

CONFERENCE

Policy/Guidance-based Challenges

session at

Public Law in 2025:
One Day Symposium

with Matt Hutchings KC and
Sarah Salmon

● ● ●
● ● ● cornerstone
● ● ● barristers



Policy/Guidance-based challenges

Matt Hutchings KC & Sarah Salmon
(with thanks to Andy Lane & Jack Parker for the slides)

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So far as the law is concerned, the meaning of a policy is a matter for the court, although a policy is not to be interpreted as if it were a statute or a contract: see, for example, *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983 at [18] and [19]. It is an expression of administrative policy intended to be a practical aid to decision making.

Lewison LJ in Haneen Abdelrahman v The Mayor and Burgesses of the London Borough of Islington [2025] EWCA Civ 1038 at para. 46





Policy production – key steps in the process and lessons from recent case law

Sarah Salmon



Legal and policy context

01

Legal duties

- To produce policy? To achieve an objective? With an indirect bearing?
- FoE1 [2023] 1 WLR 225
- FoE2 [2024] EWHC 995 (Admin)

02

Relationship to other policies

- Have regard to
- But depart from?
- E.g. R (West Berks DC v SS [2016] EWCA Civ 44]

Legal duties pulling in different directions?

Building efficiency standards

R (Rights: Community: Action Limited) v SSHCLG

[2025] EWCA Civ 990

- 2023 WMS – Policy Guidance for LPAs wanting to impose local standards for building efficiency
- Statutory Restriction on setting building efficiency standards in s.1 Planning Energy Act 2008

VS

- Statutory Power for LPAs to adopt policies in DPDs setting building efficiency standards which conflict with national policy

Key steps in the process

01

Duty of Inquiry / Tameside

- Right question?
- Reasonable steps to obtain relevant information to enable it to be answered?
- *R(Plantagenet Alliance Ltd) v Secretary of State* [2014] EWHC 1662 at [100]

02

Consultation

- Sedley Principles
- *Moseley v LB Haringey* [2014] UKSC 56

03

Rational Response?

- Within the range of reasonable responses
- No unexplained evidential gaps / leaps in reasoning
- *R(Wells) v Parole Board* [2019] EWHC 2710 (Admin) at [33]

Incomplete inquiries

Minimum kerb heights

R (Leadbetter) v SST
[2023] EWCA Civ 1496

- Review of kerb height guidance by SS
- Evidence that existing recommended height was inadequate but SoS thought more work needed
- SoS adopted revised guidance maintaining existing recommended height whilst acknowledging that further work was needed and raising possibility of early review
- Adoption of policies may be lawful even if there is "more work to be done"

Consultation: Scope and Limits

**Evidence
gathering is not
consultation**

**SSWP v Eveleigh
[2023] EWCA Civ
810**

**No need to
consider issues not
addressed by policy**

**Transport Action v
SST [2025] EWHC
1273 (Admin)**

**Duty to
give reasons for
making policy, not
consultation
outcome**

**R (Spurrier) v S ST
[2020] PTSR 240**



Court approach to Policy challenges

Matt Hutchings KC



Once meaning is established...

**Any public law
challenge? E.g.
fettering of
discretion**

**Does guidance /
policy permit or
encourage
unlawful conduct?**

**Is any
departure from
policy /
guidance
lawful?**

Overview of Gillick principles

3-types of case where policy/guidance may be unlawful

1. Includes an inaccurate statement of law
2. Duty to provide a policy/guidance but includes inaccurate statement of law (or omission)
3. Not such a duty but provides one and indicates it's an accurate statement of law (including by omission)

Lords Burnett & Sales JJSC in R (A) v Secretary of State for the Home Department [2021] UKSC 37, [2021] 1 WLR 3931 at para. 38

BUT

- ❑ 3 categories are **illustrative** of how positive statements/omissions in a policy/guidance may authorise, encourage or approve unlawful conduct – see Linden J in R (Cardona) v SSHD [2022] 1 W.L.R. 1855 at para. 70
- ❑ Not applicable to policies/guidance giving practical guidance as to how decision-makers should exercise discretion in individual cases - see DHCJ Jonathan Moffett KC in R (CPH) v SSHD from paras. 130. esp. 147
- ❑ **Policies/Guidance may be unlawful for other (public law) reasons**

Three common issues for the court

**Public bodies
should generally
follow their policy
/ guidance**

**R (Duke of Sussex)
v SSHD [2025] 4
WLR 66**

**Are their
cogent
reasons for
departing from
guidance?**

Thank you

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