CO/3024/2020

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

B E T W E E N :-

THE QUEEN
on the application of
RIGHTS: COMMUNITY: ACTION

Claimant

and

THE SECRETARY OF STATE FOR
HOUSING, COMMUNITIES AND
LOCAL GOVERNMENT

Defendant

CLAIMANT'S SKELETON ARGUMENT

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*References to [**X**] are references to page X in the Core Bundle.*

Recommended essential reading (estimated 2 hours):

-Detailed Statement of Facts and Grounds [A7-A29]

-Defendant's Grounds of Resistance [A32-A35]

-The impugned SIs and published Impact Assessments (see further below) [D1-D20]; [D30-D37, D45-D55]; [D56-D63, D70-D81]

-Witness statement of Shelter [if the application to file further evidence is allowed – B185-B204].

Introduction

1. Can the Secretary of State for Housing, Communities and Local Government ("the Secretary of State"), at a time when Parliament is not sitting, push through what the government itself has described as the most radical changes to the planning system since the Second World War:

   (1) In the absence of a strategic environmental assessment ("SEA"), or the required screening for such an assessment?

   (2) In the absence of an adequate equality impact assessment?

   (3) Without conscientious consideration of consultee responses and the views of his own appointed experts?

(4) In breach of an explicit promise to reconsult on a significant reform (demolition and rebuild)?

2. For the reasons given below, the answer to each of these questions is 'no'.

3. The Claimant is a non-governmental campaign organisation incorporated as a limited company. This is the Claimant's skeleton argument in support of its rolled-up claim for judicial review against three statutory instruments, laid by the Secretary of State on 21 July 2020 (together: "the SIs").[1]

4. SI 2020/755 and SI 2020/756 make sweeping changes to the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO"). SI 2020/757 makes sweeping changes to the Town and Country Planning (Use Classes) Order 1987 ("the Use Classes Order") in England. Although there are differences between the three SIs, they form part of a single overall package of planning reform: they were consulted on as part of the same package by the Secretary of State, they were laid in Parliament together, and for the purposes of this challenge their impact should be considered together.

5. The three SIs fundamentally change the nature of the planning system. They effectively create a shadow planning regime which could amount, in urban areas, to the dominant method of managing development. They remove local democratic control, bypass local planning policies, prevent any consideration of sustainable locations, and rule out any consideration of climate change mitigation and human health. By removing the contributions of affordable housing and other Section 106 contributions to the local planning authority, they actively reduce the quantum of decent affordable homes. The impact on the quality of development in each local authority area across England will be profound, undermining any existing obligations that local authorities have on public health, climate change, affordable homes, and regeneration.

6. The Secretary of State clearly has the right to carry out sweeping changes to the UK planning system. However, before doing so, the Secretary of State is under various duties, set out in environmental law, equality law and public law, to take into account all of the potential impacts of such changes. The crux of this challenge is that the three SIs were, in the Secretary of State's own words, brought in *"at pace"*[2], without lawfully due consideration of all the potential negative consequences: the environmental

[1] The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020/755; The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020/756; The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020/757.
[2] Explanatory Memorandum to SI 2020/757 [page 1, D64].

consequences, the equality consequences, and the other harmful social consequences – many of which were flagged by both consultees and his own appointed advisors.

7. The Claimant therefore challenges the lawfulness of the SIs under the following grounds:

(1) GROUND 1: In respect of each of the three SIs, the Secretary of State unlawfully failed to carry out an environmental assessment pursuant to EU Directive 2001/42/EC ("the SEA Directive") and the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations"). For the reasons given below, the measures in question clearly set the framework for development consents: alternatively, they modify an existing plan or programme that sets the framework for development consents. In terms of environmental impacts, the Secretary of State cannot rely on Environmental Impact Assessment ("EIA") to bypass the overarching SEA requirement: and in any event, the potential environmental impacts cannot be summarily dismissed without a proper screening process.

(2) GROUND 2: In respect of **two** of the three SIs, those relating to Permitted Development, the Secretary of State failed to have due regard to the Public Sector Equality Duty ("the PSED") in s.149 of the Equality Act 2010 ("the EA 2010"). Having considered all three of the previously unpublished equality impact assessments, the Claimant no longer pursues the argument that due regard was not had to the equality impacts of Class E (SI 2020/757).

(3) GROUND 3: In respect of each of the three SIs, the Secretary of State failed to consider the weight of the evidence against these radical reforms, including prior consultation responses and the advice of his own experts. Moreover, he acted with unlawful inconsistency, and in breach of an express promise to re-consult. This composite ground is divided as follows:

Ground 3a: The Secretary of State failed to conscientiously consider the responses to the consultation on proposed planning reforms which ran from 29 October 2018 to 14 January 2019,[3] contrary to the fourth *Sedley/Gunning* principle (*R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168). While he may have been aware of the highly negative consultation responses, he approached the consultation exercise with no intention of changing his mind about the substance of the reforms.

[3] *Planning Reform: Supporting the high street and increasing the delivery of new homes:* https://www.gov.uk/government/consultations/planning-reform-supporting-the-high-street-and-increasing-the-delivery-of-new-homes.

Ground 3b: In respect of the two SIs that expand Permitted Development rights (SI 2020/755 and SI 2020/756), the Secretary of State failed to take into account the advice of the government's own experts: in particular, the findings of the Building Better, Building Beautiful Commission's "Living with Beauty" Report ("The BBBB Report"), and the findings of his own commissioned expert report "Research into the quality standard of homes delivered through change of use Permitted Development rights" ("The Clifford Report").[4] While he may have been aware of these reports, he did not actively consider their findings or weigh them up in his mind.

Ground 3c: In respect of the two SIs that expand Permitted Development rights (SI 2020/755 and SI 2020/756), the Secretary of State adopted an approach which was unfair, inconsistent and/or irrational in the context of the approach taken to similar proposed Permitted Development reforms: namely those relating to the deployment of 5G wireless masts.

Ground 3d: In respect of SI 2020/756, the Secretary of State was required to re-consult before introducing Class ZA. There was a legitimate expectation of re-consultation on the proposal for a permitted development right allowing the demolition and rebuild of commercial properties, arising from an express and unequivocal promise to re-consult which was made in the original consultation document.

8. By way of final relief, the Claimant seeks an order declaring that the decision to lay the SIs on 21 July 2020 was unlawful. The Claimant also seeks an order quashing the SIs for unlawfulness.

9. The Claimant has provided a detailed background to the impugned SIs, the effect of the changes, and extracts from relevant consultations and expert reports in its Detailed Statement of Facts and Grounds at paras 8 to 33 [A10-A17]. While that background is important, this skeleton will not repeat that section and will focus on the grounds of challenge only.

[4] https://www.gov.uk/government/publications/quality-standard-of-homes-delivered-through-change-of-use-permitted-development-rights.

GROUND 1: STRATEGIC ENVIRONMENTAL ASSESSMENT

A. Overview

10. By this ground, the Claimant submits that *"the most radical reforms to our planning system since the Second World War"*[5] should have been subject to, alternatively screened for, a strategic environmental assessment under the SEA Directive and/or the Environmental Assessment of Plans and Programmes Regulations 2004. The sweeping changes introduced by the SIs amount to a new plan or programme, or a modification to an existing plan or programme, for the purposes of the SEA Directive.

11. The Secretary of State resists this ground of challenge on two bases:

    (1) The SIs are not likely to have significant environmental effects.

    (2) The SIs are not "plans or programmes" that are within the scope of the SEA Directive, as they do not set the framework for development consents.

12. Rightly, the Secretary of State has not pleaded that the measures within the SIs are not subject to preparation and/or adoption by an authority at national, regional or local level, or that the SIs are not required by legislative, regulatory or administrative provisions.[6] Clearly they are.[7]

13. Accordingly, under this ground of challenge, the Court is only asked to make a decision on (1) significant environmental effects and (2) the question of setting a framework for development consent. The question of setting a framework for development consent is a logically prior question, and so will be dealt with first in this skeleton.

14. However, before addressing these two questions, it is important to briefly set out the background to the SEA Directive.

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[5] Prime Minister's statement: "Build, Build, Build" - [D155-D157]
[6] SEA Directive, Art 2(a).
[7] See e.g. Lord Carnwath in *Buckinghamshire* at [21]: *"the word "required" in this context means no more than "regulated"".* Moreover, legislation can clearly fall within the scope of the Directive: see *R. (on the application of Friends of the Earth Ltd) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 518 (Admin), [9].

B. The aim and nature of the SEA Directive

15. The key aim of the SEA Directive was to ensure that the environmental impacts of proposals requiring formal State approval are taken into account by decision-makers at the earliest possible stage of the approval process. This aim is apparent from Article 1, which states:

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

16. As the European Commission stated in its initial proposal for the Directive (which was originally limited to only town and country planning[8]):

> "By the time that an application for development consent for a project is being considered by a competent authority many important decisions will already have been taken which will partly determine the outcome of the development consent process. For example, the general location of a particular type of project may be determined by the adoption of a regional town and country planning plan. Environmental assessment at the project stage comes too late in the decision-making process to cover such plan level decisions. Without the requirement for environmental assessment at the plan and programme stage in the development consent decision-making process such decisions will be taken without a comprehensive consideration of their environmental consequences."[9]

17. There is an overarching requirement that the Scope of the SEA Directive is to be construed broadly. It is apparent from the drafting history of the SEA Directive that "plan or programme" is intentionally broad in scope. Although the original draft of the SEA Directive was limited to plans and programmes covering "town and country planning", the scope of the Directive was subsequently expanded to include any plan or programme within the definition of Article 2.

18. The requirement to interpret the Directive broadly is emphasised in the recent CJEU case *Terre Wallonne ASBL v Region Wallonne* (Case C-321/18) [2020] 1 C.M.L.R. 1 at [24]:

> "Lastly, given the objective of the SEA Directive, which is to provide for such a high level of protection of the environment, the provisions which delimit the scope of the directive, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly."

[8] See draft article 2: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:51996PC0511.
[9] COM (96) 511 final.

C. First question under Ground 1: are the SIs within the scope of the Directive?

19. Article 3 of the SEA Directive sets out its scope. Article 3(1) provides that:

> "An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects."

20. Article 3(2) provides that an environmental assessment will be carried out for all plans and programmes relating to town and country planning or land use which "set the framework for future development consent" of EIA Development (Annex I and II). Article 3(4) provides that:

> "Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects."

21. Notably, Article 2(a) defines "plans and programmes" as including "any modification to" plans and programmes. Accordingly, a measure which does not set the framework for future development consent will nevertheless fall within the scope of the Directive if it modifies an existing plan or programme that does.[10]

22. The Directive has been transposed into domestic law by the Environmental assessment of Plans and Programmes Regulations 2004 (*SI2004/1633*, "the Regulations"). The requirement to carry out environmental assessment for a plan or programme which sets the framework for future development consent of projects and is likely to have significant environmental effects is found in reg 5(4).

23. In response to the Secretary of State's argument that the SIs do not fall within the scope of the Directive, the Claimant makes the following points.

(1) Permitted development (SI 2020/755 and 2020/756)

24. Firstly, the measures implemented in SI 2020/755 and SI 2020/756 do set the framework for development consent of projects:

(1) "Development consent" is not defined in the Directive, but Draft Article 2(c) of the original Commission proposal for the SEA Directive provided that *"'development*

[10] See *Compagnie d'entreprises CFE SA v Région de Bruxelles-Capitale* (Case C-43/18) [2020] Env. L.R. 11 at 71: *"In that regard, the court has repeatedly held that the concept of "plans and programmes" not only includes their preparation, but also their modification."*

consent` means the decision of the competent authority which entitles the developer to proceed with a project."

(2) In any event, the Directive is not just concerned with the grant of consents, but also the practical implementation of those consents. In *APS Onlus*, the CJEU at [50] stated that *"the notion of "plans and programmes" relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment"* (emphasis added).

(3) Permitted development under the SIs cannot proceed without prior approval: there is no deemed consent for these particular measures if a Local Planning Authority ("LPA") fails to make a decision in time,[11] and an applicant who commences development before seeking prior approval loses the right to rely on the permitted development right.[12] Accordingly, permitted development under the SIs crystallises into a 'development consent' for SEA purposes only following mandatory consideration of prior approval matters by the LPA. It is at that stage, in both practical and SEA terms, that the developer can proceed with the project.

(4) Moreover, with regard to these particular measures, the prior approval process sets out a detailed framework of procedural rules which must be followed before a project can proceed: see for example, para 7.19 of the Explanatory Memorandum to SI 2020/756 [D38-D44] concerning the need for scale drawings. There are many such detailed prior approval requirements in both of the Permitted Development SIs.[13]

(5) The Permitted Development SIs also directly affect and constrain the LPA's substantive consideration of the application. In particular, an LPA is unable to consider any matters other than those identified as having the potential to require prior approval. In that sense, permitted development sets out a rigid framework for determining the grounds on which the LPA can prevent the project from proceeding or not. Further, even in relation to those matters on which prior approval may be required, the Permitted Development SIs constrain the exercise of the LPA's discretion since (as was noted by the Court of Appeal in *Murrell v SSCLG* [2010] EWCA Civ 1367 at [46]) for permitted development the question of prior approval

[11] The Explanatory Memorandum to SI 755/2020 notes at 7.14 that *"The right does not provide a default deemed consent if the local planning authority fails to make a decision within this time, reflecting the significance of the matters under consideration"*[D24].
[12] See *Winters v. Secretary of State for Communities and Local Government* [2017] EWHC 357 (Admin).
[13] See e.g. the Explanatory Memorandum to SI 2020/756, 7.14 and 7.19 [D41]; the Explanatory Memorandum to SI 2020/755, 7.12 [D23].

"has to be made in a context where the principle of the development is not itself in issue." As a result, the Permitted Development SIs limit the extent to which LPAs can rely upon their development plan policies when considering whether prior approval should be granted: see *Murrell* at [46-50].

25. Alternatively, the Permitted Development SIs modify an existing plan or programme that sets the framework for development consent. The plan or programme in this context is England's planning system as set out in the Planning Acts, which unquestionably sets the overarching framework for development consent in England.

26. As is noted in the Detailed Statement of Facts and Grounds at para 14, Permitted Development operates through a combination of s.59 of the Town and Country Planning Act 1990 ("TCPA 1990") and the GPDO. Section 59 of the TCPA 1990 states that the Secretary of State shall provide for the granting of permission through *a "development order"* which may either itself grant planning permission for development specified, or for development of any class specified, with the express power for that order to be *"a general order … applicable to all land".* The GPDO is one such development order made under s.59 of the TCPA 1990.

27. By modifying the GPDO, these measures modify the overarching framework for development consent in the UK, which is itself a plan or programme for the purposes of SEA that was never subjected to SEA. To extent that these measures modify that plan or programme, they therefore clearly fall within the scope of the SEA Directive.

28. In particular, the interference of the Permitted Development changes with local development plans and NPPF town centre policies is significant. Many development plans, which would clearly fall within the scope of SEA, must now be approached on the basis that permission in principle has been granted to extend buildings upwards, contrary to a tall buildings policy; or to place housing blocks in places deemed inappropriate under that plan. By constraining the grounds on which prior approval can be refused, and limiting the ambit of development plan policies, the SIs modify the normal plan-led framework for the grant of consent provided for by s. 38(6) Planning and Compensation Act 2004, and so clearly modify a plan or programme subject to SEA.

(2) Class E (SI 2020/757)

29. Class E also introduces a modification to the overall framework of development consent in the Planning Acts. It effectively repeals and de-regulates use classes in the high street context, removing previous changes of use from the definition of development and therefore the ambit of planning control.

30. This is precisely the kind of measure that European case law demonstrates falls within the scope of the Directive. The fact that Class E imposes no positive requirements does not take it outside of the scope of the SEA Directive, nor does the fact that it in effect repeals existing measures rather than imposes new ones.

31. In *Thybaut v Region Wallonne* (C-160/17) [2019] Env. L.R. 8, the European Court found that a Belgian Order decreeing certain land an urban land consolidation area was within the scope of the SEA Directive. Although a consolidation area, such as that at issue, did not in itself lay down any positive requirements, it did allow for derogation from existing planning requirements, which was sufficient to bring it within scope:

> "58. It follows that, although such an instrument does not, and cannot, lay down positive requirements, the possibility which it lays down of allowing a derogation from the planning rules in force to be obtained more easily amends the legal process and consequently brings the consolidation area at issue in the main proceedings within the scope of art.2(a) and art.3(2)(a) of the SEA Directive."

32. In *Inter-Environnement Bruxelles ASBL and others v Région de Bruxelles-Capitale* (C-567/10) [2012] 2 C.M.L.R. 30 ("*IEB*") at [43], the European Court held that a procedure for the total or partial repeal of a land use plan is similarly within the scope of the SEA Directive:

> "…Article 2(a) of Directive 2001/42 must be interpreted as meaning that a procedure for the total or partial repeal of a land use plan… falls in principle within the scope of that directive, so that it is subject to the rules relating to the assessment of effects on the environment that are laid down by the directive."

33. A similar conclusion was reached with regard to the purported abolition of Regional Spatial Strategies in *Cala Homes (South) Limited v. Secretary of State for Communities and Local Government* [2010] EWHC 2866 at [61-63]. Both cases illustrate the fact that deregulatory planning reforms clearly fall within the scope of the SEA Directive. It would be perverse if the partial revocation of the rules or policies governing the grant of planning permission was required to be the subject of SEA, but a decision to remove entire categories of change of use from the definition of development for which permission is required was not.

34. As with Permitted Development rights, many local development plans which aim to control or specify certain kinds development within town centres are clearly at odds with Class E. These plans must now either be changed or their application significantly qualified. Spatial plans such as local development plans are therefore "modified" by Class E for SEA purposes. Similarly, by allowing changes of use to take place

irrespective of whether they are within or outside town centres, Class E cuts across national policy in Section 7 of the NPPF.

D. Second question under Ground 1: did the Secretary of State properly assess the risk of significant environmental effects?

35. Under Article 3 of the SEA Directive, an environmental assessment is required for plans and programmes which are likely to have significant environmental effects. Any environmental assessment carried out under the Directive has strict consultation requirements. Moreover, even if a Member State reaches the view that there are no significant environmental effects, that Member State must carry out a screening assessment and make its reasoning available to the public.

36. However, the Secretary of State asserts that these requirements can be sidestepped because *"it is obvious that none of the SIs are likely to have significant environmental effects."*[14] He relies in particular on the fact that, by virtue of Article 3(10) of the GPDO, Permitted Development cannot be granted for Schedule 1 or 2 development within the meaning of the EIA Regulations (unless that development has first been screened for EIA).

37. The Claimant makes three points in response:

(1) Even if correct, this argument is one which should have been the subject of a screening decision under reg 9(1), which would itself have been the subject of consultation and on which a statement of reasons should have been prepared. None of these things has occurred. The argument is therefore not a defence to the complaint that there has been a breach of the SEA Directive and/or the Regulations. It is at most a matter which might go to the exercise of the Court's discretion and/or the application of s. 31 Senior Courts Act 1980.

(2) The Court should be slow to exercise that discretion in circumstances where the SIs have not been analysed by reference to the criteria in Annex II of the Directive, and where the consultation which would have been required has not taken place.

(3) The Secretary of State's confidence in the lack of significant environmental effects is in any event misplaced. The availability of EIA protection at project level does not mean that SEA is not required at the strategic level. If this were so, it would entirely defeat the purpose of SEA.

[14] Grounds of Defence, para 14 [A42].

(1) The screening requirement

38. The Secretary of State confidently asserts that it is *"inconceivable"* that these measures would have significant environmental effects.[15] However, Article 3 of the SEA Directive sets out the screening requirements that apply to all Member States. These requirements apply irrespective of the conclusion eventually reached on likely environmental harm and include:

    (1) A "screening" decision undertaken by reference to the criteria in Annex II (Art 3(5));

    (2) Consultation with the authorities specified in Art 6(3): Art 5(6);

    (3) Publication of the authority's conclusions, including the reasons for not requiring an environmental assessment: Art 5(7).

39. These requirements are replicated in reg 9 the Regulations. Under reg 8, a plan or programme in respect of which a determination under reg 9(1) is required "shall not be adopted or submitted to the legislative procedure for the purpose of its adoption" unless either the determination under reg 9(1) has concluded that there are unlikely to be significant environmental effects, or an environmental assessment has been undertaken and consulted on, and the report and consultation response shave been taken into account.

40. The requirements of the Directive are clear: wherever a responsible authority adopts a plan or programme which sets the framework for development consent, or makes a modification to such a plan, it must first make a "screening" decision to determine whether the plan is likely to have significant environmental effects, and may only adopt the plan or programme (or submit it to the legislative procedure for the purpose of its adoption) if either the screening decision is negative (i.e. no likely significant effects) or an environmental assessment has been undertaken and consulted upon.

41. While a Member State may be entitled to reach the view that a plan or programme will have no likely significant environmental effects, screening is a mandatory analytical exercise that must be undertaken first.

42. In the present case, no form of screening assessment has been carried out, let alone one that would come close to justifying a conclusion that there are unlikely to be significant environmental effects. The Secretary of State's response is, therefore, not a defence to the contention that there has been a breach of the Directive and the Regulations. It is at

[15] Grounds of Defence, para 15 [A42].

most an argument which goes to the exercise of the Court's discretion in relation to the grant of relief.

(2) Breach of the Directive: Procedural Reasons why the Secretary of State's Response is Flawed

43. The Defendant also asserts that *"even if the Defendant had unlawfully failed to screen for such an assessment in respect of the SIs, the outcome would have been the same as it would have been assessed that there are no likely significant environmental effects."*[16] However, it is hard to see how the outcome of a screening assessment can be so easily predicted in circumstances where, by the Secretary of State's own admission, none of the required work has been carried out.

44. In particular:

    (1) the Annex II 'Criteria for determining the likely significance of effects' include the degree to which the plan or programme influences other plans and programmes including those in a hierarchy; the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development; the environmental problems relevant to the plan or programme; and the characteristics of the effects and of the area likely to be affected, having regard, inter alia, to the probability, duration, frequency and reversibility of the effects, the cumulative nature of the effects, the risks to human health or the environment (e.g. due to accidents), the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected). There has been no suggestion from the Secretary of State that any of these criteria have been taken into account in assessing the likely impact of the impugned SIs.

    (2) There has been no consultation on the question of whether SEA was required;

    (3) There has been no such publication of reasons, as required by Article 3(7) of the Directive or reg 9(3).

45. In the absence of compliance with these requirements, the contention that the outcome would have been the same (or even that it is highly likely that it would have been) is one which the Court should be very slow to accept. Without any evidence as to what a screening assessment would have revealed, and without any evidence of the decision-making that would have followed, it cannot be said that the bar for denying relief under s.31(2A) of the Senior Courts Act 1981 has been met.

[16] Grounds of Defence, para 21 [A44].

(3) Substantive reasons why the Secretary of State is wrong: the relationship between SEA and EIA

46. The main purpose of SEA is to allow for consideration of effects that cannot be captured by project-level EIA because an environmentally harmful decision in principle has already been made. In *R (on the application of Buckinghamshire County Council and Others) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324 ("*Buckinghamshire*"), Lord Carnwath noted at para 35 that the purpose of the SEA Directive *"is to prevent major effects on the environment being predetermined by earlier planning measures before the EIA stage is reached"* (emphasis added).

47. In line with Lord Carnwath's comment, EIA is insufficient to capture the prior decision to allow in principle this volume of new development, which may cause significant cumulative environmental harm. If the availability of EIA protection at the project level was sufficient to displace the requirement of SEA, there would simply be no need for SEA in any context.

48. It is far from obvious that small environmental effects, which may not come close to EIA at the project level (or even be an issue for prior approval), could not become significant when replicated thousands of times over England. These cumulative impacts might include changes in carbon emissions, air and water quality, light pollution and/or loss of light, soil quality and noise. In other words, the package of measures introduced by the SIs run the risk of "salami-slicing" environmental impacts on a national, widespread scale.

49. It would be very difficult to judge at the EIA project level whether, for example, one demolition under Permitted Development will have a cumulative significant environmental impact when combined with many other demolitions taking place at a national level. SEA fills that gap in environmental protection by allowing for consideration of a large number of small impacts over a very wide area. These are precisely the kind of *"secondary, cumulative, synergistic"* effects referred to in the SEA Directive.[17]

50. Furthermore, there are certain environmental factors set out in the Directive which must be considered at the SEA level which are inappropriate at the EIA project level.[18] Annex II to the SEA Directive provides the 'Criteria for determining the likely significance of

[17] SEA Directive, Annex I.
[18] And indeed, are not required in Annex III to the EIA Directive.

effects referred to in Article 3(5)'. This includes *"the degree to which the plan or programme influences other plans and programmes including those in a hierarchy"*:

(1) The potential negative impacts on the wider planning system of the recent expansion to Permitted Development rights are well documented.[19] They include, for example, a potential reduction in section 106 contributions[20], that might otherwise contribute to environmental improvements and/or the provision of infrastructure which is needed to support the development .

(2) With respect to Class E, there are clear potential conflicts and inconsistencies between Class E and the National Planning Policy Framework ("NPPF"): for example, the high street sequential test set out in part 7 of the NPPF.[21] There are also potential conflicts with local development plans that set the framework for what kind of development is acceptable on the high street: it is now much harder to argue against certain kinds of inappropriate development in the context of Class E. The environmental impact of these conflicts could be significant: and at the very least, it is impossible to rule out their significance without a proper screening analysis (see further below).

51. Finally, it is emphasised that "environmental effects" is a broad term under the SEA Directive. It includes, for instance, *"the risks to human health or the environment."*[22] This is replicated in the Aarhus Convention, Article 2(3)(c) of which defines 'Environmental Information' as including *"The state of human health and safety, conditions of human life, cultural sites and built structures…"* There is ample evidence, including from the government's own experts, of the negative social impacts of previous permitted development reforms, including the size and location of permitted development flats.[23] These impacts should also have been factored in to an assessment under the SEA Directive.

52. Finally, any doubt on the issue of potential significant environmental effects must fall in favour of a suitable screening assessment. This is borne out by Article 191 of the Treaty on the Functioning of the European Union, which notes that Union policy on the environment *"shall be based on the precautionary principle and on the principles that preventive action should be taken".*

[19] See, for example, Royal Institution of Chartered Surveyors – *"Assessing the Impacts of Extending Permitted Development Rights to office-to-residential change of use in England"* [D619-D178]
[20] As highlighted in the witness statement of Shelter.
[21] As highlighted in the witness statement of Shelter.
[22] SEA Directive, Annex I.
[23] See, e.g, the Clifford Report [D389-D601]. See also the witness statement of Shelter, which the Claimant has applied to put in as further evidence.

E. Conclusion on Ground 1

53. Accordingly, the SIs should have been subject to an environmental assessment pursuant to the SEA Directive and the SEA Regulations; or alternatively, screened for such an assessment. Neither exercise was carried out, contrary to EU environmental law.

GROUND 2: PUBLIC SECTOR EQUALITY DUTY

F. Overview

54. The Claimant argues in its Detailed Statement of Facts and Grounds that the SIs were introduced without an appropriate equality impact assessment, noting in particular impacts that were not considered, including permitted development impacts on homeless persons with protected characteristics. The Claimant also noted the likely impacts of Class E on elderly and disabled persons with respect to access to shops.[24]

55. In response, the Secretary of State has published the equality impact assessments carried out for the three SIs.

56. In light of the published assessment regarding Class E, the Claimant no longer pursues the argument that the equality impacts of Class E were not given due consideration.

57. However, the Claimant maintains that appropriate equality impact assessments were not carried out with respect to the Permitted Development SIs. The assessments that were carried out were inadequate. In particular, they did not consider the known impact of small, out-of-town Permitted Development units on those with protected characteristics.

G. Applicable law

58. Section 149 of the EA 2010 created the public sector equality duty ("the PSED"). Section 149(1) provides:

> "A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

[24] [A25-A26]

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

59. Compliance with the PSED requires the decision-maker to be informed about what protected groups will be impacted by a decision. That will involve a continuing duty of enquiry, so that the decision-maker is properly informed about impacts before making a decision: *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [26(8)]. The PSED is to consider *"precisely what the equality implications are"*: see *Hurley v SSBIS* [2012] EWHC 201 at [78].

H. Submissions on Ground 2

60. As the Secretary of State notes,[25] the focus of the equality impact assessments relating to SI 2020/755 and 2020/756 is on loss of affordable housing. There also is some focus on accessibility, although it is largely in the context of lift access rather than internal space standards.

61. These assessments did not, however, give lawful due regard to all of the obvious equality impacts. No consideration was given to the specific equality concerns set out in the Grounds about homeless and other vulnerable people. These concerns were raised repeatedly by the government's own experts (as early as January 2020). For example, the Clifford Report, which was sent to the Secretary of State in January 2020, noted at p 75 [C6] that:

> "where [schemes under Class O] are being developed as social or managed accommodation, although Bristol has homelessness issues, there is a concern that vulnerable people are being placed in accommodation that falls short of space standards, often in remote locations in the city."

62. Similarly, the January 2020 BBBB report noted (emphasis added):

> "[RICS] found that that just 31 per cent of the 1,085 permitted development homes examined in Croydon met national space standards. Only 14 per cent had access to private or communal amenity space. **In some instances, we have inadvertently permissioned future slums**."

63. Moreover, as is noted in the Detailed Statement of Facts and Grounds, persons with protected characteristics who occupy out-of-town units built under Permitted Development (including homeless persons who must accept a private rented sector offer

[25] Grounds of Defence, para 27 (i)-(ii) [A45-A46].

under section 193 of the Housing Act 1996, or else remain homeless) may be cut off from many public services, including healthcare and social care.

64. It is not *"micro-management or a detailed forensic analysis"*[26] to expect the Secretary of State to engage on a basic level with the evidence, put before him months earlier, that the most vulnerable people in society (who disproportionately have protected characteristics[27]), are being shepherded into low quality "slum" housing built through permitted development. Indeed, it is unreasonable for him not to engage, in an equality impact assessment, with important equality issues that have been brought to his direct attention.

65. The Secretary of State has also failed in his continuing duty of enquiry. In respect of SI 2020/755, the assessment notes at p 82 [B106] that *"We consider that while some further information and other data may be helpful, the cost and time required to source this is not proportionate given the given the evidence supporting the view that any potential adverse impact would be minimal."* The same sentence is duplicated, verbatim, in the assessment for SI 2020/756 at p 91 [B115]. Given the obvious potential equality impacts that were raised in the Secretary of State's own commissioned expert report, he should have further investigated these impacts before pushing through the SIs. His failure to do so was unlawful.

66. For these reasons, the Secretary of State did not pay lawful due regard to the PSED.

67. The Claimant has applied to file a further witness statement from the Chief Executive of the homelessness charity Shelter, which elaborates on many of the issues raised under this ground.

GROUND 3: FAILURE TO TAKE ACCOUNT OF CONSULTATION RESPONSES AND OTHER MATERIAL CONSIDERATIONS, AND BREACH OF EXPRESS PROMISE TO RE-CONSULT

I. Overview

68. The Claimant makes one overarching point under this composite ground of challenge: the Secretary of State failed to conscientiously consider the weight of the evidence against these radical reforms, including prior consultation responses and the advice of his

[26] Grounds of Defence, para 28 [A46].
[27] In that regard, see the witness statement of Shelter which the Claimant has made an application to put in as further evidence, which provides a detailed breakdown of equality issues facing the homeless.

own experts. Moreover, in closing his mind to these important considerations, he adopted an approach which was entirely inconsistent with his approach to comparable planning reform proposals, and broke his own promise to re-consult with respect to the changes made by Permitted Development Class ZA (demolition and rebuild).

69. The Claimant makes four general preliminary points in response to the Secretary of State's assertions about the nature of this ground of challenge:

(1) Firstly, the Secretary of State appears to suggest that if he has potentially breached his public law duties, he should be afforded a wide margin of discretion by the Court – because these matters involve *"enormously important macro-economic and macro-political"* issues.[28] However, it is of at least equally enormous importance that the Secretary of State abides by the rule of law. This is particularly so at a time where an unprecedented amount of authority and public trust has been placed in the government's hands.

(2) Secondly, the Claimant questions the relevance of the Covid-19 crisis to this challenge. The crisis would clearly be an important backdrop to, for example, a challenge to Personal Protective Equipment regulations, or the imposition of new lockdown requirements. It is less clear how the crisis is an important backdrop to a challenge to planning reforms which were announced over a year before the crisis began. The Court should be slow to accept the submission that the Covid-19 crisis allows any government measure with an "economic" angle, however tangential, to sidestep the requirements of lawful decision-making.

(3) Thirdly, these changes are not a "temporary fix" in response to Covid-19. Taken together, these SIs introduce fundamental and permanent reform to the planning system, which will long outlive the current crisis. In that context, it is particularly important that a lawful consultation was undertaken, and that all relevant impacts were considered.

(4) Fourthly, the Secretary of State has provided no evidence of the positive economic or social impacts of these reforms. Indeed, the evidence suggests that the impacts will be negative overall.

J. Applicable law

70. In order to be lawful, a consultation must comply with the *Sedley/Gunning* principles of consultation (*R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168;

[28] Para 3(iii) [A38], 35 [A49], 38 [A49].

endorsed by the Supreme Court in *R (Moseley) v London Borough of Haringey* [2014] UKSC 56 ("*Moseley*") at [25]). Those principles are as follows:

(1) First, consultation must be at a time when proposals are still at a formative stage.

(2) Second, the proposer must give sufficient reasons for any proposal to permit intelligent consideration and response.

(3) Third, adequate time must be given for consideration and response.

(4) Fourth, the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

71. Lord Wilson for the majority in *Moseley* noted the importance of the concept of fairness in a consultation, linked it to the duty to *test* the relevant information received (rather than simply dismiss it out of hand) (emphasis added):

> "24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation... **First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested"** (para 67). Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel" (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society."

72. It is a fundamental aspect of good decision making that a decision maker gives "conscientious consideration" to the outcome of the consultation process: see e.g. *Draper v Lincolnshire CC* [2014] EWHC 2388 (Admin); *Royal Brompton & Harefield NHS Foundation v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472. This means the public authority must be able to show that it has considered the outcome of the consultation process carefully and been prepared to change course in response to the outcome of consultation if appropriate.

K. Submissions on Ground 3

Ground 3a: Failure to conscientiously consider consultee responses

73. The SIs were introduced without conscientious consideration of the product of consultation, contrary to the fourth *Sedley/Gunning* principle.

74. The highly negative response of consultees were not given the conscientious consideration that was required. The Secretary of State has rightly noted that the

government's consultation response summarised the responses received.[29] That is all it did. Simply repeating what has been submitted is not the same thing as properly weighing it up.

75. As to the Explanatory Memorandums to each SI, these too show no engagement with the responses received. For example, the Secretary of State asserts that at 10.1-10.5 *"the Explanatory Memorandum for SI 2020/755 explains how the consultation responses have shaped the permitted development right and how concerns have been addressed through the prior approval process."*[30] This is incorrect, as the Memorandum does not provide any explanation as to how the consultation responses have fed through to the proposals. All the Memorandum does is summarise at 10.1-10.5 [D27] the significant opposition to the proposals. It then goes on to say, at the very end of para 10.5, *"we have sought to address concerns, where possible, in the conditions and through the prior approval process."* This perfunctory explanation is indicative of the Secretary of State's lack of lawful engagement with the serious issues raised in respect of these reforms.[31]

76. Accordingly, although the Secretary of State was clearly aware of the consultation responses in the abstract, he dismissed them without truly weighing up their merits. In other words, he approached the consultation with a closed mind. This is therefore a case where *"The Defendant had no intention of changing his mind about the substance"* of the proposed changes: see *R (Stephenson) v SSHCLG* [2019] EWHC 519 (Admin), [58]. For the consultation to be lawful, he should instead have *"embarked upon the consultation process prepared to change course, if persuaded by it to do so"*: *R v London Borough of Barnet ex p B* [1994] ELR 357, 375C.

77. It is emphasised that the fact that some limited additional prior approval matters were included in the SIs does not mean that all the issues brought to the Secretary of State's attention were taken into account. In particular, there are no prior approval considerations covering residential amenity of occupants due to limited unit size, or the location of development in terms of nearby education and healthcare services. The fact that no prior approval considerations addressing these issues were introduced (despite, as noted below, the fact that they were flagged by the government's own experts) demonstrates that these important matters were ignored.

78. The Secretary of State's approach here is also reflected in the political sphere, where he declined to submit the reforms to any Parliamentary scrutiny at all before they came into

[29] Grounds of Defence, para 32(i) [A48].
[30] As above.
[31] A similar approach, i.e. simply repeating the criticisms without engagement, is found in the other two Explanatory Memorandums SI 2020/756 [D43]; SI 2020/757: 10.1-10.5 [D67].

effect. He laid the SIs before Parliament the day before the Parliamentary summer recess, guaranteeing their coming into effect before a word against them could be spoken in Parliament.

<u>Ground 3b:</u> *Failure to take into account the government's own expert advice*

79. The Secretary of State failed to take into account material considerations before laying the SIs concerned with Permitted Development rights, namely the advice of his own independent experts on numerous issues affecting office-to-residential conversions under previous reforms to Permitted Development.

80. In particular, the Secretary of State failed to take into account:

    (1) The report of the BBBB Report, which remarked that the existing Permitted Development policy has "*inadvertently permissioned future slums",* a finding which was undoubtedly material to the decision to expand Permitted Development rights further. The Secretary of State gave no proper consideration to the issues identified in this report.

    (2) The findings of the Clifford Report, which he himself had commissioned. As set out in the Detailed Statement of Facts and Grounds,[32] the Clifford Report noted severe negative impacts of the existing Permitted Development regime, which undoubtedly were material to the decision to extend Permitted Development rights further. The report's author has now stated publicly that his findings were "ignored" by the Secretary of State.[33]

81. It is clear that Dr Clifford was correct. Both of these reports were ignored without proper consideration of their contents. Nowhere in the published impact assessments of the SIs, or the Explanatory Notes or Memorandums, is there any consideration of these findings or an explanation of how the Secretary of State changed course, or considered changing course, to mitigate them. Indeed, the Secretary of State announced the new planning reforms on the same day he decided to publish the Clifford Report, despite having received it in January 2020.

82. The Secretary of State has provided no evidence of how the important findings in these reports were taken into account. The fact that they may have been placed on his desk did not entitle him to dismiss them without active, thoughtful consideration of their contents.

[32] [A16]
[33] [A17]

83. Moreover, the fact that the Secretary of State waited six months to publish the Clifford report and only released it on the day when the planning reforms were announced will have had the practical effect of closing off public discussion of its findings before the reforms were finalised. Again, this demonstrates a failure to consider or conscientiously engage with the findings of a Report which he had himself commissioned before pressing ahead.

84. This failure to take account of material considerations was unlawful.

Ground 3c: In closing his mind to the issues raised regarding these proposed reforms, the Secretary of State adopted an approach which was unfair, inconsistent and/or irrational in the context of the approach taken to similar proposed reforms

85. In addition to the consultation on these SIs, the government consulted separately on proposals to use permitted development rights to support the deployment of 5G networks and extend mobile telephone coverage. In the government's July 2020 document *"Government response to the consultation on proposed reforms to permitted development rights to support the deployment of 5G and extend mobile coverage,"* the government promised a further *"technical consultation on the detail"* of Permitted Development proposals regarding 5G masts specifically: to include issues such as *"potential impacts on local amenity, protected land including designated landscapes such as National Parks"* (para 5) [D161]. The government noted at Para 9 [D162]:

> "We will undertake a technical consultation on the detail of the proposals, including appropriate environmental protections and other safeguards, prior to amending the existing legislation."

86. Given that there are likely to be very similar environmental and landscape concerns regarding the erection of tall structures without a formal planning application, it is unfair, and/or irrational, to allow consultees on Permitted Development rights related to 5G masts a second technical consultation on the details, but to deny that same right to consultees in respect of the SIs that this claim is concerned with.

87. The witness statement of Simon Gallagher notes that permitted development rights relating to 5G masts *"were not similar cases and they involved the balancing of different countervailing considerations."* This is not explained, nor are the differences between the two rights relating to tall structures obvious. As was noted by Lord Bingham in *R (O'Brien) v Independent Assessor* [2007] 2 AC 312 at para 30, *"It is generally desirable that decision-makers, whether administrative or judicial, should act in a broadly consistent manner. If they do, reasonable hopes will not be disappointed."*

88. This approach amounts to decision-making which is unlawfully inconsistent, unfair and/or irrational.

Ground 3d: Failure to re-consult in respect of Class ZA

89. It is well-established that when a public authority has promised that it will engage in consultation before making a specific decision, fairness generally requires it should be held to this promise: *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at page 401.

90. In the present case, consultees to the initial consultation on permitted development rights [D102] were expressly promised a further consultation in respect of the demolition and rebuild of commercial properties (now Class ZA in SI 2020/756): *"The responses to these questions will inform further thinking and a more detailed consultation would follow"*.

91. This express promise gave rise to a legitimate expectation for consultees to be consulted further on Class ZA before it was introduced. Introducing Class ZA in the absence of a further consultation on the detail of the proposal was a breach of this legitimate expectation.

92. The Secretary of State appears to have accepted, rightly, that there was a legitimate expectation of a further consultation, arising from an express promise to re-consult. However, his only response is to argue that it was proportionate to resile from that expectation because of the Covid-19 crisis. This submission cannot be sustained:

    (1) As stated above, the link between Covid-19 and planning reforms that were first announced in March 2019 is tenuous at best. The Court should be slow to accept the submission that the Covid-19 crisis allows any government measure with an "economic" angle to avoid legal scrutiny, however tangential to the crisis. Nor should the Court allow the Covid-19 crisis to be used as a political and legal cover to push through radical reforms "at pace", in a manner that bypasses the government's obligations to act in a procedurally fair manner.

    (2) There was a separate promise of a further consultation on delivering 5G masts through permitted development. The fact that this promise was not resiled from demonstrates that the decision to resile from the express promise on Class ZA was not proportionate. If anything, 5G masts relate to a subject matter with potentially far greater 'macro-economic and macro-political' benefits for England.

(3) The responses to the initial consultation on these reforms were highly negative. Against that background, the promise to reconsult further takes on a particular importance, and the breaking of that promise a particular gravity. This is because a further consultation would have allowed the many consultees disappointed with the government's decision a further opportunity to influence and refine the outcome, including through the submission of additional evidence.[34]

Conclusion and relief sought

93. It is clear from the above that the many negative potential impacts of these radical new measures, brought in *"at pace"*, did not receive the due consideration required by law. This was in breach of EU environmental law, equality law and public law.

94. Given that the Defendant has failed to show how these considerations were so minimal that they could not have influenced the outcome, it cannot be said that relief should be denied under s.31(2A) of the Senior Courts Act 1981.

95. Accordingly, the Claimant seeks:

(1) A declaration that the decision to lay the SIs before Parliament was unlawful, and that the SIs are themselves unlawful,

(2) An order quashing the SIs,

(3) Costs.

PAUL BROWN Q.C.
ALEX SHATTOCK
Landmark Chambers

29.09.2020

[34] This is highlighted in the witness statement of the Chief Executive of Shelter, which the Claimant has applied to put in as additional evidence.