IN THE COURT OF APPEAL **CA-2024-001754-A**

ON APPEAL FROM THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION (ADMINISTRATIVE COURT) PLANNING COURT **AC-2024-LON-000621**

B E T W E E N :-

THE KING (ON THE APPLICATION OF) RIGHTS: COMMUNITY: ACTION LTD
Applicant

and

SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
Respondent

and

(1) OFFICE FOR ENVIRONMENTAL PROTECTION
(2) GREEN ALLIANCE
(3) ESSEX PLANNING OFFICERS ASSOCIATION

Interveners

WRITTEN SUBMISSIONS OF GREEN ALLIANCE

References: The Core and Supplementary Appeal Bundles are referred to in the format [**CAB/tab/page**] and [**SAB/tab/page**].

INTRODUCTION

1. This appeal raises a question central to the nature and success of environmental governance in the United Kingdom: the correct interpretation of the duty in section 19 of the Environment Act 2021 ("**the Act**") requiring Ministers to have "due regard" to the Environmental Principles Policy Statement ("**EPPS**") when making policy ("**the EPPS Duty**"). While the EPPS Duty applies to Government ministers in England and when dealing with reserved matters, the systems of building environmental principles into policy making in the other countries of the United Kingdom follow a broadly similar format, so its interpretation in England will have important repercussions for the whole of the United Kingdom.

2. On 12 November 2024, the Appellant was granted permission to appeal against the decision of Lieven J in [2024] EWHC 1693 (Admin) ("**the High Court judgment**"). At the same time, the Office for Environmental Protection ("**OEP**") and Green Alliance were granted permission to intervene in the appeal, the former by way of oral submissions and a skeleton argument, the latter by way of these written submissions.

3. Green Alliance is a charity and independent environmental think tank which, since 1979, has been working with leaders in business, civil society and national and local government to ensure an environmental perspective is included in key decision-making. This now entails turning ambition on nature and climate into action and achieving a fair transition to a green economy.

4. Since 2016, an expert-led project within Green Alliance has been centrally involved in shaping and improving the new post EU exit national environmental governance systems.[1] In England, that comprised work on the draft legislation that became the Act (both the Environment Bill and the draft Environment (Principles and Governance) Bill), as well as the EU (Withdrawal) Bill, including giving expert oral and written evidence to select committees.[2]

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[1] This included, from 2016-2023, Green Alliance convening and running a formal coalition of 13 major environmental groups in a project called Greener UK, which was "at the heart of the environmental sector's work on post-Brexit environmental law": Abbot, C and Lee, M *Environmental Groups and Legal Expertise: Shaping the Brexit Process* (UCL Press, 2021) pg 33. This work is continued by an expert Green Alliance unit on environmental legislation and governance. See also Abbot and Lee, chapters 6 and 7, which assess Green Alliance's impact on the development of the new environmental framework.

[2] Green Alliance gave the following evidence:
(a) Oral evidence (6 February 2019) to the House of Commons Pre-legislative scrutiny of the draft Environment (Principles and Governance) Bill by the Environmental Audit Committee;
(b) Oral evidence (6 February 2019) on Post-Brexit enforcement of environmental law to the House of Lords Select Committee on the EU (Energy and Environment Sub-Committee);
(c) Oral evidence (13 February 2019) and to the House of Commons Pre-legislative Scrutiny of the draft Environment (Principles and Governance) Bill by the Environment, Food and Rural Affairs Committee;
(d) Written evidence (March 2019) to the House of Commons Pre-legislative Scrutiny of the draft Environment (Principles and Governance) Bill by the Environment, Food and Rural Affairs Committee and Environmental Audit Committee.
(e) Oral evidence (10 March 2020, second sitting) and written evidence (12 and 17 March 2020) to the House of Commons Scrutiny of the Environment Bill.

5. Green Alliance's work has also involved partnering with others to monitor the implementation of the new environmental governance framework.[3] On 1 November 2024, Green Alliance published a briefing: "*One year on: is the environmental principles duty working?*".[4] This found:

   a) Some departments have adopted an environmental principles assessment guide for policy makers, to steer their thinking and assessment of environmental considerations in line with the EPPS Duty, but such guides are not yet being used across government;

   b) The guide explains that consideration of the EPPS "*must take place at an early stage in the policymaking process, and throughout as appropriate, not as an afterthought at the end*" (emphasis added);

   c) Although a large number of government policies will have been subject to an environmental principles assessment since the EPPS Duty came into effect on 1 November 2023, only a handful of assessments have been published; no department publishes them routinely;

   d) This is an especially important time in the implementation of the duty. The lead government department, the Department for Environment, Food and Rural Affairs has invested in cross government training and resources, aimed at supporting policy makers to understand the requirements of the new duty and the action that they need to take. [5] Accordingly, now is the time when a common understanding of the meaning and application of the EPPS duty should be emerging.

FACTUAL BACKGROUND

6. The relevant factual background is set out at §§6-12 of the Appellant's skeleton argument (27 November 2024) [**CAB/1/6-8**] and is not repeated here.

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[3] The monitoring work is undertaken in partnership with the National Trust, the Royal Society for the Protection of Birds, Friends of the Earth; ClientEarth, the Institute for European Environmental Policy; Wildlife and Countryside Link and World Wildlife Fund UK.

[4] https://green-alliance.org.uk/wp-content/uploads/2024/11/One-year-on-is-the-EPPS-duty-working.pdf

[5] Cabinet Office, A Modern Civil Service Blog, 22 April 2024.

LEGAL BACKGROUND

7. Interpreting the meaning of section 19 is an "*exercise which requires the court to identify the meaning borne by the words in question in the particular context*": *R(PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594 at §40. Of "*central importance*" to this is identifying the purpose of the legislation: ibid. This is a "*unified process*" in which the Court discerns the natural and ordinary meaning of the language, "*construed having regard to context and in light of [the legislative] purpose*"; the "*linguistic exercise*" is not "*performed first and in isolation from context and purpose*": *CG Fry v SSLUHC* [2024] EWCA Civ 730, [2024] 2 P&CR 12 at §68.

8. As set out at §§34-41 and Annex I to the OEP's skeleton argument, the duty to "*have due regard*" is a well-used formulation used across different types of legislation. However, the formulation is linguistically quite brief and the nature and extent of the obligation which flows from it will depend on the context and purpose of the legislation.

9. The purposive approach is now an established principle of statutory interpretation. In *Attorney-General's Reference (No 5 of 2002)* [2005] 1 AC 167, Lord Steyn, at §31, held: "*No explanation for resorting to a purposive construction is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black-letter lawyer, but in a meaningful and purposeful way giving effect to the basic objectives of the legislation."*

10. Lord Neuberger then said in *Cusack v Harrow LBC* [2013] UKSC 40, [2013] 1 WLR 2022 at §58: "*Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim or purpose.*" It is notable that the provision does not need to be ambiguous or unclear, in the *Pepper v Hart* [1993] AC 539 sense, for the "*documentary and factual context*" of the legislation to illuminate the meaning of the provision.

11. Most recently, in *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657 at §70 Lord Leggatt JSC said: "*The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose*."

12. The content of any unchallenged regulations can be a guide to the interpretation of the enabling Act even when they are not made contemporaneously: *R (Palestine Solidarity Campaign Ltd) v SSHCLG* [2020] UKSC 16, [2020] 1 WLR 1774 ("***Palestine Solidarity Campaign***") at §24. While the EPPS is a statutory policy statement rather than a set of regulations, it is similarly capable of being a guide to the interpretation of its enabling provisions, particularly in illuminating the statutory purpose, or, in the words of Lord Wilson JSC, "*the policy of the Act*" (§26). Indeed, in the *Palestine Solidarity Campaign* case, Lord Wilson JSC had regard to the relevant statutory guidance in order to interpret the legislation at issue (§§25-26).

SUBMISSIONS

Meaning and Purpose of Section 19 of the Act

13. The five environmental principles and their long-established position in international law are set out at §§20-25 of the Appellant's skeleton [**CAB/1/9-11**], which Green Alliance adopts. As the Appellant emphasises, the purpose of sections 17-19 of the Act was to embed these environmental principles into the government policy-making process, in a stronger way than had previously been the case. The principles were already obviously material considerations in policy-making, particularly in the environmental arena. The deliberately legislative choice in sections 17-19 of the Act was to strengthen and systematise the role that the environmental principles play in the design and development of policy across the whole of government.

14. As the OEP points out in §6 of its skeleton argument [**CAB/1/63**], the EPPS Duty in section 19 goes further than the other constituent elements of environmental governance in the Act, in that it applies to all ministerial policy-making and therefore embeds consideration of the environmental principles into areas where there is not an explicit link to the environment or to environmental targets. This

purpose was reiterated in the explanatory memorandum to the EPPS, which states that the decision to embed the five principles in the Act with the accompanying EPPS Duty was aimed at ensuring that "*environmental protection forms an integral part of policy development in all government departments*." (emphasis added).[6]

15. The EPPS Duty was therefore deliberate designed to achieve the "*overarching objectives*" of the Act: "*sustainable development and the improvement of environmental protection*".[7] This is made explicit in the fact that section 17(4) requires the Secretary of State to be "*satisfied that the [EPPS] will, when it comes into effect, contribute to (a) the improvement of environmental protection, and (b) sustainable development*."

16. These are not amorphous concepts. "*Environmental protection*" is defined in section 45 of the Act to mean:

> "*(a) protection of the natural environment from the effects of human activity;*
> *(b) protection of people from the effects of human activity on the natural environment;*
> *(c) maintenance, restoration or enhancement of the natural environment;*
> *(d) monitoring, assessing, considering or reporting on anything in paragraphs (a) to (c).*"

17. "*Sustainable development*" is a well understood concept, meaning "*development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs*".[8]

18. Accordingly, while the EPPS Duty is one of process – the having of due regard to the principles when making policy – rather than one of outcome, the way in which the process must be undertaken is informed by the fact that the legislation makes clear explicit outcomes are sought to be achieved by compliance with the duty: contribution to improvement of environmental protection and to sustainable development.

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[6] Explanatory memorandum to the environmental principles policy statement (31 January 2023) §7.1.

[7] Ibid §7.3.

[8] Environmental Principles Policy Statement (31 January 2023) [**SAB/1/7**]; see also *R (Friends of the Earth & Others) v SS DESNZ* [2024] EWHC 995 (Admin) at §146, describing this definition as "*uncontroversial*" and applying it to the Climate Change Act 2008.

19. This is reflected in the EPPS itself, which states that requirements of the Act concerning the environmental principles "*will help policymakers to protect and enhance our environment and preserve England's unique natural assets*." [**SAB/1/6**]. The EPPS also articulates part of the "*context*" within which the duty must be interpreted: "*building resilience to biodiversity loss and the effects of our changing climate*." [**SAB/1/6**]. The fact that the process must be understood as aimed at contributing to these particular outcomes, against that environmental context, is relevant to whether retrospective compliance with the EPPS Duty, after a policy has been made, is lawful.

20. Part of the factual context of section 19 is that the choice was made to frame the duty as one of having "*due regard*", rather than having "*regard*", in order to impose a "*more robust duty*"[9] on those making policy. Green Alliance adopts the submissions made in this regard in §12 of the OEP's skeleton argument. The EPPS Duty is the only one in the Act to be framed using the stronger obligation of "*due regard*" – that, too, points to its importance. Green Alliance endorses and adopts the OEP's submissions in §§7-11 of its skeleton argument [**CAB/4/63-64**].

21. Accordingly, section 19(1), in placing a duty on a "*Minister of the Crown*", "*when making policy*" to "*have due regard to the policy statement on environmental principles currently in effect*", means that the regard appropriate in all the circumstances must be given to the EPPS, taking into account the purpose of the duty to strengthen and systematise the role that the environmental principles play in the design and development of policy across the whole of government, in order to contribute to improving environmental protection and achieving sustainable development in the context of building resilience to biodiversity loss and the effects of our changing climate. It places "*substantial, clear duties on Ministers of the Crown*", which "*confer clear legal expectation that the relevant approach is used in making decisions, and cannot simply be retrospectively applied to justify a decision*."[10]

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[9] Supplementary written evidence submitted by the Department for Environment, Food and Rural Affairs to the Environmental Audit Committee (2019) pg 4.

[10] Ibid.

The EPPS Duty and Retrospective Assessment

22. In explaining the strength of the "*due regard*" duty, as opposed to a "*regard*" duty, in the potential framing of the EPPS Duty, the Government referred both to case law concerning the Public Sector Equality Duty ("**PSED**") and the "Prevent Duty" in the Counter-Terrorism and Security Act 2015 (the requirement to have "*due regard to the need to prevent people from being drawn into terrorism*".[11]

23. The main case interpreting the Prevent Duty is *R(Butt) v SSHD* [2019] EWCA Civ 256, [2019] 1 WLR 3873 ("***Butt***"), which concerned the extent of the duty in the context of higher education and external speakers with "*extremist views*", addressed in the Prevent Duty Guidance and associated Higher Education Prevent Duty Guidance. The claimant contended that the guidance went beyond the confines of the Prevent Duty and "*terrorism*", and sought to prevent people from being drawn into "*extremism*", including "*non-violent extremism*". The Court of Appeal upheld the conclusion of the High Court that the Prevent Duty is to prevent a process occurring which would be likely to draw individuals into terrorism, and that references to "*extremism*", including "*non-violent extremism*", had to be understood to be of a kind such as to risk drawing people into terrorism.

24. The approach of the courts in the *Butt* case shows how the purpose of the due regard duty in issue is central to the scope of the duty and to its interpretation. The practical application of the duty and the extent of the steps which must be taken to comply with the duty are to be guided by the "*the policy of the Act*".

25. The PSED case law is summarised in §§15-23 of the OEP's skeleton argument, so is not repeated here. The Appellant's position is that the PSED is relevant because aspects of that duty ("*must...have due regard to*") are similar to the EPPS Duty and there is a mature body of case law on the PSED interpreting those words in the context of the Equality Act 2010 (Skeleton §31). The Respondent's position in the High Court was that, in broad terms, "*due regard*" in relation to the PSED and the EPPS Duties were "*analogous*" in terms of requiring exercise in substance, with rigour, and with an open mind [**CAB/19/243** DGR §39]. However, the Respondent

[11] Ibid.

urged caution in adopting the case law on the PSED and applying it to the different statutory context of the Act [**CAB/19/243** DGR §40].

26. The OEP's position is that it would be wrong to seek to define the EPPS duty solely by reference to cases arising in an entirely different legal context, and while the PSED case law can be of general assistance, the EPPS Duty is new and requires its own principles to be defined by the Court (Skeleton §14) [**CAB/4/65-66**].

27. Green Alliance agrees with the parties that, while the PSED case law can provide helpful insight into the nature of a "*due regard*" duty, it cannot be applied wholesale to the EPPS Duty, as only aspects of that duty are similar. In particular, Green Alliance emphasises that the context and purpose of the EPPS Duty mean that the Judge erred in §44 of the judgment in finding that the Court should apply "*the tests*" in the PSED case law to determine whether a failure to comply with the EPPS Duty in making policy can be remedied after the policy has been made.

28. The meaning, context and purpose of the EPPS Duty are set out above. It is a duty, deliberately expressed in robust language (the most robust of the regard duties in the Act), the purpose of which is to strengthen and systematise the role that well-established environmental principles play in the design and development of policy across the whole of government, in order to contribute to improving environmental protection and achieving sustainable development. This does not support retrospective application of the duty – ie considering the environmental principles after a policy has been finally designed or made.

29. This is reinforced by the wording of the EPPS itself, which is relevant to the interpretation of section 19 in light of the *Palestine Solidarity Campaign* case. The OEP rightly draws attention to the emphasis in the EPPS on "*early*" and "*iterative*" due regard being given to the principles (Skeleton §§32-33; 44 and 51(g)) [**CAB/4/71, 74, 79**].

30. The EPPS provides that "*policymakers*" (ie Ministers, their officials and "*others developing policy on [Ministers'] behalf*") should "*consider and use the principles iteratively from the outset and during subsequent stages in policy development*"

(emphasis added) [**SAB/1/7**]. Policymakers "*should identify potential environmental effects (positive or negative) and use the principles to inform and influence the design of the policy."* [**SAB/1/7**]. It indicates that proper use of the principles will "*ensure that nature and the environment are proactively designed into the policymaking process*" [**SAB/1/6**]. None of this is consistent with retrospective application of the EPPS, essentially as an 'environmental sense-check' after the policy has been designed, being sufficient to comply with the EPPS Duty.

31. Indeed, a key thrust of the EPPS is its emphasis on the principles prompting "*new*"; "*creative*"; "*innovative*" thinking. Encouraging innovation is repeated three times: in the Introduction; in the section "*What is the role of the policy statement?*" and in relation to precautionary principle, which is described as incentivising "*innovation by encouraging development of alternative policy options that reduce risk and uncertainty*." [**SAB/1/6; 8; 19**]. Retrospective application of the EPPS, after the policy has been designed or at the last moment before the policy is made, is inimical to this.

32. The EPPS also emphasises the purpose of the principles being "*to guide ministers and policymakers towards opportunities to prevent environmental damage and enhance the environment*" [**SAB/1/7**]. The identification of opportunities to act is repeated a number of times across the EPPS. As the OEP submits, applying the EPPS Duty retrospectively to policies already designed, or at the final moment when a decision to adopt a policy is being made, is not consistent with the intention of the EPPS Duty to afford opportunities to explore policy options that could lead to better outcomes for the environment (see §44 of the skeleton) [**CAB/4/74**].

33. This is in line with the guide to the EPPS Duty currently in use in some Government departments, which explains that consideration of the EPPS "*must take place at an early stage in the policymaking process, and throughout as appropriate, not as an afterthought at the end*" (emphasis added).

34. The importance of early application of the environmental principles has also been recognised by the Scottish Government, which states in its statutory guidance that

"*Given the complexity of the environmental and regulatory landscapes, the guiding principles should be considered early in decision making processes.*"[12]

35. This is also true in Northern Ireland where, in its recently published draft environmental principles policy statement, the Department for Agriculture, Environment and Rural Affairs ("**DAERA**") emphasised that "*What is particularly important is that the principles should be considered from the outset of the policymaking process and reviewed as the policy develops before any substantive decisions have been taken*".[13]

36. Turning to the environmental principles themselves, they are primarily effective if considered and applied at the earliest possible stage:
    a) The integration principle reinforces the identification of "*opportunit[ies] to embed environmental protection maintenance, restoration or enhancement into policies from the outset and throughout the development of policies.*": EPPS [**SAB/1/13**] (emphasis added);
    b) The prevention principle "*is most effective when it is considered at an early stage, ideally before any environmental harm has occurred. The policymaker should therefore attempt to apply the prevention principle as early as possible.*": EPPS [**SAB/1/14**] (emphasis added);
    c) The rectification at source principle should be "*used to guide the design of policy towards addressing or managing environmental damage, or potential environmental damage.*" and requires that "*as a priority*", environmental damage be "*addressed at its origin to avoid the need to remedy its effects later.*": EPPS [**SAB/1/15**] (emphasis added) – each of these aspects is most effective through early understanding of environmental damage, even identifying potential environmental damage;
    d) The polluter pays principle applies where environmental damage has occurred, but it aims to "*prevent or deter environmental damage*" by "*incentivising individuals or groups to avoid causing environmental damage and encourage*

[12] Scottish Government, Scotland's Guiding Principles on the Environment: Statutory Guidance, August 2023, para 5.3.

[13] DAERA, Draft Environmental Principles Policy Statement, 30 September 2024.

sustainable practices", which is most effective when applied early: EPPS [**SAB/1/16**]; and

e) The precautionary principle requires the policymaker *"to make a reasonable assessment, using the best scientific evidence, or the risk*" [**SAB/1/18**] that serious or irreversible environmental damage may occur. This plainly has to happen before considering what action to take, and the principle emphasises that waiting to achieve scientific certainty could "*increase the risk of damage occurring or could worsen the potential damage*": EPPS [**SAB/1/18**].

37. The Judge failed to engage on any of these matters. In §44 of the Judgment [**CAB/9/139**], she simply moved from the acknowledged failure of the Minister to have due (indeed, any) regard to the EPPS to the approach in the PSED case law, without any analysis of the context, purpose or function of the EPPS Duty. That was not the correct approach. In light of the context and purpose of the EPPS Duty, it is appropriate to make a declaration of unlawfulness where an assessment has been done after the adoption of the policy.

38. Furthermore, the Judge failed to engage in any detail with the EPPS itself. What are described as "*the key parts*" of the EPPS in §20 of the Judgment is solely a high-level summary of the five principles, with §21 setting out a little more detail on the Integration Principle and §22 referring briefly to the other principles [**CAB/9/132**]. Nowhere does the Judge engage with what the EPPS sets out about:

a) the purpose of the Duty (in particular in the Introduction);
b) the role of the policy statement and how it should be used; or
c) how the environmental principles should be applied to the design of policy, both in general in the section on "*Applying the principles – understanding environmental effects and opportunities*" and in the sections under each of the five principles on how they are to be applied.

39. Instead, the Judge held at §37, without any reasoning, that, as the EPPS Duty "*is to a policy statement produced under s.17(1)*" of the Act, it will "*necessarily be a great deal more diffuse*" than the PSED (emphasis added) [**CAB/9/138**]. If anything, the opposite is true, given that the EPPS explicitly directs decision-makers to the purposes of the Duty; explicates the principles and directs decision-makers as to

how the statement should be used, including specific uses relevant to each of the principles.

40. The Judge supported her approach to the EPPS Duty by reference to section 47 of the Act and the definition of "*making*" policy. In so doing she erred. Green Alliance adopts and reiterates the submissions in §§45-48 of the OEP's skeleton in this regard [**CAB/4/74-76**].

41. Drawing the above together, the specific context and purpose of the Act, and of sections 17-19 within the Act, as elucidated by the EPPS, lead to the conclusion that assessment against the EPPS of policy which has already been designed and finalised, and especially of policy which has already been made, does not comply with the section 19 duty. A 'sense-check' against the environmental principles of already formulated, or made, policy, cannot, as a matter of law, comply with the EPPS Duty, as it does not amount to giving "*due regard*" to the EPPS when "*making*" the policy.

The High Court's Erroneous Approach to the PSED Analogy

42. In addition to the above, Lieven J erred in differentiating between the PSED and the EPPS Duty on the basis that the latter "*will necessarily be a great deal more diffuse*" than the former (§37) and that environmental impacts are more complex and multifaceted than equality impacts, which "*may generally be relatively straightforward to set out*" (§42) [**CAB/9/138**]. No authority is cited for these propositions. A review of PSED and equality case law shows them to be incorrect.

43. The Judge appears not to have had regard to the case law which developed under the predecessor legislation to the PSED and at the outset of the PSED, which demonstrates the complex, multifaceted and non-linear nature of identifying equality impacts on those with protected characteristics. For example:

    a) <u>*R(Elias) v Secretary of State for Defence*</u> [2006] 1 WLR 3213 highlighted the "*far from simple*" (§7) legal issues thrown up by the claim in that case: direct and indirect race discrimination (and the extent of their potential overlap) through the exclusion of non-British born British citizens from an ex-gratia payment

scheme for British citizens interned by Japanese authorities during the Second World War. It shows how complex the issue can be of whether a protected characteristic is engaged at all (ie whether a criterion that distinguished between applicants on the basis of place of birth was directly discriminatory on the basis of national origins and, hence, race).

b) *R(E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728, where the High Court held that the protected characteristic of race was not in issue where a policy differentiated on the basis of Jewish status under Jewish law; which the Court of Appeal overturned. The Supreme Court was split five-four, with five judges finding that an admissions policy differentiating on the basis of matrilineal descent from particular Jewish denominations constituted direct racial discrimination and four finding it amounted to prima facie indirect racial discrimination;

c) *R(Hurley and Moore) v SS BEIS* [2012] EWHC 201 (Admin), [2012] HRLR 13 ("***Hurley and Moore***"), which alleged breach of the three predecessor PSEDs[14] through the making of regulations increasing fees for university tuition, which shows the difficulty of addressing intersectional impacts such as socio-economic background, race, sex and disability, where the PSED duties were held to have been breached despite full engagement by the Secretary of State with implications for the economically disadvantaged, because there was no structured attempt to consider impacts specific to those from disabled households or ethnic minorities and treatment of protected groups in a homogenous way (§§91-98);

d) *Onu v Akwiwu* [2016] UKSC 31, [2016] 1 WLR 2653, where an Employment Tribunal had judged that a mistreated Nigerian migrant worker had suffered direct discrimination on the grounds of race by her employers; this was overturned by the Employment Appeal Tribunal but permission was granted to appeal to the Court of Appeal and then to the Supreme Court. That Court held

[14] Under the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995, which had in fact, by the time the claim was argued, been "*replaced by a singled duty framed in s.149 of the Equality Act 2010*" (§69).

that, while colour, nationality and ethnic or national origin are included within the protected characteristic of race, the treatment of the worker had arisen because of vulnerability associated with immigration status, and was neither direct nor indirect race discrimination.

44. Accordingly, the Judge erred in differentiating between the PSED Duty and the EPPS Duty on the basis that environmental impacts are more complex and multifaceted than equality impacts, which "*may generally be relatively straightforward to set out*". As set out at §§22-39 above, the key difference is the context and purpose of the legislation, as elucidated by the EPPS itself – it is this which leads to the Judge's conclusion in §44 on retrospective application of the principles being wrong in law [**CAB/9/139**].

45. If, contrary to the above, the Court were to find that the Judge did not err in §44 of the Judgment, it would be important to clarify that, however complex and non-linear the identification of environmental impacts, that does not mean the EPPS Duty is capable of being fulfilled in a less exacting way than the PSED.

The EPPS Duty and the Duty of Inquiry

46. From the outset of the Court's interpretation of the PSED, it has accepted that the "*due regard*" duty involves a duty of inquiry: see eg *Hurley and Moore* §§89-90. As the Court of Appeal stated in *Hurley and Moore*, the combination of the statutory due regard duty and the principles in *Secretary of State for Employment v Tameside Metropolitan Borough Council* [1977] AC 1014 "*requires public authorities to be properly informed before taking a decision.*" (§89). The Court of Appeal explained:

> *"If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required… [Per] Aikens LJ in [R (Brown) v Secretary of State for Work and Pensions [2009] PTSR 1506] (at [85]): '…*the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account [the relevant requirement] in the context of the particular function under consideration*'. "* (§89)

47. Green Alliance adopts and reiterates the OEP's submission that the level of inquiry needed to identify potential environmental effects, and potential different policy options and design, is quite different from the PSED (Skeleton §24, §51(e)) [**CAB/4/69, 78**]. As the OEP submits, the effect of the EPPS Duty is to place consideration of environmental effects on a different footing than was previously the case, requiring policymakers and the Secretary of State to have due regard to the need to carry out additional research or analysis to inform better decision-making; to use the principles to inform and influence the design of policy and, as appropriate, to adjust the policy (Skeleton §51(e) and footnotes 22-26) [**CAB/4/78**].

Principles in Approaching the EPPS Duty

48. Green Alliance supports the principles in respect to the approach to section 19 of the Act and the EPPS Duty, set out in §§50-51 of the OEP's skeleton argument [**CAB/4/76-80**].

Application of the EPPS Duty in the Instant Matter

49. In light of the above, the Respondent erred in law and failed to comply with the EPPS Duty, as the consideration given to the environmental principles was unlawfully retrospective.

50. The Respondent's evidence is that the policy that became the Written Ministerial Statement ("**WMS**") was developed over the course of 2023, with a submission to Ministers on an early option made on 26 April 2023 [**SAB/8/56**; **SAB/27-30/152-164**]. It is notable that this was a very different policy proposal, recommending a WMS positively "*re-confirm[ing] that plan-makers can use the powers set out in primary legislation*" to set energy efficiency standards above Building Regulations [**SAB/27/154**] and an Optional Framework on how this could be done, with varying levels of ambition [**SAB/28/157-160**]. There does not appear to have been any regard given to the EPPS at that stage, nor does the Minister appear to have given due regard to the EPPS when deciding not to take forward the Optional Framework [**SAB/8/57**]. It is not possible to know whether those policy options would have been completely jettisoned, and the choice of encouraging "*plan makers to stick as*

close to current standards as possible" [**SAB/31/165**] made, had due regard been given to the EPPS at that stage, and had the potential positive environmental impacts in light of the principles been brought to the Minister's attention.

51. The next stage in the policy design appears to have taken place between April and July 2023, with advice dated 17 July 2023 being provided to the Minister [**SAB/31/165-171**]. This provided two options, recommending the option that strongly urged plan-makers carefully to consider viability and the forthcoming Future Homes Standard before going further than Building Regulations, but including an option to state that plan-makers are unlikely to need to go beyond current Building Regulations and giving criteria should they wish to do so. Again, there does not appear to have been any regard given to the EPPS or the environmental principles at that stage, nor does the Minister appear to have given due regard to the EPPS when deciding not to accept the recommendation and to steer towards the second option. Again, it is not possible to know what choice would have been made had due regard been given to the EPPS and the environmental principles at that stage.

52. The next stage in the policy design appears to have taken place between July and October 2023, with the revised text of the WMS being set to Minister Rowley on 5 October 2023. For the first time in the process, an Environmental Principles Policy Statement document was also provided [**SAB/2/21**]. The single page document only referred explicitly to two of the principles; does not in any way evidence the take into account of the EPPS in the design of the WMS, but instead sets out a high-level analysis balancing environmental impacts and concluding that: "*[o]n balance, we consider the policy in the WMS not to have the potential for significant negative environmental impact*" [**SAB/2/21**]. This fundamentally fails to undertake the basic task described in the EPPS: "*identify[ing] the potential environmental effects (positive or negative) and use[ing] the principles to inform and influence the design of the policy*" (emphasis added) [**SAB/1/7**].

53. Simply covering off the potential for significant negative environmental impacts wholly fails to give due regard to the EPPS to "*interpret and proportionately apply*

the principles, so that they are <u>used effectively to shape policy to protect the environment</u>" [**SAB/1/8**] and to "*consider how adjusting the design in the early stages of policy development could <u>result in greater environmental protection</u>*" including "*[promot[ing] environmental enhancement*" [**SAB/1/10**].

54. The final stage in the policy making process took place in December 2023, when the new Minister, Baroness Penn, was sent a submission with the background to the WMS [**SAB/8/59**], but without being provided any EPPS assessment, and her office requested the WMS be published on 13 December 2023 [**SAB/8/60**]. The Respondent accepts that Baroness Penn did not have any regard to the EPPS or to the environmental principles.

55. It is clear from the above that the opposite of the requisite iterative consideration of the EPPS and the environmental principles took place. The policymakers and the Ministers failed to consider and use the principles from the outset and during the subsequent stages of the policy development, such that the principles could not be used effectively to shape policy choices.

56. In light of the legal analysis of the EPPS Duty in §§13-41 above, the retrospective assessment done in February 2024 is a further breach of the EPPS Duty. It is superficial in its analysis and repeats the wording of the 5 October 2023 document verbatim in its final section [**SAB/3/28; c/f SAB/2/21**]. The timing and method of presentation of the EPPS assessment to the Minister also gives the strong impression that it was reverse engineered to support the policy that had already been designed and the WMS made. The Ministerial Submission was made on 22 February 2024 ("**the Submission**"), with the Respondent having informed the Appellant in pre-action correspondence that it would provide a final response to pre-action clarification and disclosure requests, by 26 February 2023. The timing is described as "*Urgent*", with a readout "*needed by Wednesday 28 February*" [**SAB/35/196**], for reasons redacted as they constitute privileged legal advice, understood to be in connection with the Appellant's proposed judicial review challenge (Appellant's skeleton §15) [**CAB/1/8**].

57. The February EPPS assessment was appended to the Submission, which only requested that the Minister "*revisit the policy contained in the WMS*" (emphasis added) [**SAB/35/198**], suggesting that the Minister could "*demonstrate compliance with*" the legal duty in section 19 of the Act by "***confirm[ing] if you are content for the WMS to remain as published***" (emphasis in original) [**SAB/35/198**].

58. The Submission made a number of references to the Appellant, the prospective legal challenge and the pre-action correspondence [**SAB/35/196-197**] and which provided, alongside the EPPS assessment, a Summary of the Appellant's proposed challenge and the Respondent's PAP letter [**SAB/35/199**] documents. Given the extent of redactions in the Submission, it apparently consisted more of privileged legal advice in light of the challenge than of advice concerning the due regard required to be given to the EPPS and the environmental principles. Green Alliance adopts the Appellant's submissions in §33(a)iv. and §15(a)v. of the Skeleton Argument [**CAB/1/15**].

59. Finally, it is clear that in the runup to the April 2023 Ministerial submission, information pertaining to the confusion and delay caused by the 2015 WMS and to what should be done to remedy that had been obtained from both local authorities and housebuilders [**SAB/27/153**]. It appears that, at no point when the 2023 WMS was being designed on the basis of the steer that a new WMS should encourage "*plan makers to stick as close to current standards as possible*" [**SAB/31/165**] were local authorities asked about the likely environmental impact of this policy, in light of the environmental principles. This is a failure to comply with the information-gathering *Tameside* aspect of the EPPS Duty and Green Alliance adopts the Appellant's submission in this regard in §33(c)v. of the Skeleton Argument [**CAB/1/17**].

The Respondent's Notice: Relief

60. On 22 November 2024, the Respondent filed a Respondent's Notice seeking to uphold the Judgment on the alternative basis that, were the Court to find a breach of section 19 of the Act – which in light of the above, Green Alliance submits should be the finding – then the Court should refuse relief. The Respondent made high-level

submissions on why she contends it is highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred.

61. The "*highly likely*" standard of proof sets a high hurdle and although section 31(2A) of the Senior Courts Act 1981 has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test, the threshold remains a high one: *R(Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446 at §273. The burden of proof is firmly on the Respondent, and the "*highly likely*" test expresses a standard somewhere between the civil standard (the balance of probabilities) and the criminal standard (beyond reasonable doubt): *R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group* [2021] EWHC 12 (Admin) at §98.

62. The court is required to undertake an evaluation of the hypothetical or counterfactual world in which the identified unlawful conduct by the public authority is assumed not to have occurred: *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269 at §89. The court must undertake its own objective assessment of the decision-making process and what the result would have been if the decision-maker had not erred in law: *R(Gathercole) v Suffolk County Council* [2020] EWCA Civ 1179, [2021] PTSR 359 at §38.

63. In so doing, the court will need to be careful not to assume the mantle of the decision-maker or to stray, even subconsciously, into the forbidden territory of assessing the merits of the decision: *R(Plan B Earth Ltd) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446 at §273, which went on to conclude "*If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is* 'highly likely' *that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law.*"

64. Accordingly, the Court will need to ask whether the Respondent can demonstrate, to a standard somewhere between the civil and the criminal standard, that the same

or a substantially similar policy to that in the WMS would have been formulated had due regard been had to the relevant principles (and their purpose) in the EPPS at a time when the design and approach of the WMS was being developed. In order to withhold relief, the Court would have to be satisfied, to a standard somewhere between the civil and the criminal standard, that:

a) At the formative stage of the policy and throughout the drafting process, the officials and/or others assisting the Secretary of State would have made substantially similar drafting decisions, rather than being prompted by the principles to take slightly different approaches;
b) The officials and/or others involved in the drafting process would not have considered it necessary to obtain any further information in light of the principles and/or, had they done so, would have made substantially similar drafting decisions; and
c) The Minister or Ministers making the final decision concerning the policy, having due regard to the EPPS, would not have sought any further information and would have made substantially similar drafting decisions.

65. This is archetypally the type of circumstance where it is very difficult for the Respondent to show that, had the executive had gone about the decision-making process in accordance with the law, it would have been highly likely that the outcome would not have been substantially different.

66. None of the matters mentioned by the Respondent in the Respondent's notice overcome that difficulty:

a) The single page 5 October 2023 document [**SAB/2/21**] does not come close to being a proper EPPS assessment (see §§52-53 above).
b) Consideration of the principles and the potential environmental impact of the proposed WMS appears to have taken place very late in the policy development process, well after the options for the new WMS were presented to the Minister in July 2023 and his steers given [**SAB/8/57-58**], meaning it is impossible to know how the design of the policy might have been influenced had due regard been given to the environmental principles and the EPPS at that stage, or at the earlier stage, in April 2023, when a very different policy approach to

encouraging "*plan makers to stick as close to current standards as possible*" [**SAB/32/165**] had been proposed to the Minister [**SAB/27-30/152-164**];

c) The EPPS assessment of February 2024 [**SAB/3/22-28**], drafted well after the WMS was made on 13 December 2023, follows the template of an Environmental Principles Assessment, but is superficial in its analysis. It repeats the wording of the 5 October 2023 document verbatim in the final section, [**SAB/3/28; c/f SAB/2/21**] giving the impression it was reverse engineered to support the policy that had already been designed and the WMS made – an impression reinforced by the Ministerial Submission made on 22 February 2024 [**SAB/35/196-205**], to which the February EPPS assessment was appended (see §§56-58 above);

d) The EPPS assessment for the Future Homes Standard (undated, but provided to the Minister in September 2023) [**SAB/4/29-35**] is relevant to that policy and does not purport not apply the principles to the draft WMS. It is notable that the Ministerial submission to which the EPPS assessment for the Future Homes Standard was attached only mentions the proposed WMS in passing, [**SAB/32/174**] and does not suggest that the EPPS assessment had any regard to the proposed WMS; and

e) The "environment nature of the policy area" does not dictate a single policy approach, let alone the policy approach alighted upon in the WMS.

Conclusion

67. For the reasons set out above, the Court of Appeal is respectfully invited to allow the appeal and to give the guidance on the correct approach to interpreting and applying the EPPS Duty suggested by the OEP.

14 January 2025 (re-referenced 19 May 2025)

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