



DISCRIMINATION LAW ASSOCIATION

Briefings

Challenging the government's guidance on the use of tactile paving surfaces

Sarah Leadbetter v Secretary of State for Transport [2023] EWCA Civ 1496;
December 20, 2023

Facts

In these proceedings, Sarah Leadbetter (SL), a visually impaired disability rights campaigner and guide-dog user, challenged the Secretary of State's guidance on the use of tactile paving which was published in January 2022 (the guidance). SL's judicial review challenge was supported by RNIB, Guide Dogs UK and the National Federation of the Blind of the UK (NFBUK).

The guidance was intended to be '*a guide to best practice by public or private bodies with a role in the provision, design and improvement of the public realm*' and covered a wide range of topics in relation to the use of different tactile paving surfaces. The guidance was intended to be an update to a similar document issued in 1998.

SL's concerns related to two particular passages in the guidance which referred to the minimum kerb height detectable by blind and visually impaired people. Kerbs are particularly important for guide dog and long cane users when navigating the public realm. Guide dogs are trained to stop at kerbs to prevent their user from stepping into the road. Similarly, a cane user will rely on kerbs of a sufficient height in order to differentiate between the footway and the road. This was an issue of significant importance for the organisations supporting SL's legal challenge.

The guidance stated that the minimum detectable kerb height for visually impaired people was 25mm. SL and those supporting her were concerned that this was much too low, placing visually impaired people at risk. The 25mm height was taken from the 1998 guidance, and it was unclear what evidence this figure was based upon.

A similar issue was considered by the courts in Northern Ireland in 2017 (*Re Toner* [2017] NIQB 49; [2017] Briefing 847). The High Court found that Lisburn City Council had breached s75 Northern Ireland Act 1998 when it developed a public realm scheme with kerbs below 60mm without having due regard to the impact on visually impaired people.

Since 1998 concerns had been growing in relation to the use by local authorities of 'shared space' designs in town centres which removed or lowered kerbs in order to create open pedestrianised spaces. In 2009, in response to these concerns, Guide Dogs UK commissioned a study in relation to the minimum detectable kerb heights for visually impaired people. The study was conducted by University College London (UCL) at the Pedestrian Accessibility Movement and Environment Laboratory. The study involved 36 visually impaired participants who were asked to walk forwards and stop when they detected a kerb. The study found that in order for kerbs to be detected reliably by visually impaired people, these needed to be 60mm or higher.

The guidance remains to date the only guide available to local authorities and others which specifies the minimum detectable kerb height for blind and visually impaired people.

In 2017 the Secretary of State instructed independent consultants - the Transport Research Laboratory (TRL) - to advise in relation to a proposed update to the 1998

**The consultation
process was
unlawful**

guidance. In July 2019 TRL sent a survey about the proposed updated guidance to the NFBUK for circulation to their members. The survey was not sent in any braille or accessible formats and the response was required within 12 days. The Federation responded, requesting further time, but no extension was granted.

In April 2021 two remote workshops were held in order to discuss the draft guidance. Representatives from the three organisations supporting SL were present and all parties highlighted the need for a minimum kerb height of 60mm to be included in the guidance in accordance with the findings of the 2009 study. No feedback was provided to the charities following the workshops. In January 2022 the guidance was published with the 25mm minimum kerb height included. TRL advised the Secretary of State that further research on minimum detectable kerb heights was required.

High Court

SL brought judicial review proceedings which challenged the guidance on three grounds:

1. The Secretary of State failed to obtain the necessary information (on minimum detectable kerb heights) in order to properly exercise his functions under the Equality Act 2010 or under common law;
2. The consultation process was unlawful;
3. The decision to include the 25mm minimum kerb height within the guidance was irrational, in the absence of any evidence that this kerb height is detectable, and in the face of the UCL study.

At first instance HHJ Jarman KC considered grounds 1 and 3 together and rejected SL's arguments on these points. He declined to interfere with the Secretary of State's decision to maintain the 25mm figure pending further research because the decision was made '*on the basis of political judgment*'. The judge noted that the guidance covered a wide range of topics and was in need of updating generally and it was not therefore irrational to issue this pending the outcome of the additional research.

In relation to the consultation process, HHJ Jarman did find in favour of SL. Any consultation must accord with the fairness requirements imposed by common law. The 2019 survey did amount to a consultation, and it was clear that insufficient time has been provided to respond (12 days). The charities involved also asked for more time to consider the draft guidance at the time of the April 2021 workshops, and this was also denied. The court noted that it was not possible to say what additional information may have come out of a further period of consultation. This could have resulted in a change in the kerb height figure, or a caveat within the new guidance.

SL accepted that the findings on the consultation point were not sufficient to quash the guidance. She was granted permission to appeal in relation to grounds 1 and 3, and the Secretary of State was denied permission to cross-appeal on ground 2.

Court of Appeal

The appeal was heard on November 23, 2023 before Lewison LJ, Singh LJ and Laing LJ. Dismissing the appeal, the court noted that the 25mm figure was included in two passages of the guidance which referred to specific road layouts, namely '*designated pedestrian crossing points*' and '*vehicle crossovers*'. The guidance was not intended to specify the minimum detectable kerb height for visually impaired people in all circumstances.

The court also found that Secretary of State was not obliged to accept the findings of the UCL study when his advisors (TRL) had advised him of the limitations of the study and the need for further research, which had indeed already been commissioned. The court also found that the Secretary of State had not breached his duties of inquiry; on the contrary he appreciated that further work was required in relation to the issue of kerb heights generally and was discharging those duties by commissioning the further research.

Conclusion

Although the court did not quash the guidance, SL and those supporting her are keen to ensure that those responsible for designing public realm schemes are aware of the need to treat the guidance on the use of tactile paving with caution, in light of the findings that the consultation exercise was unlawful. It is hoped that a full and fair consultation will be held following the conclusions of the further research, and that these will result in a prompt update to the guidance. The Secretary of State has assured stakeholders that he will not wait a further 20 years before the guidance is updated.

Elizabeth Cleaver

Barrister, Doughty Street Chambers