Hilary Term
[2017] UKSC 4
On appeal from: [2014] EWCA Civ 1573

JUDGMENT

FirstGroup Plc (Respondent) *v* Paulley (Appellant)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Kerr
Lord Clarke
Lord Sumption
Lord Reed
Lord Toulson

JUDGMENT GIVEN ON

18 January 2017

Heard on 15 June 2016

Appellant	*Respondent*
Robin Allen QC	Martin Chamberlain QC
Catherine Casserley	Oliver Jones
(Instructed by Unity Law)	(Instructed by Burges Salmon LLP)

LORD NEUBERGER: (with whom Lord Reed agrees)

1. This appeal concerns the lawfulness of a bus company's policy in relation to the use of the space provided for wheelchair users on its buses.

The factual and procedural background

2. At around 9.35 in the morning of 24 February 2012, Mr Doug Paulley, who is a wheelchair user, arrived at Wetherby bus station, expecting to catch the 9.40 bus ("the Bus") to Leeds. On arrival at Leeds he intended to catch the train to Stalybridge to meet his parents for lunch. The Bus was operated by a subsidiary of FirstGroup PLC ("FirstGroup"), which is the parent company of a group of companies which operates a total of about 6,300 buses. The Bus was equipped with a lowering platform and a wheelchair ramp. The Bus also had a space (a "space") for wheelchairs, which included a sign that read "Please give up this space if needed for a wheelchair user."

3. When Mr Paulley started to board the Bus, the driver, Mr Britcliffe, asked him to wait because the space was occupied by a woman with a sleeping child in a pushchair. The space had a sign with the familiar designation of a wheelchair sign, and in addition it had a notice ("the Notice") saying "Please give up this space for a wheelchair user". Mr Britcliffe asked the woman to fold down her pushchair and move out of the space so that Mr Paulley could occupy it in his wheelchair. She replied that her pushchair did not fold down, and refused to move. Mr Paulley then asked whether he could fold down his wheelchair and use an ordinary passenger seat. Mr Britcliffe refused that request, because there was no safe way of securing the wheelchair and the Bus had to take a rather winding route.

4. As a result, Mr Paulley had to wait for the next bus, which left around 20 minutes later. The consequence of this was that Mr Paulley missed his train at Leeds, and had to take a later train which arrived at Stalybridge an hour later than he had planned.

5. Although Mr Paulley was a frequent bus user, this was the first time that he was unable to get on a bus because someone refused to vacate the space.

6. Mr Paulley issued proceedings in the Leeds County Court against FirstGroup for unlawful discrimination against him on the ground of his disability. His claim

was based on the proposition that FirstGroup had failed to make "reasonable adjustments" to its policies contrary to section 29(2) of the Equality Act 2010. The claim came on before Recorder Isaacs.

7. The evidence showed that FirstGroup's published policy about wheelchairs and their users at the time of the incident was this:

> "As part of our commitment to providing accessible travel for wheelchair users virtually all our buses have a dedicated area for wheelchair users; other passengers are asked to give up the space for wheelchairs. … If the bus is full or if there is already a wheelchair user on board unfortunately we will not be able to carry another wheelchair user. … Wheelchairs do not have priority over buggies, but to ensure that all our customers are treated fairly and with consideration, other customers are asked to move to another part of the bus to allow you to board. Unfortunately, if a fellow passenger refuses to move you will need to wait for the next bus."

8. By the time of the trial, the published policy had changed somewhat, and it was in these terms:

> "As part of our commitment to providing accessible travel for wheelchair users virtually all our buses have a dedicated wheelchair area for wheelchair users; other passengers are asked to give up the space for wheelchairs. …
>
> Wheelchair users have priority use of the wheelchair space. If this is occupied with a buggy, standing passengers or otherwise full, and there is space elsewhere on the vehicle, the driver will ask that it is made free for a wheelchair user. Please note that the driver has no power to compel passengers to move in this way and is reliant on the goodwill of the passengers concerned. Unfortunately, if a fellow passenger refuses to move you will need to wait for the next bus."

9. The evidence before the Recorder established that Mr Britcliffe had followed FirstGroup's policy, by asking the woman with the pushchair to move from the space, but, when she refused, by taking the matter no further. Mr Birtwhistle, FirstGroup's UK Bus Projects Manager, told the Recorder that "in the main" passengers complied with a request to give up the space. Mr Birtwhistle also

explained why FirstGroup had adopted the policy set out in paras 7 and 8 above. The company had carried out a review of the way it communicated with its customers, and found that many of them thought that it was putting up too many peremptory notices on buses. FirstGroup had concluded that it would be better policy to use more pleasant and engaging notices which were friendlier to customers. So far as FirstGroup's policy about the space was concerned, Mr Birtwhistle said that it was designed to cause the customer to think "Somebody else needs this space. I will be reasonable. I will move away from it." The policy was intended to be non-confrontational and placatory.

10. The Recorder found for Mr Paulley and awarded him £5,500 damages. FirstGroup appealed to the Court of Appeal who allowed its appeal - [2015] 1 WLR 3384. Mr Paulley now appeals to this Court.

The legal requirements in relation to public service vehicles

11. Mr Paulley's claim was based on his allegation that FirstGroup had failed to comply with its duties under the Equality Act 2010, and it is therefore appropriate to set out the relevant provisions of that Act. However, before doing so, I should refer to earlier legislation applicable to public service vehicles, as it was relied on by the Court of Appeal, and it was also canvassed in the arguments before this Court.

12. The Bus was a "public service vehicle" for the purposes of the Public Passenger Vehicles Act 1981 ("the 1981 Act"), and it was therefore required to comply with Schedule 1 to the Public Service Vehicles Accessibility Regulations 2000 (SI 2000/1970) ("the Accessibility Regulations"). Paragraph 2 of that Schedule required the Bus to have at least one wheelchair space on the lower deck, which had to comply with para 3 or 4. The Bus complied with para 4, which contains detailed specifications as to the size and other characteristics of the space, and also envisages that a folding or tip-up seat may be placed in the space, and requires there to be a notice on or near such a seat stating "Please give up this seat for a wheelchair user". The Bus was also required to carry a sign adjacent to the space which showed a representation of a person in a wheelchair. Paragraph 3 of Schedule 2 to the Accessibility Regulations requires there to be at least four seats designated "as priority seats for use by disabled passengers", and a sign on or near a priority seat "indicating that disabled persons have priority for the use of that seat".

13. Section 25 of the 1981 Act also enables regulations to be made authorising the driver of a bus or, at his request, a police constable to remove a passenger infringing what are known as the Conduct Regulations, namely the Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Regulations

1990 ("the Conduct Regulations") (SI 1990/1020), which were made under these powers.

14. Para 5(2) of the Conduct Regulations provides:

> "A driver, inspector and conductor shall take all reasonable steps to ensure that the provisions of these Regulations relating to the conduct of passengers are complied with."

15. Para 6(1) of the Conduct Regulations states that no passenger shall, inter alia:

> "(b) put at risk or unreasonably impede or cause discomfort to any person travelling on or entering or leaving the vehicle …
>
> (k) remain on the vehicle, when directed to leave by the driver, inspector or conductor on the following grounds:
>
> > (i) that his remaining would result in the number of passengers exceeding the maximum seating capacity or maximum standing capacity …
> >
> > (ii) that he has been causing a nuisance; or
> >
> > (iii) that his condition is such as would be likely to cause offence to a reasonable passenger …"

16. Para 6(2) of the Conduct Regulations states that:

> "… [A] passenger on a vehicle who has with him [inter alia any bulky or cumbersome article] or any animal -
>
> > (a) if directed by the driver, inspector or conductor to put it in a particular place on the vehicle, shall put it where directed; and
> >
> > (b) if requested to move it from the vehicle by the driver, inspector or conductor, shall remove it."

17. Para 8(2) of the Conduct Regulations provides that any passenger on a vehicle who contravenes any provision of those regulations "may be removed from the vehicle by the driver … or, on the request of the driver, … by a police constable."

18. The Conduct Regulations were amended by the Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) (Amendment) Regulations 2002 (SI 2002/1974), under powers conferred by the Disability Discrimination Act 1995, to deal with wheelchair users. Para 12 of the Conduct Regulations as inserted by the amendments provides that:

> "(2) If there is an unoccupied wheelchair space on the vehicle, a driver and a conductor shall allow a wheelchair user to board if -
>
> > (a) the wheelchair is of a type or size that can be correctly and safely located in that space, and
> >
> > (b) in so doing, neither the maximum seating nor standing capacity of the vehicle would be exceeded.
>
> (3) For the purpose of paragraph (2), a wheelchair space is occupied if -
>
> > (a) there is a wheelchair user in that space; or
> >
> > (b) passengers or their effects are in that space and they or their effects cannot readily and reasonably vacate it by moving to another part of the vehicle.
>
> (4)(e) [B]efore the vehicle is driven … [the driver must ensure that] any wheelchair user is correctly and safely positioned in a wheelchair space."

In addition a bus driver has duties to help wheelchair users to board and alight and, where appropriate, to fit wheelchair restraints.

19. When the Conduct Regulations were amended, the Government issued written guidance about their application. The introduction said that the Government

was "committed to comprehensive and enforceable civil rights for disabled people. Achieving a fully accessible public transport system is a key element of that policy". Dealing with the space the guidance said:

> "A wheelchair user must only be carried if there is a wheelchair space available and the seating and standing capacity of the vehicle will not be exceeded.
>
> Because buses often carry more seated and/or standing passengers when the wheelchair space is unoccupied the opportunity for a wheelchair user to travel may depend on other passengers and how full the vehicle is at the time. If there is space available and the seating and standing capacity will not be exceeded when the space is occupied then any passengers in the wheelchair space should be asked to move. This may not be practical if, for example, the vehicle is nearing its capacity or passengers with baggage or a baby buggy are using the space."

The Equality Act 2010

20. The 2010 Act now governs cases of discrimination on the ground of a protected characteristic. Disability is one such characteristic. Section 6(3) provides:

> "In relation to the protected characteristic of disability -
>
> > (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
> >
> > (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability."

21. It is common ground that Mr Paulley's "particular disability" for the purposes of section 6(3)(a) is a physical condition which requires him to use a wheelchair. Accordingly, this case is concerned with disadvantages faced by wheelchair users rather than people with other kinds of disability.

22. FirstGroup is a "public service provider". Accordingly it falls within section 29 of the 2010 Act, which provides:

> "(1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B) -
>
> > (a) as to the terms on which A provides the service to B;
> >
> > (b) by terminating the provision of the service to B;
> >
> > (c) by subjecting B to any other detriment."

23. In addition, under section 29(7) of the 2010 Act, as a public service provider, FirstGroup has a duty to make "reasonable adjustments", and by virtue of section 20, that duty involves complying with three requirements, the first of which is in section 20(3), which is in these terms:

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

According to section 21(1), the word "substantial" in subsection 20(3) means "more than minor or trivial".

24. The applicable Schedule for the purposes of section 20(1) of the 2010 Act is in this case Schedule 2, paragraph 2 of which provides:

> "(1) A must comply with the first, second and third requirements.
>
> (2) For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally."

25. Again, it is common ground that paragraph 2(2) of Schedule 2 is, on the facts of this case, concerned with wheelchair users generally, rather than any wider class of disabled persons.

26. Section 21 provides:

> "(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
>
> (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

27. When considering whether a proposed adjustment to a provision, criterion or practice ("PCP") is reasonable in any particular case, the Code of Practice on Services, Public Functions and Associations issued by the Equality and Human Rights Commission states at para 7.30 that, "without intending to be exhaustive, … some of the factors which might be taken into account" include:

> "• whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question;
>
> • the extent to which it is practicable for the service provider to take the steps;

- the financial and other costs of making the adjustment;

- the extent of any disruption which taking the steps would cause;

- the extent of the service provider's financial and other resources;

- the amount of any resources already spent on making adjustments; and

- the availability of financial or other assistance."

The judgments below

28. The Recorder considered that there was no difference of substance between FirstGroup's policy at the time of the incident and its policy at the time of the hearing. (I am not sure that I agree, but the contrary was not argued, and it is not an issue which needs to be resolved on this appeal. In so far as it is relevant, this judgment is directed to the current policy, ie as set out in para 8 above). He found that this policy was a PCP, which he described as a "policy … of 'first come first served', … whereby a non-wheelchair user occupying the space on the bus would be requested to move but if the request was refused nothing more would be done".

29. The Recorder also found that this PCP was a policy which placed Mr Paulley and other wheelchair users at a substantial disadvantage by comparison with non-disabled bus passengers. Crucially for present purposes, the Recorder went on to hold that there were reasonable adjustments that FirstGroup could have made to the PCP which would have eliminated that disadvantage. Those reasonable steps were, at least as I read his judgment, (i) an alteration to the Notice which would positively require a non-disabled passenger occupying a space to move from it if a wheelchair user needed it, coupled with (ii) an enforcement policy that would require non-disabled passengers to leave the bus if they failed to comply with that requirement. In this connection, it is common ground that FirstGroup's conditions of carriage do not give a driver power to require, let alone to force (as opposed to request) a non-wheelchair user to move out of a space needed by a wheelchair user, or to leave the bus if she refuses to do so.

30. More particularly, the Recorder said that the contention "that the system of priority given to wheelchair users should be enforced as a matter not of request" to

any non-wheelchair user (to use the inelegant but convenient term), "but of requirement" was in his view "a reasonable one", because:

> "It could be incorporated into [FirstGroup's] conditions of carriage so that any non-disabled non-wheelchair using passenger could be obliged to leave the space if requested to do so because a wheelchair user needed to use it; just as there are conditions of carriage which forbid smoking, making a nuisance or other 'anti- social' behaviour on pain of being asked to leave the bus then a refusal to accede to a requirement to vacate the space could have similar consequences. In my view once the system had been advertised and in place there would be unlikely to be caused any disruption or confrontation as all passengers would know where they were. Although such a policy might inconvenience a mother with a buggy that, I am afraid is a consequence of the protection that Parliament has chosen to give to disabled wheelchair users and not to non-disabled mothers with buggies. I agree with the claimant that the [Conduct] Regulations do not really assist the court in determining whether the proposed adjustment suggested by the claimant is reasonable or not." (para 21)

31. FirstGroup's appeal to the Court of Appeal was due to be heard with another appeal in a case heard in the Middlesborough County Court involving virtually identical facts, *Black v Arriva North East Ltd*, where His Honour Judge Bowers had found an identical policy did not involve unlawful discrimination under the 2010 Act - see [2013] EqLR 558. However, that appeal was withdrawn.

32. Although FirstGroup's appeal in this case was unanimously allowed, in one respect the reasons given by Lewison LJ (who gave the leading judgment) differed from those of Arden and Underhill LJJ. While Underhill and Arden LJJ considered that the PCP put Mr Paulley and other wheelchair users "at a substantial disadvantage … in comparison with persons who were not [so] disabled", Lewison LJ was not convinced that this was so - see paras 62-65 (Underhill LJ), 72-73 (Arden LJ), and paras 35-39 (Lewison LJ). The majority view of the Court of Appeal is not challenged by FirstGroup in this Court (rightly, as I am currently inclined to think).

33. All three members of the Court of Appeal considered that the lawfulness of FirstGroup's policy should be assessed on the basis that it had a PCP which they formulated in slightly different terms from the Recorder, although they accepted that this difference did not affect the outcome - see per Lewison LJ at para 34. They said that the proper approach started by accepting that FirstGroup had a PCP which involved "operating its buses on a 'first come first served basis'" and then asking

"whether the modification to that PCP, namely to request but not to require non-wheelchair users to vacate the space, and if necessary the bus, when a wheelchair user wants to use the space, is an adjustment that went far enough to comply with the duty to make reasonable adjustments". There is no challenge in this Court to that proposition (again, rightly in my view).

34. The Court of Appeal decided that it was not reasonable to hold, as the Recorder had done, that FirstGroup should adjust its PCP so that its drivers required, rather than requested, non-wheelchair users to vacate a space when it was needed by a person in a wheelchair, and then positively to enforce that requirement, with the ultimate sanction being removal from the bus. The Court of Appeal considered that the adjustment which the Recorder upheld would be both unfair and impractical because:

i) (a) It would be unreasonable for the adjustment to extend to all non-wheelchair users including those whose refusal to vacate the space was reasonable, as such an adjustment could unfairly affect other passengers (para 55), and

(b) If the adjustment was limited to non-wheelchair users who unreasonably refused to vacate the space, it would be impracticable as it would require the driver to decide whether a passenger was being unreasonable (paras 48 and 52-53), and, in any event,

ii) It would not be reasonable to expect a driver to try and enforce the proposed amended policy by seeking physically to remove such a person from the space or the bus, or by halting the bus until that person vacated the space or the police arrived (paras 49-50).

In addition, the Court of Appeal doubted that the proposed adjustment to the PCP could be enforced through the police, because a person who disobeyed it would not be guilty of criminal activity - unlike a person who was in breach of the Conduct Regulations (paras 49-50 and 67).

35. The Court of Appeal also rejected the notion that the Notice in the space or the driver's request could have been more prescriptive. Lewison LJ based this view on the grounds that the Recorder "had accepted Mr Birtwhistle's evidence that FirstGroup's research had shown that the company achieved better results with more customer-friendly signage and that negative prescriptive signage produced a worse outcome; yet he did not consider that evidence in his assessment of the effectiveness of the adjusted PCP that he endorsed" (para 51).

36. Underhill LJ addressed this issue more fully at para 68. He said that he would:

> "hope and expect that, other things being equal, a driver whose first request to a non-wheelchair user to vacate the wheelchair space was refused would not simply shrug his or her shoulders and go back to the cab, and that there would normally be some attempt at further persuasion or pressure (possibly even including a threat not to proceed with the journey until the space is cleared - though this risks seriously inconveniencing other passengers)."

However, he considered that:

> "The circumstances in which such a refusal is encountered are liable to vary enormously. In most cases further attempts at persuasion or pressure would be appropriate, but in some they might not be: as Lewison LJ has illustrated, there will be cases where it would be obviously unreasonable to expect the person occupying the space to vacate it, and there would be others where the question of whose need was the greater was at least debatable and where it would not be fair to expect the driver to have to make a decision. Also, the temperaments and experience of different drivers are bound to vary: some would handle such a situation well, but others might find it difficult to cope with. It would be unrealistic for a company to have a policy which prescribed calibrated responses covering the whole range of possible situations."

He added that he "need not express a final view about any such half-way house, since this was not the basis on which the judge decided the case".

37. Arden LJ also discussed this issue, saying at para 80:

> "I consider that the bus company must provide training for bus drivers and devise strategies that bus drivers can lawfully adopt to persuade people to clear the wheelchair space when needed by a wheelchair user. Bus drivers have to use their powers of persuasion with passengers who can move voluntarily. The driver may even decline for a short while to drive on until someone moves out of the wheelchair space. There is no risk of liability to such passengers in requesting them (firmly) to

> move, if they can, because if they cannot safely do so, they will not do so. The bus company should also have an awareness campaign and put up notices designed to make other passengers more aware of the needs of wheelchair users."

However, she said in the following paragraph:

> "These steps … are not part of Mr Paulley's case: he has limited his case to requiring the bus company to require people to get off the bus when necessary so that a wheelchair user can get on."

38. In reaching their conclusion, the Court of Appeal considered that the Recorder was wrong to ignore the Conduct Regulations. In para 49 of his judgment, in a passage with which Underhill and Arden LJJ agreed, Lewison LJ pointed out that each of the anti-social activities identified by the Recorder in the passage quoted in para 12 above "is expressly prohibited by the Conduct Regulations, and the police can be called in aid of the driver under regulation 8(2)". Accordingly, he continued, "[i]n these cases the driver can truthfully say that the passenger is breaking the law". Earlier in his judgment at para 21, Lewison LJ said that he would "infer that the Government took the view" that the guidance which accompanied the amended para 12 of the Conduct Regulations (and set out in para 19 above) "struck the right balance between the interests of wheelchair users on the one hand, and other passengers on the other", and that "FirstGroup's policy follows this Government guidance". He fairly added that "this guidance pre-dated the introduction of the duty to make reasonable adjustments which is now contained in the Equality Act 2010", although as he said "the guidance has not been withdrawn or amended".

What did the recorder decide?

39. As Lewison LJ said in para 30 of his judgment, it follows from the provisions of 2010 Act set out above that if, on the morning of 24 February 2012, FirstGroup failed to comply with its duty to make reasonable adjustments to its PCP of "first come first served", in order to avoid the substantial disadvantage which Mr Paulley suffered as a disabled person, it will have unlawfully discriminated against him. As explained above, the Court of Appeal concentrated on the contention that the adjustment which it was said that FirstGroup had wrongly failed to make to its PCP was "to have a policy of requir[ing] and if necessary enforc[ing]" the requirement (as Mr Allen QC succinctly put it in his argument on behalf of Mr Paulley), as opposed to merely requesting, that non-wheelchair users vacate the space if the space was needed by a wheelchair user. This proposal involves two departures from FirstGroup's PCP: first it involves the driver requiring, rather than requesting, a non-

wheelchair user to vacate a space; secondly, in the event of non-compliance, it involves the driver, rather than doing nothing, enforcing the requirement by ejecting the non-wheelchair user (or getting him or her ejected) from the space, and, if necessary, from the bus.

40. Before discussing the issues of substance, it is necessary to address the question of what the Recorder actually decided. It appears that Lady Hale and Lord Kerr do not read the Recorder's judgment as effectively requiring a policy that could lead to a non-wheelchair user being ordered off the bus. However, for my part, I accept the submission of Mr Chamberlain QC for FirstGroup that the Recorder did hold that such a policy was mandated. I say that for a number of reasons.

41. First, the Recorder appears to me to have made it clear when he said that "a non-disabled passenger … would either have to vacate the space by, for example, folding a buggy and sitting elsewhere, or by leaving the bus and taking the next bus available" in the passage quoted in para 79 of Lord Toulson's judgment. In addition, the Recorder said that "the real adjustment alleged on behalf of the claimant" was that there should be "a clear practice/policy which not only paid lip service to the giving of priority but actually enforced such priority", so that non-wheelchair users would realise that "if there was competition for [a] space with a wheelchair user they would either have to vacate the space … or [leave] the bus". Consistently with this approach, the Recorder then considered the evidence relating to the possibility of enforcing a requirement to vacate the space on an unwilling non-wheelchair user who was occupying it, and concluded that "the real adjustment" which he had identified should have been made by FirstGroup. In addition, there is his reference to any requirement being "enforced" in the passage quoted at the beginning of para 30 above.

42. Secondly, in answer to a question from Lewison LJ, Mr Allen QC made it clear to the Court of Appeal on behalf of Mr Paulley that "it was necessary to have a policy of require and if necessary, enforce", adding "[t]hat was our case and that was the case that was put in cross-examination".

43. Thirdly, it is quite clear that the hearing before the Court of Appeal, and the judgment of that court proceeded on the basis that the Recorder had accepted Mr Paulley's case, which was that, to be legally valid, any policy should be enforceable, if necessary, by requiring a non-wheelchair user to get off the bus. Lewison LJ said at para 41 of his judgment, "the arguments on the appeal were limited to the question whether the judge was right to endorse the PCP that he did. There was no Respondent's Notice and no argument directed to some alternative and more limited form of PCP that FirstGroup should have adopted." (Mr Allen QC makes a fair criticism that the two references to "PCP" are mischaracterisations, but it is clear that Lewison LJ meant "adjustment" rather than PCP). In particular, Lewison LJ

said that Mr Paulley's case had involved an amendment to the PCP where "no discretion is given to the driver". And Underhill and Arden LJJ expressed views to the same effect - see the passages quoted from their respective judgments at the end of paras 36 and 37 above. Further, as Mr Chamberlain QC said, the point is also apparent from exchanges during the argument in the Court of Appeal, including that quoted in para 42 above.

44. Fourthly, Mr Allen QC accepted in his written case in this Court that this is how the case proceeded in the Court of Appeal, at any rate in his opening argument. He said that at first instance there had been "no discussion of 'compel[ling] all other passengers to vacate the wheelchair space irrespective of the reason why they are in it'", but, although he contended that FirstGroup did not rely on "exceptional circumstances" before the Recorder, Mr Allen nowhere disputed the notion that the Recorder concluded that FirstGroup's policy should include mandatory enforcement. It is also clear from later passages in his written case that he accepted that the question of mandatory enforcement was floated in argument before the Recorder. Indeed, in his written case, Mr Allen made the point that FirstGroup could enforce any policy by requiring drivers to turn off the bus a non-wheelchair user who did not move from a space.

45. Finally, if a bus company must have a policy which actually forces a non-wheelchair user to vacate the space, there can be no getting away from the fact that there will be occasions when that policy can only be complied with by forcing someone off the bus: eg when the bus is completely full, when the non-wheelchair user cannot stay on the bus unless she remains in the space, or when the non-wheelchair user simply refuses to move from the space.

A policy of "require and if necessary enforce": discussion

46. In my judgment, it is very difficult to disagree with the reasoning of the Court of Appeal in rejecting this contention ("the primary contention") advanced on behalf of Mr Paulley. First, in so far as this adjustment involved an absolute rule (ie that any non-wheelchair user must vacate the space if it is required by a wheelchair user), it would not be reasonable. Secondly, whether it was an absolute rule or a qualified rule (ie that any non-wheelchair user must vacate if it is reasonable), its implementation through the medium of mandatory enforcement would be likely to lead to problems on some occasions.

47. As to an absolute rule, it is true that there is nothing in the primary or secondary legislation which supports the notion that the space allocated for wheelchair-users is to be exclusively used by such individuals, although it is clear that that was, in general terms at any rate, the primarily envisaged use. It is also true

that there is no absolutist legislative provision comparable to those relating to anti-social activities as contained in the Conduct Regulations set out in paras 15-17 above. However, it does not follow from either point that a court could not conclude that, on appropriate facts, an absolute rule such as that suggested by the Recorder would be requisite. As Mr Allen QC argued, the 2010 Act accorded what Lady Hale has called an "extra right … consistent with the obligations which the United Kingdom has now undertaken under the United Nations Convention on the Rights of Persons with Disabilities" - *Aster Communities Ltd (formerly Housing Homes Ltd) v Akerman-Livingstone (Equality and Human Rights Commission intervening)* [2015] AC 1399, paras 25-26. Accordingly, I do not consider that, for instance, para 12(3)(b) of the Conduct Regulations (set out in para 18 above) or the guidance set out in para 19 above provides an automatic answer to the notion that, on appropriate facts, there should be an absolute rule.

48. Nonetheless, once one considers the effect of an absolute rule in relation to the use of spaces on buses, it is not difficult to conceive of circumstances in which it could be unreasonable to expect a non-wheelchair user to vacate a space and, even more, to get off the bus even though the space is needed by a wheelchair user. As Lewison LJ said (perhaps somewhat optimistically in some cases) in para 48 of his judgment, "[a]lmost by definition, a person who refuses to vacate the wheelchair space when asked to do so [to accommodate a wheelchair-user] will have a reason which (at least to them) seems to be a reasonable one". Thus, it might be reasonable for a person to refuse to vacate the space, if he or she was disabled and needed the space to store disability aids, or was elderly and infirm, or was accompanying infants, especially, for instance, if that person had an urgent hospital appointment, or would find it physically very difficult to alight from the bus. Or the space might be occupied by a vulnerable person who only felt safe in the space and could not reasonably be required to leave the bus in an unfamiliar or unsafe location. Of course, in some of these types of circumstances, it might be possible for the non-wheelchair user to move elsewhere on the bus, but that may be impossible in some cases, or it may only be possible if third parties, not occupying the space, alighted from the bus, which may be unacceptably difficult or even impossible to arrange.

49. Turning to the possibility of a qualified rule, it is right to record that Mr Allen accepted that, even if there was an absolute rule, there could be exceptions to it "in cases of real emergency". Such an approach is close to what I have called a qualified rule, viz a rule that non-wheelchair users would only be required to vacate a space to accommodate a wheelchair user if it would be unreasonable for them not to do so. I have some doubts whether it would be fair to impose on bus drivers the burden of deciding on the relative needs of a wheelchair user and a non-wheelchair user in circumstances when the decision may result in his requiring the non-wheelchair user to vacate the bus. However, it is unnecessary to decide that point in the light of what I say in the next three paragraphs.

50. Whether the policy of requiring non-wheelchair users to vacate the space, and, if necessary, the bus, is absolute or qualified, it seems to me to be a fair objection that it would often prove difficult (or worse) when it comes to enforcement. As Mr Chamberlain QC put it, "it would be likely to cause confrontation with other passengers and delay". This is particularly relevant given the need to take into account practicability and disruption under para 7.30 of the Code of Practice (para 27 above).

51. As I have already mentioned, a non-wheelchair user who refused to vacate the space, whether requested or required to do so, would often (indeed, I think, would normally) consider that he or she was entitled to refuse, and would often have arguably good, or at least understandable, reasons for the refusal. Further, if the bus was full, enforcement of the request would require someone to get off the bus. It would be bad enough if that involved the practically fraught requirement that the non-wheelchair user who was occupying the space get off the bus; but in some cases, the driver might have to consider whether it would be more appropriate to require one or more third parties to get off, so that, because of her needs, the non-wheelchair user could take their place. Accordingly, any enforcement by a driver of the policy proposed by the primary contention would, possibly frequently, be likely to involve confrontation at best and violence at worst.

52. Further, it is by no means clear that there is any statutory obligation on a passenger to comply with a policy relating to use of the space. This is in marked contrast with the situations dealt with in paras 5 and 6 of the Conduct Regulations (see paras 15 and 16 above), which impose a duty on a passenger, as well as on the operator and the driver, in relation to what the Recorder accurately described as anti-social behaviour on the part of the passenger. Further, in para 8, those Regulations provide for enforcement by the driver, and where appropriate by the police (see para 17 above). I note what Lady Hale and Lord Kerr say about para 6(1)(b) of the Conduct Regulations. I do not see how it could on any view be relied on if a non-wheelchair user was required to get off the bus: reading paras 6(1)(b) and 12(3)(b) together, the most that a driver can require of such a person is that she move elsewhere in the bus. Quite apart from this, I am by no means convinced that a non-wheelchair user who unreasonably failed to comply with a request to move from the space would fall foul of para 6(1)(b). Para 12 imposes duties on a driver, not on a passenger, whereas para 6 is concerned with the behaviour of passengers. And para 6(1)(b) has a requirement of reasonableness, and, as mentioned in para 48 above, most non-wheelchair users who refuse to vacate a space will believe that they are being reasonable. And, in any event, even if para 6(1)(b) did apply, it would not answer the points made in paras 50-51 above.

53. The less aggressive policy of stopping the bus until the non-wheelchair user vacates the space is, in my view, appropriate, provided that it is not required to be mandatory. Again, I find it impossible to accept that a policy would not be held to

be reasonable unless it required a driver to stop the bus until a non-wheelchair user vacated a space. It would be plainly unfair on the other passengers, particularly in a full bus or in a bus which was connecting with another service (eg a train or another bus), if the driver had to wait for a long time. Indeed, it is not fanciful to think that such a policy could lead to violence. As Buxton LJ said in *Roads v Central Trains Ltd* (2004) 104 Con LR 62, para 42, "[s]teps might be unreasonable for a [service provider] to take if they unreasonably impact on third parties". Again, I draw support from para 7.30 of the Code of Practice.

54. It is true that stopping the bus until a passenger ceased any anti-social behaviour was, on the evidence of Mr Britcliffe, a course which a driver occasionally adopted where a passenger persisted in a breach of para 6 of the Conduct Regulations. But it does not follow that it would therefore be reasonable to expect a driver to take the same course in every case where a non-wheelchair user refuses to vacate a space needed by a wheelchair user, and may have to leave the bus if he does vacate the space. In a case involving anti-social behaviour, there would rarely if ever be a need for a difficult decision about competing needs, and the nature of any confrontation would be likely to be very different from that in a case involving competing claims to occupy the space. Mr Britcliffe made the point in his evidence when he said that "there's a lot of difference between a kebab and a new-born baby, I'm afraid". Further, subject to the possible argument as to the applicability of para 6(1)(b) of the Conduct Regulations, in a case involving anti-social behaviour, the police could be called under para 8 of the Conduct Regulations, whereas there is no such provision applicable to a case where a non-wheelchair user refuses to vacate a space required by a wheelchair-user.

A policy of "require and pressurise": introductory

55. Rejection of Mr Paulley's primary contention that FirstGroup should have enforced a more prescriptive policy, requiring, rather than requesting, a non-wheelchair user to vacate the space when it was required by a wheelchair user and enforcing that requirement, does not mean that it should not have had a more prescriptive policy than it actually had, so far as any notice and instructions from the driver are concerned. Mr Paulley's alternative contention ("the alternative contention") is that, even if one rejects his primary contention, FirstGroup should still have adjusted its PCP so that it expressed itself more prescriptively in writing through the Notice and/or orally through the driver.

56. Thus, on behalf of Mr Paulley it is contended that the Notice should have positively required anyone who was a non-wheelchair user occupying the space to give it up to a wheelchair user, and that it should have stated that the obligation to vacate would be enforced. It is also contended that Mr Britcliffe, the driver of the Bus, should have told the woman occupying the space that she had to vacate it now

that Mr Paulley required it, and that Mr Britcliffe should have refused to drive on, at least for a period, if she did not comply. It is further contended that there was no good reason why FirstGroup could not have adopted such a policy with regard to its notices and its instructions to its drivers. The fact that such written and oral requirements would not be enforced by drivers or the police does not, it is argued, alter the fact that if such stipulations were expressed as requirements, rather than as requests, it is substantially more likely that any non-wheelchair user would vacate the space if it was needed by a wheelchair user.

A policy of "require and pressurise": a procedural problem

57. Although they discussed Mr Paulley's arguments on this point in the passages cited in para 35-37 above, the Court of Appeal took the view that it was not open to Mr Paulley to advance the alternative contention, and in any event that he was not doing so - see paras 42-45 above in that connection. They said that the only adjustment with which this case was concerned was that identified in paras 11 and 14 above, namely what I have called the principal contention, viz that, rather than simply requesting, FirstGroup should have required, and enforced the requirement, that persons not in wheelchairs vacate the space when it was needed by a person in a wheelchair.

58. However, the position appears to have been rather different at first instance. Mr Paulley's pleaded case and his counsel's skeleton argument advanced "a number of potential reasonable adjustments", which FirstGroup should have made to its PCP, and they were advanced both on alternative and on cumulative bases. Those alleged adjustments included the primary contention (ie forcing a recalcitrant non-wheelchair user to leave the bus), but they also included a number of alternative contentions including (i) a more peremptory Notice, (ii) the driver insisting that the pushchair was folded and (iii) the driver refusing to move on until the space was vacated (as well as other suggestions). The Recorder referred to the various suggested adjustments in his well-constructed and clear judgment, but, as explained in para 42 above described "the real adjustment alleged on behalf of the claimant" as requiring and enforcing - ie Mr Paulley's primary case - which he went on to accept.

59. In these circumstances, there are two possible problems with this Court considering Mr Paulley's alternative contention. First, it seems quite clear that the argument and judgments in the Court of Appeal proceeded on the basis that it was not part of Mr Paulley's case, as seems to have been accepted on his behalf. On the other hand, the case was advanced much more broadly before the Recorder, because, as I have explained, a number of possible adjustments were put forward on the basis that they were alternatives or cumulative. Nonetheless, because of the position adopted on behalf of Mr Paulley in the Court of Appeal, it can be said to be rather

unsatisfactory for this Court to consider whether FirstGroup should have made an adjustment to its PCP which was less extreme than that found by the Recorder.

60. The second problem arises from the fact that, in order for Mr Paulley to succeed in his claim, he must not only establish that FirstGroup should have made an adjustment to its PCP, but also that, had that adjustment been made, there is at least a real prospect that it would have made a difference. (It is right to say that decisions of the Employment Appeal Tribunal express the "real prospect" test slightly differently (compare *Lancaster v TBWA Manchester* UKEAT/0460/10/DA, para 46 and *Leeds Teaching Hospital NHS v Foster* UKEAT/052/10, para 17). However, the precise formulation of the test is not relevant for present purposes. The essential point is that there is no finding by the Recorder that, if FirstGroup had phrased the Notice more peremptorily and/or required its drivers to be more forceful, this requirement would have been satisfied, given that there would have been no question of actual enforcement. In particular, as Lord Toulson points out in para 85 below, there has been no formal appeal and no written or oral argument against the finding that the woman occupying the space refused to move after saying that her pushchair did not fold down. There is therefore no satisfactory basis upon which this Court can, in fairness to FirstGroup, conclude that there would have been a real prospect that such an adjustment to its PCP would have resulted in Mr Paulley not being placed in the disadvantage that he was.

61. In my judgment, the solution which enables this Court both to be procedurally fair to the parties and to provide as much guidance as possible in this important field, is to decide whether the alternative contention should, on the evidence given to the Recorder and findings made by him, succeed but, in the event of our so deciding not to award Mr Paulley any damages. The evidence and arguments in relation to the alternative contention were advanced before the Recorder, and, by accepting Mr Paulley's more extreme primary contention, it is very likely that he must or would have decided to reject FirstGroup's arguments against the alternative. Although the alternative contention was not advanced in the Court of Appeal, we have the benefit of some valuable thoughts on it from Underhill and Arden LJJ. Accordingly, the fact that a case based on the alternative contention was not run in the Court of Appeal should not be fatal to Mr Paulley's ability to run it before this Court. On the other hand, to award Mr Paulley any damages in the event of this Court accepting the alternative contention would be unwarranted as the Recorder made no finding as to whether he would have been disadvantaged had the PCP been adjusted accordingly. (The first instance finding that Mr Paulley was disadvantaged was based on the Recorder's view as to what FirstGroup's policy should have been, which, for the reasons which I have attempted to give, was too prescriptive.) It is true that this approach would make any finding as to the alternative contention somewhat hypothetical, and indeed arguably obiter, but that should not, in my opinion, stand in the way of our addressing it.

A policy of "require and pressurise": discussion

62. Turning then to the substance of Mr Paulley's alternative contention, it has two components. The first is that the Notice should have been more strongly expressed and that it should have stated that the obligation to vacate the space, if needed by a wheelchair user, would be enforced. The second component is that FirstGroup's bus drivers should have been required to do more than simply ask a non-wheelchair user occupying the space to vacate if it was needed by a wheelchair user, in particular they should positively have expressed themselves as requiring the non-wheelchair user to vacate the space and/or they should have refused to drive on until she did so.

63. As mentioned above, the space in the Bus contained a wheelchair sign, as specifically required by the Accessibility Regulations, and it also contained the Notice when no such notice was specifically required by those (or any other) Regulations (see paras 3 and 12 above). I do not consider that FirstGroup can be criticised for not expressing the Notice in more peremptory terms. In disagreement with the Recorder, it seems to me that, albeit politely, the Notice did require, rather than merely request, a non-wheelchair user to vacate the space if it was needed by a wheelchair user. Without the word "Please" it was a requirement, and the addition of the word "Please" at best makes it more polite and at worst softens the requirement. Secondly, there is no reason to doubt the evidence of Mr Birtwhistle, FirstGroup's manager, who said that the company had been advised that "directive" notices were a less effective means of communication with the public than more "customer friendly" and "non-confrontational" notices. (It is right to mention that there was evidence that some other bus companies used more peremptory notices, but there was no evidence to suggest that they were more effective). Thirdly, while I would not endorse it as a principle applicable in all cases, Underhill LJ's statement at para 68 of his judgment that "[l]egal liability ought not to depend on whether an employer has chosen to use specially emphatic language in expressing his policy" has real force in relation to criticisms of the way the Notice was expressed. If finding a more peremptory, persuasive or firmly worded notice in another company's buses was enough to undermine the reasonableness of the notice in this case, it could, as a matter of logic, lead to an absurd state of affairs - the fact that another bus company used more aggressive language, a larger sign, bolder print, or more exclamation marks could presumably all be relied on. And it is worth remembering that we are concerned with the question whether FirstGroup's PCP makes "reasonable adjustments", and, as is made clear by the Code of Practice, that involves taking practicality into account.

64. The Recorder also thought that the Notice should have made it clear that the priority of wheelchair users over the space "would be enforced". While that view has its attractions, I am ultimately not convinced by it. First, having rejected Mr Paulley's primary case (unlike the Recorder), I am unenthusiastic about the notion

of a court requiring a party to put up a notice containing a statement which would not be true - and it would not be true once one rejects Mr Paulley's primary case. Secondly, as I have already indicated, in the light of Mr Birtwhistle's evidence as to what constituted effective notices, and in the absence of any evidence to the contrary, I would not be prepared to hold that FirstGroup was in breach of its duty to make reasonable adjustments by failing to express the Notice more aggressively. Thirdly, there is the point made by Underhill LJ quoted at the end of para 36 above.

65. I turn finally to the contention that FirstGroup drivers should have been instructed to do more than simply request non-wheelchair occupiers to move from a space when it was needed by a wheelchair user. On this aspect, it seems to me that there is obvious force in the concerns, expressed by Underhill LJ in the second passage quoted from his judgment in para 36 above, about the difficulties of identifying any policy given the fact that the circumstances of the non-wheelchair user and the character of the driver could be very different in different cases.

66. Nonetheless, I have concluded that it was not enough for FirstGroup to instruct its drivers simply to request non-wheelchair users to vacate the space, and do nothing further if the request was rejected. I accept that allowance must be made for the fact that there will be a variety of different circumstances in which a non-wheelchair user refuses to vacate a space which is needed by a wheelchair user. Thus, the appropriate approach of the driver could depend on (i) the reason for the refusal, including, in particular, the needs of the non-wheelchair user; (ii) the surrounding circumstances, including whether the bus is full or has vacant places, whether the bus is on time, and the frequency of the service; and (possibly) (iii) the character of the driver. However, in para 68 of his judgment, Underhill LJ was in my view right in describing as "good practice", "a policy … to encourage drivers to go as far as they thought appropriate in the circumstances - in legal language, 'use their best endeavours' - to induce the recalcitrant passenger to reconsider his or her initial refusal".

67. A driver may form the view that a non-wheelchair user is reasonable in refusing to move from the space. If the driver considers that that is so, or even probably so, then it would not, at least normally, be unreasonable for any request to move not to be taken further. However, where the driver concludes that the non-wheelchair user's refusal is unreasonable, it seems to me that it would be unjustifiable for a bus-operating company to have a policy which does not require some further step of the bus driver in any circumstances. In particular, where there is some other place on the bus to which a non-wheelchair user could move, I cannot see why a driver should not be expected to rephrase any polite request as a requirement, and, if that does not work and especially if the bus is ahead of schedule, why the driver should not be expected to consider whether there was any reason why the bus should not stop for a few minutes with a view to pressurising or shaming the recalcitrant non-wheelchair user to move.

68. Because circumstances can vary so much, and because judges should plainly not impose a policy which is not practicable, I consider that this is as far as any adjustment required by this Court to be made to FirstGroup's PCP could be expected to go (at least in the light of the evidence given at trial, the Recorder's findings and the arguments we have heard). It may well be, as Underhill LJ went on to say, that, at least in many cases, "there is in reality no very deep gulf between a policy so expressed and one, like FirstGroup's, which does not in terms go further than saying that the passenger should be asked to move". However, in my opinion, there will undoubtedly be cases where the sort of "good practice" which he suggested, and which I have attempted to summarise in para 67 above, could be expected to produce positive results whereas FirstGroup's current, more pallid, policy would not do so. When a non-wheelchair user is unreasonably refusing to move from the space, there are vacant places on the bus, (and the bus is ahead of schedule) a more forceful repetition of an initial unsuccessful request in the form of a requirement (coupled with a refusal to drive on for several minutes) may well persuade the unreasonable non-wheelchair user to vacate the space.

69. The very fact that, under FirstGroup's current PCP (set out in para 8 above), drivers were expected to request a non-wheelchair user to vacate a space needed by a wheelchair user, at least if there is a place for the non-wheelchair user to move to on the bus, demonstrates that drivers can be expected to show a degree of initiative - and to see whether or not there are spare places on the bus. I therefore find it hard to see how it could be unreasonable to expect FirstGroup to train its drivers to do a bit more, when appropriate, if and when an initial request is not complied with. I also agree with Lord Toulson that this conclusion is supported by para 12(2) and (3) of the Conduct Regulations (set out in para 18 above), which show that those responsible for those Regulations did not consider it unreasonable to decide whether a non-wheelchair user could "readily and reasonably vacate" a space and "mov[e] to another part of the vehicle". Such a conclusion seems to me to be consistent with what Underhill LJ "hope[d] and expect[ed]" in the first passage quoted in para 36 above, and what Arden LJ considered that FirstGroup should do in the passage quoted in para 37 above.

Conclusion

70. Since preparing the first draft of this judgment, I have had the opportunity of reading in draft the judgments of Lady Hale, Lord Kerr, Lord Clarke, Lord Sumption and Lord Toulson. I agree with what Lord Toulson says in his concise judgment, as to the reasons for allowing this appeal, as to the interpretation of the Recorder's judgment, and as to the advisability of reconsidering the state of the law in this area.

71. I think that Lord Kerr and I have arrived at the same view as to what the driver should be expected to do under a policy which complies with a bus company's

equality duty. In that connection, I would refer to the fourth and fifth sentences of para 129 and para 133 of his judgment and paras 66 and 67 above. However, we disagree about the notice (compare his para 122 with paras 63-64 above). Lady Hale (with whom Lord Clarke also agrees) prefers to limit any decision to saying whether FirstGroup's PCP could have done more - see the end of paras 101 and 108 of her judgment. As to that, I accept that we could decide this appeal without expressing a view as to how much further FirstGroup's PCP should have gone - for instance, without deciding whether a requirement to move would have to be physically enforced. However, that would, in my opinion, be regrettable. Merely to decide that FirstGroup's PCP fails to satisfy the requirements of the 2010 Act would leave bus companies in a state of real uncertainty as to their equality duties in connection with wheelchair users. It is inevitable that any decision we reach will result in some grey areas, but it is one of the principal functions of this Court to clarify the law, and therefore to keep the grey areas as few and as small as possible.

72. As to Lord Sumption's judgment, I agree with him that, at least as a general rule, the law should not normally seek to sanction or otherwise deal with lawful but inconsiderate behaviour, and, similarly, it should not normally enforce basic standards of decency and courtesy. However, we are here concerned with a statute whose purpose is to ensure, within limits, that behaviour is curbed when it results in discrimination under section 29 of the Equality Act 2010. Accordingly, while it is essential that any judicial decision in this area seeks to take into account the realities of life and the interests of others, judges have to do their best to give effect to that purpose, even if it may involve a degree of departure from the general rule.

73. Accordingly, I would allow this appeal to the limited extent explained in paras 66-68 above, albeit on a point which was expressly not pursued in the Court of Appeal.

LORD TOULSON: (with whom Lord Reed agrees)

74. The majority of the Court of Appeal held that the respondent bus company applied a "provision, criterion or practice" ("PCP"), within the meaning of section 20(3) of the Equality Act 2010, that wheelchair users could use the wheelchair space on its buses on a "first come first served" basis, and that this PCP put wheelchair users at a substantial disadvantage compared with able-bodied passengers. There is no appeal against those findings. The issue is whether there were reasonable steps which the bus company could have taken to avoid or ameliorate the disadvantage.

75. With effect from 1 October 2002, regulation 12(2) of the Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Regulations 1990, (SI 1990/1020) as amended by SI 2002/1724, provided that:

> "If there is an unoccupied wheelchair space on the vehicle, a driver and a conductor shall allow a wheelchair user to board if -
>
> > (a) the wheelchair is of a type and size that can be correctly and safely located in that wheelchair space, and
> >
> > (b) in so doing, neither the maximum seating nor standing capacity of the vehicle would be exceeded."

Regulation 12(3) defined a wheelchair space as being occupied if

> "(a) there is a wheelchair user in that space; or
>
> (b) passengers or their effects are in that space and they or their effects cannot readily and reasonably vacate it by moving to another part of the vehicle."

76. It follows from the fact that the obligation under regulation 12(2) was imposed on drivers (and conductors), and from the wording of the regulation, that drivers could have to decide whether a passenger who was using a wheelchair space could readily and reasonably vacate it by moving to another part of the vehicle, and this was obviously not considered to be an unreasonable thing for drivers to be expected to do. It should also be noted that a non-wheelchair user who was using a wheelchair space was not expected to have to vacate the bus, but rather to move to another part of the vehicle if that was readily and reasonably possible.

77. Regulation 12(4) required the driver to ensure before the vehicle was driven that any wheelchair was correctly and safely positioned in a wheelchair space. There is therefore an apparent tension in the regulation, because regulation 12(2) requires the driver to permit a wheelchair user to board if there is an unoccupied wheelchair space, which includes a space physically occupied by a person who could readily and reasonably move elsewhere, but for as long as that person remains in the wheelchair space the vehicle must not be driven. Where the space is taken by someone who could readily and reasonably vacate it by moving to another part of the bus, the driver could properly say to that person that he, the driver, is required by law to allow the wheelchair user to occupy the space and that for this to happen that person must move. But there is a possibility that he may be ignored. I would in such circumstances interpret the obligation under regulation 12(2) as an obligation on the driver to do as much as he practically can to enable a wheelchair user to

occupy the wheelchair space, unless it is already occupied within the meaning of regulation 12(3), but if that task proves impossible he is not required to do more.

78. The Recorder accepted the claimant's argument that the bus company could reasonably have adopted a policy of requiring other passengers to allow the wheelchair space to be used by a wheelchair user, even if it meant requiring the other passenger(s) to get off the bus.

79. It is right that I should explain why I interpret the Recorder's judgment in that way, since there appears to be some difference of opinion among the members of the court on the point. After setting out the various forms of adjustment pleaded in the claimant's particulars of claim, the Recorder said at para 15 that:

> "the most comprehensive adjustment alleged by the claimant was that it should be made clear to other passengers that the wheelchair space is for wheelchair users and that they will be required [underlined] to vacate the space if needed. Once such a practice was put into effect with a proper system of notices, warnings and, if necessary, advertising then the culture will have changed and no non-disabled passenger who wished to occupy the space could be under any illusion that if there was competition for such a space with a wheelchair user, then they would either have to vacate the space by, for example, folding a buggy and sitting elsewhere, or by leaving the bus and taking the next bus available."

80. At para 21 the Recorder said that the practice suggested by the claimant was a reasonable one. I infer that the Recorder had in mind that the suggested practice was intended to apply even if it meant requiring other passengers to get off, because this was part of the claimant's case and the Recorder referred, at para 17, to counsel for the bus company asking rhetorically whether we want a culture in which "a parent with a child is removed from the bus to allow access for a wheelchair user".

81. However, more importantly than debating what precisely the Recorder meant in his full and careful judgment, the case has raised points on which those who are affected need a clear ruling from this Court. They include not only the question whether the bus company should reasonably have adopted a general practice of requiring other passengers to allow the wheelchair space to be occupied by a wheelchair user, but also the question whether that should apply even if it would mean requiring the other passenger(s) to get off the bus. On the latter point, I agree with the Court of Appeal that the Recorder went too far. The risk that a bus may be fully occupied when it arrives at a bus stop is one shared by all travellers. The risk

may be greater for wheelchair users because there is likely to be only one wheelchair space, but if that space is occupied within the meaning of regulation 12(3) of the Conduct Regulations, I do not see that it would be reasonable to require the occupier to leave the bus midway through their journey. By definition we are talking about someone who is already lawfully on the bus and who cannot "readily and reasonably vacate [the wheelchair space] by moving to another part of the bus." Moreover the person may also have protected characteristics, such as having a disability requiring the use of a walking frame or being a child. As Lady Hale has demonstrated, 90% of people with disabilities do not use wheelchairs, and the evidence is that over half of those with disabilities have mobility problems, no doubt of varying severity. Age is another protected characteristic, and there would be obvious objections to a policy which entailed telling a child that he or she was required to get off the bus, even more so if it were at an unfamiliar or unsafe location or after dark or for a lengthy or uncertain period of time. Illustrations of passengers with particularly cogent reasons to object to being told that they were required to leave the bus could readily be multiplied. If the law in this difficult and sensitive area becomes the subject of further Parliamentary consideration (to which I refer at the end of this judgment), there would doubtless be considerable argument about striking a fair balance.

82. The situation is different if the space is occupied by somebody who could readily and reasonably vacate it but refuses to do so. There is a preliminary objection that a bus driver cannot reasonably be expected to judge whether a person could readily and reasonably vacate the space, but I do not regard that as a point of substance. It is easy to make it sound complicated, but realistically it should not be difficult to tell whether there is another part of the bus which the person could readily and reasonably use. The drafter of regulation 12(2) and (3) must have presupposed that this would not be too much for a bus driver or conductor, and the bus company's own policy, set out by Lord Neuberger at para 8, expected the driver to be able to tell if other space on the bus was available for a non-wheelchair user who was occupying the wheelchair area ("If this is occupied with a buggy, standing passengers or otherwise full, and there is space elsewhere on the vehicle, the driver will ask that it is made free for a wheelchair user"). It is a matter of looking.

83. I agree with Lord Neuberger that there are reasonable steps which a bus company could take beyond simply asking the occupant to move. The driver could make it plain that it is a requirement and I do not see that it would be misleading or wrong for him to do so. For one thing, if the place is taken by someone who could readily and reasonably vacate it by moving to another available space, the object of the duty placed on the driver by regulation 12(2) and (3) is to enable the wheelchair user to occupy it and in those circumstances it must be at least open to the bus company to stipulate that the non-wheelchair user who could readily and reasonably vacate it should do so. But in any event I am not aware of a legal principle which prevents a service provider from adopting a requirement just because securing compliance with it will or may depend on moral pressure. Unless the bus is running

late, the driver could also wait at least for a time for the passenger to comply. The policy might not succeed in every case, and in that event the driver might have no practical alternative to refusing to allow the wheelchair user to remain on the bus, but the fact that the policy might not work in every case does not make it valueless. The concept of "reasonable adjustments" under section 29(7) of the Equality Act 2010 is intensely practical. Much human behaviour is governed by expectation and convention rather than legal enforcement.

84. Although this was not the primary case advanced by the claimant on this appeal, it is within it. His lengthy printed case included, for example, the contention (at para 163) that the Court of Appeal was wrong to reject the submission that even a policy of request plus some attempt at further persuasion or pressure would have been better than what happened.

85. In the present case there was no finding of fact by the Recorder whether the lady with the child in a buggy could reasonably and readily have vacated the wheelchair space. Lewison LJ said in his account of the facts that the driver asked her to move and to fold down her pushchair so that the claimant could use the space, but that she said that her pushchair did not fold down and refused to move. There was no appeal against that finding. Because it was not an issue in the appeal, the court heard no argument whether Lewison LJ's account was correct or incorrect, but I note that it was consistent with the claimant's own witness statement. It would not be right in these circumstances for this Court to substitute a contrary finding, and I do not consider that the case merits being remitted to the judge for further consideration. It follows that the award of damages in favour of the claimant cannot be sustained, but, like Lord Neuberger, I would allow the appeal to the extent of holding that the bus company ought to have adopted a policy of training its staff to make clear, in circumstances where a wheelchair user wanted to board the bus but the wheelchair space was occupied by somebody who could reasonably and readily move to another part of the bus, that the person occupying it must do so.

86. For those reasons as well as the reasons given by Lord Neuberger, I agree with his judgment.

87. By way of postscript, the Court of Appeal made critical comments about the present state of the law in this area. The divisions of opinion in this Court may be thought to reinforce the desirability of it receiving fresh legislative consideration.

LORD SUMPTION:

88. If a wheelchair user wishes to occupy the designated wheelchair space on a bus, basic decency and courtesy require the non-wheelchair user occupying it to move, unless he or she has a very good reason not to do so. But the law cannot enforce basic decency and courtesy, save insofar as they correspond to legal standards of behaviour. The difficulty in this case is that the Conduct Regulations deal with the obligations of passengers at paras 5 and 6, without imposing any obligation on them to vacate the wheelchair space when it is required by a wheelchair user. FirstGroup cannot create such an obligation of passengers by the terms of their published wheelchair policy. I agree with Lord Neuberger that in those circumstances it would be wrong to expect the bus company to rephrase the notice at the designated wheelchair space so as to suggest that a non-wheelchair user was required to move. It would simply not be true. The difficulty is that the same objection might be said to apply to Lord Neuberger's view that the driver's polite request having been rejected, he should rephrase it as a requirement. That would not be true either.

89. One solution to the problem might be for FirstGroup to change their conditions of carriage so as to require a non-wheelchair user to move to another part of the bus if there is space, or to get off the bus if there is not. They would then have a contractual right to enforce a requirement by the driver to move. The difficulties about this solution are (i) that it will not in all cases be reasonable to require the non-wheelchair user to vacate the wheelchair space, even if there is space elsewhere on the bus; (ii) it would not in my view be reasonable in any case to require him or her to get off the bus if there is no space elsewhere; and (iii) a change in the conditions of carriage which were subject to a test of reasonableness in each case would simply give rise to argument with the more recalcitrant non-wheelchair users, without being enforceable at the only point of time when enforcement would of be any use to wheelchair users.

90. I see the force of the argument that bus companies can reasonably expect their drivers not just to ask the non-wheelchair user to move but to do their best to persuade him or her to do so unless he has good reason to stay or it is clear that persuasion will be unavailing. The difficulties, as it seems to me, are (i) that if this is to be turned into a legally required policy, it is necessary to specify what, as a minimum, a driver ought to do; and (ii) that any alternative guidance must be in terms which are capable of practical application and reasonably likely to be effective in a bus full of people at the roadside. This is a sensitive area in which the circumstances may be infinitely varied and techniques of persuasion are not susceptible to detailed legal prescription.

91. The ideal solution, if there is one, would be to change the law so as to create an obligation on the part of non-wheelchair users, enforceable in the same way as the rule against anti-social behaviour, to move unless the driver reasonably considers that they have a sufficient reason not to do so. In the absence of such a change, we must recognise that there are limits to what law can achieve in amending lawful but inconsiderate behaviour. Fortunately, the evidence suggests that the present problem rarely arises.

92. For these reasons, I confess that I have misgivings about aspects of the reasoning of Lord Neuberger and Lord Toulson, which would impose on drivers a duty to "require" the non-wheelchair user to move and in some cases to stop the bus "for a few minutes", thereby inconveniencing every other passenger in order to shame the non-wheelchair user into doing something that the law does not require him to do. But this is not a case in which it would be right to dissent. In a situation where there is no ideal solution, but only more or less unsatisfactory ones, I think that the approach of Lord Neuberger and Lord Toulson comes as close to giving effect to the policy of this legislation as a court legitimately can. I therefore agree with their proposed disposition of this difficult appeal. In particular I agree with them that once one rejects, as I fear one must, the more abrasive policy required by the Recorder, there are no findings which could justify an award of damages.

LADY HALE: (dissenting in part)

93. The ability to travel and to get about is important to all of us. Without it we cannot get to work, do the shopping, visit family and friends or places of entertainment, in short be part of the community. Difficulties with transport are one of the two most common barriers to work for people with impairments. Of the 12m disabled people in the United Kingdom, one tenth, that is 1.2m people, are wheelchair users and more than a quarter of these are under the age of 60 (Papworth Trust, *Disability in the United Kingdom 2014, Facts and figures*). It scarcely needs stating that they face particular difficulties in getting about and thus playing as full a part as they can in the life of the community. Without the ability to travel they risk becoming socially isolated and losing confidence in themselves. But their journeys need even greater planning than do those of people who are not wheelchair users: will I be able to get to the bus stop, will I be able to get on the bus, when will the bus go, will I be able to get from the bus to the train station, will I be able to get on the train, when will the train go, will I be able to get to my destination at the other end?

94. Time was when the law did nothing to help. But then along came the Disability Discrimination Act 1995. This not only prohibited direct and indirect discrimination against disabled people; it also imposed duties upon the providers of employment, accommodation, goods and services, in certain circumstances, to make

reasonable adjustments to cater for the needs of disabled people. The object, as has been said time and again, is to "level the playing field", to lower the barriers which prevent disabled people having access to employment, accommodation, goods and services on the same terms as non-disabled people. It is to produce equality of results rather than equality of treatment (see, for example, *MM v Secretary of State for Work and Pensions* [2013] EWCA Civ 1565; [2014] 1 WLR 1716, para 35, citing *Archibald v Fife Council* [2004] UKHL 32; [2004] ICR 954, paras 47, 57, and *Roads v Central Trains Ltd* (2004) 104 Con LR 62, para 30).

95. However, the general duty to make reasonable adjustments, imposed upon the providers of services by section 21 of the 1995 Act, did not apply to "any service so far as it consists of the use of any means of transport" (section 19(5)(b)). Instead, Part V of the Act dealt with public transport and empowered the Secretary of State to make regulations "for the purpose of securing that it is possible for disabled persons - (a) to get on to and off regulated public service vehicles in safety and without unreasonable difficulty (and, in the case of disabled persons in wheelchairs, to do so while remaining in their wheelchairs); and (b) to be carried in such vehicles in safety and in reasonable comfort" (section 40(1); now replaced by the Equality Act 2010, section 174). It was pursuant to that and related powers that the Secretary of State made the Public Service Vehicles Accessibility Regulations 2000, which are still in force. These impose detailed and technical requirements for the provision of access to, and wheelchair spaces and priority seating in, buses and coaches. This was a big advance, making public transport much more accessible than it had been before.

96. The Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Regulations 1990 (SI 1990/1020) were made under powers contained in the Public Passenger Vehicles Act 1981. In 2002, they were strengthened to impose specific duties to allow access by disabled people, and in particular by those accompanied by guide dogs and for wheelchair users. Thus, drivers, inspectors and conductors are prohibited from preventing a disabled person accompanied by an assistance, guide or hearing dog being allowed to board and travel in the vehicle with his dog, subject to there being a suitable space available (regulation 5(7)); likewise, drivers and conductors are required to allow a wheelchair user to board if there is an unoccupied wheelchair space on the vehicle and to ensure that wheelchair users can gain access into and get out of a wheelchair space (regulation 12(2), (4)); a wheelchair space is occupied if (a) there is a wheelchair user in that space; or (b) passengers or their effects are in that space and they or their effects cannot readily and reasonably vacate it by moving to another part of the vehicle (regulation 12(3)).

97. The regulations already imposed upon drivers, inspectors and conductors a duty to take all reasonable steps to ensure that the regulations relating to the conduct of passengers are complied with (regulation 5(2)); and prohibited passengers, among many other things, from putting at risk or unreasonably impeding or causing

discomfort to any person travelling on or entering or leaving the vehicle (regulation 6(1)(b)). Any passenger who is reasonably suspected of contravening any of the regulations is required to give his name and address to the driver, inspector or conductor on demand (regulation 8(1)); and any passenger who actually contravenes the regulations may be removed from the vehicle by the driver, inspector or conductor, or, at their request, by a police constable (regulation 8(2)). Contravention of the regulations, whether by drivers, inspectors or conductors or by passengers, is a summary offence punishable by a fine, but it is a defence to prove a reasonable excuse for the act or omission in question (1981 Act, sections 24(2), 25(3) and 68(1)).

98. Parliament must have considered that the 2000 and amended 1990 Regulations were not sufficient to enable disabled passengers to enjoy the same access to public transport as is enjoyed by non-disabled passengers, because Parliament next passed the Disability Discrimination Act 2005. Section 5 of that Act added a new section 21ZA to the Disability Discrimination Act 1995, providing for the application of sections 19 to 21 of that Act in modified form to providers of transport services. Where such a provider had a policy, practice or procedure which made it impossible or unreasonably difficult for disabled persons to make use of a service which he provided to other members of the public, it was his duty "to take such steps as is reasonable in all the circumstances of the case for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect".

99. The duty of service providers to make reasonable adjustments to cater for the needs of disabled people is now contained in the Equality Act 2010. The duty is imposed by paragraph 2(1) of Schedule 2, which requires the provider to comply with the first, second and third requirements in section 20, as modified by paragraph 2. Relevant in this case is the first (in section 20(3)):

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

Failure to comply with this (or the other two requirements) is a failure to comply with a duty to make reasonable adjustments (section 21(1)); and A discriminates against a disabled person if A fails to comply with that duty in relation to that person (section 21(2)). As has been pointed out, this is a prospective duty, owed to disabled persons generally, to take proactive steps to meet their needs, and if an individual suffers as a result, then it is discrimination against him.

100. Three general points can be made about the legislative framework which is now in place. The first is that mere compliance with the earlier regulations, both as to the provision of the wheelchair space and affording access to it, is not necessarily enough. Parliament must have contemplated, in passing the 2005 Act, that other adjustments to "business as usual" might be needed in order to reduce the difficulties faced by disabled people in using public transport services. The second is that, as the Recorder pointed out, "there is an enormous difference between imposing a criminal sanction upon a driver and the obligation upon a service provider not to discriminate by a failure to take reasonable steps to adjust a present policy which is having the effect of substantially disadvantaging a disabled person" (para 18). The third, and most obvious, is that service providers owe positive duties towards disabled people, including wheelchair users, which they do not owe to other members of the travelling public, including parents travelling with small children in baby buggies or other people travelling with bulky luggage. The Court of Appeal, in my view, fell into the trap of assuming that the claims of disabled travellers were no different from the claims of any other person wishing to use the buses. They are not. Disabled people are, for very good reasons, a special case.

101. It is now not in dispute that the respondent had a provision, criterion or practice which put wheelchair users at a substantial disadvantage when compared with non-disabled passengers. This was their policy of making the wheelchair space provided on their buses available on a "first come, first served" basis and doing no more than request occupants to vacate the space if it was required by a wheelchair-using passenger. At the time of the incident in question, the policy was that wheelchair users had no priority over buggies and this infected both the content of the notices and the approach to enforcement. The issue agreed between the parties for the purpose of this appeal is a simple one: "Was the Recorder correct in concluding that FirstGroup was in breach of the 2010 Act?"

102. The Recorder concluded that FirstGroup could reasonably be expected to adjust its policy. It should have been made clear to passengers, and to their drivers, that wheelchair users had priority over anyone else in the occupation of the wheelchair space and that other passengers would be required, not merely requested, to move out of it if a wheelchair user needed it. With a proper system of notices, making the position plain, backed up with firm statements from the driver, everyone would know where they stood. The culture would change. Disruption and confrontation would be unlikely.

103. It is obviously reasonable to expect bus operators to do more than FirstGroup did in this case. One only has to travel on a London bus to find a different policy in operation. The notice carried on London buses has two boxes side by side. The left hand one is headed "Buggy users" and below this "Please make space for wheelchair users". Below this there is another heading: "Priority wheelchair area" and below this, "This space is reserved for a wheelchair when needed". It goes on to explain

how the wheelchair must be placed and ends "Please give up this space for a wheelchair". Alongside this is another panel, headed "Baby buggies". This reads "Buggies can use this area if it is not needed by a wheelchair user. Please move out of the wheelchair priority area if necessary. Buggies may need to be folded at busy times." This may not go quite as far as the Recorder contemplated, but it is clear, polite and firm and a great improvement on the "Please give up this space for a wheelchair" sign adopted by the respondent.

104. Three sorts of objection have been raised to the Recorder's conclusion. One is that "management had undertaken a review of the way in which the company communicated with its passengers. They had been told that they were being too directive so the approach was changed to one which was more 'customer friendly'. The sign was intended to be non-confrontational" (para 7 of the Recorder's judgment). But that was merely the explanation given by the company for the current sign. The evidence of Mr Birtwhistle, for the company, was that "there was no reason why the signs which were in the form of a request could not be worded differently so as to make it clear to all passengers that wheelchair users not only had such priority but that that such priority would be enforced" (para 19 of the Recorder's judgment). So he clearly did not consider the non-confrontational practice to be an objection. In any event, it is usually possible to be polite as well as clear and firm. And if clarity and firmness cannot be achieved without a more peremptory tone, then it is reasonable to expect a more peremptory tone. The point has to be got across that other people are required to vacate the wheelchair space if it is needed by a wheelchair user.

105. The second sort of objection is that there will be some circumstances in which it is not reasonable to expect an existing occupier to vacate the wheelchair space. This is so, although it is important to bear in mind that non-disabled people are not entitled to be treated in the same way as disabled people. There is no duty to make reasonable adjustments for them. There may be circumstances in which that duty, coming as it does after the Conduct Regulations, could go beyond what is required by regulation 12(2) and (3). However, the adjustments to be expected for disabled people must be reasonable ones, and there will obviously be circumstances in which it is not reasonable to expect the space to be vacated. There is nothing in the Recorder's judgment to suggest that he was expecting an absolute rule of the sort that would brook no exceptions. This may well be because this sort of objection was not raised before him, although it featured heavily in the Court of Appeal. As already mentioned, the Recorder drew a clear distinction between the criminal liability of drivers under the Regulations and the provider's duty to make reasonable adjustments.

106. The third sort of objection rests on the fact that the service provider is being expected to make adjustments which will bring about change in *other people's* behaviour. Hence a great deal of argument was directed towards how a priority

policy might be enforced against recalcitrant passengers. In my view this is something of a red herring. Most people do what they are told to do if they are told sufficiently clearly what it is that they are required to do. The possibility that some people will be disobedient should not deter the bus company from making it clear what the rules are and doing its best to persuade people to obey. There are many steps short of physically removing the person from the bus which can be taken, including delaying the departure of the bus until the rule is obeyed (which I have observed being highly effective against rowdy behaviour on an underground train). I do not read the Recorder's references to enforcement as necessarily involving forcible ejection from the space or the bus.

107. In any event, it is highly arguable that to refuse, without a reasonable excuse, to move from a wheelchair space required by a wheelchair user is to "unreasonably impede … any person travelling on or entering or leaving the vehicle" within the meaning of regulation 6(1)(b). It is also difficult to see why the Recorder was wrong to say that the company could make the requirement to leave the space a term of its conditions of carriage, in breach of which a passenger could be required to leave the bus. This is no more unreasonable than requiring passengers to refrain from eating messy or smelly foods or drinking alcohol. Drivers are frequently required to make judgments of this kind and do their best to enforce them. These points do not have to be decided for the purpose of deciding this case, but I agree with what Lord Kerr says about them in paras 123 to 128 of his judgment.

108. This case is about whether there were adjustments which the company could have made which would have enabled Mr Paulley to board this bus. There clearly were. Furthermore, in the Recorder's judgment "there is little doubt that had the practice suggested by the claimant been in force on 24 February 2012 then Mr Paulley would have been able to travel rather than having to leave the bus and wait until the next bus was due to leave the Wetherby bus station" (para 21).

109. In my view, therefore, the answer to the single issue agreed between the parties (para 101 above) is "yes": the Recorder was correct to conclude that FirstGroup was in breach of the 2010 Act. That being so, I have difficulty in understanding how it can possibly be just to deprive Mr Paulley of the damages which the Recorder awarded him. A variety of adjustments were canvassed before the Recorder and I agree with Lord Kerr (para 133) that his judgment did not partake of the absolute quality which the Court of Appeal thought that it did. Even if it did, it should have been open to Mr Paulley to argue that lesser adjustments were appropriate. He did not need to put in a respondent's notice in order to do so. And the sole issue for this Court is not whether the Recorder was correct in every particular, although I am inclined to think that he was, but whether he was correct to find that FirstGroup was in breach. The view of this Court is that FirstGroup was in breach.

110. In agreement with Lord Kerr, therefore, I would allow the appeal and restore the order which the Recorder made.

LORD KERR: (dissenting in part)

111. It is now not in dispute that FirstGroup, in making wheelchair spaces on their buses available on a first come first served basis, applied a provision, criterion or practice ("PCP") which placed wheelchair users at a substantial disadvantage. This appeal therefore centres on the question of what reasonable adjustments were required to modify the PCP. The Recorder considered that two types of adjustment to deal with the deficiencies in the PCP were entirely feasible. First, the notice on the respondent's buses could be changed to make it clear that a non-disabled passenger was obliged to move from a wheelchair space if it was needed by a wheelchair user. Secondly, passengers who failed to vacate the space when asked to do so, could be asked to leave the bus. The Court of Appeal considered that these went further than was reasonable. Lord Neuberger and Lord Toulson agree. Unlike the Court of Appeal, however, they consider that adjustments which can properly be described as reasonable could be made to the respondent's PCP. These adjustments are quite different from those deemed by the Recorder to be reasonable.

112. The reasons that the Court of Appeal considered that the adjustments proposed by the Recorder went beyond what was reasonable have been set out by Lord Neuberger in paras 34 to 39. In short summary, these are: (a) that it would be objectionable to require people to vacate the space whose refusal to do so was reasonable; (b) that it was impracticable to expect the driver to decide whether a passenger was being unreasonable in refusing to move; (c) that it was not feasible to expect a driver to remove such a person or wait for police to arrive and, in any event, police could not enforce the adjusted policy because someone who refused a direction to move would not have committed a criminal offence; and (d) that a more prescriptive notice on the bus was not realistic in light of research which suggested that better results would be achieved by a "more customer-friendly" message.

113. Lord Neuberger takes the view that what he describes as "an absolute rule" of requiring a non-wheelchair user to vacate the wheelchair space and, in the event of non-compliance, ejecting the passenger from the space must be rejected (paras 40 and 41). He accepts that establishing an absolute rule is not necessarily inconsistent with a wheelchair user's rights under the Equality Act 2010 (para 41). But he concludes that the enforcement of an absolute rule would not be reasonable in all conceivable circumstances. So, for instance, a person who was disabled but who did not require the use of a wheelchair might reasonably refuse to move from the wheelchair space. Likewise, a person who felt safe only in that space and who might otherwise be vulnerable could not reasonably be required to leave it.

114. In paras 43-46 Lord Neuberger has examined the possible difficulties in enforcing even a qualified rule. He expresses doubt as to the fairness of requiring a bus driver to assess whether an objection to vacate the wheelchair space is reasonable. Whatever of that, however, Lord Neuberger considers that the clinching argument is that enforcement of a rule that required a passenger to vacate the wheelchair space on the basis of an absolute or a qualified rule would involve unacceptable confrontation and, on that account, could not be regarded as a reasonable adjustment to the PCP.

115. What has been described as "an alternative case" that might be made on behalf of the appellant (and which was, apparently, advanced before the Recorder) is discussed by Lord Neuberger in paras 49-51. This involved the consideration of "a number of potential reasonable adjustments". They included a more peremptory notice on the buses; the driver insisting that a pushchair be folded so as to accommodate the wheelchair; and the driver refusing to continue the journey until the space was vacated. Lord Neuberger has taken the view that consideration of these alternative formulations was beset by two procedural problems. The first was that the Court of Appeal had proceeded on the basis that the appellant's case was confined to the "absolute" argument *viz* that a non-wheelchair user should be required to vacate the wheelchair space and, in the event of non-compliance, they should be ejected from the bus. The second procedural difficulty identified by Lord Neuberger was the absence of any finding by the Recorder that, if one of these modified adjustments had been made, there was a real prospect that it would have made a difference.

116. Notwithstanding these "procedural problems", Lord Neuberger considers that it is open to this Court to decide whether the alternative case should succeed but, in the event that it does, the appellant should not be awarded damages. He has concluded that it was not enough for the respondent to instruct its drivers to request non-wheelchair users to vacate the space and do nothing further if that request was not acted upon (para 59). Various courses of action that a driver might take are adumbrated by Lord Neuberger at para 60.

Reasonable adjustments

117. What is a reasonable adjustment must be determined according to the context in which the assessment is made. Here the context is the elimination of discrimination against disabled people. That will require, in appropriate circumstances, able-bodied people to accept restrictions that they may find irksome or inconvenient. It will demand of those who police or enforce the adjustments that they be ready to make difficult decisions and that they be prepared to confront and require of those who may not wish to, to suppress selfish inclinations. Moreover, difficulty in enforcement of those restrictions does not automatically determine that

they are unreasonable. There is a distinct exhortatory dimension to be recognised in deciding whether an adjustment to assist a disabled person to overcome the disadvantage that she or he has in comparison to an able-bodied person is reasonable.

A more peremptory notice?

118. On the first issue, *viz* whether the notice in the bus should have been in more peremptory terms, Lewison LJ in the Court of Appeal said that the Recorder had accepted evidence that the respondent's "research" had shown that the company "achieved better results with more customer-friendly signage and that negative prescriptive signage produced a worse outcome" but that he had failed to reflect this in his assessment of what he considered should be the adjustment to the PCP.

119. What the Recorder said about this evidence is to be found at para 7 of his judgment:

> "The sign on the bus relating to the wheelchair space is couched in terms which are entirely consistent with the 'first come first served' policy. … Mr Birtwhistle [the project director of FirstGroup] agreed that it was merely a request to those passengers, other than wheelchair users, who might be using/occupying the wheelchair space to 'give up' the wheelchair space 'if needed for a wheelchair user'. Mr Birtwhistle explained that the reason for the signs being by way of request rather than requirement was that the management had undertaken a review of the way in which the company communicated with its passengers. They had been told that they were being too directive so the approach was changed to one which was more 'customer friendly'. The sign was intended to be non-confrontational."

120. Leaving aside the question whether any distinction should be drawn between Lewison LJ's description of this work as "research" rather than "review" (as the judge described it) a real issue arises as to whether a more customer friendly notice has anything to do with a reasonable adjustment under section 29(7) of the 2010 Act. It may well be the case that customer relations might be improved if a less confrontational sign was erected but this is not a case about fostering good customer relations, at least not unless the better relations would assist in eliminating the discrimination that wheelchair users suffer in using the respondent's buses. Lewison LJ said that negative prescriptive signage would produce a "worse outcome" but it is not clear on what basis this was anticipated. Is it suggested that non-disabled

customers were less likely to comply with a requirement to vacate the wheelchair space than they would to a request to do so? Such a conclusion is certainly not warranted by the Recorder's account of Mr Birtwhistle's evidence on the subject.

121. A person is surely more likely to vacate a space if he or she is aware that they will be *required* to do so rather than if they are merely going to be *asked* to move. Customers may baulk at direct instructions but they cannot claim that they are entitled to exercise a choice in the matter. A bus company which alerts its passengers that they will have to abide by certain rules if they wish to travel removes the element of choice or the occasion for discussion. This may not be conducive to the best customer relations but it makes it clear that certain rules must be obeyed if the customer is to avail of the company's services. A reasonable adjustment geared to removing discrimination against wheelchair users cannot be discounted simply because a less rigorous policy might promote good customer relations.

122. The question whether a notice which instructs rather than requests passengers to vacate a wheelchair space when it is required by a wheelchair user must be viewed solely in terms of whether this is a reasonable adjustment to make in order to avoid the discrimination that the wheelchair user would otherwise suffer. Viewed in that way, the answer is plain. It is an entirely reasonable adjustment. It removes the element of choice on the part of the passenger occupying the space. They know, and, importantly, know in advance, that they will have to move. Some passengers may not like it but that is not the point. Such a notice, as well as eliminating any scope for debate, constitutes a significant statement which accords precisely with the Government's policy of providing comprehensive and enforceable civil rights for disabled people and achieving a fully accessible public transport system for them - see para 19 of Lord Neuberger's judgment.

Refusing to move unlawful?

123. The Court of Appeal appears to have been influenced to its decision by the consideration that, under the Conduct Regulations (Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Regulations 1990 (SI 1990/1020)), it would not be unlawful for a passenger to refuse to obey an instruction to vacate a wheelchair space. I consider that, although passengers are not expressly required to obey every instruction from the driver, a refusal to leave a wheelchair space when instructed to do so in order that it be made available for a wheelchair user would be unlawful.

124. Regulation 12(2) requires the driver to allow a wheelchair user to board the bus if the wheelchair space is unoccupied. Regulation 12(3) provides that the space is deemed to be unoccupied if a passenger, who is not a wheelchair user, occupying

the space can "readily and reasonably vacate it by moving to another part of the vehicle". In order to comply with his duty under regulation 12(2), the driver will have to make a judgment as to whether a non-wheelchair using passenger occupying the wheelchair space can "readily and reasonably" move, if that person refuses to move.

125. The first step for a driver in deciding whether to permit a wheelchair user to board the bus is to ascertain if the wheelchair space is unoccupied. Because of the deeming provision in regulation 12(3) it is not enough for the driver to discover whether there is someone in that space. He must go further. He has to decide if the person occupying the space can "readily and reasonably" move from it. If he so concludes, his duty under regulation 12(2) is activated. How, then, is he to comply with that duty if he does not at least direct the passenger deemed to be able to move to do so?

126. Quite apart from the effect of regulation 12, a passenger who is "readily and reasonably" able to move from a wheelchair space commits an offence under regulation 6(1)(b) if his refusal prevents a wheelchair user from being allowed to board the bus. This regulation prohibits any passenger from unreasonably impeding another passenger from entering a bus.

127. The Court of Appeal was concerned that enforcing regulation 6(1)(b) would require the driver to assess whether the person occupying the wheelchair space was acting unreasonably in refusing to vacate it. But I question whether this is a matter for significant apprehension. Under regulations 6 and 8 a bus driver can be called on to assess whether a passenger is causing discomfort to other passengers, or is causing a nuisance or is in a condition that would be likely to cause offence to a reasonable passenger. All of these are grounds for removal of passengers from buses and the judgment as to whether the conditions justifying such removal must be made, in the first instance at least, by the bus driver.

128. Even if it were the case that to refuse to obey an instruction to move did not amount to a criminal offence, this would not provide the inevitable answer to the question whether it is a reasonable adjustment to a PCP that drivers be required to instruct passengers to do so. As the Recorder observed, this could be made expressly clear by an adjustment to the conditions of carriage. And since it would not involve the driver making assessments which are markedly different from those which he is already required to undertake by virtue of regulations 6 and 8, it cannot be suggested that such an adjustment was other than reasonable.

129. Lewison LJ suggested that it would not be practical for a bus company to sue every passenger who refused to vacate a wheelchair space. I, of course, agree. Nor

would it be appropriate for a driver to attempt to manhandle a recalcitrant passenger off the bus - see para 50 of Lewison LJ's judgment. But these considerations do not detract from the reasonableness of an adjustment to the PCP whereby the driver is at least entitled to say to a passenger, "you have to move". If the passenger persists in refusal, the driver may decide not to proceed with the journey. This would of course inconvenience other passengers and it might well lead to unpleasantness but these are not reasons to condemn as unreasonable a change to the PCP which gives drivers the responsibility of pointing out to a passenger obstinately refusing to move that it is the policy of the bus company (and, when the adjustment to them had been made, one of the conditions of carriage) that they must vacate the wheelchair space.

130. Lord Neuberger has stated (in para 46) that what he described as the "absolute" rule required not only that the passenger be instructed to move but, if he refused, that he be ejected. I do not read the Recorder's judgment as requiring that the reasonable adjustment must incorporate the need to eject a passenger refusing to move. In para 13 of his judgment he outlined the various adjustments which the appellant had initially put forward as reasonable modifications that could be made to the company's PCP. None of these suggested that passengers who refused to move would have to be ejected. To the contrary, one suggestion was that the driver should try to persuade the passenger to move; another was that the driver should refuse to continue the journey until the passenger moved from the wheelchair space. These are not consistent with a proposal that the driver be required to eject him. At para 15 the Recorder said that it had become apparent during the hearing that the "real adjustment" which the appellant sought was "a clear practice/policy which not only paid lip service to the giving of priority to the wheelchair user but actually enforced such priority". It has been assumed that the Recorder intended that enforcement in this context connoted ejection but I do not consider that this is correct. What he actually said was:

> "… the most comprehensive adjustment alleged by the claimant was that it should be made clear to other passengers that the wheelchair space is for wheelchair users and that they will be <u>required</u> to vacate the space if needed. Once such a practice was put into effect with a proper system of notices, warnings and, if necessary, advertising then the culture will have changed and no non-disabled passenger who wished to occupy the space could be under any illusion that if there was a competition for such a space with a wheelchair user, then they would either have to vacate the space by, for example, folding a buggy and sitting elsewhere, or by leaving the bus and taking the next bus available. The extent to which the adoption of such a policy would also require an insistence that pushchairs be folded or that passengers should be asked to fold their buggies before boarding the bus or that drivers should be trained to

> enable them to better persuade passengers to move from the wheelchair area would be a matter of degree. The most effective adjustment, which would remove the disadvantage occasioned by the competition for the wheelchair space, would require a change in the first come, first served/request approach." (original emphasis)

131. I do not construe the Recorder's statement that the able-bodied passenger should be under no illusion that he or she would have to sit elsewhere or leave the bus as endorsing a policy of forcible ejection in the face of refusal to move. Ensuring that a passenger was under no illusion as to what was expected of him or her is quite a different matter from physically removing them from the bus against their will if they failed to meet that expectation. Nor do I understand him to have suggested that passengers should in every case be required to vacate the wheelchair space, regardless of whether they were able to do so reasonably. The Recorder articulated a reasonable adjustment designed to cover, among other circumstances, the case of a passenger who occupied a space with what she claimed was a buggy that would not fold. It was never suggested that there was nowhere else on the bus for the passenger to sit. The problem was, if her claim was true, where the buggy should be placed. The necessary inference from the Recorder's judgment was that, if the passenger was unable to fold the buggy and to store it somewhere away from the wheelchair space, it was reasonable to expect her to be asked to leave the bus in order that Mr Paulley could be allowed to board. This, I suggest, is clear from para 15 of the Recorder's judgment where he said that, "if there was competition for such a space with a wheelchair user, then they would either have to vacate the space by, <u>for example,</u> folding a buggy and sitting elsewhere, or <u>by leaving the bus</u> and taking the next bus available."

132. That does no more than affirm the principle that the wheelchair space is to be regarded as an area in which priority be given to wheelchair users. It is entirely consonant with the overall intention and legislative purpose of the Equality Act 2010 and the Accessibility Regulations.

Difficulty in enforcement

133. If the reasonable adjustments required to the PCP are that (i) the notice in the respondent's bus should stipulate that the wheelchair space must be vacated when a wheelchair user wishes to use it; and (ii) that the driver be required to tell a non-disabled passenger occupying the space that he must yield it to the wheelchair user (rather than that he be required to eject the passenger), many of the perceived difficulties in implementing the policy fall away. The notice would give emphasis to the policy of the company that it is expected that able-bodied passengers must yield the space to a wheelchair user. There is no reason to suppose that drivers

making that policy explicitly clear would not help to persuade reluctant passengers that it is pointless to refuse. There is every difference between a passenger who says "well, your policy allows me to refuse a request and I am refusing" and the passenger who says, "well, I know that your policy requires me to move but I am not moving." Even without coercive back-up, there is every reason to conclude that the number of passengers prepared to take the latter stance would be significantly smaller than in the former.

134. In any event, as I have said, difficulty in implementation should not be the lone yardstick against which its reasonableness should be measured. The reasonableness of the adjustments is to be judged by the contribution which they make to redressing the imbalance between wheelchair users and able bodied members of the public in the opportunity they have to use public transport. Of course, if it is utterly impossible to enforce an adjustment and if it is likely to be wholly ignored, it may be said that it is not reasonable to introduce it. But there is no warrant for reaching such a conclusion in the present case. The adjustment to the PCP would, at the very least, make an important statement about the company's commitment to ensuring equal treatment for its wheelchair bound customers. And, for the reasons that I have given, I consider that it would also bring about an attitudinal change on the part of those passengers who might be inclined to refuse a request to move.

135. Without supporting evidence, I am not prepared to accept that a stipulation that a passenger was required to move would lead to confrontation or delay. When members of the public congregate to use a generally available facility, there is always the possibility that there may be disagreement about who is entitled to what but is there any greater likelihood of discord and confrontation because a rule is clear, as opposed to one which allows the passenger to decide whether to accede to a request? I would certainly not take that as a given. And, of course, there are situations that arise under the Conduct Regulations that *do* require drivers to give instructions. It was not suggested that these gave rise to widespread problems of confrontation or delay. Even if an instruction, as opposed to a request, prompted delay, such as where a driver might refuse to continue the journey until the refusing passenger yielded, that would not be a basis on which the adjustment could be condemned as unreasonable. Wheelchair users face formidable difficulties in making use of facilities that the able-bodied can take for granted. If inconvenience to the travelling public because of delay is the price which has to be paid to allow those who depend on a wheelchair to make maximum use of the transport system which is made available to all, I do not consider that this is, in any sense, unreasonable.

Inflexible application of the adjusted policy

136. It is important to remember that what is sought is a *reasonable* adjustment to the PCP. It is not demanded that there be a wholly unyielding application of it in every conceivable circumstance. Even before the Court of Appeal, the appellant accepted that there would be circumstances in which it would not be appropriate to apply the adjusted policy in its full rigour. But, just because there should be a measure of discretion as to when the adjusted policy should be applied, it does not follow that there should not be an adjustment. The inevitable fact that there will be occasions when it would not be appropriate to require a passenger to leave a wheelchair space does not require that the correct policy should not be in place.

137. Of course, the decision when to enforce the adjusted policy rigidly and when to relax or modify it calls for judgment to be exercised by the bus driver. But there is no reason to suppose that this will require exceptional powers of discretion. It is in the nature of a bus driver's work that he or she will need to make decisions about how passengers should be handled or responded to in all manner of circumstances. The fact that there will be circumstances in which a reasonable decision may be made not to enforce a policy strictly does not mean that the policy should not exist. Nothing in the Recorder's judgment suggests that he considered that the adjusted policy would have to be enforced in an unbending fashion, whatever circumstances were encountered.

138. I am afraid that I am unable to agree, therefore, with Lord Neuberger's statement in para 55 that there is no basis on which to conclude that there would have been a real prospect that an adjustment to the respondent's PCP "would have resulted in Mr Paulley not being placed in the disadvantage that he was". On my analysis, the Recorder had, at least implicitly, accepted that drivers would not be required to eject passengers who refused to move and he had not ruled out the possibility of drivers deciding that, in exceptional circumstances, the policy should not be strictly enforced. The essential finding that he made was that what he described as "the first come first served/request policy" required adjustment. It is an inescapable inference from that conclusion that, if the adjustment had been made, there was at least a real prospect that Mr Paulley would not have been prevented from travelling on the bus. That seems to me to be an inescapable inference in any event. If the young woman who refused to move had been told that she had to move and that the bus company's policy was that she must do so, how could it be said that there was not a real prospect that she would have moved?

Was it open to the appellant to advance a "qualified" rule in the Court of Appeal?

139. For the reasons that I have given, I do not believe that the Recorder's findings partook of the absolute quality which the Court of Appeal considered that they did. He had not suggested that ejection of the refusing passenger from the bus was an indispensable ingredient of the required adjustment to the PCP. Even if he had done, however, I do not consider that the appellant should have been deprived of the opportunity of arguing that a less rigorous adjustment was appropriate. The essential case made by the appellant was that reasonable adjustments to the policy were required in order to overcome the disparity of treatment between him and able-bodied passengers. The case that he had to make was that the policy was deficient and that reasonable adjustments could have cured, or at least ameliorated, that position. He was not required to adopt unshakeably one particular form of reasonable adjustment to the exclusion of all others. That is, no doubt, the reason that a whole series of possible adjustments was adumbrated on his behalf before the Recorder, as detailed by him in para 13 of his judgment.

140. Even if it were the case that the Recorder had lighted on one particular form of adjustment, it surely does not follow that the appellant was fixed with that as the only possible avenue through which to advance his argument. I do not consider that a respondent's notice was required in order to allow the appellant to pursue a different line from that espoused by a lower court. A respondent's notice is needed where a finding made by a lower court is challenged or where a particular line of argument advanced by the respondent below had been rejected. Neither situation obtained here.

Conclusion

141. I would allow the appeal and restore the order which the Recorder made.

LORD CLARKE: (dissenting in part)

142. I initially thought that the resolution of this appeal depended upon the application of regulation 12 of the Conduct Regulations ('the Regulations') referred to by Lady Hale in para 96 of her judgment. It seemed to me that, so far as relevant to this appeal, the critical provisions were contained in regulation 12. In particular, regulation 12(2) provides for the use of an "unoccupied wheelchair space". Regulation 12(3) defines a wheelchair space as being occupied if:

> "(a) there is a wheelchair user in that space; or

(b) passengers or their effects are in that space and they or their effects cannot readily and reasonably vacate it by moving to another part of the vehicle."

Regulation 12(2) provides:

> "If there is an unoccupied wheelchair space on the vehicle, a driver and conductor shall allow a wheelchair user to board if
>
> > (a) the wheelchair is of a type and size that can be correctly and safely located in that wheelchair space, and
> >
> > (b) in so doing, neither the maximum seating nor standing capacity of the vehicle would be exceeded."

143. The express meaning of those provisions is that a wheelchair user must be permitted to board and use the space, provided that there is no wheelchair user already in the space or, if another passenger or passengers is or are in the space, he or they must be unable "readily and reasonably to vacate it by moving to another part of the vehicle". It follows that the Regulations do not themselves contemplate that such a person or persons would be asked or required to get off the bus. The Regulations thus balance the interests of wheelchair users and other passengers in a specific way. Since that balance does not contemplate that a person using the space would be asked or required to get off the bus altogether, I did not think that FirstGroup could have been in breach of any duty to Mr Paulley under regulation 12 to direct that the lady with the buggy leave the bus.

144. In so far as the Recorder concluded that FirstGroup owed Mr Paulley a duty to make adjustments to what is called a provision, criterion or practice (or "PCP") under which he would have priority as a wheelchair user and that, in appropriate circumstances, another person using the wheelchair place who was not using a wheelchair would be required to leave the bus, I thought that his case was not established under regulation 12. Assuming that those were the only relevant regulations governing the duty of the defendant ("the company") in a case of this kind it seemed to me that the only way in which it could be said that it was in breach of duty to the claimant would be as follows. First, the company should have ensured that its drivers considered whether, in circumstances like these, a person with a child and a buggy could (in the words of regulation 12(3)) readily and reasonably vacate the space by moving to another part of the bus. For my part, I do not think that it was sufficient for the driver (or the lady concerned) to refuse to wake the child up

if, as appears to have been the case on the facts, he or she was asleep. Moreover, it was not, in my judgment, sufficient for the driver to do no more than ask the lady to move out of the wheelchair space.

145. In para 5 of his judgment the Recorder set out the company's policy, both at the time of the incident and at the time of the trial. The first was in these terms:

> "Wheelchairs do not have priority over buggies, but to ensure that all our customers are treated fairly and with consideration, other customers are asked to move to another part of the bus to allow you to board. Unfortunately, if a fellow passenger refuses to move you will need to wait for the next bus."

That was on the website but was changed because "the wheelchair policy on the website did not reflect the policy" adopted by the company. It was replaced by this.

> "Wheelchair users have priority use of the wheelchair space. If this is occupied with a buggy, standing passengers or otherwise full, and there is space elsewhere on the vehicle, the driver will ask that it is made free for a wheelchair user. Please note that the driver has no power to compel passengers to move in this way and is reliant on the goodwill of the passengers concerned. Unfortunately, if a fellow passenger refuses to move you will need to wait for the next bus."

146. It is not now in dispute that neither of those terms is a satisfactory PCP. The question is whether the bus company made reasonable adjustments to the PCP. The reason that it is not now contested that those adjustments are not reasonable is that both leave the decision whether to vacate the space and to move to another part of the bus entirely to the person using the wheelchair space. Under them, if that person refuses to move, that is the end of it. For the reasons given by Lady Hale and Lord Kerr and (I think) by Lord Neuberger, Lord Toulson and Lord Reed, I agree that the failure to make further adjustments to the PCP was contrary to the law as it stood when the Regulations were introduced.

147. For these reasons, I would hold that the company was in breach of duty owed to Mr Paulley in failing to take more steps than it did in response to his request to use the wheelchair space in his wheelchair. In short, I agree with Lord Toulson and Lord Neuberger that it should have gone further than it did. See, in particular para 83 of Lord Toulson's judgment, with which I agree. I further agree with him, and

indeed with Lord Neuberger, that the appeal should be allowed, at least to the extent that they propose. I also agree in this regard with Lady Hale and Lord Kerr.

148. The question then arises, or would arise, whether there is any basis upon which the order for damages should be sustained. It is accepted by both Lord Neuberger and Lord Toulson that this alternative case was advanced by the claimant at first instance. I agree that the claimant should be permitted to take the point, since (whatever may have been said in the Court of Appeal), all parties were in a position to argue the point before this Court. The next question is whether, if the bus driver had taken further steps to put pressure upon the lady with the buggy, there was a sufficient prospect that she would have moved from her place to another part of the bus sufficient to satisfy the relevant test of causation.

149. Lord Kerr concludes that, if the policy had been more authoritative, and the lady had been told that she had to move and that the company's policy was that she must do so, there was at least a real prospect that she would have moved. I agree. It seems to me to be a reasonable inference from the facts that it was practicable for her to move to another part of the bus. It was not the evidence of the driver that there was nowhere else she could go. His requests were consistent only with the conclusion that it was both reasonable and practicable for her to move elsewhere on the bus. There is no evidence that she was faced with only two alternatives, namely staying where she was in the wheelchair space or leaving the bus. In these circumstances I agree with Lord Kerr that there is at least a real possibility that, if the position had been explained to her in clear terms, she would have moved elsewhere on the bus, even though it would have involved waking the child. I would go further. It seems to me that, if the problems and the policy had been put clearly to her, it is more likely than not that she would have agreed to do so.

150. The question then arises whether, if the driver had told the lady that she must move and if, as I think, it is more likely than not that she would have done so, it is clear that there was somewhere else in the bus she could (and would) have gone to. It is common ground that the driver asked the lady if she would move elsewhere in the bus in order to accommodate the wheelchair. It is I think clear that there was somewhere else for her to go on the bus. The further question then arises whether the buggy would have been able to be folded up. Again, it seems to me to be more likely than not that the buggy was foldable. First, although there may be some exceptions, buggies are ordinarily foldable. Secondly, the driver's evidence (in his statement) was that he asked the lady if she would fold her buggy up so that Mr Paulley could travel on the bus. In his statement he added at paras 45 and 46:

> "45 The lady pointed out to me that her child was fast asleep within the buggy and that she had no intentions of waking the child or removing the child from the buggy.

> 46. It was clear to both me and Mr Paulley that the lady was refusing to assist."

The driver did not say that the lady told him that it was not possible to fold up the buggy.

151. When he was asked whether there was anywhere else for the buggy and child to go if they moved out of the space, the driver said no. However, he was then asked whether there was any alternative to asking the person with the buggy to get off the bus. He said that the alternative was to fold down the buggy if possible, "if the buggy would fold down". It is true that he was then asked "And they had refused to do that?" and he replied yes. There is however no evidence that he heard the lady say that. As I see it, he inferred that from the reply recorded in his statement.

152. Ironically perhaps, the only evidence which might be said to support the conclusion that the buggy in question could not be folded up is in the evidence of Mr Paulley. In his statement he said at para 24 that he appreciated that "the wheelchair space is a good place for people to park their pushchairs, but they can at least fold them up". That suggests that he thought that the buggy could be folded up. However, earlier in his statement he said at para 14 that, while he was boarding the bus, the following exchange took place between the driver and the lady with the buggy:

> "Of his own initiative, the driver turned to the lady and asked if she would fold it [ie the buggy] down so that I could use the wheelchair bay. The lady (who was on her mobile phone) responded by saying that the pushchair did not fold down and so she wouldn't move."

153. It is true that in the Court of Appeal Lewison LJ at para 3 accepted that account, although he did not advert to the driver's evidence set out above. I am bound to say that it seems unlikely to me that it was not possible to fold the buggy and that it is more likely than not that the true reason for her attitude was the inconvenience of moving the child and the buggy when the child was asleep, which was essentially the reason she gave.

154. If those conclusions are correct, Mr Paulley would be entitled to succeed even if the only relevant provisions were contained in regulation 12 of the Conduct Regulations. However, Lady Hale and Lord Kerr place considerable weight upon the position as at the date of the incident. Lady Hale has described the Regulations and their provenance in detail in her para 96, which she puts in their context in her

paras 93-95 and 98. Importantly, she also stresses the importance of section 21ZA of the Disability Discrimination Act 2005 in her para 98. As she says, that section provided for the application of sections 19 to 21 of the DDA 1995 in modified form to providers of transport services. I agree with her that in passing that Act, Parliament must have concluded that the earlier regulations were not sufficient to enable disabled passengers to enjoy the same access to public transport as is enjoyed by non-disabled passengers. As she says, those sections provide that, where providers of transport services had a policy, practice or procedure which would make it impossible or unreasonably difficult for disabled persons to make use of a service which they provided to other members of the public, it was their duty to "take such steps as is reasonable in all the circumstances of the case for him to take in order to change that practice, policy or procedure so that it no longer has that effect".

155. I now appreciate that the critical point in this appeal is not whether there was a breach of regulation 12 of the Conduct Regulations. As Lady Hale says at para 101, the issue agreed between the parties for the purpose of this appeal is a simple one, namely whether the Recorder was correct in concluding that the company was in breach of the Equality Act 2010. In her paras 99 to 109 Lady Hale convincingly explains why the answer to that question is yes. The essential points which have persuaded me are these, which are really no more than those made by Lady Hale.

156. The bus company as the service provider must comply with three requirements set out in paragraph 2(1) of Schedule 2 to the 2010 Act. The first is in section 20(3) as modified by the Schedule. It reads:

> "The first requirement is a requirement, where a [PCP] of A's puts disabled persons generally at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

As Lady Hale explains in para 99, failure to comply with that requirement is a failure to make reasonable adjustments under section 21(1) and A discriminates against a disabled person if A fails to comply with that duty in relation to that person under section 21(2). This is a prospective duty, owed to disabled persons generally, to take proactive steps to meet their needs, and if an individual suffers as a result, then that failure amounts to discrimination against him.

157. I agree with the general points made by Lady Hale in para 100. In particular, the position under the 2010 Act is different from that under the Conduct Regulations. Disabled people are a special case. Their needs are to be treated differently from

those of others, including those with buggies. As Lady Hale puts it in paras 101 and 102, at the time of the incident the company's policy was that wheelchair users had no priority over buggies and that infected both the content of the notices and the approach to enforcement. It should have been made clear to passengers that wheelchair users had priority over others, who should have been required to vacate the wheelchair space. I agree with Lady Hale that disruption and confrontation would be unlikely.

158. As indicated above, it is my view that it is more likely than not on the facts here that, if the lady had been required to move, as opposed to merely being asked to do so, she would have done so. I am also of the view that if, contrary to my view of the facts of this case, a buggy cannot be folded down, the PCP should have been adjusted to make it clear that, if necessary to enable a wheelchair user to use the wheelchair space, the buggy user (and not the wheelchair user) must get off the bus. Only in this way will the statutory policy of priority for wheelchair users be carried out.

159. In reaching this conclusion, I do not disagree with the points made by Lady Hale in para 105. As she says, while non-disabled people are not entitled to the same treatment as disabled people, especially after the 2010 Act, the adjustments to be expected for disabled people must be reasonable ones, and there will obviously be circumstances in which it is not reasonable to expect the space (or indeed the bus) to be vacated. However, this is not such a case.

160. In conclusion, I agree in particular with the reasoning of Lady Hale and Lord Kerr. I too would allow the appeal. I also would answer the question posed, namely whether the company was in breach of the 2010 Act in the affirmative. I agree with Lady Hale that, whatever concession may have been made in the Court of Appeal, it cannot be just to deprive Mr Paulley of the damages which the Recorder awarded him. As I say in para 148 above, all parties were in a position to argue the point before this Court. I would therefore restore the order made by the Recorder.