Neutral Citation Number: [2016] EWCA Civ 441

Case No: C1/2015/2559

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT - CO/76/2015
MR JUSTICE HOLGATE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/5/16

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE LAWS
and
LORD JUSTICE TREACY

Between:

Secretary of State for Communities and Local Government	**Appellant**
- and -	
(1) West Berkshire District Council	**Respondents**
(2) Reading Borough Council	

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- -

Mr R Drabble QC and Mr D Blundell (instructed by the **Treasury Solicitor**) for the **Appellant**
Mr D Forsdick QC and Mr A Mills (instructed by **Legal Services at West Berkshire District Council**) for the **Respondents**

Hearing dates: 15 & 16 March 2016

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Judgment Approved by the court for handing down (subject to editorial corrections)

LAWS LJ and TREACY LJ:

INTRODUCTION

1. This is the Secretary of State's appeal, with permission granted by Lewison LJ on 22 September 2015, against the decision of Holgate J given in the Administrative Court on 31 July 2015 ([2015] EWHC Admin 2222) following a rolled-up hearing of a claim for judicial review brought by two planning authorities, the West Berkshire District Council and the Reading Borough Council. They are of course now respondents to the appeal. Holgate J held that a planning policy promulgated by the Secretary of State in a Written Ministerial Statement ("the WMS") made in Parliament on 28 November 2014 was unlawful, and granted a declaration accordingly.

2. The policy in question is described in the first witness statement of Ms Jane Everton, who is a senior official responsible for government policy on the use of planning obligations under s.106 of the Town and Country Planning Act 1990. Her account of it is described by the judge below as follows (judgment paragraph 2):

> "(i) Developments of 10 units or 1000 sq m or less (including annexes and extensions) would be *excluded* from affordable housing levies and tariff based contributions;
>
> (ii) A lower threshold would apply in designated rural areas, National Parks and Areas of Outstanding Natural Beauty (as defined in section 157 of the Housing Act 1985), with developments of 5 units or less to be *excluded* from affordable housing levies and tariff based contributions. Development of between 6 and 10 units would be subject to a commuted sum payable on or after completion;
>
> (iii) Where a vacant building is brought back into use or demolished for redevelopment, local authorities will provide a 'credit', equivalent to the floorspace of the vacant building, to be set against affordable housing contributions." (judge's emphasis)

Given the nature of the major issue in the case the language of the WMS itself is important. We should cite the following paragraphs.

> "We consulted in March this year on a series of measures intended to tackle the disproportionate burden of developer contributions on small scale developers, custom and self-builders. These included introducing into national policy a threshold beneath which affordable housing contributions should not be sought. The suggested threshold was for developments of ten units or less (and which have a maximum combined gross floor space of no more than 1,000 square metres.
>
> …

> We received over 300 consultation responses many of which contained detailed submissions local data. After careful consideration of these responses, the Government is making the following changes to national policy with regard to S.106 planning obligations:
>
> Due to the disproportionate burden of developer contributions on small scale developers, for sites of 10 units or less, and which have a maximum combined gross floor space of 1,000 square metres, affordable housing and tariff style contributions should not be sought. This will also apply to all residential annexes and extensions.
>
> For designated rural areas under Section 157 of the Housing Act 1985, which includes National Parks and Areas of Outstanding Natural Beauty, authorities may choose to implement a lower threshold of 5 units or less, beneath which affordable housing and tariff style contributions should not be sought. This will also apply to all residential annexes and extensions. Within these designated areas, if the 5 unit threshold is implemented then payment of affordable housing and tariff style contributions on developments of between 6 to 10 units should also be sought as a cash payment only and be commuted until after completion of units within the development."

3. Holgate J's judgment contains a very full account of the planning background, not least under the headings "The policy context for the challenge" (paragraphs 5 – 22), "Affordable housing policies in local plans" (39 – 46), and "The evolution of the Secretary of State's policy" (47 – 79). This gives much valuable detail, but we will not replicate it here. What follows is the barest thumbnail sketch.

4. For many years planning policy had made provision for affordable housing. Affordable housing levies and tariff-based contributions were required of developers. But by 5 December 2013, when the Chancellor of the Exchequer announced the 2013 Autumn Statement, Ministers had reached the opinion that such charges were having an adverse impact on small scale housing development. The construction of new housing had fallen significantly below housing need at a national level. The small scale housing industry had not recovered from the recession and continued to decline. In consequence the government proposed to reduce the requirement for affordable housing contributions. On 23 March 2014 a consultation paper was published. Under the heading "What are we proposing?" this was stated:

> "We are also proposing to introduce a 10-unit and 1000 square metre gross floor space threshold for affordable housing contributions through section 106 planning obligations. This will aid the delivery of small scale housing sites. Rural Exception Sites will be excluded from this threshold."

It seems that the use of thresholds for affordable housing contributions goes back at least to 1993. As the WMS stated, over 300 responses to the consultation exercise were received by the Secretary of State.

5. At length on 28 November 2014 the Minister of State announced the new policy in the House of Commons by way of the WMS. The National Planning Practice Guidance (NPPG) was amended on the same day, and subsequently revised on 27 February and 26 March 2015.

6. The learned judge upheld the respondents' challenge to the WMS on four grounds.

(i) It was inconsistent with the statutory planning regime.

(ii) The Secretary of State had failed to take into account necessary material considerations.

(iii) The Secretary of State's consultation upon the proposals was legally inadequate.

(iv) The Secretary of State had failed properly to assess the impact of the proposal upon persons with protected characteristics: Equality Act 2010 s.149.

Holgate J found it unnecessary to enter into a fifth ground of challenge, namely that the policy was irrational.

7. The Secretary of State now seeks to overturn the judge's conclusions on all four grounds. Before addressing them we should give some account of the statutory provisions which principally bear on the case.

THE LEGISLATION

8. The place of development plans in the planning regime is central to the first ground (inconsistency with the statutory scheme). In the law of town and country planning a development plan is a set of documents containing a local planning authority's policies and proposals for the development and use of land in their area: see in particular ss.17(3) and 38 of the Planning and Compulsory Purchase Act 2004 (the 2004 Act). S.38(6) is especially important in light of counsel's submissions on the first ground:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

We should refer also to s.13 of the 2004 Act which was summarised by the judge at paragraph 26 of his judgment thus: "s.13 requires each LPA to 'keep under review the matters which may be expected to affect the development of their area or the planning of its development', which include the principal physical, economic, social and environmental characteristics of the area, the principal purposes for which land is used, the size, composition and distribution of the population and the effect of changes on the planning of development in the area. These statutory surveys form an

important part of the evidence base for the preparation of development plans." S.19(2) provides in part:

> "In preparing a local development document the local planning authority must have regard to—
>
> (a) national policies and advice contained in guidance issued by the Secretary of State…"

9. The 2004 Act confers other powers on the Secretary of State which it is helpful to notice at this stage. We may adopt the judge's summary:

> "34. In addition, the Secretary of State has a broad power to intervene if he considers a local plan, or a policy in a local plan, to be 'unsatisfactory'. He may direct the LPA to modify the plan and the authority must comply with any such direction unless they withdraw the plan (sections 21 and 22). Any such modification will then generally be considered in the examination process (section 21(5)).
>
> 35. By section 26(1) an LPA may prepare a revision of its local plan at any time. Section 26(2) empowers the Secretary of State to direct the authority to prepare a revision of its plan in accordance with a timetable set by him.
>
> 36. Section 27 gives the Secretary of State a very wide default power if he considers that an LPA is failing to do anything necessary in connection with the preparation or adoption of a local plan. Subject to holding an independent examination under section 20, the Secretary of State may prepare or revise a local plan and then finally adopt a local plan."

10. S.70(2) of the Town and Country Planning Act 1990 (the 1990 Act) is important. It provides that, in dealing with an application for planning permission, the local planning authority

> "… shall have regard to
>
> (a) the provisions of the development plan, so far as material to the application,
>
> (b) any local finance considerations, so far as material to the application, and
>
> (c) any other material considerations."

11. S.106 of the 1990 Act provides in part:

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into

> an obligation… enforceable to the extent mentioned in subsection (3)—
>
> (a) restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way; or
>
> (d) requiring a sum or sums to be paid to the authority… on a specified date or dates or periodically."

12. Lastly we should note that the Secretary of State's power to formulate and adopt national planning policy is not given by statute. It is an exercise of the Crown's common law powers conferred by the Royal Prerogative. As we shall show this circumstance has played its part in the argument.

GROUND 1: INCONSISTENCY WITH THE STATUTORY SCHEME

13. Holgate J dealt with this issue first, at paragraphs 108 – 143. It was in fact Ground 2 as the claim before him was pleaded. It constitutes the major focus of the case. The plainest exposition of the judge's conclusion is to be found at paragraph 134(i) of the judgment:

> "Section 38(6)… gives 'priority' to the policies in adopted development plans. These policies have been formulated by reference to a local evidence base (section 13 of PCPA 2004) and have satisfied the requirements of the statutory process leading to adoption. The legislation does not give a general priority to, or a presumption in favour of, national policy as against statutory local policy…. The new national policy is inconsistent with the statutory scheme because its aim, and the language chosen, purports to confer exemptions *in each and every case* where affordable housing requirements in an adopted local plan policy are inconsistent with the national thresholds. A policy formulated in that way is improper because, in effect, it purports to override relevant policies in the statutory development plan in so far as they are inconsistent with the national policy. To that extent the national policy ignores or circumvents the presumption in favour of the development plan policies in section 38(6)… and the need to carry out the weighing process envisaged by the decisions in *Alconbury* [2003] 2 AC 295] and in *City of Edinburgh* [1997] 1 WLR 1447]…"

14. The focus is on the language of the WMS ("the language chosen…", "a policy formulated in that way…"), and the core of the case advanced by Mr Forsdick QC for the respondents is that the terms of the WMS constitute an instruction to planning decision-makers to depart from established local plan policies. He refers also to

passages in the evidence of Ms Everton for the Secretary of State, but upon Mr Forsdick's argument the language of the announced policy is what matters.

15. Mr Forsdick relies on a passage in the judgment of Sullivan LJ in *Cala Homes (South) Ltd v Secretary of State* [2011] EWCA Civ 639 (*Cala Homes* 2) at paragraph 26:

> "If [the policy] had advised local planning authorities to ignore the policies in the regional strategies, or to treat them as no longer forming part of the development plan, or to determine planning applications otherwise than in accordance with them because the Government proposed to abolish them, or if it had told decision-makers what weight they should give to the Government's proposal, then such advice would have been unlawful."

Two Principles

16. The submission is that the WMS is likewise to be condemned. We shall return to what Sullivan LJ said. It is important first to notice a distinction in this area of the law which is at the core of the debate in this appeal. It is between these two principles. (1) The exercise of public discretionary power requires the decision-maker to bring his mind to bear on every case; he cannot blindly follow a pre-existing policy without considering anything said to persuade him that the case in hand is an exception. See *British Oxygen* [1971] AC 610, in which Lord Reid and Viscount Dilhorne cited the classic authority of *R v Port of London Authority ex p. Kynoch Ltd* [1919] 1 KB 176 *per* Bankes LJ at 184.

17. But (2): a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions. As is stated in *De Smith's Judicial Review* (7th edn.) paragraph 9-013,

> "… a general rule or policy that does not on its face admit of exceptions will be permitted in most circumstances. There may be a number of circumstances where the authority will want to emphasise its policy… but the proof of the fettering will be in the willingness to entertain exceptions to the policy, rather than in the words of the policy itself."

18. Both of these principles – the rule against fettering discretion, and the liberty (generally) to express policy without acknowledging exceptions – apply whether or not the policy-maker and the decision-maker are the same or different persons. If it were otherwise, neither would have any integrity as a principle. We have expressed them in general terms; their application in the planning field's statutory context requires further elaboration.

The Rule against Fettering Discretion - Flexibility

19. The rule against fettering discretion is a general principle of the common law. It is critical to lawful public decision-making, since without it decisions would be liable to be unfair (through failing to have regard to what affected persons had to say) or

unreasonable (through failing to have regard to relevant factors) or both. In the law of planning it is reflected in the description of planning policy by Sedley LJ as "not a rule but a guide": *First Secretary of State v Sainsbury's Supermarkets Ltd* [2005] EWCA Civ 520 at paragraph 16. It is given life by s.38(6) of the 2004 Act and s.70(2) of the 1990 Act, which show that neither the development plan (itself, of course, a policy) nor any other policy relevant to the matter in hand is to be applied rigidly or exclusively by the decision-maker. Here we are primarily concerned with s.38(6). Guidance as to its operation in practice is to be found in the decision of the House of Lords in *City of Edinburgh Council v Secretary of State* [1977] 1 WLR 1477, which was concerned with the statutory predecessor of s.38(6) in Scotland (s.18A of the Town and Country Planning (Scotland) Act of 1972). Lord Clyde said this:

> "By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission. It is distinct from what has been referred to in some of the planning guidance, such as for example in paragraph 15 of PPG1 of 1988, as a presumption but what is truly an indication of a policy to be taken into account in decision-making. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.
>
> … [The section]… still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment and Another* (1995) 71 P. & C.R. 175 at p. 186 'What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations.' Those

> matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues."

20. We would draw two connected points from these observations. First, while the development plan is under s.38(6) the starting-point for the decision-maker (and in that sense there is a "presumption" that it is to be followed), it is not the law that greater weight is to be attached to it than to other considerations: see in particular Glidewell LJ's *dictum* in *Loup* cited by Lord Clyde. Secondly, policy may overtake a development plan ("… outdated and superseded by more recent guidance"). Both considerations tend to show that no systematic primacy is to be accorded to the development plan.

The Unqualified Articulation of Policy

21. The second of our two principles is that a policy-maker is entitled to express his policy in unqualified terms. It would surely be idle, and most likely confusing, to require every policy statement to include a health warning in the shape of a reminder that the policy must be applied consistently with the rule against fettering discretion – or, in the planning context, consistently with s.38(6) or s.70(2). A policy may include exceptions; indeed the WMS did so, allowing a 5 unit threshold for certain designated areas in place of the 10 unit requirement. But the law by no means demands that a public policy should incorporate exceptions as part of itself. The rule against fettering and the provisions of ss.38(6) and 70(2) are not, of course, part of any administrative policy. They are requirements which the law imposes upon the *application* of policy. It follows that the articulation of planning policy in unqualified or absolute terms is by no means repugnant to the proper operation of those provisions.

Limits

22. That is not to say that the potential contents of a public policy are subject to no legal constraints. The basic tests of reason and good faith apply; and where, as here, the policy is elaborated in a statutory context, the policy-maker cannot promote an outcome which contradicts the aims of the statute. Mr Forsdick characterised this limitation as an instance of the rule in *Padfield v Minister of Agriculture* [1968] AC 997, that a statutory discretion must be deployed to promote the policy and objects of the Act. In fact the power to make policy exercised by the Secretary of State in this case was not statutory, but an instance of the Crown's common law prerogative power. Still, the statutory context is plain; and it is plain (and uncontentious) that the Secretary of State was not entitled to seek by his policy to countermand or frustrate the effective operation of ss.38(6) and 70(2).

Cala Homes 2

23. We consider that this constraint upon the power to make policy constitutes the underlying rationale of the observations made by Sullivan LJ in *Cala Homes 2* at paragraph 26. The instances he gives of possible policy statements would all have urged or instructed local planning authorities to act outside the statute. There is a qualification as regards the reference to weight ("if it had told decision-makers what weight they should give…"). Mr Drabble submits, in our opinion correctly, that the

Secretary of State is perfectly entitled to express his view as to the weight to be given to his policy. But he cannot, so to speak, lay down the law about it.

The Issue in this Case Addressed

24. Given all these considerations, the question for the court is whether the WMS on its face seeks to countermand or frustrate the effective operation of ss.38(6) and 70(2); or does it merely express the Secretary of State's substantive planning policy in unqualified, though trenchant, terms? Resolution of the issue is not advanced by a consideration of Ms Everton's description of the policy's evolution. That is no disrespect to her: it is the language of the policy that counts. It is to be noted also (as Mr Drabble submitted in reply in the context of the consultation issue) that some of her evidence – paragraphs 61 and 62 of her first witness statement – was specifically fashioned in response to the respondents' evidence in the litigation.

25. The language of the WMS is in mandatory terms: "… a threshold beneath which affordable housing contributions should not be sought". Once it is accepted that (as we have put it) the articulation of planning policy in unqualified or absolute terms is not in principle repugnant to the proper operation of s.38(6), this use of language is in our judgment unobjectionable. It must be obvious that, as Mr Drabble submitted in reply, the aim or goal of a policy's author is that his policy should be followed. Moreover we should bear in mind that the Secretary of State is concerned not only to make policy in the planning field, but to participate as decision-maker in concrete cases, on appeals from the local planning authority. In that role he may well prefer his own policy to that of the development plan in case of conflict. If all the procedural requirements imposed by statute and by the common law are complied with, he is entitled to do so. More generally it is important to have in mind that the Secretary of State is responsible for national planning guidance and is answerable to Parliament for his discharge of that responsibility: see the observations of Lord Clyde in *R v (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at paragraphs 139 – 142.

26. At this point it is illuminating to consider a statement made on the second day of the hearing before Holgate J by Mr Drabble on behalf of the Secretary of State. This was cited at paragraph 99 by the judge, who made observations about it at paragraphs 100 – 102. As set out by the judge Mr Drabble stated that

> "(i) As a matter of law the new national policy is only one of the matters which has to be considered under section 70(2) of TCPA 1990 and section 38(6) of PCPA 2004 when determining planning applications or formulating local plan policies (section 19(2) of PCPA 2004), albeit it is a matter to which the Secretary of State considers 'very considerable weight should be attached';
>
> (ii) Ministers did not pursue the option of using primary legislation to create the exemptions (See Ms. Everton Witness Statement 1, paragraph 33). Instead the changes were introduced as policy, not binding law;

> (iii) In the determination of planning applications the effect of the new national policy is that although it would *normally* be inappropriate to require any affordable housing or social infrastructure contributions on sites below the thresholds stated, local circumstances may justify lower (or no) thresholds as an exception to the national policy. It would then be a matter for the decision-maker to decide how much weight to give to lower thresholds justified by local circumstances as compared with the new national policy;
>
> (iv) Likewise if in future an LPA submits for examination local plan policies with thresholds below those in the national policy, the Inspector will consider whether the LPA's evidence base and local circumstances justify the LPA's proposed thresholds. If he concludes that they do and the local plan policy is adopted, then more weight will be given to it than to the new national policy in subsequent decisions on planning applications."

27. The judge said (paragraph 99) that this was not "foreshadowed in any material previously emanating from the Department". That seems to be incorrect: Mr Drabble (skeleton paragraph 39) refers to paragraphs 47 – 56 of his skeleton argument at first instance and paragraphs 41 – 46 of the Summary Grounds of Defence. But the more substantial point is that the judge appears at paragraph 100 to contrast the language used by Mr Drabble with the language of the policy itself (and indeed that of earlier documents generated in the consultation exercise in 2014). He said:

> "The policy simply refers to a blanket threshold of 10 units or 1,000 sq m gross floor area for the whole of the country, subject only to an explicit relaxation for rural areas falling within a certain definition. It is not expressed to be subject to adopted development plan policies. The policy does not contain any language to indicate that it operates in the manner suggested much later in the Secretary of State's statement through Leading Counsel in response to the legal challenge, indeed at the hearing itself."

28. This suggests that the judge considered, at least, that a lawful planning policy must express its openness to exceptions – notably to the application of development plans which are inconsistent with it. But for reasons we have given that is a legal mistake. The policy's unqualified terms do not demonstrate that it was intended to countermand or frustrate the effective operation of the statute. The Secretary of State was not obliged to assure the reader that that was not his intention, nor to state that his policy was subject to the development plan. Moreover, if at paragraph 100 the judge intended by the expression "subject to adopted development plan policies" to indicate that such policies in principle possessed greater force than other considerations including the WMS, that too would be a mistake.

29. Leaving aside the assertion at (ii) concerning the decision to issue policy rather than seek primary legislation (as to which there is some debate in the skeleton arguments: it is unnecessary to go into it), Mr Drabble's statement amounts to no more than a

conventional description of the law's treatment of the Secretary of State's policy in the decision-making process. It does not (though this is not suggested) *save* the policy. It merely explains how the law requires it to be applied.

30. In our judgment, then, the policy stated in the WMS is not to be faulted on the ground that it does not use language which indicates that it is not to be applied in a blanket fashion, or that its place in the statutory scheme of things is as a material consideration for the purposes of s.38(6) of the 2004 Act and s.70(2) of the 1990 Act, and no more. It does not countermand or frustrate the effective operation of those provisions. The judge has, with respect, conflated what the policy says with how it may lawfully be deployed.

GROUND 2: FAILURE TO TAKE INTO ACCOUNT MATERIAL CONSIDERATIONS

31. We will deal next with the submission that the Secretary of State in adumbrating his policy failed to take into account necessary material considerations. This was Ground 1 as the case was pleaded at first instance. It has some affinity with Ground 2, which we have addressed: it concerns the legal standards which the contents of a policy must satisfy.

32. The judge considered (paragraph 167) that the Secretary of State had failed to take into account certain "obviously material" considerations. They are identified at paragraphs 88 – 90 and 158 – 160 of the judgement. Paragraphs 88 – 90 raise points on land supply. Paragraphs 158 – 160, which form part of the judge's discussion of the consultation issue, variously concern a perception by the judge of a conflict between what was said in the government's response to consultation and other evidence as to the policy's impact upon local contributions to affordable housing (paragraph 158), a point about the benefits or supposed benefits of a 3 unit threshold (159), and issues concerning the Community Infrastructure Levy.

33. As we have said, in making planning policy the Secretary of State is exercising power given to the Crown not by statute but by the common law. In *R v (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697 Lord Sumption said this at paragraph 83:

> "A common law power is a mere power. It does not confer a discretion in the same sense that a statutory power confers a discretion. A statutory discretionary power carries with it a duty to exercise the discretion one way or the other and in doing so to take account of all relevant matters having regard to its scope. Ministers have common law powers to do many things, and if they choose to exercise such a power they must do so in accordance with ordinary public law principles, ie fairly, rationally and on a correct appreciation of the law. But there is no duty to exercise the power at all. There is no identifiable class of potential beneficiaries of the common law powers of the Crown in general, other than the public at large. There are no legal criteria analogous to those to be derived from an empowering Act, by which the decision whether to exercise a common law power or not can be assessed. It is up to ministers to decide whether to exercise them, and if so to what extent. It

> follows that the mere existence of a common law power to do something cannot give rise to any right to be considered, on the part of someone who might hypothetically benefit by it. Such a right must arise, if at all, in other ways, usually by virtue of a legitimate expectation arising from the actual exercise of the power…"

34. Mr Drabble relies upon this reasoning for the proposition that in exercising his common law power to make planning policy the Secretary of State was not obliged to have regard to this or that consideration, as he would be if his power were derived from a statute which told him what to consider; if he chose to make new policy he was bound, of course, by the core values of reason, fairness and good faith, but beyond that his choice of policy content was very much for him to decide.

35. Mr Forsdick's response is to insist that while the source of the Secretary of State's power is the common law, the context in which it is being exercised is a carefully drawn statutory regime; so that, for proper planning purposes, the considerations which the judge held were left out of account were indeed "obviously material".

36. We would certainly accept that the statutory planning context to some extent constrains the Secretary of State. It prohibits him from making policy which, as we have put it in dealing with the principal issue in the case, would countermand or frustrate the effective operation of s.38(6) or s.70(2). It would also prevent him from introducing into planning policy matters which were not proper planning considerations at all. Subject to that, his policy choices are for him. He may decide to cover a small, or a larger, part of the territory potentially in question. He may address few or many issues. The planning legislation establishes a framework for the making of planning decisions; it does not lay down merits criteria for planning policy, or establish what the policy-maker should or should not regard as relevant to the exercise of policy-making.

37. In those circumstances the Secretary of State was not in our judgment obliged to go further than he did into the specifics described by the learned judge, and in consequence is not to be faulted for a failure to have regard to relevant considerations in formulating the policy set out in the WMS.

GROUND 3: INADEQUATE CONSULTATION

38. The judge held that the consultation process failed to comply with the second and fourth requirements of the "Sedley criteria" endorsed by the Supreme Court in *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947 (Lord Wilson JSC at paragraph 24). There was a failure to meet the second criterion in that the Secretary of State had failed to give sufficient reasons for his proposal so as to enable intelligent consideration and responses to be given. The result was that Local Planning Authorities (LPAs) did not have the opportunity to make representations on material which was known to the Secretary of State and central to the formulation and adoption of his new policy, in circumstances where that policy was going to have a substantial effect on the discharge of the LPAs' planning functions. The judge held that the process followed was plainly unfair.

39. In relation to this aspect it had been acknowledged by the Secretary of State that the real driver for the change in policy was the view expressed at paragraph 23 of the Response that affordable housing requirements imposed a "disproportionate burden" on small sites. The judge held that there had been a failure in the consultation paper to explain the basis for the "disproportionate burden" concern so that the focus of responses by many LPAs had been misdirected. They had concerned themselves with viability issues, whereas the Response and the evidence filed by the Secretary of State showed that the notion of a "disproportionate burden" related to something else, namely issues of stalled development and cash flow problems caused to small developers by reason of having to make up-front payments. These were matters of central importance and LPAs had unfairly been deprived of the opportunity of responding to them.

40. The judge also held that the fourth "Sedley criterion" was not satisfied. He held that the Secretary of State had failed to take the product of the consultation conscientiously into account. In this respect the judge identified two particular matters. Firstly, in the Response to consultation the Government had stated at paragraph 20 that the new policy would support self build, small scale, and brown field development "without adversely impacting on local contributions to affordable homes and infrastructure." The judge held that that statement was contrary to the evidence that the policy would have a substantial impact on affordable housing provision, as had been stated in consultation responses and confirmed in advice from officials. The Secretary of State had failed to identify any other evidence upon which that part of the Response could have been based. The judge said that, in the alternative, even if the relevant part of paragraph 20 represented a badly drafted attempt to strike a balance between support for small scale and brown field development and the degree of impact upon local contributions to affordable housing and social infrastructure, there was no evidence of any consideration being given to the difference in support for the development industry which could be achieved in any event by adopting a general threshold of 3 units as compared with 10 units. The Secretary of State had failed to grapple with an issue which, in the context of the proposed policy and the consultation exercise was an obviously material consideration which he was legally obliged to take into account in accordance with *Re Findlay* [1985] AC 318 at 334.

41. Secondly, the Secretary of State had failed to grapple with other points made by consultees which were of importance and which related to Community Infrastructure Levy (CIL) charges.

42. Mr Drabble contended that the judge had over complicated the issue and that the consultation process had been neither misleading nor unfair. The thrust of the consultation paper was that costs for small scale developers were too large and were acting as a disincentive to the building of affordable homes. The consultation was clearly about the addressing of that problem through a new policy. The judge had treated the consultation paper as if it were a statute and demanded a level of detail of explanation which was wholly inappropriate. The phrase "disproportionate burden" would have been adequately understood by consultees as referring to an excessive demand on small scale developers in the context of all the burdens, financial and legal, that they had to fulfil in order to bring forward a development. The phrase meant what it said and did not need elucidation.

43. The relevant section of the consultation paper was in the following terms:

> "*Affordable housing contributions on small sites*
>
> 23. A significant proportion of all planning obligations are [sic] affordable housing contributions. Previous research found that affordable housing accounted for approximately half of the value of all planning obligations. The Government considers that such capital contributions for small scale sites, including for those wishing to build their own home, can make a scheme undeliverable.
>
> 24. In its 2013 Autumn Statement, the Government made a commitment to reduce the planning costs to developers; including through a proposed new 10-unit threshold for section 106 affordable housing contributions. This is to help address the disproportionate burden being placed on small scale developers, including those wishing to build their own homes, and which prevents the delivery of much needed small scale housing sites.
>
> 25. This consultation proposes that before any request for affordable housing contributions can be considered as part of a section 106 planning obligations agreement, authorities will have to have regard to national policy that such charges create a disproportionate burden for development falling below a combined 10-unit and maximum of 1000m² gross floor space threshold. We also intend to make clear that, having regard to such disproportionate burdens, authorities should not seek affordable housing contributions for residential extensions or annexes added to existing homes."

44. This was followed by a question in the following terms:

> "Question 5: Is the Government's objective of aiding the delivery of small scale housing sites and expanding the self build housing market supported by:
>
> - the introduction of a 10-unit and 1000 m² gross floor space threshold for section 106 affordable housing contributions; and
>
> - the exclusion of domestic extensions and annexes from section 106 affordable housing contributions?"

45. Mr Drabble submitted that this was a straightforward question which, read against the background of the paragraphs cited above, conveyed the message that contributions required of small scale developers could make affordable housing schemes undeliverable.

46. Mr Drabble noted that the Response paper recorded responses from a significant number of developers citing examples of substantial up-front contributions being requested and the consequent stalling of the development of sites as a result. The amount of affordable housing contributions being sought from smaller sites was raised as a significant factor making sites economically unviable. Some responses highlighted cash flow restrictions. Local Authorities had raised issues of disproportionate impact in rural areas; the fact that other measures were already in place to help ensure that affordable housing contributions were viable; and referred to the differences between land values and development costs both nationally and from site to site. This latter point was put forward in support of a locally led approach to plan making. Those responses from LPAs and developers, which together represented about three quarters of all responses, illustrated that both sides of the argument about the new policy were capable of making intelligent contributions. The range of responses covered the field, demonstrating a fair and appropriate consultation. The judge had erred in holding to the contrary.

47. In relation to the fourth "Sedley criterion" Mr Drabble argued that the judge's conclusion was also wrong. The assertions of LPA consultees that the policy would have a substantial negative impact on affordable housing provision was something which the Secretary of State was obliged to have regard to. However, he was not obliged to accept those representations; the assessment of consultation responses was a matter for the Secretary of State. The judge's error was to treat the requirement to take account of consultation responses in a conscientious manner as if it were a requirement to decide the issue in accordance with those responses.

48. In relation to the absence of explanation as to why a threshold of 3 units was not adopted instead of one of 10 units, this demonstrated that the judge had descended into the arena improperly. A fair consultation did not require the Secretary of State to set out that level of detailed analysis or to apply it in formulating his policy.

49. Mr Drabble relied on the observations of Lord Woolf MR in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at paragraph 112:

> "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

50. Overall Mr Drabble contended that, contrary to the judge's findings, the consultation had been in terms which enabled intelligent responses to be made and that there had been a properly conscientious consideration of those responses.

51. Mr Forsdick submitted that, as the judge had found, the consultation document was defective. It did not identify anything other than viability considerations so that those opposed to the new policy were unaware of factors likely to be of substantial

importance to the decision. Thus LPAs had been deprived of the opportunity to comment on important factors bearing on the formulation of the policy.

52. He argued that the consultation paper failed to refer to relevant factors other than viability such as stalling of development and cash flow problems. He placed reliance on the decision in *R (London Criminal Courts Solicitors' Association) v Lord Chancellor* [2014] EWHC 3020 (Admin) where a challenge was brought to a decision on revisions to contracts which would be made available under the criminal legal aid scheme. A complaint about the consultation process was upheld based on the failure of the Lord Chancellor to disclose two independent expert reports which had been used to provide assumptions for the financial modelling which had influenced the decision under challenge which was held to amount to procedural unfairness. Failure to disclose the reports had, in the circumstances, meant that there was insufficient information to enable consultees to respond meaningfully. It was submitted that, if anything, the present consultation paper was even more flawed.

53. Mr Forsdick also placed some reliance on paragraphs 61 and 62 of the first witness statement of Ms Everton on behalf of the Secretary of State. Ms Everton recorded that witness statements filed on behalf of Local Authorities had responded on viability issues and urged by reference to historical data that the new threshold levels would indicate a likely loss of affordable housing provided by developer contributions in the future. She continued at paragraph 62 as follows:

> "We have no basis on which to challenge the factual accuracy of any of this data, but it does not take matters any further. The driver for the changes introduced to national planning policy…was not that all small scale development was insufficiently viable to provide any contribution to affordable housing rather, it was:
>
> a. that the small scale housing industry makes an important national contribution to the provision of new housing;
>
> b. that industry has steadily declined (from providing nearly two thirds of new homes registered in 1989 to just over one third in 2010);
>
> c. that disproportionate, and generally up-front, charges imposed on this sector have contributed significantly to this decline;
>
> d. that small scale sites with planning permission are stalled because of this…"

54. Particular reliance was placed upon the last two matters as demonstrating the consideration of factors which had not been raised in the consultation paper and upon which LPAs would have had much to say.

55. Mr Forsdick then moved to the other limb of this ground, namely the obligation to give serious consideration to the product of consultation. He supported the judge's view that the Secretary of State had fallen into error in reaching a conclusion that

there would be no adverse impact on local contributions to affordable homes and infrastructure when there had been no evidence to contradict the evidence raised by consultees. Whilst he accepted that the predicted effects of a policy are a matter primarily for the Minister he argued that a decision could not be made in the absence of any evidence to support it. Advice submitted to Ministers before the consultation had acknowledged that there was evidence suggesting a significant impact on affordable housing numbers, particularly in rural areas.

56. Although the responses to consultation had led to a lower unit threshold being applied to designated rural areas, the Response had not addressed urban areas such as Reading which were highly dependent on small sites for meeting affordable housing targets. Mr Forsdick characterised the passage at paragraph 20 of the Response as being wholly inadequate and demonstrating a failure properly to take into account responses:

> "The Government intends to strike an effective balance between providing the support and incentives which will drive up self build, small scale and brown field development without adversely impacting on local contributions to affordable homes and infrastructure."

57. What had occurred was a failure to address points of central importance which, as the judge had held, clearly offended against the fourth "Sedley principle". Accordingly, the judge had been correct.

Discussion

58. The essential legal principles applying to this ground were not in dispute before us. The consultation document must contain sufficient information to enable an intelligent response. Thus the consultees must know in sufficient detail not only what the proposal is, but also the factors likely to be of substantial importance to the decision, so as to enable a fair consultation process. After consultation responses have been received, the Minister must take the product of the consultation conscientiously into account. The issue, therefore, is whether the judge was in error in his application of those principles to this case.

59. We think that question 5 of the consultation paper is significant. It was couched in terms of breadth and generality following paragraphs 23 to 25 which themselves addressed the problem which was sought to be resolved in a broad way. We do not consider that on a fair reading those paragraphs confined the matters under consideration to strict viability issues. Nor do we agree that the phrase "disproportionate burden" would have been understood as relating solely to strict viability issues. That this is so is evident from the responses from developers who responded to the question posed by raising questions which go beyond strict viability. The fact that LPA respondents focused on viability issues is in our judgment a reflection of particular concerns which they wished to address.

60. A consideration of whether a non-statutory consultation process such as this contravened the requirements of procedural fairness will always be fact and context sensitive. As Burnett J (as he then was) identified in the *London Criminal Courts Solicitors' Association* case, the test is whether the process has been so unfair as to be

unlawful. The judge's conclusion that the references to "disproportionate burden" in the consultation paper was insufficiently explained so as to misdirect the focus of responses by LPAs places much reliance on paragraphs 61 and 62 of Ms Everton's witness statement. It seems to us that a significant factor which both the judgment and the submissions of Mr Forsdick have not taken into account is that, in those paragraphs, Ms Everton is providing an analysis of and commentary upon the witness statements submitted to the court by witnesses on behalf of the respondents in support of their claim, as opposed to being a reference to the responses to consultation. This seems to us to be a significant point which detracts from the force of the argument.

61. Contrary to Mr Forsdick's submissions we do not regard this case as one which represents an even greater degree of unfairness than was found in the *London Criminal Courts Solicitors' Association* case. The reverse is true. That case involved a consultation on a specialist issue which was effectively rendered meaningless without the disclosure of the two expert reports which provided the necessary assumptions which underpinned the proposed measures which were the subject of consultation. In our judgment the present case is not one involving a failure to make plain and disclose fundamental detail of that order. On the contrary the relevant paragraphs of the consultation document, together with the broadly based question, did not focus narrowly on strict viability issues. The question was posed in the context of broader-based impacts of the existing section 106 contribution regime upon small scale building developments. Insofar as the judge held to the contrary, and thus that the process was unfair, we disagree.

62. Turning next to the question of whether appropriate consideration was given to the consultation responses, we do not accept that that obligation translates into an obligation on the Minister to adopt the submissions made to him by respondents. In our judgment the Minister was entitled to consider the whole range of responses made to him, (together with all relevant information), and to form his own conclusion independently of the views of any particular section of consultees or indeed the views of his own advisers. The Response at paragraph 20 appears to us to represent the balance struck by the Minister after weighing up the various submissions made to him. This conclusion reflects our analysis and decision on the issue of whether the Minister erroneously regarded the impact of the new policy as "minor" as discussed under ground 4 below.

63. Insofar as the judge was critical of a failure of the Response document to explain why a threshold of three units was not used instead of 10 units, as had been mooted at one stage, we do not consider that is was necessary for the Secretary of State to descend to that level of particularity. The requirements of a fair consultation do not require that sort of detailed analysis of options before the Minister. As Silber J observed in *R (Maureen Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) at paragraph 78 "There is no obligation for a party to consult on each and every item of detail when there is a series of different models available as options." Moreover, the observations of Lord Woolf in *Coughlan* cited above reinforce this point. Those observations, it seems to us, are equally applicable to the process of consideration of consultation responses.

64. We therefore accept the general thrust of Mr Drabble's submissions in criticism of the judge's findings on this ground, both in terms of the fairness of the consultation and

the adequacy of consideration to the responses to it. We therefore sustain this ground of appeal.

GROUND 4: BREACH OF THE PUBLIC SECTOR EQUALITY DUTY (PSED)

65. The WMS was not accompanied by any Equality Impact Assessment. In early January 2015 Islington Borough Council, (not involved in these proceedings), intimated a judicial review challenge on the basis of a failure to comply with section 149 of the Equality Act 2010. In the light of that letter the Secretary of State indicated that the decision of 28 November 2014 was being reviewed in order to address PSED.

66. On 5 February 2015 a formal Equality Statement was produced. On 10 February the Secretary of State announced that, having considered section 149 and the findings of the Equality Impact Assessment, he was satisfied that the policy changes announced in the WMS were compatible with the requirements of the section and, accordingly, after reconsideration he had decided to maintain the policy changes.

67. As is well known, section 149 requires a public authority to have due regard to matters mentioned in subsection (1)(a)-(c) including a consideration of the interests of those sharing relevant protected characteristics such as age, gender, disability and race.

68. The judge upheld a challenge to the WMS based on the Secretary of State's failure to comply with section 149. It is common ground that those considerations had not been addressed prior to the making of the WMS. The judge held that the subsequent exercise resulting in the Equality Statement of 5 February 2015 failed to comply with section 149 because:

    i) Ministers did not take adequate steps to obtain relevant information in order to comply with the PSED; and/or

    ii) The duty was not fulfilled in substance and with rigour; and/or

    iii) Ministers did not assess the extent and risk of certain adverse impacts upon persons with protected characteristics and falling within section 149(1); and/or

    iv) The exercise was not carried out with a sufficiently open mind.

69. The judge expanded upon those findings by holding that:

    (a) The effects of one element of the policy, namely vacant building credit (which officials had previously indicated had the potential to impact upon local affordable housing contributions), did not appear to have been further considered. The Equality Statement had simply dealt with vacant building credit as part of a package with the new threshold for affordable housing and did not address the impact of this particular measure.

    (b) The Equality Statement had wrongly downplayed the effect of the policies as "minor" on the basis that only "a small amount" of affordable housing was delivered through section 106 obligations. Some months prior to the WMS, officials had advised that the "evidence suggests a *significant impact* on affordable housing numbers" if the 10 unit threshold were to be adopted. That

advice was said to be inconsistent with the Equality Statement's assessment of the impact as "minor". The Equality Statement used the same information as had been available to officials earlier in the process. A figure of 35 per cent was used as the proportion of affordable housing provided through section 106 contributions compared to overall affordable housing. The figure of 21 per cent represented the proportion of affordable housing contributions derived from sites of 10 units or below. The judge concluded that an inconsistency on a fundamental point was demonstrated, thus indicating that the Equality Impact Assessment was carried out in order to support the WMS and was not undertaken with a sufficiently open mind.

(c) The preceding point was further developed by reference to the fact that the conclusion of "minor" impact had been based on information relating to those occupying social housing as opposed to affordable housing which was a broader category than social housing. Accordingly, it was said that the Statement had been based on an incomplete analysis.

(d) The Statement showed no evidence of the obtaining of information to fill gaps identified, and the timescale involved gave the impression that Ministers only relied upon information which was to hand.

(e) In dealing with the acknowledgment based on the survey of social housing that policy changes would impact on persons with protected characteristics to a greater extent than general market housing, the Equality Statement had relied on a very broad brush point, namely that £38 billion of public and private investment would be made in relation to affordable housing in the period 2015 to 2020. This was open to two objections. Firstly, a single overall figure of investment across the whole country did not take into account the challenges facing different Local Planning Authorities, particularly those in urban areas which, in distinction to rural areas, had not been more specifically catered for in the new policy. The second objection was that the Equality Statement in referring to funding available independently of the WMS was not properly discharging the duty under section 149 to address equality impacts arising from the new policy.

70. It was for the reasons summarised above that the judge concluded that there was a failure to comply with section 149 and held that the appropriate remedy was to quash the order.

71. Mr Drabble argued that the judge's criticisms of the Equality Statement represented a highly forensic analysis of the detailed content of the statement which was inappropriate in the context of the duty imposed on decision makers under section 149 to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between persons sharing a relevant protected characteristic and those who do not. He drew attention to the observations of Underhill LJ in *R (Unison) v Lord Chancellor (No 3)* [2015] EWCA Civ 935, [2016] 1 CMLR 25 at paragraph 116 where he stated:

> "I should, however, say by way of preliminary that some of Ms Monaghan's criticisms seem to me to fall into the error identified by Davis LJ in *R (on the application of Bailey) v*

> *Brent London Borough Council* [2011] EWCA Civ 1586, [2012] LGR 530 of approaching an EIA as if it were a forensic document… An EIA is a working tool designed to ensure that decision makers pay due regard to (as a shorthand) the equality impact of their decisions and to act as a record that they have done so or at least that those impacts have been drawn to their attention. It will not typically be drafted by lawyers, nor typically should it be. To the extent that views are expressed on matters requiring assessment or evaluation the court should go no further in its review than to identify whether the essential questions have been conscientiously considered and that any conclusions reached are not irrational. Inessential errors or misjudgements cannot constitute or evidence a breach of the duty."

72. Mr Drabble additionally referred us to *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 where McCombe LJ at paragraph 78 set out principles for determining compliance with the PSED:

> "The concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

73. Mr Drabble submitted that the judge's detailed analysis fell into the error identified in the last sentence of paragraph 78 of *Bracking* and that his assessment of the alleged failings in the Equality Statement was in fact a disagreement with its merits. He emphasised that the obligation upon a decision maker was to pay due regard to the equality impact in making a decision; there was no requirement to carry out a detailed mathematical exercise in relation to potentially impacted groups. The Secretary of State had sufficiently complied with his duty by considering the impact on protected groups. The Equality Statement had identified adverse impacts on them in its assessment that 21 per cent of affordable housing contributions were derived from sites of 10 units or below, and by acknowledging that the policy changes would impact on persons with protected characteristics occupying social housing to a greater extent that the general market. The approach and analysis of the Equality Statement represented compliance with the process required by section 149. The conclusions to be drawn were a matter for the Secretary of State, not for the judge. Overall, the judge's approach had wrongly amounted to an impermissible trespass into the territory of the substantive merits.

74. Mr Forsdick sought to uphold the judge's ruling. His argument had two main strands. The first strand involved a submission that the Equality Statement demonstrated a failure to comply with section 149. The second strand urged that the consideration of equality impacts should be an important part of the decision making process, so that a post-decision Equality Assessment should not be permitted to remedy an initial failure to carry out such an exercise. To permit this would be to put the process the wrong way round and to permit ex post facto validation of incompletely formed decisions. Some analogy was drawn with the position where a court or tribunal gives reasons after a complaint has been raised that no or insufficient reasons for a decision have been given.

75. Mr Forsdick argued that the judge's approach, characterised by Mr Drabble as an improperly detailed forensic analysis, was justified and necessary since it revealed flaws in the fundamental logic of the Secretary of State's position and thus demonstrated that section 149 had been complied with. He sought to support the matters relied upon by the judge. As to the vacant building credit, this was relevant because it would have an impact on the provision of affordable housing in urban areas. Since protected groups were over-represented in those who required affordable housing the impact upon them in terms of access to affordable housing raised section 149 considerations. The Equality Statement had made no, or scant, reference to the impact of this aspect of the new policy, and thus the statutory duty had not been discharged.

76. Mr Forsdick's principal challenge, however, related to the view that the overall impact of the new policy on affordable housing supply would be "minor". Whilst the Minister's judgement was undoubtedly a matter for him, his conclusion could not be sustained because, although he had recognised impacts of his policy on protected groups, he had then gone on to judge that impact in the context of the total provision for affordable housing when he should have focused upon the impact of this particular policy. Other policies should be viewed as irrelevant for the purpose of the Impact Assessment. It was this approach that led to the conclusion of "minor" impact and which did not represent a true section 149 evaluation. This erroneous "high level" approach was inconsistent with the PSED and was compounded by a failure by the Minister properly to inform himself on the central issue of the impact of this policy on protected groups. Matters relied on demonstrated an insufficiently rigorous approach and an insufficiently open mind. Accordingly, the judge had been correct in his approach and analysis.

77. Mr Forsdick's second strand placed reliance upon the observations of Buxton LJ in *R (C (a minor)) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657. This case concerned the failure to carry out a Race Equality Impact Assessment (REIA) in the context of rules promulgated in relation to the treatment and discipline of secure training centre trainees without the benefit of such an Assessment. At paragraph 49 after observing that leading judges had stressed the importance of REIAs as an instrument in guarding against race discrimination, and the importance of compliance with the requirement to obtain them when required as opposed to a rear guard actions following a concluded decision, Buxton LJ continued:

> "In the present case, absence of an REIA was the result not of inattention but of a mistake made by the Secretary of State…In my view it sent out quite the wrong message to public bodies

> with responsibilities under section 71 to allow that deficit to be cured by a review only undertaken 8 months after the Amendment Rules have been laid, and in the face of an adverse court decision [the Divisional Court]; and only completed a year after the Amendment Rules were laid, and 4 days before the hearing in this court…I do not of course in any way doubt the good faith of the grade 7 civil servant who has produced a REIA that demonstrates that PCC is not applied in a discriminatory fashion. But as a matter of principle it cannot be right that a survey that should have been produced to inform the mind of Government before it took the decision to introduce the Amendment Rules was only produced in order to attempt to validate the decision that had already been taken."

78. Buxton LJ then went on to consider whether the Amendment Rules should be quashed. At paragraph 54 he continued:

> "It continues to be of the first importance to mark that failure by an appropriate order. That an REIA has now been produced more than a year after it should have been is by no means conclusive on this issue of principle, granted the unsatisfactory conditions under which that work was undertaken. Miss Lieven pointed out that despite this court's strictures in the *BAPIO case* [2007] EWCA Civ 1139 it did not interfere with the refusal of the trial judge to quash the regulations. But that was a case where the mistake had been realised and corrected before the matter came to court and was the subject of a proper apology. Neither of those things is true in this case."

79. Accordingly, argued Mr Forsdick, since a properly considered Equality Statement should inform the making of policy, one created retrospectively should not be acceptable.

Discussion

80. We begin by considering the Equality Statement itself. It begins at section 2 with a statement that, in order to ensure compliance with its obligations under the PSED, the Government is "reconsidering" a number of measures to reduce disproportionate costs placed on smaller developments. Section 3 refers to the fact that an earlier Equality Statement relating to measures introduced in 2013 recognised that policies on the provision of market and affordable housing have the potential to impacts on protected groups – either positively or negatively. Section 6 refers to data for groups in relation to age, disability and race which showed greater representation in social housing for those groups than in all housing types. Section 7 noted a high percentage of some groups sharing protected characteristics in social housing when compared to the percentage of overall housing in England. This was particularly the case for disabled people/long term sick, and the ethnic minorities. Any reduction in affordable housing "may therefore impact on such groups". There was then some disclosure of data which showed, when taken with other data, that adverse impacts on protected groups by reason of the new policy would occur in cases which represented part of the 21 per cent of affordable housing contributions derived from sites of 10 units or less. That

figure of 21 per cent is a percentage of the 35 per cent figure which represents the proportion of affordable housing provided through section 106 contributions compared to the total amount of affordable housing.

81. The Statement then continued:

> "This policy may result in some local reduction in affordable housing in relation to the affordable housing threshold, including annexes and extensions, and the vacant building measure. Our assessment of the data shows that this is a minor element and as stated above the Government over the next Parliament, will be building more new affordable homes than during any equivalent period in the last 20 years."

82. Section 10 stated:

> "We do not consider that this policy will have a negative impact on discrimination, fostering good relations or advancing equality of opportunity. Delivery of the Government's affordable housing targets is providing local areas access to more affordable homes, benefiting local communities and local economic growth. Data shows that 1-2 jobs are supported per dwelling built. Groups that share protected characteristics will also benefit as a result of this.
>
> This policy may impact on the delivery of affordable homes. However statistics show that the Government is on track to deliver 170,000 new affordable homes between 2011-2015. A further £38 billion public and private investment will help ensure another 270,000 new affordable homes are provided between 2015-2020. This means over the next Parliament we will build more new affordable homes than during any equivalent period in the last 20 years. The majority of which is delivered through national funding, with section 106 contributions making up a small proportion of the overall target."

83. It seems to us that this Statement demonstrated a consideration of the potential for adverse impacts on protected groups. The requirement to pay due regard to equality impact under section 149 is just that. It does not require a precise mathematical exercise to be carried out in relation to particular affected groups or, for example, urban areas as opposed to rural areas. The Assessment undoubtedly acknowledged the effect of the proposals upon protected groups but sought to place that in context by reference to other policies impacting on affordable housing.

84. A significant difference between the arguments presented to us related to the question of whether it was legitimate to have regard to other policies in the field of affordable housing. It seems to us that to assess the new policy without reference to other policies which are germane would be to adopt too narrow an approach. Viewed in this light, the prospect of an impact within the 21 per cent cohort was properly viewed as "minor" in the context of affordable housing overall. The judge's finding that there

was an inconsistency between the use of the word "minor" and the assessment of "significant impact" within the 21 per cent cohort was not justified. When the broader picture of overall affordable housing provision was considered, the use of the word "minor" was not inappropriate. It represented the Minister's assessment of the weight to be given to the equality considerations in the light of all relevant factors in accordance with *Bracking*.

85. Whilst it may fairly be said that the Equality Statement takes a relatively broad brush approach as compared to the exercise urged by the respondents and adopted by the judge, we consider that compliance with the terms of section 149 was achieved by what was done in this case. Insofar is the judge adopted a more stringent and searching approach to the Equality Statement we consider that he was in error.

86. That finding does not dispose of this issue, since it is necessary to address the second strand of Mr Forsdick's argument. We have to consider the effect of the failure to consider section 149 at the right time in the light of our conclusion that the eventual Equality Statement satisfies the statutory requirements. A reading of Buxton LJ's comments at paragraph 49 of *C* might appear to favour the quashing of the decision solely by reason of the fact that the Equality Statement was not prepared as part of the decision, and post-dated it. However, reference to paragraph 54 of *C* shows that late preparation of the Assessment is not necessarily conclusive on the question of whether quashing the decision should automatically follow. There seems to us to be some degree of tension between paragraphs 49 and 54, and there have been situations in which this court has not quashed a decision, notwithstanding a failure to address equality impacts at the correct point in time.

87. Nothing we say should be thought to diminish the importance of proper and timely compliance with the PSED. But we have strong reservations about the proposition that the court should necessarily exercise its discretion to quash a decision as a form of disciplinary measure. During the course of argument, Mr Forsdick accepted that if an Assessment, subsequently carried out, satisfied the court, there would be no point in quashing the decision if the effect of doing that and requiring a fresh consideration would not have led to a different decision. We think this was a correct concession. The court's approach should not ordinarily be that of a disciplinarian, punishing for the sake of it, in these circumstances. The focus should be on the adequacy and good faith of the later Assessment, although the court is entitled to look at the overall circumstances in which that Assessment was carried out. In the case of *C* a particularly dilatory state of affairs was identified which was of importance to the exercise of the court's discretion as to remedy. The decision in *BAPIO* appears to represent the other end of the spectrum. The present case falls somewhere between the two on that spectrum. We do not think that *C* necessarily demonstrates that an order quashing the decision must follow.

88. The judge came to his conclusion based on his assessment that section 149 was not satisfied. We have come to a different conclusion on that issue, and are thus free to consider afresh whether it is necessary to quash the decision as opposed to granting declaratory relief. In the circumstances, where bad faith is not suggested, and where we have concluded that the Equality Statement was not inadequate, it seems to us that considerations of a purely disciplinary nature are insufficient to warrant the quashing of the decision in this case. Accordingly, we uphold the appeal based on ground 4.

CONCLUSION

89. For the reasons that we have given, all four grounds of appeal succeed and the appeal must be allowed.

MASTER OF THE ROLLS:

90. I agree.