Article:
Tomlinson, Joe, Meers, Jed and Somers-Joce, Cassie (2023) Judicial Review of Public Data Gaps. Judicial Review. pp. 69-77. ISSN: 1085-4681

https://doi.org/10.1080/10854681.2023.2218256

Routledge
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Judicial Review

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjdr20

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To cite this article: Joe Tomlinson, Jed Meers & Cassandra Somers-Joce (2023): Judicial Review of Public Data Gaps, Judicial Review, DOI: 10.1080/10854681.2023.2218256

To link to this article: https://doi.org/10.1080/10854681.2023.2218256

Published online: 05 Jul 2023.

JUDICIAL REVIEW
https://doi.org/10.1080/10854681.2023.2218256

Routledge
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Judicial Review of Public Data Gaps

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1. The failure of public bodies to collect valuable data – what we call 'data gaps' – is a major problem of modern government. With government infrastructure becoming increasingly digitalised, the opportunities to collect data efficiently and at low cost are increasing exponentially. Yet, we often see public bodies making decisions which fail to capitalise on this opportunity. This may be for a range of reasons, and such failures can cause a range of serious problems. For public law practitioners, this is giving rise to an important question: are there routes to challenge decisions underpinning data gaps via judicial review?

2. This article sets out our review of existing legal authorities in public law and equality law relevant to the collection of systemic information by public sector bodies. It sets out our understanding of the law in three stages:

(a) the common law rationality jurisprudence, particularly in the form of the 'duty of inquiry' stemming from *Secretary of State for Education and Science v Tameside MBC*[1] ('*Tameside*');

(b) the law under the Public Sector Equality Duty (PSED) found in s 149 of the Equality Act 2010; and

(c) the position as to the application of these principles to systemic decisions concerning failures to collect data on administrative processes.

Common law rationality: the *Tameside* duty of inquiry

3. The duty of inquiry is a long-recognised part of public law. The duty requires decision-makers to acquaint themselves with the relevant information that they need to make their decision. The starting point when analysing the evolution of the duty of inquiry is

[1][1977] AC 1014.

the famous decision of the House of Lords in *Tameside*, within which Lord Diplock articulated the duty which falls upon a decision-maker in the following terms:[2]

> The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?

Since this important decision, the duty has been expressed in various ways.[3] Mr Justice Fordham, in his now classic treatise on judicial review, expresses the modern principle of the 'duty of sufficient inquiry' with his usual clarity: '[a] public authority must sufficiently acquaint itself with relevant information, which must fairly be presented and properly addressed.'[4]

4. The decades following *Tameside* have seen the courts articulating the relevant principles as to how the duty operates – which are now often referred to as the *Plantagenet* principles.[5] It is now clear that a court should not intervene solely because it considers that further inquiries would have been sensible or desirable. Instead, judicial intervention should take place only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the necessary information. It is for the public body, and not the court, to decide upon the manner and intensity of inquiry to be undertaken.[6] Further, the *Tameside* duty does not include information which comes to light after the decision, unless such information should have been within the knowledge of the decision-maker.[7]

5. Given the approach that the courts have taken, the duty of inquiry as articulated in *Tameside* can therefore be seen – and usually is seen – as a manifestation of *Wednesbury* review.[8] Despite the reputation of *Wednesbury* claims (i.e. that they are rarely successful), the common law duty of inquiry has proven to be a routinely-used ground of challenge ever since *Tameside*. It has been deployed with some success. In practice, as the Supreme Court has recognised, the application of the *Wednesbury* standard inevitably leads to a variable intensity of review that is informed by the context of the decision challenged.[9] The *Tameside* duty has been pleaded successfully across a variety of contexts, including planning,[10] homelessness,[11] the housing of asylum seekers,[12] and taxation.[13] Increasingly, duty of inquiry is being argued in the area of

[2]ibid 1065.
[3]See eg *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020, [2019] 1 WLR 5765 [145].
[4]M Fordham, *Judicial Review Handbook* (7th edn, Hart Bloomsbury 2020) 649.
[5]See *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [2015] 3 All ER 261. See also *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 CA [70].
[6]*R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37 [35].
[7]*R v Secretary of State for the Environment ex p. Powis* [1981] 1 WLR 584, 597.
[8]See eg *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020, [2019] 1 WLR 5765 [58].
[9]See eg *Kennedy v The Charity Commission* [2014] UKSC 20, [2015] AC 455 [54] (Lord Mance).
[10]*R (Usk Valley Conservation Group) v Brecon Beacons National Park Authority* [2010] EWHC 71 (Admin), [2010] 2 P & CR 14.
[11]*R (YR) v Lambeth LBC* [2022] EWHC 2813 (Admin), [2023] HLR 16.
[12]*R (NB) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin), [2021] 4 WLR 92.
[13]*MH Investments v Cayman Islands Tax Information Authority* 16 ITL Rep 274.

national security – a particularly interesting example of its potential for broad reach given the clear sensitivities and disclosure issues that arise.[14] Table 1 provides some non-exhaustive examples of recent cases where a breach of the duty of inquiry has been argued successfully.[15] These successful cases illustrate both the broad range of public authority activities in which these grounds have been argued and how the intensity of the duty of inquiry can vary according to the circumstances of case – such as where the decision raises important issues in the public interest.[16]

The duty of inquiry under the PSED

6. Alongside the development of the common law jurisprudence, the duty of inquiry has found a new, particularised expression in the PSED. The PSED places a duty on public authorities, and those who exercise public functions (s 149(2)), to have due regard to the need to eliminate discrimination (s 149(1(a)), advance equality of opportunity (s 149(1(c)), and foster good relations between those who do and do not share a protected characteristic (s 149(1(c)). The protected characteristics within the Act are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation (s 4). Each of the first two limbs of the PSED contained within s 149 requires a public authority to keep its duties under review, and to gather information relevant to its duty so that it can have due regard to the need to eliminate discrimination in the discharge of public functions (s 29(6)). Through this legislative scheme, both the PSED and the common law duty of inquiry can effectively place a similar duty of inquiry on decision-makers, with the PSED described variously as a 'sensible way of framing the *Tameside* duty'[17] and as 'involving a duty of inquiry'.[18]

7. The Courts have now developed extensive jurisprudence pertaining to the PSED.[19] As regards the duty of inquiry, four observations can be made about the principles that can be derived from the case law. First, it is well-established that the PSED can involve the imposition of a duty of inquiry. As Elias LJ's oft-quoted judgment in *Hurley & Moore* put it:[20]

> It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred

[14]See eg the discussion of *Tameside* grounds in *Begum v Secretary of State for the Home Department* [2023] UKSIAC SC/163/2019.
[15]These cases were identified via keyword searches on Westlaw.
[16]*R (Arquind Ltd) v SSBEIS* [2023] EWHC 98 (Admin) [110]–[111].
[17]C Knight, 'Automated Decision-Making and Judicial Review' [2020] JR 21.
[18]*R (Ward and others) v Hillingdon LBC* [2019] EWCA Civ 692, [2019] PTSR 1738.
[19]See the leading case in this area, *Bracking and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] Eq LR 60.
[20]*R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), [2012] HRLR 13, [89]–[90].

> to the following passage from the judgment of Aikens LJ in *Brown* (para [85]) ' … .the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.' I respectfully agree.

This statement was subsequently adopted in the leading case of *Bracking and others v Secretary of State for Work and Pensions*[21] as part of a bundle of 'uncontroversial principles',[22] and has been further affirmed in multiple other judgments.[23] Second, the precise extent of a duty of inquiry that the PSED places on a public authority is informed by the context of a particular decision or function.[24] Recently, in *R (Rowley) v Minister for the Cabinet Office*,[25] Fordham J explained this aspect of the duty in the following terms:

> The principles concerning compliance with the PSED are contextual in their application … The extent of the 'regard' which must be had is what is 'appropriate in all the circumstances' and 'weight and extent of the duty are highly fact-sensitive and dependent on individual judgment' … In the present case the following linked themes, regarding the principled application and enforcement of the PSED duty, are of particular significance: (i) importance; (ii) proactivity; and (iii) rigour, together with the recognised virtues of (iv) evidence-based thinking; and (v) legal sufficiency of enquiry.

Third, it is evident that the duty is continuing.[26] Fourth, the duty is non-delegable.

8. The Equality and Human Rights Commission also produces Technical Guidance on how to implement the PSED.[27] Chapter 5 sets out the need to engage with 'equality evidence' when discharging the PSED.[28] Elsewhere, the Technical Guidance sets out that decision-makers should 'remain alert to new evidence suggesting that discrimination or other prohibited conduct is, or could be, occurring and take appropriate action to prevent this happening'.[29] Furthermore, the Technical Guidance provides that, under the PSED, public bodies should consider whether they have 'enough information about levels of participation in [its] activities of people with different protected characteristics to enable it to have due regard to encouraging participation' and that ensuring this may involve the collection of data broken down by protected characteristic.[30]

[21] *Bracking* (n 19) [26(8)(ii)].
[22] ibid [27].
[23] See eg *Hotak v Southwark LBC* [2015] UKSC 30, [2016] AC 811 [73]; *R (Ward) v Hillingdon LBC* [2019] EWCA Civ 692, [2019] PTSR 1738 [71]; *Forward v Aldwyck Housing Group Ltd* [2019] EWHC 24 (QB), [2019] HLR 20 [40]; *R (Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058, [2020] 1 WLR 5037 [181].
[24] *R (AD) v Hackney LBC* [2019] EWHC 943 (Admin) [83]; *R (Refugee Action) v SSHD* [2014] EWHC 1033 (Admin) [121], [149]–[151]; *R (Law Centres Federation Ltd) v Lord Chancellor* [2018] EWHC 1588 (Admin) [75]–[76].
[25] [2021] EWHC 2108 (Admin) [40].
[26] (*R (Ward) v Hillingdon LBC* [2019] EWCA Civ 692 [71]–[74] (Lewison LJ).
[27] The latest version of which is: Equality and Human Rights Commission, *Technical guidance on the public sector equality duty: England* (February 2021).
[28] ibid [5.14]–[5.16]. See also [5.18], [5.21], [5.25], [5.37], [5.40].
[29] ibid [3.5].
[30] ibid [3.31], [3.23].

9. As with the common law duty of inquiry, cases which deal with the PSED span a wide range of contexts across public policy and administration. Table 2 provides an overview of a range of successful duty of inquiry cases that have been argued under the PSED.

The systemic application of the Tameside *and PSED duties of inquiry*

10. The duty of inquiry is now a well-established component of the public law landscape. At common law, the *Tameside* principles are clear. At the same time, it has found new expression in statute through the PSED. There is also no reason the duty ought not to be applied to systemic decisions to collect – or refuse to collect – information. The courts have recognised this by hearing claims based on the duty of inquiry concerning systemic issues. The applicable test of legality for such decisions is the – inevitably context-specific and variable intensity – standard found in *Wednesbury*.

11. For instance, in the recent landmark Court of Appeal decision in *R (Bridges) v South Wales Police*,[31] there was extensive discussion of how the PSED related to the controversial deployment of automated facial recognition by the South Wales police.[32] The Court of Appeal held that public bodies must take positive steps to identify and address risks of algorithmic discrimination:[33]

> In all the circumstances, therefore, we have reached the conclusion that [South Wales Police] have not done all that they reasonably could to fulfil the PSED. We would hope that, as AFR is a novel and controversial technology, all police forces that intend to use it in the future would wish to satisfy themselves that everything reasonable which could be done had been done in order to make sure that the software used does not have a racial or gender bias.

A particularly clear example of how system-level application of the duty of inquiry is entirely uncontroversial can been seen in a recent claim by the Joint Council for the Welfare of Immigrants.[34] The claimant argued that the Secretary of State for the Home Department failed to collect sufficient systemic data relevant to the adoption and implementation of a cut-off date for a certain category of immigration applications. The claim was put in both PSED and *Tameside* terms. On the particular facts of the case, the claim was refused permission, but the salient feature of the litigation for the present purposes is that both the Administrative Court and the Secretary of State accepted both that there was a duty of inquiry and that the applicable test was the *Wednesbury* standard.[35] Lieven J concluded:

[31] *Bridges* (n 23).
[32] For further examples, see: *R (Flinn Kays) v Secretary of State for Work and Pensions* [2022] EWHC 167 (Admin); *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 3073 (Admin), [2021] PTSR 553.
[33] *Bridges* (n 23) [201].
[34] *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2021] EWHC 638 (Admin).
[35] ibid [14].

> I accept that there is a duty of inquiry pursuant to *Tameside*. It seems to me that must be inherent within s.149. But the law is clear that a judicial review can only be brought in respect of an alleged failure to meet the duty of enquiry on *Wednesbury* rationality grounds. To some degree, I accept that *Wednesbury* will be context specific, whilst remaining a necessarily high test for a claimant.[36]

12. The reason that these types of decision are open to review, and they have been treated as such, is straightforward: they are subject to the *Wednesbury* standard in the same way that non-systemic, individualised administrative decisions are subject to that standard. If a decision not to collect systemic data (or an omission to even consider it to the same effect), when viewed in its context, is 'a decision so unreasonable that no reasonable authority could have possibly made it', then it too will be unlawful.[37] The duty of inquiry simply provides the language to express that orthodox point.

13. We recognise that such systemic-level claims may be more difficult to argue successfully than non-systemic claims – even if the distinction between the two is not always clear-cut. However, our argument is that duty of inquiry grounds are fundamentally available in principle – as demonstrated in *Joint Council for the Welfare of Immigrants*[38] – and should be argued where relevant. The ground is an important mechanism for ensuring effective scrutiny. Systemic failures to collect data are not exempt from this scrutiny.

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[36]ibid [21].
[37]*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.
[38]*Joint Council for the Welfare of Immigrants* (n 34).

Table 1. Successful *Tameside* cases

Case	Facts	Argument made relating to inquiry	Outcome
R (Dawes) v Birmingham City Council [2021] EWHC 1676 (Admin)	The claimant property owner applied for judicial review of the defendant local authority's decision to make a general vesting declaration in relation to her property under the Compulsory Purchase (Vesting Declarations) Act 1981, s 4.	The claimant's case on the *Tameside* point was that the local authority's actions were breach of its duty to make reasonable inquiries to ascertain the condition of the property and whether it was in occupation or being marketed for occupation.	It was irrational for the local authority to decide to execute the vesting declaration without having carried out an internal inspection of the property to check its condition, use and occupation, and to require the production of documents on the issue of occupation: '[n]o rational authority could have supposed that the information it had in its possession, or the enquiries it had made, were sufficient for making the decision to exercise its powers of compulsory purchase': [72].
R (CP (Vietnam)) v Secretary of State for the Home Department [2018] EWHC 2122 (Admin)	The claimant brought an application for judicial review challenging her failure to properly progress his trafficking claim and her decision to subject him to immigration detention.	The claimant contended that there was a failure to identify and protect him as a victim of trafficking. The defendant instead proceeded to make a negative conclusive grounds decision, yet due to the suspended investigation, they did not have sufficient information to reach this conclusion.	The competent authority could not rationally have concluded that it had sufficient information to reach a 'conclusive grounds' decision in September 2016. It needed to grapple with the inconsistencies between the account given by an arresting officer in March 2016, when indicators of trafficking were noted, and what the police said in an email in September 2016. It ought to have been clear that further information was required, and if inquiries could not be progressed because of the claimant's absence, the investigation ought to have been suspended.
R (YR) v Lambeth LBC [2022] EWHC 2813 (Admin)	The claimant sought judicial review of the assessment of their housing needs when Lambeth LBC put them in interim accommodation (under s 188 of the Housing Act 1996) outside of the borough.	The claimant argued that insufficient inquiries were undertaken into the impact an out-of-borough placement would have on disrupting the education of the children in the family.	The court determined that there was no evidence that inquiries were undertaken into the impact a change of school would have on the children's education, caring arrangements or the impact on their welfare more generally. This was a breach of the *Tameside* duty. In such cases, the absence of 'any reasoned decision or other evidence to show that those inquiries have been carried out', the Court will 'infer that the duty has not been discharged: [88].
R (Arquind Ltd) v SSBEIS [2023] EWHC 98 (Admin)	The claimant – an energy company – sought judicial review of the SSBEIS's refusal of development consent for a large energy infrastructure project on a specific electricity substation, instead suggesting the development take place at an alternative substation.	The claimant argued that the SSBEIS had failed to seek further information and take reasonable steps to properly inform himself on the feasibility of the alternative substation as a development site.	The court accepted the submissions that the SSBEIS breached the *Tameside* duty by failing to make further inquiries about the feasibility the alternative site for the proposed development before rejecting the application. This significant public interest in the development of the substation necessitated a more thorough investigation by the BEISS into the feasibility of the alternative site than had been undertaken in this case.

Table 2. Successful public sector equality duty inquiry cases

Case	Facts	Argument made relating to inquiry	Outcome
R (Bridges) v Chief Constable of South Wales [2020] EWCA Civ 1058	The claimant brought a judicial review of the use of automated facial recognition technology by South Wales Police.	It was argued that South Wales Police breached the PSED as it had not taken reasonable steps to investigate whether the technology had a racial or gender bias, as required by the public sector equality duty.	The PSED ground succeeded. Public concern about the relationship between the police and BAME communities had not diminished, and the duty was important to ensure that a public authority did not inadvertently overlook the potential discriminatory impact of a new, seemingly neutral, policy. The police force had never investigated whether AFR had an unacceptable bias on grounds of race or gender. The fact that the technology was being piloted made no difference.
R (Law Centres Federation Ltd) v Lord Chancellor [2018] EWHC 1588 (Admin)	The claimant applied for judicial review of the Lord Chancellor's decision to enlarge the geographic areas for which housing possession court duty scheme contracts were awarded. The scheme enabled those defending possession proceedings to obtain free, emergency legal assistance.	The claimant submitted that the decisions were breached by the PSED because the defendant had failed properly to acquaint himself with the necessary information on which they should have been based and had instead proceeded on an unfounded assumption that the introduction of larger contracts would improve sustainability. As a result, vulnerable clients would no longer have access to 'wraparound' services which local law centres were currently providing but which were not covered by legal aid.	The relevant legislation did not require the defendant to make a specific fact-finding about the sustainability or viability of the schemes; the question was whether, having rationally chosen sustainability as a relevant factor, the defendant had obtained sufficient information on that topic to enable him to make a lawful decision that there was a problem which would be solved by moving to bigger scheme areas, and whether he had gone about his inquiries in a manner that was compatible with the PSED. However, there was no evidence as to why it was thought that larger HPCD scheme areas would be regarded as more attractive by providers. The defendant's central justification for the proposed changes was based on assumption, conjecture or anecdotal evidence. The decision was one that no reasonable decision-maker could reach on the state of the evidence.
R (Danning) v Sedgemoor DC [2021] EWHC 1649 (Admin)	The claimant applied for judicial review of a grant of planning permission for a change of use that would see a pub converted to a dwelling.	The claimant's case was that the committee had not asked itself whether the planning decision it was required to make could have any implications in relation to the PSED.	The Planning Committee did not ask itself whether the planning decision that it was required to make could have any implications for the PSED. There was a complete absence of evidence to the contrary. Accordingly, the claimant had established that the Council failed to comply with its duty.

(*Continued*)

Table 2. Continued.

Case	Facts	Argument made relating to inquiry	Outcome
R (DMA) v Secretary of State for the Home Department [2020] EWHC 3416 (Admin)	The claimants sought judicial review of the Secretary of State's approach to her duty to provide or arrange for the provision of accommodation for destitute failed asylum seekers under the Immigration and Asylum Act 1999, Pt I, s 4(2).	The argument on the PSED was that once the Secretary of State had reached a decision that she had a duty to accommodate under relevant legislation, she fell under a PSED duty to monitor the provision of that accommodation for individuals who had a disability. She had not had due regard to the need to eliminate discrimination and to advance equality of opportunity between persons who shared the protected characteristic of disability and persons who did not.	The Secretary of State was in breach of the PSED in failing, once she had reached a decision that she had a duty to accommodate, to monitor the provision of that accommodation to individuals who had a disability.
R (K) v Secretary of State for Work and Pensions [2023] EWHC 233 (Admin)	The claimant sought judicial review of the Secretary of State's approach to refusing to waive 'overpayments' in Universal Credit – where claimants have been overpaid benefits which are then deducted from their ongoing award.	The claimant argued that the Secretary of State had not had due regard to the PSED when formulating a new policy on waiving overpayments. They argued that regard was necessary when there are 'grounds to suspect' that it might have an equalities impact, not just where it is 'obvious' there will be such an impact.	The Secretary of State had not complied with the PSED by failing to assess the risk and extent of any adverse impact on people with disabilities of the newly formulated waiver policy. The court agreed that the duty of inquiry is engaged where there are 'grounds to suspect' the measure will have an equalities impact.