Neutral Citation Number: [2024] EWHC 1693 (Admin)

Case No: AC-2024-LON-000621

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2024

Before :

MRS JUSTICE LIEVEN DBE

- -

Between :

THE KING
(on the application of)
RIGHTS COMMUNITY ACTION LTD

Claimant

and

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Defendant

- -
- -

Mr Alex Goodman KC and Mr Alex Shattock (instructed by **Good Law Practice Ltd**) for the **Claimant**
Mr Ned Westaway (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: **18-19 June 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is an application for judicial review of a Written Ministerial Statement ("WMS") dated 13 December 2023 titled "Planning – Local Energy Efficiency Standards Update" ("the 2023 WMS").

2. The Claimant was represented by Alex Goodman KC and Alex Shattock, and the Defendant was represented by Ned Westaway.

3. There are three Grounds of Challenge:

    a) Ground 1: In promulgating the 2023 WMS, and subsequently, the Defendant failed to fulfil his duty under s.19(1) of the Environment Act 2021 ("EA") to have due regard to the Environmental Principles Policy Statement ("EPPS").

    b) Ground 2: The Minister, through the 2023 WMS, unlawfully purported to restrict the exercise by local authorities of powers conferred by statute. In particular:

        i. The 2023 WMS misdirects local authorities, or purports to restrain them, as to the exercise of their powers under s.1 of the Planning and Energy Act 2008 ("PEA") to set policies in their development plans seeking energy efficiency standards which exceed building regulations, in a manner inconsistent with the Act's purpose or objects.

        ii. The 2023 WMS unlawfully misdirects or purports to restrain the ability of local authorities to meet their duty under s.19 of the Planning and Compulsory Purchase Act 2004 ("PCPA") (which provides that development plan documents must include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change).

        iii. The 2023 WMS unlawfully misdirects decision-makers as to the application of the statutory presumption in favour of the development plan contained in s.38(6) of the PCPA.

    c) Ground 3: The 2023 WMS presents an unlawfully misleading picture of the legal powers of decision makers (in particular Planning Inspectors): *R (A) v SSHD [2021] 1 WLR 3931.*

4. The Claimant is a non-governmental organisation incorporated as a limited company in January 2019 with social and environmental objectives, and is involved in community planning, particularly the formation of local development plans. There is no dispute about the Claimant's standing to bring this challenge.

The 2023 WMS

5. The 2023 WMS replaced policy in a 2015 WMS, which was subject to a successful judicial review brought by the Claimant (*R (Rights Community Action) v SSLUHC* [2024] EWHC 359. It covers similar territory, namely the setting of energy efficiency standards for new homes. The WMS provides, as most relevant, as follows:

> *"The improvement in standards already in force, alongside the ones which are due in 2025, demonstrates the Government's commitment to ensuring new properties have a much lower impact on the environment in the future. In this context, the Government does not expect plan-makers to set local energy efficiency standards for buildings that go beyond current or planned buildings regulations. The proliferation of multiple, local standards by local authority area can add further costs to building new homes by adding complexity and undermining economies of scale. Any planning policies that propose local energy efficiency standards for buildings that go beyond current or planned buildings regulation should be rejected at examination if they do not have a well-reasoned and robustly costed rationale that ensures:*
>
> *That development remains viable, and the impact on housing supply and affordability is considered in accordance with the National Planning Policy Framework.*
>
> *The additional requirement is expressed as a percentage uplift of a dwelling's Target Emissions Rate (TER) calculated using a specified version of the Standard Assessment Procedure (SAP).*
>
> *Where plan policies go beyond current or planned building regulations, those polices should be applied flexibly to decisions on planning applications and appeals where the applicant can demonstrate that meeting the higher standards is not technically feasible, in relation to the availability of appropriate local energy infrastructure (for example adequate existing and planned grid connections) and access to adequate supply chains."* [emphasis added]

6. It is relevant to note at the outset that it is accepted by the Defendant that the Minister (Baroness Penn) did not have express regard to the EPPS before promulgating the WMS. However, there was consideration of it in February 2024 when the Government was considering what action to take in respect of the Claimant's threatened challenge.

The genesis of the 2023 WMS

7. The 2023 WMS replaced an earlier 2015 WMS, that covered the same subject matter of the scope of local authorities' powers to set standards for new buildings above the building regulations, in circumstances where the 2015 WMS had become outdated after 2021. The 2013 WMS was the subject of my decision in *R (Rights Community Action Ltd) v SSHLUC* [2024] EWHC 259.

8. In October 2019 the Government carried out a consultation on a document called "the Future Homes Standard" ("FHS"), which was intended to provide for stricter standards

in relation to newly built homes, in order to reduce their CO2 impact and move towards "net zero" new homes. As I understand it, the FHS lies in part in changes to the building regulations and in part in changes to relevant standards. The FHS is intended to make changes to the building regulations to ensure that new homes produce at least 75% lower CO2 emissions than those built to the earlier 2013 standards.

9. In response to the 2019 consultation the Government said it would take two separate steps. Firstly, in 2021 it brought in an uplift to the building regulations, with effect from June 2022. This required new homes to deliver around 30% lower CO2 emissions compared to the standard in 2013. This is described by Mr Palmer, the Defendant's Deputy Director for Building Performance, in his witness statement as a "stepping stone" to the FHS. Secondly, the Government indicated an intention to introduce the FHS in 2025.

10. There was a further consultation on the FHS in December 2023 that was published at the same time as the 2023 WMS. Although this is perhaps rather less than clear in the document itself, Mr Westaway told the Court that the reference in the WMS to not going beyond "current or planned building regulations" is a reference to the consultation draft of the FHS, as set out in the December consultation document, or as subsequently amended before any formal adoption. Mr Westaway was clear in oral argument that Local Planning Authorities ("LPAs"), acting in accordance with the WMS, can apply standards that go up to those in the draft FHS, at whatever relevant date such a draft has been issued.

11. There is disagreement between the Claimant, together with at least some LPAs, and the Defendant about whether or not LPAs should be able to set their own different standards. Mr Palmer explains the Defendant's position, which is reflected in the documentation, that to allow different standards causes difficulties for housebuilders. This in turn may lead to less new houses being delivered, which potentially results in less lower carbon housing being built. The Claimant (and some local authorities) wish to impose higher carbon efficiency standards or requirements in order to ensure that future housing has lower carbon impacts. Dr Ellis, the Claimant's witness and Director of Policy at the Town and Country Planning Association, sets out the benefits in terms of achieving net zero, of the LPAs being able to set different standards from those in the WMS and the emerging FHS.

12. One difference between the policy in the WMS and that which some LPAs wish to adopt is the approach of national policy in the WMS and FHS to rely on Target Emission Rate ("TER"), which is a measure or metric of the energy performance of the home dependent on the level of decarbonisation of the national electricity grid; as opposed to the metric preferred by some local authorities, London Energy Transformation Initiative ("LETI"), which focuses on the carbon efficiency of the home itself. The impact of the WMS is to prevent local authorities relying on LETI and thus will lead, according to Dr Ellis, to higher carbon emissions from homes built than would be the case if local authorities were free to set their own standards.

13. Mr Palmer summarises the Defendant's position in his witness statement as follows:

> *"20. By encouraging local standards to match current or planned national standards, and where they do go further, to do so in a consistent way, the*

> *WMS, therefore, aims to mitigate the risk of adverse effects on housing supply caused by divergent local standards."*

14. The process of consideration of the WMS 2023, and the draft FHS for consultation, was as follows. On 26 April 2023 there was a submission to Ministers on an "Optional Framework" for plan-makers and housebuilders wanting to build to higher standards than the building regulations.

15. On 17 July 2023 the Minister and the Secretary of State were advised to publish a new WMS. This included the following:

> *"… "We would still wish to allow local innovation and ambition where viable, particularly where the Future Homes Standard (FHS) is not in force, to not unlawfully prevent LPAs from using their powers, and to avoid being seen to conflict with government's commitment to ensure planning policy "contributes to climate change mitigation…as fully as possible"."*

16. On 5 October 2023 the Minister was sent draft text for the WMS together with an EPPS assessment. On 12 September 2023 he had been sent an EPPS assessment of the FHS. This does not purport to be an assessment of the WMS itself, but is part of the process of relevant policy development. The October 2023 draft WMS has the same key sentence as appears in the final version: *"…the Government does not expect plan-makers to set local energy efficiency standards for buildings that go beyond current or planned building regulations."* However it did not have the sentence about flexibility being applied around existing plan policies; or the reference to the Secretary of State's intervention powers.

17. On 9 October collective agreement across government was sought for the WMS simultaneously with the FHS consultation. This is important because it was part of the process of policy development indicating that the two actions were approached as part of one package of measures.

18. On 14 November 2023 Baroness Penn joined the Department for Levelling Up, Housing and Communities ("DLHUC") and energy efficiency in new buildings became part of her brief. On 13 December 2023, after some changes had been made to the WMS, Baroness Penn's office requested DLHUC to publish the WMS. It is accepted that she had no EPPS assessment when that decision was made. The WMS was published on that day.

19. After pre-action correspondence with the Claimant, the Defendant accepted that the relevant Minister had not had an EPPS assessment when the decision was made to publish the WMS. Officials then prepared an EPPS assessment of the WMS on 22 February 2024. This went to the Minister, who was then Mr Rowley MP again. The relevant parts of the assessment are set out below at paragraph 46.

The Environmental Principles Policy Statement (EPPS)

20. The February 2024 assessment considers the WMS as against the EPPS. The EPPS was drawn up pursuant to s.17 EA and is dated 21 January 2023. It is necessary to set out the key parts of the EPPS before considering the assessment. It starts by setting out

five principles; integration, prevent, rectification at source, polluter pays and precautionary, which are themselves in s.17(5) EA.

21. Under the heading of the Integration Principle the document states:

> *"Application of the integration principle: Applying the integration principle involves considering whether the policy has the potential to cause a negative environmental effect which could be avoided, minimised or reduced through alterations to the policy in proportion to other policy aims."* [emphasis added]

22. Under both the Prevention Principle and the Rectification at Source principle there is reference to understanding the potential environmental harm of the policy. The Rectification at Source section refers to understanding where the damage originates from and considering the feasibility of rectifying the issue at source.

Ground One

23. The Claimant submits that the Defendant failed in its duty under s.19 EA to have due regard to the EPPS. Sections 19(1) and 19(2) provide:

> "**19 Policy statement on environmental principles: effect**
>
> (1) A Minister of the Crown must, when making policy, have due regard to the policy statement on environmental principles currently in effect.
>
> (2) Nothing in subsection (1) requires a Minister to do anything (or refrain from doing anything) if doing it (or refraining from doing it)—
>
> (a) would have no significant environmental benefit, or
>
> (b) would be in any other way disproportionate to the environmental benefit.

24. Section 17 sets out the duty to prepare a policy statement on environmental principles, the "EPPS":

> "**17 Policy statement on environmental principles**
>
> (1) The Secretary of State must prepare a policy statement on environmental principles in accordance with this section and section 18.
>
> (2) A "policy statement on environmental principles" is a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy."

25. The issues under this Ground fall into two parts. Firstly, establishing what the correct legal approach to the "due regard" duty is; and secondly, submissions as to whether the Defendant met that duty on the facts of the case. However, the answer to the first issue

can only be tested by considering the application of the due regard duty in the context of specific factual issues raised.

26. The Claimant submits that the duty to "have due regard" in s.19 EA should be interpreted analogously to the duty to have "due regard" in s.149 of the Equality Act (the Public Sector Equality Duty ("PSED") and that the caselaw on PSED should be applied to s.19 EA. Apparently, there is no previous caselaw on the approach to the duty in s.19 EA or the degree of analogy of approach with the PSED. Section 19 came into force on 1 November 2023.

27. Mr Goodman relies in particular on *Bracking v Secretary of State for Work and Pensions* [2014] EqLR 60 at [26], and some at least of the very extensive caselaw that follows. Mr Westaway submits that considerable caution needs to be applied in adopted case on s.149 to the wholly different statutory context of s.19 EA.

28. At [26] of *Bracking* the Court of Appeal said:

> *"Two lever arch files of authorities were placed before the court which included some thirteen cases in which relevant duties and the requirements placed on public authorities have been considered. Fortunately the principles were not significantly in dispute between the parties. I summarise the points identified, which are not, I think, different in substance from those summarised by the Judge in paragraph 32 of his judgment.*
>
> *(1) As stated by Arden LJ in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.*
>
> *(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).*
>
> *(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.*
>
> *(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin) at [23 – 24].*

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), as follows:

i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in R (Meany) v Harlow DC[2009] EWHC 559 (Admin) at [84], approved in this court in R (Bailey) v Brent LBC [2011] EWCA Civ 1586 at [74–75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

"[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

> *[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."*
>
> *(ii) At paragraphs [89–90]*
>
> *"[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [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 disabled persons' disabilities in the context of the particular function under consideration.'*
>
> *[90] I respectfully agree...."*

29. There are a number of subsequent cases that have emphasised that whether or not the s.149 duty has been met is a highly context and fact specific question. Lord Neuberger in the Supreme Court in <u>*Hotak v London Borough of Southwark*</u> [2016] AC 811 said at [74] to [75]:

> *"74. As Dyson LJ emphasised, the equality duty is "not a duty to achieve a result", but a duty "to have due regard to the need" to achieve the goals identified in paras (a) to (c) of section 149(1) of the 2010 Act. Wilson LJ explained that the Parliamentary intention behind section 149 was that there should "be a culture of greater awareness of the existence and legal consequences of disability". He went on to say in para 33 that the extent of the "regard" which must be had to the six aspects of the duty (now in subsections (1) and (3) of section 149 of the 2010 Act) must be what is "appropriate in all the circumstances". Lord Clarke suggested in argument that this was not a particularly helpful guide and I agree with him. However, in the light of the word "due" in section 149(1) , I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment.*

> *75. As was made clear in a passage quoted in Bracking , the duty "must be exercised in substance, with rigour, and with an open mind" (per Aikens LJ in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), [2009] PTSR 1506 , para 92. And, as Elias LJ said in Hurley and Moore , it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said that "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision"."*

The need to ensure that the decision maker has considered the EPPS assessment in substance, with rigour and with an open mind are all accepted by Mr Westaway. The issues turn on the more specific requirements that are referred to in *Bracking* and some of the subsequent caselaw.

30. Mr Goodman submits that the Defendant failed in his duty to have due regard to the EPPS in a number of respects. Firstly, he focuses on the fact that it is accepted that the Minister, who on 13 December 2023 was Baroness Penn, was not given any assessment of the WMS against the EPPS at the time she approved the WMS. There had been an assessment of the October 2023 draft of the WMS, but that was given to a different Minister (Mr Rowley MP) and the draft as at that date was materially different.

31. Subsequent to the promulgation of the WMS in February 2024, the Minister (by then again Mr Rowley MP because Baroness Penn was on maternity leave) an assessment of the WMS was produced, but Mr Goodman submits that that was an illegitimate "rearguard action" of the sort deprecated in *Bracking* at [26(4)]. He submits the due regard duty must be met before and at the time that a particular policy is being considered, see *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158. He also submits that the due regard has to be given by the Minister personally, and here the Minister when making the WMS had no knowledge of the earlier assessment.

32. In terms of the content of the assessment that was carried out in February 2024, Mr Goodman submits that it fails to meet the test of being carried out in substance, with rigour and with an open mind, see *Hotak*. The EPPS requires consideration of whether the environmental harm could be "avoided, minimised or reduced", but the 2024 assessment fails to address those questions. The document does not "with rigour" grasp the nettle of the environmental harm caused by the WMS through mandating a lower level of energy efficiency than would be the case if local authorities could apply higher standards. He focuses on two complaints about the February 2024 assessment. It fails to address properly or at all the negative environmental impact of the WMS, against the Principles in the EPPS set out above. Further, the assessment wrongly conflates the FHS, which is only a draft with no certainty as to when and if it will come into legal effect, with the effect of the WMS.

33. Thirdly, the s.19 duty, by analogy with the s.149 Equality Act duty, includes a duty of inquiry, see *Bracking* [26(8)]. Mr Goodman submits that the assessment fails to make any, or any proper inquiries into the scale of environmental harm caused by the WMS. He focuses on, as but one example, the difference between the approach of national policy to rely on TER, as opposed to the metric preferred by some local authorities

(LETI), which controls the carbon efficiency of the home itself. Mr Goodman focuses on this because he says this is a "standard" imposed by the WMS which will necessarily reduce the carbon efficiency of homes, but the impact of which the Defendant has not properly investigated.

34. Mr Goodman submits that the assessment fails to consider, or inquire into, these important points about the environmental harm which will flow from the WMS. Therefore he submits that the applicable approach, as set out in *Bracking*, and adopted by analogy from the PSED cases, has not been followed.

35. Mr Westaway accepts that the s.19 duty has to be applied "in substance, with rigour and with an open mind", which is in effect the tests set out by Lord Neuberger in *Hotak*. However, he submits that the caselaw in respect of s.149 Equality Act 2010 cannot simply be applied to the "due regard" duty in s.19 EA. The nature of the two duties, both in terms of the statutory schemes and the interests being protected are very different.

36. Firstly, he submits that the focus of the s.149 duty, in both s.149(1) and (3) is very clearly defined:

> "**149 Public sector equality duty**
>
> (1) 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;
>
> (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.
>
> …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

37. By contrast, the duty in s.19 is to a policy statement produced under s.17(1) Environment Act 2021, which will necessarily be a great deal more diffuse, and the balances and issues in play are very different in their nature from those in consideration in the Equality Act.

38. Secondly, the very nature of s.17 EA is to apply principles of proportionality, see s.17(2) and 19(2), which make the objectives much less clear-cut than is the case under s.149.

39. Thirdly, the s.19 duty applies to the "making" of policy, and s.47 EA defines "making" as including "developing, adopting or revising policy". Mr Westaway therefore says that the statute provides for a later consideration of the EPPS than would necessarily be the case under the s.149 duty.

40. Fourthly, the caselaw on s.149, itself sets out considerable caveats on the application of [26] of *Bracking*. In *R (Sheakh) v Lambeth LBC* [2022] PTSR 1315 at [57] the Court of Appeal said that the guidance in *Bracking* although useful must not be read as a statute, and will apply differently in different contexts. In *R (Prichard) v Secretary of State for Work and Pensions* [2020] EWHC 1495 at [120] Mrs Justice Elisabeth Laing said that [26(4)] of *Bracking* should be treated with caution.

41. In *R (West Berkshire DC) v SSCLG* [2016] 1 WLR 3923 the Court of Appeal at [83] said that s.149 did not require a precise mathematical exercise.

42. I agree with Mr Westaway on the extent to which the caselaw on s.149 is applicable to the s.19 duty. The two duties are very different, both in terms of the statutory provisions (save for the broad words "have due regard") and the aims to be achieved. Whereas the impact on those with protected characteristics may generally be relatively straightforward to set out, the environmental issues as set out in the EPPS will often be very multifaceted and complex. This case is a good example of that complexity. Although setting higher CO2 standards for new homes may appear to be more environmentally positive, it might have consequences that lead to an environmentally less good ultimate outcome. Environmental impacts are rarely linear and binary, but rather frequently involved complex and multifaceted impacts which need to be assessed in a holistic manner. The nature of the two statutory schemes, and therefore the due regard duties are very different.

43. The test set out in *Hotak* of the need to consider the EPPS with substance, rigour and an open mind, is plainly applicable to the s.19 duty. However, beyond that the approach is necessarily one that turns both on the individual facts, but also the broader purposes of the Environment Act 2021

44. In terms of Mr Goodman's specific complaints about the Defendant's compliance with s.19, the first point is the acknowledged failure of the Minister to have regard to an assessment of the EPPS at the time she made the WMS. However, the caselaw even on s.149 is clear that such failures can, in appropriate cases, be remedied later. This may be described as a rearguard action, but it is apparent from cases such as *R (Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108 at [43] that a later assessment can meet the statutory duty. The question is whether it is done conscientiously. In my view when there is a retrospective assessment, as here, the Court should apply the tests set out in *Hotak*, whether the assessment was done in substance, with rigour and an open

mind. It is not appropriate to make a declaration of unlawfulness simply because the assessment was done after the adoption of the policy.

45. That is reinforced by the fact that s.19, read with s.47, expressly defines the "making" of the policy as including the "reviewing" of the policy.

46. In my view, largely adopting Mr Westaway's submissions, the assessment does meet these tests. The February 2024 assessment does address whether the impact of the WMS is negative in environmental terms. It states:

> *"There is the potential for further positive environmental effects if LPAs set higher standards than those mandated by the Building Regulations. Any potential benefits would be further reductions in carbon emissions occurring largely in the period between now and the time the FHS is implemented. However, this should be balanced against the potential for disrupted housing supply caused by differing standards across the country. Such disruption could lead to the environmental benefits of the FHS not being met if fewer zero-carbon ready homes are built as a result of development not coming forward.*
>
> *3. Are there primary effects (an intended result or an effect directly attributed to the proposed action) or secondary effects (indirect or induced changes)?*
>
> *The FHS will have primary effects relating to reducing carbon emissions in new buildings, as well as secondary effects through the possible stimulation of the green economy (encouraging the creation of new green technologies and 'green' employment opportunities), increasing consumer familiarity with green technologies, especially heat pumps of relevance to decarbonising existing buildings, and more widely by reducing emissions over time.*
>
> *The policy contained in the December 2023 Written Ministerial Statement (WMS) aims to improve the consistency of application of any such locally mandated energy efficiency standards in new homes. The potential effect of this could be to help secure more robust housing supply, as developers and housebuilders are given more certainty of standards."*

47. The first paragraph is an acknowledgement that it might be said greater environmental benefits would flow if the LPAs could set higher standards. That is in substance an acceptance of the possible "negative" impacts or harm of the policy, in accordance with the EPPS. However, the Defendant has chosen to put considerable weight on the impact that might have on the supply of new housing, over the potential benefits of imposing higher standards. This is a policy choice for the Minister and is explained in the assessment, and does not disclose any error of law. There is nothing irrational in terms of the negative/positive environmental impacts the assessment refers to. Experts might disagree on the issue, but that is a matter for policy makers and not the Court.

48. This also covers Mr Goodman's criticism of the assessment for not meeting a duty of inquiry. The extract set out above, does albeit in summary form show a proper inquiry into the environmental impacts of the policy choice.

49. Mr Goodman criticises the reliance placed on the FHS, and submits that the Defendant erred by considering the WMS and the FHS together. He said the effect of the FHS would be to "raise the floor" in the standards but the effect of the WMS was to "lower the ceiling", and by conflating them the assessment failed to explain these differences.

50. There is some potential confusion because the FHS does not come in until 2025 and may not end up in its current form. However, the WMS when it refers to not imposing standards that go beyond "planned" building regulations is, according to Mr Westaway, referring to standards in the FHS, whatever draft form it is in at the appropriate moment. Given that the WMS is intended to cover the position up to the bringing in of the FHS, I do not think it is unreasonable for the assessment to take into account the FHS. Indeed not to do so would have made it very difficult for the Minister to understand the holistic policy approach. It is clear from the policy development set out above, that the WMS and the FHS are very much inter-related in policy terms, and it is therefore reasonable to consider them together.

51. For these reasons I reject Ground One.

Grounds Two and Three

52. Ground Two raises an entirely different issue. The Claimant submits that the WMS unlawfully purports to restrict the local authorities' powers, granted by statute and Regulation. This Ground relies on s.1 Planning and Energy Act 2008 (PEA):

> "**1 Energy policies**
>
> (1) A local planning authority in England may in their development plan documents… include policies imposing reasonable requirements for—
>
> (a) a proportion of energy used in development in their area to be energy from renewable sources in the locality of the development;
>
> (b) a proportion of energy used in development in their area to be low carbon energy from sources in the locality of the development;
>
> (c) development in their area to comply with energy efficiency standards that exceed the energy requirements of building regulations.
>
> (2) In subsection (1)(c)—
>
> "energy efficiency standards" means standards for the purpose of furthering energy efficiency that are—
>
> (a) set out or referred to in regulations made by the appropriate national authority under or by virtue of any other enactment (including an enactment passed after the day on which this Act is passed), or
>
> (b) set out or endorsed in national policies or guidance issued by the appropriate national authority;

> "energy requirements", in relation to building regulations, means requirements of building regulations in respect of energy performance or conservation of fuel and power.
>
> (3) In subsection (2) "appropriate national authority" means—
>
> (a) the Secretary of State, in the case of a local planning authority in England…
>
> (4) The power conferred by subsection (1) has effect subject to subsections (5) to (7) and to—
>
> (a) section 19 of the Planning and Compulsory Purchase Act 2004 (c. 5), in the case of a local planning authority in England;
>
> …
>
> (5) Policies included in development plan documents by virtue of subsection (1) must not be inconsistent with relevant national policies for England.
>
> …
>
> (7) Relevant national policies are—
>
> (a) national policies relating to energy from renewable sources, in the case of policies included by virtue of subsection (1)(a);
>
> (b) national policies relating to low carbon energy, in the case of policies included by virtue of subsection (1)(b);
>
> (c) national policies relating to furthering energy efficiency, in the case of policies included by virtue of subsection (1)(c)."

53. This provision is by no means easy to understand. The Act was a Private Members Bill and it was introduced by Mr Fallon MP in order to provide a clear statutory framework for what had come to be known as the "Merton Rule". This was a policy adopted by some local authorities, including the London Borough of Merton, to require a percentage of energy in their areas to be sourced from renewable sources. It is clear that that is the purpose and effect of s.1(1)(a) of the Act.

54. The present case however concerns s.1(1)(c). This allows the LPA to have development plan policies imposing reasonable requirements for development to comply with "energy efficiency" standards that exceed the requirements of the building regulations. Energy efficiency standards and energy requirements are defined in s.1(2)(b).

55. Mr Goodman submits that "standards" here means the metrics or measures used in assessing energy efficiency, whereas requirements are the substantive energy outputs. Therefore he says that it is open to the LPA to set a standard which is different and more onerous than that in the building regulations. The critical distinction on the facts, is that referred to above between TER and LETI. TER relies upon grid decarbonisation to achieve the relevant emissions reductions. LETI sets absolute energy metrics,

covering energy use intensity and space heating demand, for the building. According to Dr Ellis some local authorities are choosing to use LETI because TER and the approach in Part L of the building regulations and FHS do not achieve zero carbon homes, because of the reliance on decarbonisation of the grid, which is wholly outside their control and may not happen/be happening at the speed assumed.

56. Mr Goodman submits that the WMS unlawfully emasculates the power in s.1 EA, because it in practice prevents LPAs from setting higher standards than in the building regulations or FHS, despite the terms of s.1 PEA. He relies upon *R (Gujra) v Crown Prosecution Service* [2013] 1 AC 484, which concerned the power to pursue private prosecutions, where Lord Neuberger said at [49]:

> *"As Lord Wilson says, the central issue on this appeal is whether the 2009 policy can fairly be said to frustrate the policy and objects which underpin section 6 . Mr Fitzgerald put the issue slightly differently, namely, as reflected in Lord Mance's judgment, whether the 2009 policy emasculated (or, to use Mr Fitzgerald's words, unlawfully attenuated, restricted or diminished) the right to conduct private prosecutions. In my view, a policy which emasculated the right would indeed frustrate the policy and objects of section 6 , so I consider that there is, in principle and in practice, no real difference between the approach of Lord Wilson and that of Lord Mance."*

57. It is to be noted that in that case the Supreme Court held that the policy in question was lawful.

58. Mr Goodman also relies on *R (Palestine Solidarity Campaign) v SSHLUC* [2020] 1 WLR 1774 where the Supreme Court held that the Secretary of State's direction did unlawfully interfere with the fiduciary duties of the administering authorities of the pension funds. Lord Carnwath said at [44]:

> *"In this respect I agree with the submissions of Mr Giffin QC for the appellants:*
>
> *"What the Secretary of State sought to do in the guidance was to promote the government's own wider political approach, by insisting that, in two particular contexts related to foreign affairs and to defence, administering authorities could not refrain from making particular investments on non-financial grounds, regardless of the views held by the scheme members.*
>
> *The analogy drawn by the Court of Appeal between the basis upon which the administering authority may properly act, and the purpose for which the Secretary of State may properly issue guidance, was therefore founded upon a misconception of the administering authority's position in law. Whilst the Secretary of State was entitled to give guidance to authorities about how to formulate investment policies consistently with their wider fiduciary duties, he was not entitled to use the guidance-giving power, conferred by the Investment Regulations, to make authorities give effect to the Secretary of State's own policies in preference to those which they themselves thought it right to adopt in fulfilment of their fiduciary duties."*

59. Mr Goodman submits that the WMS in its final form effectively prevents the LPAs from using their power under s.1(1)(c) to set standards above those in the building regulations. In particular, he submits it stops the LPAs from relying on LETI standards, because the FHS relies on TER standards.

60. He further submits that the WMS frustrates the fulfilment by local authorities of their duty under s.19(1A) PCPA:

> "**19 Preparation of local development documents**
>
> (1) …
>
> (1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change."

61. He makes the same point with regard to s.38(6) PCPA, which sets out the primacy of the Development Plan:

> "**38 Development plan**
>
> …
>
> (6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

62. Mr Goodman also relies on *R (Burch v Worthing Borough Council* (1985) 59 P&CR 53. In that case a planning circular was held to be unlawful. The reasoning in the case is not particularly clear, but it is obvious that the vice in the circular was that it excluded the public from any say in the view as to whether planning permission would have been granted. The issues in the case were totally different from those before me.

63. In respect of Ground Three, which is very closely related to Ground Two, Mr Goodman submits that the WMS misstates the true legal position and is therefore unlawful. Both parties rely on *R (A) v SSHD* [2021] 1 WLR 3931. The Supreme Court set out at [46] three categories of case where there could be a successful challenge to a policy statement. The third category is:

> *"… [A]nd (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. In a case of the type described by Rose LJ, where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). …"*

64. Mr Westaway submits that the WMS takes a wholly conventional approach to the relationship between national policy and the powers given to LPAs. Section 1(1)(c) PEA is constrained by s.1(2) and (5), with (2) defining the standards that can be set and (5) being a conventional approach to local policies needing to be consistent with national policies. He does not accept Mr Goodman's analysis that s.1 PEA is drawing a distinction between standards and requirements, it being intended that "standards" was referring to the metrics or measurements, and "requirements" to the ultimate energy outputs. Mr Westaway submits that the standards can exceed building regulations, as is allowed by the WMS by reference to the emerging FHS, but cannot exceed national policy, which approach entirely accords with s.1(5) PEA.

65. Both parties agree that s.1 PEA is somewhat ambiguous, or at least unclear, and therefore reference can appropriately be had, pursuant to *Pepper v Hart* [1993] AC 593, to what was said by the Minister in Parliament. At the final debate on the Bill, Sadiq Khan MP, then Parliamentary Under-Secretary of State for Communities and Local Government, confirmed that the Government had sought to amend the Bill to make it effective in practice. With respect to the current section 1(1)(c) specifically, the Minister confirmed councils "can go further and faster than building regulations, but within the national framework". The Minister also addressed the overall intention of clause 1(2) in the following terms:

> *"The intention was for local authorities, in setting energy efficiency standards, to choose only those standards that have been set out or referred to in regulations made by the Secretary of State, or which are set out or endorsed in national policies or guidance issued by the Secretary of State.*
>
> *That approach was taken with a view to avoiding the fragmentation of building standards, which could lead to different standards applying in different areas of the country. Although supportive of the hon. Gentleman's Bill, that was not an outcome that we wanted to achieve.""*

66. Mr Westaway submits that the WMS does not in any terms frustrate or emasculate the statutory purpose, indeed it is entirely in line with the purpose and effect of s.1, as explained above.

67. In relation to the consideration of already adopted policies that go beyond current or planned building regulations, the WMS refers to applying these flexibly within certain specific criteria, e.g. technical feasibility and access to alternative supply chains. This is not prohibiting the exceedance of the building regulations or planned extensions to them (i.e. the FHS), but making clear that national policy requires certain things to be taken into consideration. The same principles apply under s.19 PCPA and s.38(6) PCPA.

68. In respect of Ground Three, Mr Westaway submits that it adds nothing to the issue under Ground Two. The WMS does not misdirect on the legal position for the same reasons as arise under Ground Two, and the test in *Re A* is not met.

69. In my view the WMS does not unlawfully state the law or undermine the purpose of s.1 PEA or s.19 and s.38(6) PCPA. The purpose of s.1(2) PEA and the section as a whole, was clearly explained by the Minister, Mr Khan MP as set out above. It was to prevent

inconsistency of standards, which is precisely what the WMS is also seeking to avoid. Section 1(5) makes it clear that the Government can constrain the setting of standards in development plans through the use of national policy. The WMS accords with this approach.

70. The distinction which Mr Goodman seeks to draw between standards and requirements, and the narrow approach to standards, is not one reflected in the language of the statute. I note in any event that s.1(5) refers to policies, and therefore does not differentiate between standards or requirements in those policies. I do not therefore accept Mr Goodman's interpretation of s.1(1)(c) and (2) as drawing this distinction.

71. In relation to the policies that have already been adopted and the WMS statement that these should be applied "flexibly", again that is in accordance with the legal position. National policy can state that decision makers should take specified matters into consideration and that is not inconsistent with the primacy of the development plan under s.38(6) PCPA.

72. For these reasons I do not consider that the WMS attenuates or emasculates the LPAs statutory powers or mis-states the law, contrary to *R (A) v SSHD*. Therefore Grounds Two and Three are dismissed.