Neutral Citation Number: [2020] EWHC 1277 (Admin)

Case No: CO/841/2019

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**LEEDS DISTRICT REGISTRY**

Leeds Combined Court Centre
1 Oxford Road, Leeds, LS1 3BG

Date: 21/05/2020

**Before** :

**MR JUSTICE JULIAN KNOWLES**

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**Between :**

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| **THE QUEEN ON THE APPLICATION OF SUSAN FISHER** | **Claimant** |
| **- and -** | |
| **DURHAM COUNTY COUNCIL** | **Defendant** |
| **and** | |
| **(1) GURDIAL SINGH SANDHU**<br>**(2) TAMINDER SINGH SANDHU** | **Interested Parties** |

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**Justin Bates and Alice Richardson** (instructed by **Newtons Solicitors**) for the **Claimant**
**Charles Holland** (instructed by **Council Solicitor**) for the **Defendant**
**The Interested Parties did not appear and were not represented**

Hearing dates: 29-30 April 2020

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# Approved Judgment

**The Honourable Mr Justice Julian Knowles:**

## Introduction

1. This is an application for judicial review by Ms Susan Fisher, the Claimant, who seeks to quash a noise abatement notice (the Notice) that was served on her by Durham County Council (the Council) on 30 November 2018 pursuant to s 80(1) of the Environmental Protection Act 1990 (the EPA 1990).

2. Permission was granted by Jefford J on 15 October 2019. She expressly left open for argument the question whether the claim should be refused on the grounds that the Claimant has an adequate alternate remedy in a form of a statutory appeal to the Magistrates' Court against the Notice under s 80(3) of the EPA 1990. There is an extant appeal which is currently stayed pending the outcome of this application.

3. The facts of this case are certainly unusual. The Claimant lives in a mid-terraced house in a village in County Durham (the Property). She has a neurological disorder which causes her to make involuntary sounds and noises, including words and phrases. She shouts and screams loudly, often during the night. As I will explain later, this noise has caused and is causing serious distress and unhappiness to her neighbours.

4. It was for this reason that the Council served the Notice on the Claimant. That requires the Claimant to stop making the noises. If she does not comply with the requirements of the notice, she commits a criminal offence under s 80(4) of the EPA 1990 (subject to a defence of reasonable excuse).

5. In these proceedings she seeks to quash the Notice. Her case is that she suffers from a disability; that the service of the Notice arose in consequence of her disability; that she cannot control the vocalisations and the decision to serve the Notice was therefore unlawfully discriminatory in that it was unfavourable treatment by reason of disability contrary to s 15(1)(a) and s 29(6) of the Equality Act 2010 (EA 2010); she says the Council breached its Public Sector Equality Duty (PSED) in its decision to issue the Notice (s 149, EA 2010); she also says that the service of the Notice breached Article 14 of the European Convention on Human Rights (the Convention) read with Article 8 and/or Article 1 of Protocol 1, and/or was irrational in the traditional public law sense.

6. The Council contends that Ms Fisher should not be permitted to raise these issues by way of judicial review, but should pursue the same arguments by way of her statutory appeal to the Magistrates' Court against the Notice.

7. Further or alternatively, the Council accepts that the Claimant is disabled and the Notice constitutes unfavourable treatment of the grounds of disability but contends that serving the Notice was lawful and justified owing to its desire to protect the interests of the neighbours. It contends it had full regard to its PSED and that it sought to engage with the Claimant in various ways over a long period of time before it served the Notice on her as a last resort. It says it actions were proportionate, not in violation of the Convention, and not irrational.

8. Ms Fisher is represented *pro bono* by Mr Bates and Ms Richardson and their solicitors. I am very grateful to them for doing so. The Council is represented by Mr Holland.

## Factual background

9. Ms Fisher is a 67-year-old retired primary school teacher. She lives alone at the Property, which is a terraced house located in the Council's catchment area. The Property is let to the Claimant by a private landlord under an assured shorthold tenancy agreement which commenced on 11 November 2016.

10. The Claimant's evidence is that she moved to the north-east from Luton in 2014. Shortly after she moved, since around August 2014, she has suffered with 'tics', ie, (broadly) involuntary vocal outbursts and physical movements. She says in her witness statement:

> "3 … I suffer from involuntary vocalisation. I started having symptoms of involuntary vocalisation in 2014, about three months after I moved to Durham. I had no history of involuntary vocalisation or movement in childhood.
>
> …
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> 9. In or about October 2018 the vocalisation changed from screaming to shouting words and phrases, the most frequent is, 'I want a baby'. I was also shouting out sentences such as, 'It is nothing to do with you'; 'You can't treat an old woman like that'; and also cry out 'Fuck'"

11. The effect the Claimant's behaviour has had on the neighbours has been serious. It is graphically described in the Interested Parties' evidence. They are the owners of one of the adjourning properties:

> "Our previous tenant, Ms Carol White, (20 March 2017-19 September 2017) left the property as she could no longer live with the screaming and shouting from [the Property]. Ms White advised us that not only was Ms Fisher's behaviour having an adverse affect her on own health but that her grandchildren were too frightened to visit and/or stay overnight with her.
>
> Whilst waiting for the property to be let again we made numerous approaches to Durham County Council advising them of the noise problem coming from [the Property] …. Naturally we had hoped that the noise problem be addressed before we found another tenant as we did not wish someone else to suffer the same way as Ms White had done.
>
> Our present tenant, Miss Newton moved in at the beginning of January 2018. Before she signed the Tenancy Agreement we made her aware of the situation with Ms Fisher. Miss Newton said that she was a Mental Health Nurse and hoped that she would be able to cope.

> The morning after her first night at the property we received a text message from Ms Newton that she had been awake from the very early hours of that morning by loud screams, swearing and shouting which went on for a very long time. Miss Newton has had to live like this for over two years now and her health is suffering considerably as a result of Ms Fisher's behaviour. Miss Newton's health, welfare and rights should be of equal importance to that of Ms Fisher. Miss Newton is a young professional woman working in a very demanding environment and who simply would like the right to enjoy a peaceful life in her home.
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> Two other families have since had to move out of [an adjoining property] and that property remains unoccupied to date. If the situation is not resolved very soon and Miss Newton decides she can no longer live with the noise and disruption from next door, our property too will stand empty and liable for Council Tax and utility bills. We fear we may not be able to rent or sell our property as other neighbours on the street and indeed many people in the village are aware of Ms Fisher's outbursts.
>
> How many more families, through no fault of their own, should endure Ms Fisher's behaviour before common sense prevails and a suitable all round solution is found. As Landlords, we too should be afforded some consideration, having invested in these properties we are providing reasonably priced rental accommodation for tenants, such as our present tenant, Miss Newton who is employed by the National Health Service.
>
> We fully understand and appreciate that Ms Fisher has a medical condition and cannot help her behaviour. However, she is clearly an intelligent person and as such should give consideration to those living around her and acknowledge that their complaints are not without justification. Ms Fisher needs to understand that it cannot be acceptable to subject her neighbours to such a level of distress and inconvenience on a daily basis."

12. In her witness statement Ms Newton describes the sort of things the Claimant shouts. Shortly after moving in she heard the Claimant repeatedly shouting out at night as if she were being attacked, or was in pain. Ms Newton was so worried she called the police. Over time the Claimant began to shout repeatedly things such as, 'I want a baby', 'They're going to kill me', 'Abracadabra', and 'You have no idea what you're doing to me.' She then took to swearing loudly and repeatedly. Later, she began making offensive comments to Ms Newton in the street. Ms Newton says that:

> "Being disturbed by Susan Fisher every morning sometimes as early as 4am is having a massive impact on my life, especially my sleep patterns … I am so tired much of the time and it sometimes affects my work. I find it hard to concentrate. Both my old job and my new one that I have just started were and are

> demanding and required me to be alert. For example I currently have assess prisoners for their risk of suicide, not easy to do on a couple of hours sleep.
>
> The tiredness makes me irritable, short tempered, stressed and is affecting my relationships. I find myself losing control of my emotions and arguing over the smallest things. It's just not me. Some mornings when Susan Fisher wakes me up I just cry."

13. Since about March 2016 the Council has been involved with the Claimant in a number of different ways, following complaints from neighbours that the Claimant's behaviour was causing a noise nuisance.

14. The Claimant saw a consultant neurologist Dr Osei-Bonsu in October 2017. He was unable to give a definitive diagnosis other than to say the Claimant's condition was not the usual mixture of vocal and motor tics typical of Tourette's Syndrome.

15. At a meeting on 21 November 2017 the Claimant made the Council's officers aware of her medical condition (although at that stage she declined to consent to sharing medical information and requested further details in writing).

16. On or around 24 January 2018 the Council served a Community Protection Warning on Ms Fisher under Part 4 of the Anti-Social Behaviour, Crime and Policing Act 2014. Failure to comply with the warning may result in service of a Community Protection Notice, breach of which is a criminal offence. The Warning required the Claimant to '(1) consider the effect that your behaviour has on residents (2) give details of and permission to consult you GP and Mental Health worker to discuss your alleged condition; (3) to engage with agencies, eg, VIP (Vulnerable Interventions Pathway) mentor or other agency". The deadline for compliance was said to be 'immediately'.

17. In March 2018 noise monitoring equipment was installed by the Council.

18. On 3 April 2018 the Council advised the Claimant that the evidence established that she had breached the Community Protection Warning and was causing a statutory noise nuisance. She was given two options (a) immediately cease any further shouting and/or screaming; or (b) provide evidence from a health care professional to demonstrate that legal action is inappropriate. She was warned that if she failed to do so within seven days she would be served with a noise abatement notice.

19. On 12 April 2018 the Claimant gave her written consent to the Council to speak to the medical professionals treating her.

20. The Claimant was an outpatient of the Regional Neurosciences Centre at the Royal Victoria Infirmary in Newcastle upon Tyne under the care of a consultant neurologist, Dr Kirstie Anderson. By cover of a letter dated 5 June 2018 Dr Anderson provided the Council with a letter which had been sent to the Claimant's GP following a consultation on 19 January 2018. Dr Anderson's opinion was that that the Claimant suffers from 'late onset vocalisations', as well as abnormal movement. It said she was under investigation.

21. In a further letter to her GP, following a review on 7 September 2018, Dr Anderson advised that she would like a second opinion from a consultant neuropsychiatrist.

22. The Council conducted further noise monitoring in September 2018 and concluded that sufficient evidence had been obtained to suggest that a statutory noise nuisance existed.

23. The Council sought further information from Dr Anderson in a letter sent on 5 November 2018.

24. By a letter dated 12 November 2018 the Claimant was advised that unless a response was received from Dr Anderson by 19 November 2018 they would have 'no alternative' but to serve a noise abatement notice on her and to inform her landlord 'who may choose to take his own private action and seek possession of the property'.

25. The letter advised the Claimant that the Council's Housing Solutions team might be able to help find alternative accommodation and that the VIP team might be able to offer assistance and support. The Claimant was warned that if she did not contact the relevant Council officer within 14 days to either engage with Housing Solutions or VIP, or provide 'tangible information on your own efforts at obtaining professional advice' then the Council would serve a noise abatement notice.

26. On 14 November 2018 Dr Anderson wrote to the Council that:

> "… I think the vocalisations are exceptionally disturbing for others and I was aware of this from the outpatient clinic … I do think there is variability to symptoms but I think on the balance of prior assessments there is very unlikely to be a rapid solution and it practice it is not always easy to distinguish between a voluntary and dissociative act."

27. On 30 November 2018 the Council served the Claimant with the Notice pursuant to s 80(1) of the EPA 1990. This followed a visit on that day by Council officers to the Property where they could hear loud shouting that was audible outside the Property. The Notice required the Claimant to 'cease excessive vocalisation/shouting at a level likely to cause a statutory noise nuisance to the residents of Gladstone Terrace …' within one hour of service.

28. Failure to comply with an abatement notice served under s 80(1) without reasonable excuse is an offence: s 80(4). A person who commits this offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale (ie, an unlimited fine) together with a further fine of an amount equal to one-tenth of the greater of £5 000 or level 4 on the standard scale for each day on which the offence continues after the conviction.

29. In due course Dr Anderson referred the Claimant to a consultant neuropsychiatrist at Walkergate Park Centre for Neurorehabilitation and Neuropsychiatry. By a letter dated 5 February 2019 a consultant neuropsychiatrist, Dr Saidi, gave the following diagnosis:

> "… explosive onset of vocal tics which significantly distractible with her daily action with no cbildhood history nor clear pattern of Tourette's. Her tic has clear evidence of temporarily suppressible, non-rhymic and often proceeded by an unwanted premonitory urge."

30. The present situation is that the Claimant remains in the Property. Ms Newton continues to live next door. So far as the Council is aware the other adjoining property is empty (one inference being it is unlettable because of the Claimant's behaviour).

31. In her evidence in these proceedings the Claimant makes clear that she does not want to engage with the Council because she does not want to leave her home. She perceives the Notice as the Council punishing her for being ill.

32. The continuing nature of the problem is illustrated by the evidence of Stacy Self, who moved into 2 Gladstone Terrace in February 2019. She suffers from schizophrenia. She says the Claimant's shouting and screaming has caused her own mental health to deteriorate. She became so ill as a consequence that she had to be detained in a mental hospital.

## Chronology

33. Mr Holland helpfully produced a Chronology setting out the dealings which the Council and other agencies have had with the Claimant, as well as other matters, some of which I have already referred to:

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| 2014 | Claimant moves to north east, takes a tenancy of a property in Gilesgate. |
| 15.03.16 | Complaint made by resident of neighbouring property about noise made by the Claimant. |
| c15.05.16 | Claimant's landlord gives her six months' notice to quit. |
| 8.07.16 | Multi-agency meeting arranged by the Council's Anti-Social Behaviour Investigations Team (ASBIT). Resolved that mental health professionals would attend upon the Claimant together with police to assess her under the Mental Health Act 1983. |
| 5.06.16 | Claimant detained in hospital under the Mental Health Act 1983.. Returns to Gilesgate on discharge. |
| 10.16 | Mental health professionals attend, find the Claimant's behaviour to be 'calm, relaxed and appropriate' with no symptoms of a mental health condition. |
| 8.11.16 | Multi-agency home visit. |
| c.14.11.16 | Claimant moves from Gilesgate to the Property. |

| | |
|---|---|
| 01.17 | Neighbour first calls the police in respect of Claimant's behaviour. |
| 21.08.17 | Neighbour sees the Claimant 'run into the yard screaming and trying to pull the gate off and then run back into the house'. |
| 22.08.17 | Council receives a complaint from the neighbour Ms Topping regarding noise from the Property. |
| 11.17 | Marie Frost (MF), the Council's Anti-Social Behaviour (ASB) Interventions Officer makes referral to the Vulnerability Intervention Pathway Service (VIP). |
| 21.11.17 | MF, Melissa Liddle (Senior Anti-social Behaviour) and Kim Jones (VIP Mentor) attend the Property. Claimant declines assistance from the VIP mentor and declines to give MF permission to speak to her GP. |
| 22.11.17 | Letter from MF to the Claimant, repeating the request to discuss the Claimant's condition with her medical professionals. |
| 12.17 | Neighbouring family move out of adjoining property. |
| 12.17 | Email from owner of adjoining property stating the neighbouring family had no option but to move and that they 'have been kept awake through the night, verbally abused and woken up at unsociable hours in the morning for the past 12 months'. He says 'something needs to be done'. |
| 12.17 | Ms Jones of VIP makes a 'cold-call' visit to the Property. The Claimant declines assistance, stating that she is an 'independent woman', is taking medication for her involuntary vocalisation and is awaiting a brain scan. |
| 2.01.18 | Follow-up visit from VIP to the Property. Claimant is calm, polite and appears to be physically well. She states medication was working and declines assistance from VIP. |
| 6.01.18 | Ms Newton moves into adjoining property. |
| 7.01.18 | Ms Newton is awoken at 5am by loud screaming from the Property. Ms Newton calls the Police as she is concerned about Claimant's welfare. Police inform Ms Newton that Claimant is OK, and that the screaming is involuntary due to a mental health condition . |
| 1.18 | Claimant's screaming continues over several days. Ms Newton makes complaint to the Council. |
| 1.18 | ASBIT officers, including MF, attend an adjoining property. Whilst in attendance they hear loud shouting and screaming from the Property. Ms Newton tells them this is distressing for her and she is having to |

sleep at her father's house during the week as she works night shifts and needs sleep.

1.18 MF refers the matter to Susan Gallimore (SG) at Environmental Health within the Community Protection Services.

24.01.18 MF and another officer carry out joint visit to the Property. The Claimant declines consent for MF to communicate with the medical professionals treating her. She also declines assistance from VIP to find a more suitable property. Claimant wishes for time to think, and a follow-up visit is arranged.

24.01.18 MF serves a Community Protection Notice on Claimant.

c.01.18 The Claimant telephones MF, indicating that she is willing to sign a consent form so ASBIT can speak to her GP. Home visit arranged for this form to be signed. Ten minutes later, Claimant telephones MF again, saying she has changed her mind and the home visit should not take place.

6.02.18 Letter from Dr Anderson to Claimant's GP, recording that a prescription of Clonindine had completely suppressed vocalisations for a three week period before its effect wore off, and recommending an increased dose and intermittent use pending an MRI brain scan.

9.02.18 MF and another officer attend the Property. The Claimant refuses to speak to them.

5.03.18 Letter MF to the Claimant, inviting her to a multi-agency meeting on 26.03.18.

6.03.18 Noise monitoring equipment installed.

20.03.18 SG satisfied that a statutory nuisance exists at the Property.

26.03.18 Multi-agency meeting takes place, attended by MF, her manager, Ted Murphy (Environmental Health/CPS) and Joanne Thompson (Council's Private Landlords Team). Apologies received from the Police and the Claimant's GP. The Claimant failed to reply to letter of 05.03.18 and did not attend. Agreed that: (a) MF would approach Mental Health in relation to possible treatments; (b) Environmental Health/CPS would write to the Claimant in relation to the nuisance; (c) the Private Landlords Team would liaise with Claimant's landlord; (d) legal advice would be sought to move the matter forward.

9.04.18 Letter (incorrectly dated 03.04.18) hand-delivered by SG to Claimant. The letter states that the Claimant is causing a statutory nuisance and gives the Claimant the option to provide, within the next seven days, 'evidence from a health care professional to demonstrate that further

legal action is inappropriate. In this case Durham County Council would seek legal advice on the way forward'.

11.04.18 Letter SG to the Claimant, repeating the invitation to provide evidence from a healthcare professional and extending the deadline.

12.04.18 The Claimant provides the Council with written consent to contact her medical professionals.

12.04.18 Letter SG to the Claimant's GP asking for a synopsis of Claimant's condition and an opinion on whether Claimant can comply with the abatement notice.

8.05.18 Letter Claimant's GP to SG, stating that the Claimant had a history of involuntary vocalisations which started in 'possibly August 2014' and was seeing Dr Anderson, a consultant neurologist.

14.05.18 Letter SG of to Dr Anderson seeking further information on Claimant's condition.

13.06.18 The Council receives letter from Dr Anderson (dated 05.06.18), stating that she had seen the Claimant on a single occasion and that the Claimant 'had a rather abrupt onset to symptoms that we might call a tic disorder if they had started in early life or childhood'.

22.06.18 Consultation begins with Council's Legal Department about the most appropriate course of action.

7.08.18 SG and MF attend Ms Newton. Ms Newton states that noise from the Property continued every day, that she had called the Police two or three times due to concern over Claimant shouting for help; she continued to stay at her father's home when working night shifts.

7.08.18 Immediately after visit to No 4, SG and MF attended the Property to discuss the medical information, ongoing noise and any support the Council or other agencies could offer the Claimant to remedy the situation. The Claimant told them to leave and put anything they wanted to say in writing.

16.09.18 Further noise monitoring undertaken.

26.09.18 Noise Monitoring Report, recording that the noise had continued and (in SG's view) changed in character, with shouts of words and phrases. It remained a statutory nuisance.

5.11.18 Letter SG to Dr Anderson, seeking further information.

12.11.19 Letter SG to the Claimant threatening formal action in default of engagement with Housing Solutions or VIP within 14 days.

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|---|---|
| 14.11.18 | Letter from Dr Anderson to SG (received 20.11.18), dealing with prognosis, suitability of alternative accommodation, effect on neighbours. |
| 30.11.18 | SG and MF visit Ms Newton. The Claimant returns to the Property and begins shouting. SG knocks at the Property and received no answer. |
| 30.11.18 | Abatement notice served on the Claimant at Property. |
| 19.12.18 | Appeal against abatement notice by way of complaint to magistrates' court. |
| 14.01.19 | Letter from Council to Claimant, inviting her to work towards a solution by engaging with multi-agency support. |
| 5.02.19 | Letter Dr Saidi (consultant neuropsychiatrist) to Claimant's GP, diagnosing a functional tic disorder, prescribing a low dose of Aripiprazole and making a referral for Comprehensive Behavioural Intervention for Tics (CBIT). |
| 1.03.19 | Noise Monitoring Investigation report confirms the continuation of a statutory nuisance at that point. |

## Legal Framework

*Environmental Protection Act 1990*

34. It is the duty of every local authority to cause its area to be inspected from time to time to detect any statutory nuisance which ought to be dealt with under s 80 – s 80A of the EPA 1990 and, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint (s 79(1)).

35. By s 79(1)(g) 'noise emitted from premises so as to be prejudicial to health or a nuisance' is capable of amounting to a statutory nuisance. That is the form of nuisance in this case.

36. Where a local authority is satisfied that a statutory nuisance falling within paragraph of s 79(1)(g) exists, or is likely to occur or recur, the authority shall either (a) serve an abatement notice in respect of the nuisance or (b) take such other steps as it thinks appropriate for the purpose of persuading the appropriate person to abate the nuisance or prohibit or restrict its occurrence or recurrence (s 80(2A)).

37. If a person on whom an abatement notice is served, without reasonable excuse, contravenes or fails to comply with any requirement or prohibition imposed by the notice, he shall be guilty of an offence: s 80(4).

38. By s 80(5) a person who commits an offence under s 80(4) shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale (ie, an unlimited fine) together with a further fine of an amount equal to one-tenth of the greater of £5 000 or

level 4 on the standard scale for each day on which the offence continues after the conviction.

39. By s 81(3) where an abatement notice has not been complied with the local authority may, whether or not they take proceedings for an offence under s 80(4), abate the nuisance and do whatever may be necessary in execution of the notice.

40. If a local authority is of the opinion that proceedings for an offence under s 80(4) would afford an inadequate remedy in the case of any statutory nuisance, then, by s 81(5), they may, subject to s 81(6), take proceedings in the High Court for the purpose of securing the abatement, prohibition or restriction of the nuisance, and the proceedings shall be maintainable notwithstanding the local authority have suffered no damage from the nuisance. This permits, for example, the local authority to apply for a High Court injunction.

41. A person served with an abatement notice may appeal against the notice to a magistrates' court within the period of 21 days beginning with the date on which s/he was served with the notice: s 80(3). As I have said, the Claimant has exercised this right and the appeal is currently stayed.

42. The grounds on which a person may appeal under s 80(3) are set out in reg 2(2) of the Statutory Nuisance (Appeals) Regulations (SI 1995/2644) (the Appeal Regulations) and include:

    a. that the abatement notice is not justified by s 80 (reg 2(2)(a);

    b. that there has been some informality, defect or error in, or in connection with, the abatement notice (reg 2(2)(b));

    c. that the authority has refused unreasonably to accept compliance with alternative requirements, or that the requirements of the abatement notice are otherwise unreasonable in character or extent, or are unnecessary (reg 2(2)(c));

    d. that the time, or where more than one time is specified, any of the times, within which the requirements of the abatement notice are to be complied with is not reasonably sufficient for the purpose (reg 2(2)(d)).

43. On the hearing of the appeal the court may (a) quash the abatement notice to which the appeal relates, or (b) vary the abatement notice in favour of the appellant in such manner as it thinks fit, or (c) dismiss the appeal: reg 2(5).

*The Equality Act 2010*

44. Disability is a protected characteristic for the purposes of the EA 2010: s 4.

45. By s 6(1) a person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.

46. By s 15(1) a person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

47. By s 29(6) a person must not, in the exercise of a public function, 'do anything that constitutes discrimination, harassment or victimisation.'

48. Part 9 of the EA 2010 is entitled 'Enforcement'. Section 113 provides:

> **"**Proceedings
>
> (1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part.
>
> (2) Subsection (1) does not apply to proceedings under Part 1 of the Equality Act 2006.
>
> (3) Subsection (1) does not prevent—
>
> (a) a claim for judicial review;
>
> (b) proceedings under the Immigration Acts;
>
> (c) proceedings under the Special Immigration Appeals Commission Act 1997;
>
> (d) in Scotland, an application to the supervisory jurisdiction of the Court of Session.
>
> (4) This section is subject to any express provision of this Act conferring jurisdiction on a court or tribunal.
>
> (5) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

49. Section 114 provides:

> "114 Jurisdiction
>
> (1) The county court or, in Scotland, the sheriff has jurisdiction to determine a claim relating to—
>
> (a) a contravention of Part 3 (services and public functions);
>
> (b) a contravention of Part 4 (premises);
>
> (c) a contravention of Part 6 (education);
>
> (d) a contravention of Part 7 (associations);
>
> (e) a contravention of section 108, 111 or 112 that relates to Part 3, 4, 6 or 7.
>
> (2) Subsection (1)(a) does not apply to a claim within section 115.
>
> (3) Subsection (1)(c) does not apply to a claim within section 116.
>
> (4) Subsection (1)(d) does not apply to a contravention of section 106.

> (5) For the purposes of proceedings on a claim within subsection (1)(a)—
>
> (a) a decision in proceedings on a claim mentioned in section 115(1) that an act is a contravention of Part 3 is binding;
> (b) it does not matter whether the act occurs outside the United Kingdom."

50. Section 29 is within Part 3 of the EA 2010. Hence, proceedings for a breach of s 29(6) must be brought in the County Court, which can grant any remedy the High Court could grant (by s 119(2)), or by way of judicial view (by virtue of s 113(3)(a)).

51. I turn to the Public Sector Equality Duty ('the PSED'). By s 149(1), a public authority must, in the exercise of its functions, have due regard to the need to:

    a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the EA 2010;

    b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

    c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it;

52. By s 149(3), having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to, *inter alia*:

    a. remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

    b. take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

53. By s 149(4), the steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

54. By s 149(6), compliance with the duties in the section may involve treating some persons more favourably than others (ie, positive discrimination is permissible).

*European Convention on Human Rights/ Human Rights Act 1998*

55. By s 6(1) of the Human Rights Act 1998 it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

56. That prohibition does not apply to an act if (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions: s.6(2).

57. Article 8 of the European Convention on Human Rights provides that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There 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."

58. Article 14 provides 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.

59. By Article 1 to the First Protocol every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

*UN Convention on the Rights of Persons with Disabilities (UNCRPD)*

60. By Article 19 (Living independently and being included in the community) parties to the Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

    a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

    b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

    c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

**The parties' submissions in outline**

**The Claimant's submissions**

61. On behalf of the Claimant Mr Bates maintained four grounds of challenge to the Notice. He also submitted that the statutory Magistrates' appeal was not an adequate

alternative remedy, or that in the exercise of my discretion I should permit the Claimant to argue her grounds on this application and rule upon them on the merits, and that I should not dismiss the judicial review claim on that ground. I will call this the 'remedies point'.

*Ground 1 - disability discrimination*

62. The Claimant's case is that by serving the Notice on her the Council unlawfully discriminated against her in breach of ss 15(1) and 29(6) of the EA 2010.

63. She pointed out, correctly, that the Council does not dispute that she is disabled within the meaning of s 6 EA 2010, nor does it dispute the that the noise nuisance arises in consequence of her disability or that the service of the Notice amounts to 'unfavourable treatment' for the purposes of s 15(1)(a).

64. The service of the Notice is therefore unlawful unless the Council can establish that it is a 'proportionate means of achieving a legitimate aim'.

65. As to that, the burden of proving that rests on the Council: s 136 EA 2010, *Akerman-Livingstone v Aster Communities Ltd* [2015] AC 1399, [33]; *TM v Metropolitan House Trust Ltd* [2020] EWHC 311 (QB), [24]-[26]. That is not disputed.

66. The Claimant said the medical evidence shows that, because of her disability, she is unable to comply with the Notice.

67. In other words, the Council has commenced a statutory process, which may lead to a criminal conviction, for behaviour which the Claimant cannot control and which results from her disability. She says that is an exercise in futility that is hence disproportionate.

68. The Claimant rejected the Council's submission that the service of the Notice, whilst itself not likely to be effective because of the involuntary nature of the Claimant's condition, is a necessary precondition for the Council taking other forms of action, such as seeking an injunction in the High Court pursuant to s 81(5) so as to require the Claimant to be rehoused in more suitable accommodation having regard to her condition. Mr Bates said that, pursuant to s 80(2A), the Council could have installed sound insulation. He said that the Council had failed to do so. He said what is clear is that the Council has failed to properly consider whether other, less drastic, courses of action would be appropriate in all the circumstances: *Akerman-Livingstone*, supra, [34].

*Ground 2 – failure to apply the Public Sector Equality Duty*

69. In the second ground of challenge the Claimant submitted that the Council has failed to pay any, or any proper, regard to the matters which it is required to under s 149 of the EA 2010. He said such policies as there were, were deficient.

70. The Claimant said that the Council accepts that it has not kept any records of its compliance with the PSED. She says in the absence of evidence it is hard for the Claimant to show compliance with its duty: *London & Quadrant Housing Trust v Patrick* [2020] HLR 3. [42],

71. She said that obtaining information about her medical problems was not compliance with the duty. That just involved obtaining information, not making an assessment of how best to help her overcome the challenges associated with her condition. She said the reality is that the Council has treated this just like any other noise nuisance case, and, in particular, took the decision to serve the Notice without seeking information from the consultant neuropsychiatrist.

*Ground 3: breach of Article 14*

72. Mr Bates says that the anti-discrimination provisions of the EA 2010 are stronger than those under the Human Rights Act 1998 (*Akerman-Livingstone*, supra, [55]). Thus, if Ground 1 succeeds, then this ground should also succeed.

*Ground 4 - perversity*

73. The Claimant submitted that in all the circumstances the decision to serve a noise abatement notice was perverse/irrational and unreasonable in a *Wednesbury* sense. There is no rational basis for concluding that the Claimant can comply with the notice. Her vocalisations are involuntary. The requirement is, in effect, to heal herself within one hour.

74. Whilst not abandoning them, Mr Bates realistically accepted that if Grounds 1 and 2 failed then he was not likely to succeed on Grounds 3 and 4.

*The remedies point*

75. On this issue the Claimant submitted as follows.

76. By ss 113 and 114, the general position under the EA 2010 is that alleged contraventions of Part 3 of the EA 2010 (including s 29(6)) should be dealt with in the County Court. By s 119 the County Court can grant any remedy which the High Court could grant. There is, however, an exception for claims for judicial review (s 113(3)(a)). The option of applying for judicial review for a breach of the EA 2010 is therefore not shut out. Mr Bates said it is striking that there is no exception or 'carve out' conferring similar power or jurisdiction on the Magistrates' Court. That, it is submitted, it a clear indication that Parliament did not envisage such claims being brought in the magistrates' court as part of an appeal against a noise abatement notice.

77. He also said that an EA 2010 challenge does not sit easily with the statutory right of appeal to the Magistrates' Court under s 80(3), and the Appeal Regulations. He said such an appeal can only be on specified grounds. He said that the only one that is possibly engaged here is reg 2(2)(a), ie, that the notice is not justified under s.80, EPA 1990.

78. But Mr Bates said that the difficulty standing in his way is that the notice probably *is* justified under s 80. He accepted that the noise nuisance is clearly *capable* of amounting to a statutory nuisance (although he was anxious not to concede the point lest the Magistrates' Court appeal proceed). The argument is *not* that this is not a statutory nuisance. The argument is that the service of the notice (ie, as a choice of

enforcement remedy) is not lawful because it amounts to a violation of s 29(6) read with s 15(1) of the EA 2010 and/or is unlawful in traditional public law terms.

79. Alternatively, Mr Bates said it was in the interests of justice to proceed by way of judicial review, and that was a matter for my discretion. Even if the Magistrates' Court could have dealt with Ground 1, it cannot deal with Grounds 2, 3 or 4. There is an obvious public interest in resolving all matters in one set of proceedings: see *R. (Lunt) v Liverpool City Council* [2009] EWHC 2356, on the earlier Disability Discrimination Act 1995.

80. For these reasons, the Claimant submitted that I should quash the Notice.

**The Council's submissions**

81. On behalf of the Council, Mr Holland submitted that I should proceed (in light of Mr Bates' stance on the existence of a nuisance) at least on the *presumption* that at the date of the Notice, a statutory nuisance existed. On this basis, by definition (EPA 1990, s 79(1)(g)), the amenity of others was being harmed. Mr Holland said there was unchallenged evidence about the deleterious effect the Claimant's behaviour was having on her neighbours (especially during the present COVID-19 lock-down).

*The remedies point*

82. The Council submitted that the Claimant has an adequate alternative remedy, namely, she can pursue all of her grounds of challenge in these proceedings as part of her extant statutory appeal to the Magistrates' Court seeking an order to quash the Notice. The Council contended that all four substantive grounds pursued in this judicial review claim are justiciable before the Magistrates' Court and so I should dismiss the claim on that basis.

83. This issue was canvassed at the permission stage. On 12 April 2019 Her Honour Judge Belcher sitting as a judge of the High Court made an order indicating that she was minded to refuse permission on the grounds that there was an alternative remedy. At that stage the Claimant and the Council were seeking a stay of the judicial review pending the outcome of the Magistrates' Court appeal that had been lodged in December 2018. However, she gave leave for further submissions to be lodged. Thereafter, both parties decided not to seek a stay of the judicial review proceedings.

84. The matter then came before His Honour Judge Klein sitting as a High Court judge. He directed an oral hearing.

85. The Council (through previously instructed counsel, not Mr Holland) made written submissions that permission ought to be refused on the grounds there is an adequate alternative remedy open to the Claimant, namely, her statutory appeal. The Council then instructed Mr Holland. Mr Holland submitted that all of the issues raised by the Claimant could be dealt with by the statutory appeal route. He said that the complaints about the way the Notice was issued, including that it was unlawful disability discrimination and issued in breach of the Council's PSED could be dealt with under reg 2(2)(b) as an 'informality, defect or error in, or in connection with, the abatement notice' and he relied upon McCracken, *Statutory Nuisance* (4th Edn), [4.39]-[4.40]. In

relation to the grounds based on the EA 2003, he argued that the provisions of ss 113 and s 114 of the EA 2010, which as I have said reserve claims for breaches of s 29(6) (which is in Part 3) to the County Court, or the High Court on judicial review, did not shut out the Magistrates' Court from considering them because, in essence, they refer to 'proceedings relating to a contravention of this Act' (s 113(1)), and the County Court having 'jurisdiction to determine a claim' (s 114(1)), having to be brought under Part 9, and such language is not apt to describe a ground of appeal based on the Act against a noise abatement notice. He said that is neither 'proceedings' nor a 'claim' within the meaning of the EA 2010.

86. The matter then came before Jefford J who, on 15 October 2019, gave permission but also expressly gave the Council liberty to re-argue (for the purposes of both merits and relief) any point arising out of allegedly adequate alternative remedies (whether in the magistrates' court or the County Court) at the final hearing.

87. On the substantive grounds of challenge, Mr Holland submitted as follows.

*Ground 1 - disability discrimination*

88. Mr Holland said the Council accepts that the Claimant is disabled within the meaning of s 6 the EA 2010 and that her vocalisations arise in consequence of that disability. The Council also accepts that service of the Notice was unfavourable treatment of the Claimant because of something arising in consequence of her disability, which by virtue of s 15(1)(a) EA 2010 will be unlawfully discriminatory treatment unless the Council shows that the treatment is a proportionate means of achieving a legitimate aim (s 15(1)(b)). Mr Holland accepted the burden of showing these matter rests upon the Council.

89. As to legitimate aim, the Mr Holland submitted that the legitimate aim sought to be achieved by the service of the Notice is the abatement of a statutory nuisance emanating from the Property. By definition, this harms the amenity of others and/or is prejudicial to the health of others. There is substantial evidence of actual harm to others.

90. Mr Holland accepted that criminal proceedings for breach of the Notice were unlikely because of the 'reasonable excuse' defence. In the event of a prosecution he accepted that if the Claimant discharged the evidential burden of the defence it would then be for the Council to disprove it to the criminal standard: *Polychronakis v Richards and Jeromm Ltd* [1988] Env LR 347. He accepted that the involuntary nature of the Claimant's behaviour meant that they would likely not succeed in doing so: cf *Wellingborough Borough Council v Gordon* [1993] Env LR 218. But he said the Notice nonetheless serves a legitimate purpose because it is a mandatory initial step for the three subsequent remedies provided for by EPA 1990: *The Barns (NE) Ltd* v. *Newcastle City Council* [2006] Env LR 25. These remedies include civil proceedings in the High Court for the purposes of securing the abatement, prohibition or restriction of the nuisance: s 81(5), EPA 1990. The High Court could order the Claimant to leave the Property and move to more suitable property. That would abate the statutory nuisance emanating from the Property and afford relief to those affected. He also relied on Ms Gallimore's evidence that one purpose in serving the Notice was to try and get the Claimant to engage with the suggestions in her letter of 12 November 2018.

91. On the question of proportionality, Mr Holland pointed to everything which the Council had done to try and engage with the Claimant before serving the Notice. He relied upon the events in his Chronology which I have set out above. Here, service was very significantly delayed whilst the Council strove to obtain information about the Claimant's personal characteristics, to consider the evidence in light of its duties and obligations, and to engage with her. This process went well outside the time period specified in the alternative procedure for noise nuisance found in s 80(2A)-(2E). He said the content of Dr Anderson's letter of 14 November 2018 and the Claimant's failure to respond to the Council's letter of 12 November 2018 suggesting alternative accommodation within the 14 day deadline left Ms Gallimore with no alternative but to serve the Notice.

92. The medical prognosis at the time of the service of the Notice is found in the letter of Dr Anderson dated 14 November 2018. She said, *inter alia*, that (a) the process to improve vocalisations was likely to take both medication, psychology and some considerable time; (b) that the vocalisations were exceptionally disturbing for others, and that their 'sheer volume and frequency' 'would significantly disrupt both the sleep and the mental health of neighbours if they can easily hear the noise'; (d) that '[i]t would seem very reasonable to suggest a solution moving to a house with better sound proofing'.

93. Mr Holland pointed that the Claimant did not reply to the Council's letter of 12 November 2018 offering support from Housing Solutions and Vulnerability Intervention Pathway. The Claimant had previously rejected such support (and this remains the Claimant's considered position). He pointed out that service of the Notice took place after the Claimant's failure to respond.

94. He said that given that the Council cannot of its own volition force the Claimant to move house, the only available route to a solution in the absence of agreement is the statutory nuisance process, which may ultimately lead to civil proceedings under s 81(5) seeking an injunction. As to that, the first step is the service of an abatement notice, which is a jurisdictional requirement to bringing civil proceedings: *Barns,* supra.

95. Mr Holland said there are no other less drastic steps the Council could have taken to achieve the legitimate aim of securing an abatement of the nuisance than serving the Notice. As to soundproofing, which was raised by the Claimant in her Detailed Statement of Facts and Grounds at [18], this was investigated by the Council, which received expert advice in November 2019 that the results would not be guaranteed. In addition, there was no funding for the works. He said that the Claimant's reliance on s 80(2A) in relation to sound proofing works was wrong because that only permits the Council to take 'such other steps as it thinks appropriate for the purpose of persuading the appropriate person to abate the nuisance or prohibit or restrict its occurrence or recurrence' and doing soundproofing works would not fall into this category.

*Ground 2 - Public Sector Equality Duty*

96. Mr Holland submitted that given that s 80(2A)-(2E) envisages the service of an abatement notice within (at most) seven days from the occurrence of the statutory

nuisance, but that some 36 weeks elapsed between the Council's determination on 20 March 2018 that a statutory nuisance existed at the Property and the service of the Notice on 30 November 2018, indicates the extent to which the Council considered its duties under the EA 2010.

97. He submitted I should find that the Council's officers conscientiously and anxiously approached this matter from the outset and throughout with regard to the issue of disability discrimination. They had due regard to the need to eliminate discrimination, harassment and victimisation; to the need to advance equality of opportunity between the Claimant and others; to the need to foster good relation between hers and those who did not share her disability. In particular, they applied a stepped approach to encourage the Claimant to provide them with information about her disability to, essentially, help them to help her. They took steps to advise her how she could avail herself of assistance from the Council in various ways to find suitable alternative accommodation where her vocalisations would not bring her into conflict with others.

98. This approach complied with the Council's Standard Operating Procedure 1 for Noise Complaint Investigations ('SOP1'). Paragraph 6.6 makes provision for sensitivity to mental illness and disabilities suffered by those causing noise disturbance. The involvement of other departments is advised in such circumstances.

99. The Council officers also had due regard to the protected characteristics of others and their needs in relation to PSED. The Council gave close considered involvement to the issues arising in this case. It had in mind the suffering that had been and was being endured by the Claimant's neighbours. They were in an intolerable situation. Mr Holland pointed out that the the PSED does not amend the statutory powers and functions of a public authority prescribed by other legislation: *Luton Community Housing Ltd* v. *Durdana* [2020] EWCA Civ 455, [19] and hence did not limit the Council's powers to issue an abatement notice provided it took into account its PSED.

*Ground 3 - Breach of Article 14 read with Article 8 of the Convention*

100. Mr Holland relied on s 6(2) of the Human Rights Act 1998 and the mandatory nature of the duty of the duty to serve an abatement notice.

101. He argued that the mere service of a notice was not capable of infringing the Claimant's rights under Article 8 or A1P1, read with Article 14, which requires that people are able to secure other rights under ECHR without discrimination).

102. A failure to have served the Notice would have been capable of infringing the rights of others under Article 8 and A1P1.

*Ground 4 - perversity*

103. Mr Holland said the Council recognised that the Notice would not solve the problem in an of itself, as Mrs Gallimore said in her evidence. It served it as a necessary precondition to taking other action which was capable of solving the issue such as injunctive relief. To do so was not perverse but was part of the fulfilment of the Council's statutory duties.

## Discussion

*The remedies point*

104. I am entirely satisfied that I should not refuse the claim, or relief, on the grounds of alternative remedy. Even if Mr Holland is right that the four grounds of challenge can be raised on the statutory appeal, I am clear that it is appropriate for me, in the exercise of my discretion, to rule upon them now. Not to do so, but to require them to be re-litigated before the magistrates, would simply delay the final resolution of this troubling case. No doubt, whichever way the magistrates ruled, there would be further litigation in the High Court with the result that the matter would likely remain unresolved for many months to come. That would not be in anyone's interests. The short answer to Mr Holland's complex arguments as set out in his Skeleton Argument and Detailed Grounds about the scope of the Appeal Regulations and the EA 2010 is that whether I should entertain this case is a matter for my discretion, which is to be exercised on the facts before me in light of the authorities. When those authorities are considered then in my judgment the answer as to what I should do is clear. In reaching that conclusion I fully acknowledge that in general a statutory remedy provided by Parliament should have primacy, given the risk that Parliamentary will might be undermined if judicial review were too readily granted despite the existence of such a remedy: *R (Willford) v Financial Services Authority* [2013] EWCA Civ 677, [50]. However, in this case there are good reasons for me to rule upon the matter now.

105. The leading decision is *R v Falmouth and Truro Port Health Authority ex parte South West Water Limited* [2001] QB 445. The applicant was a water undertaker with statutory duties on the disposal of sewage. It provided a sewage outfall at Falmouth on the Fal estuary as an interim phase of a larger scheme to comply with the United Kingdom's obligations under EU law. It had the necessary consent from the Environment Agency under the Water Resources Act 1991. In April 1998 the port health authority wrote to the applicant stating that they had received complaints that the interim scheme was prejudicial to health and a public nuisance to the users of the watercourse in the vicinity of the outfall. After an exchange of correspondence, in the course of which the applicant asked for an opportunity to view any scientific or medical evidence in the authority's possession, the authority served an abatement notice under s 80 of the EPA 1990. The notice alleged a nuisance under s 259(1)(a) of the Public Health Act 1936, namely that a part of the estuary known as the Carrick Roads and described as a 'watercourse' was so foul or in such a state as to be prejudicial to health or a nuisance as a result of the discharge of sewage from the outfall. The notice required the cessation, within three months, of the discharge of sewage from the outfall into the watercourse.

106. The applicant appealed against the notice to the magistrates' court but because the appeal could not be heard within three months the applicant also sought permission to apply for judicial review. The High Court (Harrison J) granted permission and stayed both the abatement notice and the statutory appeal. On the hearing of the substantive application the judge held that the applicant had been given a legitimate expectation of consultation which was unfairly denied, that the abatement notice was invalid for failing to specify the works required to abate the nuisance and that the Carrick Roads was not a 'watercourse' within the meaning of section 259(1)(a) of the 1936 Act. The judge quashed the abatement notice.

107. For present purposes there are two important parts of the judgment of the Court of Appeal. First, there is Simon Brown LJ's (as he then was) judgment at pp469 – 473 under the heading 'Alternative remedy'. He recorded the submission on behalf of the port health authority (before the judge and on appeal) that all the issues could and should have been dealt with on the water undertaker's application to the magistrates' court. Given the availability of that statutory remedy, he submitted, and given too the public health dimension to this case, the High Court should not have granted leave to apply for judicial review and meantime a stay of the abatement notice. Simon Brown LJ recorded counsel's concession that the court had a discretion to allow a judicial review challenge despite the existence of an alternative remedy, but noted that he had submitted that the discretion was wrongly exercised.

108. Simon Brown LJ said that central to the arguments advanced on this issue was *R v Birmingham City Council, Ex p Ferrero Ltd* [1993] 1 All ER 530 where the Court of Appeal reversed the exercise of the judge's discretion to grant judicial review and then, having allowed the council's appeal on that ground alone, found (*obiter*) in favour of the council on the substantive issues also. The case concerned a trader's challenge (on grounds of non-consultation) to a suspension notice issued by the council under section 14 of the Consumer Protection Act 1987 in relation to potentially dangerous goods (chocolate eggs containing plastic toys one of which had been swallowed by a small boy who then choked to death). Giving the only reasoned judgment, Taylor LJ referred to a number of earlier authorities and continued, at p537:

> "These are very strong dicta, both in this court and in the House of Lords as cited, emphasising that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure it is only exceptionally that judicial review should be granted. It is therefore necessary, where the exception is invoked, to look carefully at the suitability of the statutory appeal in the context of the particular case. In the present context the statutory provisions are all contained in Part II of the 1987 Act, and are thus concerned with consumer safety. Section 14 is clearly aimed at providing enforcement authorities with a means of swift, short-term action to prevent goods which have come to their notice from endangering the public. Section 14 is the only provision which enables action to be taken by a local authority against a trader, other than through the courts. The action does not require proof that the goods contravene a safety provision, but merely that the authority has reasonable grounds for suspecting they do. The notice is effective only for six months. It is intended to be an emergency holding operation. The suspension notice has to inform the recipient of his appeal rights (section 14(2)(c)), and the very next section, section 15, sets them out. They provide for application to a magistrates' court, which can set aside the notice only if satisfied that there has been no contravention of a safety provision. If the goods are not shown to be safe, the notice will remain in place. Conversely, if the goods are shown not to contravene the safety provision, the notice is set aside.

> Moreover, in that event, even if the enforcement authority had reasonable grounds for their suspicion, they are required to pay compensation to any person having an interest in the goods (section 14(7)).”

109. Later Taylor LJ said, at pp538–539:

> “[The judge] did not, in my view, ask himself the right questions. He asked whether, on the section 15 appeal, Ferrero could have aired their various complaints about … [consultation]. Having concluded they could not, he held they were entitled to proceed by judicial review. He should have asked himself what, in the context of the statutory provisions, was the real issue to be determined and whether a section 15 appeal was suitable to determine it. The real issue was whether the goods contravened a safety provision and the section 15 appeal was geared exactly to deciding that issue. If the goods did contravene the safety provision and were dangerous to children then, surely, procedural impropriety or unfairness in the decision-making process should not persuade a court to quash the order.”

110. Simon Brown LJ then went on to note that the grant of permission and the stay ordered by the judge had rendered the matter academic because new works were afoot. He said counsel had submitted that the judicial review had subverted the will of Parliament.

111. At p473 he concluded:

> “The lesson to be learnt is, I suggest, this. The critical decision in an alternative remedy case, certainly one which requires a stay, is that taken at the grant of permission stage. If the applicant has a statutory right of appeal, permission should only exceptionally be given; rarer still will permission be appropriate in a case concerning public safety. The judge should, however, have regard to all relevant circumstances which typically will include, besides any public health consideration, the comparative speed, expense and finality of the alternative processes, the need and scope for fact finding, the desirability of an authoritative ruling on any point of law arising, and (perhaps) the apparent strength of the applicant's substantive challenge.”

112. The second relevant passage is in the judgment of Pill LJ at pp476-477. He agreed with Simon Brown LJ and noted that the issues in the litigation were such that, even if they had eventually been resolved in the health authority's favour, it would have had no practical significance because the interim scheme would by then have been superseded. He said the issue of consultation was not an appropriate ground of challenge in this case and that he understood Simon Brown LJ to be of the same view. Pill LJ agreed with Lord Taylor that the relevant question was ‘what, in the context of the statutory provisions, was the real issue to be determined and whether [the statutory] appeal was

suitable to determine it.' He went on to say that given the public health context and the provision of a statutory remedy, he questioned whether matters of convenience and expedition should have been allowed to permit proceedings by way of judicial review the effect of which had been to circumvent a detailed statutory procedure.

113. The question of appropriate remedy is, at bottom, always fact and issue specific. In *R (Grace Bay Holdings SARL and others) v The Pensions Regulator* [2017] EWHC 7 (Admin), Whipple J considered the authorities in this area. She referred at [53] to the *dictum* of Moore-Bick LJ in *Willford,* supra, [36]:

> "Ultimately, of course, the court retains a discretion to entertain a claim for judicial review but whether it will do so in any given case depends on the nature of the dispute and the particular circumstances in which it arises."

114. Rightly or wrongly (and I respectfully make no observation either way) Jefford J did not decide the question at the permission stage, which Simon Brown LJ in *Falmouth*, supra, and Whipple J at [59(a)] of *Grace Bay*, supra, said was the critical decision and the stage at which the issue should be determined (as Her Honour Judge Belcher was initially minded to do). The situation is that there has been a full hearing of the judicial review over a day and a half on the substantive grounds raised by the Claimant. It does not seem to me to be in the interests of speed, expense or finality that I should dismiss the application on the basis that the Magistrates' Court can hear the arguments all over again, with further High Court litigation likely to follow, as I have already observed. That would not assist anyone. Everyone needs to know as soon as possible whether the Notice is valid. If it is, then there is likely to be little left to argue about, as Mr Bates candidly admitted given the unchallenged evidence about the extent of the nuisance.

115. No party suggested that I was unable in principle to decide the issues relating to the EA 2010 because, for example, live evidence was required. There are no material disputes of fact. There are three other important factors that must be taken into account. In this case, unlike in the *Falmouth* case and the *Ferrero* case¸ there is no question of the judicial review rendering matters moot due to the efluxion of time. Secondly, the real issues in this case, it seems to me, are those raised in the four grounds and in particular the impact of the EA 2010 on the decision to serve the Notice. These are not peripheral public law issues, as was the case in the *Falmouth* case and the *Ferrero* case, both of which had at their core statutory nuisance and public safety, respectively. Thirdly, given the legal complexity of the issues, it seems to me that on the facts of this case, judicial review is the appropriate means of challenge.

116. I am reinforced in that conclusion because in my judgment it is not wholly clear that at least some of the grounds of challenge could be argued on the statutory appeal. It is arguable that they might, but there are also arguments the other way.

117. I agree with Mr Holland that Grounds 3 and 4 could be argued as grounds of appeal in the statutory appeals process for the reasons given in *McCracken*, supra, [4.39]-[4.40] where the authors say that reg 2(2)(b) of the Appeal Regulations ('some informality, defect or error in, or in connection with, the abatement notice') is not limited to errors on the face of an abatement notice but also potentially encompasses defences based on

claims that a local authority has acted in a way which violates a Convention right or on defences based on a failure to follow an enforcement policy. He also relied on *R (Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31, [51]-[52] where Toulson LJ said that Magistrates' Courts could entertain appeals against licensing authorities on points of law.

118. The position is less clear cut in relation to Ground 1 and there are arguments either way. I acknowledge the force of Mr Holland's submission that reg 2(2)(b) is potentially broad enough to allow a statutory appeal against a noise abatement notice to be brought on the grounds that it violates s 29(6) and s 15(1)(a) of the EA 2010 as being unlawful discrimination on a protected ground. However, there are ss 113 and 114 of the EA 2010 to consider. As I explained earlier, these require proceedings for contraventions of Part 3 (which includes s 29(6)) to be brought in the County Court or by way of judicial review. Does raising s 29(6) and s 15(1)(a) as a ground of appeal against a noise abatement notice amount to 'proceedings relating to a contravention' of those provisions within the meaning of s 113(1) or a 'claim relating to a contravention of Part 3' within s 114 (1) ? Mr Holland says not. He says a ground of challenge on an appeal is not proceedings relating to a contravention but a statutory appeal, and that is different. On the other hand, he acknowledged there are decisions which tend against such a conclusion, although they are not directly on point. For example, in *Hamnett v Essex County Council* [2017] 1 WLR 1155, the Court of Appeal held that EA 2010 challenges to experimental traffic regulation orders under the statutory review procedure in Sch 9 to the Road Traffic Regulation Act 1984 had to be brought in the County Court. Gross LJ said at [24(vi)], 'I can see no warrant for not giving the word 'proceedings' in section 113(1) of the 2010 Act its ordinary meaning.' Accordingly, the statutory challenge in question fell within ss 113 and 114 and had to be brought in the County Court (for reasons which he went on to explain involving the doctrine of implied repeal, which I do not need to set out). Mr Holland also said that a challenge to a notice on the basis of an alleged breach of the PSED in the process by which it was issued could be raised as a ground of appeal because it did not fall within those provisions which by s 113 and 114 have to be brought in the County Court.

119. In my judgment, for these reasons, how far grounds of appeal based on alleged contraventions of Part 3 of the EA 2010 can be raised on a statutory appeal in the Magistrates' Court is uncertain, and this is a further factor which weighs in favour of my dealing with the issues on this application.

120. I turn now to the substantive grounds of challenge.

*Ground 1 – disability discrimination*

121. As I have already recorded, it is common ground (a) that the Claimant is disabled within the meaning of s 6 the EA 2010 and that her vocalisations arise in consequence of that disability; (b) service of the Notice was unfavourable treatment of the Claimant because of something arising in consequence of her disability; and (c) this will be unlawfully discriminatory treatment by virtue of s 15(1)(a) unless the Council discharges the burden under s 15(1)(b) of showing that the treatment is a proportionate means of achieving a legitimate aim.

122. I accept Mr Holland's submission that service of the Notice served a legitimate purpose, namely the abatement of a statutory nuisance emanating from the Property. There is substantial evidence that the Claimant's conduct is causing harm and distress to her neighbours. I am satisfied that the Council acted to protect their right and freedom to live without harmful noise nuisance.

123. I turn to the question of proportionality. The parties were agreed on the approach. The test for proportionality under 15(1)(b) of the EA 2018 was authoritatively set out by the Supreme Court in *Akerman-Livingstone*, supra, [28]. There are four questions: (a) Is the legitimate aim that is being pursued sufficiently important to justify limiting a fundamental right ? (b) Is the decision (here, to serve the Notice) rationally connected to the legitimate aim ? (c) Are the means chosen no more than is necessary to accomplish the legitimate aim ? (d) Is the adverse impact of the infringement of the Claimant's rights disproportionate to the likely benefit of (here, serving the Notice) ? In *JT v First-tier Tribunal (Social Entitlement Chamber) (Equality and Human Rights Commission intervening)* [2019] 1 WLR 1313, [83], Leggatt LJ said that, put more shortly, the fourth question is whether the impact of the right's infringement is disproportionate to the likely benefit of the impugned measure. He said that another way of framing the same question is to ask whether a fair balance has been struck between the rights of the individual and the interests of the community.

124. These are questions that the Court must consider for itself rather than by way of a review of the assessment made by a public authority decision maker: see *Akerman-Livingstone*, supra, per Baroness Hale at [38].

125. In a post-hearing Note on proportionality that I requested, Mr Bates said that there were other relevant principles to be drawn from the *Akerman-Livingstone* case. He said that in the context of the EA 2010 the following matters are particularly relevant to this four-stage assessment, drawn from the judgment of Baroness Hale: (a) people with disabilities are entitled to have due allowance made for the consequences of their disability ([31]); (b) the court must ask itself whether the local authority has done all that can reasonably be expected of it to accommodate the consequences of the disabled person's disability ([32]); (c) where, as here, the allegation is of disability discrimination under s 15, then the local authority must show that there was no less drastic means of solving the problem and that the effect upon the occupier was outweighed by the advantages ([34]).

126. There seems to me to be room for argument about whether in these passages Baroness Hale was speaking in the particular context of re-possession cases involving disabled people (as parts of [30], [31] and [32] suggest: see eg the last sentence of [31]: 'The impact of being required to move from this particular place on this particular disabled person may be such that it is not outweighed by the benefits to the local authority or social landlord of being able to regain possession', or more generally). However, as Mr Holland did not disagree with Mr Bates' Note, I am prepared to assume they are of general application in all housing cases involving disabled people. In *TM*, supra, (a possession case), Johnson J said at [27]:

> "Further, in addressing the third proportionality question, it is necessary to determine whether the landlord has done all that can reasonably be expected of it in order to accommodate the

> consequences of the disabled person's disability - see *Aster* per Baroness Hale at [32]. In addressing the first and fourth questions it is necessary to determine whether the legitimate aims of the landlord are sufficient to outweigh the effect upon the disabled person – again see *Aster* per Baroness Hale at [32]."

127. Applying the required four part analysis bearing these principles in mind I am wholly satisfied that the service of the Notice was a proportionate form of discriminatory treatment even giving due weight to the fact that the Claimant is disabled. That is for the following reasons.

128. First question: Is the legitimate aim that is being pursued sufficiently important to justify limiting a fundamental right ? I am prepared to accept that service of the Notice does represent a limitation of the Claimant's fundamental rights in as much as it impacts on how she must conduct herself inside her own home and to that extent engages her right to a private and family life under Article 8 of the Convention. And of course the Notice is accepted to be unfavourable treatment on the grounds of disability and so it impacts upon her fundamental right not to be discriminated against on grounds of her disability. But it must be questioned whether the Claimant, disabled though she is, has a fundamental right to commit a statutory noise nuisance – and it is that which the Notice seeks to curtail. Be that as it may, the legitimate aim of protecting the health and amenity of the Claimant's neighbours, and the interests of the relevant property owners, all of whom are being seriously harmed in different ways by her behaviour (including, variously, by being kept awake at night and being unable to let proper or keep tenants), justified the modest limitation of the Claimant's fundamental right as to how she lives in her home.

129. Second question: Is the decision (here, to serve the Notice) rationally connected to the legitimate aim ? I acknowledge Mr Bates' argument that the Notice was irrational because all are agreed that the Claimant is not able, through no fault of her own, to comply with it, and the Council has more or less accepted that it would not contemplate prosecuting her for breaching it. But I accept Mr Holland's submission that service of the Notice is a necessary precondition before (for example) High Court injunctive relief can be sought, which would be capable of abating the nuisance and so fulfilling the Council's legitimate aim. As Mr Holland says at [52] and [53] of his Skeleton Argument:

> "52. Given that D cannot of its own volition force C to move house, the only available route to a solution in the absence of agreement is the statutory nuisance process, which may ultimately lead to civil proceedings under s 81(5) seeking an injunction.
>
> 53. The first step is the service of an abatement notice, which is a jurisdictional requirement to bringing civil proceedings …"

130. In *The Barns (NE) Ltd*, supra, the appellants (B) were farm owners who were considered by the respondent (N) to be responsible for smoke from open burning of waste alleged to comprise a statutory nuisance under Part III of the EA 1990. N had

formed the opinion that proceedings under s 80(4) of the 1990 Act would afford an inadequate remedy and so, instead of serving an abatement notice, applied to the High Court for an injunctive order under s 81(5) prohibiting the statutory nuisance and any repetition. B submitted that an injunction under s 81 could not be pursued unless an abatement notice had first been served under s 80(1). The judge at first instance contrasted the 'self help' and costs recovery remedy under s 81(3) and (4) with the injunctive relief provisions in s 81(5). He found that the former required the local authority to provide a prior opportunity for a contention that a statutory nuisance did not exist, before incurring and seeking to recover expenditure, but that the latter did not because such contentions could be raised in the hearing of the injunction application. He went on to find that service of an abatement notice prior to institution of civil proceedings did not appear to serve any purpose and that in some cases service would be futile.

131. B appealed to the Court of Appeal, submitting that an application for an order under s 81(5) should not be considered unless an abatement notice had first been served, and that in the instant case no such notice had been served. The Court of Appeal allowed the appeal, holding that service of an abatement notice was mandatory before injunctive relief could be applied for. Staughton LJ said at [17]-[18]:

> "17. For my part, I consider that there is a series of provisions here which were intended to be consecutive steps in a line. First of all, there is to be an abatement notice. Then, if there has not been compliance, there is to be either a prosecution inthe Magistrates' Court or self-help by the Council and the requirement of payment to compensate the Council for its expenses; or, as the last resort (the third measure) the action in the High Court and an injunction.
>
> 18. In my judgment, it must have been intended that the abatement notice should apply as much to that third more drastic measure as it does in the two other measures. I would allow this appeal."

132. Agreeing, Moses J said at [19]-[20]:

> "19. … A local authority cannot seek injunctive relief pursuant to s 81(5) of the Environmental Protection Act 1990 ("the 1990 Act") unless it is first served an abatement notice under s.80(1) . I reach that conclusion for the reasons my Lord has given. But out of deference to the judge, add reasons of my own. Firstly, the wording of s 81(5) identifies the matters about which a local authority must form an opinion before it may seek an injunction. It must be of the opinion that proceedings for an offence would afford an inadequate remedy.
>
> 20. Those words are plainly a reference to s 80(4). There can be no proceedings for an offence unless it is alleged that an abatement notice has been served and that a person has failed to comply with any requirement or prohibition imposed by that

> notice. It is not possible to identify the alleged failure until the requirement or prohibition has been identified. It is not possible to identify such a requirement or prohibition until the notice specifies one or both. The requirement or prohibition can only be identified in an abatement notice served under s 80."

133. To the same effect is *R (Ethos Recycling Ltd) v Barking and Dagenham Magistrates' Court* [2010] PTSR 787, [31]. DEFRA takes the same view in the guidance published in relation to the amendments introducing the alternative procedure for noise (*Guidance on Sections 60 to 81 and Section 86 of the Clean Neighbourhoods and Environment Act 2005*, [32], [35]):

> "Section 86 of the Clean Neighbourhoods and Environment Act amends section 80 of the Environmental Protection Act 1990 by addition of a new subsection (2A) so as to enable a local authority to defer the issue of an abatement notice in the case of a statutory nuisance under section 79(1)(g)of the 1990 Act (i.e. that caused by noise emitted from premises). The deferral canbe for up to seven days while the local authority takes appropriate steps to persuade the person on whom it would otherwise be serving the notice to abate the nuisance or prohibit or restrict its occurrence or recurrence.
>
> …
>
> 35.If the authority does defer and the nuisance is not abated by the end of the seven-day period (or if the authority concludes before then that it will not be abated within that period), the authority must in most circumstances proceed to serve an abatement notice under section 80(1) in any event."

134. Third question: Are the means chosen no more than is necessary to accomplish the legitimate aim ? In other words, could less drastic measures have been used. On the evidence, the answer to this question is plainly no, and that conclusion follows more or less from the answer to the second question, given that service of an abatement notice is a necessary first step in the only process of ending the nuisance that is likely to be successful. The Chronology is relevant here. As I have set out, the Council took a number of different approaches to the Claimant. It sought on numerous occasions to engage with her in meetings; sometimes she would meet, sometimes not. It served a Community Protection Warning on her under Part 4 of the Anti-Social Behaviour, Crime and Policing Act 2014. It sought medical evidence about her condition to better understand what was going on. It sought expert advice about soundproofing her house, which was negative (albeit, I accept after service of the Notice: but if it had enquired before service the answer would have been the same). It offered the Claimant a number of Council services. It sought to discuss rehousing her in more suitable accommodation. Apart from allowing the Council to access her medical records the Claimant failed to engage meaningfully to address what is a very real problem. For example, in particular, the Claimant did not reply to the Council's letter of 12 November 2018 offering (once more) support from Housing Solutions and Vulnerability Intervention Pathway. The Claimant had previously rejected such

support, and this remains her position. She says in her witness statement at [20] and [27]:

> "20. The Council have at no stage offered [me] alternative accommodation. Tbey told me to get in touch with Housing Solutions, but I did not want to leave my current home in case my vocalisations became worse. As a consequence, I did not contact them.
> . ..
> 27. I will continue to provide further details from my medical team as and when it is available. I cannot believe there is any possibility of resolving my condition unless it is through the use of medication or any other treatment that those who have the knowledge can recommend."

135. The service of the Notice was a last resort when all else had failed despite the Council's very considerable efforts over a period of time. As I have said, Ms Gallimore's evidence is that she recognised that the service of the Notice was not likely to bring about an abatement of the nuisance. She served it because: (a) she was statutorily obliged to do so; (b) she hoped that it might bring about engagement from the Claimant with the suggestions put in the letter of 12 November 2018; (c) it was the first step in the EPA 1990 scheme, which included the option (albeit rarely exercised) of the institution of civil proceedings for an injunction; (d) she had balanced the rights of Claimant against the rights of her neighbours who had suffered a continuous statutory nuisance for over 12 months; (e) she had taken on board the lack of engagement from the Claimant and the lack of any short-term medical solution (as Dr Anderson's letter of 14 November 2018 had made clear). I accept what Ms Gallimore says at [30] of her witness statement:

> "30. The Council has significantly delayed serving an abatement notice in an attempt to find an alternative resolution. During this period, I found myself balancing the rights of Ms Fisher against the rights of the Complainant [Ms Newton], and the occupiers of the other neighbouring properties, who had suffered a continuous statutory nuisance for over twelve months. This was not easy and, given the lack of engagement from Ms Fisher, who did not provide any alternative remedy, or the lack of any short term medical resolution, this matter had reached a point where I had to serve an abatement notice."

136. I consider that the Council did all that it could have been expected to do to accommodate the consequences of the Claimant's disability: *Akerman-Livingstone*, supra, [32]. The Council has discharged the burden of showing there was no less drastic means of solving the problem.

137. Fourth question: Is the adverse impact of the infringement of the Claimant's rights disproportionate to the likely benefit of (here, serving the Notice) ? In other words, has a fair balance has been struck between the rights of the Claimant and the interests of the community ? Or, as Lord Wilson put it in *Akerman-Livingstone*, surpa, [71]: 'Section 15(1)(b) of the 2010 Act requires the claimant to show that the eviction strikes a fair

balance between its need to accomplish its objectives and the disadvantages thereby caused to the defendant as a disabled person.' Of course, in this case the Council is not seeking eviction but has taken a much less draconian step. My answer to this question is a resounding yes. The Notice itself will not have any – or scarcely any - impact on the Claimant and she can take reassurance from the Council's stance that criminal proceedings are most unlikely.

138. On the other hand, the Notice is a necessary first step in solving what has been a long running and serious issue which has caused a lot of distress and upset to a number of people, whose lives have been significantly impacted by the Claimant's behaviour. It is to their credit that many of them, despite everything, have expressed a degree of sympathy and understanding for the Claimant's medical condition. Nonetheless, they are entitled to look for the Council to provide a solution and the Notice is a fair first step in that process.

139. I therefore conclude that the Claimant has not been the victim of unlawful disability discrimination contrary to s 15(1)(a) of the EA 2010. The Council acted in a proportionate way towards her in pursuant of an important and legitimate aim and so has discharged the burden upon it pursuant to s 15(1)(b).

*Ground 2 - Public Sector Equality Duty*

140. For reasons which overlap to an extent with those that I have given under Ground 1 I have concluded that the Council did not fail to comply with their PSED. I accept that they did not *in terms* carry out a PSED assessment by specific reference to s 149 before serving the Notice, but have concluded that in substance they did so. The evidence shows that the Council had well in mind right from the start and at every stage thereafter that they were dealing with a disabled person whose rights as such had to be taken firmly into account in deciding what action to take. In my judgment, they had due regard to their statutory equality duty towards the Claimant as a disabled person so as to fulfil the statutory requirements.

141. I set out the statutory provision relating to the PSED, namely s 149 of the EA 2010, earlier in this judgment. The nature of the duty was recently discussed by the Court of Appeal in *Luton Community Housing Limited v Durdana* [2020] EWCA 445. At [17]-[18] of his judgment Patten LJ said:

> "17. The duty which this section imposes is in many ways aspirational in the sense of providing encouragement to public authorities in the exercise of their functions to achieve the objectives set out in s 149(1) . The Equality Act 2010 is an amalgam of earlier legislation dealing, inter alia, with discrimination on grounds of race, sex or disability. But the PSED embodied in s 149 is derived from s 49A(1) of the Disability Discrimination Act 1995 which was introduced by way of amendment in 2006. Its focus is on the general advancement of equality aims. It is not concerned to prohibit or regulate conduct which is discriminatory or with the imposition of the duty to make adjustments, all of which were existing features of the law in relation to disabled persons

and have been continued in the provisions of Part 2 of the Equality Act . Nor is the duty, at least in terms, one to do anything specific in addition to or independently of the performance of the functions which the authority is carrying out. As Elias LJ observed in *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) at [76], the duty is not a duty to achieve a particular result. The duty is one to have due regard to the need to carry out the s 149(1) objectives as part of the discharge of the various functions of the public authority concerned so as to equalise opportunity and eliminate discrimination. 'Due' means appropriate in all the circumstances: see *R (Baker) v Secretary of State for Communities and Local Government* [2009] PTSR 809 at [31]. There Dyson LJ said:

> "[31] In my judgment, it is important to emphasise that the s 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to achieve these goals. The distinction is vital. Thus the inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have due regard to it. What is due regard ? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing."

18. The scope for action will therefore vary from case to case depending upon the particular statutory or other function which is performed and the restrictions or obligations which may be imposed on the authority by that particular regime. As McCombe LJ said in *Powell v Dacorum Borough Council* [2019] EWCA Civ 23 at [44]:

> "In my judgment, the previous decisions of the courts on the present subject of the application and working of the PSED, as on all subjects, have

> to be taken in their context. The impact of the PSED is universal in application to the functions of public authorities, but its application will differ from case to case, depending upon the function being exercised and the facts of the case. The cases to which we have been referred on this appeal have ranged across a wide field, from a Ministerial decision to close a national fund supporting independent living by disabled persons (*Bracking*) through to individual decisions in housing cases such as the present. One must be careful not to read the judgments (including the judgment in *Bracking*) as though they were statutes. The decision of a Minister on a matter of national policy will engage very different considerations from that of a local authority official considering whether or not to take any particular step in ongoing proceedings seeking to recover possession of a unit of social housing."

142. In *London and Quadrant Housing Trust v Patrick* [2020] HLR 3 Turner J considered a number of authorities on the PSED. At [42] he said he thought it would be useful to list the factors which are likely, at least in many instances, to be the most relevant to be considered in the context of possession cases. He said the list was not intended to be either comprehensive or definitive and that judicial observations ought not to be treated as if enshrined in statute. Of particular relevance to the present case are the following points (internal citations omitted):

    a. The PSED is not a duty to achieve a result but a duty to have due regard to the need to achieve the results identified in s 149. Thus, when considering what is due regard, the public sector landlord must weigh the factors relevant to promoting the objects of the section against any material countervailing factors. In housing cases, such countervailing factors may include, for example, the impact which the disabled person's behaviour, in so far as is material to the decision in question, is having upon others (eg, through drug dealing or other anti-social behaviour). The PSED is 'designed to secure the brighter illumination of a person's disability so that, to the extent that it bears upon his rights under other laws it attracts a full appraisal' ([42(ii)])

    b. The public sector landlord is not required in every case to take active steps to inquire into whether the person subject to its decision is disabled and, if so, is disabled in a way relevant to the decision. Where, however, some feature or features of the information available to the decision maker raises a real possibility that this might be the case then a duty to make further enquiry arises ([42(iii)]).

    c. The PSED must be exercised in substance, with rigour and with an open mind and should not be reduced to no more than a 'tick-box' exercise ([42(iv)].

d. The PSED is a continuing one and is thus not discharged once and for all at any particular stage of the decision making process. Thus the requirement to fulfil the PSED does note lapse even after a possession order (whether on mandatory or discretionary grounds) is granted and before it has been enforced. However, the PSED consequences of enforcing an order ought already to have been adequately considered by the decision maker before the order is sought and, in most cases, in the absence of any material change in circumstances ([42(v)]).

e. An important evidential element in the demonstration of the discharge of the PSED is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements. Although there is no duty to make express written reference to the regard paid to the relevant duty, recording the existence of the duty and the considerations taken into account in discharging it serves to reduce the scope for later argument. Nevertheless, cases may arise in which a conscientious decision maker focussing on the impact of disability may comply with the PSED even where he is unaware of its existence as a separate duty or of the terms of section 149 ([42(vii)].

f. The court must be satisfied that the public sector landlord has carried out a sufficiently rigorous consideration of the PSED but, once thus satisfied, is not entitled to substitute its own views of the relative weight to be afforded to the various competing factors informing its decision. It is not the court's function to review the substantive merits of the result of the relevant balancing act. 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 ([42(viii)]..

143. Applying these principles, I am satisfied the Council complied with its PSED.

144. I begin with the context. The Claimant was causing serious distress and unhappiness to her neighbours, and had been doing for some time by the time the Notice was served. Whilst it was not her fault, in the sense that her vocalisations are involuntary, and the evidence shows that many of her neighbours are aware of this and have, or had, a degree of sympathy for her, it is obvious that over time resentment towards the Claimant would only grow if action were not taken. The possibility that she or her property would have become targets is by no means a fanciful possibility, although fortunately matters did not progress that far. By taking actions as they did, the Council were acting, it seems to me, to reduce or eliminate potential 'discrimination, harassment, victimisation' of the Claimant (s 149(1)(a)) and to 'foster good relations' between her and her neighbours (s 149(1)(c)). The Council was seeking to find a solution that was acceptable to everyone. The Council had due regard to the Claimant's predicament and disability but also weighed that appropriately against the rights and needs of her neighbours as, in accordance with the first of Turner J's principles, it was entitled to do. Giving effect to the PSED did not require the Council to give complete

primacy to the Claimant's wishes and wants at the expense of her neighbours' right to live in peace.

145. It seems to me that the Council explored every viable option before concluding that service of the Notice was necessary as a precursor not to criminal proceedings but to High Court civil injunctive relief. It was faced with the very difficult situation of a disabled person who could not help her disability, but who had the capacity to, and did, decline to cooperate with those who had a statutory duty to deal with the nuisance which that disability was causing. I consider that it got the balance of its duties entirely right.

146. I do not accept the Claimant's submission that the Council treated this 'just like any other 'noise nuisance' case' (Skeleton Argument, [65]). On the contrary, the Council acted in a very careful, step by step fashion, right from when it first became aware of the Claimant and the problems she was causing. It realised from the outset that the Claimant had mental health issues and it acted sensitively and intelligently. This is borne out by the Chronology I set out earlier, and by the evidence of Ms Gallimore and Ms Frost. I have set out much of the detail already, but briefly to recap, the Council involved other agencies as well as various of its own services; it sought to meet and discuss a way forward with the Claimant; it sought medical evidence and engaged with her treating medical staff. The officers involved had many discussions and took legal advice where necessary. It did not rush into enforcement action, but in my judgment the very opposite was the case. As I have said, I accept Ms Gallimore's evidence that the Notice was only served as a last resort when all else had failed and the Council had received Dr Anderson's prognosis that a medical solution was not going to be possible in the short term. The Council took steps to meet the Claimant's need for an appropriate place to live as a disabled person (s 149(3)(b)) by taking steps which took account of her disability (s 149(4)).

147. Nor do I accept Mr Bates' criticism of the relevant Council policies as paying insufficient regard to the PSED or disability issues. The Council's Equality Policy (put in evidence by Ms Gallimore) makes references to EA 2010 duties and [6.6] of its Standard Operating Procedure I Noise Complaint Investigation makes references to mental illness or disability. I accept Ms Gallimore's evidence that she and all Council staff have (as I would have expected) received diversity and equality training and that they had regard to the appropriate policies.

148. Nor do I accept there was a failure to record adequately the steps taken to fulfil the PSED. Whilst there is no specific one document (as is often seen) recording a specific PSED assessment, there is in evidence a welter of contemporaneous material showing what the Council did and why it did it, and when. There are witness statements producing a large amount of correspondence and other documentation which provides a very clear picture of the stages which the Council went through before the decision was taken on 30 November 2018 to serve the Notice. There is a lot of detail about the noise recordings the Council made. In addition, there are extensive notes of meetings between the Claimant and various Council officers demonstrating the level of their engagement with her and what was discussed and proposed, and the attitude that the Claimant displayed. There is extensive correspondence between the Claimant and the Council, and between the Council and the Claimant's treating doctors, covering a wide range of subjects. There is no ambiguity about the evidential picture which causes me

to doubt that the relevant officers had their statutory duties in mind at all times and had due regard to relevant matters.

149. Overall, I am satisfied that the Council gave full appraisal to the Claimant's disability before taking the action it did under the EPA 1990. This ground of challenge therefore fails.

*Ground 3 – breach of Article 14*

150. The Claimant complains of a breach of Article 14 read with Article 8 and Article 1 of Protocol 1 to the Convention.

151. I can take this issue shortly because it plainly fails for similar reasons that Ground ! failed.

152. I analysed the relevant jurisprudence on Article 14 in *R (Harvey) v London Borough of Haringey* [2019] ICR 1059, [94] et seq. In *R (JS) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] 1 WLR 1449, [8], Lord Reed JSC took a four-stage approach, and said that the following must be shown to establish a breach of Article 14. There must be (a) a difference in treatment; (b) of persons in a relevantly similar position; (c) which does not pursue a legitimate aim; or (d) there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. He derived this approach from what the Grand Chamber of the European Court of Human Rights said on the application of article 14 in *Carson v United Kingdom* (2010) 51 EHRR 13, para 61.

153. I am prepared to assume the first two questions should be answered in the Claimant's favour. However, for the reasons I gave in relation to Ground 1 the Council's actions were proportionate and in pursuit of a legitimate aim. There is, accordingly, no violation of the Convention.

154. I therefore need not consider Mr Holland's argument based on s 6(2) of the Human Rights Act 1998

155. This ground of challenge fails.

*Ground 4 – absurdity*

156. There is nothing in this ground either. The service of the Notice was not absurd or irrational. As I have explained, and as Ms Gallimore also explained, although the Council knew that the Claimant would not be able to comply with the Notice, there were other valid reasons for serving it, not least of which the Council concluded that it was a necessary statutory precondition to taking High Court action which it has concluded is the only likely solution to a hitherto intractable problem.

## Conclusion

157. This claim for judicial review therefore fails. Nothing in this judgment should be taken as affecting any other issue which the Claimant may wish to raise in her statutory appeal against the Notice.