Neutral Citation Number: [2015] EWHC 44 (Admin)

Cases No: CO/2812/2014 and CO/2914/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2015

Before:

MR JUSTICE GILBART

- -

Between:

CHARMAINE MOORE and SARAH COATES	**Claimants**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
and	
LONDON BOROUGH OF BROMLEY and DARTFORD BOROUGH COUNCIL	**Interested Parties**
and	
EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

- -
- -

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for the **Defendant Secretary of State**
The interested parties were not represented and did not appear

Hearing dates: 4th-5th December 2014

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Approved Judgment

MR JUSTICE GILBART:

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1 Introduction

1. In this case the Court is required to consider the approach of the Defendant Secretary of State for Communities and Local Government ("SSCLG") to the consideration and determination of planning appeals which relate to the provision of pitches for use by travellers within the Green Belt. Such pitches are used to station caravans in which travellers live.

2. In broad terms, the SSCLG has taken steps to recover planning appeals for determination by himself where they relate to proposals for pitches, whether occupied by one or more caravans, within the Green Belt. Although at first he did not seek to recover all such appeals, he was doing so from the latter part of 2013, and did so until September 2014, when he reduced the percentage recovered to 75%. That has had the effect of causing considerable delay in the hearing and determination of those appeals, and because the great majority of such appeals relate to pitches used by particular ethnic communities (Romany gypsies and Irish Travellers), the effect of the practice (to use a neutral term) has led to this challenge. For it is contended by the Claimants and by the Intervener Equality and Human Rights Commission ("EHRC") that he has acted in breach of the provisions of the *Equality Act 2010* ("*EA 2010*"), in a way which has led to unlawful indirect discrimination contrary to s 19 of the Act, and to a breach of the Public Sector Equality Duty ("PSED") imposed on him by s 149 of the Act. The EHRC also contend that the Defendant has acted contrary to his declared policy on the recovery of jurisdiction of appeals without giving reasons for doing so, or has adopted a policy which is undisclosed and conflicts with his declared policy. The Claimants also contend that he has acted in breach of Articles 6 and 8 of the European Convention of Human Rights ("ECHR"), and has acted in abuse of power, irrationally and has shown bias towards the claimants on the basis that they are travellers.

3. The Defendant SSCLG denies that he has acted in breach of either s 19 or s 149 of the *EA 2010*¸ and denies that the other claims are established. His contention is that he was entitled to recover the appeals in the way and to the extent that he did, as an exercise of his powers and discretion as Secretary of State.

4. Understanding the background to the claim requires some understanding of the system of appeals within the town and country planning system of England and Wales, as well as some understanding of the policies of the SSCLG as they affect the Green Belt, and the provision of pitches for travellers. I shall therefore start this judgment by a short description of the appeal system, followed by an analysis of relevant planning policies, before turning to the recovery of appeals for determination by him, which is the main area of dispute.

2 Determination of planning appeals - the legal and policy framework

5. In broad terms, building operations, or material changes of use involve acts of development under s 55 of the Town and Country Planning Act 1990 (as amended) "*TCPA 1990*", which then (s 57) require planning permission from the local planning authority, unless planning permission is granted by a development order (s 59). An applicant for permission who is refused planning permission, or whose application is

undetermined within the prescribed period may appeal against the actual or (in the latter case) deemed refusal - see s78 (1) and (2) *TCPA 1990*. The appeal is to the SSCLG (s 78). His powers on appeal appear in s 79:

> (1) On an appeal under section 78 the Secretary of State may—
> (a) allow or dismiss the appeal, or
> (b) reverse or vary any part of the decision of the local planning authority (whether the appeal relates to that part of it or not),
> and may deal with the application as if it had been made to him in the first instance.
> (2) Before determining an appeal under section 78 the Secretary of State shall, if either the appellant or the local planning authority so wish, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.
> (3)-(6)……
> (7) Schedule 6 applies to appeals under section 78, including appeals under that section as applied by or under any other provision of this Act.

6. By Schedule 6 paragraph 1 of the Act, the SSCLG may:

> "by regulations prescribe classes of appeals under sections 78 ……which are to be determined by a person appointed by the Secretary of State for the purpose instead of by the Secretary of State.
> (2) Those classes of appeals shall be so determined except in such classes of case—
> (a) as may for the time being be prescribed, or
> (b) as may be specified in directions given by the Secretary of State."

7. Such persons are of course the Inspectors employed by the Planning Inspectorate. Paragraph 2 provides that a decision by an Inspector has the same authority in law as one of the SSCLG:

> 2(1) An appointed person shall have the same powers and duties—
> (a) in relation to an appeal under section 78, as the Secretary of State has under subsections (1), (4) and (6A) of section 79;
> (aa)-(e)……
>
> (2) Sections 79(2)……..shall not apply to an appeal which falls to be determined by an appointed person, but before it is determined the Secretary of State shall ask the appellant and the local planning authority whether they wish to appear before and be heard by the appointed person.
> (3) If both the parties express a wish not to appear and be heard the appeal may be determined without their being heard.
> (4) If either of the parties expresses a wish to appear and be heard, the appointed person shall give them both an opportunity of doing so.
> (5) ……
> (6) Where an appeal has been determined by an appointed person, his decision shall be treated as that of the Secretary of State.
> (7) Except as provided by Part XII, the validity of that decision shall not be questioned in any proceedings whatsoever.

> (8) It shall not be a ground of application to the High Court under section 288, or of appeal to the High Court under section. . ., that an appeal ought to have been determined by the Secretary of State and not by an appointed person, unless the appellant or the local planning authority challenge the appointed person's power to determine the appeal before his decision on the appeal is given.
> (9) Where in any enactment (including this Act) there is a reference to the Secretary of State in a context relating or capable of relating to an appeal to which this Schedule applies or to anything done or authorised or required to be done by, to or before the Secretary of State on or in connection with any such appeal, then so far as the context permits it shall be construed, in relation to an appeal determined or falling to be determined by an appointed person, as a reference to him."

8. The SSCLG has the power under paragraph 3 of Schedule 6 to direct that an appeal which would otherwise be determined by an Inspector should be determined by him:

> "3(1) The Secretary of State may, if he thinks fit, direct that an appeal which would otherwise fall to be determined by an appointed person shall instead be determined by the Secretary of State.
> (2) Such a direction shall state the reasons for which it is given and shall be served on the person, if any, so appointed, the appellant, the local planning authority and any person who has made representations relating to the subject matter of the appeal which the authority are required to take into account under any provision of a development order made by virtue of section 71(2) (a).
> (3) Where in consequence of such a direction an appeal falls to be determined by the Secretary of State, the provisions of this Act which are relevant to the appeal shall, subject to the following provisions of this paragraph, apply to the appeal as if this Schedule had never applied to it.
> (4) The Secretary of State shall give the appellant, the local planning authority and any person who has made any such representations as mentioned in sub-paragraph (2) an opportunity of appearing before and being heard by a person appointed by the Secretary of State for that purpose if—
> (a) the reasons for the direction raise matters with respect to which any of those persons have not made representations; or
> (b) in the case of the appellant or the local planning authority, either of them was not asked in pursuance of paragraph 2(2) whether they wished to appear before and be heard by the appointed person, or expressed no wish in answer to that question, or expressed a wish to appear and be heard, but was not given an opportunity of doing so.
> (5)- (5A)……..
> (6) Except as provided by sub-paragraph (4)……., the Secretary of State need not give any person an opportunity of appearing before and being heard by a person appointed for the purpose, or of making fresh representations or making or withdrawing any representations already made.
> (7) In determining the appeal the Secretary of State may take into account any report made to him by any person previously appointed to determine it."

9. In fact, over 90% of planning appeals are decided by Inspectors rather than by the Secretary of State. If decided by an Inspector, s/he will write the decision letter. If decided by the SSCLG, the Inspector will write a report setting out the parties' cases,

the Inspector's findings of facts and the Inspector's conclusions and recommendations. The SSCLG will then issue a decision letter. He is entitled to reach conclusions differing from those of the Inspector, but if he seeks to differ on a finding of fact (if mentioned in or material to a conclusion reached by the Inspector) he must follow the procedure in Rule 17(5) of the *Town and Country Planning (Inquiries Procedure) Rules 2000* and afford the opportunity for further representations from those entitled to appear at the inquiry, or for their asking for the inquiry to be re-opened.

10. The time taken for decisions differs considerably between the two routes. It was common ground before me that an Inspector's decision letter is usually received within 8 weeks of the end of an inquiry. Many are received within a much shorter timescale. However it can take 6 months or more after the end of an inquiry for a decision letter to be issued should the matter be determined by the SSCLG. Although it might seem worthy of adverse comment that a decision after an inquiry relating to a small area of land which (in most cases) has lasted for two days at most can take that long to determine, the evidence before me from the SSCLG was that the Department's casework division finds such appeals complex and difficult, and that they require between 30 - 40 hours to 300 hours of dedicated work apiece, with an average time taken of 100 hours[1]. I have some scepticism about those figures, but they were unchallenged.

11. It is necessary at this stage to say something also of the position in law of the Secretary of State as policy maker, and as decision maker. I can do no better than to refer to the descriptions of the system in England and Wales set out by Lord Slynn of Hadley and Lord Clyde in *R (Alconbury Developments Limited) v. Secretary of State for Environment, Transport and the Regions),* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 All ER 929, [2001] 82 P & CR 40, [2001] JPL 920, [2001] 2 PLR 76 ("*Alconbury*"). Lord Slynn said at paragraph 48

> "48. The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for elected Members of Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for these objectives to be set out in legislation, primary and secondary, in ministerial directions and in planning policy guidelines. Local authorities, inspectors and the Secretary of State are all required to have regard to policy in taking particular planning decisions and it is easy to overstate the difference between the application of a policy in decisions taken by the Secretary of State and his inspector. As to the making of policy, *Wade & Forsyth Administrative Law,* 8th ed (2000) p 464:
>
> > "It is self-evident that ministerial or departmental policy cannot be regarded as disqualifying bias. One of the commonest administrative mechanisms is to give a minister power to make or confirm an order after hearing objections to it. The procedure for the hearing of objections is subject to the rules of natural justice in so far as they require a fair hearing and fair procedure generally. But the minister's decision cannot be impugned on the ground that he has advocated the scheme or that he is known to support it as a matter of policy. The whole object

[1] Figures given in submission to Minister on 3rd June 2013 at para 10.

> of putting the power into his hands is that he may exercise it according to government policy."
>
> As Mr Gregory Jones put it pithily in argument it is not right to say that a policy maker cannot be a decision maker or that the final decision maker cannot be a democratically elected person or body."

12. I would refer also to this passage in the speech of Lord Clyde at paragraphs 139 ff:

> "139. The general context in which this challenge is raised is that of planning and development. The functions of the Secretary of State in the context of planning may conveniently be referred to as "administrative", in the sense that they are dealing with policy and expediency rather than with the regulation of rights. We are concerned with an administrative process and an administrative decision. Planning is a matter of the formation and application of policy. The policy is not matter for the courts but for the Executive. Where decisions are required in the planning process they are not made by judges, but by members of the administration. Members of the administration may be required in some of their functions to act in a judicial manner in that they may have to observe procedural rules and the overarching principles of fairness. But while they may on some occasions be required to act like judges, they are not judges and their determinations on matters affecting civil rights and obligations are not to be seen as judicial decisions. Even although there may be stages in the procedure leading up to the decision where what used to be described as a quasi-judicial character is superadded to the administrative task, the eventual decision is an administrative one. As was long ago observed by Lord Greene MR in *B Johnson & Co (Builders) Ltd Minister of Health* [1947] 2 All ER 395, 399:
>
> > "That decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objections, vis-à-vis the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue."
>
> Moreover the decision requires to take into account not just the facts of the case but very much wider issues of public interest, national priorities. Thus the function of the Secretary of State as a decision-maker in planning matters is not in a proper sense a judicial function, although certain qualities of a judicial kind are required of him.
>
> 140. Planning and the development of land are matters which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured. National planning guidance can be prepared and promulgated and that guidance will influence the local development plans and policies which the planning authorities will use in resolving their own local problems. As is explained in paragraph I of the Government's publication Planning Policy Guidance Notes, the need to take account of economic, environmental, social and other factors requires a framework which provides consistent, predictable and prompt decision-making. At the heart of that system are development plans. The guidance sets out the objectives and policies comprised in the framework within which the local authorities are required to draw up their development plans and in accordance with which their planning decisions should be made. One element which lies behind the framework is the policy of securing what is termed sustainable development, an objective which is essentially a matter of governmental strategy.

141. Once it is recognised that there should be a national planning policy under a central supervision, it is consistent with democratic principle that the responsibility for that work should lie on the shoulders of a minister answerable to Parliament. The whole scheme of the planning legislation involves an allocation of various functions respectively between local authorities and the Secretary of State. In placing some functions upon the Secretary of State it is of course recognised that he will not personally attend to every case himself. The responsibility is given to his department and the power rests in the department with the Secretary of State as its head and responsible for the carrying out of its work. Within his department a minister may well take advice on law and policy (*Bushell v Secretary of State for the Environment* [1981] AC 75) and the Secretary of State is entitled to seek elucidation on matters raised by the case which he has to decide, provided always that he observes the basic rules of fairness. In particular he should in fairness give the parties an opportunity to comment if after a public inquiry some significant factual material of which the parties might not be aware comes to his notice through departmental inquiry.

142. There may be various agencies which will advise him on particular aspects of planning, as for example an agency skilled in the conservation of historic buildings. But it is a false analysis to claim that there is a lis between a developer and such an agency which will be heard and determined by the minister. As Lord Greene MR observed in *Johnson,* at p 399, in relation to objections to a compulsory purchase order proposed by a local authority:

> "it is not a lis inter partes, and for the simple reason that the local authority and the objectors are not parties to anything that resembles litigation. . . . on the substantive matter, viz whether the order should be confirmed or not, there is a third party who is not present, viz, the public, and it is the function of the minister to consider the rights and interests of the public."

The minister is not bound to follow the view of any agency, nor is he bound to follow the desires or interests of any other Government department. He is not bound to apply a particular policy if the circumstances seem to him inappropriate for its application. He is not independent. Indeed it is not suggested that he is. But that is not to say that in making the decisions on the matters in issue in the present appeals he is both judge and party. It does not seem to me correct to say of the Secretary of State that he is judex in sua causa, at least in any strict sense of that expression. He is, as I have already sought to explain, not strictly a judge. Moreover the cause is not in any precise sense his own. No one is suggesting that he, or the officials in his department, have any personal financial or proprietary interest in these cases. The concern of the Secretary of State and his department is to manage planning and development in accordance with the broad lines of policy which have been prepared in the national interest."

3 Short history of Written Ministerial Statements setting out recovery criteria

- ***a. WMS 30th June 2008***
- ***b. WMS 1 1st July 2013***
- ***c. WMS 2 17th January 2014***

13. Against that background, the SSCLG was of course entitled to issue a policy on the recovery of appeals for determination by himself. The issue of a policy, and especially so in the form of a Ministerial Statement to the House of Commons, has the signal advantage of allowing political and public scrutiny of the approach of the Secretary of State. On 30th June 2008 the then Parliamentary Under Secretary of State set out the then policy (and described as policy) of the SSCLG, in the following terms

> "The majority of planning appeals in England are decided by inspectors, but a small percentage is decided by the Secretary of State for Communities and Local Government, usually because the development is large and/or controversial. Around 27,000 appeals are made each year: in 2007, 110 appeals were determined by the Secretary of State.
> This statement sets out the Secretary of State's policy on recovering planning appeals. It replaces the previous policy on which appeals are recovered for the Secretary of State's determination (which was set out in a House of Commons *Hansard* written answer for 24 July 2006). These changes are being made following the review of the 2006 criteria promised in the White Paper, "Planning for a Sustainable Future". They introduce two new criteria, one of which relates to climate change and energy and the others to World Heritage Sites.
> In future the Secretary of State will consider recovery of appeals involving:
>
> - proposals for development of major importance having more than local significance;
> - proposals giving rise to substantial regional or national controversy;
> - proposals which raise important or novel issues of development control and/or legal difficulties;
> - proposals against which another Government Department has raised major objections or has a major interest;
> - proposals of major significance for the delivery of the Government's climate change programme and energy policies;
> - any proposal for residential development of over 150 units or on sites of over five hectares, which would significantly impact on the Government's objective to secure a better balance between housing demand and supply and create high quality, sustainable, mixed and inclusive communities;
> - proposals which involve any main town centre use or uses (as set out in paragraph 1.8 of PPS6) where that use or uses comprise(s) over 9,000m (2) gross floor space (either as a single proposal or as part of or in combination with other current proposals), and which are proposed on a site in an edge-of-centre or out-of-centre location (as described in Table 2 of PPS6) that is not in accordance with an up-to-date development plan document prepared in accordance with the policy in PPS6;
> - proposals for significant development in the green belt;

- major proposals involving the winning and working of minerals; and
- proposals which would have an adverse impact on the outstanding universal value, integrity, authenticity and significance of a World Heritage Site.

There may on occasion be other cases which merit recovery because of the particular circumstances."

14. A written Ministerial Statement ("WMS") was given on 1st July 2013 by the Local Government Minister (referred to before me as "WMS 1"). It stated that in the case of

> "traveller sites"

the SSCLG was

> "revising the recovery criteria issued on 30 June 2008 and will consider for recovery appeals involving traveller sites in the Green Belt."

(I shall set out below more of what it set out, as I shall something of its history).

15. That policy was continued, but in amended form, by a written Ministerial Statement of 17th January 2014 (referred to before me as "WMS 2"), whose terms I shall also consider below.

16. It follows from the above that there was a published policy of the SSCLG, issued in 2008, which was revised by a WMS of 1st July 2013, and continued in another revised form in January 2014. It seems to me to be impossible to describe WMS 1 as anything other than the announcement of a change in policy, given the use of the terms "revising the recovery criteria" about a document which expressed itself (and properly so) as a "policy." The same point must apply to WMS 2.

4 Substantive Policies

- ***NPPF***
- ***PTTS***
- ***Green Belt policy***
- ***Methods of giving policy guidance***

17. The policies of the Secretary of State are an important material consideration for the purposes of s 70(1) TCPA 1990 (see Lindblom J's lucid exposition in *Cala Homes (South) Ltd v Secretary of State for Communities & Local Government* [2011] EWHC 97 (Admin), [2011] JPL 887 at paragraph 50). Further, as policies of the SSCLG himself, he is required to follow them himself unless he gives reasons for not doing so in order that the recipient of his decision would know why the decision was being made as an exception to the policy: see *Gransden v Secretary of State* [1986] JPL 519 at page 521 and *Horsham DC v Secretary of State* [1992] 1 PLR 81 at 88. The same principle applies to his Inspectors.

18. Of course another route by which the SSCLG can set out his views on planning policy is in decision letters issued by him. It has been the practice of successive Secretaries

of State to call in some applications (see s 77 *TCPA 1990***)** or recover a set of appeals so that he can set out his approach. That will then carry great weight in other development control decisions (whether made by local planning authorities or on appeal). Thus, for example, the Secretary of State might call in a group of applications or appeals for determination by him, or arrange that a number of proposals be heard at one inquiry. In doing so, he of course reduces the chances that subsequent applicants, appellants or local planning authorities might seek to avoid adherence to the line he has taken on the basis that he had only considered one application.

19. The substantive planning policy approach to the issues at play in a case concerning traveller pitches is derived principally from two sources

i) The National Planning Policy Framework ("NPPF"): this was published by the SSCLG on 27th March 2012. It is stated at paragraph 1 that

> "The National Planning Policy Framework sets out the Government's planning policies for England and how these are expected to be applied."

It contains policies relating to most aspects of development control, including Green Belt policy and Travellers Pitches.

ii) The "Planning Policy For Traveller Sites" ("PPTS") which was published by the SSCLG on the same date. Its first paragraph states

> "This document sets out the Government's planning policy for traveller sites. It should be read in conjunction with the National Planning Policy Framework."

Substantive policy (1) Green Belt (2) Travellers Pitches

20. Green Belt policy is a policy about controlling development. In its current form it was first coined in 1955 in Circular 42/55 of the Ministry Of Housing and Local Government, the predecessor department of the Department of Communities and Local Government. Various Ministerial Circulars and Planning Policy Guidance Notes have followed from the various predecessor departments of the current Department, but the essence of the policy has remained untouched. Green Belts are defined to achieve purposes (now 5 in number). Its essential aim is to keep the areas within the defined Green Belt as free from inappropriate development. In the terms of NPPF paragraph 79

> "The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence."

21. The development control policy that applies is to be found in its current form in the NPPF at paragraphs 87-88

> "87 As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

22. "Inappropriate development" includes the construction of new buildings; see NPPF paragraph 89. The following appears in PPTS as Policy E

> Policy E: Traveller sites in Green Belt
>
> 14 Inappropriate development is harmful to the Green Belt and should not be approved, except in very special circumstances. Traveller sites (temporary or permanent) in the Green Belt are inappropriate development.
>
> 15 Green Belt boundaries should be altered only in exceptional circumstances. If a local planning authority wishes to make an exceptional limited alteration to the defined Green Belt boundary (which might be to accommodate a site inset within the Green Belt) to meet a specific, identified need for a traveller site, it should do so only through the plan-making process and not in response to a planning application. If land is removed from the Green Belt in this way, it should be specifically allocated in the development plan as a traveller site only."

23. Just pausing there, the test in paragraph 88 of NPPF (which follows that in the original Planning Policy Guidance Note 2 of 1992) had come about as a result of a

number of Court of Appeal decisions, and in particular the very well-known decision of *Pehrsson v Secretary of State for the Environment* [1990] PLR 80, although one must note that as this is a Green Belt established by a statutory development plan, the three stage-test in *Pehrsson* must be read in the light of the enactment of what is now s 38(6) of the *Planning and Compulsory Purchase Act 2004.*

24. PPTS contains another policy, Policy H

"Policy H: Determining planning applications for traveller sites

20. Planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise.
21. Applications should be assessed and determined in accordance with the presumption in favour of sustainable development and the application of specific policies in the National Planning Policy Framework and this planning policy for traveller sites.
22. Local planning authorities should consider the following issues amongst other relevant matters when considering planning applications for traveller sites:
a) the existing level of local provision and need for sites
b) the availability (or lack) of alternative accommodation for the applicants
c) other personal circumstances of the applicant
d) that the locally specific criteria used to guide the allocation of sites in plans or which form the policy where there is no identified need for pitches/plots should be used to assess applications that may come forward on unallocated sites
e) that they should determine applications for sites from any travellers and not just those with local connections
23. Local planning authorities should strictly limit new traveller site development in open countryside that is away from existing settlements or outside areas allocated in the development plan. Local planning authorities should ensure that sites in rural areas respect the scale of, and do not dominate the nearest settled community, and avoid placing an undue pressure on the local infrastructure.
24. When considering applications, local planning authorities should attach weight to the following matters:
a) effective use of previously developed (brownfield), untidy or derelict land
b) sites being well planned or soft landscaped in such a way as to positively enhance the environment and increase its openness
c) promoting opportunities for healthy lifestyles, such as ensuring adequate landscaping and play areas for children
d) not enclosing a site with so much hard landscaping, high walls or fences, that the impression may be given that the site and its occupants are deliberately isolated from the rest of the community
25. Subject to the implementation arrangements at paragraph 28, if a local planning authority cannot demonstrate an up–to-date five-year supply of deliverable sites, this should be a significant material consideration in any subsequent planning decision when considering applications for the grant of temporary planning permission.
26. Local planning authorities should consider how they could overcome planning objections to particular proposals using planning conditions or planning obligations including:

a) limiting which parts of a site may be used for any business operations, in order to minimise the visual impact and limit the effect of noise
b) specifying the number of days the site can be occupied by more than the allowed number of caravans (which permits visitors and allows attendance at family or community events)
c) limiting the maximum number of days for which caravans might be permitted to stay on a transit site."

Under paragraph 28 in the Implementation section, it is stated that

"The policy set out in paragraph 25 only applies to applications for temporary planning permission for traveller sites made 12 months after this policy comes into force."

25. That policy approach (i.e. in paragraphs 20-26 inclusive) applies to all applications, whether in the Green Belt or outside it, so it follows that the considerations at paragraph 22 onwards will bite at the stage when the decision maker is determining whether there are very special circumstances based on "other considerations" within paragraph 88 of NPPF. But what the Travellers Sites policy does not do is to impose a prohibition on such sites being located in the Green Belt. It is axiomatic in Green Belt policy that *if but only if* very special circumstances are shown, and the test in the policy is passed, then a development thus permitted is permitted in accordance with the policy and not in breach of it; see *P and O Developments Ltd v Secretary of State for the Environment [1990] 2 PLR 52 @* 55H per Nolan J, who after citing the then policy in paragraphs 12 and 13 of PPG 2 of January 1988 (which said that there was a general presumption against inappropriate development in Green Belts, and that in the case of development outside excepted categories (which were appropriate development) "approval should not be given except in very special circumstances") went on

> "That, as (Counsel) correctly submitted, amounted to this…….inappropriate developments were to be permitted as a matter of policy if (and only if) a presumption against them was rebutted. A presumption is of its nature capable of rebuttal and is not a proscription."

26. That approach involves no watering down of the test that permission should only be given in very special circumstances. The fact that it is not a proscriptive policy is well illustrated by the decision of the Court of Appeal in relation to the original refusal of a temporary planning permission in the Claimant Mrs Moore's case. There, the Inspector who had determined her appeal against a refusal of permission for a traveller's pitch in the Green Belt had also refused to grant a temporary permission. Her application under s 288 of *TCPA 1990* to quash the decision succeeded before Cox J. An appeal by the SSCLG against the order of Cox J to the Court of Appeal failed - see *Moore v Secretary of State for Communities and Local Government & Anor* [2013] EWCA Civ 1194. In short terms, the question turned on the manner in which the Inspector addressed the "other considerations" in the then test as it appeared in Planning Policy Guidance Note 2. It demonstrates that Green Belt policy is not a policy presumption which operates proscriptively. Richards LJ said this

10 "The "other considerations" relied on cumulatively by the claimant as clearly outweighing the harm were the need for sites for gypsies and travellers in the area; the individual needs of the claimant and her family; the lack of suitable alternative sites that were both available and affordable; the likely outcome of refusing planning permission, including human rights considerations; and personal considerations including health and education. The inspector's detailed findings in respect of those matters are again set out in Cox J's judgment. In short, the inspector found that there was some immediate need for sites in the borough but that the figures did not weigh heavily in favour of the claimant; and that the circumstances surrounding the claimant's departure from her Housing Association property were such that the current lack of suitable accommodation carried only limited weight. He referred to the fact that the claimant suffered from "joint laxity" for which she was on strong painkillers and anti-inflammatories; she was on anti-depressants for depression and anxiety; her doctor had written that moving to a caravan in a field would have a positive effect on her mental health and her joints; and moving to a roadside existence would be harmful to her health. He said that her health needs carried some weight. He referred to the fact that two of the children attended school (and one of them saw a specialist dyslexia teacher), whilst the third received home education. He said that a settled education was a benefit and carried some limited weight."

27. After reciting the passages in the Decision Letter where the Inspector considered whether those other considerations clearly outweighed the harm he had identified, Richards LJ went on:

12. "That was the reasoning that led the inspector to refuse permanent planning permission. He went on immediately to consider the question of temporary planning permission, as follows:

"34. Paragraphs 45 and 46 of ODPM Circular 01/2006 set out the transitional arrangements for considering planning applications in circumstances where sites have not yet been secured through the development plan process. It identifies how this relates back to paragraphs 108-113 of Circular 11/95 *The Use of Conditions in Planning Permissions*. In this case there is a limited level of unmet need for sites. There are no alternative suitable sites that are available and affordable. The plan-led process may result in sites becoming available in 2014. In these circumstances advice in the Circular is that substantial weight should be given to the unmet need in considering whether a temporary permission is justified.

35. There is therefore a change in the balance in that substantial weight must now be attached to the unmet need. In addition, there would be reduced harm to the Green Belt due to that harm being for a limited period. However, in view of the amount of harm and all the other circumstances identified above, I do not consider that the balance would be tipped sufficiently for the material considerations to clearly outweigh the harm. In such circumstances temporary planning permission would not be appropriate."

28. Richards LJ then set out Cox J's reasons for quashing the decision. She had criticised the Inspector in the following terms

> "73. … Further, in this case, the vulnerable position of Gypsies generally and the need for special consideration to be given to their needs, to which Carnwath LJ referred in *Wychavon* [*Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692, [2009] PTSR 19], had a particular focus when considering temporary permission for this Claimant. In addition to her status as a single Gypsy mother with three young children, she was a person with compelling health needs, for whom the consequences of refusal of a temporary planning permission were potentially extremely serious.
> 74. In circumstances where no alternative sites were available, or likely to become available in the foreseeable future; where injunction proceedings for immediate eviction had already been started; where the inspector found that the Claimant and her children would probably have to leave the site if permission were refused; where there was a recognised risk that the Claimant and her children, once evicted, would have to resort to roadside existence, which would harm the Claimant's health and cause serious harm to the quality of life of the Claimant and her children; and where there was no evidence that the Claimant, once evicted, would in fact be offered a pitch on one of the Council-run sites or indeed anywhere else in the area, the decision that the other material considerations in this case were not sufficient to clearly outweigh the identified harm and to justify the grant of temporary permission was, in my judgment, irrational.
> 75. The inspector's tentative findings, that there was no certainty that the Claimant would resort to a roadside existence, and that the Council may not evict the Claimant before a pitch becomes available, do not save the decision to refuse a temporary permission, when considered in the context of the other findings referred to above. The probability that the Claimant and her children would have to leave the site; the lack of any finding as to where they would go once evicted; and, in particular, the medical opinion as to the adverse effects of roadside existence upon this Claimant's health, the adverse effects upon the continuity of her children's education and upon the quality of life for them all cannot in my judgment be said to constitute other than very special circumstances."

29. Richards LJ endorsed the approach of Cox J, and went on at paragraphs 24-27 to say this

> 24 "If the family was likely to face a roadside existence in the event of refusal of temporary permission, it would involve a far more serious interference with their article 8 rights, especially through the impact on health and education, than if they were likely to obtain alternative accommodation. Thus the issue went to the core of the article 8 analysis. Moreover, the "other material considerations" advanced by the claimant included "the likely outcome of refusing planning permission including human rights considerations" (para 17 of the inspector's decision), which underlined the need for a finding on likelihood.
> 25 The question whether the family was likely to resort to a roadside existence was also important in relation to the "harm" side of the balance. On the inspector's own finding, at para 31 of his decision, roadside camping would be likely to be equally harmful to the Green Belt and potentially more harmful to the countryside. Of course, the grant of temporary permission would still result in the harm identified

by the inspector, and it may not be strictly accurate to describe that harm as being cancelled out or neutralised by the harm that would result from the refusal of temporary permission, but the overall balance would necessarily be affected if the harm resulting from the refusal of temporary permission would be equal to or greater than the harm resulting from the grant of such permission. The judge did not deal with the point in quite this way but it goes to support the conclusion she reached.

26 There was ample material before the inspector on which to make a finding as to the likelihood of roadside camping if temporary permission was refused. The point does not fall for decision, but I doubt whether on that material he could reasonably have reached any conclusion other than that roadside camping was a likelihood. The council's injunction application, although on hold pending the appeal to the inspector, was for the claimant's immediate eviction; and as the judge said at para 71(e) and (f) of her judgment, the council had adduced no evidence that there were any alternative sites or as to the circumstances in which pitches had been offered previously to those forced to move. It is difficult to see what realistic alternative the family had to a roadside existence.

27 In my judgment, it is far from inevitable that the inspector would have reached the same conclusion if he had made a finding on the likelihood of roadside camping and had followed through its implications in the respects considered above."

30. The policy context has now been amended by the publication of PPTS, but there is no reason why Policy H and its list of considerations cannot be addressed when considering whether the Green Belt presumption against inappropriate development has been rebutted.

5 SSCLG's approaches to recovery of appeals in 2013-4, including publication of WMS 1 and WMS 2

31. I shall start by setting out the bare bones of the approaches adopted. Then because part of the challenge here relates to whether there was discrimination contrary to s 19 of the *EA 2010*, and whether there was a breach of the public sector equality duty under s 149 of *EA 2010*, it will be necessary, subject to my findings of fact, to consider what steps were taken by the SSCLG and his Ministers in deciding on the approaches adopted.

32. The original policy on the recovery of appeals in 2008 had not made any specific reference to travellers' sites, let alone to those in the Green Belt. If appeals relating to their provision in the Green Belt were recovered pursuant to the 2008 policy, that would occur under the criterion of being " proposals for significant development in the Green Belt" or falling within the saving criterion of being one of the "other cases which merit recovery because of the particular circumstances." In fact, as appears from the evidence before the Court from Mr Richard Watson, Head of Planning Casework in the Department of Communities and Local Government, there was a criterion in use which was applied to such appeals, albeit that it formed part of no published policy. So far as sites for travellers' pitches in the Green Belt were concerned, appeals relating to sites with 8 pitches or more were recovered. However by 2010 the relevant number of pitches had been reduced to 4 pitches or more. While some such proposals might well have significant effects, it might be thought very

difficult to categorise all proposals for 8 or 4 pitches (and therefore not necessarily involving structures of any kind) as "proposals for *significant* development in the Green Belt" but the informal criterion seems not to have excited controversy. Mr Watson advised the Minister for Local Government Mr Brandon Lewis MP on 23 January 2013 that

> "The lower threshold for recovering traveller appeals in the Green Belt reflects the fact that traveller proposals are often more controversial and more complex than other types of development (e.g. in terms of their relationship to existing settlements or integration with infrastructure."

33. Mr Watson's evidence was that from late 2012, the SSCLG and his Ministerial Team

> "became concerned as to whether the aims and objectives of PPTS were being correctly understood and implemented by decision-makers where development in the Green Belt was concerned."

On 2nd July 2013 Mr Brandon Lewis, the Local Government Minister, made a written statement to Parliament (WMS 1). It included the following

> *Protecting the green belt*
> Our policy document, Planning policy for traveller sites, was issued in March 2012. It makes clear that both temporary and permanent traveller sites are inappropriate development in the green belt and that planning decisions should protect green belt land from such inappropriate development.
> As set out in that document and in March 2012's National Planning Policy Framework, inappropriate development in the green belt should not be approved except in very special circumstances. Having considered recent planning decisions by councils and the Planning Inspectorate, it has become apparent that, in some cases, the green belt is not always being given the sufficient protection that was the explicit policy intent of ministers.
> The Secretary of State wishes to make clear that, in considering planning applications, although each case will depend on its facts, he considers that the single issue of unmet demand, whether for traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the 'very special circumstances' justifying inappropriate development in the green belt.
> The Secretary of State wishes to give particular scrutiny to traveller site appeals in the green belt, so that he can consider the extent to which Planning policy for traveller sites is meeting this government's clear policy intentions. To this end he is hereby revising the appeals recovery criteria issued on 30 June 2008 and will consider for recovery appeals involving traveller sites in the green belt.
> For the avoidance of doubt, this does not mean that all such appeals will be recovered, but that the Secretary of State will likely recover a number of appeals in order to test the relevant policies at national level. The Secretary of State will apply this criteria" (sic) "for a period of 6 months, after which it will be reviewed.
> ***Revoking 'equality and diversity in planning'***
> Under the last administration's flawed rules, a sense of unfairness was embedded in the planning system. Unauthorised developments created tensions between travellers and the settled population, whilst some community groups seemingly

were given favoured treatment. That approach has harmed community cohesion. We want to redress the balance and put fairness back into local communities.

I appreciate that there is ongoing concern, as reflected by some honourable members recently proposing a Private Member's Bill on this issue.

I can announce today that the government is cancelling the last administration's practice guidance Diversity and equality in planning which was issued by the Office of the Deputy Prime Minister in 2005.

This guidance is outdated, excessive in length (at 186 pages), and sends unhelpful signals about the planning process. For example, the document:

- fails to strike the correct balance between the spatial impact of a planning proposal and the background of the applicant in considering a planning application
- encourages monitoring of local residents' private lives – such as through intrusive lifestyle/diversity surveys
- promotes the excessive use of Equality Impact Assessments, which are an expensive and bureaucratic burden on the public sector
- tells councils to translate into foreign language, which undermines integration by discouraging people from learning English, weakens community cohesion and a common British identity, and wastes taxpayers' money.

As part of our wider consolidation of practice guidance, we do not intend to replace it.

The National Planning Policy Framework makes clear that councils should plan to provide wide choice of high quality homes based on the needs of their local community. Councils should simply use their common sense in light of prevailing legislation, planning policy and material considerations.

I hope this will send a positive message about treating all members of the community with respect and with due process, and that this government is restoring a proper sense of fairness to the planning system."

34. It will be noted that the effect was to revise the 2008 policy, and to "*consider for recovery"* appeals involving traveller sites in the green belt (my italics) but without recovering all of them, and that a number would be recovered to enable a review to take place.

35. In fact, within a few months, and by no later than September 2013, all appeals relating to traveller sites in the Green Belt were being recovered. It was urged upon me by Mr Warren that that had not been the intention of Ministers, for reasons which I shall explore presently, but that is in fact what happened. The evidence for the Defendant SSCLG also revealed that of the 53 appeals recovered following WMS 1, only one had been decided by the time that the six months review period (identified in WMS 1) had elapsed.

36. On 17th January 2014 a further Written Ministerial Statement was made by the same Minister (WMS 2). It stated that

"In my written statement of 1 July 2013, official report, column 41 WS, I noted the government's intentions with regard to the importance of the protection of the green belt.

> The government's planning policy is clear that both temporary and permanent traveller sites are inappropriate development in the green belt and that planning decisions should protect green belt land from such inappropriate development. I also noted the Secretary of State's policy position that unmet need, whether for traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the "very special circumstances" justifying inappropriate development in the green belt.
>
> The Secretary of State wishes to re-emphasise this policy point to both local planning authorities and planning inspectors as a material consideration in their planning decisions.
>
> That statement revised the appeals recovery criteria by stating that, for a period of 6 months, the Secretary of State would consider for recovery appeals involving traveller sites in the green belt, after which the position would be reviewed.
>
> The Secretary of State remains concerned about the extent to which planning appeal decisions are meeting the government's clear policy intentions, particularly as to whether sufficient weight is being given to the importance of green belt protection. Therefore, he intends to continue to consider for recovery appeals involving traveller sites in the green belt.
>
> Moreover, ministers are considering the case for further improvements to both planning policy and practice guidance to strengthen green belt protection in this regard. We also want to consider the case for changes to the planning definition of 'travellers' to reflect whether it should only refer to those who actually travel and have a mobile or transitory lifestyle. We are open to representations on these matters and will be launching a consultation in due course."

37. It continued to be the case that all appeals for travellers sites in the Green Belt were recovered, although as will be observed, the stated policy was not to recover all appeals, but "*to continue to consider for recovery appeals involving traveller sites in the green belt.*" In fact, the evidence before me was that the Planning Inspectorate was under standing instructions from Ministers to recover all appeals.

38. Both claims were issued in June 2014. Permission to apply for judicial review was given by Singh J on 4th August 2014. On 2nd September 2014, after a submission to Ministers about the judicial review proceedings, the Planning Inspectorate ("PINS") was instructed not to recover 100% of appeals, but instead to recover 75%.

39. As already noted, the policy of considering all appeals for recovery, including those for single pitches, had not been adopted or applied in the case of any other kind of residential development in the Green Belt, be it for building operations (e.g. building a new dwelling) or for a material change of use (e.g. the internal conversion of an outbuilding to residential use). The evidence before the court, which was unchallenged, showed that housing developments involving several houses were not being recovered and were being left to Inspectors to decide[2]. The smallest number of houses on any of the housing appeals recovered in the period in question was 82. Thus, a traveller wanting to live on a pitch in the Green Belt, but not erect any buildings, could now expect that his or her case would be recovered, whereas a person proposing to build one or more dwellings would not. That was true even in cases where the application or permission would be temporary, so that not only would there

[2] I set out the details of that evidence below

be no permanent structures erected in the Green Belt, but the use would come to an end. One may contrast that temporary harm to the openness of the Green Belt with that caused by the erection of new dwellings, or the continued residential use of a building which had hitherto been in, for example, agricultural use.

40. Of course if the SSCLG wished to exert more oversight over one kind of development, that is a matter for him and not for the courts, subject always to his doing so within the ambit of the law, and as part of that subject to his complying with his statutory duties under the *EA 2010* insofar as they applied.

41. I shall deal in due course with the very substantial, and entirely unchallenged, evidence put before me of the very considerable effect which the approaches of the SSCLG have had on the process for dealing with traveller sites, and the contrast between such cases and others involving residential proposals in the Green Belt.

42. Against that background, these two claimants have brought these proceedings, and the EHRC have intervened.

6 The Claimants and their planning appeals

43. I shall start with Mrs Moore. The Claimant is the owner and occupier of the Appeal Site at North Cudham in the London Borough of Bromley ("LBB"). LBB (which is not taking part in these proceedings) is the local planning authority for the area. The Claimant is a Romany Gypsy. She is also a single mother of 3 dependent children who attend schools local to the Appeal Site. She and one of her daughters are disabled.

44. On 9th July 2010 the Claimant applied for planning permission to live on the Appeal Site seeking "change of use – private Gypsy and Traveller Caravan Site comprising 1 pitch, accommodating one mobile home and one touring caravan". The facts preceding her application are detailed in paragraphs 6-14 of Cox J's judgment in *Moore v Secretary of State for Communities and Local Government & Anor* [2012] EWHC 3192.

45. On 14th September 2010 the LBB refused her application. The Claimant appealed under s78 *TCPA 1990*. By a Decision Letter of 9th June 2011 an inspector rejected her appeal. The Claimant applied under s288 *TCPA 1990* to quash this decision. On 16th November 2012 Cox J quashed the decision. On 9th October 2013 the Court of Appeal dismissed the Defendant's appeal against Cox J's decision (*Moore v Secretary of State for Communities and Local Government & Anor* [2013] EWCA Civ 1194). The appeal then required redetermination by the SSCLG. LBB however elected not to await the outcome of the redetermination, but issued two enforcement notices under s 171 of *TCPA 1990*. The Claimant appealed against those notices under s 172 of *TCPA 1990.*

46. On 11th February 2014 the Defendant recovered the Claimant's planning and enforcement appeals. The sole reason given was:

> "this is an appeal involving a traveller site in the green belt".

47. According to Mr Watson, the witness for the Defendant SSCLG, at paragraph 51 of his first Witness Statement

> "Mrs Moore's appeal was recovered…….pursuant to the Secretary of State's wide discretion to recover planning appeals and on the basis that the appeal involves a traveller site in the Green belt. The decision to recover Mrs Moore's appeal was an application of the WMS which embodies a decision by the Secretary of State to consider for recovery Green belt appeals in order to test the application and ensure correct understanding of the NPPF and PPTS."

The WMS then in place was WMS 1 as revised by WMS2.

48. The inquiry took place on 18th-19th February 2014 with the inspector as a reporting inspector, not a decision-maker. It will be noted that the recovery of the appeals took place just 7 days before the start of the public inquiry

49. On 4th March 2014 a pre-action protocol letter was sent to the Defendant SSCLG. Difficulties occurred over the obtaining of Legal Aid funding, and the grant of legal aid was delayed until 2nd June 2014. The claim was filed on 16th June 2014. (I should add that the Defendant takes no point on delay in the case of either claimant).

50. No decision letter has yet been issued. The Inspector's Report was provided to the SSCLG, but the Court was not informed of the date of receipt.

51. Mrs Coates' position is as follows. She is also a Romany Gypsy. She applied for planning permission on 15th May 2012 when she moved on to Green Belt land at the junction of Dartford Road and Station Road, Sutton at Hone in Kent. The application was for temporary use of the land for stationing of a static caravan for a Gypsy family with special needs. She is disabled, and one of her three children is seriously disabled. On 20th July 2012 the application was refused by the local planning authority, Dartford Borough Council. An appeal was lodged on 1st September 2012. Thereafter in December 2012 owing to enforcement of an earlier order made under s 187B of the Town and Country Act 1990, the land was vacated. Her appeal was recovered on 23rd January 2014 on the grounds that

> "this is an appeal involving a traveller site in the Green Belt".

52. There has been an inquiry (on various dates from May 2013 to June 2014) but the Inspector has not yet reported. For reasons which are not entirely clear to me the inquiry was adjourned a number of times and took 20 days in all.

53. According to Mr Watson, the witness for the Defendant SSCLG, at paragraph 55 of his first Witness Statement:

> "Like Mrs Moore's appeal, Ms Coates' appeal was recovered…….pursuant to the Secretary of State's wide discretion to recover planning appeals and on the basis that the appeal involves a traveller site in the Green belt. The decision to recover Ms Coates' appeal was an application of the WMS which embodies a decision by the Secretary of State to consider for recovery Green belt appeals in order to test the application and ensure correct understanding of the NPPF and PPTS. The purpose of the recovery was to ensure that the outcome of the appeal is correct, in the sense of

(sic) that it should represent a proper application of PPTS policy to the particular facts"

54. It will be noted that this paragraph of Mr Watson's evidence (about Ms Coates) follows paragraph 51 precisely, save for the addition of the last sentence.

55. Similar funding problems occurred (and were also overcome) in the case of Mrs Coates. Her application for judicial review was issued on 24th June 2014.

56. It follows that both Claimants have been kept waiting a long time for a determination of their planning appeals. Even if one discounts the earlier proceedings in Mrs Moore's case and calculates time from the time that the Court of Appeal gave judgment, she has been waiting since October 2013, and Mrs Coates has been waiting since September 2012. As Mr Jones pointed out, the timescale in which 80% of appeals heard at inquiry are to be determined is a period of 22 weeks from the submission of the appeal (see paragraph 014 of "Planning Practice Guidance: Appeals: June 2014" published on the web by the SSCLG).

57. Thus far, both have waited in excess of 12 months, and Mrs Coates has waited for over twice that long. In the experience of this judge, waiting for a decision for 12 months is only to be expected in the cases of very substantial development indeed. I accept entirely that travellers' pitch cases can raise difficult issues, but one must not confuse difficulty with complexity. A two day case may raise challenging issues, but that does not mean that the decision maker requires a long period of consideration to resolve, and certainly not the lengthy timescales at play in the cases of these two Claimants. It is to be remembered also that the length of time taken also affects those with an interest in the determination of their appeals, which will include the local planning authority, and those who may oppose their appeals.

7 Position of Romany Gypsies and Irish Travellers, and effects of the changes in recovery practice

58. It was common ground that by virtue of s 9(4) of *EA 2010*, Romany Gypsies and Irish Travellers, each a distinct racial group, form a racial group for the purposes of s 9 of the Act.

59. The Court received evidence, none of which was in dispute, about the position of the ethnic groups involved here. For Ms Coates, it was said in the witness statement of her solicitor Parminder Sanghera, who has extensive experience of appeals relating to travellers sites, that

> "From working extensively with Romany Gypsies I am aware that as a group they are severely disadvantaged when compared with the general population in terms of accommodation, health, life expectancy, infant mortality and education."

60. The EHRC submissions, which referred to published EHRC reports, were that (footnotes included as per submissions)

> "In terms of health and education, ethnic Gypsies and Travellers[3] are one of the most deprived groups in Britain. Life expectancy for Gypsy and Traveller men and women is 10 years lower than the national average. Gypsy and Traveller mothers are 20 times more likely than the rest of the population to have experienced the death of a child. In 2003, less than a quarter of Gypsy and Traveller children obtained five GCSEs at A*- C grades, compared to a national average of over half. The Commission's research has shown that a lack of authorised sites for Gypsies and Travellers perpetuates many of these problems.[4] Thus, there is a clear relationship between effective access to the planning system and the welfare of this disadvantaged racial group"

61. That view is not disputed by the Defendant SSCLG. In the Initial Screening Form of his Department's own Equality Impact Assessment of March 2012, it is stated that (paragraph 6) the policy change (i.e. effected by PPTS)

> "would be likely to affect Romany Gypsies and Irish Travellers. Romany Gypsies and Irish Travellers are recognised as having a protected characteristic under the Equality Act 2010 ……
> The Government takes its responsibilities seriously and also recognises that Romany Gypsies and Irish Travellers are ethnic minorities that experience poor social outcomes and discrimination. It therefore wants changes to policy in relation to these groups to promote equality and reduce discrimination."

62. The PPTS itself was not directed at ethnic Gypsy and Travellers as such, but travellers, whatever their race or origin. However as accepted in the Equality Assessment, and as is obvious common sense, this racial group would be particularly affected by it. It follows that a policy to recover a large number or all of applications for traveller pitches would be likely to affect them also.

63. The Court also received undisputed evidence about the practice of recovery. It went further than the limited evidence before Lewis J in *Connors and others v SSCLG and others* [2014] EWHC 2358 and criticised by him at paragraphs 148-150. The evidence before me had been obtained by FOI requests made of the Department for Communities and Local Government. The evidence before me is itself not immune from criticism, because it must be noted that some of the statistics provided by the DCLG are inconsistent, and there has obviously been some confusion in the mind of the officer answering the requests. In particular, the figures which have been provided for the period to 1st September 2014 cannot be reconciled exactly with earlier information. Thus, for example, an answer to an FOI request of 16th July 2014 says that there were 17,233 planning and enforcement appeals lodged with the Planning Inspectorate between 1st July 2013 and 17th June 2014, whereas one dated 24th

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3 The disadvantages are also faced by non-ethnic gypsies and travellers, but this claim is focussed on ethnic Gypsies and Travellers.

4 Gypsies and Travellers: simple solutions for living together (EHRC, March 2009), p5, and Inequalities experienced by Gypsy and Traveller communities: A review (EHRC, Winter 2009), chapter 2.1.

September 2014 says that the number lodged between 1st July 2013 and 1st September 2014 was 13,446. The number of appeals in the Green Belt is given as 1,734 in the first case and 1,383 in the second. Some of the internal figures in the latter response are also out of step. It is very unfortunate that the Department has been unable to provide consistent figures in answer to requests which were straightforward and phrased with clarity.

64. However the areas of difference do not affect the overall picture relevant to this case, which can be seen by looking at appeals from two time periods:

a. appeals lodged from 1st July 2011 to 1st July 2013 (pre WMS 1)

b. appeals lodged from 1st July 2013 to 1st September 2014 (post WMS 1)

(The tables appear on the next page)

Appeals lodged from 1st July 2011 to1st July 2013 (pre WMS 1)

1st July 2011 to 1st July 2013		Lodged and recovered in period	Lodged in period but recovered after period	Total recovery
All Appeals	23,837			
All GB Appeals	2,561			
All residential (including use) in Green Belt	1,251	24 (1.9%)	52	76 (6%)
Traveller sites in above GB residential figure	89	19 (21.3%)	51	70 (78%)
Other residential in above GB residential figure	1,162	5 (0.4%)	1	6 (0.5%)

Appeals lodged from 1st July 2013 to 1st September 2014 (post WMS 1)

1st July 2011 to 1st July 2013		Lodged and recovered in period	Lodged in period but recovered after period	Total recovery
All Appeals	13,446	13,446		
All GB Appeals	1,383	1,383		
All residential (including use) in Green Belt	741	39 (5.2%)	52	91
Traveller sites in above GB residential figure	28	33 (100%)[5]	51	79 (based on 28)
Other residential in above GB residential figure	713 (based on 28)	6 (0.8%)	1	7

65. The picture that emerges from the above is that there is a considerable disparity between recovery in non-traveller residential Green Belt cases and recovery of traveller residential Green Belt cases. Up to 1st July 2013 an appeal relating to a

[5] Both figures (28 and 33) appear in the DCLG answer to the FOI request. Other evidence shows that all were recovered.

traveller residential site in the Green Belt was about 50 times[6] more likely to be recovered than a non traveller scheme, and after 1st July 2013 that had risen to 125 times more likely[7].

66. The Court also received evidence about the scale of the housing proposals which were being recovered by the SSCLG in the non traveller cases. Of the 6 appeals recovered in the period from 1st July 2013 to 17th June 2014, the following scales of housing development were proposed in the Green Belt

a. 85 new dwellings (St Albans)

b. 750 homes and a new neighbourhood centre (Basildon)

c. 100 new dwellings and associated works (St Albans)

d. 265 dwellings and associated works (Castle Point)

e. 280 dwellings and associated works (Northumberland)

f. 92 dwellings and associated works (Newcastle under Lyme).

67. It follows that there was a marked disparity in terms of recovery between the scale of non traveller residential development and traveller residential development. In terms of the effect on the openness of the Green Belt, plainly each of the housing schemes listed above would have had a far greater impact than a site for a few travellers' pitches, let alone a single one.

68. Mr Watson from the Department of Communities and Local Government also gave evidence about the numbers of cases recovered:

i) on 1st May 2013 Ministers were warned that

> "Urgent. There is growing concern amongst interested parties that few traveller appeals involving sites in the Green Belt have recently been issued, and further delay risks reputational damage to the Planning Inspectorate."

Officials suggested recovering between 3 and 6 cases, which were identified, and the submission went on:

> " Recovering these appeals offers the opportunity to send clear messages in the decision letters in relation to the importance of effective provision in the Local Plan (or at least significant progress towards getting effective provision in place) and the weight that should be given to different types of personal circumstances when considering planning decisions"

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[6] 21.3% as against 0.4%

[7] 100% as against 0.8%

ii) that memorandum states that the Ministers' then view was that a number of appeals should be selected which could provide:

> "opportunities to articulate key Ministerial messages in support of (PPTS) in a way which does not entail substantial legal risk."

iii) however on 8th May 2013 Mr Brandon Lewis MP, the Minister for Local Government, now asked officials to list all pending appeals for Gypsy and Traveller sites in the Green Belt. Officials again advised the Minister to select between 3 and 6 cases from a list of 6 cases

> "as we consider that these offer the clearest opportunities for sending policy messages about the importance of effective provision in the Local Plan (or at least significant progress towards getting effective provision in place) and the weight that should be given to different types of personal circumstances when considering planning decisions; and that the remaining cases are released for a decision."

iv) on 10th June 2013, the Minister decided that a further six appeals should be recovered. On 24th June 2013 (after officials had again advised against recovering no more than 3 to 6 appeals, and had at his request set out the resource implications of doing so) the Minister approved a submission that the number recovered be increased. That led to WMS 1 on 1st July 2013;

v) however by the end of July 2013 the Minister decided that a further 9 should be recovered. On 31st July 2013, against advice from the officials, the Minister asked that a decision about to be issued by the Inspectorate should be held in abeyance. It appears from the terms of a very significant memorandum written by the Chief Planning Inspector to the Minister Mr Lewis on 7th August 2013, that an instruction had been issued that if a decision was about to be issued by the Inspectorate it should be referred to the Minister. It included these passages (my italics):

> "5 Notification was as per the protocols. They are in place to give Ministers advance warning of appeal decisions. They should not however be used as an avenue for the recovery of appeals where Ministers do not agree with the planning judgment being exercised by the appointed Inspector.
>
> 6 The vast majority of appeals are decided by Inspectors……..Whilst it is open to the Secretary of State to recover any appeal for his own decision at any point prior to the Inspector's decision being issued, this "recovery of jurisdiction" is exercised selectively, and then only under one of the published criteria in the attached annexe" (the 2008 WMS). Less than 1% of appeals each year are recovered.
>
> 9 ……(discussions) between (the Planning Inspectorate) and Planning Casework in mid July. The understanding was that as you had indicated you did not wish to recover all traveller appeals in the Green Belt- a point you made in the Written Ministerial Statement on 1 July- the normal recovery criteria would apply. This appeal relates to 2 pitches, below the "threshold"

of 4 pitches where recovery is automatic, so it was agreed at that point that the appeals should not be recovered.

10 Further to a recent instruction from the Secretary of State's office, we are now holding back the decision, as instructed, so that you can personally consider whether the appeals should be recovered in this case. However this case has already been in the appeal system for a considerable period of time given (an adjournment that had occurred from February to June). As such it is important that a decision on recovery is reached swiftly.

11 We do not consider the appeals merit recovery in this case. You have already recovered 17 other cases which will be used to articulate Ministerial thinking- the inspector's reports in 6 of those cases were sent to Planning casework in early July; the remainder will be following in the near future. C*ontinual recovery would lead to significant pressure to recover many, if not all, traveller appeals in the Green Belt- contrary to your Statement. …….. Not recovering the appeals would on the other hand demonstrate your intention to pursue a selective approach to the recovery of small scale traveller appeals in the Green Belt, in accordance with the ministerial statement*" ;

vi) a similar Ministerial decision was made about three more appeals on 14th August 2013.

vii) on 6th September 2013 the Minister decided that a further 5 appeals be recovered which had been held in abeyance, the officials having advised against recovery. The Minister also decided that all appeals where PINS was likely to issue decisions before the end of October should be recovered. Officials reported to him that they numbered 20, and the instruction was confirmed;

viii) at the beginning of November 2013, officials were instructed to hold all further Gypsy and Traveller appeals in abeyance pending a decision on how Ministers wished to proceed after the 6 month period in WMS expired. On 12th December 2013, PINS was instructed to recover 7 such appeals when they were ready for decision;

ix) on 9th January 2014 Ministers decided to extend the WMS, and recover all relevant appeals for 6 months or until a revised policy was in place. The WMS was the subject of discussion before its issue on 17th January 2014, by which time it had been decided that all relevant appeals would be recovered "for the time being" but no end date was included in the new WMS (WMS 2);

x) at paragraphs 44 to 45 of his witness statement Mr Watson describes the situation in December 2013 and January 2014. After describing how Ministers wanted further consultation on a new policy and/or guidance, and wanted the WMS 1 policy on recovery extended he goes on (my italics)

> "Ministers confirmed on 9th January 2014 that they wanted to extend the WMS and *continue to recover relevant appeals for a further 6 months or until revised policy was in place.*
> In early January 2014 a draft WMS was submitted to Ministers. *This did not set an end date and was clear that the Planning Inspectorate would recover all relevant appeals for the time being…..*"

xi) according to paragraph 46 (again my italics)

> " *during the latter half of 2013, Ministers had taken overall control of the G & T (*sic*) Green Belt appeals…(WMS 2) did not expressly rule out the possibility of all appeals being recovered as a consequence, and indeed to date, Ministers have considered it necessary to instruct (PINS) to continue to recover all such appeals until instructed otherwise.*"

69. That position (i.e. recovery of all appeals) was still current when Mr Watson made his first witness statement on 9th September 2014. However Mr Watson stated there that the Minister did not intend to recover 100% over the coming months. That is not a coincidence. On 29th August 2014, Ministers had received a Submission from officials entitled "*Gypsy and Traveller Litigation: Coates and Moore Applications for Judicial Review*." It noted that Grounds of Defence had to be submitted by 9th September 2014. Officials advised that (my italics)

> "You *will recall that, in July 2013, it was not Minister's intention to recover all G & T (sic) appeals in the GB but in practice, almost all such appeals have been recovered*."

70. They were advised that there were at that time 32 recovered Gypsy and Traveller cases being worked on, with another 24 (involving 47 appeals) having been recovered. Given the number recovered, and the wide variety of factual circumstances, it was recommended that it was time to recover fewer appeals in the future. A figure of 50% was suggested. On 2nd September Ministers decided that in future the percentage recovered should be reduced to 75%, plus others which met other criteria for recovery. There was no policy announcement (whether by way of revision to WMS2 or otherwise) that the figure had been reduced.

71. There can thus be no doubt, and I so find, that

a. from 1st July 2013, all appeals relating to Gypsy and Traveller sites in the Green Belt were being considered for recovery;

b. in fact almost all were being recovered;

c. as a matter of fact, in the latter part of 2013, and certainly from September at the very latest, all were being recovered;

d. from January 2014, although WMS 2 does not say that all would be recovered, it was in fact the intention of Ministers that all should be recovered;

e. that approach (recovery of all) continued until 2nd September 2014 when the figure was reduced to 75% as a result of the Department's officials and Ministers

considering their position in the context of these judicial review proceedings having been commenced.

72. Two other matters of importance must be observed about the process described by Mr Watson. Firstly, at no time in any submission to Ministers, or in any report of any Minister's views, is there any suggestion that any consideration was given, whether by officials or Ministers, to the Public Sector Equality Duty placed on the SSCLG, his Ministers and his Department pursuant to s 149 of the *EA 2010*. The most there is a reference by officials in submission to Ministers on 14th March 2013 that recovering all Gypsy and Traveller appeals in the Green Belt

> "seems likely to give rise to criticism that this change targets gypsies and travellers disproportionately."

That was the last time the topic was ever raised, at least in the redacted copies of the submissions made to Ministers and disclosed to the Court. Nor is there any suggestion in the evidence of Mr Watson (which is full and careful) that the topic was ever raised or referred to again. The case for the SSCLG before me was that no assessment was required. The Claimants and EHRC suggest that, while no formal assessment may have been required, proper consideration of the effects was required, and that its absence was a most significant omission. I shall give the Court's views on that in due course.

73. Secondly, some time was spent considering the effects of the changes in recovery practice on delaying the determination of appeals. It is common ground that the effect of the 100% recovery has been to delay the determination of appeals very substantially. Ministers were given warning of that. In the submission of 13th March 2013 it was said that

> "Recovery of over 30 appeal cases has severe and immediate resource implications for PINS, the casework team, and the in house legal team. These would need to be resolved quickly or these cases will remain in the appeals system for unacceptably long periods of time."

74. Similar warnings were given of delays on

a. 13th May 2013

> "few traveller appeals involving sites in the Green belt have recently been issued, and further delay risks reputational damage to the Planning Inspectorate. The Planning Inspectorate has indicated that they will need to write to affected parties this week to explain the delays, given the queries and complaints they have received."

b. 3rd June 2013

> "the team is already fully loaded. If you wished to take all 26……..cases, we continue to estimate that we would require 3-4 additional experienced casework officers (based on our knowledge of the length of time the average traveller case takes.)"

c. 24th June 2013

> "You have previously agreed to increasing resources for the casework team to deal with those appeals currently identified. We will also need to increase legal resources. Subject to your decision on the approach to adopt now and the number of additional recoveries we make, there may be further resource implications"

d. 7th August 2013: I have already referred to the Chief Planning Inspector's memorandum of that date. He had also referred to

> "continuing delays in determining traveller appeals "(paragraph 10).

e. 19th December 2013. The submission to the Minister Mr Brandon Lewis MP said

> " Pressing: we need now to instruct PINS on how Ministers wish to proceed, so as to avoid a backlog of unissued cases building up at PINS …….. progress is proving slow …….. significant resource implications……the impact of this (recovery of all cases) will be that the additional casework resource to deliver these cases will need to be maintained until at least October 2014."

75. It was common ground that it was taking much longer to deal with the cases than would have been the case had they been determined by Inspectors. The Defendant's detailed defence shows that as at January 2014, only 1 out of 53 cases recovered since 1st July 2013 had been determined over 6 months later as at January 2014. As at May 2014, an FOI request to the Department shows that of the 84 cases recovered after 1st July 2013 (there being therefore an additional 31 cases), only 14 had been decided, although 61 Inspector's Reports had been received. It follows that only 13 cases were decided between January and May 2014, and 14 between WMS 1 in July 2013 and the date in May 2014, out of a caseload of at least 84. The number outstanding at 3rd June 2013 was given to Ministers by Mr Watson as 26 (Submission of 3rd June 2013 paragraph 5) which shows that the outstanding caseload increased from 26 to about 70 (84-14) over the course of 11 months or so. At least 12 appeals (26-14) outstanding in July 2013 must still have been outstanding in May 2014.

76. On any view that means that the delays in the cases of Ms Coates and Mrs Moore are not atypical. I find that substantial delays of several months' duration have been occurring in the determination of appeals, which must be compared to the generally accepted position (and the figure in undisputed evidence before me) that an unrecovered appeal will be determined in about a maximum of 8 weeks from the holding of the inquiry or submission of the appeal representations, and in inquiry cases 80% will be determined within 22 weeks of the submission of the notice of appeal. Further, it will be recalled that some of the cases recovered were cases where the decision was ready to be made by the Inspector, so that all that remained was the consideration, drafting and issuing of the decision.

77. A schedule was prepared by the Claimants of the outcomes of those appeals that had been determined since WMS 1 (remembering always that some will relate to cases

recovered before that date) up to mid May 2014. If one takes out enforcement appeals, which were not included in the FOI figures quoted two paragraphs above, it shows that of 20 planning appeals, 15 were dismissed by the SSCLG. Of the remainder he granted permission in 2 cases, and a time limited permission in 3 cases. In the cases where the appeal was dismissed, the Inspector had recommended approval (permanent or temporary permission) in 4 cases.

78. If one looks at the enforcement appeals recovered over the same period (where on appeal a planning permission can be granted), there were 13 appeals considered by the SSCLG of which all were dismissed. Of those, the Inspector had recommended the grant of a temporary permission in 4 cases.

8 An overview of the cases for the Claimants, the EHRC and the Defendant Secretary of State

79. It is helpful to set out an overview of the several interrelated arguments, before turning to each topic raised.

80. Mr Jones for Mrs Moore argued that

a. the Defendant's recovery of the appeal constituted indirect discrimination contrary to ss 19 and 29(6) of *EA 2010* and a breach of the public-sector equality duty ("PSED") contrary to s 149;

b. the Defendant has breached the Claimant's right under Article 6 of the European Convention of Human Rights ("ECHR") both through preventing determination by an independent and impartial tribunal and through delay;

c. the Defendant has shown bias and irrationality towards the Claimant as a Gypsy and Traveller contrary to common law;

d. the Defendant has breached the Claimant's right under Article 8 of the ECHR in respect of her private and family life and her home;

e. the Defendant has breached the Claimant's right under Article 14 of the ECHR read with her Article 8 right;

f. Mr Jones also adopted the ECHR's additional ground relating to a policy being undisclosed.

81. Mr Cottle for Ms Coates argued that

a. the Defendant SSCLG's recovery of her appeal within the Green Belt constituted an abuse of power, because it was unnecessary, because in doing so he failed to consider the circumstances of the case, and it was disproportionate;

b. there has been a breach of Article 14 of ECHR because of differential treatment for the reasons similarly advanced by Mr Jones;

c. there has been a breach of the PSED under s 149 *EA 2010;*

d. there has been a breach of Article 6 of ECHR, for the reasons similarly advanced by Mr Jones;

e. Mr Cottle also adopted the additional ground taken by ECHR about the undisclosed policy.

82. The EHRC argued that:

a. looked at overall, the Recovery Practice disadvantaged (and continues to disadvantage) ethnic Gypsies and Travellers applying for planning permission for a home in the Green Belt because it takes substantially longer to determine a recovered appeal. The result is that an ethnic Gypsy or Traveller applicant with a meritorious appeal is inherently more likely to face a far longer wait for planning permission than a non-Gypsy or Traveller applicant with a meritorious appeal;

b. this was a "stark case" of indirect discrimination under s 19 of the *Equality Act 2010* and of a breach by the Secretary of State, and in particular his Minister, of the PSED under 149 of the *Equality Act 2010*;

c. he has failed to show that his practice or policy was a proportionate means of achieving a legitimate aim;

d. In addition, on the evidence lodged by the Defendant, the Recovery Practice was unlawful (at least until September 2014) because it was fundamentally inconsistent with the Defendant's publicly stated position.

83. Mr Warren QC and Mr Blundell for the Defendant SSCLG argued that;

a. The SSCLG, who has a wide discretion to recover appeals, is not independent but he is the head of the planning system and is entitled to consider decisions which engage his own planning policies, and is entitled to decide to recover types of appeal if he considers that relevant policies are not being applied correctly in them;

b. he is entitled to recover as many or as few as he considers necessary subject to the EA 2010 and common law duties (e.g. fairness);

c. the Court should allow him a large measure of discretion in that matter. If a recovered decision is flawed, then a challenge can be made in this Court under ss 288/289 *TCPA 1990*;

d. the criteria for recovery are not a policy as such but cover many different situations;

e. given the importance of Green Belt policy, such cases raised important issues, and he was entitled to recover any such case he is entitled to use recovery as a tool so that he can determine what weight should be applied to the considerations at play;

f. the SSCLG was entitled to be concerned about the application of PPTS. It is not a single test policy;

g. the Court should allow him a wide margin of appreciation in his determining in 2013 to change the recovery criteria as occurred in WMS 1

h. he went through a long process of consideration with his officials. The WMS was not just about sending messages on how unmet need should be treated, but was based on an exhaustive set of detailed considerations over nearly 6 months which the Minister was ideally placed to assess, against a background of a lawful PPTS which embodies equality objectives, and was designed to set the basis for recovering appeals to enable the Secretary of State to be the one allotting weight to the various factors in multiple appeal scenarios;

i. There was no blanket recovery policy under WMS 1. Such a policy was only adopted under WMS 2;

j. the only effect of the policy causative of disadvantage was that the determinations of appeals were delayed;

k. there was no indirect discrimination because ethnic gypsies and travellers were treated in the same ways as non-ethnic gypsies and travellers, which is the proper comparator group;

l. in any event the policy or practice was in pursuit of a legitimate aim and was proportionate. There was no need for any formal assessment of the impact on equality, but "due regard" was had within the meaning of s 149 of *EA 2010*;

m. as to the alleged breach of Article 6, the delays were not unreasonable;

n. there is no evidence of bias, abuse of power or irrationality.

84. It is helpful to start with the arguments about discrimination and the PSED.

9 Equality Act 2010

i) ***Role of EHRC***

ii) ***Direct and indirect discrimination***

iii) ***Interpretation of section 19 (1) and (2)(a) and (b)***

iv) ***Arguments relating to claim of indirect discrimination under section 19***

v) ***Arguments relating to Public Sector Equality Duty in section 149***

vi) ***Court's discussion and conclusions on section 19 arguments***

vii) ***Court's discussion and conclusions on section 149 arguments***

85. By and large, the Claimants made common cause on this issue, and supported the EHRC submissions. I shall indicate where they differed.

i) ***Role of EHRC***

86. It is the statutory duty of EHRC under s 11(1) *Equality Act 2006* to "monitor the effectiveness of the equality and human rights enactments" and by s 30 of that Act it

has the power "to institute or intervene in legal proceedings……. if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function." I gave permission for the EHRC to intervene in the proceedings on 17th November 2014. The SSCLG had no objection to that course.

(ii) Direct and indirect discrimination

87. In order to understand the way the cases were put, it is necessary to start with s 19 of the *EA 2010* which defines indirect discrimination. "Discrimination" for the purposes of s 149 could be direct (s 13) or indirect (s 19) (see the index in Schedule 28 of the *EA 2010).*

88. Direct discrimination (which is not suggested here but is relevant in the context of the issues argued before me) occurs where a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others, unless he can show it to be a proportionate means of achieving a legitimate aim (s 13(1) *EA 2010).* Indirect discrimination occurs in the circumstances set out in s 19

> "19 Indirect discrimination
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
> a. A applies, or would apply, it to persons with whom B does not share the characteristic,
> b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it
> c. it puts, or would put, B at that disadvantage, and
> d. A cannot show it to be a proportionate means of achieving a legitimate aim
> (3) The relevant protected characteristics are
> - age;
> - disability;
> - gender reassignment;
> - marriage and civil partnership;
> - race;
> - religion or belief;
> - sex;
> - sexual orientation."

iii) ***Interpretation of section 19 (1) and (2) (a) and (b)***

89. Mr Buttler for EHRC said that if one takes the first test in s 19(2) at sub-paragraph (a)

> "(a) A applies, or would apply, it to persons with whom B does not share the characteristic"

that means that for the ethnic Gypsy or Traveller one takes as the comparator group other non-ethnic travellers affected by the provision, criterion or practice. However when one considers the next test at (b)

> "(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it"

he says that now one should take as the comparator group a wider group, because those who share the particular characteristic (i.e. other ethnic gypsies) are at a particular disadvantage when compared with persons with whom B does not share the characteristic of race (i.e. races other than ethnic gypsies, e.g. Chinese, White English etc.) This is because other races are less likely to be travellers, and a higher proportion of those with the protected characteristic of race, being ethnic gypsies and travellers, will be caught by the provision, practice or criterion, than those who will not. He refers to *CRE v Dutton* [1989] 1 QB 783 (CA), itself a case about gypsies and travellers under the predecessor legislation to the *EA 2010*, where a public house (engagingly called the Cat and Mutton) exhibited a sign saying " No Travellers". Nicholls LJ, as he then was, having rejected a claim for direct discrimination, said this when upholding the claim for indirect discrimination

> "Clearly the proportion of gipsies who will satisfy the "No Travellers" condition is considerably smaller than the proportion of non-gipsies. Of the estimated gipsy population in the United Kingdom of some 80,000, between one half and two thirds now live in houses. But this still means that a far higher proportion of gipsies are leading a nomadic way of life than the rest of the population in general or, more narrowly, than the rest of the population who might wish to resort to the Cat and Mutton."

90. Mr Warren says that it is wrong to look at the 2008 recovery criteria as a single policy so that one cannot compare the treatment of cases of traveller pitches in the Green Belt with major development proposals which are not in the Green Belt. He says that when one takes the comparator group as the other persons to whom the recovery practice applied (i.e. travellers of all kinds) then the ethnic Gypsy has suffered no disadvantage as against them, because all members of the larger group suffer the same disadvantage.

91. The difficulty can be seen when one realises, as Mr Buttler accepted in argument, that for Mr Buttler's argument to succeed the persons in the phrase in (b) "when compared with persons with whom B does not share it" are not the same persons as in the phrase in (a) "as to persons with whom B does not share the characteristic."

92. Mr Buttler cited *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15, [2012] WLR(D) 122, [2012] IRLR 601, [2012] Eq LR 594, [2012] ICR 704, [2012] 3 All ER 1287 and the judgment of Baroness Hale of Richmond at paragraphs 11 ff:

"The discrimination issue

7 The ET found that the appropriate age group was people aged 60 to 65, who would not be able to obtain a law degree before they retired [15]. That group was put at a particular disadvantage compared with people younger than that, because they were prevented from reaching the third threshold and the status and benefits associated with it [18]. The claimant was put at a disadvantage because he could not achieve the qualification (and therefore the status) before he retired. The ET noted that it was not argued that he was put at a disadvantage because fewer people in his age group had law degrees [18].

8 The EAT and Court of Appeal were however persuaded that what put Mr Homer at a disadvantage was not his age but his impending retirement. Had it not been for that, he would have been able to obtain a degree and reach the third threshold. As Mr Lewis argues on behalf of the respondent, the key words in regulation 3(1) (b) are "puts at". What is it that puts him at – or causes – the disadvantage complained of? It is the fact that he is due to leave work within a few years. Regulation 3(2) requires that the relevant circumstances in the complainant's case must be the same, or not materially different, from the circumstances in the case of the persons with whom he is compared. So, argues Mr Lewis, you have to build the relevant circumstance into the comparator group also, in this case the proximity of leaving work. So Mr Homer must be compared with anyone else who is nearing the end of his employment for whatever reason. Anyone who was contemplating leaving within a similar period – whether for family reasons or some other reason - would face the same difficulty. That is what puts him at a disadvantage and not the age group to which he belongs. Indeed, what Mr Homer is arguing for would put people of his age group at an advantage compared with younger people, because they would be able to get the benefits of the third threshold without having a law degree when others would not.

9 This argument involves taking the particular disadvantage which is suffered by a particular age group for a reason which is related to their age and equating it with a similar disadvantage which is suffered by others but for a completely different reason unrelated to their age. If it were translated into other contexts it would have alarming consequences for the law of discrimination generally. Take, for example, a requirement that employees in a particular job must have a beard. This puts women at a particular disadvantage because very few of them are able to grow a beard. But the argument leaves sex out of account and says that it is the inability to grow a beard which puts women at a particular disadvantage and so they must be compared with other people who for whatever reason, whether it be illness or immaturity, are unable to grow a beard.

10 Ironically, it is perhaps easier to make the argument under the current formulation of the concept of indirect discrimination, which is now also to be found in the Equality Act 2010. Previous formulations relied upon disparate impact – so that if there was a significant disparity in the proportion of men affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. But, as Mr Allen points out on behalf of Mr Homer, the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in *Equality: the New Legal Framework*, Hart 2011, pp 64 to 68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not

share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages."

93. Mr Buttler says that what has happened here may be equated to Baroness Hale's example of the beard. I am troubled by that, and while I find Baroness Hale's use of it helpful and appropriate in the context of that case and other comparable cases, I do not find that it can be applied to the facts in issue here in the manner argued for by Mr Buttler. In the case of the criterion cited by Baroness Hale

    a. it is being applied in her example to persons (other potential employees who are male) with whom a woman potential employee does not share a characteristic (gender)

    b. it puts that woman and others with whom she shares the characteristic (women potential employees) at a disadvantage, when compared with those who do not share it (male potential employees).

94. In other words in that example the comparator "persons with whom she does not share the characteristic" are the same in (a) and (b). I therefore find Mr Buttler's reliance on it in this case to be of limited assistance. It seems to me that these difficulties only arise because of the choice he has made in this case of the comparator persons at the first stage under (a) as being the non-ethnic gypsy or traveller appellants who are appealing against a refusal of planning permission for traveller pitches in the Green Belt, compared to whom the ethnic gypsies have in fact suffered no disadvantage, as Mr Warren correctly pointed out. Mr Warren argued that if one did not take the "all travellers" group, then the alternative comparator group was all those whose appeals fell within the categories for recovery specified in the 2008 WMS.

95. This issue of the choice of group was a matter I raised with all counsel. Mr Cottle submitted that one could properly take a larger group, such as those persons wishing to seek planning permission for a habitation in the Green Belt. Mr Buttler accepted that one could take it. If one took that group (which includes those seeking to live in the Green Belt, and in some cases build anything from one to many houses) then in my judgment the difficulty disappears.

96. I find that reassuring because I take very seriously Baroness Hale's observations at paragraph 15 of her judgment – that one should avoid placing technical obstacles in the way of establishing that indirect discrimination has occurred. Just as I consider that Mr Buttler's preferred comparator group is too small, I find that Mr Warren's alternative group (of all appellants for any kind of development specified in the 2008 WMS as a candidate for recovery) is far too large. In the real world, what has happened here is that in the case of the Green Belt there is a marked and obvious difference between those on the one hand who seek to live there (or allow others to do so), and to that end seek planning permission on appeal to construct a house, or indeed several houses, within it, or who seek to convert a building or buildings to residential use, and on the other, those who seek to live there as well but are gypsies or travellers, many of whom are likely to be ethnic gypsies or travellers. There can be no doubt that that likelihood of their ethnicity is real. Firstly, the very fact that the recovery practice is aimed at "Travellers" will result in ethnic gypsies and travellers

being affected: travelling is after all fundamental to their way of life. Secondly I remind myself of the approach of Nicholls LJ in *CRE v Dutton*, cited above.

97. It is no part of s 19 that the provision, criterion or practice was intended to be discriminatory. The test of whether it is discriminatory is its effect, not its purpose. A policy which imposes greater delays on a racial group's planning appeals than it does on others who also wish to set up a habitation in the Green Belt is patently discriminatory, subject of course to whether the SSCLG can show it to be a proportionate means of achieving a legitimate aim.

98. Subject of course to that caveat, if such a criterion or practice was directed at ethnic gypsies and travellers as such, it would on any view be caught by s 13 as direct discrimination. The reality is, as the evidence shows, that the category identified in WMS 1 and 2, while it includes some non-ethnic gypsies and travellers, includes large numbers of ethnic gypsies and travellers who follow the nomadic way of life which involves the use of pitches. The presence of others within the group affected does not mean that the criterion or practice is not indirectly discriminatory under s 19. That would be the sort of technical, and in my judgment quite artificial, obstacle of the sort which Baroness Hale has stated in *Homer* that the courts should avoid. I am also comforted in my approach by the facts that

a. as noted above, paragraph 6 of the PPTS Equality Impact Assessment identified the particular effect of the PPTS policy on ethnic gypsies and travellers;

b. On 14th March 2013, Ministers were advised that recovering all Gypsy and Traveller appeals in the Green Belt

> "seems likely to give rise to criticism that this change targets gypsies and travellers disproportionately."

99. Mr Warren also argued that the words "provision, criterion or practice" in s 19(1) should be read discretely. I disagree. In my judgment it does not matter whether one classifies the acts of A within the section as one or the other, and indeed (just as happened here) one may have elements of one or more at play. What matters is not the precise label, but whether A is so conducting his affairs as to effect discrimination against B. In this case, the criterion included in WMS 2 actually reflected the practice which had been in play for some months, as Mr Watson candidly described in his evidence. I regard it as irrelevant that the one was a practice and the other a criterion or provision, which is a matter of labelling and not of substance.

iv) Arguments relating to claim of indirect discrimination under s 19

100. The next questions are therefore those under s 19(2)(c) and (d), of whether the discrimination

c. puts, or would put, B to disadvantage, and

d. A cannot show it to be a proportionate means of achieving a legitimate aim

101. As to the first criterion, it was common ground that delay was caused to the determination of the appeals of Mrs Moore, Ms Coates and other ethnic Romany gypsies and Travellers. That must constitute a disadvantage. But in the case of the second there was substantial disagreement.

102. Mr Buttler, supported by Mr Jones and Mr Cottle, contended that

i) The burden is on the Defendant SSCLG to show that it is a proportionate means of achieving a legitimate aim;

ii) Apart from the warning officials gave Ministers about the potential criticism that the recovery of all traveller appeals in the Green Belt would affect gypsies and travellers disproportionately, there is no evidence at all this matter was ever addressed, let alone addressed proportionately;

iii) if it was a legitimate aim to give a 'clear steer' (as it was put) on the application of PPTS, there were several other ways of achieving that end, which would have less effect on ethnic Gypsies and Travellers, ways of pursuing that objective. For example:

a) carrying out a formal review of the previous recovery policy/practice to inform the decision as to what extent additional gypsy and traveller appeals needed to be recovered to promote the objective –the preferred approach of his officials;

b) recovering gypsy and traveller appeals in the Green Belt usually only where they concern four pitches or more – the advice given to the Defendant on 23 January 2013;

c) selectively recovering those appeals that offered the clearest opportunities for giving guidance – the repeated advice given to the Defendant by his officials on 1 May, 14 May 2013 and 3 June 2013;

d) recovering a proportion of gypsy and traveller appeals in the Green Belt at a rate significantly lower than 100%;

e) issuing a guidance note to local authorities and inspectors, setting out the Defendant's position;

f) recovering all, or a proportion of all, gypsy and traveller appeals in the Green Belt for a shorter period;

iv) there is no evidence that the Defendant considered less intrusive alternatives to the Recovery Practice.

103. Mr Warren argued that the particular context is key, and said that the PPTS is not a single-test policy. It involves the weighting and balancing of numerous various factors in the light of several overall policy objectives, something which the Secretary of State as ultimate decision-maker is best placed to consider. These include;

i) "ensur[ing] a fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community";

ii) Policy E making all traveller sites in the Green Belt inappropriate development in policy terms, and recognising a range of factors which must often be assessed;

iii) the equality assessment conducted into the PTTS policy showed that Green Belt is a particularly difficult area. When considering the PPTS and assessing it against PSED and equalities legislation, the Secretary of State paid particular attention to the need to balance meeting Gypsy and Traveller needs against the need to "ensure that traveller sites are developed in appropriate places and not in Green Belt land";

iv) the PPTS is a lawful policy document which embodies the Secretary of State's manifest concerns about (a) Green Belt protection from Gypsy and Traveller development, (b) ensuring fair and equal treatment for Gypsies and Travellers and the settled community. These matters were all very important and fresh in the Secretary of State's mind when keeping an eye on progress under the PPTS in 2013. The Secretary of State went through a lengthy process before he adopted the WMS criterion, as Mr Watson's evidence shows;

v) that process enabled the Secretary of State to consider in the round, on the basis of evidence and advice, whether his initial concerns about the way PPTS was being applied should lead to his recovering more decisions, and if so, on what basis. The advice of his officials was just that – it did not fetter the Minister – but provides evidence of the matters which the Minister was considering;

vi) the discussions and advice began in early 2013. The existing lower threshold for recovery in GB cases was identified, and the likelihood of greater delay due to recovery clearly flagged up;

vii) it was noted that the absence of evidence that 'unmet need' itself tended to lead to a VSC finding (very special circumstances). That was one of the two specific points raised by Ministers in January 2013;

viii) by 14 March 2013, the Minister had reached the view that he wished to recover more cases. He was advised about the implications for resourcing – i.e. how such an increased recovery was to be dealt with by the Department so as to enable it to be handled appropriately. No advice was received that suggested that it would be inappropriate for the Minister to recover appeals to ensure that in this difficult area, decisions were made in the way he thought fit;

ix) having reached that view in principle, the Minister proceeded on 1st May 2013 to consider how many appeals should be recovered. The issue is how, though recovered appeals, clear messages might be sent about how the PPTS should be applied; and at this stage delay in appeals processing was clearly flagged up;

x) officials identified 3 to 6 cases and said that those were most suitable. The Minister was unconvinced and requested sight of all pending Green Belt Gypsy and Traveller appeals;

xi) a further submission dated 13 May 2013 provided this information with more advice. The wide ambit of the "messages" which the Minister was keen to send is clear from paragraph 3 of the submission of that date (officials said that recovering 3-6 cases from a list "would offer the clearest opportunities for sending policy messages about the importance of effective provision in the Local Plan (or at least significant progress towards getting provision in place) and the weight to be given to different types of personal circumstances when considering planning decisions"). Advice about resourcing was also given. A limited recovery was advised;

xii) the Minister did not rush to recover many cases or to introduce the criterion. He had a meeting on 23 April 2013 to discuss various recovery options, but rather than look at just 3-6 cases, he requested to see all the pending cases. The advice was aimed at ensuring greater recovery took place as far as possible without further delay in processing appeals. The Minister looked at all the pending cases when forming his view about the need for a WMS criterion. The decision was made to adopt "Option 2" on 24th June 2013. The reason for the adoption of this approach was so that the Minister would be the one allotting weight across a range of cases when applying the planning balance in the PPTS.

104. As a consequence, said Mr Warren:

i) the WMS was not just about sending messages on how unmet need should be treated;

ii) it was based on an exhaustive set of detailed considerations over nearly 6 months which the Minister was ideally placed to assess;

iii) it was against a background of a lawful PPTS which embodies equality objectives;

iv) it was designed to set the basis for recovering appeals to enable the Secretary of State to be the one allotting weight to the various factors in multiple appeal scenarios.

105. As to proportionality, Mr Warren contends that

i) the only real way to achieve the objective was for the Secretary of State to decide the appeals as promulgator of the PPTS and head of the planning system. The other suggested means were raised with the Secretary of State (advice to Inspectors, selective recovery, lower % recovery) and he rejected them;

ii) The Secretary of State must in these circumstances be entitled to reserve to himself such cases as he considers that it is necessary for him to decide. If every case is different and requires the allocation of weight to various factors,

then it is hardly surprising or disproportionate for the Secretary of State to wish to decide them himself, rather than try to deal with the matter at a generalised level;

iii) in such circumstances, to recover a high proportion or even 100% pro tempore was proportionate to the objective of sending clear messages through decisions. The wider the category of factual circumstances, the more examples are likely to be needed to send out "clear messages" for otherwise future cases will not have sufficiently close (rarely of course identical) comparator Secretary of State decisions.

106. I will set out my conclusions on those arguments when I have addressed the 149 PSED issue. I do so because the issues raised on proportionality in this case are common to both s 19 and s 149. Against that background, I can turn to s 149 and the PSED.

(v) Arguments relating to Public Sector Equality Duty in s 149

107. Section 149 of the Act reads

> "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;
>
> (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.
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
>
> (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.
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
>
> (7) The relevant protected characteristics are –
>
> …
>
> race..."

108. I am indebted to Mr Buttler for the EHRC for his succinct summary of the case law on s 149, which was not challenged. I have adopted his skeleton on the issue.

109. In *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, para 26 McCombe LJ summarised the principles to be derived from the authorities on s 149, as follows:

(1) "As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293 at 274, [2006] IRLR 934, [2006] 1 WLR 3213, 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* [2006] EWCA Civ 1293, [2006] IRLR 934, [2006] 1 WLR 3213 (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), [2009] PTSR 1506, 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."

110. McCombe LJ went on to identify three further principles, which may be summarised as follows:

(8) It is for the Court to decide for itself if due regard has been had, but providing this is done it is for the decision maker to decide what weight to give to the equality implications of the decision (following *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), *per* Elias LJ @ [77]-[78]).

(9) "[T]he 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 that some further consideration with appropriate groups is required" (*R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), *per* Elias LJ @ [89]).

(10) The duty to have due regard concerns the impact of the proposal on all persons with the protected characteristic and also, specifically, upon any particular class of persons within a protected category who might most obviously be adversely affected by the proposal (*Bracking, per* McCombe LJ @ [40]).

111. As to the importance of the second principle, McCombe LJ stated @ [60]-[61]:

> "it seems to me that the 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude" and "In the absence of evidence of a 'structured attempt to focus upon the details of equality issues' (per my Lord, Elias LJ in *Hurley & Moore*) a decision maker is likely to be in difficulties if his or her subsequent decision is challenged".

112. Mr Buttler, supported by Mr Jones and Mr Cottle, having referred to the authorities cited above, submitted that

i) In a case where a large number of very disadvantaged people are affected, the "due regard" necessary is very high. That is the case here, because ethnic Gypsies and Travellers are a seriously and multiply disadvantaged group, and the timely provision of planning permission to this group for homes in the Green Belt in meritorious cases is of high importance in reducing those disadvantages.

ii) Where a decision maker identifies a need to eliminate discrimination, he or she is required to do something about it. He referred to Mitting J in the unreported case of *R (BAPIO Action) v Royal College of General Practitioners* [2014] EWHC 1416 (Admin) at [31]:

> "Section 149 does not permit a person exercising public functions to identify the need to eliminate discrimination in one of the public functions it exercises and then do nothing about it. If it acted thus it would not be "having regard" to the need to eliminate discrimination in the exercise of its public function, it would be disregarding a specific need which it had itself identified" (original emphasis).

He referred also to *Pieretti v London Borough of Enfield* [2010] EWCA Civ 1104, per Wilson LJ at [34].

iii) On the evidence lodged, it appears to the Commission that the Defendant did not comply with his public sector equality duty. In particular:

(1) there is no evidence that the Defendant had any appreciation of the equality objectives when implementing the Recovery Practice;

(2) there is no evidence that the Defendant appreciated the impact of delay on Gypsies and Travellers, *e.g.* on the link between absence of planning permission and health and educational outcomes;

(3) there is no evidence that the Defendant had any regard (still less due regard) to the impact of the Recovery Practice (*i.e.* the blanket delay caused to all ethnic Gypsy and Traveller applicants in the Green Belt) as it affected equality objectives for that group;

(4) there is no evidence that the Defendant took any steps to acquire the information he needed to inform himself for the purpose of his public sector equality duty;

(5) the Defendant did not consult the groups which he consulted when carrying out an equality impact assessment in relation to the PTTS or give anybody an opportunity to make representations on the Recovery Practice, so as to inform him for the purpose of his public sector equality duty. Indeed, interested persons were effectively prevented from making representations, because the Defendant's Recovery Practice was contrary to his public statements as to his practice in WMS1 and WMS2 (see further the Commission's submissions on the public law duty to adhere to published policies, below);

(6) the duty is a continuing one, but it appears that there was no consideration of the equality impacts of the Recovery Practice upon the expiry of WMS1 or at any other time;

(7) if – contrary to the evidence – the Defendant did recognise that the Recovery Practice would have an adverse impact on equality objectives,

he was required to take steps to mitigate the impact, but he did not do so (see further the Commission's submissions on indirect discrimination).

113. Mr Warren argued that;

i) the PSED under s 149 *EA 2010* requires public authorities, in the exercise of their functions, to have due regard to three matters as set out in s 149(1) (a) to (c). The Courts have clarified that the discharge of the PSED is a matter of substance rather than form: *R (Brown) v. Secretary of State for Work and Pensions* [2009] PTSR 1506, at [92]. There is no need, for instance, for a formal EqIA on every occasion when a public authority function is exercised: *R (Hurley) v. Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin);

ii) "Due regard" in s 149 means such regard as is appropriate in all the circumstances of the case: *R (Baker) v. Secretary of State for Communities and Local Government* [2008] EWCA Civ 141. It is accepted (EHRC) that in this case there was no need for a formal EqIA (even on the WMS decision, let alone on individual applications of the criterion), and that the question is one of substance not form. That is a very broad spectrum, designed to reflect the reality that in some cases a formal EqIA is necessary (e.g. PPTS), and in others a very much lesser degree of consideration is legally necessary to ensure equality is properly considered. It is clear that where equality considerations are not engaged, or only to a very limited degree indeed, the application of s149 is similarly circumscribed. There are many decisions where due regard is actually no regard, because of no equality implications arising from the function;

iii) 'Due' regard was given in this case:

a) the only identified impact on a protected group (delay) was self-evidently also an impact on a non-protected group. There was therefore no discrimination as defined in the EA 2010 based on delay – delay did not engage EA 2010;

b) "due regard to the need to eliminate discrimination" (see s 149(1)(a) Tab 2) was inherent in the process of ensuring good decisions in line with the PPTS;

c) there was no real sense in which some additional delay in reaching a lawful application of an equality-compliant policy gave rise to 'equality of opportunity' issues, under s 149 (1) (b). None has been spelled out by the Cs or the EHRC. Far more obviously relevant is a correct outcome under the PPTS;

d) similarly, the outcome under the PPTS would be relevant to fostering good relations (see PPTS and EqIA references earlier). It overextends the statutory objective to suggest it arises where delay is concerned.

114. He says that it is clear why the Minister felt it necessary to impose the criterion, and that it was intended to bring about better PPTS decision making (as he saw it). It could not be suggested that he did not have the nub of the issues going to equality firmly in mind. There is ample evidence that he considered delay as part of his overall considerations before July 2013. Indeed it was something self-evident.

115. Had the Minister 'spelled out' that recovery would cause greater delay to Gypsies and Travellers, Mr Warren said that it would have made no conceivable difference to his view that the criterion was necessary, given that the whole aim of the recovery was to ensure that the equality-compliant PPTS was properly implemented. This is not a discretion point, but a substantive point underlining why in this case "due regard" was indeed given.

116. Mr Warren also says that

i) the decision to recover jurisdiction in each of the Claimant's cases was a procedural decision which transferred jurisdiction in the Claimant's substantive appeal back to the Secretary of State;

ii) recovery of an appeal under either WMS is intended, as the WMS both stated, to restore overall control of Gypsy and Traveller Green Belt cases to the Secretary of State to the extent that he wishes. That was the case where the Claimants' appeals were concerned. The PPTS itself was subject to a full EqIA and PSED analysis, which rendered it unnecessary and disproportionate for the Secretary of State to carry out a further PSED analysis of the recovery decision itself;

iii) it is the PPTS that includes relevant policy on the exercise of the Secretary of State's planning functions in relation to Gypsy and Traveller Green Belt appeals. WMS1 and WMS2 do not. They involve no new policies or criteria to be applied in Gypsy and Traveller Green Belt cases. The only change they effect is in the identity of the decision-maker. But even then, the point goes nowhere. By paragraph 2(6) of Schedule 3 to the 1990 Act, the inspector's decision on a non-recovered appeal is to be treated as that of the Secretary of State.

iv) insofar as delay is concerned, the fact that recovery of appeals can give rise to additional delay is self-evident. Furthermore, delay was considered by the Secretary of State before he made the WMS. It is well-established in judicial review proceedings that, where there is a conflict of evidence, the Court should take the facts as set out by the Defendant: *R v. Board of Visitors of Hull Prison, ex parte St Germain (No 2)* [1979] 1 WLR 1401, *per* Geoffrey Lane LJ at 1410H. In fact, the Claimants and EHRC do not point to any evidence to contradict that of Mr Watson. In those circumstances, his evidence should be accepted;

v) in any event, it is plain from the Ministerial submissions that the consequences of recovery in terms of the time taken to make decisions on appeal and the consequential resource implications were at the forefront of officials' advice to the Secretary of State: see, for example, paragraphs 8-17 of the 3 June 2013

> submission under the heading "Resourcing". It is simply wrong to suggest that the Secretary of State failed to have regard to delay.

(vi) Court's discussion and conclusions on s 19 arguments

117. I have set out above my conclusion that the conduct of the SSCLG and his Ministers is caught by the tests in s 19 (1) and (2) (a) and (b) of *EA 2010.* It is entirely clear that the effect of the policy or practice to recover all appeals relating to traveller's pitches put ethnic gypsies and travellers at a disadvantage , namely that their appeals would take far longer to determine. I now consider whether the recovery of all appeals, as was the practice from later 2013 and was the policy in WMS 2 from January 2014, was a proportionate means of achieving a legitimate aim.

118. There is in my judgment one aspect of the case for the SSCLG which I simply cannot accept as reflecting the true position. It was urged on me by Mr Warren that an important purpose of PPTS had been to meet the needs of travellers by advising local planning authorities to provide sufficient sites for pitches, and to include policies which reflected the particular disadvantages endured by ethnic gypsies and travellers. I accept that part of his argument, for it is borne out by what appears in PPTS and in its Equality Impact Assessment. I accept also that it was one which officials in the Department had in mind. But what I do not accept is that there is any evidence that the purpose of WMS 1 was to enable the SSCLG to give a steer on those aspects of PPTS. WMS 1 gives one, and one reason alone, for the new policy on recovery

> "The Secretary of State wishes to make clear that, in considering planning applications, although each case will depend on its facts, he considers that the single issue of unmet demand, whether for traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the 'very special circumstances' justifying inappropriate development in the green belt. "

119. This is a case where the evidence filed by the Defendant shows that officials and Ministers were not ad idem. That is not a matter for criticism, but it does mean that the fact that the officials had one or some objectives or rationales in mind does not imply that the Minister did so. I quite accept that officials had suggested other reasons for recovery, but none of those other reasons was included, expressly or impliedly, in what the Minister said. He gave one reason, and one alone. Indeed reading the Ministerial submissions there can be no reasonable doubt that the Minister was concerned that too many appeals were being allowed, not too few.

120. At the same time, I also accept that it is quite proper for the SSCLG or his Ministers to take the view that the policy point made in WMS 1 needed making. It is a matter for the Secretary of State whether he considers that too much weight has been given in some cases to very special circumstances. That could in my judgment be a legitimate aim.

121. It is true that officials advised Ministers that there was no evidence of excess weight having been given by Inspectors, and there is actually no evidence by reference to any analysis that that was the case before WMS 1 was coined. Lists of appeals were provided to the Minister, and the issues raised in each appeal identified, but the schedules contain no suggestion that any Inspector's decision letter had applied

weight inappropriately. The only evidence there is is the fact that the Minister did not accept the officials' advice against increasing the rate of recovery of appeals. However I am prepared to accept that the SSCLG is entitled to form the view that a clearer steer was required, as set out in WMS 1, and again in WMS 2. But it is noteworthy also that the reasons given to the two Claimants for recovery of their appeals referred to one matter only, namely that their appeal related to a travellers site in the Green Belt. It made no suggestion that either case had any particular features beyond that. As far as the Court understands, that was true in the case of all the recovered appeals.

122. In my judgment the real issue at play here is therefore one of proportionality. The test from the House of Lords authority of *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 is that in order to justify the Recovery Practice, the Defendant must demonstrate:

i. that the objective is sufficiently important to justify limiting a fundamental right;

ii. that the measure is rationally connected to the objective;

iii. that the means chosen are no more than is necessary to accomplish the objective.

123. Now it is true of course that as a general matter in judicial review of the SSCLG's power of call in or recovery or challenge of a decision letter under s 288 of *TCPA 1990* (or generally), the accepted and adopted principle is that the courts should not be asked to criticise the way in which he approaches the making or application of policy provided that he does so in accordance with the law- see *Alconbury* cited above. But, as was accepted by Mr Warren, that means that the SSCLG must not act in a way which breaches s 19 or 149 of the *EA 2010*. While I accept that some margin of appreciation (to use the phrase Mr Warren used) must be deployed in his choice of means to pursue a legitimate objective, that must be tempered by questions of proportionality appropriate to that context. I can see no reason why the tests in *De Freitas* should not apply, albeit in the context of the SSCLG's particular role, nor was any suggested to me. In particular in my judgment, proportionality in the context of s 19 must be measured not just generally, but also in the specific context of the objectives set out in s 149, and the clear guidance of the Court of Appeal in relation to the PSED. Thus, in the context of a policy, if a choice exists between a method which discriminates against an ethnic group, and one which does not, or one which advances the specified objectives in s 149, and one which does not, there must be good proportionate reason advanced by the policy maker to choose the former pair and not the latter.

124. In my judgment the SSCLG has real difficulty in this case in meeting the first or third criteria derived from *De Freitas*. In the case of the <u>first</u> criterion, at least two fundamental rights are in play

a. The right of an appellant under Article 6 of ECHR to have a determination of his/her appeal without unreasonable delay;

b. The right of ethnic gypsies and travellers not to be treated less favourably than others.

In the case of the third criterion, there is ample evidence of other routes by which the same end could be achieved, without affecting all appeals, and therefore without affecting all appellants seeking permission for travellers' pitches in the Green Belt. The SSCLG and his Ministers could have issued a further policy statement, or (as officials advised, and WMS 1 anticipated) recovered a representative group of appeals for determination. That is in the experience of the Court a very common way for the SSCLG to have his say on a policy issue of importance. It has the advantage of avoiding later attempts by other applicants or appellants to distinguish the policy conclusions reached on the basis that they are tied to the facts of one case. It also avoids disadvantaging all appellants (and local planning authorities and other interested parties) by having the cases of all waiting for determination, and, given the far smaller numbers involved, will cause less delay in determination of the selected appeals. Lastly, in the context of the objective of avoiding indirect discrimination against a racial group, those whose appeals are delayed are not all those who have made an application, but a far smaller number whose appeals are those selected for recovery.

125. In the context of repeated advice from his officials that the approach the Minister wished to see adopted would and did cause delay, and that it could lead to unfair treatment of the particular ethnic group, by the rejection of that course, and by the adoption of one which caused very real disadvantage to those in the position of the claimants, the Secretary of State and his Minister have in my judgment fallen far short of showing that the recovery of all such appeals was a proportionate way of achieving his objective. Indeed a notable feature of the evidence for the SSCLG is that it shows that his officials repeatedly advised against the course being followed, and recommended the course of selecting a few cases so that a clear message could be given, while drawing attention to the increasing delays being caused to interested parties. Yet there is an absence of any evidence from the SSCLG in these proceedings of why the Minister or the SSCLG thought that their preferred approach *was* proportionate, and why none of the alternatives being suggested to them would not meet the objectives they had identified. It is also evident from the submission to Ministers of 1st May 2013 at paragraph 9 that the Minister for Local Government had originally accepted the idea of selecting a few cases so as to give a clear message. But lacking from the evidence is any understanding of why he thought that that course became unacceptable. It is after all the one which officials continued to recommend, and as already observed, it is in my judgment and experience a common way of proceeding. It was left to Mr Warren, without evidence but with forensic bravery, to assert that the Minister had good reason to do so. I should add for completeness that I have concentrated on the idea of recovering a few cases because it seems to the Court to be an obvious way of proceeding, and not least because it was what was being suggested to Ministers. But that is not to say that there were not other ways of achieving the objective, such as the issue of a further policy statement, which could give the clear steer the SSCLG and his Minister apparently thought was required. But the SSCLG has filed no evidence showing why he thought that only recovery of all appeals was the appropriate course.

126. I accept that as written, WMS 1 did not seek to recover all appeals in the category, but only to consider them for recovery. It would have enabled the SSCLG to recover some, and far less than all, or even far less than half or a quarter, just as his officials had advised, and continued to advise him, would be appropriate. Although it falls within the first two tests in s 19(1), I consider that WMS 1 could be taken *on its face* as a proportionate way of achieving the legitimate objective. I do not therefore consider that WMS 1 is itself discriminatory within the terms of s 19(1). But the *application* of WMS 1 was in fact a practice whereby all appeals were recovered, despite the clear terms of WMS 1 that it did not imply that. In my judgment, the practice therefore adopted after its publication was discriminatory within the meaning of s 19.

127. The terms of Policy WMS 2

> "Therefore, he intends to continue to consider for recovery appeals involving traveller sites in the green belt"

are also not written so as to see all appeals recovered, although the case for the SSCLG (and the evidence as to what happened) shows that that was what was meant by it. The practice existing before WMS 2 and afterwards was therefore undoubtedly discriminatory for the reasons I have already set out. So far as the change in September 2014 is concerned (to 75% recovery) I have already set out the fact that the percentage was fixed on when consideration was given to the judicial review challenge, which suggests that there must have been some appreciation of the difficulties in which the previous policy had placed the SSCLG. It is to be observed that there was nothing in the evidence before the court from the SSCLG which shows how the cases within the 75% were to be chosen, nor any justification of that choice of percentage. It was as far as the court can see, an entirely arbitrary figure, fixed on after the officials had suggested an equally arbitrary figure of 50%. That is not to say that a rounded percentage figure could not be justified by reference to some even very brief analysis of how many cases showed up the particular issue of concern. But there was no exercise or analysis of any kind put before the court in evidence. It would not have been difficult to do some exercise. I note for example that there had been schedules of cases prepared in 2013 in the run up to WMS 1, and no reason is put forward why some similar straightforward exercise (or even a sampling exercise of say 10-15 cases) could not have been undertaken.

128. It is therefore my judgment that the Defendant SSCLG has failed to show that the 75% practice was a proportionate way of achieving a legitimate objective, and I must therefore conclude that the practice adopted since September 2014 has remained and is discriminatory within the meaning of s 19 of the *EA 2010*.

129. I must add one important rider. My conclusions are not to be taken as implying that the court doubts the SSCLG's view that the issue of the siting of Travellers' pitches, both generally and within the Green Belt in particular, can be a difficult one to deal with. The Court expresses no view on the outcome of a properly conducted exercise, carried out with proper regard to the requirements of the law, and in a proportionate manner, and properly evidenced.

(vii) Court's discussion and conclusions on s 149 arguments

130. I agree with Mr Warren that this issue is a procedural one. I am not persuaded that the Court should go as far as was suggested in *R (BAPIO Action) v Royal College of General Practitioners* [2014] EWHC 1416 (Admin), although that was no doubt the right approach on the facts of that case. It is not for the court to reach a view on the decision it would reach were it making the decision under s 149. It is for the Court to decide for itself if due regard has been had, but providing this is done it is for the decision maker to decide what weight to give to the equality implications of the decision. But that having been said, it is an issue of great importance, for the reasons emphasised by the Court of Appeal and summarised in *Bracking*. Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation, and have been so for many years (and certainly before the *EA 2010* was enacted- see the *Elias* decision).

131. Was "due regard" had in this case? I remind myself of what McCombe LJ said in *Bracking* at paragraph 40. The duty to have due regard concerns the impact of the proposal on all persons with the protected characteristic and also, specifically, upon any particular class of persons within a protected category who might most obviously be adversely affected by the proposal.

132. I do not accept Mr Warren's submission that the consideration of equality at the time of PPTS in 2012 meant that there was no need for the matter to be addressed when considering whether to alter the practice of recovery in 2013-4. Gypsies and travellers were affected by a policy dealing with how the issues in their applications and appeals were to be considered (the PPTS) but they would also be affected by a policy which affected the way in which the procedure for determination of their appeals was to be conducted, and especially so as the effect was, as is common ground, to cause very considerable delays in determination. Indeed the fact that the PPTS and its Equality Assessment rightly recognised the particular disadvantages suffered by their ethnic group, was a very good reason for the SSCLG and his Ministers to recognise that care had to be taken if their position as compared to other appellants was not to be worsened.

133. But it must also be observed that there is no evidence that the reason put forward by Mr Warren was actually a reason which was ever in the mind of the SSCLG or Ministers at all. The Court has read all of the redacted Ministerial submissions. Despite the very clear guidance of the Court of Appeal, oft repeated, no one in the Department seems to have thought that Ministers or officials should even consider the tests which the law required them to address before embarking on the practice or policy. Apart from the single warning which was given by officials in March 2013 there is no mention of the issue or of the questions which statute said had to be addressed. Mr Warren says that the EHRC does not suggest that a formal Equality Impact Assessment had to be carried out in order for "due regard" to be had. But even assuming that that is right, that does not mean that there was no requirement for an assessment or consideration of *any* kind.

134. The fact is that this in truth not a case whether the regard the Secretary of State and his Ministers had was "due regard." The fact is that, on the evidence filed by the SSCLG, they had no regard at all. As the authorities cited above make clear, evidence is required that due regard was actually had. The Court is unable to assume that due regard was had simply because Counsel for the SSCLG asserts that it was, however engagingly. The Court of Appeal could not have been plainer in the several authorities

recited earlier that the duty requires actual consideration, and that it expects evidence of a structured attempt to focus upon the details of equality issues. That applies as much to Ministerial consideration and decisions as it does to those of other public bodies. That omission is notable, given the care taken at the time of the PPTS by the SSCLG and his Department to address the issues in question.

135. I am therefore in no doubt that there has been a failure to comply with the PSED. It is not a case of the SSCLG and his Ministers addressing it but falling short; it is one of not addressing it all, and not doing so on either occasion when changes in policy were being considered.

136. Even if I thought that the SSCLG and his Ministers had considered the issue, I would still have found on the evidence before me that they had not had due regard. That is because, as I have already concluded, the steps taken to achieve a legitimate end (giving the clear steer) have not been shown to be proportionate.

137. In the case of both Mrs Moore and Ms Coates, only one reason was given for the recovery of their respective appeals, which was the fact the appeals related to travellers pitches in the Green Belt. No other reason was given in writing, nor appears in Mr Watson's evidence, which suggests that either possessed any other feature, or raised any other issue, requiring recovery by the SSCLG. I conclude therefore that their appeals' recoveries were each vitiated by the breach of this duty and by the indirect discrimination towards the ethnic group of which they are members.

138. Just as I did in the case of my conclusions about indirect discrimination, I make an important caveat. It is not the view of this Court that one could never have a policy or practice which sought to recover some, or even all, planning appeals in the Green Belt of a certain kind. That is a matter for Ministerial Policy, and not for the courts, *provided* that it is done in accordance with the duties placed on the SSCLG and his Ministers by Parliament in statute, and if not so done, then he or they run the risk of the Court being asked to declare it unlawful. In devising and considering a policy or practice, the PSED requires actual consideration, and the Court of Appeal expects evidence of a structured attempt to focus upon the details of equality issues. I reiterate that that principle applies as much to Ministerial consideration and decisions as it does to those of other public bodies. The disadvantaging of a racial group (to take the characteristic in issue here) without having a legitimate aim or without having a proportionate approach to its achievement, or a failure to have due regard to issues of equality, is no more or less objectionable if it is occasioned by Ministerial decision making.

10 Articles 6 and 8 of ECHR: arguments, discussion and conclusions

139. It is apt to start with the terms of s 6 of the Human Rights Act 1998

> 6 Acts of public authorities.
>
> (1)It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2)Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament. "

140. Article 6(1) reads

"In the determination of his civil rights and obligations……., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law……."

141. As to Article 8, it reads

"Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

142. It was common ground that Article 6 applies to the determination of planning appeals. Both Mr Jones and Mr Cottle argue that there are two breaches of Article 6 :

i) the SSCLG, by recovering the appeals, has deprived the Claimants (and travellers in recovered travellers' sites cases) of a hearing before an Inspector, who would be impartial, and instead decided to determine them himself, when he is not independent;

ii) delay has been caused to the determination of appeals.

143. Mr Jones in particular argued that the court should not follow the approach in *Alconbury* [2001] UKHL 23, [2003] 2 AC 295, whereby the House of Lords endorsed as compliant with Article 6 the system of appeals being determined by the Secretary of State in called in or recovered cases. As Lord Slynn said at paragraph 54:

" 54. I accordingly hold that in relation to the judicial review of the Secretary of State's decision in a called in application or a recovered appeal under the planning legislation and to a review of the decisions and orders under the other statutes

concerned in the present appeals, there is in principle no violation of article 6 of the European Convention on Human Rights as set out in the Schedule to the Human Rights Act 1998. The scope of review is sufficient to comply with the standards set by the European Court of Human Rights. That is my view even if proportionality and the review of material errors of fact are left out of account: they do, however, make the case even stronger. It is open to the House to rule on that question of principle at this stage of the procedure in the various cases."

144. I would refer also to the speech of Lord Hoffman at paragraphs 117 ff, where he reviewed the jurisprudence of the European Court of Human Rights on this issue

117. ……..No one expects the inspector to be independent or impartial in applying the Secretary of State's policy and this was the reason why the court said that he was not for all purposes an independent or impartial tribunal. In this respect his position is no different from that of the Secretary of State himself. The reason why judicial review is sufficient in both cases to satisfy article 6 has nothing to do with the "safeguards" but depends upon the *Zumtobel* principle of respect for the decision of an administrative authority on questions of expediency. It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal.

118. My Lords, I can deal much more briefly with the other two cases. In *Varey v United Kingdom* Application No 26662/95 27 October 1999 the Commission considered a complaint by gypsies against whom enforcement proceedings had been taken for stationing caravans on land without planning permission. They had applied three times for permission. On the first occasion, an appeal to the Secretary of State was dismissed. On the second occasion, the inspector said that there had been a change in circumstances and recommended that permission be granted but the Secretary of State disagreed. He said that the new circumstances were insufficient to justify overriding the Green Belt policy. On the third occasion the inspector again recommended that permission be granted and for similar reasons the Secretary of State rejected his recommendation and dismissed the appeal. In no case did the applicants appeal to the High Court.

119. The Commission, following the *Bryan* case, 21 EHRR 342, said that there had been no violation of article 6. The High Court's jurisdiction on appeal from the Secretary of State was sufficient. So the case adds little to *Bryan* itself. I would only comment that I find puzzling a remark of the Commission, at paragraph 78, that -

> "the procedural protection afforded to the applicants' interests by the process of a public inquiry before a planning inspector, who had the benefit of inspecting the site and of receiving written and oral evidence and representations, must be regarded as considerably diminished by the rejection on two occasions by the Secretary of State of the inspector's recommendations."

120. The Secretary of State does not appear to have differed from the inspector on any finding of fact or evaluation of the facts. He disagreed because he did not think that the inspector had given sufficient weight to the importance of maintaining the Green Belt. This is a pure question of administrative policy or expediency. It has nothing to do with the issues on which it is essential for the inspector to be judicial and impartial. However, despite these remarks, the Commission concluded that even

though the safeguards had been diminished, the procedure still complied with article 6.

121. Finally there is *Chapman v United* Kingdom Application No 27238/95 18 January 2001, a decision of the Grand Chamber of the European court. This was another case of enforcement proceedings against gypsies. Her appeal on ground (a) was dismissed by an inspector exercising the power to determine the appeal under Schedule 6. She did not appeal to the High Court and complained that the High Court would not have been entitled to determine the merits of her claim that she should have planning permission. The court stated briefly that, following the *Bryan* case, the scope of judicial review was sufficient to satisfy article 6.

122. My Lords, I conclude from this examination of the European cases on our planning law that, despite some understandable doubts on the part of some members of the Commission about the propriety of having the question of whether there has been a breach of planning control determined by anyone other than an independent and impartial tribunal, even this aspect of our planning system has survived scrutiny. As for decisions on questions of policy or expediency such as arise in these appeals, whether made by an inspector or the Secretary of State, there has never been a single voice in the Commission or the European court to suggest that our provisions for judicial review are inadequate to satisfy article 6."

145. I would refer also to this passage in the speech of Lord Clyde at paragraphs 158ff:

"158. So far as the content of the dispute is concerned, the present point is that the Secretary of State should not be the decision-maker. The challenge is advanced substantially as one of principle, although in relation to the Huntingdonshire case a variety of particular points were raised regarding the interest or involvement in the Alconbury proposals on the part of various persons connected with the department or the Government. But I find it unnecessary to explore these in detail. The Secretary of State is admittedly not independent for the purposes of article 6(1). I do not consider that it can be decided at this stage whether the interest or involvement of these other persons is going to provide grounds for challenging the legality of the eventual decision. Grounds for challenge which are at present unpredictable may possibly arise in due course. As matters presently stand the issue is whether article 6(1) is necessarily breached because the decision is to be taken by the Secretary of State with the assistance of his department. The challenge is directed not against the individual but against the office which he holds. The question which arises is whether the Secretary of State or some person altogether unconnected with the Secretary of State should make the decision.

159. As I indicated at the outset, Parliament, democratically elected, has entrusted the making of planning decisions to local authorities and to the Secretary of State with a general power of supervision and control in the latter. Thereby it is intended that some overall coherence and uniformity in national planning can be achieved in the public interest and that major decisions can be taken by a minister answerable to Parliament. Planning matters are essentially matters of policy and expediency, not of law. They are primarily matters for the executive and not for the courts to determine. Moreover as matter of generality the right of access to a court is not absolute. Limitations may be imposed so long as they do not so restrict or reduce the access that the very essence of the right is impaired (*Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249, para 72). Moreover the limitation must pursue a legitimate aim and the relationship between the means employed and the aim sought to be achieved must be reasonably

proportionate (*Ashingdane v United Kingdom* (1985) 7 EHRR 528). In the context of the present cases the aim of reserving to a minister answerable to Parliament the determination of cases which will often be of very considerable public interest and importance is plainly a legitimate one. In light of the considerations which I have already canvassed it seems to me that there exists a reasonable balance between the scope of matters left to his decision and the scope of the control possessed by the courts over the exercise of his discretionary power.
160. Accordingly as matters presently stand I find no evident incompatibility with article 6(1). That view seems to me to accord fully with the decisions of the European Court of Human Rights. A consideration of the cases on the specialised area of town and country planning to which I now turn suggests that the court has recognised the sufficiency of a limited appeal and the decisions fully support the view which I have expressed……"

146. Mr Jones sought to persuade the Court that since *Alconbury* jurisprudence had moved on. He referred to the speech of Lord Bingham in *R (Anderson) v Secretary of State for Home Department* [2002] UKHL 46, [2003] 1 AC 837, HL (EW), 881 at paragraph 26 (a case concerned with convicted murderers) to the effect that "independent" in the context of article 6(1) of the Convention means "independent of the parties to the case and also of the executive". He went on:

> "Far from being independent of the executive, the Home Secretary and his junior ministers are important members of it. I need not linger on this point, since it is not controversial. Plainly, the Home Secretary is not independent of the executive and is not a tribunal."

147. Mr Jones submitted that in place of determination of published government policy by professional impartial specialist planning inspectors, the Defendant has operated a system to the disadvantage of the Claimant, under which recovery is used to achieve a covert change of policy to one less favourable than the published policy being applied by those inspectors.

148. I do not accept these arguments for three reasons

i) *Alconbury* is itself strong authority that determination by the Secretary of State is compatible with Article 6. That authority is binding on this Court. But in any event I am not persuaded that such recent House of Lords authority should be departed from, and certainly not on the basis of *Anderson* which relates to a quite different statutory context and was also decided within a year of *Alconbury*;

ii) the recovery *decision* is not a consideration of the substantive merits of a planning appeal, but a procedural step- see *R (Hadfield) v. Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1266 (Admin). The Court has stressed that any party with a meritorious case should not have any reasonable fears about the process: *Hadfield*, at [56], per Sullivan J as he then was ;

iii) the evidence shows that those appeals that have been determined by the SSCLG since the practice of recovery of all cases have not all been dismissed. Some have been allowed. There is in my judgment no evidence which tends to show that the SSCLG is or was predisposed to dismiss any or any particular appeals.

149. But Article 6 does not relate only to the fairness and impartiality of the tribunal, but also to having the hearing within a reasonable time. Mr Warren argues that

i) the allegation of excessive delay is not made out on the facts. In Ms Moore's case, the inquiry concluded on 19 February 2014. The Inspector's report has been received and is being actively considered. To date, there has been a period of nine months since the inquiry concluded. Had the Secretary of State not recovered jurisdiction, it would still have taken some time for the inspector to determine the appeal;

ii) in the context of civil proceedings, the reasonable time guarantee under Article 6 recognises "*the importance of rendering justice without delays which might jeopardise its effectiveness and credibility*": *H v. France* (1990) 12 EHRR 74. In determining whether a reasonable time has been passed, it is relevant to have regard to the complexity of the case, the applicant's conduct and the manner in which the matter was dealt with by the administrative and judicial authorities: *König v. Germany* (1978) 2 EHRR 170, at [99] (applied *per* Lord Hope in *Magill*, at [110]);

iii) in neither Ms Moore's nor Mrs Coates' case, can it realistically be said that the period which has passed since the end of their appeal inquiry is unreasonable, particularly when it is considered that some of that time would have been inevitable even if the decision were taken by the inspector and were not recovered.

150. Here I consider that the claimants are on strong ground. To anyone with experience of development control and planning inquiries, it is remarkable that cases involving a modest amount of evidence, and typically taking two days at most, could then require consideration for in excess of 6 months, let alone the 10 months that has elapsed in Mrs Coates' case. I recognise that Mrs Moore's case has involved some complexities, but there is no evidence at all that it was anything but atypical. But as Mr Watson's evidence showed with clarity, it is the effect of the recovering of all cases which was expected to, and has, caused significant delays in determination. It was not the issues raised by any of the cases which caused the delays but the Ministerial decision to recover them all for determination. No evidence has been put forward by the SSCLG to show that the delays were necessary in travellers' cases, and it must again be observed that although WMS 1 sought to stress the same substantive policy message for cases in the Green Belt relating both to travellers' housing and "conventional" housing, yet appeals of the latter kind have not been delayed whereas appeals of the former kind have been delayed, and considerably so. The pitches concerned (and certainly so in the Claimants' cases) contain their homes where they live, or wish to live, with their children. The SSCLG has failed to show that the delays caused to the determination of the appeals was a proportionate response to the issue of giving the policy "steer." It follows that the appeals have not been determined within a reasonable time.

151. As to Article 8, I do not consider it adds anything to the discussion as such, save only that it confirms (should confirmation be required) that the effect on the home lives of the Claimants (and of other travellers affected) is part of the context for giving weight to the importance of determining appeals as promptly as one can.

11 Allegations of bias: arguments discussions and conclusions

152. As the passage cited above from paragraph 48 of Lord Slynn of Hadley's speech in *Alconbury* demonstrates, the application of a policy does not establish bias. It is after all inevitable that a policy in development control will be directed towards a particular kind and/or location of development. Provided that the terms or application of the policy are otherwise lawful, a policy directed towards the issue of travellers' pitches in the Green belt is not exceptionable. If one is considering whether there was bias in the decisions to recover the appeals of the claimants, or generally, I do not consider that there is anything which goes beyond arguments that there were breaches of the *EA 2010*. For decision makers in their exercise of development control, there are difficult issues raised by the question of the application of Green Belt policy to the siting of Traveller's pitches in the Green Belt, and as set out above I do not consider that a decision to recover all or some of those appeals is necessarily objectionable, provided that the tests in ss 19 and 149 of *EA 2010* are met. If the SSCLG had been able to show that he had acted proportionately, then the disadvantage imposed on appellants in such cases (and therefore on ethnic gypsies and travellers) would not have constituted unlawful discrimination under s 19 of *EA 2010,* and if due regard had been had to the issues specified in s 149, there would have been no breach of the PSED. It would not be possible then to argue that there was bias if the tests in the Act had been passed. But lest there be any doubt, I am not suggesting that all that is missing is a simple procedural step. No-one should doubt that the issues which make the development control issues ones to which there may not be an easy answer (on which see the previous litigation relating to Mrs Moore's case) will also require careful consideration in the exercise required under ss 19 and 149 of the *EA 2010*. (But I repeat again, that the fact that they are not easy does not mean of itself that therefore they are complex or will require much time for determination.) The outcome of that consideration is not for the Court but the SSCLG to determine, but determine them he must in accordance with the statutory provisions.

153. If the allegation is that there was bias because the SSCLG was minded to dismiss the appeals of all or any of the appellants, including the claimants, because they were travellers, I do not consider that there is any evidence to justify such a claim. The SSCLG allowed some of the appeals which have got as far as the decision stage. The fact that he disagreed with his Inspectors in 4 out of 15 cases where the appeals were dismissed, and dismissed appeals which they would have allowed, gets nowhere near showing bias. The Court simply has no material relating to those cases which would justify it concluding that the decision to dismiss the appeal was in any way objectionable. In the case of the Claimant Mrs Moore, it was an Inspector who had dismissed her original appeal. The now recovered appeal has not been determined by the SSCLG, so one has no idea of his views of the case. In Ms Coates' case the Court has not been informed of what the Inspector has recommended, nor of what the SSCLG considers the outcome should be.

154. It follows that I consider that there is no evidence of bias by the SSCLG against either Claimant.

12 Allegations of abuse of power and irrationality

155. Mr Cottle argued that it was an abuse of power for the SSCLG to take the steps he had, because the policy position relating to travellers' pitches in the Green Belt was well established, not least through PPTS, and that to recover more or all appeals on the basis that he was concerned about the application of the policy was unnecessary. Both he and Mr Jones argued that the Inspectors were very experienced in such cases and in the issues that arose.

156. It was also argued that it was irrational for the SSCLG and his Ministers to want to recover all cases, when they could have recovered a few or had reemphasised the contents of PPTS.

157. I regard these arguments as being without merit. The Secretary of State was entitled to decide that he should give a particular steer in the context of PPTS. He was also entitled, if he followed the appropriate route, to decide that he wanted all or most such cases recovered, and his discretion as to recovery under paragraph 3 of Schedule 6 of the *TCPA 1990* is a broad one. The tests of proportionality and rationality are not the same, nor are they coterminous.

158. This was in truth an attack on the idea that the SSCLG should have and exercise jurisdiction over such appeals. In the light of *Alconbury* that argument is untenable.

13 Allegations that the Defendant SSCLG acted in accordance with an undeclared policy, and contrary to his declared policy:

i) arguments

159. Mr Buttler, supported by Mr Jones and Mr Cottle, argued that

a. the Written Ministerial Statements to Parliament publicly represented that it was the Defendant's approach that he would not recover all gypsy and traveller appeals, but that a number of appeals would be recovered to test the policy;

b. in fact, the Defendant recovered all, or practically all, gypsy and traveller appeals.

c. the Defendant's witness, the Head of Planning Casework, expressly recognised that this practice was inconsistent with the publicly stated position;

d. as a matter of public law, it is unlawful to depart from published policy without articulating a good reason for doing so in the course of the decision making process. No such reasons were given by the Defendant;

e. further, as a matter of public law, it is unlawful to follow an unpublished policy or practice which is inconsistent with the published policy: *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245, *per* Lord Dyson at [20]. The Defendant's blanket approach of recovering Gypsy and Traveller appeals in the Green Belt amounted to an unwritten practice that was inconsistent with his unequivocal public representations as to his practice.

160. Mr Warren submitted for the Defendant SSCLG that;

a. WMS1 did not necessarily mean that all Gypsy and Traveller Green Belt appeals would be recovered; but nor was that possibility precluded. If, as happened, the Secretary of State was of the view that all such appeals needed to be recovered, then he had discretion to do so. The WMS1 established the criterion for recovery – namely, Gypsy and Traveller appeals in the Green Belt – but set no limits on the level of recovery. Accordingly, there is no substance to the "*blanket*" argument. It is based on a misreading of WMS1.

b. Similarly, the argument based on *R (Lumba) v. Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 by the EHRC, and on which the Claimants now also seek to rely, is without merit because it is based on a misreading of WMS1. The Secretary of State did not maintain a secret and undisclosed policy on the level of recovery. WMS1 did not preclude him from recovering all Gypsy and Traveller Green Belt appeals.

ii) Discussion and conclusions

161. There can be no doubt on the evidence that WMS 1 did not set out to recover all appeals relating to travellers' pitches in the Green Belt, as I have observed above. Indeed its terms denied any such intention. But there can also be no doubt that from no later than September 2013, it was actually the case that all appeals were being recovered as a matter of course. That was despite the express terms of WMS 1

> "For the avoidance of doubt, this does not mean that all such appeals will be recovered, but that the Secretary of State will likely recover a number of appeals in order to test the relevant policies at national level. The Secretary of State will apply this criteria" (sic) "for a period of 6 months, after which it will be reviewed. "

162. As the Chief Planning Inspector pointed out to the Minister in early August 2013, the approach of the Minister for Housing and Local Government was leading to a practice of "continual recovery" which was not consistent with the very recently announced policy. By the time WMS 2 was issued in January 2014 all appeals were being recovered as a matter of course. That approach continued until September 2014. It has now been replaced by recovery of 75% of appeals. But WMS 2 itself does not state that all appeals are to be recovered, but only that appeals will be considered for recovery.

163. There can in my judgment be no doubt, and I so find, that the practice being applied as a matter of course from September 2013 to 17th January 2014 was in conflict with WMS 1 until it was replaced by WMS 2 on the latter date. From that date onwards, the practice being applied was not in conflict with WMS 2. However, the practice being followed was not derived from WMS 2 but from an internally adopted but unpublished policy that all such appeals would be recovered, or from September 2014, that 75% of them would be recovered.

164. Contrary to Mr Warren's submissions, I do therefore find that the Secretary of State did maintain an undisclosed policy on the level of recovery. No-one consulting Hansard, or reading the Ministerial Statements on the Department's website could

have appreciated that in the case of WMS 1, its carefully written rider was treated as being of no effect within 3 months of its issue, and that in the case of WMS 2, there was actually a policy that all appeals should be recovered.

165. In *Lumba* Lord Dyson said this at paragraphs 20 and 35

> "20 Here too, there is little dispute between the parties. Mr Beloff QC rightly accepts as correct three propositions in relation to a policy. First, it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations."

> "35 The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it."

166. That approach chimes with the principles long adopted in the case of planning decisions, that the Secretary of State when determining an appeal must have regard to his own policies, and if he chooses to depart from his policy, must give reasons for doing so in order that the recipient of his decision would know why the decision was being made as an exception to the policy: see *Gransden v Secretary of State* [1986] JPL 519 at page 521 and *Horsham DC v Secretary of State* [1992] 1 PLR 81 at 88.

167. I regard the case of the EHRC as well made about the period from September 2013 to 17th January 2014. The position after that date is less clear, because while the policy actually adopted was undisclosed, it would have been possible to recover all cases under WMS 2 without any inconsistency with its terms. Further, the decision to recover a case by the Secretary of State is not one where he is bound to invite representations before making it, and he has a wide discretion. That is an important distinction from polices which go to the planning merits of an appeal, of the kind considered in *Horsham.*

168. It will be recalled that in the case of both claimants, the sole reason given was:

> "this is an appeal involving a Traveller site in the green belt".

I do not regard that as inconsistent with WMS 2, albeit that WMS 2 did not suggest that that was sufficient reason of itself.

169. Although I can understand why some may cavil at the use of an undisclosed policy, my task is to determine whether a decision made in its application is unlawful. It is not for this Court to determine whether it was appropriate for the SSCLG and his Minister to have acted on a policy which had not been disclosed to Parliament. That is a matter for Parliament, not this Court.

170. I therefore conclude that at the times that these two appeals were recovered (both post date 17th January 2014), the SSCLG was entitled to act on the undisclosed policy, and I reject this ground of challenge.

14 Conclusions on the merits

171. This case involved a very substantial challenge to the way in which the Secretary of State for Communities and Local Government, and in particular his junior Minister, had approached the conduct of appeals relating to travellers' pitches in the Green Belt.

172. While I am satisfied that the challenges mounted on issues of bias, irrationality and abuse of power have failed, I have found that the challenges based on breaches of the *Equality Act 2010* and of Article 6 of the *European Convention of Human Rights* have succeeded. Both are part of the law of England and Wales. These are not to be dismissed as technical breaches. Although the issue of unlawful discrimination was put before the Minister by his officials, no attempt was made by the Minister to follow the steps required of him by statute, nor was the regard required of him by s 149 of the *Equality Act 2010* had to the matters set out there.

173. The Article 6 challenge has succeeded because substantial delays have occurred in dealing with the appeals of Mrs Moore and Ms Coates, and with many other cases. In the context of delay, Article 6 of the ECHR does no more than encapsulate the long standing principle of the common law that justice should not be unreasonably delayed, as it was and has been here. The Claimants were and are entitled to have their appeals determined within a reasonable time. The delays they have experienced have also affected those who oppose their appeals.

174. I have not addressed the alleged breach of Article 14 separately, given my conclusions under s 19 of the *EA 2010.*

15 Delay

175. It was not suggested by the Defendant SSCLG that the delay in issuing these proceedings should disqualify the Claimants from relief. As set out above, it came about because of the refusal of public funding to the claimants, which decisions were later reversed. Nothing has been lost as the result of the proceedings being issued. The appeal decisions in their cases and others have not been held up by the judicial review process but by the delays within the Department as a result of the policy which is under challenge.

16 Orders and the exercise of the Court's discretion

176. The next question is whether I should make any order as the result of the challenges succeeding, and if so to what effect.

177. Mrs Moore sought

a. an order quashing the decision to recover her appeal

b. an order prohibiting the Defendant from recovering it.

178. Ms Coates sought

a. an order quashing the decision to recover her appeal

b. alternatively, an order requiring the Defendant to revoke his decision to recover it.

179. I think it important to identify what was unlawful. I have determined that what was unlawful was the practice of recovering all appeals, and the unreasonable delay caused to Mrs Moore's and Ms Coates' appeals. I have not determined that WMS 1 as drafted and published was unlawful, but I have found that its application was. In the case of WMS 2, its terms do not reflect the reasons for its being made nor its application.

180. What was unlawful was the application of the policies in WMS 1 and WMS 2 in such a way as to recover all traveller's pitch appeals, which, due to the way the practice was approached, amounts to a breach of ss 19 and 149 of the 2010 Act. I have also found that the practice of recovering all appeals, or an arbitrary percentage thereof, was and is unlawful. The effect of the approach of the Secretary of State was also to breach Article 6 so far as Mrs Moore and Ms Coates are concerned.

181. I have no doubt that the Secretary of State and his Ministers will not seek to carry on a practice which this Court has ruled unlawful. But equally, the Court does not wish to prevent the Secretary of State and his Ministers from being able to exercise their discretion to recover jurisdiction over such appeals as require it. It follows from the terms of this judgment that in the absence of the exercise required by ss 19 and 149 of the 2010 Act, a policy of recovery of all or some other arbitrary percentage is unlawful. But recovery of individual cases on their merits is not unlawful, and as indicated earlier, a properly considered decision within the parameters of the 2010 Act to recover a number of appeals would also not be unlawful.

182. But it must also be said that the issues raised by Mrs Moore and Ms Coates are not limited to their appeals. There are, as the figures set above demonstrate, many others whose appeals have been recovered and who must be experiencing delays, as are those who oppose their appeals. If, as appears to be the case, the appeals were recovered not because of their merits but because they were cases of travellers' pitches in the Green Belt, then the effect of the judgment will be to call into question the legality of many other recoveries. But it may be that when addressed properly, some of those appeals would have merited recovery anyway. No doubt sorting out which should or should not be recovered will involve some time and resources being expended, although it will no doubt be less than the time and cost spent in dealing with judicial review claims by many others should a review not be conducted.

183. But this difficulty has not come about through any fault of the Claimants, nor of those who oppose their planning appeals. It has come about because the Minister concerned elected to follow the path he did from August 2013 onwards despite warnings from his officials and the Chief Planning Inspector about the backlog of appeals that would be created. He had already been put on notice in March 2013 that such a policy could be regarded as disproportionate in terms of its effects on gypsies and travellers.

184. I turn now to the specifics of the two cases. In the case of both Mrs Moore and Ms Coates, an inquiry has taken place, with the Inspector reporting to the SSCLG rather than as the decision maker. The report in the former case has been submitted, but not in the latter. Quashing of the recoveries, if there is not a further lawful recovery, will

therefore require the reconsideration and rewriting in part of the first report (to turn it into a decision letter) and in the latter the reconsideration of parts of that which has been written so far. The Court has seen neither report, and I am not willing to speculate on what either might contain.

185. I am in any event not persuaded that they could not be proper cases for recovery if the criteria were lawfully applied. Mrs Moore's case has already been to the Court of Appeal because it raises some difficult issues, and Ms Coates' case took some 20 days at inquiry. But while I do not think it appropriate to limit the discretion of the Defendant, properly exercised, in connection with their recovery, it would in my judgment be wrong to leave untouched two unlawful recoveries of jurisdiction which were made pursuant to a practice coined and developed in breach of an express statutory duty, and which discriminated unlawfully against a racial group.

186. Therefore in the exercise of my discretion, I have concluded that I should limit the relief granted by the Court to the quashing of the two recoveries.

187. I could not finish without expressing my gratitude to all Counsel for their very well researched and forcefully argued submissions.