



Neutral Citation Number: [2022] EWHC 360 (Admin)

Case No: CO/1936/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

18th February 2022

Before:

MR JUSTICE FORDHAM

Between:

THE QUEEN (on the application of

A, J, K, B and F)

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Chris Buttler QC and Eleanor Mitchell (instructed by Duncan Lewis) for the **Claimants**
Joanne Clement and Raphael Hogarth (instructed by Government Legal Department) for the
Defendant

Hearing date: 1/2/22

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

A handwritten signature in blue ink, appearing to read "Michael R", with a stylized flourish at the end.

.....
THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

I. Introduction

1.

This is a case about common law standards of legally adequate consultation, and statutory duties in the [Equality Act 2010](#) (“EA 2010”), sought to be applied to a consultation and engagement process undertaken to inform decision-making as to the design of a Bill of primary legislation to be introduced into Parliament. The case comes before the Court as a renewed application for permission for judicial review, such permission having been refused on papers by Lang J on 11 November 2021 (see §8 below). The question with which I have to grapple is whether to grant permission for judicial review. In their submissions on the viability of the claim, Counsel addressed me on justiciability and arguability. I will address both topics below. Although this is only the permission stage there is quite a lot which it is appropriate to explain, including about the factual context and about the legal context so far as justiciability is concerned.

2.

This was a half-day hybrid hearing, for which I gave directions. What happened was this. One of the Counsel in the case had tested positive for Covid but they continued to feel well and were able, unhampered, to view, listen and address the Court remotely. Everyone else associated with the parties was in the court-room. I gave permission for the use of mobile phones so that the remote-Counsel’s team could communicate with Counsel by the electronic equivalent of a ‘note’ or verbal exchange which is the practice when Counsel is in the court-room. There were some technical issues at Counsel’s end – the commonly encountered ‘frozen screen’ – but we simply paused. The hearing worked well. Nothing was missed by anyone.

II. Context

3.

On 24 March 2021 the Defendant (“the Secretary of State”) presented to Parliament a “Policy Statement” entitled “New Plan for Immigration”. The Policy Statement included seven substantive chapters with these titles: “Protecting Those Fleeing Persecution, Oppression and Tyranny”; “Ending Anomalies and Delivering Fairness in British Nationality Law”; “Disrupting Criminal Networks and Reforming the Asylum System”; “Streamlining Asylum Claims and Appeals”; “Supporting Victims of Modern Slavery”; “Disrupting Criminal Networks Behind People Smuggling”; and “Enforcing Removals Including Foreign National Offenders”. In a short chapter, entitled “Engagement and Consultation”, the Policy Statement said this:

To inform the proposals set out in this policy statement and to ensure we can deliver effective legislative change across the system, we are initiating a comprehensive consultation and engagement process which will commence on 24 March 2021. The process will be delivered in partnership with an insight and strategy firm, in line with established principles, as well as taking into account any other relevant statutory duties. As part of this process, we want to listen to a wide range of views from stakeholders and sectors, as well as members of the public. Further details about this process as set out in the information accompanying this publication.

It was therefore explicit that the purpose of the engagement and consultation was to “deliver effective legislative change”. And “legislative” meant primary legislation. And so it was, on 6 July 2021, that the Nationality and Borders Bill was introduced in the House of Commons. Substantive Parts of the Bill were concerned with these topics: “Nationality”; “Asylum”; “Immigration Offences and Enforcement”; “Modern Slavery”; and “Miscellaneous”. The Bill was accompanied by 84-pages of Explanatory Notes,

prepared by the Home Office. Subsequently, on 22 July 2021, the Secretary of State presented to Parliament a 22-page document constituting the “Government Response” to the “Consultation on the New Plan for Immigration”.

4.

The “consultation” strand of the “consultation and engagement process” ran for six weeks from 24 March 2021, ending on 6 May 2021. It and the other strands are described as follows in the Secretary of State’s pleaded ‘summary grounds of resistance’ (supported by a statement of truth):

The Secretary of State proactively chose to consult and has considered carefully how to conduct this consultation and engagement exercise. She was aware that these proposals would require primary legislation and that, as well as the consultation and engagement exercise ..., anyone with an interest in the proposals would be able to raise their views in the ordinary way through their elected representatives as the Bill progressed through Parliament. The final form of any proposals requiring primary legislation will, ultimately, be a matter for Parliament. In this light, the Secretary of State decided to structure the consultation exercise by combining targeted consultation and engagement with stakeholders, with a wider consultation with any members of the public who may wish to contribute. The Secretary of State engaged “Britain Thinks”, an insight and strategy consultancy, to advise on, and deliver, the consultation and targeted engagement plan. Britain Thinks was commissioned as an independent research partner to facilitate core elements of the consultation. The consultation was extensively publicised, and allowed for multiple opportunities, and methods, for participation. A list of relevant stakeholders who are likely to have interest and expertise in the proposals was drawn up, to include relevant oversight and accountability bodies, government agencies and public bodies, industry and suppliers with an interest, professional bodies and academia, Parliamentary bodies and NGOs. Many of these NGOs themselves have built up the experience and expertise to represent the views of those with lived experience of the system.

There were four strands to the consultation. First, a Consultation questionnaire. The questionnaire was delivered via a bespoke platform hosted by CitizenLab on the website domain www.newplanforimmigration.com. The website included a summary of the objectives for the New Plan for Immigration, and information about taking part in the consultation. It also included downloadable PDFs of the New Plan policy statement and UASC family reunion information sheet, plus a questionnaire response form. PDFs were provided in English and in Welsh. The questionnaire was designed with advice from Britain Thinks in order to facilitate the fullest responses. It consisted of 26 closed and 19 open questions relating to different chapters of the New Plan, the UASC Information Sheet, and potential qualities or vulnerabilities impacts of the proposals. There were no character or word limits for the open text questions, as the Secretary of State is keen to ensure full and varied feedback is provided...

Second, “stakeholder deep dives”. This consisted of 8 events, each covering one of the following topics: Safe and legal routes (protection and adult family reunion); Integration; UASC family reunion; Asylum reform; One-stop process; Streamlining appeals and judicial processes; Modern slavery; Equalities and vulnerabilities. The events took place in April 2021. Between 8 and 19 stakeholders were invited to each session, based on those sessions that were most relevant to the stakeholders’ area of expertise. The sessions were divided into breakout groups of up to 6 stakeholders per group. Each session focused on specific

proposals in the Plan (save for the UASC family reunion session, which gathered stakeholders' broader views)... The Home Office and the Ministry of Justice also held a series of stakeholder consultation events covering the more technical aspects of the proposals, e.g. around reform to British nationality law, rules on expert evidence, legal aid etc...

Third, focus groups with members of the public. Six online focus groups were held, split by age and socio-economic group, and ensuring there was a spread by location across the UK. The online focus groups focused on the five main topics in the New Plan and its overall objectives. The following topics were discussed across the public focus groups: Key objectives of the New Plan, UASC family reunion, safe and legal routes, asylum reform, views on streamlining asylum claims and appeals, views on disrupting criminality and increasing removals of those with no right to be in the UK. These events took place between 17 and 19 April 2021.

Fourth, the "lived experience" forum. A series of in-depth interviews and discussion groups were held with those who have lived experience of the UK asylum system, including those with experience seeking asylum in the UK and victims of modern slavery... These sessions were planned from the outset. The Home Office identified the groups of participants they would particularly like [to] hear from, who had experience of those parts of the process that would be most likely impacted by the reforms. The Home Office liaised with a number of NGOs who have existing "lived experience" networks, to identify suitable participants and to obtain their support in organising such sessions. These networks included British Red Cross' VOICES network, (an independent organisation run by refugees to help make the transition into British life easier and give refugees and people seeking asylum a platform for speaking up about their own experiences), Freedom from Torture's One Strong Voice (a network of individuals and organisations based in the UK with direct lived experience of the UK immigration and asylum system) and Survivor Speak OUT network, as well as the Salvation Army (who are responsible for providing specialist support for all adult victims of modern slavery in England and Wales). The Home Office was aware of a reluctance on the part of some with lived experience of the system to discuss matters with the Home Office. The sessions were accordingly conducted by Britain Thinks. Individuals were assured that all findings would be kept anonymous, Home Office representatives would not be present in the session and would not be provided with any details about who had taken part in the session that would enable anyone to be identified. The lived experience sessions took place after the online consultation questionnaire had closed as it took more time than anticipated to liaise with the NGOs to identify suitable participants for the focus group and to agree the logistics of the sessions with the NGOs concerned. Five online focus groups were conducted with those with experience seeking asylum in the UK. Each of these sessions lasted 90 minutes, with 5-7 participants per group. 3 online focus groups were held with individuals identified through the VOICES network. 2 online focus groups were held with individuals identified by Freedom from Torture. Four in depth interviews were also conducted with victims/survivors of modern slavery. Participants were recruited via the Salvation Army's network. Where needed, interpreters for these lived experience sessions were arranged by the Home Office or by the relevant network. Interpreters were requested on two occasions (for Arabic and Edo). The NGOs facilitating the sessions confirmed that all other participants preferred to participate in English. Where required, support workers were welcome to attend in a supportive capacity.

5.

During the consultation process, on 21 April 2021, the Claimants' solicitors had written a letter which posed a series of questions. The first of these was:

What provision has been made for details of the Policy [Statement] and the consultation to be available and accessible in any languages other than English? If so, which languages and where are they accessible?

On 28 May 2021 the Claimants' solicitors filed this claim for judicial review. The "decision" which was impugned in the claim form was:

Consultation on the New Plan for Immigration through arrangements that were: indirectly discriminatory (ss.19 and 29(6) EA 2010); in breach of s.149 EA 2010; in breach of common law requirements for a lawful consultation.

The details of the "remedies" sought in the claim were:

1. A declaration that (i) the Secretary of State's arrangements for consulting on the New Plan for Immigration were indirectly discriminatory contrary to s.19 EA 2010 (or Article 14 ECHR taken with Article 8); (ii) in deciding on those arrangements, the Secretary of State breached s.149 EA 2010; and (iii) in consulting on the New Plan for Immigration, the Secretary of State failed to comply with the common law requirements of a lawful consultation.

2. A mandatory order requiring the Secretary of State to re-open the consultation for a further fixed period.

3. Damages for breach of s.19 (or Article 14 ECHR).

I say no more about Article 14 ECHR, since it was relegated to a footnote in the Claimants' skeleton argument for the hearing before me and was unmentioned in Mr Buttler QC's oral submissions. Within the grounds for judicial review (§13) it was said that the Claimants were requesting a prompt decision on permission and an expedited substantive hearing, proposing a 2½ day substantive hearing to be listed by the end of September 2021.

6.

The Claimant's pleaded grounds for judicial review said this about the value and purpose of standalone declaratory relief (at §124):

The Claimants emphasise that, even if a mandatory order were not ultimately granted, declaratory relief would be of significant value to them and others in their position. This is because, in the event that the Secretary of State decides to proceed with one or more of the proposals affecting the Claimants, these will be transposed into a draft bill for consideration by Parliament. It is appropriate and desirable that, if that bill were the product of an unlawful consultation exercise, the Claimants (and the public at large) should be able to bring this to their local MPs' attention in order for Parliament to consider what weight to attach to the consultation exercise.

Thus, a declaration of unlawfulness in relation to the consultation process was intended by the Claimants to inform "Parliament", in dealing with the Bill, about what "weight" to attach to the (unlawful) consultation exercise.

7.

The focus of the claim, for which permission is sought, rests squarely upon the following: (1) the fact that consultation documents were published only in English and Welsh; (2) the fact that certain engagement sessions were invitation-only and did not allow wider participation (including by the Claimants themselves); and (3) a series of eight points in the grounds for judicial review (three of which were emphasised in the Claimants' skeleton argument) on which it is said that the consultation materials breached the principle known as "[Gunning \(ii\)](#)". [Gunning \(ii\)](#) is the second of a suite of four public law standards of legally adequate consultation, derived from [R v Brent London Borough Council, ex p Gunning](#) (1985) 84 LGR 168, and endorsed in [R \(Moseley\) v Haringay LBC](#) [2014] UKSC 56 [2014] 1 WLR 3947 at §25 as "a prescription for fairness" (sub-paragraphs added):

(i) First, that consultation must be at a time when proposals are still at a formative stage. (ii) Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. (iii) Third . . . that adequate time must be given for consideration and response and, finally, (iv) fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

So as to avoid any confusion, it is worth explaining the phrase "statutory proposals" in the formulation of [Gunning \(iv\)](#). What the phrase meant was "proposals put forward in the exercise of a statutory function". It did not mean "proposed primary legislation". [Gunning](#) was a judicial review challenge impugning a local authority's decision to propose (to the Secretary of State) that a school be closed, in a context where the statute (the [Education Act 1944](#)) made provision regarding the making of such proposals. So far as concerns consultation and "legislative" functions, it is well-established that "secondary" legislation – although laid before Parliament – can be impugned on the ground that it (and the decision to make it) is vitiated by a legally inadequate consultation or unfair procedure. An example of this is [R v Secretary of State for Health, Ex p United States Tobacco International Inc](#) [1992] QB 353, discussed in [Bank Mellat v HM Treasury \(No.2\)](#) [2013] UKSC 39 [2014] AC 700 at §146. Equally, it was common ground before me that primary legislation, introduced as a Bill in Parliament (and the decision to introduce it), cannot be impugned on the ground that it is vitiated by a legally inadequate consultation.

8.

Lang J's reasons for refusing permission for judicial review were as follows:

In my judgment, the Claimants have not established arguable grounds which have a realistic prospect of success. In March 2021, the Defendant presented her "New Plan for Immigration" Policy Statement to Parliament which set out a range of policy proposals, most of which require primary legislation. In Chapter 9 the Plan announced a "comprehensive consultation and engagement process" to obtain "a wide range of views from stakeholders and sectors, as well as members of the public". An extensive consultation was conducted. There were over 8,500 responses to the consultation questionnaire, and extensive engagements with stakeholder groups, public focus groups, and those with "lived experience" of the asylum system and modern slavery. On 6 July 2021, the Defendant introduced the Nationality and Borders Bill to Parliament.

In my judgment, this claim cannot succeed because, even if the criticisms of the consultation procedure were well-founded, the Court could not grant the relief sought, namely, to declare that the consultation was unlawful and order the Defendant to re-open it, without offending against the principle that the Court cannot interfere with a minister's

decision to lay a bill before Parliament, or seek to prevent Parliament from considering a bill. The Claimants also face obstacles in pursuing their claims of indirect discrimination, contrary to section 29 of the ... EA 2010, and breach of the public sector equality duty in section 149 EA 2010. Paragraph 2(1) of Schedule 3 to EA 2010 states that section 29 EA 2010 does not apply to preparing, making or considering an Act of Parliament or a Bill for an Act of Parliament. Paragraph 4 of Schedule 18 to EA 2010 excludes functions in connection with proceedings in the House of Commons from the scope of section 149 EA 2010.

In any event, I do not consider that the criticisms of the consultation procedure do give rise to arguable grounds of challenge. The Claimants, who are asylum seekers from El Salvador, Sudan, Yemen and Eritrea, complain that: (i) they could not participate in the consultation because they do not read English, and the Defendant did not provide translations in their native languages; (ii) they were not invited to feedback sessions; (iii) the Defendant's proposals were too vague and there was insufficient time given to respond, so even solicitors and pressure groups who act for asylum seekers could not provide informed and meaningful responses. The authorities are clear that it is for the public body charged with performing the consultation to determine how it is to be carried out, subject only to review on conventional public law grounds. On considering the evidence, in my view, the Claimants do not have any realistic prospect of success in establishing that the consultation process was so unfair as to be unlawful. Whilst non-English speakers were at a disadvantage, it was justifiable for the Defendant to address that difficulty by structuring the consultation so as to encourage engagement from bodies who represent asylum seekers, and also to engage directly with those who had "lived experience" of the asylum system and modern slavery. The Claimants have not been able to identify any arguable breach of ECHR rights, and so Article 14 is not engaged.

III. Justiciability

9.

Article 9 of the 1689 Bill of Rights provides: "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament". Both Counsel cited *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin). In that case the Divisional Court (at §§46-47) cited passages from earlier authorities in which the Courts had articulated the following points: the principles on which the law of Parliamentary privilege is based involve "the requirement of mutual respect by the Courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the Courts"; one of the principles on which the law of Parliamentary privilege is based is "the principle of the separation of powers, which in our Constitution ... requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature"; "the courts exercise a self-denying ordinance in relation to interfering with the proceedings of Parliament"; and "it behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so". Article 9 and these points set the scene for the consideration of justiciability of the present claim.

The Claimants' position: 'vitiation' and 'interference'

10.

In the course of his submissions, Mr Buttler QC for the Claimants has accepted each of the following. (1) There is a principle of non-justiciability, rooted in the Bill of Rights (a constitutional statute), and reflected in the case-law. (2) It would offend that principle of non-justiciability for the Courts to entertain a challenge, or express any reasoning, involving: (i) any “vitiation” of a decision to lay a Bill before Parliament; or (ii) any “interference” with the laying of a Bill of primary legislation before Parliament. (3) Impermissible “vitiation” would be exemplified by a legal challenge whose target, or subject matter, involved impugning a decision as to the design of primary legislation, including where that decision has been arrived at following a process of consultation and engagement. (4) Impermissible “interference” would be exemplified by a legal challenge whose substantive content, or claimed remedy, involved impeding or delaying the introduction of a Bill or primary legislation into Parliament (or conversely which involved dictating that a Bill, or the design of a Bill, be introduced into Parliament). (5) The reach of the statutory duties found in EA 2010 fall to be analysed against the backdrop of the principle of non-justiciability, so understood (as is reflected in *R (Adiatu) v HM Treasury* [2020] EWHC 1554 (Admin) [2020] PTSR 2198 at §§229-238). (6) The statutory duty not indirectly to discriminate (EA 2010 s.29(6), read with s.19) would not apply to the “function” of making a substantive decision as to the design of a Bill of primary legislation to be placed before Parliament; nor would the public sector equality duty (“PSED”) (EA 2010 s.149). (7) Nor could the *Gunning* principles, as to legally adequate consultation, be invoked to impugn such a substantive decision.

11.

Against that backdrop – which in Mr Buttler QC’s submission is as far as the authorities take the principle of non-justiciability – he emphasises the following. (1) The appropriateness and importance of characterising as a distinct act and function of a public authority, and a distinct “target” for a judicial review claim, decisions regarding the design of a consultation process. (2) Such decisions would include: process decisions about into what languages consultation documents are translated; which persons and organisations are invited to engagement meetings; and what degree of clarity and specificity is used to describe policy proposals in a consultation document. (3) A claimant for judicial review is entitled to select as the “target” for judicial review, such decisions as to the design of the consultation process, with the claim extending no further than that. (4) The judicial review claimant is entitled to restrict the remedy sought, to a declaration that legal standards applicable to the design of the consultation process have been breached. (5) Where Government chooses to embark on a consultation process, designed to inform a substantive decision as to the design of a Bill, common law standards of legally adequate consultation are in principle applicable and enforceable through the supervisory jurisdiction of the judicial review Court, invoked by a claimant who has restricted their claim in these ways. (6) On the legally correct interpretation of the EA 2010, there is in the process decision-making about the design of the consultation process a “public function” (see s.31) to which the following can be invoked as applicable (again, by a claimant who has restricted their claim in these ways): the duty not indirectly to discriminate (s.29(6) read with s.19), with the consequential availability of a declaration of unlawfulness and damages (s.119, read with s.114(1)(a)); and the PSED (s.149), with the consequential availability of a declaration of unlawfulness.

12.

That approach, says Mr Buttler QC, is consistent with the authorities, including *Adiatu* (see §§18-21 below). It is, moreover, supported by the following points. (1) Decisions as to the design of a consultation and engagement process are acts which are distinct from decisions made in consequence of a consultation and engagement process. (2) In public law, a first unlawful act may mean – but does not necessarily mean – that a second and subsequent act is vitiated and unlawful. (3) A judicial review

claimant (like the judicial review Court itself) can tailor and restrict the scope of the analysis. That means that a judicial review claimant which does not put before the Court arguments as to a “vitiating” or “interfering” consequence is, in deciding not to do so, necessarily preventing the Court from “trespassing” in any such way. (4) Where in the authorities there is reference to an inappropriateness of impugning the legality of a “process” in relation to a decision to introduce a Bill into Parliament, such a reference can (if correct) only be to the “Parliamentary process” of the introduction of the Bill: “proceedings in Parliament”. (5) But even if and insofar as any (correct) reference did extend to the inappropriateness of impugning the legality of a “prior” process – a process culminating in the substantive decision as to whether a Bill (and if so with what design) should be introduced in Parliament – that could only (if correct) be because the judicial review claimant has failed to restrict the nature of the challenge and the remedy sought, to involve “vitiation” or “interference”.

13.

Based on all of this, says Mr Buttler QC, the issues raised in the present case are justiciable and the common law Gunning (ii) principle and EA 2010 duties are properly invoked as applicable legal obligations in the present case, restricted to impugning the process decision-making as to the design of the consultation and engagement process, and supporting the grant by the judicial review Court of a declaration that applicable legal duties were breached in the design of that process (together with consequential damages arising from the indirect discrimination). The Claimants’ contentions that the consultation engagement process unlawfully denied participatory rights, by reason of the languages of the consultation document and the restricted nature of the invitation-only engagement sessions, and by reason of the lack of clarity in the consultation document proposals involve no inappropriateness, no infringement of the principle of non-justiciability. Since that is at least arguable with a realistic prospect of success, permission should not be refused on non-justiciability grounds. That, as I see it, is the essence of the analysis put forward by Mr Buttler QC. Is it right?

Some basics

14.

It will assist the legal analysis to start with some basic observations of my own. (1) Generally speaking, the substantive decision of a public authority will involve a process by which that substantive decision is arrived at. Sometimes, the relevant action of a public authority in judicial review proceedings will be the failure to make a substantive decision, in which case there may also be a failure to have any process by which any decision would have been arrived at. (2) Generally speaking, a process by which a substantive decision is arrived at will involve a decision or decisions about the nature of the process. An example of a decision about the nature of the process would be a decision not to convene an oral hearing to inform the substantive determination about downgraded-classification or release-outcome regarding a prisoner. The substantive decision about classification, risk or release would involve the decision-making process. The decision about whether to convene an oral hearing would be a distinct procedural decision. (3) In the same way, in the context of carrying out a consultation process, the public authority performing the consultation is described as having the function of determining how the consultation is carried out, including its manner and extent, with those process decisions being reviewable by a Court on conventional judicial review grounds: see R (Help Refugees Ltd) v Secretary of State for the Home Department [2018] EWCA Civ 2098 [2018] 4 WLR 168 at §90(v). (4) The process, by which a substantive decision is arrived at, is likely to be the responsibility of the substantive decision-maker. (5) The design and implementation of the process is, moreover, likely to be intimately linked to the public authority decision-maker’s thinking about the

substantive decision. There is a link between decision-making process and reasoning process. The link between process and substantive thinking is exemplified in the following: cases concerned with the nature of the “sufficiency of the enquiry” undertaken by a decision-maker; cases about the substantive decision-maker eliciting informed representations; cases about legally adequate consultation; cases about ensuring that all (but only) “relevant considerations” are taken into account; cases about the need for a legally adequate evidential basis for conclusions; and cases about whether statutory duties of regard (or – as in the case of the PSED – due regard) are discharged. (6) In the context of the PSED, the link between substantive thinking and process is illustrated by the description of the PSED as being concerned with “procedure” rather than with “outcome” (see eg. *Adiatu* at §204), in the making of “policy decisions” (see eg. *Adiatu* at §206). (7) Legal standards relating to process, and decisions about process, are linked to the public authority’s thinking about the substantive decision and to the substantive outcome itself. (8) However, those legal standards, and those process decisions, may have a value – concerned with due process, inclusion and participation – which is independent and free-standing from the way in which they serve to influence the decision-maker’s thinking and the substantive decision. That independence and freestanding value may be seen in the following: cases about oral hearings; cases about consultation; cases about eliciting informed representations; and cases about equality considerations. (9) As has memorably been said in public law, “context is everything”, and it is generally wise “never to say never”.

Design of a process: a disability example

15.

Mr Buttler QC gave examples (see §46 below) designed to test the logic of justiciability, in the context of a process intended to culminate in a substantive decision as to the design of a Bill of primary legislation to introduce into Parliament. To his examples, this one of my own can be added. Suppose that a Secretary of State is contemplating designing a Bill of primary legislation relating to disability rights, and has announced a consultation and engagement process, including public meetings at which relevant ideas will be explained and discussed. Suppose now that the implementation of the process of consultation and engagement regarding those public meetings involves decisions to use venues which are inaccessible to wheelchair users. Mr Buttler QC would submit that a legal challenge based on the EA 2010 by way of judicial review (or in the county court), seeking a declaration and damages, impugning the legality of the decision-making about the process, by which wheelchair access to the public meetings was denied, would in principle be justiciable. The force and attractiveness of that submission are obvious. Mr Buttler QC would submit that, if that is so, the same must be true in the present case, regarding: the decision not to have translations of consultation documents in languages beyond English and Welsh; the decision not to make invitation-only engagement sessions available more widely; and the decision not to give greater clarity in the description of proposals in the consultation documents.

The *LH* case

16.

In *R (LH) v Shropshire Council* [2014] EWCA Civ 404 [2014] PTSR 1052 a 63-year- user of Hartley’s Day Centre in Shrewsbury brought a claim for judicial review of the local authority’s substantive decision to close the Day Centre. The grounds for claiming judicial review were breach of the legal standards regarding consultation (see §19) and breach of the PSED (see §33). The remedies sought included a declaration of breach of applicable duties, and a mandatory order that the substantive decision to close the Day Centre should be reconsidered, after a proper consultation process (see §§19(vii), 35). The claim succeeded in the Court of Appeal, on the basis that there had been an

unlawful failure to consult service users and relatives, before making the substantive decision to close the Day Centre (see §31). There was no separate breach of the PSED (see §34). However, in circumstances where the Day Centre had by now closed and all the staff had been dispersed, the Court of Appeal declined to quash the substantive decision or to order a consultation, as not being “consonant to good administration” (see §36). The Court nevertheless considered it appropriate to grant a declaration, formally recording that the failure to consult had resulted in the local authority acting unlawfully (see §§37-38 and p.1065H). Mr Buttler QC relies on LH as illustrative of the fact that the judicial review Court could, in principle, entertain a judicial review challenge tailored to impugning a decision about process (whether relating to standards of legally adequate consultation or the application of the PSED), and tailored to seeking a declaration of a breach of the law in the conduct of the process. It could do so without the claim, the analysis by the Court, or the remedies granted by the Court involving any “vitiation” or “interference” so far as concerns the substantive decision. He submits that this logic follows through to a case in which the substantive decision concerns the design of a Bill of primary legislation to be introduced into Parliament, and its introduction into Parliament.

Purposes of seeking a declaration in this case

17.

Asked about the purpose of the present claim for judicial review proceeding to a substantive hearing, Mr Buttler QC emphasised two strands which he submitted demonstrated that the claim is appropriate and has a proper utility. One strand was the idea of “vindication” as to the rights and position of the Claimants, they having been disadvantaged by the design of the process. That “vindication” would come through the Court recognising the unlawfulness of that disadvantageous treatment and, in the case of indirect discrimination (EA 2010 s.29(6) read with s.19), through the Court awarding them damages. Mr Buttler QC likens that to the “vindication” of the claimant in LH, through the grant of the declaration of unlawfulness in that case. Mr Buttler QC’s other strand was the idea of providing relevant legal clarity “for the Secretary of State” and “for Parliament”. Mr Buttler QC told me that the purpose of declarations of unlawfulness in this case would lie in:

... making clear to the Secretary of State and to Parliament what was and wasn’t lawful in the consultation process, thereby giving Parliament a free choice to act...

This strand was reflected in the passage in the pleaded grounds for judicial review which addressed the purpose of a standalone declaration (see §6 above), describing it as:

... appropriate and desirable that, if [a] Bill were the product of an unlawful consultation exercise, the Claimants (and the public at large) should be able to bring this to their local MPs’ attention in order for Parliament to consider what weight to attach to the consultation exercise.

The Adiatu case

18.

One key question which emerged from the arguments in the present case concerns an important passage in the judgment in Adiatu. Here, the Divisional Court was addressing the question whether the PSED (EA 2010 s.149) was applicable to “decisions that are given effect by primary legislation”. The challenge on this part of the case was to the decision to amend the scheme for statutory sick pay (SSP) by virtue of regulations (see Adiatu at §33) in response to the Covid pandemic without at the same time removing the lower earnings limit (LEL) (see §36(2)(c)), something which would

necessitate an amendment to primary legislation. The claimants in Adiatu were arguing that the decision-making relating to amendment of the SSP scheme had not involved the due regard required by the PSED, that being a duty concerned with “procedure” (see §204). The Court concluded (at §238) that the PSED did not apply to a decision which was a matter requiring primary legislation. In the course of its reasoning, the Court described the challenge as being “to a decision to invite Parliament to amend primary legislation” (see §230). The key passage in the judgment (at §§229-238) was as follows:

Does the PSED apply to decisions that are given effect by primary legislation?

229. This question arises in relation to the LEL. The current position, namely that SSP is payable only where an employee earns over the LEL, is set out in primary legislation... Its removal would, therefore, necessitate an amendment to primary legislation.

230. In our judgment, the position is different where the challenge is to a decision to invite Parliament to amend primary legislation. The making of primary legislation is the quintessential Parliamentary function. In our view it would be a breach of Parliamentary privilege and the constitutional separation of powers for a court to hold that the procedure that led to legislation being enacted was unlawful. The consequence of this would be that the legislation itself would be ultra vires and void (even though the Claimants in this stage seek declaratory relief only). The court has no power to declare primary legislation void on a basis such as this.

231. Article 9 of the 1689 Bill of Rights provides: “That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.”

232. In Wheeler ... the Divisional Court dismissed the claimant’s claim that the Prime Minister was bound by a promise made in Parliament, and repeated outside Parliament, that the people would be consulted, by means of a referendum, on whether to ratify the Lisbon Treaty.

233. At para 49, Richards LJ said:

“49. In our judgment, it is clear that the introduction of a Bill into Parliament forms part of the proceedings within Parliament. It is governed by the Standing Orders of the House of Commons (see, in particular, standing order 57(1)). It is done by a Member of Parliament in his capacity as such, not in any capacity he may have as a Secretary of State or other member of the government. Prebble (cited above) supports the view that the introduction of legislation into Parliament forms part the legislative process protected by Parliamentary privilege. To order the defendants to introduce a Bill into Parliament would therefore be to order them to do an act within Parliament in their capacity as Members of Parliament and would plainly be to trespass impermissibly on the province of Parliament. Nor can the point be met by the grant of a declaration, as sought by the claimant, instead of a mandatory order. A declaration tailored to give effect to the claimant’s case would necessarily involve some indication by the court that the defendants were under a public law duty to introduce a Bill into Parliament to provide for a referendum. The practical effect of a declaration would be the same as a mandatory order even if, in accordance with long-standing convention, it relied on the executive to respect and give effect to the decision of the court without the need for compulsion.”

234. In *R (UNISON) v Secretary of State for Health* [2010] EWHC 2655 (Admin), at para 9, Mitting J said that: “The courts cannot question the legitimacy of an Act of Parliament or the means by which its enactment was procured: see *British Railways Board v Pickin* [1974] AC 765, and as to proceedings in Parliament, Article 9 of the Bill of Rights).”

235. The starting point, therefore, is that the courts cannot question the legitimacy of an Act of Parliament (or an amendment to an Act of Parliament). It is against this background that the scope of s 149 must be examined.

236. In our judgment, it is clear that the ‘functions’ of a public authority, referred to in s 149(1), do not include the preparation and promotion of an Act of Parliament or an amendment to an Act of Parliament. The making of primary legislation is a matter for Parliament and not the Executive. The passage from the Court of Appeal judgment in the *C* case, set out at para 219 above, makes clear that there is a difference between delegated or secondary legislation, on the one hand, and primary legislation, on the other, in terms of the scope for challenge. Whilst the actions of a Government Department leading up to the making of delegated legislation are separate from the proceedings of Parliament itself, and so may be the subject of a challenge on procedural impropriety grounds, the same does not apply to the actions of a Government Department leading up to an amendment to primary legislation: the responsibility for the primary legislation rests with Parliament itself, and so any procedural impropriety in the lead-up to the amendment does not render ultra vires or invalidate the amended legislation.

237. Another way of arriving at the same conclusion is that para 14 of Sch 18 to the EA 2010 excludes decisions relating to primary legislation from the scope of s 149, because they are part of a function in connection with proceedings in the House of Commons or the House of Lords.

238. Accordingly, the PSED does not apply to the decision not to remove the LEL from SSP, as this was a matter that required amendment of primary legislation.

19.

So, in this part of the judgment in *Adiatu* the Divisional Court unmistakeably reasoned (at §230, emphasis added) that:

... it would be a breach of Parliamentary privilege and the constitutional separation of powers for a court to hold that the procedure that led to legislation being enacted was unlawful ...

And the Court (at §234, emphasis added) cited this from Mitting J in *Unison*:

The courts cannot question the legitimacy of an act of Parliament or the means by which its enactment was procured ...

Then, against this as part of the “background” (§235), the Court concluded (§236): that the PSED was inapplicable to “the preparation and promotion of an Act of Parliament or an amendment to an Act of Parliament”; that it would be applicable to “the actions of a Government Department leading up to the making of delegated legislation ...”; but that it would be inapplicable (§236, emphasis added) to:

the actions of a Government Department leading up to an amendment to primary legislation.

20.

Mr Buttler QC submitted that, in this analysis in Adiatu, the phrase “the procedure that led to legislation being enacted” is to be taken as being a description of proceedings “in Parliament” (see the Bill of Rights: §231). That means Parliamentary procedure; and the Parliamentary standards applicable to the actions regarding a Bill of primary legislation in Parliament. Mr Buttler QC submitted that Parliamentary process was the subject-matter of the Pickin case, referred to in the quotation from Unison (at §234).

21.

I cannot accept that that this submission is, even arguably, correct. In my judgment, it is clear from the analysis of the Divisional Court in Adiatu that the Court’s reference to “the procedure that led to legislation being enacted” at §230 did not have Mr Buttler QC’s suggested narrow focus, on “Parliamentary procedure”. My reasons are these:

i)

The Court was considering the PSED as a legal standard, which it had recognised was a standard concerned with “procedure” (see §204), and which involved “advance consideration” in the making of a substantive “policy” decision (see §206).

ii)

The Court was concerned in Adiatu with substantive decision-making which had led to the making of regulations amending SSP (§33) but unaccompanied by any amendment to the primary legislation to remove the LEL (§36(2)(c)). The question in Adiatu was whether the PSED was applicable to the process of substantive decision-making that had produced the response taken by way of the regulations but – critically – which had not produced the response of any amendment to the primary legislation. That was the relevant decision-making “procedure”, to which the PSED would have applied, had it been in law applicable.

iii)

What the Court clearly meant by “the procedure that led to legislation being enacted” – and in Adiatu the procedure that led to amending primary legislation not being enacted – was the prior decision-making procedure, culminating in a substantive decision relating to substantive design of amendments to legislation. That prior decision-making procedure is also clearly what the Court was describing as “the actions of a Government Department leading up to an amendment to primary legislation” (see §236). It was that decision-making procedure that could involve what the Court called “procedural impropriety in the lead-up to the amendment” (see §236), but “any procedural impropriety” of that nature would be part of the responsibility of Parliament (see §136).

iv)

Moreover, it is noteworthy that the Court wove into its analysis its citation from the Unison case, in which passage Mitting J was addressing an issue concerning prior consultation. Consultation was, as Mr Buttler QC accepted, what Mitting J was describing as “the means by which... enactment was procured”. So, Unison was a case about a prior process, of consultation, addressed in a passage which the Court in Adiatu was therefore specifically applying (see §234) in considering the applicability of the PSED to the “procedure” and “actions of a Government Department leading to” legislation being enacted or amended (or in the case of Adiatu not enacted or amended).

v)

It follows that the Divisional Court reached the conclusion that the PSED was not an applicable standard in relation to the “procedure” of decision-making regarding the design of primary legislation; and the Divisional Court reached that conclusion because it reached the prior conclusion

that Parliamentary privilege and the constitutional separation of powers did not permit the Court to hold to have been unlawful the “procedure” of decision-making regarding the design of primary legislation (or put another way, the “actions of a Government Department leading up to” primary legislation, including any “procedural impropriety”).

vi)

Finally, what is also clearly the case is that the Divisional Court did not regard the “point” as being capable of being “met by the grant of a declaration”. As to that, it cited the passage from Wheeler which had rejected declaratory relief on the basis that it “would necessarily involve some indication by the court” as to “a public law duty” in the context of introduction of a Bill into Parliament. The Divisional Court in Adiatu clearly concluded that that same answer was applicable to a declaration that the PSED had been breached in the decision-making procedure that had led to a substantive decision about whether and how to design primary legislation. After all, in Adiatu itself where the claimants were arguing that the PSED had been breached in the decision-making, they were seeking “declaratory relief only” (see §238).

Mr Buttler QC accepted that there would be no basis on which this Court could or would depart from the analysis of Parliamentary privilege and the constitutional separation of powers or the reach of the EA 2010 in Adiatu. I agree. Even for the purposes of permission for judicial review, I should proceed on the basis that the conclusions and material reasoning in Adiatu are legally correct.

The PSA case

22.

Both Counsel cited R (Police Superintendents Association) v HM Treasury (“PSA”) [2021] EWHC 3389 (Admin), where §230 of Adiatu was considered and applied by Heather Williams J: at §156 (where it was cited) and §214 (where it was applied). The latter passage was obiter (see §207), because the defendant had evidently treated the grant of permission for judicial review as meaning the issues as to unlawful consultation and breach of the PSED (see §6) were justiciable or at least appropriate for the Courts to determine on their substantive legal merits (see §4). The case was about impugned public service pension scheme closures (see §1), involving a Bill introduced into Parliament. Heather Williams J addressed the question whether it could be appropriate to grant a declaration of unlawfulness, including a declaration that the consultation had been unlawful (see §207). She said this (at §214) (I have inserted numbering for ease of cross-reference):

[i] A declaration that the closure decision was unlawful would be tantamount to saying that the decision embodied in Clause 76 of the Bill is unlawful. Yet, the form of primary legislation in a matter for Parliament and not for the courts... [ii] Furthermore, Parliamentary privilege would be breached if the Court were to declare that the procedure leading to legislation being enacted was unlawful... However, that would be the effect of granting a declaration that the consultation preceding the Bill was unlawful. [iii] It would also entail disruption to the Parliamentary timetable in the sense that the Defendant would be under a public law duty to then do something about the consultation. Declaratory relief is sought in these proceedings precisely because the claimant wants to influence the course of the Bill.

In this passage, point [i] exemplifies Mr Buttler QC’s “vitiation” point; while point [iii] exemplifies his “interference” point. As to point [ii], which was squarely based on §230 of Adiatu, Mr Buttler QC submits that Heather Williams J misunderstood that Adiatu §230 was concerned only with the narrow question of Parliamentary procedure in the introduction of a Bill before Parliament. As I have

explained already, I cannot agree. In my judgment, for the reasons I have given, Heather Williams J's point [ii] was a correct reading of Adiatu §230.

Justiciability and the Gunning principles

23.

Three grounds for judicial review are advanced in this case, as reflected in the declaration sought (see §5 above). In reaching my conclusions on justiciability, I will start with ground three: the Gunning principles and common law consultation (see §7 above). It is well established that in principle when a public authority decides to conduct a consultation the Gunning standards are applicable: see PSA at §122. It is also well established that in principle when a public authority reaches a substantive decision arising out of a decision-making process in which the Gunning standards have been breached, the substantive decision is "vitiated". Whether or not a judicial review claimant is seeking declaratory relief only, and whether or not the judicial review Court tailors or refuses remedies, it is the legal logic of a Court holding that the procedure that led to a substantive decision (including the introduction of a measure), that the substantive decision (or measure) is in law "vitiated". It would be the same with a substantive decision made without an oral hearing, or without hearing representations, and where the Court concludes that the procedure was unfair. It is that inescapable "vitiating" logic, of a finding of unlawfulness as to the procedure, which demonstrates the inappropriateness of the judicial review Court being invited to hold that the procedure that led to legislation being enacted was unlawful. That was the substance of the point that was being made by the Divisional Court in Adiatu at §230.

24.

The justiciability question in the present case is this: does the Court's supervisory jurisdiction on judicial review extend to the Court policing the Gunning standards, in the context of a consultation which was concerned with "delivering effective legislative change", and whose culminating substantive decision necessarily entails the design of a Bill of primary legislation to be introduced into Parliament? In my judgment, the answer to that question – based on the authorities – is clearly, and beyond reasonable argument, "no". In the first place, the "vitiating" consequence of breach of the Gunning standards – as seen throughout public law wherever those standards are policed by the judicial review Court – can have no place in the present context. Mr Buttler QC accepts that, which is why he strives to confine his claim to declaratory relief, and to confine the target for his claim to the decision as to process, in the design of the consultation. Mr Buttler QC relies on the LH case (see §16 above) as supporting the contention that the legal focus can properly be so confined. In my judgment, that is not so. The LH case was one in which the Court was expressly accepting that there had been a "vitiating" failure to consult. It was a failure which "did result in [the local authority] acting unlawfully". The judgment of the Court in LH recognised that the substantive decision to close the Day Centre had been legally vitiated, as a matter of public law. The Court's refusal to grant any remedy, beyond a declaration of unlawfulness, was borne out of the practical realities. Remedies in judicial review are always discretionary. The Day Centre had been closed. But, unmistakeably, that decision to close the Day Centre was vitiated in law. It had been arrived at in breach of applicable public law standards, where procedure and substance are linked.

25.

It is not possible, in my judgment, to treat the Gunning standards as being legally applicable to "process decisions" about 'the design of the decision-making process', in a manner which is distinct from and insulated from the substantive decision-making as to the design of the Bill. Consultation is really about "participation in" a "decision-making" process. That is how Lord Reed put it in Moseley at

§§38-39. To see the point, one need only look at Gunning (iv), by which the judicial review Court polices the standard of legally adequate consultation which requires that:

the product of the consultation must be conscientiously taken into account when the ultimate decision is taken.

The Court could not do this, without accepting that the supervisory jurisdiction extends to scrutinising the “ultimate decision” and the way in which it has been approached. Turning the point around, once it is accepted that it could not be appropriate for the judicial review Court to scrutinise the reasoning and thinking behind the “ultimate decision” – here, as to the design of a Bill of primary legislation to be introduced into Parliament – it must follow that Gunning (iv) is not a legal standard which can properly be enforced by the judicial review Court. In my judgment, it is wholly unconvincing then to seek to rescue other aspects of the Gunning principles, so as to disconnect those from their legal logic, consequence and effect, so as to leave a “freestanding” issue for the supervisory jurisdiction of the judicial review Court which asks an “isolated”, and “insulated” question, as to the clarity of proposals in a consultation document (Gunning (ii)).

26.

A declaration that an applicable legal standard was breached, in the consultation and engagement process culminating in the operative decisions as to the design of the Bill to introduce into Parliament, would, in my judgment, clearly constitute a breach of Parliamentary privilege and the constitutional separation of powers, as these are clearly described by the Divisional Court in the Adiatu case. A declaration from a judicial review Court, declaring that the consultation which preceded the Bill and informed its design was unlawful would – even if the Court bent over backwards to make very clear that that was the scope and extent of its judgment and its declaration – clearly raise questions about whether some step ought to be taken in light of that conclusion of law by the Court. There are two points to make about this:

i)

First, Ms Clement convincingly submits that a responsible Government would be likely to respond to such a finding of breach of an applicable public law duty by needing to “do something about it”. She emphasises that this is not a “practical impossibility” scenario as in LH. She submits that if Government did indeed respond to such a finding by reference to “doing something about it”, that would stand to disrupt the Parliamentary timetable. These points echo what Heather Williams J said in PSA at §214 (see §22 above) about granting a declaration. They link to Wheeler at §49, cited in Adiatu at §243 (see §18 above).

ii)

Secondly, there is this. Let it be assumed that the Court’s conclusion did not involve any “step” being taken by Government. Suppose instead that the Court’s judgment instead cast a legal “shadow” over the product of the consultation. That shadow would, in my judgment, itself stand – in the circumstances of the present case – as an interference in the Parliamentary process. The Court would, unmistakably, have concluded that the “product” of the consultation was legally “tainted”. The Court would have held that the product had been arrived at in breach of a relevant, material and applicable legal standard. In the present case, the Claimants’ pleaded grounds for judicial review, in my judgment, demonstrate this “shadow” point very clearly when they address the purpose of a freestanding declaration (§§6, 17 above). The very consequence for which the Claimants hope, and which they intend, through the bringing of this claim for judicial review and the seeking of a declaration of breach would, in a real sense, be seeking to “influence the course of the Bill” (to echo

the phrase in PSA at §214). Otherwise, how could the judgment be affecting the thinking of “Parliament” (as it is put), or thinking of those involved in the Parliamentary process?

27.

In conclusion, it is not – in my judgment – arguable, with a realistic prospect of success, that the Gunning standards are legal standards engaging the supervisory jurisdiction of the judicial review Court in these following circumstances: where Government has chosen to undertake a “consultation and engagement process”, for the purposes of “delivering effective legislative change”, where the outcome would necessarily be substantive decisions as to the design of a Bill to be introduced into Parliament. That is this case.

Justiciability and the EA 2010

28.

I turn to the applicability of the statutory duties within the EA 2010. I have found that these are brought into sharp focus by the disability example to which I have referred (see §5 above).

i)

I start with the PSED. The Claimants’ difficulties are these. First, once it is recognised that the description in Adiatu of it being a breach of Parliamentary privilege and the constitutional separation of powers “for a court to hold that the procedure that led to legislation being enacted was unlawful” (Adiatu §230), which then leads to the conclusion that “actions of a Government Department leading up to” the making of primary legislation are not within the “functions” of a public authority to which the PSED applies (Adiatu §236), it is immediately extremely difficult to see what room there could be for the PSED to apply to the “function” of the public authority in “determining how a consultation is to be carried out” (see Help Refugees at §90(v): see §14(3) above). The logic would have to be that although the PSED is inapplicable to impugn the “procedure” by which a “policy” decision concerning the design of primary legislation is taken, the PSED is nevertheless applicable to impugn “decisions” taken as to the design of that very “procedure”. That very slender distinction unravels when examined. If the PSED were applicable in that way in the present case, the same two points (see §26 above) about the consequences of a declaration of unlawfulness would apply, in relation to the Claimants achieving that declaration in relation to the PSED. In particular, the unmistakable and deliberate “shadow” would still be cast over the progress of the Bill in Parliament, as is illustrated by the Claimant’s pleaded purpose in seeking such a declaration (§§6, 17 above). Impugning decisions taken as to the design of the “procedure” would entail the Court being invited to hold that “the procedure that led to legislation being enacted was unlawful”, which is what has been identified as impermissible in the context of understanding the reach of the PSED (Adiatu §230).

ii)

I turn to the statutory duty not indirectly to discriminate. As Ms Clement submits, if “the taking of decisions about procedure”, relating to the ‘design of a consultation’ which culminates in a substantive decision about the design of the Bill of primary legislation to be introduced into Parliament, is not a “function” for the purposes of the PSED (EA 2010 s.149), then it must equally surely not be a “function” for the purposes of remediable indirect discrimination (EA 2010 s.29 (6), read with s.19). In the context of indirect discrimination too, as in the context of the Gunning principles and unlawful consultation and the PSED, the same two points (§26 above) arise as to the effect of a declaration, including the purposes which the grant of remedies would stand to have, in (deliberately) casting a legal ‘shadow’ within the Parliamentary process on the steps which had preceded the Bill as on the product of the pre-Bill process of consultation and engagement.

29.

In my judgment, beyond reasonable argument, the EA 2010 duties invoked by the Claimants are inapplicable to the function of designing the “consultation and engagement” process which is the focus of the present case.

30.

In Adiatu, the Divisional Court referred to there being “another way of arriving at the same conclusion” (§237), so far as the inapplicability of the PSED was concerned. That alternative route was within Schedule 18 to the EA 2010, by which (see Sch 18 §4(3)(a)) there are excluded from the PSED – in the case of persons who are not public authorities but by whom public functions are exercisable (Sch 18 §4(1)) – a function “in connection with” proceedings in the House of Commons or the House of Lords. The Divisional Court evidently treated it as going without saying that any “public authority” function of that kind was equally excluded. The Divisional Court treated that provision as indicating an alternative route, on the basis that decisions relating to primary legislation – which included “the procedure that leads to legislation being enacted” and “the actions of a Government Department leading up to the making of primary legislation” – are parts of a function “in connection with” proceedings in the House of Commons or the House of Lords. In relation to indirect discrimination (s. 29(6) read with s.19), there is a similar alternative route. It is to be found within Schedule 3 §2 to the EA 2010. That provision states (Sch 3 §2(1)(b)) that s.29 does not apply to “preparing, making or considering ... a Bill for an Act of Parliament”. This language (“preparing”) matches the phrase used in Adiatu at §236, which spoke of acts relating to the “preparation”, as well as the promotion, of a Bill. There is, in my judgment, at least as much cogency in the invocation of this alternative route (“preparing ... a Bill”), to “the procedure that leads to legislation being enacted” and “the actions of a Government Department leading up to the making of primary legislation”, as the Divisional Court recognised there would be in the invocation of the PSED exclusion (“functions in connection with proceedings in the House of Commons or the House of Lords”), as “another way” of arriving at the same conclusion.

Not ‘what’, but ‘who’

31.

A key point worthy of emphasis is this. These conclusions on justiciability are not conclusions as to the absence of “standards” against which actions can be scrutinised. The Court’s conclusion on justiciability does not mean there is no “standard”: concerned with whether “insufficient reasons have been given for a proposal to permit of intelligent consideration and response”; or concerned with whether “the product of consultation has not been conscientiously taken into account in the ultimate decision” fuelling the design of a Bill; or concerned with whether a consultation and engagement process, or the measure arising out of that process, has been designed without appropriate “regard” to “the need to eliminate discrimination, advance equality of opportunity and foster good relations”; or concerned with whether these were designed as involving some ‘provision or practice’ which “unjustifiably places persons with protected characteristics at a particular disadvantage”. The Court is not saying that such considerations are, in principle, irrelevant to “the actions of the Government Department leading up to the making of primary legislation”, or “the procedure that leads to legislation”. All of that is about “what”. It is all inextricably linked to the making of primary legislation, which is a Parliamentary function. The approach in the case-law to justiciability is recognising that the responsibility for considering “standards” and “accountability” in relation to those standards is a responsibility falling within the domain of Parliament and its process. That is the “who”. The Court does not have a role of identifying legal standards, and enforcing them – albeit that

they would be identified and enforced in the context of decision-making culminating in delegated legislation – so as to identify what Adiatu called “procedural impropriety in the lead-up to” primary legislation, for the purpose of informing Parliament or members of Parliament or informing public debate (as is the Claimants’ wish). That would be an act of “interference” which – on the authorities – the Courts’ chosen, self-denying ordinance, based on the Courts’ perception and delineation of the constitutional principle of the separation of powers, alongside the Courts’ perception and delineation of the constitutional principle of the rule of law, inhibits the Courts from undertaking.

IV. Arguability

32.

I have dealt, at some length, with the question of justiciability. The first question which arises is whether, in light of my conclusions, I should stop there. The position at this permission-stage hearing was that the Court received full written and oral argument about justiciability, but it also received full written and oral argument about whether the claim for judicial review (if justiciable) would be properly arguable. Ms Clement, on behalf of the Secretary of State, specifically asked the Court – whatever its conclusion on justiciability – to go on to address the question of arguability (if justiciable). The Secretary of State – having put forward non-justiciability – was not concerned about any inappropriateness of the permission-stage Court then “expressing a view” about arguability of the legal issues, adopting a premise of justiciability. I have been persuaded by the Secretary of State to address the issue of arguability (if justiciable), having heard full submissions about it. I do so in case I am wrong about justiciability. That would include the prospect of some shift or development in the law – perhaps at higher judicial altitude – perhaps in revisiting Adiatu (possibly in PSA), or in explaining the law differently from the way in which I have understood it and sought to be faithful to it. So, what follows is my analysis of arguability, on the premise that the claim is justiciable. In doing so, I will take the grounds in the same sequence as they have been presented by the Claimants, as reflected in the declaration sought (see §5 above). I am able to deal with this topic more concisely than I have found possible with the topic of justiciability.

Indirect discrimination

33.

The essence of the Claimants’ analysis on ground one (indirect discrimination pursuant to EA 2010 s. 29(6) read with s.19), as I see it, is as follows. In the public function of the consultation and engagement process, and specifically the decision-making as to the design of that process, the unavailability in languages other than English and Welsh of the consultation documents – which operated alongside the limited scope of the invitation-only engagement sessions – constituted a “provision, criterion or practice” which placed at a “particular disadvantage” persons sharing the protected characteristic of “race” (which includes non-British nationals), constituting indirect discrimination for which a declaration and damages are the appropriate remedy. Ultimately, that is because the Secretary of State cannot discharge the onus, which is on her, of showing that the provision criterion or practice was a “proportionate means of achieving a legitimate aim”, striking “a fair balance”. It is true that speed and simplicity – that is, the avoidance of delay and complexity – would constitute “a legitimate aim”. But in the absence of some step identifying the effect for speed and simplicity (delay and complexity) of providing further translations of consultation documents (by way of an example, having them translated into a “top five” relevant languages beyond English and Welsh) – and/or for providing open or greater access to engagement sessions for those wishing to share their lived experience – the Secretary of State cannot discharge that onus. In fact, the Secretary of State would need to show this: that she could not have had the consultation documents translated

more widely – and/or the engagement sessions open or more widely accessible – without creating undue complexity and delay. Further, it is not sufficient for the Secretary of State simply to point to invitation-only engagement sessions as “mitigating steps” in the context of the absence of translated versions of the consultation documents. At this permission stage, there is no evidence from the Secretary of State. There needs to be evidence. The threshold is one of arguability and it is crossed.

34.

I am not able to accept these submissions. This consultation and engagement process included a six week consultation exercise reflecting the degree of urgency in promoting the legislation in this field, as assessed by the Secretary of State. The consultation and engagement process was designed to have its various interrelated strands. They were significant. Among those interrelated strands was the engagement with bodies who represent asylum seekers. Also among those interrelated strands was the lived experience forum, the series of in-depth interviews and discussion groups specifically held with those who had lived experience of the UK asylum system. Those sessions, planned by the Home Office, included the provision of interpreters arranged by the Home Office or the relevant network, where interpreters were needed. The detailed description of all of this is set out in the summary grounds of resistance. It is accompanied by a statement of truth. It stands evidenced by that and by the documents which are before the Court. As Lang J explained in her detailed reasons for refusing permission for judicial review (see §8 above), in addition to the over 1500 responses to the consultation questionnaire there were the extensive engagements with stakeholder groups, public focus groups, and those with “lived experience” of the asylum system and modern slavery. She went on to explain that: whilst non-English speakers were at a disadvantage, it was justifiable for the Secretary of State to address that difficulty by structuring the consultation so as to encourage engagement from bodies who represent asylum seekers, and also to engage directly with those who had lived experience of the asylum system and modern slavery. Beyond argument, in my judgment, the Secretary of State can already show, assuming all other stages of the argument in the Claimants’ favour, that the “provision criterion or practice” in the language of the consultation documents – and/or the scope of the invitation only engagement sessions – whose linguistic or invitational expansion would self-evidently have involved substantially reduced speed and simplicity (increased delay and complexity), was a proportionate means of achieving the legitimate aim of ensuring such speed and simplicity, and struck a fair balance. It follows that there is no properly arguable basis (having a realistic prospect of success) for claiming a declaration of unlawfulness, or for claiming damages for indirect discrimination. Since this is the only ground of the three engaging damages, the claim for that remedy cannot on this basis succeed. Nor would there be a basis for transferring any damages claim to the county court.

Breach of the PSED

35.

The essence of the Claimants’ analysis on ground two (breach of the PSED pursuant to section 149 of EA 2010) is, as I see it, this. In the public function of the consultation and engagement process, and specifically the decision-making as to the design of that process, with the unavailability in languages other than English and Welsh of the consultation documents – which operated alongside the limited scope of the invitation-only engagement sessions – there was a failure by the Secretary of State to have “due regard” to “the need to eliminate discrimination, to advance equality of opportunity between persons sharing a relevant protected characteristic and persons not sharing it, and to foster of good relations between persons who share a relevant protected characteristic and those who do not”. The relevant protected characteristic is race (including non-British nationals). The

disadvantages in participation with the consultation process not only stood to constitute discrimination (see ground one) but were detrimental to equality of opportunity and to the fostering good relations. In circumstances where the Defendant has throughout denied the applicability of the PSED it is particularly unconvincing for her to submit that she complied with it. The fact that strands of the consultation and engagement process included engagement from bodies representing asylum seekers and directly included some individuals who had “lived experience” of the asylum system and modern slavery does not of itself mean that “due regard” was had so as to discharge the PSED. Evidence is needed and there is no satisfactory evidence of due regard. This ground is at least arguable.

36.

I am not able to accept those submissions. I accept the Secretary of State’s submission, as it is put in the summary grounds of defence: that it was “manifestly obvious” that those who do not speak English including non-British nationals who might want to respond to the consultation exercise may find it more difficult to respond to the consultation questionnaire; and that it was in that context that the Secretary of State structured the consultation and engagement process, so as to encourage engagement from stakeholder bodies including many who represent groups affected by the proposals, and so as to encourage direct engagement with those having lived experience of the asylum system including direct experience of modern slavery. It bears repeating in context that the lived experience forum, included the provision of interpreters arranged by the Home Office or the relevant network. The steps and their design are evidenced before the Court. It is not, in my judgment, arguable with a realistic prospect of success that the decision-making in the design of the consultation and engagement process, and specifically in relation to language versions of the consultation documents and the scope of and numbers included in the invitation only engagement sessions, constituted a breach of the “due regard” duty in the PSED.

Breach of Gunning (ii)

37.

The essence of the Claimants’ analysis on their ground three (legally inadequate consultation by reference to Gunning (ii)) is, as I see it, as follows. Having chosen to conduct a consultation and engagement process (in an announcement which recognised applicable “established principles”: see §3 above), the Secretary of State failed through the lack of clarity and specificity in the consultation documents to discharge her common law duty: to give reasons for proposals sufficient to permit intelligent consideration and response. This, moreover, was a context involving proposals some of which stood to involve the deprivation of existing rights or advantages. That called for high standards of procedural fairness in the consultation process. By reference to 8 topics set out in the grounds for judicial review – three of which are further discussed in the Claimants’ skeleton argument, and one of which was the subject of oral submissions – there was a breach of this important duty. The breach is exemplified by the fact that the description in the consultation document relating to the reintroduction of “fast-track appeals” made no reference to any proposal regarding “loss of appeal rights”, yet such a proposal was indicated to a non-governmental organisation (the Public Law Project) at a subsequent engagement session. The breach of Gunning (ii) is also strongly supported by the reactions of responsible stakeholder bodies (engagement with whom the Secretary of State so strongly emphasises). ILPA (the Immigration Law Practitioners’ Association) described proposals in the consultation documents as “confusing” and being “at such a high level of generality” that it was “difficult to provide meaningful comments”. The Bar Council described the consultation documents as “deeply confused” and commented that “in the absence of any detail at all” there was “little that could

be said". Liberty described the proposals as "worryingly unclear and imprecise". The Law Society said that "further consultation" would be necessary given the "lack of detail". Refugee Action said it was "impossible" to respond because "no real information" had been provided. The vagueness in the proposals rendered the consultation "so unfair as to be unlawful" (as the test has been put: see *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWCA Civ 1074 at §69). It is at least arguable that there was a breach of *Gunning* (ii).

38.

I am not able to accept those submissions. The question of what *Gunning* (ii) requires of a public authority's consultation process is "fact-specific and can vary greatly from one context to another": see *Help Refugees* at §90(iii). The nature of consultation will be related to the context and purpose for which it is carried out, and a mechanistic approach to the requirements of consultation should be avoided: see *Moseley* at §36. In order for consultation to be found to be unlawful, clear unfairness would need to be shown, and the starting point is that it is for the public authority charged with performing the consultation to determine how it is to be carried out, including "the manner" of the consultation: see *Help Refugees* at §90(v). Key points, convincingly identified by the Secretary of State in her summary grounds of resistance, are these: that the scope of any duty to consult varies greatly, depending on the policies in question and the context and purpose of the consultation, as well as the degree of urgency required by the nature of the decision-making; that the proposals which were contained in the Policy Document in this case were proposals which would require primary legislation; that the nature and content of any duty to consult arises and must be considered against the backdrop that there would be an opportunity for views to be made known on legislative proposals as these progressed through Parliament; that the consultation was on policy proposals set out in the Policy Document; that the Secretary of State was not consulting on the terms of proposed legislation which had yet to be designed; and that this was not in the nature of a consultation on a draft Bill. I can see no realistic prospect of this Court at a substantive hearing concluding that, applied in the context and circumstances and by reference to the aim of this consultation, the common law standard of specificity and clarity in *Gunning* (ii) was breached by the terms of the consultation documents, whether by reference to the eight examples in the judicial review grounds, the three emphasised in the skeleton argument, or the one which was emphasised as illustrative in the oral submissions of Mr Buttler QC.

Conclusion

39.

For all these reasons, had I proceeded on the basis that the claim raises justiciable legal standards and applicable legal duties which it is the proper function of the judicial review Court to supervise and enforce, I would have refused permission for judicial review on grounds of lack of arguability, in agreement with Lang J.

V. Other points

40.

A number of other topics were raised and addressed in submissions in this case, which it is appropriate to address. The first is this. In his oral submissions, Mr Buttler QC identified this "fallback" argument. Even if the policy proposals outlined in the consultation documents were predominantly envisaged to be incorporated within a suitably designed Bill of primary legislation to be introduced into Parliament, that is not true universally. There are particular instances of topics and proposals whose implementation would not require primary legislation, but which would be the

subject of other arrangements. Insofar as there is any non-justiciability “shield”, it could not apply to these, and permission should therefore be granted. I reject this as a basis for granting permission. The plain focus of this claim for judicial review, from the outset, has been on the consultation and engagement process adopted for the purposes of delivering effective legislative change. At no stage – in the judicial review grounds, in the permission stage reply, or in the skeleton argument – was this narrower fallback argument identified or articulated. On grounds of “procedural rigour” alone, I would refuse to entertain a last-ditch line of argument of this kind, advanced for the first time orally at a permission renewal hearing. But nor, in my judgment, was Mr Buttler QC able convincingly to identify any specific proposal falling within the area of implementation through means other than primary legislation, with which any of the Claimants had expressed any concern. One was identified which one of them had mentioned, to express support for it. If and insofar as any person or body having a sufficient interest wished (or wishes), in proceedings promptly pursued, to seek to impugn any decision to implement any proposal by means other than primary legislation, on the basis of breach of an applicable legal duty (having, moreover, a “vitiating” effect for that substantive decision), they could always have done so.

41.

Mr Buttler QC in writing and orally submitted that the claimant’s abandonment of the mandatory order sought in the claim form was attributable to delays within the Administrative Court Office in dealing with the papers filed on 28 May 2021. The true position is that the mandatory order originally sought, requiring a further period of consultation, would plainly have constituted an interference with the timetable in which a Bill could be introduced into Parliament. As Mitting J put it in Unison at §11: “The... challenge... if successful... would require the Secretary of State to defer or delay introducing the... Bill until [she] had consulted ...” The mandatory order sought, from the start, offended against the “interference” principle which Mr Buttler QC has in the event accepted (see §10 above).

42.

Reference was made by the parties to two specific statutory duties arising by virtue of [section 3\(3\) of the Immigration and Social Security Coordination \(EU Withdrawal\) Act 2020](#) and [section 33 of the Immigration and Asylum Act 1999](#). These were “relevant statutory duties” referred to in the Policy Statement (see §3 above). By [section 3\(3\)](#) of the 2020 Act Parliament imposed a statutory duty on the Secretary of State to ensure a “review” of the ways in which protection claimants who are in EU member states are able to enter the United Kingdom lawfully and, in relation to one aspect of that review, to consider, with “a public consultation”, the position of unaccompanied children in member states who are protection claimants and are seeking to come to the UK to join relatives here. By [section 33 of the 1999 Act](#) Parliament imposed a statutory duty on the Secretary of State to “consult” persons considered by her to be appropriate, before issuing a “code of practice” (laid before Parliament) to be followed by persons operating systems for preventing the carriage of clandestine entrants. I asked Mr Buttler QC whether either of those statutory duties cast any light on the legal logic so far as concerns questions of justiciability and non-justiciability. His answer was that these were “slim strands” of the consultation and engagement process, did not assist the analysis in this claim and had nothing to do with the claim. I was not shown how either of these duties engage any proposal within the design of primary legislation. If they did, the Court may need to reconcile Parliamentary privilege and the enforcement of a specific and applicable statutory (and therefore necessarily an applicable legal) obligation. Neither Counsel submitted that the contours and implications of that question were relevant to my decision on justiciability. I have therefore done what they did: put the two specific statutory duties to one side.

43.

I asked Mr Buttler QC whether the answer to the question of justiciability in the context of [the 2010 Act](#) statutory duties would simply be a question of statutory interpretation as to the reach and applicability of the provisions of that Act. In response, he said that was not the way the Claimants put their case. His submissions acknowledged that the case-law proceeds on the basis that the reach and applicability of the EA 2010 statutory duties is to be approached against the backcloth of the Bill of Rights (which Mr Buttler QC accepts is a “constitutional statute”) and principles of parliamentary privilege and the constitutional separation of powers. That is certainly supported by *Adiatu* §§230-235. However, as I have explained, the Court in that case (*Adiatu* §237) identified express provision of the EA 2010 as “another way of arriving at the same conclusion” (see §30 above). In the circumstances, I need say no more.

44.

Both Mr Buttler QC and Ms Clement sought to derive assistance from §242 of *Adiatu*, where the Divisional Court described as the exercise of a public authority’s function, for the purposes of s.149(1) of EA 2010, one which “consists of the implementation of the measures that the public authority decides upon”. Mr Buttler QC relied on this passage in support of a contention that *Adiatu* was therefore a case in which there was “no function” because there was no decision to amend (but rather a decision not to amend) the primary legislation. Ms Clement relied on this passage in support of a contention that the PSED applies only to “implementation” and not to a “decision-making function”. In my judgment, they each sought to derive from §242 a proposition which cannot be so derived. That paragraph in *Adiatu* was doing no more than explaining that due regard in the PSED is concerned with due regard to the implications of those steps which the public authority intends to take, not with any other steps which it is not taking or even considering. This was not a passage in my judgment which materially assisted either side on either of these points.

45.

Ms Clement reminded me of the statutory duty on the permission-stage Judge, having been asked to do so by a judicial review defendant, to consider whether the ‘outcome for the Claimants’ would have been “substantially different” if the “conduct complained of had not occurred”: s.31(3C) of the Senior Courts Act 1981. If not, she reminded me of the duty – except in case of involving reasons of “exceptional public interest” – to refuse permission (s.31(3D)-(3F)). Had Mr Buttler QC persuaded me that it was appropriate to focus solely on “decisions about process” and about the “design of the consultation and engagement process”, and had he persuaded me that any of the three grounds for judicial review was properly arguable with a realistic prospect of success, I would not have refused permission for judicial review in the application of these statutory duties. That is because the legal logic – which on this premise I would have accepted – would logically have followed through. The focus would, in my judgment, then have been on whether the “outcome” as to the “design of the consultation process” would have been substantially different “for the claimants”. That design could have involved language versions of the consultation documents; it could have involved a different approach to invitation only engagement session; and it could have involved differently formulated proposals to elicit responses requiring to be conscientiously taken into account by an open-minded decision-maker considering the design of a proposed Bill. Viewed in this way, I would not have concluded that my faithful application of the statutory duties imposed on me by Parliament would have the consequence of shutting out this claim at the permission stage.

46.

As I have mentioned (see §15 above), Mr Buttler QC suggested illustrative examples to test the Secretary of State's position on justiciability. I have given my own disability example (§15 above). Mr Buttler QC's first example was about whether the adjudication of a charge of payment of a bribe during the consultation and engagement process would have fallen within the Crown Court's jurisdiction competence. There was a second example about whether a false accusation in a consultation document or response during the consultation and engagement process would have fallen within the civil court's jurisdictional competence in defamation proceedings. Had such examples been set out at any stage in writing, there could have been analysis to see what they assumed and whether they assisted. I was not, in the circumstances, assisted by them. The third example was closer and clearer. This was an example about a design of the consultation and engagement process which was "white people only". But Mr Buttler QC accepted that the - no less striking example - of a decision to design a Bill which purported to confer protection on "white people only" would not be justiciable by reference to any 2010 Act duty or common law public law duty. The same would be true of any "white people only" step regarding Parliamentary process or proceedings in Parliament. This is classic "who" rather than "what" territory (see §31 above), as would be the conventional common law example involving the exclusion of "red-haired people".

47.

Finally, Mr Buttler QC sought in the context of justiciability to rely on Warsama v Foreign and Commonwealth Office [2020] EWCA Civ 142 [2020] QB 1076. That case, about the interrelationship between the Human Rights Act 1998 and Article 9 of the Bill of Rights, involved the reach of Parliamentary privilege in the context of an Inquiry Report which was to be (and had now been) published in Parliament pursuant to the Parliamentary process known as Motion for an Unopposed Return. The Court of Appeal (on 11.2.20) decided that Parliamentary privilege protected "the content and conclusions of the Report itself" (§78), recorded that no privilege applied "in relation to the preparation of the Report" and that privilege "could not ... have been relied on to prevent ... a judicial review challenge ... to a decision taken during the course of the Inquiry as to what procedure to adopt" (§71). The Court of Appeal clearly had in mind that challenges to "procedural decisions" of the Inquiry - it gave examples of judicial reviews of such decisions during the course of the Saville Inquiry and the Leveson Inquiry - would not constitute an interference with proceedings in Parliament even if they would delay the publication of the Inquiry Report and so the date on which it would come to be published in Parliament. That alone shows that there is no safe analogy. As Mr Buttler QC accepts, and as Mitting J found in Unison, a procedural challenge which stands to delay the timing regarding the introduction of a Bill of primary legislation into Parliament would be non-justiciable. Unison was not considered in Warsama. In turn, Warsama was not considered in Adiatu. These lines of authority are presumably "ships passing in the night", for the good reason that they are on different parts of the map.

VI. Conclusion and Consequentials

48.

I am grateful to the parties and their teams for the assistance which they have given to the Court. It has enabled me to come to clear conclusions, applying the permission threshold of arguability. Those conclusions, the reasoning behind them, and the setting and context in which they have arisen have taken some time to explain. But for the reasons which I have explained, there is in this case, in my judgment, no viable claim for judicial review having a realistic prospect of success. In those circumstances, and in agreement with Lang J (see §8 above), permission for judicial review is refused.

49.

Two consequential matters were raised. The first was the Secretary of State's invitation, to which I accede, to record the grant of permission to cite this permission judgment in light of the discussion of justiciability.

50.

The second concerns costs. The Claimants' representatives asked me to direct a short period of further time for "focused submissions" to challenge Lang J's order summarily assessing at £10,000 the costs of the Secretary of State's Acknowledgment of Service ("AOS"). The Secretary of State resisted any further rounds of submissions and asked me to uphold Lang J's order. In my judgment it is neither necessary nor appropriate to allow a further round of submissions. Lang J made a Court Order which (a) required the Claimants to file within 14 days any "written representations" for challenging her costs order and (b) made clear that the Judge dealing with the renewal hearing would make a final determination on costs based on those representations. Those representations were made. That was the opportunity for "focused submissions". The sole issue is the reasonable costs of the AOS. There has been no application by anyone relating to the costs of the hearing before me. Further, the parties were on clear and adequate notice that the Court would deal with consequential matters in its Order to accompany hand-down. That course enables reasoned rulings on consequential matters within the handed-down judgment. There is no good reason to allow further delay. The Claimants had the opportunity to make clear submissions and have done so.

51.

As to the summary assessment of the costs of the AOS, the starting point is that the £21,912 claimed by the Defendant was disproportionate and unreasonable, far exceeding the costs applications normally made at the permission stage, including claims far more extensive and complex than this once. Lang J reached and expressed all of these conclusions and I agree with her about them. In inviting the Court to reduce to £3,000 the order which Lang J made, the Claimants have invoked this guidance and illustration:

In R (Roudham and Larling Parish Council) v Breckland Council [2009] 2 Costs LR 282, the Court of Appeal noted that the [AOS] should contain only a summary of the grounds on which the claim is resisted. If a party wishes to go further than that at the permission stage, it does so at its own expense (§26). In that case, the Court of Appeal awarded £5,000 of the £17,000 claimed, in circumstances where the claimant was a public authority and the AOS in issue was filed by a private company.

The Secretary of State does not contest that description of that guidance or that case. She submits that there were a number of legal issues which required more legal research and detailed drafting than is standard in preparing an AOS, and asks me to uphold the £10,000 assessed by Lang J.

52.

I have reconsidered the summary grounds of resistance within the Secretary of State's AOS. They were an 18-page (single-spaced) document dealing comprehensively with fact, law and submissions. They set out in some detail factual matters (accompanied by a statement of truth) on which Lang J and I were able to rely. However, had those factual matters been in an accompanying permission-stage witness statement, I would not have been allowing them as AOS costs. The summary grounds addressed the law in some detail – as have I – which assisted Lang J and me. It was open to the Secretary of State to instruct Sir James Eadie QC as well as Ms Clement; to provide so thorough and comprehensive a summary grounds document; and then to provide a 12-page skeleton argument 'incorporating by reference' key sections within the summary grounds. However, having regard to all

the circumstances and to the Roudham guidance – which has not been challenged – I am satisfied that it is appropriate to reduce the summarily assessed AOS costs, in all the circumstances, to £7,500.