from those duties to undertake other work, either regularly or at all. This impression that the risk of this

is low is reinforced by the job description for the teaching assistants. Although the document is stated to be non-contractual, the job description makes it clear that the line of reporting for the specialist teaching assistant is through the school's Inclusion Manager (the manager with specific responsibility for the provision of special educational needs at the school). This reporting line must significantly reduce, if not remove, the risk that a teaching assistant would be redeployed away from specialist work. There is also a further practical consideration. The specialist teaching assistants may be employed by each school, but their positions are funded by Redbridge. In the event that a specialist teaching assistant was redeployed away from specialist duties either permanently or from time to time, I see no reason why it would not be open to Redbridge to require the school to stop that practice.

31. All these matters satisfy me that the risk the Claimant points to is theoretical rather than real. A risk of this nature or extent does not render the arrangements presently in place unlawful.

32. It must also be pointed out that a centralised model that the Claimant contends for would not necessarily remove the risk of redeployment. Even though under such arrangements, Redbridge would be the employer, the specialist teaching assistant would be seconded to the school and would fall under the day-to-day control of the senior staff at the school. If a school were minded to redeploy specialist teaching assistants in the way the Claimant suggests (and I note once again, there is no evidence at all that this has happened at the Claimant's present school) it could try to do that even if secondment arrangements were in place. If it did, the local authority employer would no doubt act to bring that state of affairs to an end. But that scenario would be little different from the pupil's perspective from that which could, also in theory, arise under Redbridge's present model. Put shortly, neither set of arrangements removes the possibility that a school might attempt some form of subversion; no set of arrangements would be fail-safe in such circumstances. But there is no evidence to support any contention that that is the basis on which I should approach this matter. The evidence goes in the other direction and indicates that where specialist teaching assistants are in place to assist specific pupils, those arrangements are not abused by schools.

33. *When a specialist teaching assistant is off sick.* There is always a risk that, just like any other teacher, a specialist teaching assistant might on occasion be off work, sick. Any absence of any teacher is capable of having some adverse impact on the education of the pupils affected. However, I do not consider the possibility of sick leave is such as to render Redbridge's present arrangements unlawful. Cover arrangements can be made for short-term absences. At the school the Claimant attends there are four specialist teaching assistants. Apart from that there is the possibility that Redbridge could seek assistance from JCES to cover a sickness absence, perhaps in the form of additional short-term assistance from a QTVI. The fact that Redbridge may not hold in reserve a fully-trained substitute (which I take to be the Claimant's point for this purpose about a centralised system) does not render the present arrangements inherently unlawful. It is in the nature of any arrangement which requires teaching staff to be available that adjustments may have to be made from time to time to deal with unexpected circumstances.

34. Nothing that I have said so far is to be read as meaning that the arrangements Redbridge has in place are perfect, or fool-proof, or fail-safe. I doubt that they are. I have seen evidence both from the Claimant's mother, and from the mother of another child who

suffers severe visual impairment. Each is critical of how on occasions, matters relating to the education of their children have been addressed. But the issue in this claim is not directed to the specifics of individual cases. Rather, the challenge is at a generic level, to the general arrangements in place. What happens on any particular occasion may be the subject of specific challenge which may or may not succeed on its merits. However, at the generic level, the arrangements made by Redbridge for the provision of services from JCES to support the teaching of VI pupils in mainstream schools are not such as to be irrational, and are not such as to warrant an inference that they have been entered into without due regard for relevant considerations. This disposes of Ground 1.

35. Ground 2 is the contention that the arrangements now in place are such as to make it inevitable that Redbridge will fail to meet its statutory obligations. It will be apparent from what I have said already that I do not consider there is substance to this ground.

36. For the purposes of this part of the claim I have been referred to a number of authorities: *R(Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1WLR 2219; *R(Hillingdon LBC) v Lord Chancellor* [2009] LGR 554; *Fox v Secretary of State for Education* [2016] PTSR 405; *R(Liverpool City Council) v Secretary of State for Health* [2017] PTSR 1564; and *Bayer PLC v NHS Darlington CCG* [2018] EWHC 2465 (Admin).

37. Based on these authorities, one point in dispute before me was whether the existence of an unacceptable risk of illegality in the operation of a policy, including for the present purposes the generic arrangements made by Redbridge for the provision of assistance to VI pupils in its mainstream schools, was capable of giving rise to any ground of challenge. The submission for Redbridge based on the judgment of Garnham J in the *Liverpool City Council* case at paragraphs 57 – 67 was that it was not, and that challenges to generic arrangements could only be made on the basis that they gave rise to *"unacceptable risk of unfairness"*.

38. I do not accept this submission. It is right that in the *Refugee Legal Centre* case and also in the further decision of the Court of Appeal in *R(Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] 1 WLR 4620, the Court of Appeal framed the question to be addressed in terms of an unacceptable risk of unfairness: see per Sedley LJ in *Refugee Legal Centre* at paragraph 20; and per Richards LJ in *Tabbakh* at paragraph 38, where having considered Sedley LJ's judgment he concluded that asking whether there was a unacceptable risk of unfairness was in substance asking whether the system was *"inherently unfair"*. However, both in the *Refugee Legal Centre* case and in *Tabbakh*, the focus of the challenge was the fairness of the arrangements made. In the former, the matters in issue concerned the fast-track asylum adjudication system, and in the latter the dispute concerned risk assessment decisions for persons convicted of violent or sex offences. Those contexts are significant because they explain why in each instance the court's reasoning was formulated in terms of the language of fairness. The principle applied by the court in those cases was not limited to the notion of fairness or to policies of a procedural nature; the principle is an applicable standard to judge substantive policies too.

39. This was the view taken by Whipple J in *Bayer*: see her judgment at paragraphs 196 – 198. The policy in issue in that case concerned treatments available through the NHS for age-related macular degeneration. Whipple J formulated the question for the court in terms of whether the policy was capable of lawful application, such capability being

assessed realistically and pragmatically. In my view there is no difference between this standard and Richards LJ's notion of inherent illegality.

40. In the present case the Claimant's substantive case based on this principle rests on: (a) the obligation at section 42(2) of the Children and Families Act 2014, that local authorities *"secure the specified educational provision"*, i.e. the provision specified in an EHCP; and (b) the factual contention that the lead-time under a decentralised system that is necessary for a school to secure and train a specialist teaching assistant means that, for an initial period at least, there will be a failure to comply with the section 42 obligation.

41. For the reasons already set out, I do not consider the arrangements in place under which specialist teaching assistants are employed by schools and trained and supported by JCES give rise to any inherent likelihood that Redbridge will fail to comply with its section 42 obligation. I am satisfied Redbridge's arrangements, in particular for the management of transfers between schools at the end of Year 6 for the beginning of Year 7, are sufficient when considered at a generic level, and do not entail inherent likelihood that Redbridge will fail to comply with its section 42 obligations.

42. This case concerns provision for severely disabled children with high-level educational needs who are pupils in mainstream schools. The Claimant's circumstances are a particular example of circumstances of such pupils. Where such high-level needs require the presence of a specialist teaching assistant, it is likely that some time will be needed to recruit and train that assistant. But it seems to me that this will be so regardless of whether the local authority concerned works to a centralised model or a decentralised one. The premise for the Claimant's submissions as to the virtues of a centralised system presuppose that under any such arrangements the local authority would employ a sufficient number and range of specialist training assistants so as to be able to cover any/all particular needs that might fall to be met. If that is not the premise then the lead-time problems the Claimant identifies would also be a feature of a centralised model. That premise seems to me to be unrealistic. It would require local authorities to retain that range of reserve teaching assistants indefinitely, on the off-chance that a pupil whose needs required those skills entered a mainstream school in the local authority's area. To take the example I have already mentioned: before the five VI pupils now in Redbridge's mainstream schools, there had been no such pupils in Redbridge for 20 years.

43. I cannot see that compliance with section 42 of the 2014 Act requires local authorities to maintain arrangements of the sort that are inherent in the Claimant's argument. *"Secure"*, as it is used in section 42 of the 2014 Act means provide and maintain. Sometimes provision can take time to arrange, particularly in a case with a pupil with high-level needs. The expectation, even in such cases, is that local authorities will plan so that needs do continue to be met even when a child transfers from one school to another. Compliance with section 42 is likely to require a local authority to engage in reasonable forward planning. However, there may be circumstances which cannot reasonably be expected to be met by reasonable forward planning. If such a situation arises section 42 requires a local authority to ensure that what is specified in the EHCP is provided promptly, and thereafter maintained.

(2) Ground 3. The discrimination claims

44. The Claimant's case on discrimination is put in three different ways: (a) a claim under the Human Rights Act 1998 relying on Article 14 read together with Article 8 and /or Article 2 of Protocol 1 to the ECHR; (b) a claim of indirect discrimination relying on sections 6, 19, and 29(6) of the Equality Act 2010; and (c) a claim under sections 20 and 21 of the 2010 Act read together with section 29(7) of the Act and Schedule 2 to the Act, that here has been a failure to make reasonable adjustments.

45. However, the substance of the issue is the same regardless of the different legal bases for the discrimination claims. Each way in which the discrimination argument is put rests on the premise that the arrangements Redbridge has in place with JCES for the provision of support to VI pupils in mainstream schools work to the disadvantage of pupils who suffer from severe VI such that they need the assistance of a specialist teaching assistant. The disadvantages identified are the same as the ones relied on for the purposes of Grounds 1 and 2 – i.e. the risk that because of the "decentralised system" the provision of a trained specialist teaching assistant may be delayed; the risk that as an employee of the school, the specialist teaching assistant may be redeployed to other duties; and the risk that in the absence of a pool of reserve specialist teaching assistants employed by Redbridge, a VI pupil may be left without the support of a specialist teaching assistant in the event that the teaching assistant assigned is off sick.

46. For the purposes of each of the discrimination claims these matters are relied on as leading to disadvantageous treatment of pupils in mainstream schools with a high level of special educational needs by comparison with pupils at mainstream schools who either have no special education needs or have special needs which do not under the EHCP require provision of a specialist teaching assistant. As it seems to me, the comparison needs to be more tightly drawn. So far as concerns special educational needs provision in Redbridge, the only matter before me evidenced in any detail is the arrangements made with JCES to provide support in mainstream schools to pupils who suffer from visual impairment. As I have already explained, the support provided by JCES is not limited to pupils such as the Claimant who have a severe visual impairment, but extends to any pupil with a visual impairment in a mainstream school who is the subject of a EHCP that specifies educational support. On the basis of this evidence the relevant comparison is between on the one hand VI pupils in mainstream schools with needs that require provision of specialised teaching assistant, and on the other hand either pupils in mainstream schools who have less significant special educational needs, or pupils in mainstream schools with no special educational needs. These matters therefore form the premises for consideration of each of the discrimination claims.

(a) The indirect discrimination claim under the Human Rights Act

47. The Claimant asserts a claim of indirect discrimination on the basis that Redbridge's error is to fail to draw a sufficient distinction between the arrangements that need to be put in place to make provision for the special educational needs of pupils such as the Claimant who require the assistance of a specialist teaching assistant, and either the arrangements to meet the special educational needs of other pupils in mainstream schools who require a lesser level of provision under their EHCPs, or the arrangements made for pupils without special educational needs. Hence, runs the submission, there is discrimination contrary to the provisions of Article 8 and/or Article 2 of the First Protocol to the Convention, when read together with Article 14.

48. The principle the Claimant relies on is well-established: see for example the judgment of the Court of Appeal in *R(DA) v Secretary of State for Work and Pensions* [2018] PTSR 1606, per Sir Patrick Elias at paragraphs 16-19. However, I do not consider that this principle gains any traction when applied to the circumstances of this case.

49. This ground of challenge founders on the facts. I have considered already (in the context of Grounds 1 and 2), the factual merit of the matters relied on as comprising the disadvantages. In the context of Grounds 1 and 2 the question was whether there were drawbacks or failings in the arrangements in place such as to render the decision to maintain them unlawful either on grounds of rationality or relevance, or because the arrangements were such as to be inherently at odds with Redbridge's obligations under section 42 of the 2014 Act. The question for the purposes of the discrimination claim is a little different: do the arrangements put one category of pupils at mainstream schools at a disadvantage compared with the other categories of pupils at those mainstream schools. Yet although the question is different, the outcome is the same. At the generic level, I do not consider that the arrangements are a source of disadvantage or, put in the terms of the judgment of the Strasbourg Court in *Thlimmenos v Greece* (2001) 31 EHRR 15, that the arrangements make insufficient allowance for the differences between pupils with special educational needs which require the provision of a trained teaching assistant, and other pupils. For the purposes of this ground of challenge the Claimant also relies on Article 24 of the UN Convention of the Rights of Persons with Disabilities, and submits that the effect of ECHR Article 14 (when read together with Article 8 and/or Article 2 of the First Protocol) should be read consistently with the provisions of Article 24 of the UN Convention on, among other matters, access to education (see in particular, at Article 24(2) and (3)). I do not doubt this general principle of interpretation, but I do not consider that the resort to Article 24 takes matters further in this case.

50. It is important to have in mind that this ground of challenge too, is directed to the arrangements in place at a generic level. Are the arrangements such that they bring with them the disadvantage alleged? Evidence of problems in individual cases where there have been complaints that what has been provided has not met the provision specified in an EHCP is not determinative. Although it is possible that such matters could give rise to an inference of failure at a generic level, for the reasons already explained under Grounds 1 and 2 my conclusion is that the arrangements Redbridge has put in place with JCES for the provision of support to pupils in mainstream school such as the Claimant who suffer from severe visual impairment are appropriate. I do not consider they are such as inherently to give rise to disadvantage. Thus, the discrimination claim under ECHR Article 14 fails at that stage. The question of justification does not arise. I have received submissions on the application of the recent judgments of the Supreme Court in *R(DA) v Secretary of State for Work and Pensions* [2019] UKSC 21 on the issue of justification. However, that is not a matter I need to consider in this judgment.

(b) The indirect discrimination claim under the Equality Act 2010 (sections 6,19, and 29(6)).

51. In substance this claim is a reiteration of the claim under ECHR Article 14. The policy, criterion or practice relied on is the arrangements made by Redbridge with JCES for the provision of support to VI pupils in mainstream schools. The particular disadvantages relied on are also the same, i.e. the risk of delay when it is necessary for a specialist

teaching assistant to be recruited and trained; the possibility that specialist teaching assistants employed by schools to support a pupil with special educational needs might be redeployed to other duties; and the risk that if a specialist teaching assistant is off sick, cover will not be available.

52. The same analysis applies to this claim as to the claim under Article 14. On the evidence, no material disadvantage is made out in terms of the generic operation of the arrangements Redbridge has in place. The claim fails for that reason.

(c) The failure to make reasonable adjustments claim under the Equality Act (sections 6, 20, 21 and 29(7), and Schedule 2).

53. Section 20 of the 2010 Act provides that the duty to make reasonable adjustments comprises three requirements. The first requirement is the one that is material for present purposes

> "(3) The first requirement is a requirement, where a provision, or criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

A failure to comply with the section 20 duty is unlawful discrimination: see section 21 of the 2010 Act.

54. The relevant criterion or practice is, once again, the arrangements made by Redbridge with JCES for the provision of support for VI pupils in mainstream schools. The matters relied on as comprising the substantial disadvantage are also as I have described them for the purposes of the Article 14 claim and the indirect discrimination claim under the 2010 Act. The claim under sections 20 and 21 fails on its facts for the same reasons as the other discrimination claims. Considering the arrangements in place, for this purpose too at the generic level, the case on substantial disadvantage is not made out.

(3) Ground 4: section 27 of the Children and Families Act 2014

55. By section 27(1) of the 2014 Act local authorities are required to keep under review

> "**27 Duty to keep education and care provision under review**
>
> (1) A local authority in England must keep under review—
>
> (a) the educational provision, training provision and social care provision made in its area for children and young people who have special educational needs or a disability, and
>
> (b) the educational provision, training provision and social care provision made outside its area for—
>
> (i) children and young people for whom it is responsible who have special educational needs, and

> (ii) children and young people in its area who have a disability."

56. By section 27(2) local authorities must

> "…consider the extent to which the provision referred to in subsection (1)(a) and (b) is sufficient to meet the educational needs training needs and social care needs of the children and young people concerned."

Section 27(3) requires local authorities in excise of their functions under subsection (1) and (2) to consult various specified groups of person.

57. The Claimant's case under section 27 of the 2014 Act is distinct from the earlier grounds of challenge. It is to the effect that since the commencement of section 27 (1st September 2014) Redbridge has failed to discharge its obligations under subsections (1) and (2) by failing to conduct a review of the arrangements it had in place with JCES for the provision of support to pupils in mainstream education who are affected by visual impairment. The Claimant relies on the judgment of Elisabeth Laing J in *DAT v West Berkshire Council* (2016) CCL Rep 362. There, she concluded that the section 27 obligations arose and fell to be discharged whenever a local authority *"makes a decision which will necessarily affect the scope of the provision referred to in section 27"*.

58. Strictly speaking the Claimant does not need to rely on that dictum at all. It is not the Claimant's submission in this case that some event has occurred that triggered compliance with the section 27 duties. The Claimant's case is simply that Redbridge has done nothing since 1st September 2014 that amounts to compliance with section 27, and that it is about time that it did.

59. This submission requires consideration of the nature of the section 27 obligations. This has also been considered by a Divisional Court (Sharpe LJ and McGowan J) in *R(Hollow) v Surrey County Council* [2019] EWHC 618 (Admin): see the judgment at paragraphs 87 to 107. In *Hollow* the court took a different view from the one reached by Elisabeth Laing J in *DAT* as to whether the section 27 obligations were obligations triggered by specific events. At paragraphs 102-105 Sharpe LJ stated as follows.

> "102. The claimants' case that section 27 of the 2014 Act is engaged by the decision under challenge must carry with it the proposition that the extensive duties of consultation made mandatory by section 27(3), of the many different parties who must be consulted, are engaged whenever a local authority makes any alteration to SEND services, including budgetary decisions of the kind taken by the Council in this case. This is an interpretation that we are unable to accept. We do not consider Parliament can have intended that the extensive and onerous duties of consultation made mandatory by section 27, should be undertaken on a "rolling basis" let alone, that it would be triggered every time a change is made to the provision of SEN. Such an interpretation would be capable of leading to absurd

> results, adversely affecting both the ability of local government to carry out its business, and the amount of resources available to meet the needs of those the legislation is designed to protect.
>
> 103. In our view, there is nothing in the legislation, or legislative history for that matter, to support such an interpretation, or to indicate that this was Parliament's intention. On its face, and when read in the statutory context to which we have referred, in our view, the legislation imposes a duty on local authorities, which arises from time to time, to consult at reasonable intervals, those identified in section 27(3) in order to keep the provision referred to under review, in which connection local authorities must consider the extent to which the provision referred to is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned.
>
> 104. The case for the claimants rests here on an observation made by Laing J in *R DAT* … In *DAT*, it was held that the duties imposed by section 27 must bite where a local authority makes a decision which will necessarily affect the scope of the provision referred to in section 27. However, in the short passage in her judgment, at para 30, … the judge gave no reasons for her conclusion, and expressed misgivings about it, in particular because, as she said, she had heard limited, if any argument on the point, and had not been referred to any material which explained the frequency with which the duties were expected to be exercised. In that connection the judge was not referred to section 12(1) of the Interpretation Act 1978 to which we have referred.
>
> 105. We think the judge was right to express those misgivings. If her reluctant interpretation were to be correct, the results would be startling indeed. This would mean that every time a local authority makes a decision that will affect the scope of provision made in its area for children with SEND or the provision that is made outside its area for children with SEND who are from its area, no matter how small, it must review the entirety of its provision both in and outside its area. It must consider whether the entirety of its provision is sufficient and it must consult the wide range of persons and bodies identified (including children with SEND) whether the decision is to reduce the scope of provision or increase it, regardless of the interest that such consultees, such as youth offending teams, might have in any change."

60. In my view that general conclusion as to the circumstances in which the section 27 duties fail to be performed, is correct. It is notable that section 27 is formulated differently from duties, for example the section 149 Equality Act 2010 public sector

equality duty, which attach to general decision-making. Language such as in section 149(1) of the 2010 Act which ties the obligation under that section to *"the exercise of functions"* is singularly absent from section 27 of the 2014 Act. For the reasons given by Sharp LJ there is no sustainable basis for reading that sort of requirement into Section 27.

61. Rather, in *Hollow*, the court relied on Section 12 of the Interpretation Act 1978 as a sufficient explanation of when the section 27 obligations will arise

> "(1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

62. This does not, however, address the substantive content of the section 27 duties – i.e. what is required to discharge the obligations imposed. As I see it, this is point that arises in the present case. The outcome of the section 27 argument in this case does not depend on whether or not the section 27 duty is triggered by events in like or similar manner to the public sector equality duty. On the facts of this case the Claimant does not point to any specific trigger event.

63. I consider that in substance, the section 27 duty is in the nature of a strategic obligation. Section 27 is a more sophisticated and subtle function than many which are imposed on local authorities. As formulated, section 27 suggests local authorities ought to take some sort of programmatic approach to the review and assessment of their general provision for children who are disabled or who have special educational needs. I do not suggest that what is required is a written programme. Section 27 is directed to substance not form. What is required is something programmatic in the sense that in the course of a sensible period of time, a local authority monitors and evaluates the provision it makes, leading overall to reconsideration of whether that provision ought to be the provision that continues to be made.

64. It is likely that from time to time, a range of different steps may be appropriate if a local authority is to review and consider the sufficiency of the provision it makes available. Any local authority may in the first instance decide for itself what steps should be taken and when they should be taken. Section 27 does not contain obligations of the sort that lend themselves to an overly prescriptive approach by the courts. A "one size fits all" approach ought not to be the objective. Local authorities should be best-placed to determine for themselves what the elements of a review programme should be, subject always to review by the courts against the well-known *Wednesbury* standards of purpose, relevance and rationality. What a local authority might do in discharge of its section 27 obligations could include general strategic review exercises; it might also include more specific exercises prompted by particular decisions or circumstances. Such actions, perhaps a mix of higher level exercises and lower level exercises, perhaps a range of interlocking steps, will collectively, demonstrate compliance with the section 27 duties.

65. In the present case the Claimant's case is that since September 2014 when section 27 came into effect, Redbridge has not acted so as to comply with its requirements. In fact,

the section 27 duty is not as new as that submission might be taken to suggest: see the judgment in *Hollow* at paragraphs 88-90. In respect of the arrangements for special educational needs provision there were precursors to section 27 of 2014 Act in section 2 of the Education Act 1981, section 159 of the Education Act 1993, and section 315 of the Education Act 1996.

66. In this case Redbridge points to two matters indicating compliance with section 27. The first is a High Needs Review undertaken in response to the introduction of a new national formula for the 2018/19 academic year. The review covered the whole of what is referred to as the "High Needs block" which comprises services provided to children and young persons up to the age of 25 who are assessed as having high needs as a result of disability or special educational need. In scope, the High Needs Review covered all expenditure on special educational needs funded through the High Needs budget. The work of the Review included discussion with those involved in the provision of services, and consultation with those who have EHCPs and their parents. The second matter Redbridge relies on is the annual process by which it determines in relation to the provision of the support for VI pupils in mainstream schools, the nature and extent of services it buys-in from JCES. This process is specific to a single area of service provision. It may well not entail any, or any significant consultation with those in receipt of those services. It does include review of provision by the Council's officers, and approval by elected members of the arrangements proposed for the following year.

67. The Claimant's response is to the effect that the JCES reviews do too little as they only concern provision of outreach services for visually impaired pupils in mainstream schools, while exercises such as the High Needs Review do too little because they are too broad and insufficiently focused on matters such as outreach provision for pupils with visual impairments.

68. In the context of the section 27 obligations as I have sought to describe them, I do not consider that either criticism is valid. Compliance with the section 27 duties will not necessarily rely on single, set-piece, comprehensive exercises. A mix of generic and specific actions is capable of being sufficient, so long as the overall consequence is the progressive review and assessment of the provision that a local authority makes. In the present case, I do not consider there to be any sufficient evidence to make good the submission that Redbridge has failed to comply with its section 27 obligations.

(4) Ground 5. Section 149 Equality Act 2010, the public sector equality duty

69. The Claimant's case on this ground of challenge is that what she describes Redbridge's "policy" i.e. the arrangements it has made with JCES for the provision of services to support pupils with visual impairment in mainstream schools, have been made without consideration of the obligation to have due regard to the criteria specified in section 149(1)(a) to (c) of the Equality Act 2010. The Claimant's contention is that by maintaining a decentralised system Redbridge has failed to have due regard to the needs of pupils with complex educational needs, and has not properly taken into account the need to eliminate discrimination between those pupils and other pupils in mainstream schools.

70. In context of this case, that argument cannot succeed. Section 149(1) of the 2010 Act is a duty directed to the decision-making processes. By improving decision-making processes, by ensuring that the mandatory relevant criteria are properly considered,

section 149(1) aims at securing substantive outcomes. But the section 149(1) duty itself is not about outcomes. Thus, the respective merits of "centralised systems" against "decentralised systems" are not specifically an issue for this purpose.

71. I consider that the circumstances of the present case are ones where the observations of Lord Brown in *R(McDonald) v Kensington and Chelsea RLBC* [2011] PTSR 1266 are apposite. In the context of a challenge to a care plan devised under the provisions of the NHS and Community Care Act 1990, Lord Brown addressed a challenge under the predecessor to section 149(1) as follows

> "24. This argument … is in my opinion hopeless. Where, as here, the person concerned is ex-hypothesi disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons, it may be entirely superfluous to make express reference to section 49A and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section. That, I am satisfied, is the position here. The question is one of substance, not of form. This case is wholly unlike *Pieretti v Enfield London Borough Council* [2011] PTSR 565 (which held that the section 49A duty complements a housing authority's duties to the homeless under Part 7 of the Housing Act 1996)."

72. In the present case the very purpose of the arrangements Redbridge makes with JCES from year to year is to ensure that what is required to meet the assessed needs of visual impaired pupils in mainstream schools, specified in the educational needs sections of the EHCPs, is available. The provision specified in the material part of each EHCP is the provision assessed as necessary to permit the pupil to participate in education in a mainstream school. Thus, it is possible to describe the very purpose of an exercise undertaken in order to satisfy the needs specified in the EHCPs, as seeking the elimination of discrimination between those pupils and other pupils in mainstream schools who do not have special educational needs. That purpose runs through to Redbridge's decision on what services should be secured from JCES. It follows that this part of the claim fails.

E. Conclusion

73. For all the reasons set out above, all the Claimant's claims fail and are dismissed.