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Case No: CO/3275/2021 & CO/3276/2021

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**ADMINISTRATIVE COURT**

**PLANNING COURT**

Royal Courts of Justice Strand,

London, WC2A 2LL

Date: 24/06/2022

**Before :**

MRS JUSTICE LIEVEN

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**Between :**

**THE QUEEN on the application of**

**SALLY HOUGH**

**Claimant**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

**and**

**(1) FOLKESTONE AND HYTHE DISTRICT COUNCIL**

**(2) TAYLOR WIMPEY UK LIMITED**

**Interested Parties/Defendants**

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**Mr Alex Goodman, Mr Alex Shattock and Mr Charles Bishop** (instructed by **Deighton Pierce Glynn**) for the  
**Claimant**

**Mr Richard Honey QC, Mr Mark Westmoreland Smith and Mr Charles Streeten** (instructed by  
**Government Legal Department**) for the **Respondent**

**Mr Richard Harwood OBE QC** attended to observe for the **First Interested Party/Defendant The Second**  
**Interested Party/Defendant** did not attend and **was not represented**

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Approved Judgment

**Mrs Justice Lieven DBE :**

1. These are two linked challenges to the making of the Town and Country Planning (Napier Barracks) Special Development Order 2021/962 ('the SDO'). The Claimant is a local resident who has been running a drop-in centre at the Barracks since April 2021. There is no challenge to her standing to bring the claims.
2. The Claimant was represented by Alex Goodman, Alex Shattock and Charles Bishop. The First Respondent was represented by Richard Honey QC, Mark Westmoreland Smith and Charles Streeten. Richard Harwood QC attended to observe for the first Interested Party, the second Interested Party did not attend and was not represented.
3. Napier Barracks is part of Shorncliffe Garrison, a former military camp to the west of Folkestone, Kent. Shorncliffe Garrison has been considered surplus to Ministry of Defence requirements for many years. On 28 February 2014 an agreement was reached between the MoD and Taylor Wimpey, a housing developer. Part of that agreement was that Napier Barracks would be released to Taylor Wimpey for development in 2026. The Napier Barracks site comprises some 3 ha and at the moment has a number of single storey barracks buildings upon it.
4. On 17 December 2015 Shepway District Council granted planning permission to Taylor Wimpey for the redevelopment of Shorncliffe Garrison for a predominantly residential development with associated facilities and infrastructure ("the Taylor Wimpey development"). The permission was part full and part reserved matters. Accompanying the application was an Environmental Statement and an indicative phasing plan, which was tied by condition 14 to the permission. There is a significant factual dispute between the parties concerning the impact of the SDO on the Taylor Wimpey development. It is therefore necessary to set out the planning history, and the proposed timing, of that development.
5. The development was split into four phases with Napier Barracks forming Phase 4 and the adjoining area to the south, known as Burgoyne Barracks, being in Phase 2C. The dates within the phasing plan are that Phase 2 would commence in 2018 and Phase 4 in 2026. In accordance with the condition 11 of the outline permission, development must be commenced within 3 years of the land in that phase being released to Taylor Wimpey.
6. There were a number of further conditions attached to the outline planning permission including the production of a dust management plan for the construction works.
7. On 18 September 2020 Shepway District Council granted reserved matters approval for the Napier Barracks site and the Burgoyne Barracks site, thus placing Phase 2C and 4 into the same reserved matters approval.
8. Although the Claimant, through her expert witness Mr Leigh, suggests that the two Phases (2C and 4) were intended in the 2020 permission to be built together, the documentation shows that they are capable, both legally and practically, of being built separately. The documentation shows that Taylor Wimpey submitted the two phases together for reserved matters approval for the purposes of co-ordinating the design across the two areas. However, the reserved matters approval did not change the position from the outline consent, that they were distinct phases with the timeline for their

development being in practice driven by the land ownership constraint, namely that the MoD retained ownership over Napier until 2026.

9. Mr Honey took the Court through the documentation submitted by Taylor Wimpey. This shows that both the road and sewerage infrastructure can be built on the southern Burgoyne site before any work commences on Napier Barracks, thus indicating that Phase 2C can be commenced and indeed completed before Phase 4 is commenced in 2026. The reserved matters approval does not purport to change the phasing in condition 14 of the outline permission and does not impose any requirement as to building out the permission at the same time, or in one phase.

10. The process by which the Defendant made the SDO was not set out in any written document and was not known to the public at the time it was made. That process has now been described in a witness statement from Oliver Banner, a senior civil servant in the Home Office Resettlement, Asylum Support and Integration Directorate, and the relevant documents have been disclosed in these proceedings.

11. Since September 2020 Napier Barracks has been used by the Defendant as accommodation to house asylum seekers. The site continues to be owned by the Ministry of Defence and they have entered into an agreement with the Home Office to allow its use. The view taken by the relevant departments was that planning permission was required for the change of use from barracks to asylum accommodation. I note that the LPA, at least initially, did not consider that permission was needed, presumably in the light of the historic use of the site. In any event, permission was granted in reliance on Part Q, Part 19 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order ('GPDO'). Initially Class Q only allowed use for 6 months but, largely as a result of the Covid-19 pandemic, that period was subsequently extended to 12 months. Therefore, permission under Class Q subsisted until 20 September 2021.

12. In early 2021 a number of asylum seekers brought a judicial review challenging the conditions of their accommodation at Napier Barracks. On 3 June 2021 Linden J ruled in R (NB) v Secretary of State for the Home Department [2021] 4 WLR 92 that the provision of the accommodation was unlawful, inter alia for not meeting the minimum standards required under s.96 of the Immigration and Asylum Act 1999.

13. In the light of the NB judgment the Defendant made a number of changes and improvements to the provision of the accommodation including capping the amount of time each resident remained at the Barracks. The Secretary of State carried out a review and decided to continue using the Napier Barracks for asylum accommodation. Mr Banner explains that a briefing was sent to Ministers as to the options for retaining Napier Barracks after 21 September 2021, on 19 July 2021. The briefing explained the various planning options for continuing with the use and recommended the use of an SDO, and the Defendant decided to go down that legal route.

14. An Equality Impact Assessment ('EqIA') for the use of Napier Barracks for asylum accommodation was originally drawn up on 20 September 2020. This was updated on 15 July 2021. The premise of that document was that the use would only continue until 21 September 2021. I will return to the EqIA when I deal with Ground 3 (iii) at para 93 below.

15. On 9 August 2021 the Secretary of State for Defence agreed to extend the Defendant's use of Napier Barracks until March 2025 when the site would be passed back to the MoD and ownership would transfer to Taylor Wimpey pursuant to the contract.

16. On 26 August 2021 the Defendant made the SDO. The SDO grants planning permission for the use of Napier Barracks for asylum accommodation for 5 years from 21 September 2021. The SDO was laid before Parliament under the negative resolution procedure on 27 August 2021. It came into force on 21 September 2021.

17. On 12 August 2021 the Defendant instructed planning consultants Cushman & Wakefield ('C&W') to prepare an Environmental Impact Screening Assessment for the SDO. On 20 August they produced a request for a screening opinion pursuant to regulation 6 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ('EIA Regulations') which was an appendix to their planning report. They contacted Historic England, Highways England, Natural England and the Environment Agency in respect of the proposal. None of these bodies raised an objection, although neither Natural England nor the Environment Agency replied.

18. C&W's assessment considered the physical characteristics of the site and the previous documentation prepared on behalf of Taylor Wimpey. They considered that the development fell within paragraph 10(b) of Schedule 2 of the Environmental Impact Assessment Regulations and applied the criteria in Schedule 3 to determine whether the development was likely to have a significant environmental effect. They concluded that the development was "unlikely to have significant environmental effects" and therefore was not Environmental Impact Assessment ('EIA') development.

19. The Home Office had asked a planner from the Department for Education ('DfE') to carry out a review of the screening request and planning report. According to Mr Banner this was to ensure objective consideration of the planning proposal. The DfE produced a Submission Appraisal Report ('SAR') in which they agreed with C&W and concluded that the proposal was not EIA development and was appropriate subject to recommended conditions.

20. On 26 August 2021 Lord Greenhalgh considered the SAR and other supporting documents. I note that Lord Greenhalgh was at the time a Minister in both the Home Department and the Ministry of Housing, Communities and Local Government. Mr Banner states that the Ministry of Housing, Communities and Local Government ('MHCLG') had recommended that an independent Minister should be appointed as the decision maker to assess the planning proposal for the SDO, in order to achieve a separation of functions. Lord Greenhalgh had had no prior involvement with the Napier Barracks proposal, although he was a Minister in the Home Office.

21. Lord Greenhalgh was provided with a submission that explained the conclusions of the planning consultants, an analysis of the issues and an explanation that he was to act as an independent approving Minister.

22. In respect of the EqIA the submission to Lord Greenhalgh stated:

"A PES (Policy Equality Statement) has been completed for the current use of Napier as contingency accommodation. This would need to be revisited if Napier were to be used to pilot the reception centre model. This will inform final decisions about the reception centre requirements for those with protected characteristics."

It appears that Lord Greenhalgh did see the EqIA that had been updated on 21 July 2021.

23. Lord Greenhalgh on 26 August determined to approve the proposal, and it was decided that he should sign the SDO. The read out of the decision records:

“[Lord Greenhalgh] ... was mindful of the urgency and importance of securing contingency accommodation for asylum seekers, particularly given recent events in Afghanistan. He accepted that the proposed order is the most reasonable way in which to make available the planning permission required to continue to provide suitable accommodation for destitute asylum seekers, to the challenging timeframes required.

For the reasons set out in the advice, including the planning report and independent planning report from DfE, Lord Greenhalgh concluded there would likely be no significant environmental effects, including effects on designated sites, would arise as a consequence of the planning permission being granted by the SDO. He considered and was content that [g]iven the site’s past use as a military barracks, and current use as asylum accommodation, there would be minimal impact from the SDO on flood risk and drainage, Ecology, Transport and Highways, Ground Conditions, heritage, or noise. He also carefully considered the [EqIA] and Human Rights implications of the SDO, particularly in terms of the asylum seekers housed there and on the impact on local residents.

Lord Greenhalgh considered the draft SDO. He noted that the planning permission given was temporary until the end of September 2026 in article 4. He also noted that the permission was subject to the conditions in article 5, including the need for a OMP; and that the OMP should explicitly include provision to consult local residents, businesses and public services, as well as the other provisions outlined in the SDO. Having considered all of these materials together, particularly expert impartial advice together with the PSED, he agreed he was satisfied this allowed him to agree to the proposals and to make the order.

The Minister expressed his gratitude for all the quick work on this by officials and by external partners. He has emphasised that helping to provide shelter to those most in need is something we should be proud of as a Department, especially in the current circumstances.”

24. This claim was issued on 22 September 2021.

25. On 10 January 2022 the Defendant published on its website what was described as a consultation on the change of use at Napier Barracks together with a planning statement from C&W and what is described as an EIA Screening Opinion. Mr Honey says this consultation was pursuant to a request formally made on 11 January from the Defendant to the Secretary of State for Levelling Up, Housing and Communities requesting him to review the SDO.

### The Grounds

26. There are a number of Grounds, which I will set out in the order in which Mr Goodman argued them:

- a. Ground 1(iii) – breach of reg 64 of the EIA Regulations 2017;
- b. Ground 1(i) – breach of the EIA Regulations by failing to apply para 13(b) of Schedule 2 of the Regulations, by not assessing the “change” given effect by the SDO to the 2015 EIA development;
- c. Ground 1(ii)- breach of the EIA Regulations because the screening opinion failed to have proper regard to the in-combination effects of the SDO and the 2015 permission;
- d. Ground 2 – that the SDO is unlawful because it offends against the principle in Pilkington v Secretary of State for the Environment [1973] 1 WLR 1527 as the SDO rendered impossible the implementation of the reserved matters approval during the currency of the SDO permission;

e. Ground 3 – the SDO was ultra vires for the following reasons:

i.(i) the SDO unlawfully avoided the requirements of para Q(1)(b) of the GPDO; ii.(ii) there was a breach of the procedural requirements;

1. To consult;

2. To undertake relevant inquiries pursuant to the duty in Secretary of State for Education v Tameside MBC [1977] 1 AC 1014;

3. To comply with the Public Sector Equality Duty in s.149 of the Equality Act 2010;

f. Whether I should apply either s.31(2A) of the Senior Courts Act 1981 or the principle in Simplex GE (Holdings) v Secretary of State for Trade [1989] 3 PLR 25.

Ground 1(iii)

27. The Claimant argues that the SDO was made in the breach of the EIA Regulations on a number of different grounds. Ground 1(iii) is that the procedure the Defendant adopted was in breach of regulation 64.

28. Regulation 64 states:

“64.(1) Where an authority or the Secretary of State has a duty under these Regulations, they must perform that duty in an objective manner and so as not to find themselves in a situation giving rise to a conflict of interest.

(2) Where an authority, or the Secretary of State, is bringing forward a proposal for development and that authority or the Secretary of State, as appropriate, will also be responsible for determining its own proposal, the relevant authority or the Secretary of State must make appropriate administrative arrangements to ensure that there is a functional separation, when performing any duty under these Regulations, between the persons bringing forward a proposal for development and the persons responsible for determining that proposal.”

29. The source of regulation 64 in the EIA Directive 2014/52/EU is Article 9a:

“Member States shall ensure that the competent authority or authorities perform the duties arising from this Directive in an objective manner and do not find themselves in a situation giving rise to a conflict of interest.

Where the competent authority is also the developer, Member States shall at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions when performing the duties arising from this Directive.”

30. Mr Goodman submits that the process adopted for the SDO breached the requirements for legal certainty as required by EU law. He says that the lack of transparency over the administrative arrangements for achieving functional separation led to an unlawful procedure. He relies upon the lack of a written statement of the process; inaccuracy and confusion in the documentation; and the failure to inform the public as to what the process was.

31. The Claimant’s argument largely rests on the decision of Holgate J in London Historic Parks and Gardens Trust v Secretary of State for Communities and Local Government [2021] JPL 580. That case was a challenge to the handling arrangements made for the determination of the Secretary of State’s

planning application for the proposed Holocaust Memorial in Victoria Tower Gardens. The first issue was whether regulation 64 had been properly transposed from the EIA Directive 2014/52/EU. The Judge found that it had been properly transposed [115]. The second Ground was whether the handling arrangements complied with the duty to act in an objective manner and to make “appropriate administrative arrangements to ensure that there is functional separation”.

32. The Claimant in Historic Parks argued under the second issue that:

“Mr Howell QC submits that regulation 64(2) fails to comply with the principle of legal certainty in EU law. The requirements of article 9a have to be guaranteed by the member state through domestic law and with the precision and clarity necessary for persons concerned to know the full extent of any legal rights they have and to be able to have those rights enforced before national courts. He sometimes referred to this as a requirement for sufficiently precise rules. Administrative measures may not be relied upon to achieve any necessary transposition of a directive into domestic law. In this respect Mr Howell criticises regulation 64(2) because it allows individual planning authorities, whether the Secretary of State or local authority, to determine administrative arrangements, which may vary from case to case and may be varied administratively from time to time.”

33. In finding for the Claimant on the second ground Holgate J said at [126]:

“However, I accept Mr Howell’s criticisms that the current version of the handling arrangements fails to refer to regulation 64(2) and that there has also been a failure to publish the document. These requirements derive from the principle of legal certainty. They are matters of substance and not mere formalism. It is important to bring home to those to whom the arrangements apply, whether involved in the promotion of the development or the handling of the application by the competent authority, that the document lays down a regime in order to comply with the Secretary of State’s legal obligations under regulation 64(2), and that those regulations are enforceable in the courts.

Accordingly, ministers and officials must understand that they have to comply with the arrangements. The document is not to be treated as simply guidance. The document, and any amended version, should also be published so that the public is aware that it sets out the arrangements made by the Secretary of State in order to comply with his legal obligations under regulation 64(2).”

34. Mr Goodman argues that the process for determining the SDO and meeting the EIA requirements was not published and was completely non-transparent. Indeed, in respect of who was to be the decision maker, the determining Minister changed at the last moment. Mr Goodman relies upon the EU law principle of legal certainty, which he says, relying on Historic Parks, applies to the way in which the requirement for functional separation in regulation 64 is put in place. Therefore, there was a requirement to publish the administrative arrangements that were to be followed so that the public were aware of the process and therefore could vindicate their rights. In fact, the Claimant and the public did not know what the process had been until they received Mr Banner’s witness statement, and there was no publicity whatsoever around the screening opinion and how it was reached.

35. Mr Goodman argues that the process in Historic Parks was significantly more transparent and achieved greater functional separation through the role of the Planning Inspector than was the case here. However, Holgate J still determined that there was a breach of regulation 64 in that case. Mr Goodman also relies on the common law duty to inform those affected of a policy as set out in R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245 and R (Anufrijeva) v Secretary of State for the Home Department [2004] 1 AC 604.

36. He accepts that Historic Parks concerned the substantive EIA process rather than the screening stage but points out that Holgate J made no such point of distinction in the judgment. Further, he says the public need to be confident that the screening process has been carried out lawfully even though it does not give rise to the same rights of public participation.

37. Mr Goodman also relies on the fact that Lord Greenhalgh was a Minister in the Home Department, as well as the Ministry of Housing, Communities and Local Government and, as such, the functional separation required by regulation 64 has not been properly achieved.

38. Mr Honey submits that there are no obligations of transparency and publication under regulation 64, or more generally in respect of a screening opinion. The legal analysis in Historic Parks was different because the development there was accepted to be EIA development as it had been assessed as having significant likely environmental impact. That then gave rise to a number of public rights, including that of participation in the process. The fact that those rights existed then necessarily led to the need to ensure that the public had the information to allow them to vindicate those rights. However, in the present case there are no equivalent public rights because the decision in issue here is only that of a screening opinion, which gives rise to no rights of public participation. Therefore, the two situations are not analogous, and Historic Parks is of no relevance.

39. The references in Historic Parks to the principle of legal certainty must be seen in the context of the facts in that case where the public had a right to participate in the full EIA process. The relevant duty in regulation 64 which arose in the present case was only to make “appropriate administrative arrangements” and that is what was done. There was no obligation under regulation 64 to publish those arrangements, or even to write them down before the decision was made.

40. In my view, the Defendant is correct and there is no breach of regulation 64. There is a fundamental distinction between Historic Parks, which concerned a full EIA, and the present case, which concerns a screening opinion. In Historic Parks the public had legal rights, including that of participation, to which the principle of legal certainty had to apply. If the handling arrangements were not published and did not refer to the public rights in regulation 64(2) then the requirement for legal certainty was not achieved, and potentially the public could not vindicate their rights.

41. However, in the present case the public had no equivalent rights in relation to the screening opinion. The difference between the screening and the substantive stage of EIA has been emphasised in a number of cases and is critical in this case. I set out some of the cases where that distinction has been highlighted below, but they are summarised by the Court of Appeal in R (Kenyon) v SSHCLG [2020] EWCA Civ 302.

42. The most relevant issue at this stage of the analysis is that there is no public right to consultation or even notification at the screening stages. Neither regulation 64 nor Article 9a create any obligation for transparency of the screening process nor publication of any part of it. The only obligation under regulation 64 was to have “administrative arrangements” and the Defendant did have handling arrangements, albeit they were not written down. The failure to write them down in one document might well be legally problematic if there was a public right to know about them, but there was no such right in this process.

43. For these reasons I consider that the analysis in Historic Parks is distinguishable from the position in relation to the SDO and Ground 1(iii) fails.

Ground 1(i) and (ii)



44. Ground 1(i) and (ii) and Ground 2 are very closely aligned. The Claimant argues the development permitted by the SDO was “EIA development” within the meaning of regulation 2 of the EIA Regulations, and thus was prohibited to be granted without an EIA. She submits that the screening process was therefore flawed. Under Ground 1(i) the Claimant argues that the screening opinion failed to consider, pursuant to paragraph 13b of Schedule 2 of the Regulations, the likely significant effect of the “change” to the authorised Taylor Wimpey development, which was accepted to be EIA development. Alternatively, under Ground 1(ii) it is submitted that the screening opinion failed to have proper regard to the thresholds in paragraph 10(b) of Schedule 2 as itself being “an urban development project” (when taken with the Taylor Wimpey development). Alternatively, again, it failed to have proper regard to the selection criteria in Schedule 3, contrary to regulation 5(4).

45. By either route, the Claimant argues that the screening opinion should have assessed the Taylor Wimpey development and the SDO development together, and not the SDO development in isolation. Mr Goodman argues that there were three groups of impacts which arose from the “whole” development which were not assessed – population and health impacts, heritage impacts, and air quality and dust impacts.

46. The relevant provisions which set out what is defined as EIA development are as follows:

a. Regulation 2 provides that EIA development is either Schedule 1 development, or Schedule 2 development “likely to have significant effects on the environment by virtue of factors such as its nature, size or location”.

b. Regulation 3 places a prohibition on granting development consent for EIA development without EIA.

c. Schedule 2 paragraph 10 (b) states:

(b) Urban development projects, including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas;

(i) The development includes more than 1 hectare of urban development which is not dwellinghouse development; or

(ii) the development includes more than 150 dwellings; or

(iii) the overall area of the development exceeds 5 hectares

d. Schedule 2 paragraph 13(b) states:

“Any change to or extension of development of a description listed paragraphs 1 to 12 of column 1 of this table, where that development is already authorised, executed or in the process of being executed.”

e. Schedule 3 then sets out the selection criteria for screening Schedule 2 development.

47. The dispute between the parties turns on whether the SDO development was treated as a “standalone project”, and the Defendant therefore wrongly failed to consider the impacts on the permitted Taylor Wimpey Development in determining whether the SDO constituted EIA development under the paragraphs above.

48. Mr Goodman submits that the effect of the SDO is to change the permitted scheme, for example by changing the access routes, the timing of development, the mix of housing and the drainage strategy.

He relies upon R (Baker) v Bath and North East Somerset Council [2009] Env LR 27 where Collins J at [45]-[53] concluded that the Regulations, in their form at that time, failed to properly consider the whole impact of the development, and wrongly focused on the change or extension alone. In R (Warley) v Wealden DC [2012] Env LR 4 at [75] where Rabinder Singh QC sitting as a DHCJ (as he then was) said:

“It seems to me, accepting the claimant's submission, that approach is also applicable in the present case. To take one example, although floodlighting itself might on one view be thought to have relatively limited impact on the environment, if what it does is to facilitate more extensive use of a sports facility for longer hours and at different times of the night or day, that may well have an impact on other relevant considerations, for example impact on car parking issues and other environmental impact. It is for that reason that, if the answer to the question posed by paragraph 13 of schedule 2 was to be answered correctly, as distinct from the question in paragraph 10, then a careful analysis was needed of what the local planning authority's view was on what the overall consequences of the project would be once there had been the change made by reason of the floodlighting, “change” being the word used in paragraph 13 of schedule 2 .”

49. I note, as is so often the case where paragraphs are taken out of judgments in this way, that it is important to consider the context of what was being considered. In Baker there had been no EIA for the first development, so it is hardly surprising that Collins J held that when considering whether the threshold had been crossed, it was necessary to look at the totality of the two developments in order to determine whether there was a significant likely environmental effect. That is a materially different situation from the present where the first development (the Shorncliffe Barracks development) had been subject to EIA.

50. Warley concerned the addition of floodlighting to an existing tennis club. The effect of the floodlighting was to allow the intensification of the existing permitted use particularly at night, creating a significant likely environmental effect, which had neither existed at the time of the original permission nor been subject to EIA assessment. That is the point made by Mr Singh QC (as he then was) at [75]. That is not the case here because the SDO does not lead to any intensification of the use across the rest of the Shorncliffe Barracks site.

51. The legal principles to be applied in a challenge to an EIA decision making process were considered by the Court of Appeal in R (Kenyon) v SSHCLG [2020] EWCA Civ 302. There is, in my view, considerable relevance to the EIA Grounds in this case in the comment of Coulson LJ at [2]: “I wondered if the most important point to arise from the appeal hearing was the need to ensure that appeals in cases of this kind do not become another weary trot around a well worn course”.

52. The principles set out at [13] and [15] are directly applicable to the EIA Grounds here:

“13. The limited nature and scope of a screening opinion was emphasised by Moore-Bick LJ in R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157. He said at paragraph 20:

“20. Having dealt with those points I can return to the substance of the argument, which is that the planning officer failed to demonstrate that she had considered the likely effect of the development in relation to traffic movements, the landscape and noise or, if she had, to explain why an EIA was not required in this case. When considering a submission of this kind I think it important to bear in mind the nature of what is involved in giving a screening opinion. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an assessment of environmental factors, among others. Nor does it involve a full

assessment of any identifiable environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all. I think it important, therefore, that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the term "screening opinion"."

In the same case, Mummery LJ said:

"40. In my judgment, the decision not to have an EIA is a significantly different kind of decision from a refusal or grant of planning permission. The reasons for a preliminary administrative decision whether or not to have an EIA do not have to satisfy the same standards of information and reasoning as would apply to a substantive decision on a planning application. The degree of "grappling" is different, more provisional and less exacting..."

...

15. As to the practical limits of any screening decision, Lindblom J (as he then was) said in *Hockley v Essex County Council & Anr* [2013] EWHC 4051 (Admin) :

"102. There has to be a sensible limit to what a screening decision-maker is expected to do. This view is supported in the cases to which I have referred, notably, for example, in *Bateman* (see paragraph 24 above). Conjecture about future development on other sites that might or might not act with the development in question to produce indirect, secondary or cumulative effects is not in the screening decision-maker's remit. I do not think the precautionary approach extends to that. And when it is suggested in a claim for judicial review that a screening decision was deficient because some potential cumulative effect was left out, it is not enough for a claimant simply to point to other developments in the locality that have been or might be approved, and to leave it to the court to work out whether any aggregate effects were unlikely to be significant. Unless it is obvious that relevant and potentially significant effects on the environment have been overlooked, the court will need some objective evidence to show this was so. It will need to be satisfied that the authority responsible for the screening decision was aware, or ought to have been, of the potential cumulative effects; that the screening opinion could not reasonably have been negative if those potential effects had been considered; and that this was, or should have been, apparent to the authority at the time."

53. Mr Honey argues that the SDO is not a change to the Taylor Wimpey permission. It is a distinct development which does not alter or affect the permitted scheme. Most importantly, there is no requirement under the Shorncliffe Garrison permissions (outline and reserved matters) that Phase 2C and 4 are tied together and must be built out together. They were placed together in the reserved matters submission for reasons of consistency of design and approach, but that did not alter the timelines in the outline permission. The SDO does not prevent Phase 2C being completed by 2025, nor Phase 4 being commenced in 2026. Therefore, the grant of the SDO does not alter the permitted scheme, and the premise of the Claimant's Grounds relating to this point is wrong as a matter of fact.

54. His second answer is that paragraphs 10(b) and 13(b) of Schedule 2 are two different gateways to EIA screening. The development did pass through the paragraph 10(b) gateway as an urban development project and was screened but considered not likely to have a significant environmental effect and therefore not EIA development. It would have made no difference if it had also passed through the paragraph 13 (b) gateway as a change to the Shorncliffe Garrison permission. The crucial point is that whichever gateway is used, the development in question was judged not to have

significant likely environmental effects, and this was a matter of broad judgement for the Secretary of State, as shown by the caselaw referred to above. That question was answered under the paragraph 10 heading and would have been no different under the paragraph 13(b) heading.

55. As I understand Mr Goodman's response on this point, he submits that it is important for the decision maker to start from the correct position. It therefore matters that the Defendant should have started from an analysis under paragraph 13(b) in order to fully take into consideration the "in- combination" effects of the two developments co-existing. In particular, it was important to have regard to the fact that the asylum accommodation was next to a permitted housing site and the implications that had on the use of the Napier Barracks site. Therefore, on Mr Goodman's analysis, the alleged "change" to the Taylor Wimpey development brought about by the SDO should have led to the focus under paragraph 13(b) being on the combined developments.

56. The first stage of the analysis is a largely factual one, whether the SDO development did change the approved Taylor Wimpey development. The Claimant argues that the effect of permitting the use of Napier Barracks for five years from September 2021 was to change and ultimately frustrate, in part, the authorised development. The Claimant points to the reserved matters approval for Phase 2C and 4 together and argues that the SDO prevents the Napier Barracks part of the site being built until at least 2026. The SDO will necessarily entail that the access cannot be built out, that the drainage systems cannot be installed, and that the housing mix is not that contemplated by the reserved matters approval.

57. The Defendant says that as a matter of fact this analysis is not correct. Although Phase 2C and 4 were linked in the reserved matters approval, the phasing in condition 14 of the outline permission was not changed, and neither were the documents that lay behind it and were attached by condition, namely the Development Specification Document and the Masterplan. These contemplated that the Napier site would not be built out until 2029.

58. The legal position is that Taylor Wimpey already has possession of the Burgoyne site (Phase 2C) but will not receive the Napier site until 2026 and this has not changed by reason of the SDO. For design purposes, Taylor Wimpey decided to submit the reserved matters application for Phase 2C and 4 together, but there is nothing in the documentation which requires them to build both phases together or to vary the phasing in the outline. The phasing in the permissions therefore reflects the land availability agreed between Taylor Wimpey and the MoD.

59. Further, I accept that from the face of the submitted documents it is clear that both the drainage and the access on the Burgoyne and Napier parts of the reserved matters approval can be built separately. That is confirmed by Mr Banner's witness statement where he sets out in detail how the different parts of the development can be brought forward independently and in accordance with the timescales required by condition.

60. I therefore accept Mr Honey's submissions as to the effect of the SDO. It does not change the Taylor Wimpey permission. The contract with the MoD provided for the Napier site to be released to Taylor Wimpey in 2025. There is nothing in the structure of either the outline or reserved matters permission which required the Napier site to be developed earlier than that date. On the basis of the documentation and Mr Banner's witness statement I accept that the SDO does not change the permitted scheme. The timing does not change and matters such as access roads and drainage can be built as provided for in those permissions.

61. As such, there was no requirement on the Defendant to carry out an assessment under para 13(b) based on the change to the Taylor Wimpey permission because there was no such change.

62. The next stage of Mr Goodman's argument is that the Screening Opinion failed to consider the "in- combination" impacts. Mr Goodman argues that in considering the EIA grounds it is important to have regard to the overall purposes of the Directive, and in particular the need to avoid developers "salami- slicing" development so that the requirements of EIA are avoided. He points to the need for EIA at reserved matters stage if the environmental effects have not been fully assessed at the outline stage. He argues that the development within the SDO introduced new impacts over a five year period which needed to be assessed together with the Taylor Wimpey development. It was therefore necessary to consider the entire development across the Shorncliffe Barracks site to ensure that all the likely significant environmental impacts had been assessed.

63. To the degree that this is a separate point to that considered above, I do not accept it. As Mr Honey submits, the Defendant (in the SAR, the screening request and the Cushman & Wakefield planning report) did consider the Schedule 3 criteria and did take into account the fact that the Napier Barracks site adjoined the approved Shorncliffe Barracks site. The references were relatively short, but firstly this was only a screening opinion and secondly, the caselaw makes clear that the Court should be slow to interfere with such a matter of planning judgement.

64. For these reasons I think the Defendant's application of the EIA Regulations fell well within the scope of the appropriate judgement.

#### Ground 2

65. The Claimant argues that the SDO permission impedes the implementation of the Shorncliffe Garrison permission and as such is contrary to the principle in Pilkington v Secretary of State for the Environment [1973] 1 WLR 1527. In Pilkington the Court of Appeal held that where there were two incompatible permissions, the developer could not implement the earlier development when the later had rendered it no longer capable of implementation in the permitted terms.

66. Mr Goodman argues that the SDO makes it impossible to implement the reserved matters approval in 2019. He submits that the SDO permission causes a physical impediment to the completion of Phases 2C and 4 because it impedes the access routes, the drainage scheme and the mix of housing that was envisaged in the permitted scheme.

67. This ground fundamentally turns on the factual analysis of the planning permissions and the layout on the ground. Mr Goodman accepted that there was no breach of condition in Phase 2C, i.e. the Burgoyne Barracks site, not being completed in 2025 but argues that the SDO changes the form of the development.

68. However, as I have explained above, I accept Mr Honey's submission that the SDO does not prevent Phase 2C being built out in accordance with the permissions, and Phase 4 being commenced in 2026, as envisaged in the permissions and the Taylor Wimpey contract. This case therefore does not, on its own facts, fall within the principle in Pilkington and this ground therefore fails.

#### Ground 3

69. The Claimant's Ground 3 is that the SDO is ultra vires for four entirely legally distinct reasons. Firstly, because it frustrates the purpose of Class Q of the GDPO 2015; secondly, because of a failure to consult; thirdly, because of a failure to undertake a proper Tameside investigation, and fourthly

because of a failure to comply with the Public Sector Equality Duty ('PSED'). Slightly confusingly, the second and third arguments both fall within Ground 3(ii).

70. Under Ground 3(i) the Claimant argues that it is ultra vires s.59 Town and Country Planning Act 1990 ('TCPA') for the Defendant to make the SDO because of the requirement to remove the buildings in the GPDO.

71. Section 59 TCPA states:

**“59 Development orders: general.**

(1) The Secretary of State shall by order (in this Act referred to as a “development order”) provide for the granting of planning permission.

(2) A development order may either—

(a) itself grant planning permission for development specified in the order or for development of any class specified; or

(b) in respect of development for which planning permission is not granted by the order itself, provide for the granting of planning permission by the local planning authority (or, in the cases provided in the following provisions, by the Secretary of State or the Welsh Ministers on application to the authority (or, in the cases provided in the following provisions, on application to the Secretary of State or the Welsh Ministers) in accordance with the provisions of the order.

(3) A development order may be made either—

(a) as a general order applicable, except so far as the order otherwise provides, to all land, or

(b) as a special order applicable only to such land or descriptions of land as may be specified in the order.”

72. Mr Goodman submits that Class Q1(b) sets out the legal obligations upon the Defendant, namely the conditions on the permission requiring the removal of the development after 12 months. The Defendant has failed to comply with the conditions in Q1(b) and therefore the SDO has breached the statutory requirement in the GPDO and is unlawful.

73. Article 1(2) of the GPDO provides:

“(2) This order applies to all land in England, but where land is the subject of a special development order, whether made before or after the commencement of this Order, this Order applies only to that land only to such extent and subject to such modification as may be specified in the special development order”.

74. The conditions imposed on Class Q permitted development are follows:

“(1)(a) the developer must, as soon as practicable after commencing development, notify the local planning authority of that development; and

(b) on or before the expiry of the period of 12 months beginning with the date on which the development began—

(i) any use of that land for a purpose of Class Q ceases and any buildings, plant, machinery, structures and erections permitted by Class Q is removed; and

(ii) the land is restored to its condition before the development took place, or to such other state as may be agreed in writing between the local planning authority and the developer, unless permission for the development has been granted by virtue of any provision of this Schedule or on an application under Part 3 of the Act.”

75. Mr Honey submits that the SDO plainly overrides and takes precedence over the conditions set out in the GPDO. This is made explicit in Article 1(2) of the GPDO and Article 3 of the SDO which states:

“Subject to the provisions of this Order, the Town and Country Planning (General Permitted Development) (England) Order 2015(a) applies to Napier Barracks.”

Article 4 of the SDO then grants planning permission for the use.

76. Mr Honey argues that orders made under s.59 frequently amend earlier orders under the same provision. There can be nothing objectionable about such an order varying or amending the effect of an earlier order.

77. I accept Mr Honey’s submissions on this ground. The scheme of the GPDO and the SDO regimes, both made under s.59 of the TCPA, is that the specific powers in an SDO take precedence over the general powers created in the GPDO. This is made clear by Article 1(2) of the GPDO and Article 3 of the SDO. As Mr Honey submits, it is common for orders under s.59 to amend earlier orders made under the same provision. The second Order can supersede the first without expressly removing a GPDO condition that had not been complied with. There is nothing outside the intent or purposes of s. 59 for the later provision to override any condition or requirement imposed by the earlier provision.

78. Further, it would make no sense of the statutory scheme if where an SDO was granted after some GPDO power had been relied upon, for the SDO to have to expressly discharge any extant condition. The plain intent of Article 1(2) is that the SDO automatically takes precedence without the need for an express discharge of the condition.

79. Ground 3(ii) is that the SDO is unlawful because the Defendant’s failure to consult before making it was “conspicuously unfair”. Mr Goodman rests this argument on R (Article 39) v Secretary of State for Education [2021] PTSR 696, in particular [85], where Baker LJ said:

“85. Thirdly, given the impact of these proposed amendments on the very vulnerable children in the care system, it was in my judgment conspicuously unfair not to include those bodies representing their rights and interests within the informal consultation which the Secretary of State chose to carry out. I can find nothing about the circumstances that existed in March 2020 to justify the Secretary of State’s decision (if indeed any conscious decision was made) to exclude the Children’s Commissioner and other bodies representing the rights of children in care from the consultation on which he embarked. He decided to undertake a rapid informal consultation, substantially by email. In the circumstances, it was plainly appropriate for the consultation to be conducted in that fashion, rather than a more formal, drawn-out process. But having decided to undertake the consultation, there was no good reason why that process should not have included the Children’s Commissioner and the other bodies. On the contrary, there were very good reasons why they should have been included.

(1) The persons most affected by the regulations were the individuals whose rights and interests are represented by those bodies.

(2) Those individuals were particularly vulnerable – children in care, many of whom have been abused or neglected and in most cases were separated from their families, often at a considerable distance.

(3) The organisations best equipped to identify the impact of the proposed amendments on the vulnerable children were those expressly set up to represent their interests. They were plainly better equipped to do so than the local authorities and care providers whom the Secretary of State chose to consult. In so far as the judge concluded in the circumstances of this case that the interests of children would be sufficiently protected by consulting the providers, I respectfully disagree. The assertion in the submission to ministers on 6 April that the principles to be followed in making decisions were "broadly endorsed by the sector" was, in my view, potentially misleading. The "sector" plainly included not merely local authorities and service providers but also all those engaged or involved with children's social care, including those bodies whose focus was on children's rights.

(4) The Children's Commissioner has statutory responsibility to promote and protect the rights of children in England, and to consider the potential effect of government policy proposals and government proposals for legislation on children, particularly those children living away from home receiving social care. She, and other bodies, had been consulted before as part of the Department's established practice. The fact that Parliament, when amending and expanding the role and powers of the Children's Commissioner in 2014, chose not to include any general statutory duty to consult the Commissioner does not, in my view, assist in deciding whether there was a duty to consult on this occasion. I accept Ms Richards' submission, however, that, given the expanded powers and duties of the Commissioner found in s.2(3) and (4) of the Children Act 2004 as amended, once the Secretary of State decided to carry out a brief informal consultation about the proposed Amendment Regulations, it was irrational and unfair not to include the Commissioner in that consultation.

(5) By consulting those persons and organisations, the Secretary of State would have been better equipped to make judgments about how the regulation should be amended.”

80. The conclusion in Article 39 was based on the analysis in R (Plantagenet Alliance) v Secretary of State [2015] 3 All ER 261 and R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755.

81. Mr Goodman does not submit that there was any legitimate expectation of consultation. He argues that the fact that the condition required the use to cease on 21 September 2021 and that the Defendant had said the site would only be used on a temporary basis led to conspicuous unfairness in continuing the use without consultation. He relies upon the passage in R (Plantagenet Alliance) v Secretary of State for Justice [2015] 3 All ER 261 [98] where the Divisional Court refer to “conspicuous unfairness” being a ground for a duty to consult.

82. He also submits that the fact that there was consultation with some bodies, such as Highways England and Historic England, makes the case analogous with the situation in Article 39 where there was consultation with some bodies but not the Children’s Commissioner.

83. Mr Honey referred to R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755 at [42] where the Court of Appeal referred to the test for whether there was a duty to consult being whether the action was “so unfair as to amount to an abuse of power”.

84. Again, I consider this argument to be plainly wrong essentially for the reasons given by Mr Honey. As is well known, there is no general duty to consult in public law. Further, in circumstances where there is a detailed regulatory scheme in which many decisions are subject to statutory duties to consult, such as within the EIA process, the Court should be slow to import a further duty to consult into that statutory process. In order for a duty to consult to arise, there must be particular circumstances which give rise to conspicuous unfairness.



85. The phrase “conspicuous unfairness” is one open to a wide range of interpretations. I adopt the terminology used in the Court of Appeal in Bhatt Murphy that the unfairness must amount to an abuse of process. In Article 39 this test was met, particularly because of the statutory role of the Children’s Commissioner and the apparent decision to specifically exclude her from consultation. However, in the present case there is no such abuse of process or conspicuous unfairness.

86. Firstly, there was no promise or assurance of consultation which would give rise to a legitimate expectation or some lesser categorisation of conspicuous unfairness. The statement in October 2020 that the site would be used for 12 months was plainly in the context of the GPDO allowing a use of the site under Class Q for 12 months. It was not a statement that there would be no further use sought, nor that the public would be consulted if any further use was contemplated.

87. Secondly, the case is not analogous with Article 39. In that case the potential impact on the children in the case of the proposed changes was very great, and it appeared that the Children’s Commissioner had been deliberately excluded from the consultation which had taken place with other stakeholders. Further, as Baker LJ set out, the children who would be affected by the proposals were particularly vulnerable, and the Children’s Commissioner was the person with statutory responsibility to protect their interests. There was therefore an extremely strong case for her being consulted on the proposals.

88. Thirdly, the consultation that did take place was with the statutory bodies such as Highways England. On the facts of the case there is no abuse of power in the Defendant consulting with those bodies with statutory responsibility for matters such as highways but not with the general public. The public, particularly those in the vicinity of the site, did have an interest in the proposed development. But absent a general duty to consult, that interest was not sufficient to give rise to conspicuous unfairness in them not being consulted about the proposal.

89. For these reasons this Ground fails.

90. Ground 3(ii), part two, is that the Defendant failed to carry out the necessary inquiries as to the material impacts of the proposed development, and as such failed to fulfil the requirements of Secretary of State for Education v Tameside MBC [1977] 1 AC 1014. The inquiries that the Claimant says the Defendant failed to carry out were into the material planning impacts namely the risk of unexploded ordinance on the site; the impact on health infrastructure, such as local GP surgeries; the co-location of asylum accommodation and a housing scheme; the heritage impacts on the listed St Marks Garrison Church and the implications on the LPA’s development plan and housing land supply.

91. In my view, there is no merit in this Ground. The Defendant, through the work of Cushman & Wakefield, had carried out considerable investigations into the site, the planning history and relevant matters such as heritage impacts, the relationship to adjoining development and health impacts on the site. These investigations were not as full, nor doubtless as accurate, as they would have been if consultation had been undertaken. However, there was, as I have set out above, no duty to consult.

92. These investigations might be considered to be somewhat cursory, but that does not mean that the decision was unlawful. Tameside is a high test (see inter alia Plantagenet Alliance at [99]-[100]). It is for the decision maker to decide the manner and intensity of the investigation subject only to the Court’s rationality review and there is no obligation on a decision maker to have full knowledge of every matter that could conceivably be relevant. In my view the Defendant had undertaken an adequate level of investigation through the C&W work.

93. Ground 3(iii) is whether the Defendant erred in law in respect of her PSED under the Equality Act 2010. Section 149 of that Act states:

“(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.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(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.

...

(5) Having due regard to the need to foster good relations 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) tackle prejudice, and

(b) promote understanding.

....

(7) The relevant protected characteristics are— age;

disability;

gender reassignment;

pregnancy and maternity; race;

religion or belief;

sex;

sexual orientation.

...”

94. The scope of the PSED was neatly encapsulated by the Court of Appeal in R (Bridges) v Chief Constable of South Wales Police [2020] 1 WLR 5037 at [181]:

“We acknowledge that what is required by the PSED is dependent on the context and does not require the impossible. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics, in particular for present purposes race and sex.”

95. At [175] the Court of Appeal endorsed McCombe LJ’s summary of the principles that emerge from the earlier caselaw in R (Bracking) v Secretary of State for Work and Pensions [2014] EqLR 60:

“In that summary McCombe LJ referred to earlier important decisions, including those of the Divisional Court in R (Brown) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) [2009] PTSR 1506, in which the judgment was given by Aikens LJ; and R (Hurley) v Secretary of State for Business, Innovation and Skills [2012] HRLR 13, in which the judgment was given by Elias LJ. For present purposes we would emphasise the following principles, which were set out in McCombe LJ’s summary in Bracking and are supported by the earlier authorities:

- (1) The PSED must be fulfilled before and at the time when a particular policy is being considered.
- (2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
- (3) The duty is non-delegable.
- (4) The duty is a continuing one.
- (5) 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.
- (6) 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 it is for the decision-maker to decide how much weight should be given to the various factors informing the decision.”

96. In R (End Violence Against Women) v Director of Public Prosecutions [2021] 1 WLR 5829 the Court of Appeal said at [86]:

“Section 149 of the 2010 Act applies to a public authority when it exercises its functions (see section 149(1)). It requires a public authority to give the equality needs which are listed in section 149 the regard which is ‘due’ in the particular context. It does not dictate a particular result. It does not require an elaborate structure of secondary decision making every time a public authority makes any decision which might engage the listed equality needs, however remotely. The court is not concerned with formulaic box-ticking, but with the question whether, in substance, the public authority has complied with section 149. A public authority can comply with section 149 even if the decision maker

does not refer to section 149 (see, for example, *Hottak v. Southwark London Borough Council* [2015] UKSC 30; [2016] AC 811).”

97. Mr Honey relies on *R (Sheakh) v London Borough of Lambeth* [2021] EWHC 1745:

“148. Next, I accept Mr Mould's submission that the duty is not a duty to carry out an assessment. It is a duty to have due regard to what can be called the equality objectives. Assessment is the tool used to create the evidence base to show performance of the duty. It is not the performance of the duty itself. There is no necessary breach of the duty where no formal assessment has been done.”

98. In *R (Hurley) v Secretary State for Business Innovation and Skills* [2012] EWHC 201 Elias LJ said at [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.”

99. The Minister here did have the Equality Impact Assessment dated 15 July 2021. However, this document was expressly dealing with the use of the site only up to September 2021. It states in the introductory section: “The site will be used until 21st September 2021, as agreed with the MoD... Napier, by design, is intended for short-term use and was secured as an emergency measure because of shortages in the general accommodation estate during lockdown and the global pandemic”.

100. There is brief mention in the EqIA of the impact on community relations of the use:

“The site has placed asylum seekers in an area not previously used to housing asylum seekers. Community relations have been managed via online panel events with the Home Office and via a joint letter from the Home Secretary and the local leaders. There have been tensions online and demonstrations outside the camp both against the asylum seekers and against the camp in support of the asylum seekers.”

101. The Claimant argues that the assessment of equality impacts that was carried out was wholly inadequate. The subject matter here, the provision of asylum accommodation with the asylum seekers housed together and separately from the local population, was one that had a direct equalities impact that demanded proper consideration. By reason of being placed together in one large and plainly segregated accommodation, the asylum seekers were marked out as a group which created obvious and significant equalities implications.

102. The work that was done in the EqIA highlighted that there were concerns, but this was only for the very limited period up to 21 September 2021 rather than for the five year period permitted by the SDO. The Defendant has failed to have regard to the duty to eliminate harassment and victimisation, two specific heads under s.149. Mr Goodman submits that the EqIA did not have any meaningful regard to the impact of the decision on community relations in the area, in particular the co-location of the asylum accommodation and the housing development.

103. Mr Honey submits that the Defendant did have adequate regard to the duty under s.149. The Minister had the full suite of decision-making documents which referred to the PSED. The read out from the Ministerial meeting dated 26 August 2021 expressly stated: “He [the Minister] also considered the PSED and the Human Rights implications of the SDO, particularly in terms of the asylum seekers housed there and on the impact on local residents”.

104. Mr Honey submits, correctly, that the caselaw makes clear that there is no need for an EqIA document. The EqIA which was carried out for the use up to 21 September 2021 was for the nature of the use, i.e. asylum accommodation, which was the same use as that to be continued after that date. Therefore, the Defendant had the relevant information. It was obvious to the Minister that the use was to carry on for five years, and therefore the impacts that were relevant up to 21 September would themselves carry on for the period of the SDO. He would therefore necessarily have had regard to the impacts in s.149.

105. There was nothing else that had changed between the period covered by the EIA and the period covered by the SDO. Mr Honey submits that if regard is had to the substance rather than the form of the assessment, then it is clear that the Minister considered the relevant statutory duty.

106. In my view there has been a failure to have proper regard to the PSED. The caselaw establishes that whether the s.149 duty has been complied with involves a highly fact sensitive inquiry, both into the nature of the decision and the form of the consideration of equality issues. The nature of the development here is one that raises very obvious issues under s.149, in particular relating to potential victimisation and harassment under s.149(1)(a), and the fostering of good relations under s.149(c). The provision of a large amount of segregated accommodation for male asylum seekers on the edge of the town has the obvious potential to create tensions within the local community. This risk was set out in the EqIA and I accept that the Minister must therefore have been aware of the general issue.

107. However, there is a very significant difference between a development which is proposed to continue for two months and one for five years. This must especially be the case where the issue is developing community relations, as opposed to some physical impact which will vary little over time. Pressure on community services, for example on the local GP and community health services and possibly on the police, will be very much greater over a prolonged period than only two months. The potential for impact on community relations are wholly different over the much longer period. In the documentation before the Minister, there is no consideration of those longer-term impacts on the community relations. There is no consideration of the ability of local health services to manage this population over the much longer period, and how that situation might impact on issues relevant to s. 149.

108. Very importantly, this lack of assessment of PSED impacts over five years then means that there is no consideration of what steps could be taken to mitigate such impacts, including liaison between local agencies. The PSED is there in part to allow for the proper consideration of impacts from a decision so that the decision maker can consider what further steps or mitigation might be taken. If an EqIA had been carried out for the SDO development, proposals for mitigation or changes to the scheme might have been recommended which the Minister would then have considered. It is for this reason that the failure to produce a proper EqIA, in whatever form, is of material significance in this case. Although the Minister knew that the use would continue for five years, he did not have information about how that would impact on community relations over that period and what other steps could or should be taken.

109. Mr Honey refers to the fact that the duration of the accommodation for any individual asylum seeker remains limited to 90 days so the impact for them is much less than the five years. However, in respect of s.149 impacts that is in my view largely irrelevant. The potential tensions with the local community and the pressure on services and facilities that may lead to harassment and victimisation do not relate to individual asylum seekers duration in the accommodation, but rather the duration of the use. Indeed, it may be that the rapid turnover of residents and the effect that has on local services is itself a factor which itself needs to be considered under the s.149 duty.

110. For these reasons I do not consider that there was a proper consideration of the s.149 duty in this case.

Discretion – Simplex/section 31(2A) Senior Courts Act 1981

111. Mr Honey submits that the Court should apply the “no difference” principle if any of the Grounds set out above are made out. He submitted there was no material distinction in this case between the test in Simplex GE (Holdings) v Secretary of State [1989] 3 PLR 25 or in s.31(2A) Senior Courts Act 1981 that the decision was “highly likely not to be substantially different.”

112. Given that I have only found for the Claimant on Ground 3(iii) it is only necessary to address this issue in respect of that Ground. Mr Honey referred to Gathercole v Suffolk CC [2020] EWCA Civ 1179 at [38]–[39]:

“38. It is important that a court faced with an application for judicial review does not shirk the obligation imposed by Section 31 (2A). The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic.

39. In my view, this case is a good example of the type of situation for which Section 31(2A) was designed. For the reasons set out below, I consider that, if there had been a paragraph in the officer's report flagging the point, explaining that the use of the outdoor areas was subject to all possible noise mitigation measures but that there was a potential residual issue for children with protected characteristics, it would have made absolutely no difference to the planning decision that was taken.”

113. I do not consider that this is a case where a fresh decision is highly likely to be the same and that quashing the decision would merely lead to a waste of time and money. It may be that the Defendant would still decide to use Napier Barracks as asylum accommodation. However, given the concerns raised about the impact on community relations of the use, and the complete absence of analysis of the effects of that use over five years on community relations, I am not in a position to say there would be “no difference” to the decision. Even if the substantive decision was the same, there is a real possibility that if proper investigation were made, and the Minister fully appraised as to the Equalities impacts of the development, further mitigation measures might be put in place. An EqIA for the five year use would inevitably consider impacts on local resources and this might well lead to a need to put further investment into those resources in ways that would reduce community impacts.

114. For these reasons I do not consider that this is a case where Simplex and or s.31A SCA should be applied.

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