Neutral Citation Number: [2020] EWCA Civ 1651

Case No: C1/2020/0139

IN THE COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2020

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE FLAUX
and
LORD JUSTICE NEWEY

- -

Between:

THE QUEEN (ON THE APPLICATION OF DURAND EDUCATION TRUST)	**Claimant**
- and –	
SECRETARY OF STATE FOR EDUCATION	**Defendant**
- and -	
(1) DUNRAVEN EDUCATIONAL TRUST **(2) LONDON BOROUGH OF LAMBETH**	**Interested Parties**

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- -

Andrew Sharland QC and Stephen Kosmin (instructed by **Lee Bolton Monier-Williams**) for the **Claimant**
Jonathan Moffett QC and Matthew Smith (instructed by the **Government Legal Department**) for the **Defendant**
Jonathan Auburn (instructed by **SV Law**) for the **Second Interested Party**
The **First Interested Party** was not represented.

Hearing dates: 3-4 November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Tuesday 08 December 2020 at 10:30am

Lord Justice Newey:

1. This case concerns land at Hackford Road in Stockwell, London ("the Hackford Road Site") where a school called Van Gogh Primary is now based. Title to the Hackford Road Site was formerly vested in the claimant, Durand Education Trust ("DET"), but it has been transferred to the London Borough of Lambeth ("Lambeth") without payment of any consideration pursuant to directions made by the defendant, the Secretary of State for Education, under the Academies Act 2010 ("the AA 2010"). DET does not challenge the transfers as such, but it alleges that the decision not to pay it compensation in respect of part of the property, referred to as "the Leisure Centre Land", was unlawful. It complains of breaches of article 1 of the First Protocol to the European Convention on Human Rights ("the Convention"), article 14 of the Convention and the public sector equality duty ("the PSED") for which section 149 of the Equality Act 2010 provides.

2. There has been a school on the Hackford Road Site since the 1880s. In time, the school came to be known as Durand Primary School and I shall call it that for the period up to its conversion into an academy in 2010.

3. By the 1980s, Durand Primary School was maintained by, and the Hackford Road Site held by, the Inner London Education Authority ("ILEA"). Following the abolition of ILEA in March 1990, Lambeth assumed responsibility for maintenance of the school and the site was transferred to it by operation of law without any payment of consideration. Also in 1990, the governors of the school received a grant of £100,000 from the London Residuary Body, which had been established to distribute funds of the Greater London Council after its abolition. At least part of the grant was used to construct an all-weather sports pitch and a swimming pool on the Hackford Road Site.

4. In 1995, Durand Primary School turned into a grant-maintained school and the Hackford Road Site was again transferred by operation of law without any payment of consideration, this time to the school's governors ("the Governors") in accordance with section 38 of the Education Act 1993. That section provided for land used or held for the purposes of a school to be transferred to, and vest in, its governing body on its becoming grant-maintained. By now, the Governors had corporate status, having been incorporated as Durand Primary School's governing body pursuant to section 34 of the 1993 Act.

5. In about 1995, further works were undertaken on the Hackford Road Site, to convert the upper floors of one of the school buildings into residential accommodation. By 1997, the Governors were renting out that accommodation and also the sports pitch and swimming pool.

6. In 1997, the Governors incorporated a company limited by guarantee, London Horizons Limited ("LHL"), to undertake trading activity on their behalf. The plan was for LHL to occupy land at the Hackford Road Site for free but to donate its profits to the Governors with the benefit of gift aid. LHL's 2002 accounts explained:

> "[LHL] was set up to undertake trading activity on behalf of Durand Primary School …. A Deed of Covenant arrangement has been set up with the School whereby taxable profits are

> transferred to the School. All the Directors of [LHL] are Governors of Durand Primary School.
>
> The Directors of [LHL] consider that the parent undertaking is the Durand Primary School."

More recently, from 2015, DET has been LHL's sole member.

7. Grant-maintained status was abolished in 1999. At that stage, Durand Primary School became a foundation school without a foundation pursuant to the School Standards and Framework Act 1998 ("the SSFA 1998"). The school continued to be maintained by Lambeth and the Hackford Road Site remained in the ownership of the Governors.

8. In 2001, a residential accommodation block was built on the Hackford Road Site and this was subsequently rented out on a commercial basis. There was substantial further work in 2004, with the construction of a leisure centre including a swimming pool, a gym, changing facilities and a restaurant.

9. A spreadsheet supplied by DET's then solicitors in 2018 shows "Expenditure on Income Generating Assets 1995 to 2017". This includes three entries in respect of the Hackford Road Site, as follows:

1995	Teachers accommodation block – located in the main school building	£201,612
2001	Accommodation block – Liberty Street	£961,763
2004	Swimming pool and sports centre – Liberty Street	£1,678,966

10. In 2001, LHL had awarded a 10-year contract for the management of parts of the Hackford Road Site to a company owned by Durand Primary School's headmaster, Sir Greg Martin, and members of his family. A similar 10-year contract was awarded to another company owned by Sir Greg Martin and his family in 2012.

11. In May 2010, Durand Primary School became a foundation school with a foundation with the incorporation of DET on 18 May 2010 as a trust for the foundation. (A foundation school had a foundation where an entity other than its governing body held land on trust for the purposes of the school: see section 21(3)(a) of the SSFA 1998.) The Hackford Road Site was transferred to DET, once again without any payment of consideration, under the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007. Paragraph 2A of schedule 6 to those regulations provided as follows:

> "(1) This paragraph applies where any proposals that a foundation school should acquire a foundation have been approved.

> (2) In such a case, any land, which immediately before the implementation date, was held or used by the local authority or governing body for the purposes of the foundation school, must on that date transfer to, and by virtue of this paragraph vest in, the trustees of the school, to be held on trust for the purposes of the school."

DET thus held the Hackford Road Site "on trust for the purposes of the school".

12. DET is a company limited by guarantee and a registered charity. Its objects were until 2019 stated in article 3 of its articles of association to be restricted to the following:

> "3.1 To advance education for the public benefit and in particular the education of the pupils at Durand Primary School and at any school which is a Qualifying School [i.e. a foundation school], or at any other School in respect of which the Company [i.e. DET] acts or has acted as a foundation it being acknowledged that in carrying out the Objects the Company must, so far as is consistent with this purpose, have regard to its obligation to promote community cohesion under the Education Acts.
>
> 3.2 To advance education for the public benefit by establishing, maintaining, carrying on managing and developing Academies offering a broad curriculum with a strong emphasis on, but in no way limited to, one or a combination of the specialisms specified in the funding agreements entered into between the Company and the Secretary of State for Children Schools and Families … relating to each of the Academies"

Article 4.1 empowered DET:

> "To act as the foundation of Durand Primary School for the purposes of the School Standards and Framework Act 1998 and to act as the foundation of any School which is a Qualifying School".

13. In September 2010, Durand Primary School converted into an academy called Durand Academy. DET retained title to the Hackford Road Site, but it was required by the Secretary of State to grant a lease to Durand Academy Trust, which had been established in the preceding month as an exempt charity regulated by the Department for Education. Lambeth ceased to maintain the school and the Governors were dissolved by operation of law, although most of the individual governors were by then trustees of Durand Academy Trust.

14. Durand Academy Trust ceased to operate Durand Academy on 31 August 2018 with the termination of its funding agreement by the Secretary of State. Van Gogh Primary opened on the Hackford Road Site the next day. The first interested party, Dunraven Educational Trust, is the academy trust for Van Gogh Primary (as well as for other academies).

15. Earlier in 2018, on 3 April, the chief executive of the Education and Skills Funding Agency ("ESFA") had made a direction on behalf of the Secretary of State under paragraph 15 of schedule 1 to the AA 2010 to the effect that, on the date Durand Academy ceased to be an academy, the part of the Hackford Road Site containing the school buildings be transferred to Lambeth. The direction ("the First Direction") provided that, once the transfer had taken place, the Secretary of State would determine whether the payment of any consideration was appropriate and, if so, in what sum. Following the transfer, Lambeth granted a 125-year lease of the land to Dunraven Educational Trust at a peppercorn rent.

16. On 30 April 2019, DET changed its objects so that they were restricted to the following:

> "To advance education for the public benefit and in particular the education of young persons under the age of 30 who are residing in, or who have resided within the London Borough of Lambeth".

17. On 22 May 2019, ESFA made a further direction ("the Second Direction") on behalf of the Secretary of State. This directed that the balance of the Hackford Road Site (viz. the Leisure Centre Land) be transferred to Lambeth "to be held on trust for the purposes of the school now known as Van Gogh Academy". The direction went on to state that, in the light of representations that DET had already made, the Secretary of State had determined that no consideration should be paid for any of the Hackford Road Site.

18. On 9 October 2020, the Leisure Centre Land was transferred to Lambeth pursuant to the Second Direction.

19. The officials responsible for the making of the Second Direction did not turn their minds to article 1 of the First Protocol to the Convention ("A1P1"), article 14 of the Convention or the PSED. However, the solicitors acting for DET had not placed any reliance on any of these in the extensive correspondence with ESFA and the Government Legal Department which had preceded the Second Direction being made.

20. Paragraph 15 of schedule 1 to the AA 2010, in pursuance of which the First and Second Directions were made, is in these terms:

> "15 Power of Secretary of State to make direction on educational institution ceasing to be an Academy
>
> (1) This paragraph applies if—
>
> (a) an educational institution ceases to be an Academy, and
>
> (b) immediately before it does so, publicly funded land is held by a person for the purposes of the Academy.
>
> (2) Sub-paragraph (1)(a) applies whether or not, on the educational institution ceasing to be an Academy, it simultaneously ceases to function as an educational institution.
>
> (3) The Secretary of State may make one or more of the following directions—

> (a) a direction that the land or any part of the land be transferred to such local authority as the Secretary of State may specify, subject to the payment by that authority of such sum by way of consideration (if any) as the Secretary of State determines to be appropriate;
>
> (b) a direction that the person holding the land pay, either to the Secretary of State or to such local authority as the Secretary of State may specify, the whole or any part of the value, as at the date of the direction, of the whole or any part of the land;
>
> (c) a direction that the land or any part of the land be transferred to a person concerned with the running of an Academy, subject to the payment by that person or the Secretary of State of such sum by way of consideration (if any) as the Secretary of State determines to be appropriate;
>
> (d) a direction that the land or any part of the land be transferred to the governing body, foundation body or trustees of a school, subject to the payment by that body or trustees (as the case may be) or the Secretary of State of such sum by way of consideration (if any) as the Secretary of State determines to be appropriate."

21. DET does not dispute that the terms of paragraph 15 of schedule 1 to the AA 2010 were such as to authorise the making of the First and Second Directions. As I have mentioned, however, it alleges that the decision to transfer the Leisure Centre Land without compensation was unlawful because it breached A1P1, article 14 of the Convention and the PSED.

22. On 20 August 2019, DET issued a claim for judicial review. On 1 November, Griffiths J made an order on the papers refusing permission to apply for judicial review, but DET renewed its application to an oral hearing. On 16 January 2020, the matter came before Lang J, who also refused permission to apply for judicial review, but DET applied for permission to appeal to the Court of Appeal. On 24 February, Lewison LJ granted DET permission to apply for judicial review, taking the view that the grounds of appeal had real prospects of success, and determined that the claim should be retained in this Court. What is before us, therefore, is DET's application for judicial review rather than, strictly, an appeal from Lang J's order.

23. The following issues arise:

    i) Does the transfer of the Leisure Centre Land without compensation breach A1P1 because it is disproportionate?

    ii) Is the transfer in breach of A1P1 because of an absence of guidance on the payment of compensation?

    iii) Does the transfer breach article 14 of the Convention read with A1P1?

    iv) Should relief in respect of breach of the PSED (which the Secretary of State admits) be denied pursuant to section 31(2A) of the Senior Courts Act 1981?

Issue (i): A1P1 - Proportionality

24. A1P1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

25. In *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35, the European Court of Human Rights ("the ECtHR") noted in paragraph 61 that A1P1 comprises three distinct rules:

> "The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph."

26. We were taken to two decisions in which the ECtHR considered whether deprivations of property without compensation breached A1P1 because they were disproportionate: *Jahn v Germany* (2006) 42 EHRR 49 and *Vistiņš v Latvia* (2014) 58 EHRR 4. In *Jahn v Germany*, the ECtHR summarised the relevant principles as follows under the heading "Proportionality of the interference":

> "93. The Court reiterates that an interference with the peaceful enjoyment of possessions must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Art.1 of Protocol No.1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions.
>
> 93. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to

> ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. Nevertheless, the Court cannot abdicate its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicants' right to 'the peaceful enjoyment of [their] possessions', within the meaning of the first sentence of Art.1 of Protocol No.1.
>
> 94. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Art.1 of Protocol No.1 only in exceptional circumstances."

27. *Jahn* concerned land which had been allocated to forebears of the applicants, subject to substantial restrictions, when it was in the Soviet Occupied Zone of Germany following the Second World War. In 1990, the East German Parliament passed a law known as the "Modrow Law" lifting all restrictions on the disposal of such land, with the result that those in possession of it became its owners in the full sense of the word. After the reunification of Germany, however, the applicants were compelled to reassign the properties to the tax authorities without compensation in accordance with legislation passed in 1992 by the Federal Parliament. The applicants complained that A1P1 had been violated, but on the particular facts the ECtHR held that there had been no breach. As regards proportionality, it concluded in paragraph 117:

> "Having regard to all the foregoing considerations and taking account, in particular, of the uncertainty of the legal position of heirs and the grounds of social justice relied on by the German authorities, the Court concludes that in the unique context of German reunification, the lack of any compensation does not upset the 'fair balance' which has to be struck between the protection of property and the requirements of the general interest."

28. Mr Andrew Sharland QC, who appeared for DET with Mr Stephen Kosmin, stressed both the unusual facts of *Jahn* and the reference in paragraph 94 of the judgment to total lack of compensation being considered justifiable under A1P1 "only in exceptional circumstances".

29. *Vistiņš v Latvia* related to the expropriation of land in Riga for sums which the ECtHR saw as "almost tantamount to a complete lack of compensation" (paragraph 119). The ECtHR held there to have been a violation of A1P1, concluding in paragraph 131 that:

> "the state overstepped the margin of appreciation afforded to it and … the expropriation complained of by the applicants imposed on them a disproportionate and excessive burden,

> upsetting the 'fair balance' to be struck between the protection of property and the requirements of the general interest".

Distinguishing *Jahn*, the ECtHR said in paragraph 127:

> "In sum, unlike the case of *Jahn*, the present case is not one where a manifestly unjust situation that emerged in the process of denationalisation had to be remedied by the legislature ex post facto within a relatively short time in order to restore social justice."

The ECtHR said in paragraph 126 that in *Jahn*:

> "the objectives of the second Property Rights Amendment Act were legitimate, and the Court therefore recognised that the Federal Republic of Germany's parliament could not be deemed to have been manifestly unreasonable in considering that it had a duty to correct the effects of the Modrow Law for reasons of social justice".

Further:

> "Given the 'windfall' from which the applicants had benefited as a result of the Modrow Law, the fact that the relevant correction had been made without paying any compensation was not disproportionate."

30. In paragraph 119 of the *Vistiņš* judgment, the ECtHR observed that "only very exceptional circumstances" could justify the absence of compensation. In contrast, the ECtHR had said in paragraph 112, in a section of the judgment headed "General principles", that "a total lack of compensation can be considered justifiable only in exceptional circumstances" (without adding "very").

31. The *Vistiņš* judgment includes these comments on the need to focus on reality rather than appearances and the significance of the fact that property was acquired by way of gift:

    i) "in order to assess the conformity of the state's conduct with the requirements of art.1 of Protocol No.1, the Court must conduct an overall examination of the various interests in issue, having regard to the fact that the Convention is intended to guarantee rights that are 'practical and effective', not theoretical or illusory. It must go beneath appearances and look into the reality of the situation at issue, taking account of all the relevant circumstances, including the conduct of the parties to the proceedings, the means employed by the state and the implementation of those means" (paragraph 114); and

    ii) "The Court notes that whilst the applicants acquired the land at issue by way of donation, the parties agreed that this had taken place in return for certain services rendered by the applicants to the donors. It would therefore be incorrect, strictly speaking, to assert that the property in question was acquired 'free of charge'. In any event, a donation being definable as a transaction entered into with

> an *animus donandi*, the manner in which the applicants acquired their property cannot be held against them" (paragraph 121).

32. As Mr Sharland pointed out, "margin of appreciation", to which there was reference in both *Jahn* and *Vistiņš*, is as such a concept that applies internationally rather than domestically. However, comparable concepts are to be found in domestic law. The Courts have recognised a "discretionary area of judgment" where "the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention" (*R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, at 381, per Lord Hope; see also *A v Secretary of State for the Home Department* [2005] 2 AC 68, at paragraphs 37–42, per Lord Bingham). In *In re Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016 Lord Mance explained at paragraph 54:

> > "At the domestic level, the margin of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature's margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level: *In re G (Adoption: Unmarried Couple)* [2009] AC 173 and *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2015] AC 657, per Lord Neuberger of Abbotsbury PSC at p 781, para 71, per Lord Mance JSC at p 805, para 163 and per Lord Sumption JSC at pp 833-834, para 230. However, domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis: see the *AXA* case [2012] 1 AC 868, para 131, per Lord Reed and *R (Huitson) v Revenue and Customs Comrs* [2012] QB 489, para 85. But again, and in particular at the fourth stage, when all relevant interests fall to be evaluated, the domestic court may have an especially significant role."

Lord Mance had earlier described the "fourth stage" as that involving consideration of "whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right" (see paragraph 45).

33. The weight to be accorded to a decision-maker's views may be affected by the extent to which it can be seen to have made an informed choice. Thus, in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420, Baroness Hale said at paragraph 37:

> > "The legislation leaves it to the local authority to [strike a fair balance] in each individual case. So the court has to decide whether the authority has violated the Convention rights. In doing so, it is bound to acknowledge that the local authority is much better placed than the court to decide whether the right of sex shop owners to sell pornographic literature and images

> should be restricted-for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights of others. But the views of the local authority are bound to carry less weight where the local authority has made no attempt to address that question. Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be."

In a similar vein, Lord Mance said:

> "46. … But, what is the position if a decision-maker is not conscious of or does not address his or its mind at all to the existence of values or interests which are relevant under the Convention?
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> 47. The court is then deprived of the assistance and reassurance provided by the primary decision-maker's 'considered opinion' on Convention issues. The court's scrutiny is bound to be closer, and the court may, as Baroness Hale observes in para 37 of her opinion, have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider."

34. In the present case, DET maintains that there were no "exceptional circumstances" which could justify the failure to pay any compensation for its loss of the Leisure Centre Land. The usual entitlement to compensation for a deprivation of possessions ought, it is said, to be given effect. Such compensation could be appropriately measured, DET suggests, by the difference between the value of the Leisure Centre Land as transferred by Lambeth in 1995 or, alternatively, by the value of the entrepreneurial efforts, time and hard work expended on the Leisure Centre Land by DET, its servants and agents during the period it was the owner of the property.

35. DET had unencumbered title to the Leisure Centre Land, Mr Sharland said. That it had not had to pay for it does not matter, just as the manner in which the applicants in *Vistiņš v Latvia* had acquired their property was unimportant. Moreover, the conduct and expenditure of DET contributed to the value of the Leisure Centre Land. The money invested came from commercial exploitation of the land and is appropriately to be seen as private. To regard funds derived from a profit-making commercial enterprise such as LHL as anything other than private merely because the enterprise's initial capital expenditure emanated from public funds would strain proper use of language. For Lambeth to acquire the Leisure Centre Land without paying anything for it would be to confer a windfall, Mr Sharland argued. Further, anxious scrutiny must be applied since the Secretary of State did not consider Convention rights when making his decision, and it is of significance that the Secretary of State accepted in correspondence in 2010 that the Leisure Centre Land had been "privately enhanced by DET".

36. In my view, however, the Secretary of State was amply justified in concluding that no compensation should be paid to DET for the Leisure Centre Land. That did not involve a disproportionate interference. To the contrary, there were exceptional circumstances making it inappropriate for compensation to be payable.

37. In the first place, I do not think DET will ever have had unencumbered title to the Leisure Centre Land. It was transferred to it in 2010 subject to a trust "for the purposes of the school" pursuant to the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007. Mr Sharland submitted that that trust came to an end when Durand Academy replaced Durand Primary School later in 2010, but it will not have been as simple as that. Mr Jonathan Moffett QC, who appeared for the Secretary of State with Mr Matthew Smith, suggested that the trust continued beyond the closure of Durand Primary School, on the basis that the relevant *purposes* survived and could be served by use of the land by Durand Academy and, more recently, Van Gogh Primary. Supposing, however, that that analysis were wrong, it seems to me, as Mr Moffett argued in the alternative, that a cy-près occasion would have arisen and that DET should have been asking for a scheme to be made (see section 61 of the Charities Act 2011 and, before that, section 13(5) of the Charities Act 1993). Such a scheme could be expected to have provided for the Leisure Centre Land to be held on trust for Durand Academy or, later, Van Gogh Primary, as Durand Primary School's successors on the Hackford Road Site.

38. Secondly, there is no reason to believe that any conduct or expenditure on DET's part enhanced the value of the Leisure Centre Land. The simple fact is that no works were carried out on the Leisure Centre Land when DET was its owner. The leisure centre was constructed in 2004, the accommodation block dated from 2001 and the upper floors of the school building had been converted in about 1995. In contrast, DET did not even come into being until 2010.

39. Thirdly, no money that can sensibly be regarded as "private" was ever invested in the Leisure Centre Land. LHL's profits may have helped to fund the improvements there, but it had no external funding. Its earnings derived from exploitation of land held by the Governors/DET, of which it was essentially an arm. As mentioned earlier, the company's accounts confirm that it was set up to undertake trading activity on behalf of Durand Primary School and had the Governors and, later, DET as its parent. The intention was that profits should be transferred to the Governors in a tax-efficient way, but the company itself was to belong to the Governors. Latterly, moreover, LHL ceased to supply Durand Academy with any funds. The evidence indicates that, while LHL achieved profits of some £8.3 million between 2010 and August 2018, less than £1 million of this sum accrued to the benefit of Durand Academy and neither LHL nor DET transferred any money at all to Durand Academy Trust or Dunraven Academy Trust after 2015.

40. Fourthly, in so far as it might be said that non-financial efforts on the part of, say, Sir Greg Martin or his companies contributed to the development of the Leisure Centre Land or the earnings from it, they were well remunerated for them. LHL appears to have paid the companies upwards of £3.5 million between 2002 and 2018 aside from Sir Greg Martin's salary and pension contributions as head teacher of successively Durand Primary School and Durand Academy. In a 2014 report on the Education Funding Agency's oversight of related party transactions at Durand Academy, the

National Audit Office gave Sir Greg Martin's total remuneration in that role in 2012-2013 as £229,138.

41. Fifthly, there is no question of Lambeth receiving a windfall. The Leisure Centre Land was transferred to Lambeth "to be held on trust for the purposes of the school now known as Van Gogh Primary". As it was put by Mr Jonathan Auburn, who appeared for Lambeth, Lambeth is but the latest custodian of the land for the benefit of the school there. It is not in a position to profit from the Leisure Centre Land, yet requiring it to pay DET for the land would impose a major financial burden, to the potential prejudice of both those using its services and council tax-payers. We were told that Lambeth is in an exceptionally strained financial position.

42. Sixthly, looking at matters more broadly, the "reality of the situation at issue" (to use words from the judgment in *Vistiņš v Latvia*) is that the Hackford Road Site, including the Leisure Centre Land, has been held by successive entities for the purposes of the publicly-funded school there. The land has passed from one owner to another with changes in the education system, but always without consideration and without any injection of private capital. The different title-holders can aptly be thought of, as Mr Auburn suggested, as custodians. That being so, far from it being the case that Lambeth receives a windfall from the Second Direction, DET would gain one if it were compensated for the Leisure Centre Land.

43. Seventhly, with regard to the reference in 2010 correspondence to the Leisure Centre Land having been "privately enhanced by DET", it is fair to say that an official in the Department for Education told DET in an email of 25 August 2010 that the Department was content to allow the Hackford Road Site to remain with DET "given that it is public land which has been privately enhanced by DET". However, there is room for debate as to what the official meant and he went on to say that the Department was content "because in relation to public land being used for an Academy (even if not transferred or directed to be transferred) the Secretary of State can still make directions in relation to it, when it ceases to be an Academy (as per para 7(2) and 7(6) of Schedule 1 of the AA 2010)". In any case, no legitimate expectation claim having been pursued, what was said in the correspondence cannot be important. It cannot affect the overall assessment of proportionality and fair balance.

Issue (ii): A1P1 – Absence of Guidance

44. As was noted in *Sporrong and Lönnroth v Sweden*, the second sentence of A1P1 "covers deprivation of possessions and subjects it to certain conditions". One of the conditions is that the deprivation should be "subject to the conditions provided for by law".

45. In *Vistiņš v Latvia*, the ECtHR said this about this requirement:

> "95. The Court reiterates that art.1 of Protocol No.1 requires that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph of that article authorises the deprivation of possessions 'subject to the conditions provided for by law'. Moreover, the rule of law, one of the fundamental principles of

> a democratic society, is a notion inherent in all the articles of the Convention.
>
> 96. However, the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal basis must have a certain quality, namely it must be compatible with the rule of law and must provide guarantees against arbitrariness. In this connection it should be pointed out that, when speaking of 'law', art.1 of Protocol No.1 alludes to the very same concept as that to which the Convention refers elsewhere when using that term.
>
> 97. It follows that, in addition to being in accordance with the domestic law of the Contracting State, including its Constitution, the legal norms upon which the deprivation of property is based should be sufficiently accessible, precise and foreseeable in their application. As to the notion of 'foreseeability', its scope depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. In particular, a rule is 'foreseeable' when it affords a measure of protection against arbitrary interferences by the public authorities. Similarly, the applicable law must provide minimum procedural safeguards commensurate with the importance of the principle at stake."

The ECtHR went on to say this at paragraph 111:

> "Moreover, the Court reiterates that, where an individual's property has been expropriated, there should be a procedure ensuring an overall assessment of the consequences of the expropriation, including the award of an amount of compensation in line with the value of the expropriated property, the determination of the persons entitled to compensation and the settlement of any other issues relating to the expropriation."

46. In *R (British American Tobacco (UK) Ltd) v Secretary of State for Health* [2016] EWHC 1169 (Admin), [2016] ETMR 38, at paragraph 809, Green J took *Vistiņš v Latvia* to be authority for the proposition that:

> "where there is an expropriation the State should set up a procedure which makes an overall assessment of the consequences of the expropriation, undertake a valuation of the expropriated property in line with normal market values, determine who the persons to be paid compensation are, and provide award of an amount of compensation in line with the value of the expropriated property."

47. DET's complaint in the present case is that no such procedure applies in relation to the determination of what, if any, compensation should be paid on the making of a direction for the transfer of land under paragraph 15(3)(a) of schedule 1 to the AA 2010.

Paragraph 15(3)(a) states simply that the Secretary of State may make "a direction that the land or any part of the land be transferred to such local authority as the Secretary of State may specify, subject to the payment by that authority of such sum by way of consideration (if any) as the Secretary of State determines to be appropriate". On the face of it, the Secretary of State is given an unfettered discretion to decide what, if any, consideration should be paid, without anything to limit uncertainty, arbitrariness or inconsistency. Moreover, while paragraph 21 of schedule 1 to the AA 2010 empowers the Secretary of State to make regulations containing incidental, consequential and supplemental provisions, none have been made. Nor has any relevant guidance been issued.

48. Mr Moffett submitted that DET had sold the pass on this argument. A1P1 requires *deprivations* to be "subject to the conditions provided for by law". In the present case, the "deprivations" were of the Leisure Centre Land and the remainder of the Hackford Road Site, to neither of which there is a challenge. All that DET is disputing, Mr Moffett said, is the absence of compensation, and the principle of legality does not apply to that separately. Procedural matters could, at most, bear on overall proportionality, but on the facts of this case the Secretary of State's decision that there should be no compensation was plainly proportionate. In this connection, Mr Moffett pointed out that paragraph 111 of the ECtHR's judgment in *Vistiņš v Latvia* is to be found in a section headed "Proportionality of the impugned measure".

49. I am not persuaded. While procedural matters may be of significance in assessing proportionality, it seems to me that the principle of legality can also play an independent role in relation to the assessment of compensation as well as the deprivation itself. What, if any, compensation is to be paid will of course commonly be important in considering whether a deprivation is consistent with A1P1, but the contention that, because the bare deprivation is not at issue, the principle of legality is irrelevant to compensation strikes me as overly technical, the more so when it is remembered that the Convention "is intended to guarantee rights that are 'practical and effective', not theoretical or illusory" and that the Court "must go beneath appearances and look into the reality of the situation at issue" (see paragraph 31(i) above). It is noteworthy, too, that paragraphs 95-97 of the judgment in *Vistiņš v Latvia*, which I have quoted in paragraph 45 above, are not included in the section headed "Proportionality of the impugned measure" but rather in one with the heading "'Subject to the conditions provided for by law'".

50. Even so, I do not consider that the absence of a formal procedure or guidance on the payment of compensation gave rise to a breach of A1P1 in the present case. In the first place, the discretion conferred on the Secretary of State by paragraph 15(3)(a) of schedule 1 to the AA 2010 was not in fact unfettered. Exercise of the power was constrained by reference to the purpose for which it had been conferred and other conventional public law principles as well as A1P1. The Government Legal Department told DET's solicitors in a letter dated 17 May 2019 that the Secretary of State would take his decision "in accordance with … normal duties of fairness, rationality, proportionality and due process". That reflected the legal position.

51. Secondly, a fair procedure was in fact put in place. Although it might be preferable for regulations or at least formal guidance to be issued, the Secretary of State did here adopt "a procedure ensuring an overall assessment of the consequences of the expropriation" (to use words of the ECtHR in *Vistiņš v Latvia*). The approach which was used was

such as to allow the particular circumstances to be fully considered, with DET having ample opportunity to advance the arguments it wished and to address points raised on behalf of the Secretary of State. Between February 2018 and May 2019, when the Second Direction was made, there was very extensive correspondence between ESFA and the Government Legal Department on the one hand and solicitors acting for DET on the other. There were also two meetings, in February and March of 2019. The Secretary of State's approach was explained in great detail, and DET's solicitors had every chance to voice their views. It therefore comes as no surprise that the Government Legal Department said in a letter to DET's solicitors of 17 May 2019 that, thanks to the interaction there had been between the parties, "ESFA fully understands DET's position and will take it into account in deciding whether to make a second direction, and on what terms".

Issue (iii): Article 14

52. Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

53. As Baroness Hale explained in *R (Stott) v Justice Secretary* [2018] UKSC 59, [2020] AC 51 at paragraph 207, in article 14 cases:

> " it is customary in this country to ask four questions: (1) does the treatment complained of fall within the ambit of one of the Convention rights; (2) is that treatment on the ground of some 'status'; (3) is the situation of the claimant analogous to that of some other person who has been treated differently; and (4) is the difference justified, in the sense that it is a proportionate means of achieving a legitimate aim?"

54. The word "status" has been given a wide construction (see e.g. the *Stott* case at paragraphs 56, 63, 185 and 209). In the present case, the "status" in question is said by DET to be "the different categories of body that hold land for use by schools".

55. DET argues that its situation is analogous to that of a foundation for a foundation school, but that it has been treated less favourably. Had it held the Leisure Centre Land as a foundation for a foundation school, DET says, Lambeth could not have claimed the enhanced value of the land.

56. In this connection, Mr Sharland took us to schedule 22 to the SSFA 1998. That schedule applies to the disposal of land owned by the trustees of a foundation, voluntary or foundation special school which, putting matters broadly, was acquired or enhanced with public money. The trustees must give the Secretary of State notice of their intention to make such a disposal and the Secretary of State must then "decide whether to make a direction under paragraph 12 of Schedule 1 to the Academies Act 2010 (transfer to Academy) in respect of the land" (see paragraph A13A(7)). Paragraph 12 of schedule 1 to the AA 2010 provides:

> "The Secretary of State may direct that the land or any part of the land to which the notice relates be transferred to a person concerned with the running of an Academy, subject to the payment by that person or the Secretary of State of such sum by way of consideration (if any) as the Secretary of State determines to be appropriate."

57. If, on the other hand, the Secretary of State decides against making a direction, paragraph A14 of schedule 22 to SSFA 1998 will apply. That obliges the trustees to notify the local authority of their intention to dispose of the land, and the notification must by paragraph A14(7) specify:

> "(a) the relevant capital expenditure upon which it is proposed the publicly funded proceeds of disposal are to be used, and
>
> (b) the estimated amount of the proceeds of disposal".

In turn, pursuant to paragraph A14(9), the local authority may give the trustees:

> "(a) notice of their objection to the disposal, giving reasons for their objection;
>
> (b) notice of their objection to the proposed use of the publicly funded proceeds of disposal, giving reasons for their objection;
>
> (c) notice of their claim to the whole or a part of the publicly funded proceeds of disposal".

In the event of such a notice being given and the local authority maintaining its objection or claim, the trustees may not proceed with the disposal or proposed use of the "publicly funded proceeds of disposal" (as the case may be) until the "relevant requirements" have been met. Absent an agreement between the trustees and the local authority, the "relevant requirements" involve reference to an adjudicator. Where the local authority has claimed all or part of the "publicly funded proceeds of disposal" in accordance with paragraph A14(9)(c) and an adjudicator has determined that it is appropriate for a sum to be paid to the local authority, the trustees must pay that sum to the local authority and "ensure that the remaining publicly funded proceeds of disposal are used on the agreed relevant capital expenditure" (see paragraph A16). "Relevant capital expenditure" means, by paragraph A18:

> "capital expenditure in relation to the premises of–
>
> (a) the school,
>
> (b) any existing foundation, voluntary or foundation special school, city technology college, city college for the technology of the arts, or Academy, or
>
> (c) any proposed foundation, voluntary or foundation special school, or Academy".

58. In making their decisions, trustees, local authorities and adjudicators are to have regard to any guidance from the Secretary of State and also, by paragraph A19, to the following factors:

> "(a) in the case of any disposal, the value of the land as at the date of the determination,
>
> (b) in the case of any disposal, any enhancement in value of the land attributable to expenditure on the land by the local authority or a relevant person,
>
> (c) in the case of any disposal, any expenditure on the land by a relevant person,
>
> (d) in the case of any disposal, any relevant payments made by a relevant person to the local authority or the Secretary of State,
>
> (e) in the case of any disposal, to the extent that they do not fall within paragraph (c) or (d), any payments in respect of the acquisition of the land, and
>
> (f) in the case of a disposal falling within paragraph A1(1)(i), paragraph A7(1)(h) or paragraph A13(1)(h) or (k), (2)(a)(iii) or (b), or (3)(a)(ii), the extent to which the proceeds of disposal mentioned in the provision in question were publicly funded proceeds of disposal as defined for the purposes of paragraph A2, A8 or A14, as the case may be".

In the case of a disposal to which paragraph A14 applies, "relevant person" means "the governing body or the trustees of the school in question" (see paragraph A19(5)).

59. The expression "publicly funded proceeds of disposal" is defined in paragraph A14(8) in these terms:

> "the proceeds of disposal which are attributable to the land having been acquired or enhanced in value, or both, as the case may be, as mentioned in the relevant paragraph or paragraphs of sub-paragraph (1), (2) or (3) of paragraph A13".

The following parts of paragraph A13 are material for present purposes:

> "(1) This sub-paragraph applies to any disposal by the trustees of a foundation, voluntary or foundation special school in England of–
>
> …
>
> (d) any land acquired under any of the following–
>
> …

> any regulations made under section 24 of the Education and Inspections Act 2006 by virtue of subsection (3)(b) of that section;
>
> …
>
> (2) This sub-paragraph applies to any disposal by the trustees of a foundation or foundation special school in England of–
>
> (a) any land acquired by the trustees from the governing body of the school or of another foundation or foundation special school which was land–
>
> (i) acquired by the governing body under a transfer under section 201(1)(a) of the Education Act 1996 ….”

60. Mr Sharland argued that, had DET been a foundation for a foundation school which was disposing of the Leisure Centre Land, it would have received compensation for enhancements to that land under the scheme laid down by schedule 22 to the SSFA 1998. He referred in this respect to some 2007 guidance from the Secretary of State, “The Transfer and Disposal of School Land England”. The “Overview” at the beginning of this document explains:

> “This guidance describes and summarises the procedures and legislation governing the transfer of land when a school changes category (and when a new foundation school is established) and also the disposal of surplus non-playing field land by foundation and voluntary schools and by foundation bodies. This includes the factors that the Adjudicator will consider when asked to determine a matter where there is not local agreement on the land to be transferred, on proposals to dispose of surplus non-playing field land which has in some circumstances been acquired or enhanced by public money, and on local authority claims for part of the proceeds from such disposals which are attributable to public investment.”

Later in the guidance, this is said:

> “Where the local authority claims a share of proceeds of disposal attributable to public investment in the land and buildings being sold, the process is two-fold. The adjudicator must first determine what share of the proceeds are attributable to public investment, and then what share of this, if any, should be allocated to the school. This will usually relate to the total cost of the project it proposes, where the share attributable to the school is less.
>
> Determining the relative shares may not be straightforward. The guiding principle is that the investment of trustees or governing or foundation bodies - the private investment - should be protected. It is not the government’s aim to appropriate assets

> that have been provided or enhanced by schools, foundation bodies or trusts …."

61. DET's thesis, as I understand it, is that had DET held the Leisure Centre Land as a foundation for a foundation school and the Secretary of State decided not to make a direction under paragraph 12 of schedule 1 to the AA 2010 in respect of the land, Lambeth could not have made a claim to anything other than "publicly funded proceeds of the disposal" and those proceeds would not have extended to the value of the enhancements to the land since, while the land may have been *acquired* as mentioned in paragraph A13(1) and (2) of schedule 22 to the SSFA 1998, it was not *enhanced* in such circumstances.

62. As, however, was pointed out by Mr Moffett, the premise is false: the *totality* of the proceeds of the Leisure Centre Land would have been "publicly funded proceeds of the disposal" for the purposes of schedule 22 to the SSFA 1998, not merely such of them as might have been attributed to the land itself rather than enhancements to it. The "publicly funded proceeds of the disposal" are "the proceeds of disposal which are attributable to the land having been acquired or enhanced in value, or both, as the case may be, as mentioned in the relevant paragraph or paragraphs of sub-paragraph (1), (2) or (3) of paragraph A13", and "land" is defined to include "buildings and other structures" (see section 142(8) of the SSFA 1998 and section 579(1) of the Education Act 1996). Here, DET acquired the Leisure Centre Land, with the buildings on it, under regulations made under section 24 of the Education and Inspections Act 2006 (within paragraph A13(1)(d) of schedule 22 to the SSFA 1998) and the Leisure Centre Land, with the buildings on it, had also been acquired from the governing body of a foundation school which had itself acquired it under a transfer under section 201(1)(a) of the Education Act 1996 (within paragraph A13(2)(a)(i) of schedule 22). The whole of the proceeds of a disposal would thus have been attributable to the land (including buildings) having been acquired as mentioned in paragraphs A13(1) and (2). The entirety of the land, and the buildings on it, were acquired as mentioned in paragraph A13(1) and (2) and so the entirety of the proceeds of any disposal would have been attributable to the land and buildings having been acquired in that manner.

63. For good measure:

i) A foundation disposing of land under the regime for which schedule 22 to the SSFA 1998 provides would have been bound to use such of the "publicly funded proceeds of the disposal" as were not claimed by the local authority on "relevant capital expenditure", i.e. capital expenditure in relation to the premises of the school in question or another school, college or academy. In contrast, DET wishes to be able to apply any compensation in any way consistent with the articles it has latterly adopted (for which, see paragraph 16 above) and so to use the money for purposes unconnected with the school on the Hackford Road Site or in fact any school;

ii) Had DET been a foundation whose foundation school had been discontinued (which might be said to be analogous to DET's actual position), paragraph 5 of schedule 22 to the SSFA 1998 would have been in point and enabled the Secretary of State to make a direction similar to the Second Direction. Paragraph 5(4B) of schedule 22 provides:

> "On an application under sub-paragraph (4ZA) or (4A), the appropriate authority may do one or more of the following, namely–
>
> (a) require the land or any part of the land to be transferred to such local authority as the appropriate authority may specify, subject to the payment by that local authority of such sum by way of consideration (if any) as the appropriate authority determines to be appropriate …."

64. In all the circumstances, I do not consider there to have been any breach of article 14 of the Convention.

Issue (iv): The PSED

65. The PSED requires a public authority, in the exercise of its functions, to have due regard to:

> "the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it".

66. In *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058, [2020] HRLR 16, the Court of Appeal (Sir Terence Etherton MR, Dame Victoria Sharp PQBD and Singh LJ) observed at paragraph 176 that, while the PSED is "a duty of process and not of outcome", that "does not … diminish its importance". The Court emphasised in paragraph 175 the following principles which, as it noted, were set out in the judgment of McCombe LJ in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] Eq LR 60 and supported by earlier authorities:

> "(1) The PSED must be fulfilled before and at the time when a particular policy is being considered.
>
> (2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
>
> (3) The duty is non-delegable.
>
> (4) The duty is a continuing one.
>
> (5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.

> (6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision."

67. In the present case, the Secretary of State has accepted that the PSED was not complied with and apologised for that. He contends, however, that section 31(2A) of the Senior Courts Act 1981 ("the 1981 Act") is applicable and, hence, that we must refuse to grant any relief in respect of the failure.

68. Section 31 of the 1981 Act provides so far as material as follows:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

69. Where, accordingly, it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred, the Court must refuse to grant relief on an application for judicial review unless there are "reasons of exceptional public interest" for doing so.

70. Section 31(2A) of the 1981 Act was the subject of consideration by the Court of Appeal (Sir Terence Etherton MR, McCombe and Lindblom LJJ) in *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 860, [2018] 1 WLR 5161. In the course of its judgment, the Court expressed the view (albeit obiter) that "[t]he concept of 'conduct' in section 31(2A) is a broad one, and apt to include both the making of substantive decisions and the procedural steps taken in the course of decision-making" (paragraph 47) and explained that "[i]f … the court is to consider whether a particular outcome was 'highly likely' not to have been substantially different if the conduct complained of had not occurred, it must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law" (paragraph 55).

71. In *Aldwyck Housing Group v Forward* [2019] EWCA Civ 1334, [2020] 1 WLR 584, Longmore LJ, with whom Bean and Moylan LJJ agreed, "decline[d] to accept the proposition that, as a general rule, if there is a breach of the PSED, any decision taken after such breach must necessarily be quashed or set aside or even the proposition that there is only a narrow category of cases in which that consequence will not follow" (see paragraph 21). In *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179, where section 31(2A) of the 1981 Act was held to apply in the context of a breach of the PSED, Coulson LJ, with whom Floyd and Asplin LJJ agreed, said at paragraph 38:

> "It is important that a court faced with an application for judicial review does not shirk the obligation imposed by Section 31 (2A). The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic."

On the other hand, in *R (Plan B Earth) v Transport Secretary* [2020] EWCA Civ 214, [2020] PTSR 1446, the Court of Appeal (Lindblom, Singh and Haddon-Cave LJJ) warned at paragraph 273 that "courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review" and that "the threshold remains a high one" (citing Sales LJ in *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin), [2018] ICR 269, at paragraph 89).

72. In the present case, the failure to comply with the PSED having come to be appreciated, ESFA prepared an equality impact analysis ("the EIA") in respect of the decision not to require the payment of compensation to DET. The EIA concluded that:

i) The decision will not have any material impact on the elimination of discrimination, harassment, victimisation, or any other conduct that is prohibited by or under the Equality Act 2010;

ii) The decision will not have any material impact on the fostering of good relations between persons who share a relevant characteristic and those who do not share it;

iii) The two most important impacts that the decision is likely to have on equality of opportunity between persons who share a protected characteristic and those who do not are, on the one hand, the materially negative impact on the opportunities of pupils at Van Gogh Primary who identify as African, Caribbean or black other and, on the other, the significantly positive impact, albeit of uncertain extent, on the opportunities of vulnerable children and adults;

iv) Since those impacts pull in opposite directions and the decision gives rise to both negative and positive impacts more generally, the decision is, overall, likely to have a neutral effect on the advancement of equality of opportunity.

73. Ms Eileen Milner, the chief executive of ESFA, has explained in a witness statement that it was she who took the decision not to require the payment of compensation to DET when the Second Direction was made and that she has considered whether, if she had been provided with the EIA in May 2019, she would have made a different decision. She acknowledged that it was difficult to put herself back in the position she was in May 2019, but having "tried to exclude any element of prejudgement and to consider matters afresh" she concluded that her decision would not have been any different. She said that she did "not consider that any of the equalities implications identified in the EIA would have caused [her] to require Lambeth to use scarce public funds to confer what would have been, in [her] view, an unjustified windfall on DET".

74. Mr Sharland criticised the EIA, describing it as "a much-delayed exercise in *ex post facto* reasoning regarding the equality implications of the Decision" and "an attempt to validate the Decision that has already been taken". He further submitted that the EIA was flawed because (a) it made no attempt to quantify the sum to be paid to DET, (b) the Secretary of State did not inquire sufficiently into how DET would use any compensation, (c) "the asserted link between Lambeth's payment of any consideration and the diminution of resources from Lambeth's existing budget … is neither necessary nor logical" and (d) the EIA "weighs in the balance" the "positive impact … that persons in the relevant groups would not .. be required to pay additional council tax" even though it was "judged more likely" that the resources would be taken out of existing budgets. Mr Sharland also said that there was no evidence from the primary decision-maker, whom he identified as the relevant Minister, Lord Agnew.

75. Mr Moffett countered that DET had not suggested that the compensation it was seeking was other than substantial; that DET has neither explained what it would have said about how it would use any compensation had it been asked nor alleged that the EIA's assessment of the potential beneficiaries was wrong; that the possibility of Lambeth borrowing to fund any compensation was considered in the EIA and ruled out; and that the EIA did not exclude the possibility of Lambeth raising money from council tax. He noted, too, that Ms Milner's evidence specifically identified her as the relevant decision-maker.

76. Standing back, I find Ms Milner's assessment of the position wholly convincing. The ultimate question is whether it is "highly likely" that compliance with the PSED would have made no difference to the decision that DET should not be paid compensation. In my view, that is the case. In fact, I should have thought it extremely unlikely that compliance with the PSED would have altered the decision. After all, there were very compelling reasons not to award DET any compensation (see paragraphs 37-43 above) and no likelihood of a decision not to do so having significantly adverse equalities implications. I see no basis for doubting that Ms Milner would have seen a payment to DET as an "unjustified windfall", as her evidence suggests.

Conclusion

77. I would dismiss the claim.

Lord Justice Flaux:

78. I agree.

Lord Justice McCombe:

79. I also agree.