



Neutral Citation Number: [2011] EWCA Civ 1586

Case No: C1/2011/2655

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE OUSELEY
[2011] EWHC 2572 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2011

Before :

LORD JUSTICE PILL
LORD JUSTICE RICHARDS
and
LORD JUSTICE DAVIS

Between :

R (on the application of Margaret Bailey & Others)

- and -

London Borough of Brent Council

- and -

All Souls College

- and -

Equality and Human Rights Commission

Appellants

Respondent

**Interested
Party**

Intervener

Miss D Rose QC and Mr G Facenna (instructed by **Bindmans LLP**) for the **Appellants**
Miss E Laing QC and Miss Deok-Joo Rhee (instructed by **London Borough of Brent**) for
the **Respondent**
Miss K Monaghan QC for the **Intervener** (written submissions only)

Hearing dates : 10 and 11 November 2011

Approved Judgment

LORD JUSTICE PILL :

1. This is an appeal by Mrs Margaret Bailey and others (“the appellants”), residents of Brent, against a decision of Ouseley J dated 13 October 2011 by which the judge refused an application by the appellants to quash a decision of Brent London Borough Council (“the council”) on 11 April 2011. It was decided to close six of the twelve public libraries in the Borough, including two in premises given to the council for use as libraries by All Souls College (“the interested party”). The decision was confirmed by the council’s Overview and Scrutiny Committee on 27 April 2011, subject to the libraries remaining open throughout the 2011 public examination period for young people.
2. Interim relief has subsequently been granted by consent to the extent of requiring the council, pending the determination of this appeal, not to take any steps to dispose of the buildings closed as libraries or to take any steps to dispose of the stock in them. The libraries are located at Barham Park, Cricklewood, Kensal Rise, Neasden, Preston and Tokyngton.
3. The sequence of events was summarised by the judge at paragraph 2 of his judgment:

“In anticipation of budgetary cuts and building on earlier work, officers had presented a report to the executive on 15 November 2010 recommending public consultation on changes proposed to the public library service in the Borough; these included the closure of the six libraries. There was opposition to that report from various deputations. The report was approved. An extensive process of public consultation followed over a three month period. An Equality Impact Assessment or EIA was prepared under the Equality Act 2010, taking into account the results of the public consultation. The budgetary cuts came much as feared. A careful report, with the EIA, was presented to the executive for its meeting on 11 April 2011, leading to the decision now challenged.”

The population of Brent is about 290,000 and it is the second most ethnically diverse local authority area in the country.

4. Numerous points were taken before the judge. The points now taken were succinctly summarised by Miss Rose QC, for the appellants:
 - (1) Breach of section 149 of the Equality Act 2010 (“the 2010 Act”) in failing to have due regard to the risk of indirect discrimination against Asian residents of the Borough.
 - (2) A further breach of section 149 in failing to have any regard for the requirements of the section until too late a stage in the decision-making process. The six libraries had been named for closure in November 2010, before the EIA.
 - (3) A breach of section 7 of the Public Libraries & Museums Act 1964 (“the 1964 Act”) with its duty “to provide a comprehensive and efficient library service for

all persons desiring to make use thereof” in failing to conduct an adequate investigation of needs.

- (4) Procedural unfairness in having invited community groups to submit business plans for running libraries proposed to be closed but failing to tell them the criteria by which the plans would be assessed.

The November 2010 Report

5. The background to the proposals of 15 November 2010 is set out in the Report (“the November Report”) of Ms Harper, the council’s Director of Environmental and Neighbourhood Services. The November Report was entitled ‘Libraries Transformation Project’ (“LTP”). It provided at paragraph 1.1:

“1.1 The Libraries Transformation Project is a One Council project to improve the quality of library provision in Brent, while contributing to the Council’s need to meet efficiency targets in response to reductions in funding. The number of library buildings in the borough will be reduced, enabling resources to be concentrated on the best located libraries. An enhanced core library offer for residents will be established that provides value for money and reflects the needs of all customers. Online and digital services will be expanded to widen access and comparable services will be provided to those who are unable to visit a library. Libraries will be co-located with council services and local agencies to provide community hubs with cultural activity. In order to do this the project will deliver:

- Modern, multi functional, library buildings
- A realignment of resources to achieve both improvements and efficiencies
- A clear definition of what residents can expect from their library service, wherever they live, based on an assessment of user needs
- A review of digital provision and online services in libraries
- Staff training to equip a multi skilled workforce
- Savings to the Council in the region of £1 million.”

6. The November Report referred to a Library Strategy which the council had adopted in January 2008 for the period 2008/12. After 2008, new factors had arisen including a plan for £90m savings across the council’s functions. The proposed new strategy, on which the public were to be consulted included, as its first and second proposals:

“Rationalisation of resources by closing six library buildings that are poorly located and have low usage: Barham Park, Cricklewood, Neasden, Tokyngton, Kensal Rise and Preston.

A commitment to ensuring that residents have high quality library facilities in accessible locations.”

Following the consultation Ms Harper submitted a further Report to the council in April 2011 (“the April Report”).

The statutes

7. Section 149 of the 2010 Act provides, in so far as is material:

“(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 this Act;
- (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.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(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 -

- (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;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

...

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are -

age;
disability;
gender reassignment;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

...”

8. Reliance is primarily placed on section 149(1)(a), that is, due regard for the need to eliminate discrimination, race being one of the characteristics concerned. The word “discrimination” in the paragraph leads to section 19 of the Act where indirect discrimination is introduced and defined:

“Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are-

age;
disability;
gender reassignment;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

...”

This case is concerned with indirect discrimination in the provision of services, and in that context, by virtue of sections 28 and 29, ‘age’ is not a relevant protected characteristic, as far as it relates to persons who are under the age of 18.

9. I have no doubt that the decision of the council, with its consequences, came within the meaning of “provision, criterion or practice” in section 19 of the 2010 Act. The expression, which comes from Council Directive 97/80/EC, was considered by Lord Walker of Gestingthorpe in *Secretary of State for Trade & Industry v Rutherford (No.2)* [2006] ICR 785, a sex discrimination case. At paragraph 47, Lord Walker stated that “the definition has a broad scope.” He added that a “measure” comes within it, whether “formal and general or informal and particular, ranging from national legislation applicable to all employment in a member state to an administrative change in a single employer’s shift system.”
10. It is important to keep in mind that the opportunity for a defendant, for example under section 1(1)(b)(ii) of the Race Relations Act 1976, to justify a measure, irrespective of race, has not been taken in this case. The council claims that a situation in which it was required to do so, had not arisen, because discrimination had not been established.
11. Section 7 of the 1964 Act provides:

“(1) It shall be the duty of every library authority to provide a comprehensive and efficient library service for all persons desiring to make use thereof,

Provided that although a library authority shall have power to make facilities for the borrowing of books and other materials available to any persons it shall not by virtue of this subsection be under a duty to make such facilities available to persons other than those whose residence or place of work is within the library area of the authority or who are undergoing full-time education within that area.

(2) In fulfilling its duty under the preceding subsection, a library authority shall in particular have regard to the desirability—

(a) of securing, by the keeping of adequate stocks, by arrangements with other library authorities, and by any other appropriate means, that facilities are available for the borrowing of, or reference to, books and other printed matter, and pictures, gramophone records, films and other materials, sufficient in number, range and quality to meet the general requirements and any special requirements both of adults and children; and

(b) of encouraging both adults and children to make full use of the library service, and of providing advice as to its use and of making available such bibliographical and other information as may be required by persons using it; and

(c) of securing, in relation to any matter concerning the functions both of the library authority as such and any other authority whose functions are exercisable within the library area, that there is full co-operation between the persons engaged in carrying out those functions.”

It was common ground that in order to fulfil the duty under section 7 the council had to make a reasonable assessment of the needs which the library service should meet.

The April 2011 Report

12. Before the consultation period ended, the council had had to set its budget. For the year 2011/2012, spending was reduced by £42m and was estimated to reduce by a further £24.6m for the following year. It was considered that the library proposals would achieve a net saving of £800,000 in a full year, after allowing for additional costs of nearly £200,000 for improvements to the service. The council was obliged to set a balanced budget. Under the heading “Statutory duties” it was stated:

- “*Statutory duties:* the Council has a legal responsibility to provide a comprehensive and efficient library service to facilitate the borrowing of books. It has several other relevant legal responsibilities, including that of setting a balanced budget, and to assess the impact of its service proposals on communities who may be disproportionately disadvantaged.”

13. In the April Report, duties under the 1964 Act were considered:

“In considering whether the service delivered by the Library Transformation Project is comprehensive, officers have had regard to a wide range of information about the borough’s population, the active borrowers, people who are not library users, participants in consultation, the result of research and needs assessment, opportunities offered by a range of different forms of distribution and access, the differing needs of people with a range of characteristics, and other related factors, all of

which are addressed in different parts of the main report and appendices.

In considering whether the service is efficient officers have had regard to detailed information and analyses of the costs of the existing service, the resources available to the Council for delivering library services, the balance between costs of different parts of the service, particularly the proportion available for spend on stock, alternative means of distribution and access and opportunities (some already well established) for savings through joint procurement and alternative provision.”

14. Duties under the Equality Act 2010 were also considered:

“6.13 The council’s duty under Section 149 of the Act is to have ‘due regard’ to the matters set out in relation to equalities when considering and making decisions on the provision of library services. Accordingly due regard to the need to eliminate discrimination, advance equality, and foster good relations must form an integral part of the decision making process. Members must consider the effect that implementing a particular policy will have in relation to equality before making a decision.

6.14 There is no prescribed manner in which the equality duty must be exercised. However, the council must have an adequate evidence base for its decision making. This can be achieved by means including engagement with the public and interest groups, and by gathering details and statistics on who uses the library service and how the service is used. The potential equality impact of the proposed changes to the library service has been assessed, and that assessment is found at Appendix Four and a summary of the position is set out in paragraph 9 of this report. A careful consideration of this assessment is one of the key ways in which members can show “due regard” to the relevant matters.

6.15 Although the information on equalities issues relating to libraries was gathered before the new duty came into force, officers anticipated the change in the legislation and accordingly the information is sufficient to enable compliance with the new duty.

6.16 Where it is apparent from the analysis of the information that the policy would have an adverse effect on equality then adjustments should be made to avoid that effect (mitigation). The steps proposed to be taken are set out in paragraph 9 of the report and in more detail at Appendix Four.

6.17 Members should be aware that the duty is not to achieve the objectives or take the steps set out in s.149. Rather, the duty on public authorities is to bring these important objectives relating to discrimination into consideration when carrying out its public functions (which includes the functions relating to libraries). ‘Due regard’ means the regard that is appropriate in all the particular circumstances in which the authority is carrying out its functions. There must be a proper regard for the goals set out in s.149. At the same time, Members must also pay regard to any countervailing factors, which it is proper and reasonable for them to consider. Budgetary pressures, economics and practical factors will often be important, which are brought together in Appendix One. The weight of these countervailing factors in the decision making process is a matter for members in the first instance.”

15. Both the November Report and the April Report were very detailed and wide ranging. In summarising them, I have had regard to the issues now present. In the April Report, it was recognised, at paragraph 54 of Ouseley J’s judgment:

- “a comprehensive service cannot mean that every resident lives close to a library. This has never been the case. ‘Comprehensive’ has therefore been taken to mean delivering a service that is accessible by all residents using reasonable means, including digital technologies
- an efficient service must make the best use of the assets available in order to meet its core objectives and vision, recognising the constraints on Council resources
- decisions about the Service must be embedded within a clear strategic framework which draws upon evidence about needs and aspirations across the diverse communities of the Borough.”

16. When considering closures, it was stated at paragraph 57 of the judgment:

“A reasonable geographical spread across the borough was also important. High street locations and proximity to public transport were preferable to ensure maximum footfall.

7.5 Libraries such as Cricklewood, Kensal Rise, Barham Park and Tokyngton are limited by their position and their proximity to better located buildings such as Willesden Green, Kilburn, Ealing Road and Harlesden.

7.6 Issues of deprivation and community access were also considered, particularly in relation to the three libraries at Preston, Neasden and Kilburn. Key issues relate to the access to libraries for younger people (under 19) older people (over 60) and people with disabilities.

Population centres for these communities have been mapped, and are shown at the annexes to Appendix Four (the Equalities Impact Assessment.) Looking at these maps, it is clear that populations of all three of these groups are disproportionately centred around Kilburn, and therefore this library building was prioritised for the future Library service. (It is much easier to understand this issue by reference to the maps than by purely numerical presentation.)

7.7 Long term viability of buildings has also been considered and the fact that long term repairs of some of the underused libraries [are required]. Refurbishment of libraries over the past three years has been achieved through both external funding (such as Big Lottery), prudential borrowing and partnerships with other council services. The current financial climate means that many of these sources are now unavailable.”

17. An EIA was incorporated into the April Report. It was reported:

“The EIA shows that there is a restricted number of library users, particularly in the Cricklewood area (where the PTAL rankings are the poorest), who will experience the worst impact in relation to access to libraries either because they cannot use public transport, cannot walk to nearby public transport or alternative libraries, or cannot afford transport. Across all equality strands where a potential adverse effect due to issues of access and affordability has been identified, a range of mitigation measures have been established including outreach services, online and digital services, home delivery and home visits, books by mail and monthly outreach deposit collection to specific centres. These mitigations, which are considered sufficient to address much of the impact, will be particularly tailored to those areas and communities most affected.

...

The current economic situation and its impact on local government necessitate a review of all services at local, regional and national level. Brent’s library service is looking to transform service delivery. The aim of this project is to both secure efficiencies and to deliver a better focused, more transparent and better supported Library service, offering better facilities and services in 6 locations.”

18. At paragraph 25 of his judgment, Ouseley J summarised the closures:

“Of the six libraries proposed for closure, five had the lowest number of annual visits, and the greatest costs per visit. The

sixth, Neasden was a little cheaper per visit and had a few more visitors than Kilburn, which was not suggested for closure and to which particular community considerations applied.”

19. After a fuller description of the Reports than I have provided, Ouseley J stated, at paragraph 65:

“It is, in my view, on the face of it at least, a careful and full analysis of the issues, and provides a deal of data on needs and how they could be affected. The key issues are the obvious ones which library closures could give rise to.”

The judge added, at paragraph 68:

“Before the executive reached its decision on 11 April 2011, it heard representations from a number of residents wishing to keep one or more of the six libraries open. Ward councillors were also able to address the executive. After debate, the proposals were accepted.”

Submissions on grounds 1 and 2

20. In opening her submissions, Miss Rose accepted that in these times of economic difficulties, economies have to be made and decisions are primarily for democratically elected local authorities. However, these are subject to statutory duties imposed. Before this court, Miss Rose (who did not appear before the judge) has placed emphasis on the decision to close libraries at all rather than to economise elsewhere, such as at leisure centres, an argument which hardly featured before the judge. Miss Rose submitted that the statutory duties cannot be avoided and, however the case has been put in the past, it is the court’s duty to consider whether the council has complied with them.
21. The central submission of Miss Rose is that the council was in breach of its section 149 duty in failing to have due regard to an obvious risk. The adverse effect of the proposal upon Asian residents of the Borough should have been apparent. The council failed to understand the implications of its own statistics.
22. By virtue of section 19 of the 2010 Act, an apparently neutral provision or practice may involve a breach of the Act, submitted Miss Rose, if it puts a racial group, in this case Asians, at a particular disadvantage. The classic example of indirect discrimination, Miss Rose submitted, is part-time working which puts women at a disadvantage but it applies to the provision of library services of which the council is admittedly a service-provider under section 29 of the 2010 Act. There was discrimination in providing the service, it was submitted, because Asians were subjected to a detriment.
23. Section 149 imposes a duty upon councils exercising their functions to have due regard to each of the protected characteristics stipulated in section 19(3), save that age is partly excluded by the operation of sections 28 and 29. There is nothing revolutionary in that, submitted Miss Rose; it is a statutory requirement. Miss Rose submitted that the respondents erred in law in failing to analyse the risk of indirect

discrimination resulting from the library closures, or the impact of the closures on the Asian community.

24. The basic statistic relied on by Miss Rose to establish indirect racial discrimination appears at paragraph 5.2.2 in the April Report, prepared for the meeting of the council's executive on 11 April 2011. The figures are accepted by the council to be a fair representation of usage. Whereas 28% of the population of the Borough is Asian, 46% of the active borrowers from libraries are Asian. The corresponding figures for whites are 45% population, 29% active borrowers, and for blacks 20% population, 19% active borrowers.
25. It was submitted that the council had failed to appreciate the significance of the above figures in the context of indirect discrimination. Closure of libraries had a discriminatory effect upon the Asian community. The council had failed to conduct an analysis under section 149 believing that there was no indirect discrimination. On that point, Miss Rose relied on the summary by the judge, at paragraph 138 of his judgment, of the council's submissions:

“The Council accepted that the April 2011 report did not analyse indirect discrimination, but Miss Laing [Miss Laing QC, for the council in this court and below] submitted that it did not have to do so and that this involved no unlawfulness unless, after a proportionate investigation of the issue, a reasonable public body would have concluded that the LTP created an obvious risk of unlawful conduct. There was nothing on the facts of this case to warrant such a conclusion.”
26. Miss Rose developed her submission by reference to figures in the Report: Asians made up the largest single ethnic group of active users of four of the six libraries to be closed and the largest ethnic group of active users of all six of the libraries to be closed. It was submitted, first, that the decision to close libraries at all had a discriminatory effect indirectly and, secondly, that the selection of the particular libraries to be closed carried with it a risk of indirect discrimination, which required consideration and analysis.
27. Further, and in more detail, the nearest library to Barham Park, to be closed, was Ealing Road, the second busiest library in the Borough. That is located in a predominantly Asian area and is used mainly by Asians. There followed a potential for significant overcrowding at Ealing Road, a library used mainly by Asians.
28. Miss Rose produced maps, based on data in the 2001 census, and therefore available to the council. In what she described as graphic advocacy, Miss Rose sought to demonstrate the adverse effect on the selection of the libraries to be closed upon the Asian population. Tables of figures prepared for the purposes of this hearing showed that three of the six closures were in areas where the Asian population was above the Borough average and only two where it was below the Borough average, whereas the Asian population was only above the Borough average in the areas of two of the six libraries remaining open.
29. How much of a disproportionately adverse impact has to be established is a matter of fact and degree, it was submitted. It was not enough to collect and collate statistics,

the issue of indirect discrimination must be addressed. The Report had failed to appreciate the implications of the distribution, by race, of the population of the Borough.

30. At paragraph 136, the judge referred to the submission on indirect discrimination:

“Ms Mountfield [Ms Mountfield QC appeared for the appellants before the judge] developed orally an argument in relation to indirect discrimination which went somewhat beyond what had been foreshadowed. This led to written submissions at my request from Ms Laing and then in reply from Ms Mountfield in the course of which this subsidiary argument took on a life of its own. She did not initially say that the Council’s decision involved indirect discrimination, but rather that defects in its analysis of data meant that obvious potential indirect discrimination had not been analysed and without that it could not have given due regard to the s149 duty. This failure prevented the Council saying that its EIA had been done with rigour and with due regard to the needs in s149.”

The judge set out the arguments then advanced and dealt with them in some detail.

31. Miss Rose referred to the EIA as described in the first statement of Ms Harper. It was submitted that Miss Harper took too narrow a view of the adverse impact of closures when stating that the impact was “only for those who cannot travel or migrate to the remaining libraries, e.g. certain disabled people who have mobility issues, the elderly who have mobility issues and the very young.” That approach, it was submitted, failed to have regard to relevant factors, such as the choice of a preferred library, the additional length and expense of travel, the less frequent library use likely to follow a closure of some libraries and the additional crowding in libraries left open. Reference was made to evidence from users and to the existing overcrowding at Ealing Road.
32. The council should have appreciated the impact of the closures on the more Asian parts of the Borough, it was submitted. At paragraph 98 of the statement, Ms Harper stated that “a factor that led to the proposal to retain Kilburn library was that populations of the disabled, the elderly and the young were disproportionately centred around that library, rather than Neasden and Preston”. A similar exercise should have been done by way of race, it was submitted. In Annex 4.4 to the Report, indices were provided by way of age (over 60 and under 19), by way of deprivation and by way of disability but not by way of race as between Asian and other ethnic groups.
33. Miss Rose referred to the corporate guidelines introduced by the council for the purposes of EIAs. They provided that the proposed decision maker should decide “whether the proposed policy is relevant to equality and diversity, and how relevant it is likely to be.” A checklist is provided. Further checklists are provided for each stage of the decision-making process.
34. The disparity between the percentage of the population of the Borough which was Asian (28%) and the percentage of library users who were Asian (46%) is striking and should, it was submitted, obviously have been taken into consideration in decisions

about library provision and, if there were to be closures, decisions as to where they should occur. Those figures appeared in the Report (5.2.2) as did a fuller table showing percentage of users, by race, at each of the libraries. In that table, the Asian category is broken down into Asian Indian, Asian Pakistani, Asian Bangladeshi and Asian other. Chart 2, which follows those figures, shows, by race as sub-divided, the number of active borrowers at the six affected libraries. This shows Asian Indians as the largest single category by some margin.

35. Having stated that the appellants' argument about indirect discrimination "went somewhat beyond what had been foreshadowed" the judge requested written submissions "in the course of which this subsidiary argument took on a life of its own." It was claimed to be obvious that the council "could cause a particular closure to bear disproportionately on a particular ethnic or religious group in its vicinity." Three examples were given by the appellants in an attempt to demonstrate the point to the judge.
36. Further statistics were produced of users of libraries. The judge referred to and accepted the council's analysis. The judge noted, at paragraph 147:

"In any event, since Asians are the largest ethnic group among the users of Brent libraries, it would be expected that they would be the most numerically disadvantaged. But the Asian users of the libraries were not proportionately more disadvantaged or indeed advantaged than non-Asians. 76% of Asian users and 76% of non-Asian users use the libraries that remain and 24% of Asian users and 24% of non-Asian users use the libraries that will close. Moreover, once accurate figures were used, and the effect removed of using rounded figures for the purpose of further calculations which magnified the effect of the roundings, the Claimants' analysis showed that the percentage of users of all Brent libraries who were Asian and the percentage of users of the six to be closed who were Asian differed by 0.04."

The council also refers to evidence that the percentage of Asian library users of the six libraries proposed for closure (49%) is very close to the percentage of active borrowers across the Borough who are Asian (46%).

37. Miss Laing QC, for the council, underlined that the council's duty was to "have due regard" to the need to eliminate racial discrimination. There is a list of eight "relevant protected characteristics" in section 19 and in section 149(7). While some of them were binary, for example sex, some had what Miss Laing described as multiple strands. Race and religion have many variations. In this case, the category "Asians" has been selected by the appellants; it could, on the statistics, have been sub-divided into Hindus and Muslims or in other ways. By combining one characteristic with another, or others, for the purposes of study, an almost infinite number of possibilities arise for possible study.
38. Miss Laing's submission was that in deciding what amounts to "due regard" a council has to be selective in its analysis. Some characteristics may be predictable as likely to give rise to discrimination in one situation, and others in another. Only characteristics

or combinations of characteristics on which, in a particular situation, discrimination can be predicted as likely to arise, need be taken into consideration.

39. The duty of the council to have “due regard” must be kept within reasonable bounds, it was submitted. It did not require that every potential ramification needed to be investigated. Minute forensic examination of all material which could potentially arise out of section 149(7) was not required.
40. The council should conduct an exercise which was reasonable and proportionate to the circumstances. The principal effects on equality were considered by the council, it was submitted, and the subsequent allegation of race discrimination, now at the heart of this litigation, was not clearly engaged at the time. The council considered the question of accessibility, and its relevance to disabled people. On the information reasonably obtained, there was no obvious risk of indirect discrimination which required the council, or its officers, to analyse during the decision-making process, possible ways in which it could be said to arise.
41. Moreover, when further analysis was undertaken and, if one takes library users as the appropriate pool for analysis, the relevant figures are those accepted by the judge at paragraph 147 of his judgment. The percentage of users of all Brent libraries who were Asian and the percentage of users of the six to be closed was almost identical. There was no indirect discrimination involving Asians.
42. It was further submitted that what has now been described as the anterior issue, whether any reduction at all in library provision should have been made, was barely advanced before the judge. In any event, bearing in mind the major savings which were required to be achieved by the council, it was necessary and inevitable that a share of the burden be borne in the budget for library provision.

Indirect Discrimination

43. For definition of the scope of indirect discrimination, Miss Rose relied on the decision of the European Court of Justice in *O’Flynn v Adjudication Officer* [1998] ICR 608, on which it appears that UK legislation has been based. It was held that migrant workers were entitled to enjoy funeral payments under the same conditions as national workers. The migrant worker may “on the death of a member of the family, have to arrange for burial in another member state, in view of the links which the members of such a family generally maintain with their state of origin.” The condition imposed on payment of the benefit that burial or cremation takes place within the United Kingdom was intrinsically liable to affect migrant workers more than national workers, to the disadvantage of the former. It constituted indirect discrimination, unless objectively justified. The court stated, at paragraph 20:

“A provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.”

Miss Rose submitted, and I agree, that to establish indirect discrimination it is not necessary to show that all Asians suffer a disadvantage.

44. In *Secretary of State for Work and Pensions v Bobezes* [2005] EWCA Civ 111, Lord Slynn with whom Pill LJ and Buxton LJ agreed, confirmed that:

“. . . the Commissioners and the court are entitled to take a broad approach and to find that indirect discrimination is liable to affect a significant number of migrant workers on the ground of nationality without statistical proof being available.”

“It was enough in cases of discrimination based on nationality that the effect of the provision is ‘essentially’ ‘intrinsically’ ‘susceptible by its very nature’ ‘by its own nature’ liable to be discriminatory.”

Indirect discrimination may be established without sociological or psychological evidence as to why Asians like using libraries, it was submitted. The word “intrinsic” was used in *O’Flynn* because the link between migrant workers and burying members of the family in other countries was intrinsic, that is by its own nature, and did not need statistical evidence to establish it.

45. Miss Laing, adopting the expression “intrinsically liable” in *O’Flynn*, submitted that there was no intrinsic or inherent link between being Asian and library use. The appellants needed to establish such a link before indirect discrimination can arise. It was Miss Rose, in her opening submissions, who had submitted that the council should have conducted a study as to why Asians made considerable use of library facilities and whether, for example, it was because of overcrowding in Asian homes.
46. In the present case, the statistics did not establish racial discrimination, Miss Laing submitted, and there was, in any event, no intrinsic relationship, to adopt the expression in *O’Flynn*, between race, the protected characteristic, and library use.
47. Miss Rose submitted that to establish indirect discrimination, it was not necessary to establish a link between race and a wish to read books or make other use of libraries. That would be to misread the statute, *O’Flynn* and subsequent cases. The concept of indirect discrimination had broadened since its inception. Statistical evidence is not necessary but when available, as in *Gibson & Ors v Sheffield City Council* [2010] ICR 708, can provide a compelling case. In *Gibson* there were “clear and compelling statistics” establishing a “sexual taint” and, subject to justification, the case was established (Pill LJ at paragraphs 12, 51 and 52). Smith LJ, at paragraph 54, and Maurice Kay LJ, at paragraph 75, agreed with that conclusion.
48. In her comments at paragraph 63 of *Gibson*, Smith LJ was canvassing the possibility, considered in *Armstrong v Newcastle Upon Tyne NHS Hospital Trust* [2006] IRLR 124, that there may be circumstances in which an employer can demonstrate that what might appear, for example from statistics, to be a disadvantage to women arises from factors wholly unrelated to gender. Smith LJ contemplated that an employer had “the opportunity to demonstrate that what might appear to be a disadvantage to women arises from factors wholly unrelated to gender.” That is a different point, Miss Rose submitted, from Miss Laing’s submission that the word “intrinsic” requires a link to be established between race and an interest in reading books. Smith LJ’s point has no application in the present context, it not being suggested that differential use of libraries by Asians was due to anything other than the racial characteristic.

49. In *O'Flynn*, statistics were not relied on. Discrimination was held to have arisen because migrant workers were more likely to have to arrange for burial of family members in their state of origin. The provision of national law thereby was intrinsically liable to affect migrant workers more than national workers. It does not, in my judgment, follow that an intrinsic link between being Asian and using libraries is necessary to establish indirect discrimination. It is capable of being established on evidence that the impact on Asians of a particular policy puts them at a particular disadvantage when compared with persons of other races.
50. I agree with Miss Rose's proposition that, to establish indirect discrimination in the present context, subject to justification, which does not arise, it is sufficient to show an adverse impact of the proposal on the Asian community as compared with non-Asian communities. I also agree with her submission that Smith LJ's concern at paragraph 63 of *Gibson* is not material for present purposes. These findings are, however, only one aspect of conclusion as to whether there has been a breach of duty in this case.

The Pool

51. In their belated submissions to the judge, the appellants appear to have adopted users of libraries as the appropriate pool for analysis but it is now submitted that the appropriate pool is the entire population of the Borough so that the 46%/28% split, recited at paragraph 24 above, is claimed to be the relevant one. Miss Rose submitted that the claimants before the judge had not irretrievably committed themselves to a users' pool but, in any event, it is the duty of this court to consider the material now before it and to decide whether there has been a breach of section 149.
52. In *Secretary of State for Trade & Industries v Rutherford (No.2)* [2006] ICR 785, an issue arose as to the pool of employees to be chosen in considering the disparate impact of a proposal and whether the entire workforce should be chosen. The applicants were male employees dismissed when they were over 65. It was held that the provisions applied to the same proportion of women in that group as men and there was no indirect sex discrimination. Baroness Hale of Richmond, with whom Lord Scott of Foscote and Lord Rodger of Earlsferry agreed, stated, at paragraph 77:

“But in my view one should not be bringing into the comparison people who have no interest in the advantage in question.”

53. Baroness Hale added, at paragraph 82:

“The common feature is that all these people are in the pool who want the benefit - or not to suffer the disadvantage - and they are differentially affected by a criterion applicable to that benefit or disadvantage. Indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage or disadvantage in question. If it were, one might well wish to ask whether the fact that they were not interested was itself the product of direct or indirect discrimination in the past.”

That approach justifies the adoption of library users as the appropriate pool for analysis in this case, Miss Laing submitted.

54. In *Grundy v British Airways PLC* [2007] EWCA Civ 1020, a sex discrimination case under the Equal Pay Act 1970, the court considered the application of *Rutherford*. Sedley LJ, with whom Waller LJ and Carnwath LJ agreed, stated, at paragraph 31:

“*Rutherford (No 2)* seems to me to be a striking illustration of Lord Nicholls' proposition that the assessment of disparate impact is a question of fact, limited like all questions of fact by the dictates of logic. In discrimination claims the key determinant of both elements is the issue which the claimant has elected to pose and which the tribunal is therefore required to evaluate by finding a pool in which the specificity of the allegation can be realistically tested. Provided it tests the allegation in a suitable pool, the tribunal cannot be said to have erred in law even if a different pool, with a different outcome, could equally legitimately have been chosen. We do not accept that *Rutherford* is authority for the routine selection of the widest possible pool; nor therefore that any question arises of "looking at" a smaller pool for some unspecified purpose short of determining the case.”

A discretion in pool selection is thereby recognised as are the problems facing a decision maker, including one under the 2010 Act, in deciding upon the scope of his investigation in a context where “due regard” is required.

Ground 2

55. It was submitted that the duty under section 149 of the 2010 Act applied throughout the decision-making process and that the council was in breach of the duty in failing to have regard to the requirements of the section until too late a stage.
56. Miss Rose submitted that the duty to have due regard requires due regard to be had at the formative stage. Reliance is placed on the judgment of Moses LJ sitting in the Administrative Court in *R (on the Application of Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 Admin. Racial discrimination was alleged. Moses LJ stated, at paragraph 27:

“The essential procedural failures . . . turned on the failure of Ealing to carry out the necessary racial equality impact assessment at a stage when it was formulating the criteria according to which it would offer grants to those providing services to victims of domestic violence. Throughout the process leading to its decision it failed to assess the impact on black minority ethnic women . . .”

It was submitted that there was a failure to consider the present issue “throughout” the procedure because a proposal that six specified libraries should be closed had been tabled before an EIA was conducted.

57. In written submissions on behalf of the Equality and Human Rights Commission, Miss Monaghan QC underlined that compliance with the public sector equality duty applies at each stage of a decision-making process. It cannot be put to one side pending an ultimate decision as to the adoption of a policy. It must be addressed at the formative stage of any policy proposal. If policy has been closely formulated without the duty being addressed, there is a real risk that any consideration will be too late to secure effective compliance. The opportunity to consider alternative proposals, which might mitigate the impact of the proposal, might have been lost.
58. The judge dealt with the issue at paragraphs 120 and following. At paragraph 122 the judge stated:

“The formative stage at which the duty must be performed, in the sense meant by the guidance and decisions, is not one or all of the earlier stages when the officers or Council are contemplating and working up various options. It must be performed before the decision is made and be part of the decision-making process, rather than as a justification for the decision after it has been taken. The issue has to be addressed in the exercise of the functions, using the statutory language rather than judicial exegesis. The point at which the Council here exercised its functions under s.7 was when it decided, at the April 2011 meeting, that the LTP should proceed, including the six closures”

The judge said at paragraph 123 that the issue was very much bound up with the contention that the council approached the issue of equality and closures in April 2011 with a closed mind; and, having referred to the absence of evidence to support that contention, he continued:

... Nor is there anything in the EIA itself to support it since, whatever criticisms the Claimants may make of it, it is on its face a conscientious and thorough effort to grapple with the duty in s149, in substance and with rigour. It set out to ask and answer the relevant questions which library closures give rise to in relation to the equality duty. The EIA was genuinely in my judgment a core part of the decision-making process. It cannot fairly be said that the decision to adopt the LTP and to close six libraries, and which ones, had already been taken; there really was no factual basis for that submission, which ran as a leitmotif through many of Ms Mountfield’s points.”

59. Miss Laing supported the judge’s conclusion. She submitted that the section 149 function (like the section 7 function) was exercised when the decision was taken and that due regard was had to the relevant requirements at the time of that decision; but that if one needed to look at an earlier stage, then the council had due regard at that stage too, as is clear from its realisation that equality issues had to be addressed and its decision to carry out the EIA for the purpose.
60. The judge’s approach reflected that he had taken, at paragraph 90, on the consultation issue raised before him:

“I see no conflict between the Council keeping an open mind and its consulting on the preferred route identified by officers and approved by the executive for consultation in November 2010. I accept Ms Laing’s submission that the Council was entitled to consult on the proposals which it had approved for consultation, rather than on a series of options which it did not propose. A lawful consultation process does not require that all the anterior phases in the selection of a preferred course be formally and specifically opened to consideration. There was no evidence that the Council was unwilling to reconsider its proposals in the light of the consultation process if a strong enough case had been made.”

Ground 3

61. As to section 7 of the Act, Miss Rose submitted that to discharge the duty, a reasonable investigation was necessary. The investigation had failed to have regard to the needs of Asians, very young children and children who attended schools at which the school library had closed.

62. The claim is freestanding and is not parasitic on the section 149 claim, it was submitted. Particular needs had not been investigated. While it was recognised that younger people may have to travel further to a library, the council’s claim that “affordability will not necessarily be a major issue as bus travel is free for under 5s, 5-15 year olds . . .” was a false point, it was submitted. The accompanying adults would have to pay fares. Local schools were asked about class visits to libraries but their poor response went unremarked in the Report.

63. The judge referred, at paragraph 111, to mitigation measures:

“The mitigation measures addressed the problems. The accessibility of the nearest open libraries was described. Specific measures for children and young people, including those with disabilities were set out to address both accessibility, and for those who could not use free public transport to get to the nearest library, other measures were proposed such as enhanced outreach, virtual homework help, and outreach services to schools. The specific problems at Preston which a local school used as its school library and at Barham Park which was used as a children’s centre were known to the Council and covered by its general mitigation proposals for outreach to schools, and indeed to homes as well.”

These mitigation measures were insufficient to satisfy section 7, Miss Rose submitted.

64. Having referred to other measures, the judge concluded, at paragraph 113:

“I have no doubt that there is room for legitimate debate about the effectiveness of these measures, and whether every point raised has been addressed, but that is not a measure of the lawfulness of the needs assessment.”

Ground 4

65. The council invited alternative proposals from community groups but did not, it was submitted, tell them the criteria by which their proposals would be judged. That, it was submitted, amounted to an error of law. The seven criteria used were:

- “Viability of the group making the proposal
- Viability of the proposals
- Quality of the proposals
- Extent to which proposal promotes inclusion and diversity
- Ability to meet the Council’s savings targets
- Acceptable contract terms and transfer of risk
- Risks to the Council the context of procurement legislation”

66. The judge found, at paragraph 91 of his judgment, that there was nothing in the point. He stated:

“The second point concerns the use of the seven factors or criteria for a robust business case, which were not declared to the public in the consultation process. This is untenable as a basis for asserting the consultation to be unlawful: it is obvious that such a case will include the nature and experience of the group in running such a venture, the financial resources available to such a group, the cost to the Council in the light of its warnings that there was no financial support if the savings envisaged were to be made, and its prospects of delivering a worthwhile contribution to the library service. The factors or criteria are not, save for one, more than an elaboration of the test which was fully notified to consultees, and of which I accept any group capable of making a worthwhile contribution would have been aware, without it having to be spelled out to them. The goalposts were not moved. The contribution to diversity and inclusion is not one of which the need to promote a robust business case would necessarily have forewarned a group looking to make a contribution to running a library. But the Claimants should have been aware that any failing in the public sector equality duty, such as that with which they charge the Council, would have been a failing on their part as well. No proposal failed on that one ground anyway: they failed because they were not a viable proposal run by viable groups. Considerable detail on the process whereby groups sought and were provided with information which they sought for their proposals was set out in the documents and brought together in a speaking note from Ms Laing, along with detail on the basis for the rejection of the alternative proposals in Appendix 6 to

the April 2011 report. They contend that had they known that the groups needed to show that they were capable of running a library, they would have been able to demonstrate that. I am satisfied that any group wishing to run a library, whether at its own expense and even more so if at public expense to some degree, should have realised that its experience and financial capability was an issue to be addressed in the consultation process.”

67. Miss Rose took two of the community responses to illustrate her submission. Mr Erik Pollock was concerned with Cricklewood library. In his statement, he said that a charity with which he was concerned, Cricklewood Homeless Concern (“CHC”), were told that they needed to produce a business case to put to the Executive Committee. The council’s written response to CHC’s proposal, which was in great detail, acknowledged that it came “with the backing and experience of an established and experienced group.” Cogent criticisms were, however, made in the response: “key commercial assumptions needed better evidence” : it was “not clear how the library service will work.” The “realism/viability of the business module” was questioned.
68. Mr David Butcher, whose concern was with Kensal Rise, stated that “there was quite a bit of speculation about what was needed at this stage.” Kensal Rise Friends Group made clear that their proposal was “an outline proposal.” There were meetings with representatives of the council and some further information was provided by the council, but not enough, it was submitted.
69. In an equally detailed response on Kensal Rise, the council stated that it was not clear what the roles of proposed staff members would be, or their relationship to the volunteers. It was stated that “the proposal is silent on a number of key issues relating, for example, to staffing, public liability, insurance etc.”
70. In her statement, Ms Harper referred to extensive correspondence between officers and members of the groups in question and gave examples of information provided. A robust business case was required.
71. The time within which community proposals had to be submitted was comparatively short, as circumstances required, but I do not accept that there was a risk that those submitting them were unaware of what was required. I am impressed by the detailed consideration given to each of the proposals received. The reasons for rejecting them appear to me to be cogent and persuasive. The decision was for the council and no error of law is established. I say now that I agree with the judge’s approach and conclusion on ground 4.

R (Harris) v London Borough of Haringey

72. Since the hearing, the court has received written submissions on the decision of this court in *R (Harris) v London Borough of Haringey* [2010] EWCA Civ 703, a decision which the court drew to the attention of the parties. The case was concerned with the equality duty in section 71 of the Race Relations Act 1976. There was no EIA in that case, no specific reference in the decision maker’s deliberations to section 71 and no

specific reference to the substance of the duties it contained. Giving the leading judgment, I stated, at paragraph 27:

“I find it impossible . . . to find any focus on the substance of the section 71 duty when the complex issues to be decided by the council's committee are set out and debated.”

73. In *Harris*, the council's stance was that section 71 considerations were effectively built into the decision-making process because the development brief for the area and the relevant planning policies themselves reflected section 71 considerations. That submission was rejected by the court.
74. What was underlined in *Harris* was the need to analyse the material before the council in the context of the duty (paragraph 40), which in this case, is the duty to have due regard to the need to eliminate discrimination. The court cited the decision of Davis J in *R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin), at paragraph 74, a "conscious directing of the mind to the obligations."
75. I confirm that approach. When preparing policies and making decisions, decision makers must always keep in mind their duties under the 2010 Act. I do not, however, consider that the *Harris* approach assists the appellants in the present case. There can be no doubt that the duty was in mind. An EIA was conducted and the duty is fully described in the April Report, including a reference at appendix 1 to possible "differential impact".
76. The point taken in this case is a different one, that is that it should have been obvious on the available statistics that the proposals did have a discriminatory impact upon Asians. The council rely on the submission, already considered, that it was far from obvious, and, indeed, on analysis it is not established.

Conclusions on grounds 1, 2 and 3

77. It is not suggested that there was an error of law in Brent reducing its expenditure on public services. The decision to do so followed Government and local decisions properly taken, decisions which were, as Miss Rose properly accepted, primarily for democratically elected bodies. There was evidence before the judge that the then current pattern of service was not sustainable and that new methods were required in any event. That does not, however, avoid the requirement to comply with section 7 of the 1964 Act and section 149 of the 2010 Act.
78. Given the scale of the spending reductions the council was required to make, and the information available following earlier studies, a decision that the library service should bear a share of the reduction was not, in my judgment, unlawful. There is no reason to doubt that the council was aware of its statutory duties, including those in relation to race discrimination which preceded the 2010 Act. Duties under the statute are set out in detail in the April Report as are implications, for example in relation to disability.
79. Further, this aspect of the claim has only fully emerged before this court. The need to economise in this whole area was not plainly challenged before the judge. I do not find that surprising because evidence of the need to economise, across the board and

including library services, would have been available. It is, in my judgment, fanciful to suggest, taking the best view one can of the appellants' evidence, that it was so obvious that library provision, as distinct from other services, had discriminatory effects upon the Asian community that it needed to be a significant factor in fundamental decisions as to apportionment of resources.

80. The decision as to which libraries to close was carefully considered by the council. The quotations I have made from very detailed Reports serve to demonstrate that. Cogent reasons were given in the Reports for the decisions taken, and the factors to be taken into consideration. A full consultation was conducted and fully reported to the decision makers.
81. Having regard to the duty under section 149 of the 2010 Act to have due regard to the need to eliminate discrimination, I do not consider that the council was in breach of duty in failing to give further consideration to the racial dimension, in so far as it affected the Asian community in relation to other communities. The council was not plainly confronted either on behalf of the Asian community, or otherwise, with the issue now said to exist. Undoubtedly there were serious concerns, across the communities, about library closures and the council was made aware of them fully and forcefully. Factors were rightly and rationally considered when making the decisions as to which libraries should be closed and decisions were explained in the Reports. I do not accept that a racial dimension rendered the choice unlawful. The section 149 duty to have due regard did not require further consideration and analysis of that dimension when the decision was taken.
82. Analysis of the available information, when the point was raised before Ouseley J and subsequently, has confirmed that. I accept that an adverse effect on the Asian population, as distinct from other racial groups, was capable of creating a breach of section 149 of the 2010 Act, read with section 19. It was legitimate to take, as the council did at that stage of the argument, the pool of library users rather than a pool comprising the entire population of the Borough, in making an assessment. Adopting that pool, the figures accepted by the judge at paragraph 147 of his judgment do not support a claim that there was indirect discrimination.
83. I repeat what I said in *Harris* when considering, at paragraph 40, the "due regard" duty in section 71 of the Race Relations Act 1976. There must be an analysis of the material "with the specific statutory consideration in mind." The thought processes of decision makers need to include having regard for the duties in the 2010 Act. The section 149 duty must be kept in mind by decision makers throughout the decision-making process. It should be embedded in the process but can have no fixed content, bearing in mind the range of potential factors and situations, as Miss Laing aptly submitted in submissions summarised at paragraphs 37 to 40 above. What observance of that duty requires of decision makers is fact-sensitive; it inevitably varies considerably from situation to situation, from time to time and from stage to stage. In my judgment, there was no breach of the duty in this case.
84. As to ground 2, in my judgment the council exercised its functions in this case with due regard to the requirements under section 149. To put forward a reasoned proposal for closures was a reasonable reaction in the circumstances, including the urgent need to economise. It was not necessary for an EIA to be conducted before the formulation of the proposals on which the public were to be consulted. I accept that

the council had s.149 properly in mind from an early stage and for that reason decided to carry out a full EIA for consideration together with the results of the consultation. Factors under section 149 were in mind at each stage. The council did not put the relevant requirements to one side until the ultimate decision was taken but had regard to them as an integral part of the decision-making process.

85. As to ground 3, the duty under section 7 of the 1964 Act was also in mind and the council aware of the duty specified. Decisions as to closures were taken with that duty in mind, the proposals including improved ways in which the expectations of users might be met. Mitigation measures were proposed in this regard. The appellants have drawn attention to detailed matters which, even if they were not expressly considered, do not create a breach of section 7. The section contemplates flexibility in meeting the needs of users and detailed consideration has been given to those needs.
86. I would dismiss this appeal.

LORD JUSTICE RICHARDS :

87. I agree that the appeal should be dismissed for the reasons given by Pill LJ and Davis LJ.

LORD JUSTICE DAVIS :

88. It is clear that a significant number of people in the London Borough of Brent sincerely and strongly oppose the closure of some or all of these libraries. They consider that the decision to close them is utterly wrong. But it is important to emphasise that Miss Rose QC, appearing on behalf of the appellants, has not sought to say – and, in my view, rightly has not sought to say – that the decision is perverse or irrational or otherwise in itself unlawful. Her challenge is as to the lawfulness of the *process* by which this particular decision was reached. That, of course, is conventional judicial review territory.
89. I was, nevertheless, initially rather disconcerted by one particular aspect of this appeal. The principal argument on the appeal, vigorously advanced by Miss Rose, was based on the assertion that insufficient regard was had by the council to the need to eliminate discrimination for the purposes of s.149 of the 2010 Act. The point was, it is true, referred to in the Grounds of Claim. It was, however, then developed before Ouseley J to such an extent that he described it as “taking on a life of its own”. Then in this court the point has been yet further developed and recast by Miss Rose (who did not appear below). But as far as I can see the possibility of discrimination, direct or indirect, against the Asian community or Asian library users never really featured in the actual evidence filed by the claimants (one of whom, as we were told, is Asian) or, indeed, in objections made prior to the council’s decision: the many objections (for example, lack of proper consultation, failure to appreciate the impact on children, potentiality of overcrowding at libraries which were left open, difficulties in travel to more distant libraries and so on), as reflected in the evidence subsequently filed, were directed elsewhere. So the point about indirect discrimination does not seem to coincide with what may be styled the underlying “merits” of the case: rather, it seems to be deployed by way of collateral means of achieving the desired result (viz. the quashing of the decision).

90. Ultimately, however, I think Miss Rose was entitled to say that the duty imposed by s.149 was there to be complied with; and the responsibility in that regard was on the council. Moreover, she also appositely referred to the council's own Corporate Guidelines, which expressly refer to a starting assumption being required to the effect that mooted policies and projects of the council are relevant to equality and diversity: and the Guidelines then set out the relevant check-lists. Nevertheless the failure in a particular case to advance such objections prior to a decision is, in my view, at least capable of being relevant when considering whether "due regard" (that is to say, regard which is appropriate in all the circumstances) was given for the purposes of s.149 in any particular case. For example, in the Harris case a letter of objection and written responses to the consultation process prior to the making of the decision had been put in, specifically referring to the alleged impact of the proposal – in that case, a projected development – on ethnic minority businesses and communities.
91. I was also initially rather disconcerted by the emphasis placed in the opening responses of Miss Laing QC, on behalf of the council, to the effect that, in an appropriate case, "due regard" may legitimately involve no regard. I can certainly see some situations where that might be so: and it then becomes empty semantics to distinguish between giving no consideration in the first place and between giving consideration and then ruling a matter out as irrelevant or insignificant. In the present case, for example, that would extend, as Miss Laing observed, to the risk of unlawful harassment or victimisation: there simply was no basis for thinking that a decision to close these libraries (which I agree is to be regarded as a provision for the purposes of s.19 of the 2010 Act) could give rise to unlawful harassment or victimisation. But that is not necessarily so with regard to the other potential impacts of the decision. In the event, Miss Laing – in my view, wisely – speedily advanced (or retreated) to the proposition that, on the evidence, the council here did have due regard to the relevant needs set out in s.149.
92. So that is the real question: whether the council did have due regard. This has to be decided as a matter of substance, not form. Thus in any particular case it is not necessarily fatal if there is no EIA; and likewise it is not necessarily conclusive if there is an EIA.
93. At some stages in her argument Miss Rose herself seemed to suggest that the council simply did not consider the matters set out in s.149. Put like that, that cannot be right. The Executive was expressly reminded, and at length, in the April Report of the duty under s.149. The Executive also had a most detailed EIA annexed to that Report: and (as the minute of the meeting of the Executive records) that was specifically drawn to the attention of the council members. Further, the Borough Solicitor's advice was recorded that the EIA was "a thorough analysis which members had had the opportunity to consider." The minute of the Call In Overview and Scrutiny Committee meeting of 27th April 2011 records that one reason for calling in was "to discuss fully the impact of the closures on age and race equality issues."
94. The issue therefore becomes whether the council *sufficiently* considered the matters set out in s.149 so as to have had "due regard": and that was indeed the main thrust of Miss Rose's argument. Her complaint was that the council failed to "analyse" (in her word) the situation: the raw information was there in the April Report and EIA, so far as potential indirect discrimination with regard to Asians was concerned, but had not been sufficiently assessed, she submitted, so as to discharge the duty under s.149.

95. In my view, and in agreement with Pill LJ, there was on the evidence here sufficient consideration by the council for the purposes of s.149. In my view, as a matter of substance “due regard” was had to the specified needs. The finding of Ouseley J to the effect that the EIA was informed and thorough and addressed the relevant issues in substance and with rigour was also a justified finding.
96. Miss Rose did not, as I understood her, seek to argue that a potentiality for indirect discrimination arose here simply where the proportion of Asian users of the libraries corresponded to the proportion of Asians in the population of Brent. Her particular point was that a particular disadvantage was potentially caused to Asians (grouping the various relevant ethnic communities under this heading) by reason of their disproportionate use of the libraries: as revealed, as a matter of statistics, in the table contained in paragraph 5.2.2 of Appendix 3 to the April Report, which was itself based on responses received to the prior Questionnaire.
97. As the debate wore on, I became increasingly doubtful if this argument on behalf of the appellants could be right; and in fact I have arrived at the view that it is artificial and wrong.
98. What was plain was that a significant proportion of the Brent library using community, being Asian, stood potentially to be affected by the proposed closure (as would other library users). It was also the case that, of library users in Brent, Asians used libraries out of proportion to their actual numbers in the Brent population. That was set out in the April Report and the EIA. Further, at paragraph 2 of Appendix 4.1 to the EIA (headed “Race Equality”) there was a detailed section providing the ethnicity breakdown for each of the wards affected and the adjoining wards and also an ethnicity breakdown of the library users for the six libraries which it was proposed be closed. Regard was given to this in the context of the 2010 Act obligations.
99. Miss Rose nevertheless criticised the evidence of Ms Harper, which she says reveals that the wrong approach was taken by the council. In paragraph 96 of her witness statement dated 24th June 2011 Ms Harper had described the EIA as identifying “the key issue as being that of accessibility to the six improved libraries.” But that does not mean that the need to have regard to the elimination of race discrimination was not regarded as an issue. On the contrary in her statement Ms Harper goes on to say that the council did have regard to equalities issues. In paragraph 99, moreover, she says: “The detail of the ethnic breakdown of active users of the libraries in question is set out in the EIA and in the Demographic Data book...Members were fully aware of the impact of closures on members of particular ethnic groups.” That that is so is borne out by the contents of the April Report and the EIA. The EIA had itself expressly drawn attention at the outset, in general terms, to a likelihood of a differential impact on a group on grounds of ethnicity.
100. Miss Rose went on to submit that there was no requirement for there to be a causal relationship between the relevant protected characteristic and the particular disadvantage suffered: and I agree that no such requirement is specified in s.19 of the 2010 Act. For her part, Miss Laing submitted that there must be an intrinsic or inherent liability on the part of the provision in question to give rise to the particular disadvantage so as to be discriminatory: relying in particular on paragraph 20 of the O’Flynn case for that purpose. She accordingly submitted there was no such intrinsic link, attributable to race, in the present case relating to library users in Brent. But I do

not accept there necessarily has to be such an intrinsic link. Where there is, then no further statistical support may be needed. But where there is not, then reference to statistics may be permissible. I agree with Miss Rose on that. In the present case, however, as was demonstrated by the analysis of Ouseley J, the subsequently supplied statistics in fact lent no support to the appellants' case. If that statistical reliance is thus taken away from the appellants' case as to the risk of indirect discrimination, I can see no obvious risk of indirect discrimination otherwise arising requiring any greater consideration than was evidenced in the April Report and the EIA. In my view, there was no reason to think that the fact that (according to those answers received to the questionnaire) 28% of the Brent population were Asian but 46% of library users were Asian required any further investigation as to the reason, on grounds of race, over and above what is set out in the EIA. In fact, I find it rather difficult to see *how* such an investigation could, realistically and sensibly, be undertaken by the council amongst the various groupings collectively categorised as "Asian".

101. I would add in this regard that I am convinced that the correct comparator pool in this case was the pool of library users in Brent, not the general population of Brent. The judge was right so to conclude. That accords with the general approach indicated by Baroness Hale in the Rutherford case. It also accords with what is provided in s.7 of the 1964 Act.
102. The importance of complying with s.149 is not to be understated. Nevertheless, in a case where the council was fully apprised of its duty under s.149 and had the benefit of a most careful Report and EIA, I consider that an air of unreality has descended over this particular line of attack. Councils cannot be expected to speculate on or to investigate or to explore such matters ad infinitum; nor can they be expected to apply, indeed they are to be discouraged from applying, the degree of forensic analysis for the purpose of an EIA and of consideration of their duties under s.149 which a QC might deploy in court. The outcome of cases such as this is ultimately, of course, fact specific (see Harris). All the same, in situations where hard choices have to be made it does seem to me that to accede to the approach urged by Miss Rose in this case would, with respect, be to make effective decision making on the part of Local Authorities and other public bodies unduly and unreasonably onerous.
103. As to the second ground, the council was not under a duty to consult as to the contents of the EIA: although, of course, failure to have an awareness of issues potentially arising could vitiate the EIA as failing to demonstrate the appropriate regard for the relevant needs. In the present case officers of the council were plainly aware from the outset of, and they consulted as to, potential equality issues, including on race and ethnicity. The requirements of the 2010 Act were throughout in mind. As already stated, the EIA when finally produced – and it will have taken an amount of time to prepare – was a thorough document. It was then properly considered, along with the April Report, by the council, before the actual final decision was made.
104. There cannot necessarily be easy identification of particular formative "stages" in every decision making process: and it is certainly unreal to require a "comprehensive scrutiny" (whatever that may mean) at every moment throughout the process. Precisely what consideration is due can and will vary from time to time during the process; even if there needs to be consideration during the process and even if an ultimate assessment may need to be made as to whether, overall, "due regard" had

been given. Here too it is what happens in substance that counts. In the field of important decisions by local authorities of a kind such as the present, nevertheless, experience teaches one that there may be many local residents who will, rightly or wrongly, assume that an announced proposal has in truth already been decided on; and that subsequent consultation or impact assessments or reports will be moulded so as to endorse a predetermined result. (Indeed that is what some residents think in the present case). It is necessary that consideration of the duty required to be regarded – most obviously here, s.149 of the 2010 Act – properly informs the decision-making process before the ultimate decision is made. There may, for example, be cases - as the EHRC Guidance warns - where the very late and unheralded production of an EIA immediately prior to a final scheduled meeting may, depending on the circumstances, not suffice. To the extent that the judge may at one stage in his judgment have indicated that a full EIA will *always* suffice provided only that it is produced prior to the decision finally being made that may be going too far. But in any event that is, on the evidence, plainly not the position here. Although the final Report and EIA were produced relatively shortly before the April meeting, they were clearly the product of careful prior thought and research (consistently with the council's Corporate Guidelines). Diversity implications and the need for an EIA had been noted at the outset in the November Report presented at the Executive meeting of the 15th November 2010. They continued to be borne in mind. The final EIA itself was, as I have already said, a thorough and detailed document; and it was thereafter also fully and properly considered by the council before the final decision was made. In my view, the extent of the continuing obligations throughout the process sought to be imposed here on the council by the appellants is far too extensive and intensive to be realistic; and it is not required under s.149 itself. In my view on the facts here it cannot be said that the public sector equality duty was “put on one side pending the ultimate decision”, adapting a phrase of Ms Monaghan's.

105. I do not wish to add anything on Grounds 3 and 4. They are not sustainable grounds, and they were rightly rejected by the judge after detailed examination of them by him.
106. It seems to me that Ouseley J, after a most careful and thorough review of all the points advanced, reached the right conclusions. In agreement with Pill LJ, I too would dismiss this appeal.