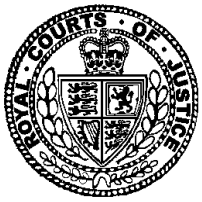

Neutral Citation Number: [2022] EWHC 1262 (Admin)

Case No: CO/1292/2021

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

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street, Birmingham B4 6DS

Date: 25/05/2022

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

THE QUEEN
On the application of

(1) THE BRITISH MEDICAL ASSOCIATION **DR GLYNN EVANS**	**Claimants**
- and -	
SECRETARY OF STATE FOR DEFENCE	**Defendant**
- and -	
SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Interested Party**

- -

Kate Gallafent QC and Celia Rooney (instructed by Wace Morgan) for the **Claimants**
James Strachan QC and Simon P G Murray (instructed by Government Legal Department) for the **Defendant**

Hearing date: 22nd – 23rd March 2022

- -

Approved Judgment

The Hon. Mr Justice Bourne:

Introduction and factual background

1. The claimants challenge a decision by the defendant, communicated to the claimants on 12 January 2021, to direct that the Government should not commence or fully implement section 192 of the Employment Rights Act 1996 ("ERA") at present. That section, if implemented in full, would enable service personnel to bring Employment Tribunal claims for causes of action including unfair dismissal.

2. There is an application by the first claimant for permission to withdraw his claim. That is not opposed by any party and I will grant permission for his withdrawal, subject only to any costs issues which can be decided later. That leaves the British Medical Association ("BMA") as the surviving claimant.

3. The ERA today contains many, though not all, of the fundamental statutory employment law rights of employees and workers, including the right not to be unfairly dismissed.

4. That right was first introduced in the Industrial Relations Act 1971 and was re-enacted in Part V of the Employment Protection (Consolidation) Act 1978 ("1978 Act"). The right was not extended to members of the armed forces. So the provisions of section 138 of the 1978 Act, as originally enacted, included:

> "(1) Subject to the following provisions of this section, Parts I …, II, III, V, VIII and this Part and section 53 shall have effect in relation to Crown employment and to persons in Crown employment as they have effect in relation to other employment and to other employees.
> (2) In this section, subject to subsections (3) to (5), "Crown employment" means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by any enactment.
> (3) This section does not apply to service as a member of the naval, military or air forces of the Crown …, but does apply to employment by any association established for the purposes of Part VI of the Reserve Forces Act 1980."
>
> (emphasis added)

5. In 1993, provision was made for the relevant parts of ERA to be applied to service personnel at some point in the future. Section 31 of the Trade Union Reform and Employment Rights Act 1993 ("the 1993 Act"):

   i. provided that section 138(3) of the 1978 Act would be amended so as to read:

      > "(3) This section applies to service as a member of the naval, military or air forces of the Crown but only in accordance with section 138A and it applies also to employment by any association established for the purposes of Part VI of the Reserve Forces Act 1980"; and

ii. added a new section 138A of the 1978 Act, which would permit the relevant provisions to be applied to the armed forces by Order in Council, subject to such exceptions and modifications as might be specified in the Order, including "provision precluding the making of a complaint or reference to any industrial tribunal unless the person aggrieved has availed himself of the service procedures for the redress of complaints applicable to him".

6. However, section 31 of the 1993 Act was, itself, never brought into force and therefore the contemplated amendments of the 1978 Act did not take place.

7. On 22 August 1996, most provisions of the ERA came into force. The right not to be unfairly dismissed was now found in Part X of that Act.

8. Section 191 of the ERA provides:

> "(1) Subject to sections 192 and 193, the provisions of this Act to which this section applies [*these include the relevant provisions of Part X*] have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers."

9. This claim is concerned with the "principal" version of section 192 which, if and when brought into force, would replicate the approach taken in the uncommenced section 138A of the 1978 Act by providing that the relevant provisions could be applied to members of the armed forces by an Order in Council which could be subject to modifications including provision precluding the making of a tribunal claim unless the claimant had exhausted internal redress mechanisms. Although the principal version of section 192 has not been brought into force, it has been amended from time to time but the amendments are not material to this claim. The principal version, so far as material, now reads:

> "(1) Section 191—
> (a) applies to service as a member of the naval, military or air forces of the Crown but subject to the following provisions of this section, and
> (b) applies to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996.
>
> (2) The provisions of this Act which have effect by virtue of section 191 in relation to service as a member of the naval, military or air forces of the Crown are—
> …
> (e) Part X, apart from sections 98B(2) and (3), 100 to 103, 104C, 108(5) and 134,
> …
> (3) Her Majesty may by Order in Council—
> (a) amend subsection (2) by making additions to, or omissions from, the provisions for the time being specified in that subsection, and
> (b) make any provision for the time being so specified apply to service as a member of the naval, military or air forces of the Crown subject to such exceptions and modifications as may be specified in the Order in Council,

but no provision contained in Part II may be added to the provisions for the time being specified in subsection (2).

(4) Modifications made by an Order in Council under subsection (3) may include provision precluding the making of a complaint or reference to any employment tribunal unless—
(a) the person aggrieved has made a service complaint; and
(b) the Defence Council have made a determination with respect to the service complaint.

(5) Where modifications made by an Order in Council under subsection (3) include provision such as is mentioned in subsection (4), the Order in Council shall also include provision—
(a) enabling a complaint or reference to be made to an employment tribunal in such circumstances as may be specified in the Order, notwithstanding that provision such as is mentioned in subsection (4) would otherwise preclude the making of the complaint or reference; and
(b) where a complaint or reference is made to an employment tribunal by virtue of provision such as is mentioned in paragraph (a), enabling the service complaint procedures to continue after the complaint or reference is made.

(6A) In subsections (4) and (5)—
'service complaint' means a complaint under section 334 of the Armed Forces Act 2006;
'the service complaint procedures' means the procedures prescribed by regulations under that section.

(7) No provision shall be made by virtue of subsection (4) which has the effect of substituting a period longer than six months for any period specified as the normal period for a complaint or reference.

(8) In subsection (7) 'the normal period for a complaint or reference', in relation to any matter within the jurisdiction of an employment tribunal, means the period specified in the relevant enactment as the period within which the complaint or reference must be made (disregarding any provision permitting an extension of that period at the discretion of the tribunal)."

10. I describe this as the "principal" version of section 192, because "transitory provisions" of the ERA brought an alternative version of that section into force. Paragraph 16 of Schedule 2 provides:

> "(1) If section 31 of the Trade Union Reform and Employment Rights Act 1993 has not come into force before the commencement of this Act, this Act shall have effect until the relevant commencement date as if for section 192 there were substituted—
>
> 'Section 191 –
> (a) does not apply to service as a member of the naval, military or air forces of the Crown, but

> (b) does apply to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996.'
>
> (2) The reference in sub-paragraph (1) to the relevant commencement date is a reference-—
> (a) if an order has been made before the commencement of this Act appointing a day after that commencement as the day on which section 31 of the Trade Union Reform and Employment Rights Act 1993 is to come into force, to the day so appointed, and
> (b) otherwise, to such day as the Secretary of State may by order appoint."

11. The overall effect is that the "transitory" version of section 192 applies initially, until it is replaced by the "principal" version on "such day as the Secretary of State may by order appoint". Unless and until the principal version comes into force, service personnel cannot make the relevant claims in the Employment Tribunal.

12. It should however be noted that they can make Employment Tribunal claims of other kinds which arise under other statutes, such as discrimination claims or claims for equal pay under the Equality Act 2010.

13. There being no recourse for service personnel to the excluded employment law rights, there have for many years been internal arrangements for service complaints. In the modern era, detailed provisions were made by the Armed Forces Act 2006 and associated secondary legislation. From 1 January 2008, the 2006 Act introduced a new service complaints system ("SC") for all three of the services, where previously there had been a single Act applicable to each service. That legislation also introduced the participation of panels including an independent member to deal with certain types of complaint and a Service Complaints Commissioner to provide further independence and public scrutiny of the system. The system was further amended by the Armed Forces (Service Complaints and Financial Assistance) Act 2015, which converted the Service Complaints Commissioner into an Ombudsman and streamlined the complaints process.

14. Successive annual reports by the Commissioner and then by the Ombudsman have criticised the efficiency and effectiveness of the SC system.

15. The original first claimant, Dr Evans, left the Army Reserve with effect from 12 July 2019. He wished to bring a claim for unfair dismissal against his former employers but could not do so because section 192 had not been brought into force. He sent a Pre-Action Protocol letter to the Government Legal Department on 26 November 2019, threatening to challenge a failure to consider the commencement of section 192. The Defendant responded on 17 December 2019, contending that the claim was time-barred, that Dr Evans lacked standing and that the proposed claim sought impermissibly to rely on Parliamentary material.

16. Dr Evans and the BMA commenced judicial review proceedings in January 2020.

17. The Defendant responded, in the first witness statement of David Howarth, that the Ministry of Defence in August 2019 had begun a review of the SC system which would, by the end of June 2020, address the question of whether the power to appoint a day for the commencement of section 192 should be exercised.

18. On 22 July 2020, Steyn J refused permission for the judicial review claim, ruling that the impending consideration of commencement of section 192 rendered it academic, but she awarded the claimants their costs because this remedy had not been offered in the pre-action correspondence.

19. Following requests by the claimants for updates, on 20 September 2020 Mr Howarth made a second witness statement in which he stated that the review of the SC System had thrown up issues "which meant that the ministerial decision on s.192 could not be taken in advance of a decision on the overall package of Service Complaints reforms". He stated that his proposals following the outcome of his review had been approved at Director General level via the Defence People Leadership Team on 28 May 2020 (so far as they related to s.192), and by the Chiefs of Staff on 21 July 2020. The proposals were then on the agenda for consideration by the Ministry of Defence's Chiefs of Staff Committee and its Executive Committee ("ExCo") on 24 September 2020. On 2 October 2020 the claimants were informed that the proposals were agreed by ExCo on that date and a submission to Ministers ("the Submission") was being prepared.

20. The Submission went to Ministers on 30 November 2020. It identified as the issue the fact that the 2020 judicial review claim had been made. By way of background, it explained the role of the ET and the fact that service personnel could access it only in limited circumstances such as in equal pay or discrimination claims. It continued:

> "9. In the version of s.192 which is not yet in force, Service Personnel would have an entitlement to bring a claim under section 191 of the same Act to the ET, subject to any conditions set out in an Order in Council. Following the subsequent introduction of the Service Complaints system, this could include a condition that the Service person make a Service Complaint first.
>
> Service Complaints System
>
> 10. The Service Complaints system was first introduced in 2008 as a result of primary legislation. In March 2020, a new statement of purpose was agreed by Military People Leadership Team for the revised system which includes the requirement to 'provide an independently overseen process for raising grievances that might otherwise be able to be taken to an ET'."

21. The Submission went on to state that civil servants had considered whether to bring section 192 into force "through initial analysis as part of the Service Complaints Review". It made comments on the relative merits of the SC and ET systems to which I shall return below. It referred to an Equality Impact Assessment which had not identified a shift from SC to ET as having any major equality impact and said that this "will need to be revisited when further investigation into Armed Forces wider access to ET is undertaken". Under the heading "Impact on the Current System" it added:

> "22. Defence as an organisation is going through a significant period of transformation and the nature of Service and Defence as a concept is developing. It may be that as these develop over time the ET may become a more logical solution for service grievances. We believe however that we need to better understand what the future working environment looks like before the MOD commits to a change of this magnitude for its people.
>
> 23. To work through the issues and create a new system that is compatible with the ETs would require primary legislation and we would need to consider the issue of consequential amendments. This would probably take 2-3 years to bring in, as there is currently a priority requirement to embed a reformed Service Complaints system, as the current system has not been deemed to be efficient, fair and effective."

22. Under "other relevant issues" the Submission stated that "when undertaking a full review of the implementation of s.192", consideration would need to be given to devolution issues, the unique nature of service life, the implications of external redress on the coherence of the chain of command and the broader implications for the deployment of personnel.

23. In conclusion, the Submission expressed the belief that there was "a more urgent need to improve the performance of the grievance system for the Armed Forces" and that access to the ET should not be changed at present. The Submission put forward a recommendation which was adopted verbatim, as I record in the next paragraph.

24. On 12 January 2021 the GLD informed the claimants of the decision which is now under challenge, in these terms (with original emphasis):

> "The appropriate Minister has directed:
>
> a. That the Government should not commence/fully implement s.192 ERA 1996 at this time, given the Department's immediate priority to improve the Service Complaints system and the other factors discussed in this submission. The current, transitional version of s.192 which precludes service personnel from issuing employment related claims in the ET, should remain in place as it has done since 1996.
>
> b. That s.192 ERA 1996 should not be repealed at this time, as it may be desirable for the Government to consider the issue of Service Personnel's access to ET in the future.
>
> and noted:
>
> c. That the decision on whether to fully implement s.192 at this stage would not be permanent given the continuing periodic nature of the duty to review.
>
> d. The recommendation that a more substantial review takes place once the changes from reform of the Service Complaints system have been embedded."

25. The claimants made a number of requests for disclosure of the Submission and the Minister's response, without success. This judicial review claim was issued on 9 April 2021.

26. On 12 May 2021 the defendant filed summary grounds of resistance together with the Submission, a witness statement by its author, David Howarth, and the Minister's decision as communicated to officials by email on 14 December 2020. The latter was the same as the decision of 12 January 2021 above, save that the verb in the first line, as per the recommendation in the Submission, was "agreed" rather than "directed".

27. The use of "directed" in the GLD letter had prompted the claimants to include a ground of claim based on a Minister not having the power to "direct" Government to do or not do anything. Following disclosure of the decision dated 14 December 2020, that ground was removed by amendment and is no longer material to this case.

Grounds for judicial review

28. The claimants now claim that:

    i. the defendant has failed to comply with his duty to consider, conscientiously and from time to time, the commencement of s.192;

    ii. the defendant made a material error of fact by wrongly assuming that, prior to 2008, there was no statutory SC system and therefore that the SC system post-dated the enactment of section 192 in 1996;

    iii. the defendant acted irrationally by (1) taking account of irrelevant factors such as the intention to improve the SC system, a suggestion that section 192 would reduce the types of SC complaints that could be made, an incorrect assumption that primary legislation would be needed if section 192 comes into force and an incorrect assumption that the section would apply to ET claims for unlawful deductions; and (2) failing to take account of relevant factors such as the power to require the SC process to be exhausted before any ET claim and the fact that service personnel can already make ET discrimination claims.

    iv. the defendant failed to make sufficient inquiry into the costs which claimants or the MOD might incur, relative to such costs under the SC system.

The relevant legal principles

29. As I have said, this claim concerns the exercise or non-exercise by the defendant of a power, arising from paragraph 16(2) of schedule 2 to ERA, to appoint a day for the commencement of the principal version of section 192. It raises the questions of what if any duty arises from the existence of that power and of whether and how the Court may review its exercise.

30. It is necessary to answer those questions at the outset before turning to the grounds of claim.

31. As the parties agree, it is not unusual for primary legislation to state that particular provisions will come into force on a date to be determined by a Secretary of State. That approach can, and does, result in statutory provisions not being brought into force until long after their enactment or, sometimes, never being brought into force.

32. The nature, and the justiciability, of the Secretary of State's duties when deciding whether to exercise such a power were considered by the House of Lords in *R v Home Secretary ex p Fire Brigades Union* [1995] UKHL 3, [1995] 2 AC 513 ("FBU").

33. The case concerned the criminal injuries compensation scheme. Originally this was a non-statutory ex gratia scheme in which victims of crime were compensated on principles similar to those used in calculating tortious damages. Following recommendations over a number of years that this be put into statutory form, sections 108 to 117 and schedules 6 and 7 of the Criminal Justice Act 1988 codified the existing scheme and established an enforceable right to compensation. Commencement of these and other provisions of the 1988 Act was dealt with by section 171(1) which read:

> "Subject to the following provisions of this section, this Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint and different days may be appointed in pursuance of this subsection for different provisions or different purposes of the same provision."

34. Although section 171 came into force on 29 July 1988, no commencement order was made in respect of the sections codifying the scheme. There was then a rise in the number of claims and in the annual cost of the non-statutory scheme. In November 1992 the Secretary of State announced that the Government would bring in a new non-statutory scheme in which awards would be based on a flat-rate tariff for each category of injury. It was estimated that the annual cost would be less than half of that of the existing scheme. A White Paper stated:

> "Provision was made in the Criminal Justice Act 1988 for the scheme to be placed on a statutory footing. However, at the request of the Board the relevant provisions were not brought into force, because this would have disrupted their efforts to deal with the heavy workload. With the impending demise of the current scheme the provisions in the Act of 1988 will not now be implemented. They will accordingly be repealed when a suitable legislative opportunity occurs."

35. The new tariff scheme was introduced under prerogative powers with effect from 21 July 1994.

36. The claimants in the FBU case were trade unions and other bodies whose members in the course of their work were liable to be the victims of personal injury caused by crime. They sought declarations that (1) the Secretary of State had acted unlawfully in

breach of his duty under the 1988 Act by failing or refusing to bring the provisions into force and (2) that he had acted in breach of his duty under the 1988 Act and/or had abused his common law powers by implementing the tariff scheme.

37. The House of Lords unanimously refused to make the first declaration, dismissing a cross-appeal by the claimants against the decision of the Court of Appeal. It decided by a majority, Lords Keith and Mustill dissenting, to uphold the second declaration, dismissing an appeal by the Secretary of State against the decision of the Court of Appeal.

38. Some effort is needed to identify the propositions which won the support of at least a majority of the House, there being five fairly detailed speeches which (save for Lord Keith stating that he agreed with the speech of Lord Mustill) make no reference to each other. Both counsel addressed me at length about the principles which should be drawn from FBU. Their submissions were very helpful, and the contrary should not be assumed if I do not make extensive reference to them here. Instead, I shall concentrate on my conclusions about what the FBU case decided.

39. There are important differences of fact between this case and FBU. There it was alleged, and the majority held, that the Secretary of State had abrogated his discretion by deciding, in terms and also by permanently implementing an inconsistent non-statutory compensation scheme, that the sections would never be brought into force. In the present case, by contrast, the decision under challenge states expressly that commencement of section 192 will be considered again in future. In addition, the second declaration in FBU concerned, at least to some extent, the question of whether prerogative powers could be exercised in a manner inconsistent with the uncommenced statutory provisions, and that question does not arise in the present case.

40. In my judgment, the following relevant and binding propositions can be extracted from FBU:

    i. A provision for commencement on a day to be appointed by the Secretary of State does not impose a duty which could be enforced by mandatory order (formerly an order of mandamus) to appoint a commencement date (Lord Keith at 544E-H, Lord Browne-Wilkinson at 550F-H, Lord Mustill at 562D-563B, Lord Nicholls at 575C-E)

    ii. Such a provision does however impose on the Secretary of State a duty to keep the question of commencement under review or to consider it from time to time, unless and until the provisions are either commenced or repealed (Lord Keith at 546B, Lord Browne-Wilkinson at 551D-E, Lord Mustill at 565C-D and 566C, Lord Nicholls at 575F-H and this conclusion is also consistent with what is said by Lord Lloyd at 573D-E).

41. The following further questions arise in the present case. No doubt because they did not arise directly in FBU, it is more difficult to decide whether FBU helps to identify a clear answer to them:

    i. Can the exercise or non-exercise of the duty to consider commencement from time to time to be challenged by judicial review?

    ii. If so, what grounds of challenge can be entertained and what if any margin of appreciation should the Court allow the Secretary of State?

42. Potentially relevant dicta in FBU are the following:

    i. Lord Keith said at 544E:

> "The first question for consideration is whether, by the terms of section 171(1) of the Criminal Justice Act 1988, Parliament has evinced an intention to confer upon the courts an ability to oversee and control the exercise by the Secretary of State of the power thereby conferred upon him to bring into effect sections 108 to 117 of the Act, at the instance of persons who claim an interest in that being done. I am clearly of opinion that this question must be answered in the negative. In the first place the terms of section 171(1) are not apt to create any duty in the Secretary of State owed to members of the public. In the second place any decision by the Secretary of State as to whether or not sections 108 to 117 should be brought into effect at any particular time is a decision of a political and administrative character quite unsuitable to be the subject of review by a court of law. The fact that the decision is of a political and administrative character means that any interference by a court of law would be a most improper intrusion into a field which lies peculiarly within the province of Parliament. The Secretary of State is unquestionably answerable to Parliament for any failure in his responsibilities, and that is the proper place, and the only proper place, for any possible failure in the present respect to be called in question."

    and at 546A, in the context of the second declaration sought:

> "The applicants argue that to make payments under the proposed new tariff scheme would be unlawful because that would be inconsistent with the scheme embodied in sections 108 to 117, since that would make it impossible for all practical purposes ever to bring the statutory scheme into operation. The Secretary of State must at least be under a duty, so it is said, to keep under review from time to time whether to bring sections 108 to 117 into force. I would accept that the Secretary of State is under such a duty, but in my opinion it is one owed to Parliament and not to the public at large."

ii. Deciding that there was no duty to appoint a commencement date which could be enforced by mandamus, Lord Browne-Wilkinson said at p.550F that for the court to intervene in the legislative process by requiring an Act of Parliament to be brought into effect:

> "… would be for the courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation. In the absence of clear statutory words imposing a clear statutory duty, in my judgment the court should hesitate long before holding that such a provision as section 171(1) imposes a legally enforceable statutory duty on the Secretary of State."

iii. However, Lord Browne-Wilkinson held at 551C-D that Parliament's clear intention was for the commencement power "to be exercised so as to bring those sections into force when it is appropriate and unless there is a subsequent change of circumstances which would render it inappropriate to do so", and therefore that there was "a clear duty to keep under consideration from time to time the question whether or not to bring the sections … into force" which could not be abrogated. That reasoning, together with his conclusion on the facts, led to his decision to dismiss the Secretary of State's appeal against the declaration granted by the Court of Appeal.

iv. Lord Mustill, having pointed out that an order of mandamus requiring the Secretary of State to appoint a commencement date would involve an unprecedented "penetration into Parliament's exclusive field of legislative activity", continued at 562H:

> "… a legal regime of this kind would be so, lacking in precision that it can scarcely have been the intention of Parliament to create it. Where the exercise of power is challenged it is possible for the court to assess the question of irrationality in the light of the relevant factors as they stood at the relevant time. Once taken, the decision can once and for all be put in question. But if the applicants are right and the non-exercise of the power was intended by Parliament to be controllable by the courts, a continuing omission to appoint a day, under any one of the innumerable statutory provisions subject to the same regime as is created for the Act of 1988 by section 171(1), would be continuously open to challenge in the light of the changing interplay of practicality and policy in the light of which decisions of this kind must be made. It seems to me highly improbable that Parliament would have wished to make justiciable in court what are essentially political and administrative judgments, rather than retain them for its own scrutiny and enforcement."

v. Lord Lloyd, on the other hand, in the context of his agreement with the second declaration, said at 572D:

> "Finally, it is said that to grant the applicants relief in a case such as this would be an intrusion by the courts into the legislative field, and a usurpation of the function of Parliament. If the Home Secretary has trespassed, it is for Parliament to correct him. It is most unlikely, so the argument goes, that Parliament intended to confer on the courts the power to declare that the Home Secretary has acted unlawfully. I find this argument difficult to understand. The duty of the court to review executive action does not depend on some power granted by Parliament in a particular case. It is part of the court's ordinary function in the day to day administration of justice. If a minister's action is challenged by an applicant with sufficient locus standi, then it is the court's duty to determine whether the minister has acted lawfully, that is to say, whether he has acted within the powers conferred on him by Parliament. If the minister has exceeded or abused his power, then it is the ordinary function of the Divisional Court to grant appropriate discretionary relief. In granting such relief the court is not acting in opposition to the legislature, or treading on Parliamentary toes. On the contrary: it is ensuring that the powers conferred by Parliament are exercised within the limits, and for the purposes, which Parliament intended. I am unable to see the difference in this connection between a power to bring legislation into force, and any other power. Nor, with respect, can I understand the concept, or relevance, of a duty owed to Parliament, as distinct from a duty owed to the public at large. Some cases are more likely to attract Parliamentary attention than others. But the availability of judicial review is unaffected."

vi. Lord Nicholls emphasized at 574F the need for a "wide measure of flexibility" in light of the "host of … practical considerations" which could affect a decision on commencement. He added at 574G that "the width of the discretion given to the minister ought not to be rigidly or narrowly confined" because "the range of unexpected happenings is infinite" and any of these, including financial considerations, might mean that commencement should be deferred. Then at 575D, rejecting the idea that failure to set a date could be met with a mandatory order, he said:

> "In the first place, a legal duty to appoint would be substantially empty of content in view of the wide range of circumstances the minister can properly take into account in deciding whether or not to appoint a commencement day. Secondly, and much more importantly, a court order compelling a minister to bring into effect primary legislation would bring the courts right into the very heart of the legislative process. But the legislative process is for the legislature, not the judiciary. The courts must beware of trespassing upon ground which, under this country's constitution, is reserved exclusively to the legislature. Clearer language, or a compelling context, would be needed before it would be right to attribute to Parliament an intention that the courts should enter upon this ground in this way.
>
> Nevertheless, although he is not under a legal duty to appoint a commencement day, the Secretary of State is under a legal duty to consider

whether or not to exercise the power and appoint a day. That is inherent in the power Parliament has entrusted to him. He is under a duty to consider, in good faith, whether he should exercise the power."

vii. Having found that the Secretary of State had failed to appreciate that he was obliged to keep the exercise of the power under review, Lord Nicholls said at 576H:

> "I do not consider this misapprehension by the Secretary of State is a matter calling for relief. In the course of his submissions the Lord Advocate accepted that the Secretary of State is under a duty to keep the exercise of the commencement day power under review. Sending the matter back to the Secretary of State to consider this afresh now would be a pointless exercise. There can be no doubt that, for the financial reasons already noted, his decision would still be against bringing sections 108 to 117 into operation at present."

viii. However, Lord Nicholls then turned to what he called the "crucial question", and said at 577F:

> "As already noted, pending the exercise of the commencement day power or its repeal the Secretary of State can act only within the constraint imposed by the duty attendant upon the continuing existence of that power. He cannot lawfully do anything in this field which would be inconsistent with his thereafter being able to carry out his statutory duty of keeping the exercise of the commencement day power under review. If he wishes to act in a manner or for a purpose which would be inconsistent in this respect, he must first return to Parliament and ask Parliament to relieve him from the duty it has imposed on him. Parliament should be asked to repeal sections 108 to 117 and the relating commencement day provision.
>
> The crucial question is whether the Secretary of State has taken such an inconsistent step in this case."

ix. Lord Nicholls decided that question of fact adversely to the Secretary of State and therefore ruled at 578F that "the new scheme is outside the powers presently vested in him".

43. It seems to me that Lords Browne-Wilkinson, Lloyd and Nicholls decided that the Court could entertain a challenge, based on section 171, to a decision by which the Secretary of State abrogated the continuing duty to keep commencement of sections 108-117 under review. Lord Nicholls, however, considered that the case did not call for relief and that, on the facts of FBU, requiring the Secretary of State to consider it afresh would be pointless. Nevertheless, he concurred in the dismissal of the appeal against the second declaration.

44. But it does not appear that any majority of the House would have thought it permissible for the Court to review, on grounds such as rationality, an exercise of that

review power rather than an abrogation of it (e.g. a decision that the provisions would not be commenced now but that commencement would be reconsidered at a later date). That scenario did not arise in FBU, but Lords Keith, Mustill and Nicholls considered that the Court could not or should not entertain a challenge to a failure by the Secretary of State to exercise the power to appoint a commencement date. It is difficult to see why that ruling should apply any less to a challenge directed at an allegedly defective decision, taken under the continuing review power/duty, to defer commencement for further consideration at a later date.

45. That last point is not displaced by the various dicta relied upon by Ms Kate Gallafent QC, counsel for the claimant, which emphasize that:

    i. Parliament's intention in enacting section 171 was for sections 108-117 to be brought into force when appropriate, subject only to significant practical obstacles or to unexpected changes of circumstances; and

    ii. section 171 (the analogue of paragraph 2 of Schedule 16 to ERA in the present case) was in force throughout, and whilst sections 108-117 had not been brought into force, they could not be ignored and Hobhouse LJ (who gave a dissenting judgment in the Court of Appeal) had erred by treating them as if they "writ in water" (Lord Lloyd, 570H).

46. Nor do I consider that Lord Mustill, in the passage at 562H quoted at paragraph 42 iv above, was suggesting that a rationality challenge could be so entertained. Rather he said that whilst it might be possible to assess the rationality of a decision to appoint, Parliament could not have intended the Courts to review the lawfulness of a "continuing omission to appoint a day".

47. Mr James Strachan QC, counsel for the defendant, does not go so far as to submit that the decision in the present case cannot be reviewed by the Court. Instead, he interprets FBU as yielding a unanimous view that although the Court may have jurisdiction to review a commencement decision, its attitude will be one of self-restraint or abstention in view of the political nature of such decisions. He draws an analogy with the approach of the Court to certain acts which are an exercise of sovereign power, inherently governmental in nature, and done outside the United Kingdom with the prior authority or subsequent ratification of the Crown in the conduct of its relations with other states, as explained by the Supreme Court in *Mohammed (Serdar) v Ministry of Defence* [2017] AC 649.

48. Mr Strachan relies on the width of the defendant's discretion and the open-ended nature of the considerations that may be relevant to its exercise, as well as the fact that its exercise involves matters of policy and administration. He invites me to conclude that any judicial review will be of low intensity. Relying on *R (Friends of the Earth) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190 at paragraphs 116-122, he submits that (1) the defendant's judgment as to what factors to take into account, and what weight to give them, can be challenged only on grounds of irrationality, (2) the Court will give the defendant a margin of appreciation in that

regard and (3) the Court will not hold that a matter should have been taken into account unless it is "so obviously material" that no reasonable decision maker could have failed to take it into account. See also *R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004, [2021] Env LR 10 at paragraphs 47-52, where the Court ruled that a challenge to the Government's decision to continue with the HS2 project was subject only to a "light touch" and to a broad margin of discretion, inter alia because it was a decision taken at Cabinet level and was largely a matter of political judgment, Cabinet could be taken to be aware of background matters and the decision required Cabinet to "balance a number of significant – and potentially conflicting – political, economic, social and environmental considerations".

49. Mr Strachan also referred to another important difference between FBU and the present case. Whilst Parliament's manifest intention in FBU was for sections 108-117 to be brought into force when appropriate, its intention in this case was more nuanced. The principal version of section 192 did not simply apply the relevant sections of ERA to service personnel. Instead, section 192(3) enabled the making of an Order in Council which could (1) omit some of those sections from those brought into force, or add other sections and (2) make the application to service personnel subject to exceptions or modifications including a requirement that the internal Service Complaint system be exhausted before the bringing of any tribunal claim. In other words, the defendant was not only given a discretion as to the time of commencement. He was also given a discretion as to which employment rights would be given to service personnel, and as to the interplay between those rights and the internal redress process. So Parliament did not simply intend the defendant to introduce the right to bring, for example, unfair dismissal claims. Rather it intended the defendant to decide which relevant rights would be introduced, and how that should be done. Mr Strachan submits that the width of this discretion is another indication that any judicial review should have a light touch.

50. In response, Ms Gallafent pointed out that the defendant has been inconsistent in framing his position on justiciability or abstention or restraint, putting it in different ways in his various pleadings and submissions. She rejected the comparison with *Mohammed*, as that case was dealing with a free-standing doctrine applicable to acts of state. Instead, Ms Gallafent makes a comparison with *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 in which the Supreme Court ruled that the Prime Minister's exercise of the prerogative power to advise the Crown to prorogue Parliament was justiciable, and was unlawful because it went beyond the limits of the prerogative power by frustrating or preventing Parliament from carrying out its constitutional role. Paragraphs 30-31 of the judgment of the Court explained that the courts maintain a supervisory jurisdiction over Government decisions even where they "have a political hue". *Miller* did not fall within an area of "high policy" into which a Court will not venture and neither, she submits, does this case.

51. Ms Gallafent also seeks to distinguish *Packham*, pointing out that the intensity of review will always depend on the facts and that a number of the factors which explained the "light touch" in *Packham* are not present in this case. Instead, she submits, this is a case in which the Secretary of State's duty was to give effect to

Parliament's intention by appointing a commencement date, at least in the absence of some change of circumstances which would justify doing otherwise and which, she submits, cannot be found in the facts of the present case.

52. As I have said, there are significant differences between the statutory provisions at stake in FBU and in this case, and between the types of decision under challenge in the two cases.

53. In my judgment, FBU therefore does not constrain me to rule that the Court cannot question the lawfulness of the defendant's decision, and Mr Strachan has not sought to persuade me that it does. Although a majority of their Lordships said that a failure by the Secretary of State to exercise the power to appoint a commencement date could not be challenged, I do not believe that they would have refused to countenance a challenge on a fundamental ground such as bad faith. That is consistent with the fact that a majority did entertain and uphold a challenge to a decision which abrogated the power. Their refusal, instead, was to consider, on the facts of the FBU case, the rationality of the failure to appoint a date.

54. Turning to the approach to be taken in the present case, it is, I think, uncontroversial that the intensity of review, or the width of discretion or margin of appreciation allowed to the decision maker, depends on the factual and legal context.

55. Considering the factual and legal context, I have no doubt that Mr Strachan is right to say that any review should apply a "light touch". That is because of:

    i. the width of the discretion conferred by paragraph 2 of schedule 16 in providing that the defendant "may" appoint a date;

    ii. the multiplicity of reasons, either practical or reasons of a policy nature reflecting changing circumstances, which could persuade a Secretary of State that now was not the time to appoint a date; and

    iii. the policy-related nature of the judgments to be made, not just as to the timing of commencement but as to which employment law rights should be introduced and how those would interact with the SC system.

56. That means, in practice, that it was for the defendant acting in good faith to judge what factors to take into account and what weight to give them, and that the Court will intervene only if that judgment was irrational in the *Wednesbury* sense.

57. I now apply that approach to the grounds of challenge.

Ground 1

58. Ms Gallafent contends that the defendant, instead of considering the commencement of section 192 conscientiously and from time to time, gave the issue "only provisional and partial consideration".

59. The evidential basis for ground 1 is that the decision, quoted at paragraph 24 above, recommends that "a more substantial review takes place once the changes from reform of the Service Complaints system have been embedded", whilst the Submission, summarised or quoted at paragraphs 20-23 above, also stated that civil servants had considered whether section 192 should be brought into force "through initial analysis", that the findings of an Equality Impact Assessment would "need to be revisited when further investigation" was undertaken, that "further analysis" of the Ombudsman's role in the SC process "would need to be undertaken in any review", that consideration would need to be given to devolution issues, the unique nature of service life, the implications of external redress on the coherence of the chain of command and the broader implications for the deployment of personnel "when undertaking a full review" and that "further work should be carried out" to establish "what the implementation of this version of s.192 might look like … but only once reforms to the Service Complaints system are embedded" (emphasis added throughout).

60. Ms Gallafent submits that these passages expressly identify relevant considerations and expressly reveal that they had not yet been fully considered. She submits that the defendant had no power to make a partial consideration of the question and to defer a proper consideration. Still less could he do so when the commencement power had existed for 24 years without ever being properly considered by any Secretary of State. She submits that the defendant's duty was to consider whether events had occurred since the ERA came into force which made it undesirable to appoint a commencement date for section 192, and that that duty was not satisfied by a decision merely to defer consideration of it to a later date.

61. Mr Howarth, in a third witness statement filed during these proceedings, claims that the decision was based on considerations including the four specific issues mentioned in the decision itself.

62. Ms Gallafent (in addition to pointing out, rightly, that limited if any weight should be given to post-decision evidence of reasons) makes a fair point that the Submission does not really consider the four issues but instead parks them for consideration at a later date. She characterises this approach as a failure to have proper regard to Parliament's intention that section 192 should be brought into force, at least in the absence of a significant change of circumstances.

63. Mr Strachan responds that it was rational, and within the proper scope of the defendant's discretion, to decide that full consideration of the question should be deferred until after a review of changes to the SC system, and that the claim identifies nothing more than disagreement with that approach.

64. I agree with Mr Strachan. In particular, I see no basis for the submission that any consideration of the question was legally required to be "full" rather than "partial". The duty to consider the question "from time to time", as recognised in FBU, required or empowered the defendant to decide at intervals when the question should next be considered. On this occasion the defendant did precisely that, by deciding that the question should next be considered once changes to the SC system were embedded.

65. I also do not accept the claimant's submission that, whenever he considered whether to bring section 192 into force, the defendant was bound to ask himself whether there had been some change in circumstances which justified not doing so. Instead, his duty was simply to consider, from time to time, whether to do so (and if so, given the wider discretion conferred by paragraph 2 of schedule 16, to what extent and in what way). As was recognised in FBU, there could be infinite possible reasons for not bringing the section into force. It was for the defendant, acting in good faith, to decide what factors to take into account and what weight to give them.

66. Ground 1 therefore cannot succeed.

Ground 2

67. This ground, alleging a material factual error, is also linked with Ms Gallafent's contention that a decision not to bring section 192 into force depended on there having been a change of circumstances which justified not giving effect to Parliament's original intention. Essentially the alleged error was in perceiving or identifying a change of circumstances when there was none.

68. Ms Gallafent points to an apparent error of fact in the Submission, namely a suggestion that the SC system and, therefore, the possibility of an Order in Council requiring exhaustion of the SC system before the making of an ET claim, did not exist before 2008. The relevant passages are quoted at paragraph 20 above.

69. Although the SC system was changed in 2008 as I have said, there have been internal systems for many years, and provision enabling an Order in Council to require the internal procedures to be exhausted was introduced first in 1993 and again, with section 192, in 1996.

70. Ms Gallafent observes that judicial review may succeed where unfairness occurs because a decision maker is mistaken as to an existing fact and the mistake has a material (though not necessarily decisive) influence on the outcome: see, for example, the judgment of the Court in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 at [66] per Carnwath LJ. She submits that the mistake was material in the present case because it gave the Secretary of State the misapprehension that a necessary element of a decision not to commence section 192, i.e. a change of circumstances since 1996, was present.

71. In response, Mr Strachan submits that there was no such mistake. The Submission said, in effect, that a new system was introduced in 2008, and that was no more than

the truth. In the alternative he submits that even if there was such a mistake, it was not central to the decision-making process.

72. In my view the relevant passages in the Submission are clumsily expressed, so that a casual reader could form the misapprehension that there had not been a statutory system for internal redress before 2008. However, I do not think it probable that the defendant was under such a misapprehension. In forming that conclusion, I place little if any weight on post-decision evidence. However, I think it reasonable to assume that the defendant will have considered the issue carefully. On the facts of this case, it so happens that the defendant personally served as an Army officer in the 1990s, and may well have been aware of the existence of the grievance procedures under the Army Act 1955 at that time. Much more important, however, is the fact that if there had been no internal system before 2008, the exclusion of service personnel from key employment rights since 1971 and the non-implementation of the principal version of section 192 in 1996 would have seemed very surprising indeed. It would also mean that the provision in section 192(4) referring to the exhaustion of the service complaint procedure would have to have been a later addition.

73. Be that as it may, I also do not consider that any mistake was material. That is because, as I explained at paragraph 65 above, the defendant's decision did not depend on a change of circumstances having occurred, and he did not in fact base the decision on there having been a change of circumstances. Instead, the basis for the decision was that it would be premature to bring section 192 into force before the forthcoming review of the SC system. That conclusion was unaffected by the question of what if any SC system had existed before 2008.

74. Indeed, it seems to me that Ground 2 is inconsistent with the matters complained of under Ground 1. Ground 1 relies on the fact that the defendant did not actually decide the question of whether service personnel should have any of the rights conferred by section 192, but deferred it for consideration later. Therefore, on the claimant's case, the defendant did not in fact decide that the introduction of the SC system was a change of circumstances which justified not bringing section 192 into force.

Ground 3

75. Ms Gallafent submits that the decision under challenge was irrational because the defendant (1) took account of irrelevant factors such as the intention to improve the SC system, a suggestion that section 192 would reduce the types of SC complaints that could be made, an incorrect assumption that primary legislation will be needed if section 192 comes into force and an incorrect assumption that section 192 would apply to ET claims for unlawful deductions; and (2) failed to take account of relevant factors such as the power to require the SC process to be exhausted before any ET claim and the fact that service personnel can already make ET discrimination claims.

76. In support of this ground, Ms Gallafent took me through the Submission, pointing out what she describes as errors of fact or of logic. In summary:

i. Parliament has always known that the SC system existed alongside the ET system. Since that fact did not prevent section 192 from being enacted, there is no logical reason why a review of the SC system should affect the implementation of section 192.

ii. Paragraph 1 of the Submission wrongly states that section 192 would provide access to the ET for claims including unfair dismissal "and unlawful deductions of wages". In fact, the provisions in relation to unlawful deductions appear in Part II of ERA, which is not one of the Parts specified in s.192(2) as having effect in relation to service as a member of the Armed Forces. Moreover, the SSD is statutorily prohibited from adding any provision in Part II to the list of Parts specified in s.192(2): see s.192(3).

iii. Whilst paragraph 4a states that the Department's priority is to improve the SC system, there is no evidence of any specific forthcoming reform which could make it inappropriate to implement section 192. That paragraph also refers to "other factors" but these have never been identified. There is no logical connection between the implementation or non-implementation of section 192 and any actual outcome of the SC review (contained in provisions of the Armed Forces Act 2021 which received the Royal Assent in December 2021).

iv. Although paragraph 9 refers to the possibility of imposing a requirement that the SC process be exhausted before any ET claim, the Submission contains no discussion of the potential effects of doing so. More generally, the discussion of the costs and benefits of the ET system ignores the possibility of managing access to that system via Orders in Council.

v. Paragraph 16 seems to suggest that "allowing complaints to go to the ET would allow the Service Secretariats to concentrate on the non-Bullying, Harassment and Discrimination (BHD) cases as part of the Service Complaints system". This (1) wrongly assumed that all non-BHD claims would go straight to an ET without being considered under the SC procedure when in fact the defendant could decide to require claimants to exhaust the SC system and (2) wrongly disregarded the fact that complaints of harassment and discrimination under the Equality Act 2010 already go to the ET, whilst it is only claims arising under ERA (such as unfair dismissal claims) which do not.

vi. Paragraph 20 makes an incorrect assumption that access to the ET would mean a reduction in the types of SC cases that staff could bring. But such a reduction would occur only if the defendant decided to change the scope of the SC scheme, which is not a necessary consequence of bringing section 192 into force.

vii. There is no basis whatsoever for the assertion in paragraph 23 that creating a new system that was compatible with ETs would require primary legislation. No such need arose when EA 2010 claims were permitted to go to the ET.

77. In response, Mr Strachan reminded me that the Court's review is of relatively low intensity and that, in the absence of statutory provision specifying relevant factors, it was for the defendant to decide what factors were relevant, subject to challenge only for irrationality.

78. He also invited me to take a measured approach when assessing the adequacy of the Submission. In *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, Sedley LJ (with whom Keene LJ and Bennett J agreed) said at [62] that a Minister should be told enough to ensure that nothing that is necessary for him to know is left out of account, but that is not a requirement to know everything that is relevant. The relevant matters could be "sifted" and "distilled" in a submission which gave him "enough to enable him to make an informed judgment".

79. Mr Strachan also referred again to *E v Secretary of State for the Home Department* (see paragraph 70 above), for the proposition that a mistake of fact will not found a legal challenge to a decision unless it played a material part in the decision-maker's reasoning.

80. Mr Strachan's broad submission is that the defendant's key conclusion was rational for the simple reason that if there is access to both the ET and the SC system, they will have to work in parallel, so there was obviously a rational connection between implementation of the one and the anticipated review of the other.

81. With that introduction, Mr Strachan resisted parts of the attack on the Submission and made the following specific points:

    i. The possibility of imposing a condition that SC procedures be exhausted is referred to, and it is unreal to contend that it was not taken into account.

    ii. Paragraph 16 was just a detail of a legitimate point made at paragraph 15, namely that reducing the scope of the SC system would make it easier to manage and operate.

    iii. A potential need for primary legislation was a matter for the judgment of the civil servants advising the Minister, and cannot be ruled out (e.g. if the role of the SCO is to be downgraded).

    iv. The claimant's case takes paragraph 20 of the Submission out of context, and in fact it makes a perfectly logical reference to a reduction in the types of case that the SC system would deal with if section 192 came into force.

82. Finally Mr Strachan adds that none of the criticisms of the Submission identify matters that were critical to the defendant's decision.

83. In fairness to Ms Gallafent, some of the reasoning in the Submission is unconvincing, such as the confident but entirely unspecific assertion that primary legislation will be needed, and there are mistakes such as the reference to unlawful deductions claims.

The differences between the ET and SC systems are not explored, and potential effects of implementation such as a reduction in SC cases are mentioned but with no analysis of them.

84. However, it is necessary to be cautious when analysing a ministerial submission as part of a challenge to a Minister's decision. Criticisms of the former will not necessarily support criticisms of the latter. Subjecting ministerial submissions to fine legal analysis could lead to an undesirable situation in which such submissions would routinely have to be drafted, or at least checked, by lawyers.

85. In the present case, I consider that the detailed criticisms of the Submission overlook the relatively uncomplicated nature of the decision. That decision was that since there was to be a review of the SC system, the question of implementation of section 192 should be deferred.

86. In my judgment the clear purpose of the very summary comparison of the two systems in the Submission was simply to explain to the Minister that they are logically connected with each other. It sought to anticipate the types of issue which might arise from the review and which would have to be explored when implementation of section 192 was back on the table. This, however, was not and did not purport to be that exploration.

87. For that reason I accept Mr Strachan's submission that the details contained in the submission, some of which were unconvincing or wrong, were not critical to the defendant's decision. My conclusion is that the defendant was told what he needed to know in order to decide that implementation of section 192 should await the SC review. He was not led into any error which was material to that specific decision. The decision was not taken in irrational reliance on any irrelevant factor or disregard of any relevant factor.

Ground 4

88. This ground is based on the duty of a decision maker to take reasonable steps to acquire the relevant information which is needed in order to make a rational decision. Discussion of that duty is found in the well-known case of *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 (HL), per Lord Wilberforce at 1047-8 and Lord Diplock at 1064-5. More recently, in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, Underhill LJ gave the following summary at [70]:

> "First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge … it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no

> reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

89. The specific complaint made under ground 4 is that the defendant failed to make a sufficient comparison of the costs which claimants or the MOD might incur under the SC system and under the ET system if section 192 were brought into force.

90. The Submission, at paragraph 12, expressed concern that although there are no fees associated with bringing a claim in the Employment Tribunal and the employer's legal fees are rarely imposed on a complainant, nevertheless "a complainant may have other general expenditure related to the ET, but outwith the legal aspects mentioned above, that require consideration". Paragraph 34 noted that implementation would be likely to lead to costs for the MOD because it would require representation in each claim and these costs would normally not be recoverable.

91. However, Ms Gallafent submits, there has been no attempt to discover the level of such expenses or the numbers who might incur them, or to assess expenses incurred in the SC system in order to make a comparison. Ms Gallafent describes the discussion in the Submission as half-hearted and submits that, whilst its inclusion in the Submission shows that this was a relevant factor, the discussion falls short of a sufficient inquiry into it. She also emphasizes that the *Tameside* duty was made more important in this case by the width of the defendant's discretion in making the decision under challenge.

92. In response, Mr Strachan submits that the duty of inquiry requires decision makers to be briefed only on those matters which they judge to be relevant, that judgment being amenable to challenge only on rationality grounds. In the present case, he contends, because of the nature of the actual decision being made, there was no need for the defendant to have estimates of the figures in question.

93. In my judgment, the answer is the same as under Ground 3 above. The defendant's decision did not consist of a choice between the ET and SC systems. Therefore a comparison of costs arising in the two systems, though addressed in the Submission as background information, was not directly relevant. The decision was merely to postpone the question of implementation. That question, which plainly would involve

a degree of choice between the different systems, would be considered after the review of the SC system. It was manifestly within the scope of rationality for the defendant not to make further inquiries comparing expenses under the two systems when arriving at the decision to postpone the question.

Conclusion

94. The claim for judicial review fails for the reasons set out above. I have therefore not found it necessary to address the question of whether, if the challenge had succeeded, the defendant could have relied on section 31 of the Senior Courts Act 1981 to show that any of the matters complained of would not have led to a substantially different outcome.