Neutral Citation Number: [2023] EWHC 1838 (Admin)

Case No: CO/3846/2022

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

Wednesday, 19th July 2023

Before:

MR JUSTICE FORDHAM

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Between:

THE KING (on the application of POLICE SUPERINTENDENTS' ASSOCIATION)	**Claimant**
- and -	
(1) THE POLICE REMUNERATION REVIEW BODY	**Defendants**
(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	

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Andrew Sharland KC and **Stephen Kosmin** (instructed by Mariel Irvine Solicitors) for the **Claimant**
Tom Tabori (instructed by GLD) for the **First Defendant**
Richard O'Brien and **Thomas Yarrow** (instructed by GLD) for the **Second Defendant**

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Hearing date: 4.7.23

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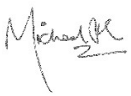
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This case is about police pay and the public sector equality duty ("PSED"). It also raises issues about a public authority defendant's duty of candid disclosure. One issue is about whether that duty can be now discharged by a practice of communicating the 'substance' of undisclosed documents (see §§13-18 below). Another feature of the case is a Permission-Stage Assurance provided by Counsel (see §19 below).

The Claim

2. The proceedings are a claim for judicial review brought by the Claimant ("the Association") on 17 October 2022. The named Defendants are the Police Remuneration Review Body ("the Review Body") and the Home Secretary. There are two 'targets' for challenge. The first is found within the Review Body's Eighth Report (the "Report"), published by the Home Secretary by being presented to Parliament on 19 July 2022 (CP712). The Review Body's impugned decision is its recommendation ("the Recommendation") of a flat-rate pay increase of £1,900 to all police officers at all pay points for all ranks, with effect from 1 September 2022 (Report §5.36). The second 'target' is the Home Secretary's decision to accept the Recommendation ("the Acceptance"). That decision was contained within a Written Statement, also published on 19 July 2022. The essence of the claim for judicial review is as follows. There was a breach by the Review Body of the PSED in making the Recommendation, which was in any event unreasonable given that no party making representations supported the course taken. Further, there was a breach by the Home Secretary of the PSED in making the Acceptance, which was in any event unreasonable given that the Recommendation being accepted was unlawful.

The PSED

3. The PSED is imposed by s.149 of the Equality Act 2010, in these terms:

> ***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 – age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation. (8) A reference to conduct that is prohibited by or under this Act includes a reference to – (a) a breach of an equality clause or rule; (b) a breach of a non-discrimination rule. (9) Schedule 18 (exceptions) has effect.***

Police Ranks and Pay

4. In England and Wales, as at 31 March 2021, there were 135,301 full-time equivalent police officers (142,526 in headcount terms), across 7 ranks in 43 police forces. These were broken down by rank as follows (Report Table 5.1): Constable (106,790); Sergeant (19,211); Inspector (5,941); Chief Inspector (1,846); Superintendent (970); Chief Superintendent (307); and Chief Police Officer (236). The Association represents the interests of Superintendents and Chief Superintendents. Other bodies represent the interests of other ranks. There are a series of pay points referable to each rank (Report Apx E). These pay points correspond to length of service and progress within the rank. Prior to 1 September 2022, the ranges from lowest pay point to highest were as follows: Constable (lowest £21,654, highest £41,130); Sergeant (lowest £43,965, highest £46,227); Inspector outside London (lowest £52,698, highest £57,162,); Inspector inside London (lowest £55,005 highest £59,490,) Chief Inspector outside London (lowest £58,332, highest £61,725); Chief Inspector inside London (lowest £60,654, highest £64,032); Superintendent promoted to rank on or after 1/4/2014 (lowest £70,173, highest £82,881); Chief Superintendent (lowest £86,970, highest £91,749).

The Pay Increase

5. The Recommendation and the Acceptance involved an identical flat-rate pay increase of £1,900 for every rank and at every pay point. This meant that every police officer, of whatever rank and at whatever pay point, would receive that same flat-rate pay increase of £1,900. Viewed as cash in the bank, the amounts received by every officer are identical. But viewed as a percentage increase in pay, there is a sharp differentiation. Officers at the lowest pay point for the rank of Constable receive the highest pay rise viewed as a percentage increase. Officers at the highest pay point for Chief Police Officer ranks receive the lowest pay rise viewed as a percentage increase. That picture was set out in the Report (§5.37). The percentage increase for the lowest paid Constable amounted to 8.8% and for the highest paid Constable 4.6%. The percentage increase for the lowest paid Sergeant was 4.3% and for the highest paid Sergeant 4.1%. For Inspectors the lowest paid would be receiving 3.6% and the highest 3.3%. For Chief Inspectors it was 3.3% and 3.1%. For Superintendents it was 2.7% and 2.3%. For Chief Superintendents it was 2.2% and 2.1%. And for Chief Police Officer ranks it was 1.8% and 0.6%.

6. In order to understand the Review Body's thinking, we can start with what was said in the Foreword to the Report:

> ***This is an extraordinary year in terms of the economic climate. Events in Ukraine and elsewhere have delivered further shocks to the economy as it fights to recover from the effects of the coronavirus (COVID-19) pandemic. During our visits programme in late 2021, where we heard from almost 400 officers, we were told about reports of lower paid officers in debt and of many struggling to meet basic fuel and food costs. The financial***

> ***pressures they face have increased since then and energy prices are now at unprecedented levels.***

Then, in explaining the reasoning behind the Recommendation (Report §§5.35-5.36):

> ***In our view this is an extraordinary year in terms of the economic climate. We are deeply concerned about the impact on the lowest paid police officers of the substantial increase in the cost of living and the ongoing economic volatility. A rise in the cost of living has a greater impact on the lower paid than those on higher salaries. Therefore, there are very strong arguments in favour of a sharply differentiated approach that provides those at the bottom of the pay scale with some protection against the rising cost of basic necessities and unprecedented increases in energy prices. We are also mindful of the evidence that suggests that recruiting officers will be more challenging in the final year of the Uplift Programme. In these exceptional circumstances, we explored options that delivered a substantial uplift to the lowest paid in the police service. We concluded that a consolidated flat award which has the effect of giving the lowest paid police officers an uplift close to the rising cost of living was most appropriate. We note the Government's announcements on 26 May 2022 regarding a package of support to help the most vulnerable households with the rising cost of living. There is no exact data available, but it is likely that the majority of police officers will only benefit from the universal payments to help with energy bills. While this provision is welcome, we judge from the evidence we have heard that those at the bottom of the police pay scale will still struggle to meet rising household bills. After taking the above factors into account and in particular affordability considerations, our analysis of recruitment, retention, motivation and morale, and pay trends in the private sector, we concluded that a pay uplift with an overall cost of 5% was appropriate. Given our concerns about the lowest paid police officers, we recommend that this should take the form of a consolidated increase of £1,900 to all police officer pay points for all ranks from 1 September 2022.***

7. The Home Secretary's reasoning in the Acceptance said this:

> ***The Review Body recommends a consolidated increase of £1,900 to all police officer pay points for all ranks from 1 September 2022, equivalent to 5% overall. It is targeted at those on the lowest pay points to provide an uplift of up to 8.8%, and between 0.6% and 1.8% for those on the highest pay points. The Government recognises that increases in the cost of living are having a significant impact on the lower paid. It is within this context and after careful consideration that we have chosen to accept this recommendation in full. As at March 2022 there are 142,526 police officers who will receive this consolidated increase.***

The Statutory Scheme

8. The relevant statutory scheme involves three key sources in particular. First, there is the Police Act 1996. The Act by s.50 empowers the Home Secretary to make regulations as to the government, administration and conditions of service of police forces, including provision with respect to pay and allowances. Part 3A (ss.64A and 64B) and Schedule 4B make provision relating to the Review Body. Secondly, there are the Police Regulations 2003 (SI 2003 No. 527). These were made by the Home Secretary, pursuant to s.50. Regs.24 and 46 make provision for the determination by the Home Secretary of police officers' pay. Thirdly, there is the Equality Act 2010, s.149 of which imposes the PSED (§3 above) on public authorities, and on non-public authorities who exercise public functions. Here, "public function" is approached using the Human Rights Act 1998 test: s.150(5) of the 2010 Act. That brings into play cases like Aston Cantlow v Wallbank [2003] UKHL 37 [2004] 1 AC 546 §12 and YL v Birmingham City Council [2007] UKHL 27 [2008] 1 AC 95 at §105.

The Sequence of Events

9. This was the basic sequence of events. The Home Secretary on 6 December 2021 published a Remit Letter, written on 2 December 2021 to the Review Body. That constituted a s.64B(1) referral containing s.64B(5) directions, pursuant to the reg.46(1A) referral duty. The referral required the Review Body to "consider and report" (s.64B(1)), obtaining evidence and making recommendations (s.64B(5)(c)-(d)). The Report was for publication (s.64B(2)). The Review Body was told in the Remit Letter that the Government "must balance the need to ensure fair pay for public sector workers with protecting funding for frontline services and ensuring affordability for taxpayers". The Remit Letter referred to the standing Terms of Reference. These – themselves published directions – required the Review Body to reach recommendations having regard to various considerations (s.64B(5)(b)(d)), among which were the relevant legal obligations "on the police service" including anti-discrimination legislation.

10. The Review Body was statutorily-entitled to determine its own "procedure" (Sch 4B §11). The Report describes various procedural steps that were taken in the gathering of evidence. There was the visits programme (described in the Foreword: §6 above). This was undertaken in the autumn and winter of 2021/22. In it, the Review Body met police officers of all ranks from 7 police forces (Report §1.9). There was then a February 2022 written evidence stage, receiving evidence from the "parties" (Report §1.13). The "parties" were the Home Office; HM Treasury; the National Police Chiefs Council; the Association of Police and Crime Commissioners; the Metropolitan Police Service; the Chief Police Officers Staff Association. This gathered evidence was hyperlinked in the Report (Apx A), ready for accessibility on publication. There were also oral evidence sessions. These were held with the same "parties", as well as with the Minister for Crime and Policing and the Chief Executive Officer of the College of Policing (§1.15). The Association and the Police Federation of England and Wales ("PFEW") did not submit written evidence or attend oral evidence sessions, having withdrawn from the Review Body process in 2021, but the Review Body was able to rely on the Association's published 2021 pay morale survey and the PFEW's published survey results (§1.16). Documents accompanying the Review Body's Acknowledgment of Service in these judicial review proceedings show that the Report was provided to the Home Secretary on 31 May 2022. That is also the date given in the Foreword to the Report. The Report was at that stage classified as "official – sensitive until publication" and recipients were told that they were responsible for ensuring that the Report was "distributed no further".

11. In light of the publication on 19 July 2022 of the Report (containing the Recommendation) and of the Written Statement (containing the Acceptance), the Association took the following key steps. On 5 August 2022 the Association wrote to the Review Body, asking for a response by 24 August 2022 to questions including: "what evidence there is to support [the] finding" that "a rise in the cost of living has a greater impact on the lowest paid than on those on higher salaries" (Report §5.35); "was it taken into account when making your recommendation that many police constables are young, single, without family commitments and share household bills with others?"; "did you consider that older more senior officers with young families are likely to be hit hard by the rising cost of living, as are those older officers who contribute financially to the care of elderly relatives?"; and "was an Equality Impact Assessment ["EqIA"] conducted before finalising the PRRB recommendation?" The Review Body's reply came on 6 September 2022 saying that the Review Body did not

"provide additional public commentary on its deliberations" and that "it is for Government to respond to our recommendations and conduct any [EqIA] necessary". The Association then had a meeting with the Home Office on 7 September 2022 and wrote a follow-up letter on 8 September 2022. The Home Office replied on 14 September 2022, confirming these points: "[i] The PRRB looked [at] all the available evidence and made recommendations, supported by a detailed explanation and rationale. [ii] The Home Office and Ministers reflected on the PRRB's recommendations and on their duties under the Equality Act. [iii] An assessment of the equality impact will accompany the draft determinations under the Police Regulations 2003 implementing the PRRB recommendations, when they are submitted to Ministers for approval." Next, judicial review letters before claim were written to the Review Body and the Home Secretary on 20 September 2022. The Home Secretary responded on 4 October 2022. The Review Body responded on 12 October 2022, after a 7 day extension was agreed by the Association's solicitors. A longer extension was sought by the Review Body. But this was refused by the Association because it would take the filing of the claim outside the 3 months referred to in the rules for commencing judicial review. After commencement of the claim, the Review Body's Summary Grounds of Resistance were dated 14 November 2022. The Home Secretary's Summary Grounds of Resistance were dated 10 November 2022 and refiled in amended form on 9 December 2022. A permission stage Reply was filed by the Association on 2 December 2022 and refiled in amended form on 29 January 2023. Meanwhile, the pay increase had come into effect from 1 September 2022, in accordance with the Recommendation and the Written Statement. Formal implementation of the decision required a Determination pursuant to reg.46. An EqIA was produced, and the Determination was made on 6 December 2022.

Quotes from Ministerial Submissions

12. The Home Secretary's Summary Grounds of Resistance, annexed to an Acknowledgment of Service bearing a statement of truth, recorded the "factual position" as having been that the Acceptance had been arrived at after considering two Ministerial Submissions (dated 28 and 29 June 2022), each of which had "specifically stated" as follows (emphasis in original):

> ***The Public Sector Equality Duty (PSED) must be considered when developing policy. The PRRB's recommendation has the effect of targeting pay at officers on the lowest pay points. These officers will have fewer years in service and are therefore likely to have a lower age profile. To formally implement the PRRB's recommendations, determinations made under Police Regulations 2003 will be amended. A full [EqIA] will be submitted for you to consider alongside the relevant determinations.***

The Home Secretary's lawyers declined to disclose the Ministerial Submissions themselves and there is before me an application for permission-stage specific disclosure of those documents.

Candid Disclosure: Gardner and JM

13. What emerged from the oral submissions of Mr O'Brien for the Home Secretary is that the course taken in this case, in not disclosing the Ministerial Submissions themselves (§12 above), was a course being adopted, at the permission-stage, in reliance on passages in two relatively recent cases decided in this Court. The first case is R (Gardner) v SSHSC [2021] EWHC 2422 (Admin) (Eady J, 26.8.21) at §22.

Gardner was a challenge to the legality of Covid measures relating to care homes. In that case, the Court decided that further disclosure was unnecessary to determine the claim fairly and justly, but directed a statement clarifying steps taken to comply with the duty of candour. At §22, Eady J said this:

> ***The duty of candour does not, however, give rise to a duty to disclose documents per se; although defendants may discharge their duty through the disclosure of documents (and may be encouraged to do so, where that is a means of ensuring the court is informed of the relevant facts underlying, and the reasons for, a decision), they are not ordinarily required to give the sort of standard disclosure which might be required under CPR31; disclosure, as opposed to compliance with a duty of candour, is not required in judicial review proceedings unless the court so orders. (See PD54A, para.10.2). That is so, even if the documents in question are referenced in witness statements filed in the proceedings …***

The second case is R (JM) v SSHD [2021] EWHC 2514 (Admin) [2022] PTSR 260 (Farbey J, 4.10.21) at §91. JM was about whether the Home Secretary had discharged the duty to provide for the essential living needs of an accommodated asylum seeker. There, Ministerial Submissions had themselves been disclosed, the day before the hearing (§84). Farbey J decided not to treat that late disclosure as a breach of the duty of candour (§92). In the course of her analysis of that point, she said at §91:

> ***There was no duty on the defendant to provide … the ministerial submissions per se; but the substance of the information in the documents which shed light on the decision-making process in my judgment fell to be disclosed as a matter of candour.***

Mr O'Brien told me that it was these observations from these two cases (especially JM) which had led to the Home Secretary adopting the approach of not disclosing the Ministerial Submissions, but quoting from them, at least at this permission stage. He told me that he was unable to point to any earlier authority, prior to Gardner or JM, which would have supported this course. I accept that the Home Secretary's lawyers were, in good faith, following what they thought was guidance from the High Court about complying with the duty of candour without producing the document. But was the Court giving guidance of that nature?

Candid Disclosure: Some Principles

14. The duty of candid disclosure is discussed in the Administrative Court Judicial Review Guide, in the current 2022 edition ("JR Guide 2022") at §§15.1-15.5 and fn.249-269. In the JR Guide 2022, the cases which are cited (with hyperlinks) include the following: R (Huddleston) v Lancashire County Council [1986] 2 All ER 941 (fn.263); Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment [2004] UKPC 6 [2004] Env LR 761 (fn.268); Tweed v Parades Commission for Northern Ireland [2006] UKHL 53 [2007] 1 AC 650* (fn.250); R (National Association of Health Stores) v Secretary of State for Health [2005] EWCA Civ 154 (fn.264); Lancashire County Council v Taylor [2005] EWCA Civ 284 [2005] 1 WLR 2668* (fn.264); Re Downes [2006] NIQB 77 (fn.265); R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs [2018] EWHC 1508 (Admin) [2018] ACD 91 (fn.251, 258, 263-265); R (Citizens UK) v SSHD [2018] EWCA Civ 1812 [2018] 4 WLR 123 (fn.251, 258, 265-266); R (Terra Services Ltd) v National Crime Agency [2019] EWHC 1933 (Admin)* (fn.259). Other important cases include R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409*; Graham v Police Service Commission [2011] UKPC 46*; and R (Bancoult) v Secretary of State for Foreign

and Commonwealth Affairs (No.4) [2016] UKSC 35 [2017] AC 300. In the usual way, later cases cite earlier ones. These* were within the bundle of authorities for the hearing before me.

15. For the purposes of analysing the issue with which I am concerned, I can identify the following as relevant Principles. For ease of later cross-referencing, I will give each Principle a label. I will identify, for each, some of the supporting sources, to which I will add references to the JR Guide 2022 and to passages in Gardner and JM:

(1) The 'Standard Disclosure' Principle. In judicial review, unlike most civil claims (CPR31), the parties are not generally required to give standard disclosure of documents (CPR PD54A §10.2), which means simply giving or offloading lots of documents is unnecessary and inappropriate (Hoareau §§19-20). (JR Guide 2022 §15.1.1; Gardner §22)

(2) The 'Just Disposal' Principle. In judicial review, the test for ordering disclosure of specific documents or categories of documents (CPR31.12(1)) is necessity to resolve the matter fairly and justly (Tweed §3), a test also governing requests in judicial review for further information (CPR18.1: see R (Bredenkamp) v SSFCA [2013] EWHC 2480 (Admin) §19) and cross-examination. (JR Guide 2022 §§7.6.2, 11.2.2; Gardner §§25, 27, 29 and 35)

(3) The 'Candid Disclosure' Principle. Judicial review is conducted with all cards face upwards on the table (Huddleston 945F), meaning full and fair disclosure of all 'relevant material' so the court can decide whether the public authority acted lawfully (Bancoult §192), based on an underlying principle that public authorities are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law (Hoareau §20). (JR Guide 2022 §15.3.5, Gardner at §20; JM §90)

(4) The 'Information-Too' Principle. Candid disclosure also requires that relevant facts be identified in witness statement evidence, insofar as unapparent from disclosed contemporaneous documents (Belize §86), which means breach of the duty can lie in non-disclosure of a material document or the omission or obscuring in a witness statement of a fact or identified significance of a fact or document (Citizens UK §106(4)). (JR Guide 2022 §15.3.5; Gardner §21)

(5) The 'Relevant Material' Principle. Candid disclosure is required of (a) those materials reasonably required for the court to arrive at an accurate decision (Graham §18), (b) full and accurate explanations of all the facts relevant to the issue that the court must decide (Quark §50 Citizens UK §106(3); Hoareau §20) and (c) a true and comprehensive account of the way in which relevant decisions in the case were arrived at (Quark §50; Downes §21) including the underlying reasoning (CPR PD54A §10.1). (JR Guide 2022 §§15.3.1, 15.3.4; Gardner §20; JM §90)

(6) The 'Non-Selectivity' Principle. Candid disclosure must not be selective but must include the unwelcome along with the helpful (Taylor §60; Graham §18; Hoareau §21). (JR Guide 2022 §15.3.5)

(7) The 'Best Evidence' Principle. Documents should be produced, not gisted or a secondary account given, since the document is the best evidence of what it says: Tweed §4; Hoareau §24; National Association §§47, 49). (JR Guide 2022 §15.1.3; Gardner §21)

(8) The 'Redaction' Principle. Documents need not be disclosed in their entirety but can be redacted (Tweed §33) for public interest immunity, confidentiality, legal professional privilege or statutory restriction. (JR Guide 2022 §15.5.1)

(9) The 'Permission-Stage' Principle. The duty of candour applies prior to – and for – the Court's consideration of whether to grant permission for judicial review, though what is required to discharge the duty at the substantive stage will be more extensive (Terra Services §§9, 14), and the limited nature of disclosed material could inform a decision to grant permission (R (Sky Blue Sports & Leisure Ltd) v Coventry City Council [2013] EWHC 3366 (Admin) [2014] ACD 48 §25). (JR Guide 2022 §15.3.2)

(10) The 'Unpleaded-Grounds' Principle. The duty of candour extends to documents and information which will assist the claimant's case or may give rise to further grounds of challenge which might not otherwise occur to the claimant: De Smith's Judicial Review (9th edition) at §16-026; Treasury Solicitor's Guidance [2010] JR 177 at §1.2; R (K, A & B) v SSD [2014] EWHC 4343 (Admin) §11; after R v Barnsley Metropolitan Borough Council, ex p Hook [1976] 1 WLR 1052, 1058C-D (cited in Graham §18).

Disclosing the 'Substance' of Documents: My Analysis

16. In my judgment, the Home Secretary's legal representatives have misappreciated – albeit, I accept, in good faith – the significance of what was being said at Gardner §22 and JM §91. When in Gardner at §22 Eady J said the duty of candour does not give rise to a duty "to disclose documents per se", she was discussing the 'Standard Disclosure Principle' (§15(1) above). The reason why Eady J said that the duty "may" be discharged through disclosure of documents, as "a means" of ensuring the court is informed of relevant underlying facts and reasons, is because of the 'Information-Too' Principle (§15(4) above): the contemporaneous documents may not be enough. Eady J went on (in §22) to refer to CPR31, standard disclosure and CPR PD54A §10.2, having (in §21) referred to Citizens UK §106(4) (the 'Information-Too' Principle) and Tweed §4 (the 'Best Evidence' Principle: §15(7) above). In JM at §91, Farbey J was dealing with a situation where the documents – Ministerial Submissions – had themselves been disclosed as documents, as she emphasised at §92. Her observation referring to the substance of the information which shed light on the decision-making process was a clear reference to the 'Relevant Material' Principle (c) (§15(5)(c) above). Nothing turned on any distinction between documents and communication of their substance, since neither the documents nor a communication of their substance had previously been provided. Farbey J did not need to consider, and did not discuss, the 'Best Evidence' Principle (§15(7) above), on which nothing could turn on the facts. There is, unsurprisingly, no indication that she was referred to the relevant authorities on that Principle, on which nothing turned. Above all, she was dealing with a case-specific and fact-specific situation, not giving general guidance, still less undermining previous general guidance.

17. It is, in my judgment, wrong to conclude that it is or has become sufficient for public authority defendants in judicial review cases to communicate – whether in witness statements or grounds of defence – the 'substance' of undisclosed primary documents such as Ministerial Submissions, as an alternative to producing or exhibiting the primary documents themselves. The answer lies in the 'Best Evidence' Principle (§15(7) above) and the "good practice" identified in Tweed. That principled answer had clearly been exemplified in a passage from National Association at §47, under the heading "the use of secondary evidence". That case and that passage are both cited in the JR Guide 2022 at fn.264. It does not appear that Farbey J's attention was invited in JM to National Association, nor for that matter to Tweed. Nor was National Association cited at the hearing before me, though the JR Guide 2022 and Tweed both were. As it happens, National Association was a case about ministerial submissions (briefings) which had not been disclosed. Instead, a witness statement had described those factors which had been taken into account in the briefings (National Association §§44-45). The Court of Appeal was unimpressed with this approach to candid disclosure, describing this as a "second-hand account of a document of which the original was available" (§46), criticising the Secretary of State for a policy position against "voluntary disclosure of ministerial briefings" (§47), emphasising that "what a witness perfectly honestly makes of a document is frequently not what the court makes of it" (§49), and explaining the importance of "best evidence" in judicial review "in the absence of any public interest in non-disclosure" (§49). National Association was one of the foundational cases behind the "best practice" statement in Tweed §4 (as can be seen from the argument in Tweed at [2007] 1 AC 650 at 652E-G). That statement continues to apply in judicial review, certainly to any "significant" document (Hoareau §24).

18. So, it needs to be appreciated that the observations in Gardner and JM were and are not judicial guidance endorsing the use of secondary evidence to communicate the "substance" of withheld documents. The principled "good practice" identified in Tweed provides the answer. If documents matter, they should be provided. If they matter prior to or at the permission stage, that is when they should be provided. Not gists. Nor summaries. Not descriptions of contents or features of the document. Not selected quotations. Instead, the documents themselves. This is proper candid disclosure. It is not the supply of material whose request would constitute 'fishing'. It is not automatic disclosure of any document mentioned. It is to achieve 'Candid Disclosure' of 'Relevant Material' by 'Best Evidence' (§15(3)(5)(7) above), subject to the 'Redaction Principle' (§15(8) above). Disclosure, and candid disclosure, should not be replaced by 'further information': the Principle is 'Information-Too' (§15(4) above) not 'Information-Instead'. The "cards" themselves, and not a narrative description or a summary or quotation, are to be face upwards (§15(1)). What are necessary for 'Just Disposal' (§15(1)) are the documents. The duty of candour applies to 'material' (§15(3)(7)), not information about the contents of 'material'. That is the position in principle. As to the present case, I am going to return at the end of this judgment to whether, in all the circumstances, I should now order specific disclosure.

A Permission-Stage Assurance

19. There is another important candour-related point which arose in the present case. I have explained that this case is at the Permission-Stage (§15(9) above) and the Ministerial Submissions have not been disclosed. The Home Secretary's explanation

of this was that the only passages relevant to the PSED, and the pleaded grounds of challenge, had been quoted. Pre-action correspondence from GLD told the Association that: "No other part of the wider document is arguably relevant to any issue which the court must decide". This language reflected 'Relevant Material' Principle (b) (§15(5)(b) above). Mr O'Brien fairly pointed to the express design of the Association's application for specific disclosure, which was tailored to the PSED. But the position nevertheless gave rise to a concern on the part of the Court. Where did the Home Secretary's approach to disclosure leave the 'Unpleaded-Grounds' Principle (§15(10) above)? Mr O'Brien accepted the legal correctness – and applicability – of both the 'Permission-Stage' Principle and the 'Unpleaded-Grounds' Principle (§§15(9)(10) above). At my invitation, Mr O'Brien and Mr Yarrow were able to address them by giving an assurance. It was, in its essence, as follows:

> ***Counsel for the Home Secretary have read and reviewed the Ministerial Submissions – and other undisclosed materials – and can assure the Court that nothing within the undisclosed material would serve to assist the claim or give rise to any other ground for judicial review.***

In my judgment, this type of assurance stands as an appropriate safeguard, in the context of the 'Permission-Stage' and 'Unpleaded-Grounds' Principles (§§15(9)(10) above). Naturally, if permission for judicial review is not being resisted, there is no risk of the claim failing for material non-disclosure. But where permission is resisted it is, in my judgment, legitimate for a Claimant – or the Court – to ask whether a Permission-Stage Assurance of this kind is being given, or not. After all, a public authority defendant should not be both (i) resisting permission for judicial review and (ii) failing to recognise the fundamental importance, discipline and governing principles of the duty of candid disclosure.

PSED: The Heart of the Case

20. I can now turn to the PSED centre-piece of the Association's claim for judicial review. The PSED claim is framed as follows. There was – by the Review Body and again by the Home Secretary – a failure of "due regard", constituting breach of the PSED, given that the Recommendation and Acceptance involved a 'disproportionate impact' in terms of the 'protected characteristic' of age, constituting 'indirect discrimination', which needed to be 'acknowledged' and the 'elimination' or 'mitigation' of which needed proper consideration. (I interpose that indirect age discrimination is not advanced as a ground for judicial review; it is the "due regard" PSED breach which alone is advanced.)

21. At my invitation, Mr Sharland KC was able to assist the Court by putting the PSED argument – and the legal concepts featuring within it – into plain and clear language. The essence of the argument comes to this. The Recommendation involves a pay increase. It is a uniform amount. But it has a differential impact. That differential impact can be seen when the pay increase is viewed as a percentage increase. The negative impact is visited on the more senior – the better paid – ranks. There is a clear, relative disadvantage – in percentage terms – for those in higher paid ranks and at higher pay points. That, viewed in percentage terms as a matter of relative advantage and disadvantage, is a negative outcome for the higher ranks and higher pay points. But this is not just the better paid, and it is not just the senior ranks. This is the older officers. That is because of the broad correlation between higher rank – and higher pay point within a rank – and age. Higher rank officers tend to be older

officers. That means the negative outcome, in terms of relative disadvantage, constitutes a disproportionate impact on those who are older. This truth engages the protected characteristic of age. Absent a justification, this pay increase would constitute indirect age discrimination. And that is where the process duty – the PSED – comes in and is so important. The PSED imposed by Parliament required the Review Body, and then the Home Secretary, to grapple with that position in order to discharge this "due regard" duty. That meant recognising the impact. But they never did. It meant grappling with whether, in light of that recognised impact, the chosen response was truly the right and appropriate one, or whether the disproportionate impact should be eliminated. They never did that. It also meant grappling with whether, in light of that recognised impact, even if the chosen response was right and appropriate, and even if the impact was not to be eliminated, there were appropriate ways in which to 'mitigate' or alleviate it. That might involve a cash "allowance" (like the London 'weighting'). Or it could even be a non-cash benefit (like an enhanced leave entitlement). They never did that either.

Viability of the Claim

22. It is important to have identified the essence of the central line of argument which the Association wants to advance as the centre-piece to these proceedings. But having done so – and then looking at the materials – it becomes very clear that this is a legal challenge with no realistic prospect of success. I will explain why. The starting point is that each and every police officer was going to be receiving the same amount of money. It is quite right that, viewed in terms of a percentage increase, there was a relative advantage for the lower paid and a relative disadvantage for the higher paid. But that was conscious and deliberate. It was also clearly acknowledged. The Report expressly identified what was called a "sharply differentiated approach" (§5.35), describing its "effect" in "giving the lowest paid police officers an uplift close to the rising cost of living". The reasoned analysis and explanation contained in the Report went into considerable detail, in identifying and illustrating the implications of the proposal in percentage terms. There was analysis which identified the implications, for each pay point within each rank, as a percentage increase. There was in the Report a table (Table 5.1) which explained the position. It did so for each rank. It took the range from the lowest pay point to the highest pay point. It explained that the lowest paid Constable was getting an 8.8% pay rise, and the highest paid Constable a 4.6% pay rise. The Report explained the ranges for each rank (§5 above), including Superintendent (2.7% to 2.3%), Chief Superintendent (2.2% to 2.1%) and Chief Police Officer (1.8% to 0.6%). It was quite impossible – reading the Report – to misappreciate that, when viewed in relative percentage increase terms, the proposal constituted a relative advantage for the lower paid ranks and a relative disadvantage for the higher paid ranks. This was notwithstanding that, viewed in terms of a flat cash payment, the amounts being received by every officer at every rank were exactly the same.

23. Nor was there any mistaking that this relative advantage and relative disadvantage – in percentage terms – was being applied across the lower ranks and then higher ranks, correlating to younger ages and then older ages. That was addressed within an appendix to the Report – Appendix D – which was an Analysis of Police Earnings and Workforce Data. Appendix D set out information which was relevant to the Report and what the Review Body was recommending. Its clear purpose was to enable an

understanding of the relevant cohorts of police officers and truths about them. The protected characteristics, by reference to which equality and discrimination considerations arise, were unmistakeable. One chart in Appendix D addressed the percentage of female officers by rank (Chart D.7). Another chart (Chart D.8) addressed the percentage of ethnic minority officers by rank. There was then a chart (Chart D.9) which specifically dealt with "age" breakdown of police officers by rank. It showed the proportion of Constables who were under 26, aged 26 to 40, aged 41 to 55 and aged over 55. It then did exactly the same thing for all of the other ranks. There was then another chart (Chart D.10) which showed the proportion of police officers aged 40 and under for each rank across the past 6 years. The clear effect of that work was to show the very correlation, between rank and age, on which reliance is being placed in the PSED arguments. Age, moreover, was being considered alongside characteristics familiar from the 2010 Act as protected characteristics.

24. It is entirely clear that the central theme which the Review Body was addressing was whether the proposal of the flat-pay increase was the appropriate response – and the "most appropriate" response – in the context of securing "fair pay" while protecting funding for frontline services and ensuring affordability for taxpayers. The thinking was that a rise in the cost of living has a greater impact on the lower paid than those on higher salaries. It was this that gave rise to the very strong arguments in favour of the sharply differentiated approach. It was this which had the effect of getting the lowest paid police officers an uplift close to the rising cost of living. And all of this followed from the judgment, on the gathered evidence, that it was those at the bottom of the police pay scale who struggled to meet rising household costs. Obviously, instead of a flat-rate 'cash' increase across the board, there could instead have been a flat-rate 'percentage' increase across the board. Viewed in terms of relative advantage and disadvantage, in percentage terms, that would have eliminated the 'differential' and therefore the targeting. Equally obviously, there could have been a 'hybrid' approach. For example, a combined cash-rate and percentage-rate increase. Or uplifts and allowances in different places within the ranks. Indeed there was a proposed £5,675 uplift at one pay point of the Chief Superintendent scale, advocated by some voices to the Review Body. The course of action which the Review Body identified and maintained was "the most appropriate" course was the flat-rate cash payment to every Officer. The Report, in my judgment, beyond argument, gave a proper, informed, evidenced and reasoned basis for the Home Secretary then to make a decision as to whether the Recommendation was truly the right response to the merits of the situation – notwithstanding the impacts and implications – and was to be accepted. The nature of the issues, and the nature of the impacts and implications, were all being laid bare from the work done within the Report. Put another way, everything that mattered in terms of the PSED was "patent and well understood" (cf. R (End Violence Against Women Coalition) v DPP [2021] EWCA Civ 350 [2021] 1 WLR 5829 at §88).

25. It follows that I accept Mr Tabori's submissions on this part of the case. With its displayed underlying evidence and reasoned analysis, the Recommendation as presented – if understood, thought about and accepted – itself delivers compliance with the PSED. There is clear recognition of the relevant impact, the grappling with whether it was truly the right thing to do to bring about that impact, and the grappling with the question whether to do something else which would eliminate or reduce that impact. These were all inherent parts of the process which the Review Body had

undertaken in providing its evidenced and reasoned analysis and Recommendation. Mr Sharland KC and Mr Kosmin are quite right when they say that the Report does not mention the PSED. But the core principles on which they rely, gathered together in Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 345 §26(5)(iii), include the recognition that an absence of express reference of the PSED is not of itself fatal. The question is whether "in substance", there has been due regard to the relevant statutory need: Baker v SSCLG [2008] EWCA Civ 141 [2009] PTSR 809 at §§37, 40. The question is one of "substance, not form": R (McDonald) v Kensington & Chelsea RLBC [2011] UKSC 33 [2011] PTSR 1266 at §24.

26. But suppose it were arguably necessary explicitly to recognise and record the PSED as a prism through which to consider the impact, the policy correctness, and the virtues of alternatives eliminating or mitigating the impact. Even if that were right, it is clear beyond argument that this happened when the Home Secretary came to make the Acceptance decision. It follows that I accept the submissions of Mr O'Brien and Mr Yarrow on this part of the case. The Home Secretary was "the decision-maker" (Baker §37). What was set out in the direct quotation from the Ministerial Submissions (§12 above) was not a defensive, reactionary or rearguard step. It came in late June 2022, long before any PSED query or challenge had been raised by the Association. The direct quotations from the Ministerial Submissions dated 28 and 29 June 2022 show, as a fact, that the Home Secretary was specifically being told that the PSED "must be considered", when "developing policy". The decision-making culminating in the Acceptance was the "developing" of the "policy". In the quoted paragraph, the Home Secretary was being told that the recommendation in its effect targeted pay at officers on the lowest pay points. That is a reference to the point which the Association's argument emphasises: that viewed in terms of a percentage pay increase there is a relative advantage for lower paid officers, and a relative disadvantage for higher paid officers. The other key point was also specifically being spelled out for the Home Secretary in the quoted passage, namely that this had a correlation to age. That was making the link to the work that had been done in the Report at Appendix D.9 and D.10. This was 'joining the dots' for the key PSED points, in the context of the PSED, reflecting age as a protected characteristic. So, the Home Secretary needed to think about the policy merits of the Recommendation, and whether to accept it or do something else which would avoid or ameliorate this impact, in light of the PSED, given these key points about an age-related impact. Finally, the Home Secretary was being told that a determination would be needed for formal implementation of the Recommendation – which was correct – and that it was intended that there would be a full EqIA at that stage to consider. In the light of that last point, I was concerned to ensure that the quote as a whole had not been taken out of context. Mr O'Brien, at my invitation, was able to confirm that the quotation comes from the main body of the Ministerial Submissions; not in a part dealing with 'next steps'. Although I have concluded that the Ministerial Submissions should have been disclosed, so that the Court could have seen the structure and headings for itself, I accept that confirmation.

27. Although in my judgment the 'Best Evidence' Principle should have been complied with and was not (§15(7) above), Mr O'Brien and Mr Yarrow are plainly correct in their submission that, prior to making the decision under challenge, the Home Secretary was directed to consider the PSED; that she was aware that the PSED had to be complied with when making the policy decision; and that prior to accepting the

Recommendation she had express regard to the fact that it had the effect of targeting pay officers on the lowest paid points, who had fewer years in service and were therefore likely to have a lower age profile. Non-compliance with the 'Best Evidence' principle means that the Home Secretary cannot herself derive any further assistance from the Ministerial Submissions. She cannot, for example, point to any analysis of the Recommendation, or of alternatives. Her choice not to disclose the Ministerial Submissions means that the Court has no reasoned analysis other than in the Report. That counts against the Home Secretary. But the information and evidence gathered, and the description of the impacts and implications in the Report, were plainly sufficient by way of reasoned analysis, whether more was done or not.

28. There is one important further point which reinforces the picture. In due course when the determination was being made – by way of the implementation of the Acceptance of the Recommendation – there was a full EqIA. That too was not in the nature of a rearguard action. It was always the intention, as recorded within the quoted passage from the Ministerial Submissions. That is why the Association was promptly told about it by the Review Body on 6 September 2022 and by the Home Office on 7 and 14 September 2022. The policy decision had been made and published on 19 July 2022. Payments had begun to be made as of 1 September 2022. But under the statutory scheme formal implementation is by way of a reg.46 determination, which can change pay levels with retrospective effect, provided there is no clawback: reg.46(3). An EqIA is not a prerequisite for the PSED, and in any event some work may take place at an implementation stage (cf. R (Motherhood Plan) v HM Treasury [2021] EWHC 309 (Admin) [2021] PTSR 1202 at §88). What matters most, for present purposes, is that when someone came to write an EqIA containing an analysis of the protected characteristic of age and impacts, from the perspective of the prescribed needs in the PSED, there was nothing new. The substance was exactly what had already been known, appreciated and considered. The key points made in the EqIA were these. The "indirect discrimination" was that the pay increase had the effect of targeting pay at officers on the lowest pay points, with fewer years in service and therefore likely to have a lower age profile. The appropriateness derived from the Review Body's deep concern about the cost of living impact on lower earners, who typically spend a greater proportion of their income on essentials such as food and fuel, providing the very strong arguments in favour of a sharply differentiated approach protecting those on the lowest pay points against rising costs. The consolidated flat award of £1,900, which had the effect of giving the lowest paid officers a percentage uplift close to the rising cost of living, was most appropriate. While the percentage increase varied across ranks and pay points, all officers would receive the same value cash award. There was no new insight here. The reasoning, expressed in an EqIA, reinforces the conclusion that this is not a case in which even arguably it can be said that the 'process duty' of due regard (see R (Bridges) v Chief Constable of South Wales Police [2020] EWCA Civ 1058 [2020] 1 WLR 5037 at §176) has in substance been breached, by anyone. This is not a 'materiality' point, about the outcome being inevitable (at common law) or 'highly likely' (under statute), had the breach not taken place. It is a no-breach point. There was, beyond argument, compliance with the "due regard" duty. On my analysis, the 'highly likely' question raised by the Defendants does not arise and – since answering it would involve a false premise of arguable breach – I say no more about it.

29. That disposes of the arguments of PSED breach. There is no viability in the unreasonableness points either. The fact that none of the "parties", whose written or oral representations were recorded by the Review Body, advocated the flat-rate pay increase does not begin to support a conclusion that the Recommendation was unreasonable. The allegation of unreasonableness on the part of the Home Secretary is parasitic on there first being an unlawful recommendation by the Review Body. That is a false premise for the reasons I have explained. As I have also explained, even if the PSED required express articulation and 'joining the dots' that is what happened with the Recommendation. The Home Secretary could – if needed – act curatively in relation to the Recommendation and the Report. There is no reasonableness ground with any realistic prospect of success.

Delay

30. The other objections to a green light for judicial review were fully argued and I will deal with them. Both the Review Body and the Home Secretary submitted that permission for judicial review should be refused on grounds of lack of promptness or undue delay. I was unpersuaded by these points and would not have shut out this claim, were it otherwise viable. I can quite see that the Recommendation and Acceptance published on 19 July 2022, to take effect from 1 September 2022 (albeit with a reg.46 determination to follow) would need a speedy and expedited challenge, if any 'unravelling' of pay were seriously contemplated. Mr Sharland KC and Mr Kosmin, emphasising that judicial review is a last resort, submit that the Association acted promptly and sensibly in the period through to filing the claim. This began with studying the Report and then on 5 August 2022 writing to the Review Body to raise questions about it. There was no response to that letter for more than a month (until 6 September 2022) after which the Association promptly engaged the Home Office through the meeting (7 September 2022) and a letter (8 September 2022) to which it was appropriate to await the response (14 September 2022). There was then the proper writing of the letter before claim (20 September 2022) and the responses were received only on 4 October and 12 October 2022 giving a sensible 14 day period for the Home Secretary and the additional 7 days for the Review Body. The papers were then prepared at speed and the Association commenced proceedings on 17 October 2022, all within the 3 month period. There was no suggestion throughout of any need for greater urgency and no delay point was taken until the Home Secretary's letter of response of 4 October 2022. Looking at the context and circumstances, my view is that judicial review commenced only at the 3 month mark (17 October 2022) would be likely to mean any remedy would be limited to declarations. I would certainly have left the delay issues open to be considered at the substantive hearing. I would not have refused permission on grounds of delay in all the circumstances.

31. Mr Tabori took a particular delay point, so far as the challenge to the Recommendation is concerned. He submitted that the Report was provided to the Home Secretary on 31 May 2022, a date which was also reflected in the Foreword when the Report was subsequently published. He says ignorance of the challenged act does not change the start-time for the delay rules, that the claim was well outside the 3 months in the rules, and that no extension of time should be granted. He accepts that the Association could not be expected to have sought an extension of time in the N461 Claim Form. That is because the Review Body's own pre-action letter of response (12 October 2022) took no delay point and did not identify 31 May 2022 as

the relevant date. Mr Tabori says, after this was explained in the Review Body's Summary Grounds of Resistance (14 November 2022), procedural rigour required an application for an extension of time in a Form N244. In my judgment, Mr Tabori's submission about an N244 has stretched the virtues of procedural rigour well beyond breaking point and into the realms of arid technicality. Instead of a Form N244, the Association promptly filed a permission stage reply which set out its position, including asking for an extension of time if now necessary in light of what had been explained. That, in my judgment, was permissible and proper. It caused no conceivable doubt or prejudice. If, moreover, the Review Body had wanted to insist on a Form N244, it could and should have written to say so. The backcloth is that the Review Body did not take its time point in pre-action correspondence, did not draw attention to the date (known to it) when the Report had been finalised, and itself asked for extensions of time. In these circumstances, it is not necessary to enter, still less resolve, the debate about whether the principle in R (Anufrijeva) v SSHD [2003] UKHL 36 [2004] 1 AC 604 – or some analogous principle – means that a Review Body report takes effect, for the purposes of the running of time, only from the date on which it is published pursuant to s.64B(3). Even if it does not, the Review Body's delay objection would not, in my judgment, have constituted a permission-stage knockout blow based on a procedural bar.

Public Function

32. Next, Mr Tabori made detailed submissions that the Review Body, in making the Recommendation, was – beyond argument – not discharging a public function so as to be amenable to judicial review, or a Human Rights Act 1998 public function (§8 above) so as to be the subject of the PSED. He makes these points. The necessary focus on the specific function here means the Recommendation, rather than the broader "consider and report" function (s.64B(1)). What matters is not the statutory power but the regulatory position (cf. R (Holmcroft Properties Ltd) v KPMG LLP [2018] EWCA Civ 2093 [2020] Bus LR 203 at §38). The Review Body is, in substance, still discharging the function of its predecessor the Police Negotiating Board under the old s.61 of the 1996 Act, described as "negotiating and arbitrating" (R (Staff Side of the Police Negotiating Board) v SSHD [2008] EWHC 1173 (Admin) [2008] ACD 81 at §81). Police pay would fall to be a private employment subject-matter under the classification in McClaren v Home Office [1990] ICR 824 at 836-837. The Report was sent privately to the Home Secretary; it was the Home Secretary who had the statutory duty to publish it; and the Review Body had no function of public consultation. This advisory and recommendation-making function would be on the wrong side of the public function line (as with Senior-Milne v Advocate General for Scotland [2020] CSIH 39 [2020] SLT 853) and not the right side of the public function line (as with R (Eisai Ltd) v NICE [2008] EWCA Civ 438 (2008) 101 BMLR 26 and R (Lewisham LBC) v SSH [2013] EWCA Civ 1409 [2014] 1 WLR 514). In principle, the body amenable to judicial review and attracting the PSED will always be the Home Secretary, pointing to the defendant in R (FDA) v Minister for the Cabinet Office [2018] EWHC 2746 (Admin) as the Minister and not the recommendation-making Permanent Secretaries. The Home Secretary could always be answerable for, or could take appropriate action in the face of, any wrongdoing or serious default by the Review Body.

33. I would not have refused permission for judicial review on the basis of these arguments. The "public function" issues were addressed – on both sides – against an arguability threshold, rather than as a preliminary issue for substantive determination. I consider the Association's position arguable. Indeed, I think the balance of the arguments which I heard tends to favour the conclusion that this is a "public function", for both reviewability and PSED-applicability. The Review Body is a statutory body established by Act of Parliament (s.64A). It exercises a statutory function (s.64B). It is statutorily required to "consider and report", to obtain "evidence" and to make "recommendations". Its report is required, by Parliament, to be published by the Home Secretary (s.64B(2)). I entirely see that – in the ordinary course of things – it should suffice for any claim for judicial review to arise as a challenge to the actions of the Home Secretary, such actions having been taken having received a report. But that is not a jurisdictional conclusion. Instead, it is a point about utility and alternative remedy. It does not displace the public function. The function of giving advice and making a recommendation can in principle be a public function amenable to judicial review, as in Eisai and Lewisham. I regard as over-technical the attempt to isolate the "recommendation" function from the statutory "consider and report" function. These are surely inextricably linked, and part and parcel of the same statutory function. That function – as it now stands – is not, as I see it, framed as 'negotiating and arbitrating'. Suppose the Review Body, as a statutory body with a statutory function, made a clear and unequivocal promise that it would not finalise its report without receiving and considering a person's representations. Suppose it then announced that it had decided to proceed anyway. I would be very surprised if there were a jurisdictional bar on a judicial review Court being able to entertain a claim for judicial review against the Review Body. Or suppose, in 'determining its own procedure' (Sch 4B §11), the Review Body chose a course contravening basic values of procedural fairness. I would be similarly surprised at finding a jurisdictional bar.

34. As to the PSED, I find it unsurprising to see that the Review Body's first instinct, in its carefully-considered pre-action letter of response, was to accept that it was subject to the PSED duty. I think there are two ways in which that can be put as a matter of legal analysis. One is that this is straightforwardly a "public function", to which the PSED applies directly. The other is more subtle, and indirect. The Review Body has the important independent statutory function of doing the work, collecting the evidence, conducting the reasoned analysis, providing the consideration and reporting, and making a recommendation arising out of all of that. Everybody agrees that the Home Secretary owes the PSED, in the taking of the decision. The 'fitness for purpose' of the Review Body's product can properly be tested by the Review Body asking itself this question. If the Home Secretary read our report, reasoning and underlying evidence and accepted our recommendations, would it follow that the PSED duty will have been complied with? Whether direct or indirect, there are, in my judgment, obvious virtues in one or other of these positions being correct as a matter of law. I was provided with a Report by Incomes Data Research (August 2018), entitled Discrimination Law and Pay Systems, which said (at p.7) it was "open to some doubt" whether the functions of a pay review body would count as "public" for directly-applicable PSED purposes. The Report went on to say "it is important for government to ensure that the recommendations made by the pay review bodies are informed by the principles underlying the Equality Act". Indeed, that may be a possible interpretation of the direction in the standing Terms of Reference (§9 above)

about the Review Body having regard to legal obligations "on the police service" in anti-discrimination legislation.

Specific Disclosure

35. I end by returning to the Ministerial Submissions and the Association's application for specific disclosure. I was satisfied that it was appropriate, in the circumstances of the present case, to hear the submissions on all of the permission-stage issues 'in the round', on the material currently before the Court. That exercise could properly inform my decision as to whether to make an order for specific disclosure of the Ministerial Submissions. Mr Sharland KC and Mr Kosmin asked me to make the order, deferring my decision on permission for judicial review until after disclosure had taken place and written submissions had been received. I am not going to take that course. Nor am I going to grant permission for judicial review, on a Sky Blue Sports basis (§15(9) above), informed by the fact that full disclosure has yet to be made. I decline to order specific disclosure in the special circumstances of this individual case. These are my reasons. First, although I have found that the Home Secretary's approach to the duty of candid disclosure was in error, I have accepted that the error was a good faith misunderstanding of recent case-law. Secondly, that error has now been corrected by this judgment (which I will certify as citable) and should not be made in future. Thirdly, Mr O'Brien is right to point out that the Association chose to frame its application for specific disclosure on the narrow and specific basis of necessity to determine the PSED issues. Fourthly, although the Home Secretary erroneously argued (based on Gardner and JM) in favour of candid disclosure by secondary evidence of the 'substance' of a document, what the Home Secretary actually put forward was a direct quotation. Fifthly, as I have explained (§26 above) I was able to rely on Mr O'Brien's assurance that the quotation has not been taken out of context. Sixthly, as to any broader implications, I have been able to rely on the Permission-Stage Assurance (§19 above). Seventhly, in all these circumstances – and having regard to the Report – I have been left in no doubt that this is a very clear-cut case where there is no viable claim for judicial review. For those reasons, specific disclosure is declined. That is not a vindication for the Home Secretary's approach to disclosure, any more than was National Association (where at §49 the Court of Appeal, for different reasons, did not require the briefing to be produced). In this case, as in that case, the Ministerial Submissions themselves should have been before the Court.

Conclusion

36. For the reasons which I have explained, although I reject the Home Secretary's approach to candid disclosure as legally erroneous, and although I reject the Defendants' delay objection and the Review Body's public function objections, I am dismissing the applications for permission for judicial review and for specific disclosure. Having circulated this judgment as a confidential draft, I am able to deal here with any contested consequential matter. I record that this judgment is certified as citable further to the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001.

Costs

37. The only contested consequential matter was costs. I received and digested 23 pages of written submissions. In the event, eleventh-hour peace broke out between the Association and the Home Secretary, who agreed that there be no order as to costs as between them. That leaves the Review Body. It did not participate in the application for disclosure of the Ministerial Submissions. It sought the costs in full of its Acknowledgment of Service and Summary Grounds of Resistance ("AOS") (£7,310.20) and the oral hearing (£8,553.66). The Association's position was that the Review Body's costs should be limited to £3,000, as the reasonable costs of an AOS limited to the PSED-breach issue. I have decided that the Association should pay a portion of the Review Body's costs, summarily assessed at £8,000. The Association could have decided to impugn the Acceptance only. It chose to impugn the Recommendation, bringing in the Review Body as a distinct and first defendant, understandably with a distinct legal team. The principles as to a defendant's costs of an oral permission hearing are summarised in JR Guide 2022 at §25.4.5. Here, the oral hearing was directed by Lang J, so that the Court could be assisted by all parties in light of the issues. This claim for judicial review has been persistently-pursued, on legal merits exposed as lacking viability in clear-cut fashion. However, the Review Body – in its AOS and at the oral hearing – took three failed knock-out points. They were: delay, reviewability and PSED-applicability. These involved substantial lawyer time, introduced many authorities, and drove up costs all round. It is no answer to say – as Mr Tabori does – that the Review Body was "entitled" to raise these, and that the 'public function' points were found to be arguable. These were time-consuming, permission-stage points which failed. Had the Review Body fought the permission stage on the viability point which alone succeeded, its reasonable AOS and hearing costs would have been very substantially lower. Overall, in the exercise of my judgment and discretion, I am satisfied that £8,000 is the just and proportionate order as to costs.