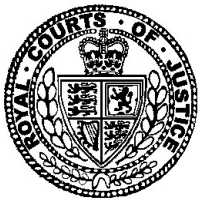

Neutral Citation Number: [2020] EWCA Civ 1179

Case No: C1/2019/0891

IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE HIGH COURT OF JUSTICE ADMINISTRATIVE COURT His Honour Judge Allan Gore QC [2019] EWHC 978 (Admin)

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 09/09/2020

Before:

LORD JUSTICE FLOYD
LADY JUSTICE ASPLIN
and
LORD JUSTICE COULSON

- -

Between:

David Gathercole	**Appellant**
- and -	
Suffolk County Council	**Respondent**

- -
- -
- - -

Charles Streeten (instructed by **Richard Buxton Solicitors**) for the **Appellant**
Richard Ground QC and Jack Parker (instructed by **Suffolk Legal Services**) for the **Respondent**

Hearing date: 23rd July 2020

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-

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 on the 9th September 2020.

LORD JUSTICE COULSON:

1 INTRODUCTION

1. The right of an aggrieved party to seek judicial review of a planning decision is an important safeguard to prevent capricious or irrational decision-making. Too often, however, such challenges can depart radically from the original planning objections, and focus instead on what might be called generic failures to comply with statutory obligations which have never before been raised. Two regular candidates for such after-the-event challenges are the planning authority's alleged failure to have regard to the Public Sector Equality Duty ("PSED") and the failure to require a proper Environmental Statement ("ES"). Sometimes, these kinds of challenge can take on an arid quality, raising matters of form rather than substance. This appeal involves challenges on both these grounds, based on complaints which had not been raised by the appellant (or his predecessor, the relevant Parish Council) during the lengthy planning process. The respondent submits that this is an academic challenge because, even if the breaches are made out, the court can be confident that the same planning decision would have been taken.

2. In a decision notice dated 23 October 2018, the respondent granted planning permission for a new primary school and pre-school at Lakenheath in Suffolk. On 4 December 2018, Lakenheath Parish Council ("the PC") applied for permission to bring judicial review proceedings of that decision. Although there were originally three grounds on which that application was made, permission was granted for ground 3 only, in respect of the adequacy of the ES. On 5 April 2019, at the hearing before Judge Allan Gore QC, sitting as a judge of the High Court ("the judge"), the PC renewed their application for permission in respect of ground 1 (Article 8) and ground 2 (PSED), at the same time as the judge heard the challenge on ground 3. In an *ex tempore* judgment ([2019] EWHC 978 (Admin)), the judge refused permission to apply for judicial review on grounds 1 and 2 and rejected the claim for judicial review in respect of ground 3.

3. The PC decided not to appeal further. However, the appellant, who said that he had worked alongside members of the PC during the planning process, was substituted for the PC in this appeal. He sought to appeal on all three grounds, although the skeleton argument produced on his behalf was limited to a third attempt to obtain permission to argue the PSED ground, and the ES appeal. Although Mr Streeten's skeleton argument was silent as to why the appellant wished to prevent the building of a new school to meet the proposed expansion of Lakenheath, it emerged towards the end of the hearing that he favours an alternative site for the school, which was considered by the respondent but rejected for various reasons.

4. In Section 2 of this judgment, I set out the factual background, and in Section 3 I identify the salient parts of the decision of the judge. Thereafter, in Section 4, I set out the factual context in which this appeal falls to be considered. Thereafter, I deal with the PSED ground in Section 5, and the ES ground in Section 6. There is a short summary of my conclusions at Section 7.

2. THE FACTUAL BACKGROUND

5. Since 1941, Lakenheath has been the home of a United States Air Force base operating from a site belonging to the RAF. In recent years, planning permission has been granted in full or in outline for 663 new homes in or near Lakenheath, comprising:

   (a) 81 dwellings at Rabbit Hill Covert;

   (b) 140 dwellings west of Eriswell Road;

   (c) 67 dwellings at Briscoe Way; and

   (d) 375 dwellings at Station Road.

   Many of these proposed developments are at the north end of Lakenheath village, which is also the location of the proposed new school on Station Road.

6. The respondent, as the local authority, applied to itself as the relevant planning authority for planning permission for a new primary school for up to 420 pupils, and a further 60 pre-school places. The principal problem to be addressed in the planning application was the issue of excessive noise, particularly in outdoor areas, generated by the aircraft using the airbase.

7. There were three years of consultation and discussion about the proposals before the planning application for the new school on Station Road was made on 2 March 2018. The application was supported by a detailed ES. This was a lengthy document which dealt in detail with (amongst other things) two factors relevant to the present appeal. Chapter 2 was concerned with the "Need for the Development and Alternatives"; Chapter 7 dealt with noise.

8. Chapter 2 of the ES identified the clear need for a new primary school in Lakenheath given that the existing school was assessed as being at capacity. Paragraph 2.1.2 noted that Forest Heath District Council were preparing their new Local Plan which identified the need for a new primary school. An area was identified in that draft Local Plan for the new school, and the proposed site on Station Road fell within that proposed area. The Local Plan has since been completed with no material change.

9. The ES addressed various alternative sites. It said that all these "were discussed at stakeholder meetings which included representatives from the Parish Council, District and County Councils along with the head teacher and governors from the existing school." That was a reference to the discussions that had taken place over the preceding three years.

10. The alternative sites were as follows:

    (a) *Site 1: Lakenheath North*: This was the most northerly of all the sites considered. It was even further north than the proposed site, but it was not accessible from Station Road. In relation to this alternative, the ES said at paragraph 2.2.9:

"There was concern that this site was to some extent isolated and a better option would be to relocate the school to the southern part of the site closer to the highway and Lakenheath (as shown in this planning application) to address the accessibility issues."

In other words, the proposed site for the school was a little to the south of Site 1, with direct access onto Station Road.

(b) *Site 2: Middle Covert*: At paragraph 2.2.10, the ES said:

"2.2.10 The site is currently woodland and to develop this site would have an ecological and visual impact having to cut down a considerable number of trees. A number of trees are subject to TPOs and the site is considered to be a wildlife corridor. There would be no additional land if the school had to expand in the future to accommodate more than 420 places."

(c) *Site 3: Maids Cross Way*: The ES noted at paragraph 2.2.13 that acquisition of this site "would be a cost to the applicant". It went on:

"2.2.14 Access into the site is constrained due to potential access roads coming through residential estates. It is located close to the existing primary school (as marked on the plan) and potential highway congestion which could be caused on the local highway network. There would be no additional land if the school had to expand in the future to accommodate more than 420 places."

In addition, in respect of site 3, paragraph 2.2.15 of the ES noted that "noise levels here would likely be similar to those at the existing primary school which would be in excess of the application site's noise levels". In other words, Maids Cross Way would be noisier than the proposed site for the school. It is the Maids Cross Way site that is favoured by the appellant.

(d) *Site 4: Maids Cross Hill*: It was noted that this site was currently a field and not subject to any planning applications or adjacent to any sites that were the subject of planning applications. It was also outside the development boundary of Lakenheath. Paragraph 2.2.18 went on:

"It was considered by the applicant that as the site is isolated and there was no reasonable prospect of a planning application coming forward it was to be discounted."

(e) *Site 5: Eriswell Road*: This was towards the south of the village, away from most of the proposed new homes. The ES noted that the land costs for this alternative site would be at full residential value. Paragraph 2.2.20 went on:

"The location of the site for a school is not ideal in respect of planned growth of the village."

(f) *Site 6: Sparks Farm*: This alternative site was noted as being subjected to considerable noise because it was "very close to the end of the runway and almost directly beneath the take-off path so short-term noise from aircraft taking off is

likely to be very high". It also noted that the site, which was a long way south of the village, was detached from the Lakenheath settlement "and would have the potential of causing highway issues if there was not also a school developed for Lakenheath. Paragraph 2.2.24 added:

"Given the noise, location and potential traffic constraints the site was discounted."

(g) *Site 7: Current school site*: Paragraph 2.2.25 of the ES noted that "there is insufficient land available to extend the school to accommodate the required growth/capacity." Nobody suggested that Site 7 was ever a viable (let alone main) alternative and it did not feature in any of the submissions on appeal.

11. As I have said, Chapter 7 of the ES was concerned with noise and vibration. It referred to numerous standards and regulations. The focus of this was on the noise insulation for the new building. There were detailed proposals concerning the sound insulation of the building envelope by reference to the walls, the glazing, the doors and the roof. Attached to the ES was a report from Adrian James Acoustics Limited which dealt in detail with the sound insulation for the new building and the outside areas.

12. There was also a section of Chapter 7, starting at paragraph 7.5.11, which was concerned with the provision for pupils with special needs, including those with permanent hearing impairment. There was an express reference to the Equality Act 2010 and the PSED. The ES said at paragraph 7.5.17, that "unless stated otherwise in this report we have used acoustic criteria mainstream teaching and not those for spaces designed specifically for students with special hearing or communication needs."

13. There were a number of opportunities for those concerned about the proposal to express their views. In particular:

(a) As noted at paragraph 7 above, there had been numerous meetings and discussions in relation to the proposal over the three years before the planning application was first made. By way of example, the court was shown an email sent by the PC on 27 February 2015 in which they set out what they described as "our pros and cons list for the four main possible school sites in Lakenheath" and going on to note that the PC's preferred option was Maids Cross Way (Site 3 in the ES).

(b) Prior to the planning meeting in October 2018, the PC sent a lengthy four page submission about the proposal and, in particular, the alternative sites. Paragraph 20 of these detailed comments said:

"It would appear that when decisions were made regarding the potential School sites that cost was the driving force. On page 10 item 2.2.8 Lakenheath North site was offered at no cost to you and yet a concern was expressed of the site being isolated. Maids Cross Way was with acquisition costs. Item 2.2.13 states that this would be a suitable site for the school and it was also described as being well located to the rest of Lakenheath but ruled out because of the access into the site being constrained and a concern of congestion to the local highway network, something the chosen site would cause too. Maids Cross Hill, owned by the diocese, was ruled out as it's outside of the development boundary of Lakenheath and for being isolated. Just as the chosen site is.

Sparks Farm again refers to the site being detached from the Lakenheath Settlement and having the potential of causing highway issues, again just as the chosen site will. In our view cost should not be the driving force for making decisions relating to children's education and well being. Safety should be the driving force not money." (c) The PC made oral representations along these lines at the meeting of the respondent's planning committee on 16 October 2018.

14. At that meeting, a detailed officer's report was considered. It is impossible to set out every potentially relevant paragraph but the following particular paragraphs should be noted:

> "34. Both buildings would have enhanced sound insulation to protect against aircraft noise, including non-opening acoustic laminated double glazing, acoustically-rated external doors and sound lobbies, acoustically-attenuated mechanical ventilation or mechanically-assisted hybrid ventilations.
>
> 35. A number of noise mitigation huts would be provided as refuges during periods of loud aircraft noise. Three are proposed on the playing field, and one each in the play area of the Reception and Pre-School classes…
>
> 47. The do-nothing option is not considered appropriate as the proposal seeks to meet development needs. Lakenheath has been identified to receive a considerable level of housing growth and additional educational infrastructure needed to support this growth.
>
> 48. The applicant has considered the need for a new primary school in Lakenheath since 2013. Several site options have been considered: see Table 1 below…"
>
> [Table 1 dealt with the alternative sites in very similar terms to the ES, as set out in paragraph 10 above]
>
> "69. The noise impact assessment addresses all the relevant issues. The [Adrian James] report states that the site is considered acoustically suitable for a primary school. I generally agree with the assessment methodology adopted and the recommendations given in the report. I consider, however, that aircraft noise could prove a significant issue in any external teaching areas. If there are to be any such areas, I recommended you satisfy yourself that the school body are fully aware of it and accept the limitations on the use of any external areas.
>
> 70.The survey confirms that aircraft noise is very significant on the site with average noise levels (LAEQ 30 min) generally above 55 DBA over 60 DBA for around half the time and even reaching 70 DBA on a few occasions. The proposed solution to achieve the noise criteria set out in BB 93 inside classrooms is enhanced facade of high performance acoustic glazing and mechanical ventilation. This is considered an acceptable approach.
>
> 71.The measured noise levels far exceed the desirable noise levels in external areas due to aircraft flyovers. AJA, who conducted the noise surveys, point out that the noise climate is relatively quiet for the majority of the time interspersed

with high noise levels when teaching outside could be paused. Consider it imperative that the school body are aware of this limitation and are willing to accept it…"

[Paragraphs 119 and 120 identify the relevant noise standards and guidance and explain how the new buildings would meet the relevant guidelines.] "122. An onsite noise survey was conducted for one week during March 2018. This indicated that external noise levels average 66. DBLAEQ 30 min and typically peaked at between 80 and 85 DB. This would considerably exceed the above guideline. It is unlikely a teacher would be able to address a group of children for the duration of an aircraft overflight and teaching would have to be paused for short periods during overflights. Five covered shelters would be provided around the school sites to provide some mitigation of direct noises for pupils' comfort during external play and teaching in small groups. These shelters are expected to provide around 5 DBA reduction in noise levels. The precise degree of mitigation would be determined by their detailed construction and siting to be agreed by condition on any grant of planning permission...

124. Planning guidance accompanying the NPPF states that the impact of noise levels will depend on how various factors combine in any given situation, including the source and absolute level of noise. For non-continuous sources of noise the number of noise events and the frequency and pattern of occurrence of the noise, the spectral content and general character of the noise. It also states that noise impacts should not be considered in isolation separately from economic, social and other dimensions of the project.

125. On the proposed site average daytime noise levels during school hours are mainly influenced by relatively short periods of high noise levels due to overflying aircraft with relatively low and constant residual noise levels at other times. Analysis of the four 30 minute periods during school hours with the highest measured short-term noise levels shows that aircraft noise typically peaked at 80 to 58 DBA, but that these averaged less than seven minutes in duration.

126. The applicant has confirmed acceptance that overflying would impose some limitation on the use of external areas for teaching due to short periods of loud noise. It considers the sound-limiting pods could be used as teaching or play spaces for younger pupils and for formal sports tuition instruction, if it is taking place outside when overflying is in progress…"

[At paragraph 161, the officer noted that the proposed site was allocated for a primary school in the emerging Local Plan.]
"162. The main policy breach relates to impact of aircraft noise on external areas of the school which cannot be fully mitigated. Although noise levels from passing aircraft may interrupt teaching in outside areas, this would be for relatively short periods and, given its sporadic nature, not all external lessons would be affected. The applicant has confirmed that this limitation on the use of outside areas for teaching is accepted.

> 163. Aircraft noise is endemic to the Lakenheath area. Published noise contours for RAF Lakenheath show that the application site is in a relatively favourable noise environment, as noise levels increase in a southerly direction towards the village centre. By comparison, the existing Lakenheath Primary School is on the 72 DB contour in a noisier environment than the application site. Its school buildings were not constructed to defend against aircraft noise, but, despite this, it has a good Ofsted rating and Ofsted reports do not mention military aircraft noise as an issue.
>
> 164. While noise nuisance is clearly a dis-benefit in the planning balance, the weight to be attributed to it is reduced by its sporadic nature and because it cannot be avoided if a new school is to be built to serve the new housing planned on the north side of Lakenheath. Government planning guidance makes it clear that in the planning balance noise should not be considered in isolation.
>
> 165. On site specific issues there is a large degree of conformity with the NPPF and Local Plan Policies. Taken as a whole, the proposals are considered to constitute sustainable development where any adverse impacts are decisively outweighed by the benefits of a new village school and preschool. I therefore recommended that planning permission is granted with the conditions set out in para.13 above."

15. Following the meeting of the planning committee on 16 October 2018, in a decision notice dated 23 October 2018, the planning authority granted planning permission for the new school. This was subject to 39 conditions. Three particular conditions related to noise:

> "2. The development users and associate activities hereby approved shall only be carried out in accordance with … (xviii) Environmental Statement Appendix 7.1 Noise Technical Report[1]…
>
> 21. Prior to their construction, details of the noise attenuation shelters shall be submitted to and approved in writing by the county planning authority. Such details shall include constructional details, facing materials, overall dimensions and orientation of openings. The shelters shall be provided in the approved form and, thereafter, be retained.
>
> 27. Following completion of construction and prior to occupation, a copy of the test report carried out in accordance with the recommendation of BB 93 Acoustic Design for Schools shall be submitted to and approved in writing by the county planning authority."

[1] That was the Adrian James report referred to at paragraph 11 above.

3. THE DECISION OF THE JUDGE

16. There were three separate issues before the judge. He had to deal with the renewed applications for permission to bring judicial review proceedings in respect of ground 1 (a claim by reference to Article 8 of the ECHR) and ground 2 (the PSED). He also had to deal with the substantive challenge in respect of the alleged inadequacy of the ES.

17. At [54] – [60] of his judgment, the judge rejected the application for permission to apply for judicial review in relation to Article 8. Although that matter was originally identified in the grounds of appeal to this court, it is not now pursued.

18. At [61] – [66], the judge dealt with the renewed application for permission in respect of PSED. He did not grant permission. At [65] he said:

> "65. In my judgment, the officer's report and, therefore, the planning authority's decision in reliance upon it, can be demonstrated evidentially to have satisfied this requirement, despite the absence of explicit reference to it in literal terms. All concerned identified and reflected upon the excessive levels of noise that would exist in the outdoor areas surrounding the new school. Steps were taken either to remove the disadvantages for those with protected characteristics, in the conditions attached to the planning permission, by the requirements that would achieve quieter indoor sound levels in the new school than would be provided to those groups in the existing school or to minimise them by the provision in the outdoor areas of noise attenuation shelters designed and constructed to achieve an approved standard. By providing that removal or minimisation of the disadvantages, while also providing new school places, shows that regard was had to meeting the needs of children with relevant protected characteristics to be placed in mainstream education who would live in the new housing. The effect would be to encourage their participation in the activity of education to which, therefore, due regard was had."

19. The judge also rejected the substantive ES challenge at [67] – [71]. At [71] he said:

> "71. The question for the planning authority, therefore, was to decide whether the adverse environmental impact of excessive noise at the proposed site weighed in the scale of planning decision making so heavily as to require refusal of permission. That is to conduct an EIA, at least in substance, which is what the authorities require this court to evaluate. Moreover, it is material that at no stage has the claimant, or anyone else, identified yet further alternatives to be considered. The planning decision in this case proceeded upon the conclusion that even the adverse impact of excessive outdoor noise at the proposed site, balanced against the needs and benefits identified, justified the grant of planning permission, even though the environmental impact at alternatives sites considered was either no worse or in many, if not most cases, less severe or even absent. That is a matter for the planning judgement of the officers and the authority. I do not consider that the officer's report materially misled the planning authority in this respect. Accordingly, ground 3 of the challenge fails."

20. For these reasons, therefore, the judge dismissed the various applications for judicial review.

4. THE CONTEXT FOR THIS APPEAL

21. It is perhaps useful to draw the various factual strands together, in order to summarise the context for this appeal, before going to consider the two areas at debate between the parties: The factual background therefore is:

(a) There is an overwhelming need for a new school in Lakenheath created by the likelihood of 663 new homes in the village in the next few years. The existing school is at capacity and this is the only current proposal for a new school to cater for that need.

(b) The National Planning Policy Framework ("NPPF") states that, in any planning decision, "great weight" is to be given to the creation of new schools. This was a matter to which the officer said, at paragraph 117 of his report, "significant weight attaches."

(c) Forest Heath Core Strategy Policy CS13 (cited repeatedly in the officer's report) links the release of any land for development with sufficient infrastructure, a matter of which, at paragraph 114, the officer said "should be attributed significant weight" when this proposal for a new school (an important element of infrastructure) was considered.

(d) The proposed site for the new school at Station Road was in accordance with the Local Plan which was being prepared at the time of the application, and is in accordance with the Local Plan as now completed.

(e) The new school will have extensive noise insulation and mitigation measures. It will be a quieter environment than the existing school.

(f) The problem of external noise is beyond the respondent's control. That noise will be mitigated at the new school in a way that it is not at the existing school.

(g) The alternative site at Maids Cross Way favoured by the appellant has access issues. More significantly, it has the same noise levels as the existing school, which makes it noisier – and therefore a worse option from the point of view of noise - than the proposed site at Station Road.

(h) The planning officer's advice was unequivocal: that "the proposals are considered to constitute sustainable development where any adverse impacts are decisively outweighed by the benefits of a new village school and pre-school."

5. GROUND 1: PSED

5.1 The Law

22. Section 149 of the Equality Act 2010 sets out the PSED in the following terms:

> "149. Public sector equality duty
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b)advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c)foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

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

(3)Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a)remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b)take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c)encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4)The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5)Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a)tackle prejudice, and

(b)promote understanding.

(6)Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7)The relevant protected characteristics are—

- 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.

23. General guidance as to the operation of the PSED can be found at paragraph 26 of the judgment of McCombe LJ in *Bracking & Others v Secretary of State for Work and*

Pensions [2013] EWCA Civ 1345, [2014] Eq LR 60. At paragraph 26(5) he referred to an earlier decision of this court:

> "26.(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:
>
> i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;
>
> ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
>
> iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument; iv) The duty is non-delegable; and
>
> v) Is a continuing one.
>
> vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty."

24. *Bracking* was itself referred to in paragraph 73 of the judgment of Lord Neuberger in *Hotak v Southwark London Borough Council* [2015] UKSC 30, [2016] AC 811. Lord Neuberger also noted that, in *Baker v Secretary of State for Communities and Local Government* [2009] PTSR 809, Dyson LJ had emphasised that the PSED was "not a duty to achieve a result" but a duty "to have due regard to the need" to achieve the goals identified in paragraphs (a) – (c) at Section 149(1) of the 2010 Act. He went on to say that, in the light of the word "due" in Section 149(1), "I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment."

25. Subsequently, judges have stressed the fact-sensitive nature of the exercise: see, by way of example, Lewis J in *R v Buckley v Bath and North East Somerset Council & Curo* [2018] EWHC 1551. At paragraph 36 of that same judgment, the judge noted that "the absence of a reference to the PSED will not, of itself, necessarily mean that the decision maker failed to have regard to the relevant matters although it is good practice to make reference to the duty…". In similar vein, in *Stroud v N & W Leicestershire DC* [2018] EWHC 2886, the deputy high court judge warned against interpreting and applying the PSED "in a way that introduces unnecessary and cumbersome formality and box ticking".

26. In *Powell v Dacorum BC* [2019] EWCA Civ 23, [2019] H.L.R 21, McCombe LJ referred back to his judgment in *Bracking*. He emphasised the importance of context, noting at paragraph 44:

> "44. In my judgment, the previous decisions of the courts on the present subject of the application and working of the PSED, as on all subjects, have to be taken in their context. The impact of the PSED is universal in application to the

> functions of public authorities, but its application will differ from case to case, depending upon the function being exercised and the facts of the case.
>
> The cases to which we have been referred on this appeal have ranged across a wide field, from a Ministerial decision to close a national fund supporting independent living by disabled persons (*Bracking*) through to individual decisions in housing cases such as the present. One must be careful not to read the judgments (including the judgment in *Bracking*) as though they were statutes. The decision of a Minister on a matter of national policy will engage very different considerations from that of a local authority official considering whether or not to take any particular step in ongoing proceedings seeking to recover possession of a unit of social housing."

5.2 Having Due Regard To The PSED

27. The appellant seeks permission (for what is now the third time) to review the decision on the ground that the respondent failed to have due regard to the PSED. The submission is a narrow one: it is said that the decision did not have due regard to the needs of children with protected characteristics (in particular those with hearing impairment, ASD, and ADHD) when considering the effect of noise in the outdoor areas of the new school, which are accepted as being an important element of the teaching and learning experience. It was said that the judge was wrong to rely on the planning conditions in this respect, because those related to the use of outdoor areas by all children, not simply those with protected characteristics. Thus, it was said that the planning decision was taken in breach of s.149.

28. The respondent argues that this is a challenge of form, not substance. They point to the absence of any objection on this ground during the three years or more that the proposals were being considered and the fact that, in the result, because of the mitigation measures, the decision minimises the disadvantage to those children with protected characteristics.

29. For the reasons set out below, I have concluded that Mr Streeten was right to say that the respondent failed to have due regard to the PSED in respect of the effect of noise in the outdoor areas on children with protected characteristics.

30. First, I do not consider that this is a case of the kind referred to in *Buckley,* where the PSED was not expressly referred to in any of the documents, but where the decisionmaker was nevertheless found to have complied with the duty. On the contrary in this case, the promotors of the proposal were well aware of the PSED. I have already set out at paragraph 12 the relevant section of the ES which expressly referred to the PSED. That was accompanied by the clear statement that the design did not take into account the needs of students with protected characteristics. That was not picked up anywhere in the officer's report, as it should have been, and there is nothing in the report or the subsequent decision to show that any regard was had to the PSED.

31. In my view, this analysis represents a complete answer to Mr Ground QC's complaint that the failure to have regard to the PSED in respect of the outdoor areas was not something that was raised by the PC or the appellant during the planning process. Although that is correct as a matter of fact (the current headteacher of the primary

school raised the point in her letter dated 27 July 2016, but it was not subsequently taken up by the PC or the appellant), whether or not it was raised by a member of the public was irrelevant, given that it was something which the promotors of the proposal themselves had referred to.

32. Secondly, although Mr Ground QC may have been right to submit that the mitigation measures for the outdoor areas identified in the ES would disproportionately help those who were sensitive to noise, that approach runs the risk of treating the PSED as a duty to achieve a result, rather than a duty to have regard to the needs of those with protected characteristics. I accept that this may be a relatively fine line in this case. I also accept that the mitigation measures are directly relevant to the second part of the judicial review exercise concerned with whether or not the decision should be quashed on the basis of a failure to have due regard to the PSED. But I am not persuaded that the existence of the mitigation measures alone can mean that the respondent somehow had due regard to the PSED, when the officer's report made no mention of it, and the mitigation measures were generic, so were not targeted at those children with protected characteristics.

33. Thirdly, I think Mr Streeten was right to say that the judge found that there was a *prima facie* failure to have regard to the PSED. At [63] the judge said, "I have come to the conclusion that the approach adopted in this case as a matter of form was not on its face adequate. Not to mention the existence or applicability of the duty makes it difficult to say that the evidential element of demonstration of regard to it has been discharged." That came on top of his earlier concern about the lack of any reference to the needs, within the cohort of children generally, of those with relevant protected characteristics [58], and his observation that a potential relevant factor ignored in the balance were the needs of those with protected characteristics [60]. There is no appeal from those findings.

34. Accordingly, for these reasons, I have concluded that the respondent failed to have due regard to the PSED in respect of the narrow point advocated by Mr Streeten, namely that they failed to have regard to the effect of aircraft noise in the outdoor areas on children with protected characteristics.

5.3 Section 31(2A)

35. Section 31(2A) of the Senior Courts Act 1981 was introduced by Section 84 of the Criminal Justice and Courts Act 2015, coming into effect on 13 April 2015. It provides:

> "The High Court – (a) must refuse to grant relief on an application for judicial review… if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

36. The argument that, in some way, this power was restricted to procedural or technical errors was comprehensively rejected in *R (Goring on Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 860, [2018] I WLR 5161. In that case, this court said:

> "47. We remind ourselves that our starting point here is not to consider the merit of Mr Streeten's argument on the scope of the duty in section 31(2A). We are not re-making the permission decision, or even at this stage considering whether there is a "powerful probability" that Rafferty L.J.'s decision to refuse permission was wrong. In our view, however, the proposition that the section 31(2A) duty applies only to "conduct" of a merely "procedural" or "technical" kind, and not also to "conduct" that goes to the substantive decision-making itself, is a surprising concept. The duty has regularly been applied to substantive decision-making across the whole spectrum of administrative action, including in the sphere of planning, both at first instance and in decisions of this court (see, for example, the judgment of Lindblom L.J. in *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427, at paragraphs 71 to 73). Although we did not hear full argument on the point, we would be prepared to say that the narrow construction of section 31(2A) contended for by the parish council is, on the face of it, mistaken. It does not seem to us to gain any real support in the first instance decisions on which Mr Streeten relied. The concept of "conduct" in section 31(2A) is a broad one, and apt to include both the making of substantive decisions and the procedural steps taken in the course of decisionmaking. It is not expressly limited to "procedural" conduct. Nor, in our view, is such a qualification implied. But this, we must stress, is not a necessary conclusion for the purposes of our decision on the application to re-open…

55. The mistake in Mr Streeten's submissions here is that, in the context of a challenge to a planning decision, they fail to recognize the nature of the court's duty under section 31(2A). It is axiomatic that, when performing that duty, or, equally, when exercising its discretion as to relief, the court must not cast itself in the role of the planning decision-maker (see the judgment of Lindblom L.J. in *Williams*, at paragraph 72). If, however, the court is to consider whether a particular outcome was "highly likely" not to have been substantially different if the conduct complained of had not occurred, it must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law.

56. It is, in our view, clear from Rafferty L.J.'s reasons that she was not persuaded there was a real prospect of establishing that, in performing the section 31(2A) duty, Cranston J. had trespassed into the forbidden territory of planning judgment. She did not need to say more than she did to make this clear. Mr Streeten highlighted Cranston J.'s use of the word "weighty" in paragraph 69 of his judgment to describe the factors seen by the district council's officer as going in favour of the grant of planning permission, and outweighing the harm to the conservation area. Rafferty L.J., however, was plainly unpersuaded that this was anything other than the judge's description of the officer's own planning assessment, supported, to the extent it was, by the conservation officer's response. She plainly also accepted that the officer's assessment had, quite legitimately, informed, but not dictated, the judge's own conclusion in performing the section 31(2A) duty. Otherwise, her conclusion would have had to be different."

37. On the assumption that Mr Streeten's complaint about the respondent's failure to have due regard to the PSED was well-founded, Mr Ground QC argued, in reliance on these passages in *Goring*, that the application for permission to bring judicial review proceedings on that ground should still be refused because, even if there had been a reference to this issue in the officer's report, it is highly likely that the planning decision would have been the same. In response, Mr Streeten said that the test of

'highly likely' was a high one, and that it would be "unfortunate" if this court came to such a conclusion in a case like this, where there was a good deal of strong emotion.

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

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

40. First, following the guidance in [55] – [56] of *Goring*, this court should undertake its own objective assessment of the decision-making process. That takes the focus right back to the officer's report. On any objective view, that was a clear and thorough report leading to the planning decision that was made. There is no basis for any suggestion that, if due regard had been had to the PSED in the report in the limited way explained above, the result would or could have been different.

41. Secondly, the officer's report points unequivocally to the conclusion there is no site for a school in Lakenheath which would not be subject to noise from aircraft. The problem of noise for all children, including those with protected characteristics, cannot therefore be wished away: the only thing that can be done is to locate and design the school in a way that ensures that the effect of such noise is mitigated as well as it can be. The documents show that that is what has happened here: there can be no doubt that the issue of noise was carefully considered, first in the ES, and then in the officer's report.

42. As to the location of the proposed school, paragraph 163 of the officer's report expressly stated that "the application site is in a relatively favourable noise environment". As to the outdoor mitigation measures, they were the subject of the officer's report, and included noise mitigating huts and sound-limiting pods. And as the report made clear,

[2] Mr Streeten's oral submissions accepted that this was the most which the report needed to include. As he put it, "It could have been very short. Someone should have flagged it for the planning committee to say either that the children in question would have to be educated elsewhere or that it will be difficult, but we could try and get round it."

the design/specification means that the internal noise environment for the new school will be superior to that in the existing school. As a result, it is highly likely that the missing sentence or paragraph in the officer's report addressing the PSED and noise, would not have made any difference to the decision.

43. As a result, I consider that Mr Ground QC was right to say that, for any children with protected characteristics who can be accommodated in mainstream education, the disadvantages that they may suffer will be minimised at the new school. It will be a considerably better noise environment than the existing school.

44. Finally, the factual context summarised at paragraph 21 above makes it highly likely – if not inevitable – that the same decision would have been reached in any event. The officer's report demonstrates that, from the planning perspective, this is the best location for a much-needed new school. No-one has been able to suggest any improvement to the proposed design/specification of noise mitigation measures, either inside or out.

5.4 Summary/PSED

45. For the reasons set out above, I consider that, although there was a failure to have due regard to the PSED in respect of the outdoor areas, it is highly likely – if not inevitable – that if due regard had been had to the PSED, precisely the same decision would have been taken. I would therefore dismiss the appeal against the refusal of permission to bring judicial review proceedings on the basis of the failure to have due regard to the PSED.

6. GROUND 2: THE ES

6.1 The Law: Assessment of Alternatives

46. Article 5(3)(d) of the EIA Directive sets out the requirement to include in environmental information supplied regarding a project "an outline of the main alternatives studied by the developer and are the main reasons for his choice, taking into account the environmental effects". This obligation was introduced into domestic law by The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations"). Although those have subsequently been superseded, it was the 2011 Regulations that applied in this case. The following definitions in those Regulations are relevant:

> "'Environmental information' means the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development;
>
> "'Environmental statement' means a statement -
>
> (a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development... but
>
> (b) that includes at least the information referred to in Part 2 of Schedule 4"

47. Paragraph 4 of Part 2 of Schedule 4 to the EIA regulations contains an obligation in the same terms as Article 5(3)(d).

48. Article 5(3)(d) was the subject of the CJEU decision in C-461/17 *Holohan v AN Bord Pleanala* [2019] PTSR 1054. That was a case in which the developer's plan to build a

road across a flood plain was the subject of a planning inquiry, at the end of which the inspector sought greater information on a variety of matters, including alternative proposals. Despite the developer's failure to provide that information, the planning authority granted consent for the scheme anyway.

49. Although one of the questions that the CJEU was originally asked was whether an environmental impact assessment was required to contain sufficient information as to the environmental impact "of each alternative", the CJEU redrew the question at [60]. They went on:

> "66. Further, since, according to Article 5(3)(d) of the EIA Directive, only an outline of those alternatives must be supplied, it must be held that that provision does not require the main alternatives studied to be subject to an impact assessment equivalent to that of the approved project. That said, that provision requires the developer to indicate the reasons for his choice, taking into account at least the environmental effects. One of the aims of imposing on the developer the obligation to outline the main alternatives is that reasons for his choice should be stated.
>
> 67.That obligation on the developer ensures that, thereafter, the competent authority is able to carry out a comprehensive environmental impact assessment that catalogues, describes and assesses, in an appropriate manner, the effects of the approved project on the environment, in accordance with Article 3 of the EIA Directive.
>
> 68.Last, it must be observed that the outline referred to in that provision must be supplied with respect to all the main alternatives that were studied by the developer, whether those were initially envisaged by him or by the competent authority or whether they were recommended by some stakeholders.
>
> 69.In the light of the foregoing, the answer to the fifth, sixth and seventh questions is that Article 5(3)(d) of the EIA Directive must be interpreted as meaning that the developer must supply information in relation to the environmental impact of both the chosen option and of all the main alternatives studied by the developer, together with the reasons for his choice, taking into account at least the environmental effects, even if such an alternative was rejected at an early stage."

50. The conclusion at [66], that the assessment of the main alternatives is not required to be the equivalent of the assessment of the approved project, is consistent with UK

domestic authority: see for example *R v SSE Transport and Regions* [2001] Env LR 12 and *Sharp v Chelmsford City Council* [2013] EWHC 4180 (Admin). In the latter case, Ouseley J said that there was no requirement "to carry out a mini, let alone near full, environmental assessment of alternatives"

51. Mr Streeten formulated what he said was the principle to be derived from *Holohan* at paragraph 31 of his skeleton, as follows:

> "Article 5(3)(d) requires a developer to provide in the ES sufficient information to enable a comparative assessment of the relative environmental effects of the proposed development and each of the main alternatives studied".

He accepted that *Holohan* did not express it in that way, and he agreed that he was unable to rely on any other authority in support of it.

52. In my view, his formulation amounts to an unacceptable and significant gloss on what the CJEU said in *Holohan*, and comes far too close to requiring a detailed environmental assessment of each main alternative, which is emphatically not the law. Such a requirement would lead to major additional expense, and endless disputes between developer and objector about what is or is not a 'main' alternative. If, for example, alternative X would cost four times as much to develop as the proposed site, and there is also what the planning officer considers to be a sound environmental reason for the rejection of alternative X, capable of being stated in one line, then the authority is entitled to discount alternative X on that basis. Anything else would lead to a natural tendency on the part of developers to address as few alternative sites as possible in the ES – because of the cost and trouble of so doing - which would be the opposite of what the Directive was designed to achieve.

6.2 The Law: The Test For Judicial Review In These Circumstances

53. What is the correct legal test which the court should apply as an application for judicial review when assessing compliance with the EIA Regulations? The starting point is the decision of Sullivan J (as he then was) in *R (on the application of Blewett) v Derbyshire CC* [2003] EWHC 2775 (Admin), [2004] ENV.L.R. 29 at paragraph 41. In dealing with the legal inadequacy of an ES for the purposes of an EIA for a development project under the EIA Directive and Regulations, he said:

> "41. Ground 1 in these proceedings is an example of the unduly legalistic approach to the requirements of Sch.4 to the Regulations that has been adopted on behalf of claimants in a number of applications for judicial review seeking to prevent the implementation of development proposals. The Regulations should be interpreted as a whole and in a common-sense way. The requirement that ''an EIA application'' (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in R. v North Yorkshire CC Ex p. Brown [2000] 1 A.C. 397, at p.404, the purpose is ''to ensure that planning decisions which may affect the environment are made on the basis of full information''. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the ''full information'' about the environmental impact of a project. The Regulations are not based upon

such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting ‘‘environmental information’’ provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement

is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (Tew was an example of such a case), but they are likely to be few and far between."

54. In *R (on the application of Spurrier v Secretary of State for Transport and others* [2019] EWHC 1070 (Admin) ("the Heathrow case"), the Divisional Court considered and affirmed the approach in *Blewett,* noting:

"419. We turn to the EIA authorities. In Blewett, the complaint was that the environmental statement for a proposed extension to a landfill site contained no assessment of the effect of the scheme on groundwater protection. Instead, the minerals planning authority decided that that matter could be left to be assessed following the grant of planning permission, by assuming that complex mitigation measures would be successful. Sullivan J held that the starting point was that it was for the local planning authority to decide whether the information supplied by the applicant was sufficient to meet the definition of an environmental statement in the EIA Regulations, subject to review on normal Wednesbury principles (see [32]-[33]). Information capable of meeting the requirements in schedule 4 to the EIA Regulations should be provided (see [34]), but a failure to describe a likely significant effect on the environment does not result in the document submitted failing to qualify as an environmental statement or in the local planning authority lacking jurisdiction to determine the planning application. Instead, deficiencies in the environmental information provided may lead to the authority deciding to refuse permission, in the exercise of its judgment (see [40]). Thus, the statement in [41], that the deficiencies must be such that the document could not *reasonably* be described as an environmental statement in accordance with the EIA Regulations, was in line with the judge's earlier observations in [32][33]. It simply identified conventional Wednesbury grounds as the basis upon which the court may intervene.

420. In Shadwell Estates Ltd v Breckland District Council [2013] EWHC 12 (Admin) at [73], Beatson J referred to a number of authorities which had taken the same approach in EIA cases to judicial review of the adequacy of environmental statements or the environmental information available: R v Rochdale MBC ex parte Milne [2000] EWHC 650 (Admin); [2001] Env LR 22 at [106], R (Bedford and Clare) v Islington London Borough Council [2002] EWHC 2044 (Admin); [2003] Env LR 22 at [199] and [203], and Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321; [2012] Env LR 22 at [39]. In Bedford and Clare, Ouseley J held that the environmental statement for the development of a new stadium for Arsenal was not legally inadequate because it had failed to assess

> transportation impacts using the local authority's preferred modal split, the loss of an existing waste handling capacity to make way for the development, noise effects at night and on bank holidays, contaminated land issues, and the effects of dust during construction. He considered that the significance or otherwise of those matters had been a matter for the local authority to determine. The claimant's criticisms did not show that topics such as modal split or noise effects had not been assessed at all. Instead, they related to the level of detail into which the assessment had gone and hence its quality. That was preeminently a matter of planning judgment for the decision-maker and not the court."

55. When the Heathrow case went to appeal, ([2020] EWCA Civ 214), this court agreed with that approach. They also agreed with [434] of the Divisional Court decision, to the effect that "decisions on the inclusion or non-inclusion in the Environmental Report of information on a particular subject, or the nature or level of detail of that information, or the nature of extent of the analysis carried out, are matters of judgment for the plan-making authority." This court also referred to *Ashdown Forest Economic Development LLP v Weald and District Council* [2015] EWCA Civ 684; [2016] ENV. L.R. 2 where Richards LJ said that "the identification of reasonable alternatives… is a matter of evaluative assessment for the local planning authority, subject to review by the court on normal public law principles, including ['*Wednesbury'*] unreasonableness". This court concluded at [136] of its judgment in the Heathrow case:

> "136. The answer, we think, must be apt to the provisions themselves. The court's role in ensuring that an authority - here the Secretary of State - has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information "may reasonably be required" when taking into account the considerations referred to - first, "current knowledge and methods of assessment"; second, "the contents and level of detail in the plan or programme"; third, "its stage in the decision-making process"; and fourth "the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment". These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional "Wednesbury" standard of review - as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court."

6.3 The *Wednesbury* Challenge To The ES

56. The complaint is that the ES did not assess the environmental effects of the alternative sites properly, or in some cases at all, so that the decision to grant planning permission in reliance upon it was irrational. This alleged deficiency was never raised in any of the

discussions or representations made up to the taking of the decision. Indeed it was not raised prior to these judicial review proceedings. Mr Streeten's only answer to that was to say that *Holohan* changed the law, so the argument only became viable following the decision in that case.

57. I do not accept that, because I do not accept that *Holohan* changed the law in any material respect. I consider that the absence of any contemporaneous complaint about the adequacy of the ES in relation to the alternative sites is an indication of the unrealistic and unpersuasive nature of this challenge. In my view, on the application of ordinary public law principles, as set out in *Blewett*, the judge was right to conclude that this ground of challenge was unsustainable.

58. Dealing first with Sites 2, 3 and 6, they were plainly considered in the ES (and then the officer's report) by reference to the environmental impact of any development: see paragraph 10 above. Site 2 was currently woodland and the ES (and the officer's report) expressly referred to the ecological and visual impact of cutting down trees, some of which were subject to TPOs. It was expressly said that Site 2 was a wildlife corridor. Site 3, the site that the appellant favours, was noted as having constrained access. Potential access roads would have to come through residential estates and there was the potential for highway congestion. Those were all environmental negatives. More significantly still, the ES and the officer's report expressly noted that the noise levels for Site 3 would be similar to the existing school and therefore in excess of the noise levels at the proposed site. And Site 6 was discounted in the ES and the officer's report because it was detached from the Lakenheath settlement so that there was the potential of highway issues. Again more significantly it was at the end of the runway and directly beneath the take-off path so the short term noise was "likely to be very high".

59. Since it cannot be said that the environmental impact of development at these three alternative sites was ignored in the ES and the officer's report, the only remaining complaint must be that the information in respect of these sites was insufficiently detailed. In my judgement that submission is unsustainable. The law makes plain that the environmental assessment for potential sites is not intended to be detailed. Moreover, the question of sufficiency of information was, as per *Blewett* and *Ashdown Forest,* classically a matter for the decision-maker. It was a planning judgment, and not a matter for the court on judicial review.

60. As to Sites 1,4 and 5, the appellant argued that these were not the subject of any environmental assessment at all. I disagree as a matter of fact. Sites 1 and 4 were discounted on the basis that they were too isolated. It is trite that, in planning terms, if a site is isolated, it means that it is more difficult to access and is more likely to require greater vehicular travel to and from the site itself. That is an environmental issue. Site 5 was discounted on the basis that its southerly location in the village was not ideal when considered against the planned growth of the village. In other words, it was not near the proposed new developments, so there would be longer journeys to Site 5 if that was where the school was located. Again that is an environmental consideration.

61. On analysis, the appellant's real criticism in respect of Sites 1,4 and 5, must be that the information provided in relation to these three sites was not extensive enough. Again, I

reject that criticism because the sufficiency of information in relation to alternative sites was a matter of judgment for the planning committee.

62. Finally, I should say that I was not persuaded by Mr Streeten's argument that, because the definition of an ES in the EIA Regulations (paragraph 46 above) states that an ES must include "at least" the information in Part 2 of Schedule 4, this somehow elevated the importance of the "outline of the main alternatives" and made a breach of the EIA Regulations in this case easier to establish. In my view, the definition is simply concerned to show the minimum information to be included within an ES. That does not affect what might be called the *Blewett* approach, which I have set out above.

63. Accordingly, there is no basis for a *Wednesbury* challenge in relation to the ES in this case. Not only were these alternatives well known to all the proposed objectors, and

not only were their pros and cons the subject of detailed debate, but environmental assessments of one sort or another were provided in relation to each alternative site. True it is that those were brief, both in the ES and in the officer's report, but the brevity or otherwise of the assessment must ultimately be a matter for the decisionmaker. It cannot be said that the decision to choose the proposed site instead of any of these other alternatives was irrational. The judicial review challenge therefore fails on that ground alone.

64. For completeness I should add that the judge's approach to this issue at [71], which I have set out at paragraph 19 above, was not supported by Mr Ground QC. It seems to me that, in that paragraph, the judge conflated the allegation of breach of the EIA Regulations with the separate issue of whether, if there was a breach, it would have made any difference to the outcome. It is important that these two questions are dealt with separately. For the reasons which I have given, I would reject the allegation of breach. Although that makes it strictly unnecessary to consider the separate issue of causation, for completeness, I go on to consider briefly whether, if the alleged breach had been established, it would have made any difference.

6.3 Did The Breach Make Any Difference?

65. Again, on the assumption that my primary view is incorrect and there was a failure to comply with the EIA Regulations, Mr Ground QC maintained that in any event this would not have made any difference, and that the decision to grant planning permission would have been the same.

66. It is right to note at this stage that, before this court, the causation argument was rather different to the equivalent argument in respect of the failure to have regard to the PSED (paragraphs 35-44 above). There, Mr Ground QC was successfully able to rely on Section 31(2A) and the decision in *Goring.* But in relation to the alleged failure to comply with the EIA Regulations, it was Mr Streeten's case that, because the right derived from European law (where the test is that the decision would not have been different if the breach had not happened), Section 31(2A) either had to be read as consistent with European law or had to be disregarded. This potential compatibility problem was recently identified by Lang J in *R(XSWFX) v London Borough of Ealing* [2020 EWHC 1485 (Admin) at [17].

67. As to the first alternative, Mr Streeten accepted in argument that the European test, that the decision would not have been different, was inherently a different - and higher – test to that of it being "highly likely" that the decision would have been the same. It is not possible to read the two together. However, this court does not have to decide the second issue (namely whether, in such circumstances, Section 31(2A) has to be discounted altogether) because Mr Ground QC was content on the facts of this case to accept and meet that higher test.

68. In relation to the that test, he relied on two decisions of the Supreme Court. In *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51, Lord Carnwath was dealing with an appeal about a major road scheme in Scotland for which permission had been granted. He referred to similar applications to quash the decision where little or no prejudice would eventuate, and went on at paragraph 131:

> "Here by contrast the potential prejudice to public and private interest from quashing the order is very great. It would be extraordinary if, in relation to a provision which is in terms discretionary, the court were precluded by principles of domestic or European law from weighing that prejudice in the balance."

69. The second case was *R(Champion) v North Norfolk DC* [2015] UKSC 52, [2015] 1 WLR 3710 where Lord Carnwath said:

> "54. Having found a legal defect in the procedure leading to the grant of permission, it is necessary to consider the consequences in terms of any remedy. Following the decision of this court in *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51, it is clear that, even where a breach of the EIA Regulations is established, the court retains a discretion to refuse relief if the applicant has been able in practice to enjoy the rights conferred by European legislation, and there has been no substantial prejudice (para 139 per Lord Carnwath, para 155 per Lord Hope).
>
> 55. Those statements need now to be read in the light of the subsequent judgment of the CJEU in *Gemeinde Altrip v Land Rheinland-Pfalz* (Case C72/12) [2014] PTSR 311. That concerned a challenge to proposals for a flood retention scheme, on the grounds of irregularities in the assessment under the EIA Directive. A question arose under article 10a of the Directive 85/337 (article 11 of the 2011 EIA Directive), which requires provision for those having a sufficient interest to have access to a court to challenge the "substantive or procedural" legality of decisions under the Directive. One question, as reformulated by the court (para 39), was whether article 10a was to be interpreted as precluding decisions of national courts that make the admissibility of actions subject to conditions requiring the person bringing the action – "… to prove that the procedural defect invoked is such that, in the light of the circumstances of the case, there is a possibility that the contested Page 26 decision would have been different were it not for the defect and that a substantive legal position is affected thereby…
>
> 58. Allowing for the differences in the issues raised by the national law in that case (including the issue of burden of proof), I find nothing in this passage

> inconsistent with the approach of this court in *Walton*. It leaves it open to the court to take the view, by relying "on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court" that the contested decision "would not have been different without the procedural defect invoked by that applicant". In making that assessment it should take account of "the seriousness of the defect invoked" and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive."

70. For the following reasons, my assessment is that, even if fuller information had been provided by way of an environmental assessment of the main alternative sites,[3] it

would have made no difference to the planning decision. That decision would have been the same.

71. First, there is the factual context in which this decision was taken, summarised in paragraph 21 above. That made the choice of this proposed site in effect the only rational choice.

72. Secondly, in identifying the various matters which Lord Carnwath set out at paragraph 58 of *Champion*, I consider that the alleged defect was not serious, given that, in respect of each of the alternative sites, there were other reasons, in addition to the environmental issues, which militated against their choice as an appropriate site for the new school.

73. Thirdly, as Lord Carnwath identified, the real issue is whether the appellant, or any other member of the public, had been deprived of access to information and participation in the decision-making process that led to the choice of the site for the new school on Station Road. The answer is plainly in the negative. The appellant was involved throughout the planning process. He, along with the PC, had numerous opportunities to make representations as to why the noisier site at Maids Cross Way was the best. That argument was repeatedly made: see paragraph 13 above. There is no suggestion of any lack of information provided and no complaint about a lack of participation.

74. Fourthly, there is the separate question of prejudice. Mr Streeten maintained that, as a result of *Altrip* (referred to by Lord Carnwath in *Champion,* in the passages cited at paragraph 68 above) questions of prejudice were irrelevant. I respectfully disagree. There is Supreme Court authority (*Walton)* for the proposition that prejudice is a relevant factor in the *Champion* assessment. Prejudice was not dealt with in *Altrip,* much less rejected as a potentially relevant factor, and *Walton* was expressly affirmed in *Champion.* It is therefore a factor to be taken into account in this assessment. In a case where the officer concluded that the benefits of the proposal "decisively outweighed" the adverse impacts, the prejudice in quashing the decision to allow the

[3] I am prepared to assume for this purpose only that each of Sites 1 - 6 were 'main alternatives', although I am not convinced on the facts that this is a correct categorisation..

school to be built is plainly a factor which supports the conclusion which I have already outlined.

75. The only specific argument that Mr Streeten sought to rely on in answer to these points was the suggestion that, if he had been provided with the further environmental information, it was impossible to know what the appellant – or any other member of the public – would have said or done during the consultation process. But in reality, we do know that: the PC and the appellant carefully considered the main alternative sites over a period of years[4], and repeatedly favoured the site at Maids Cross Way, despite the fact that the officer's report made plain that it was a worse option environmentally (which conclusion is not subject to any challenge). The appellant has never suggested that there were any environmental factors relating to Sites 1-6 which had been ignored or mis-stated in the ES or the officer's report. In the circumstances, the appellant has failed to identify anything to weigh in the balance against the raft of material on the other side of the scales, and which demonstrates that the planning decision would not have been different.

6.4 Summary

76. For the reasons set out above, I consider that the challenge to the decision on public law principles, based on an allegedly inadequate ES, must fail. But if the challenge was sustainable, on the basis that there should have been more environmental information about the main alternatives, that was a procedural defect only and did not have any substantive effect on the decision. The defect would have made no difference: the planning decision would have been the same, even if the error had not been made. The appellant and the public always received full information and participated in the process for more than three years. Moreover, the prejudice if the decision was now quashed would be serious and significant, because it would mean that there was no school, and no proposal for a school, to accommodate the children of those moving into the 663 new homes in Lakenheath.

7. CONCLUSION

77. For the reasons set out above, I would dismiss this appeal.

LADY JUSTICE ASPLIN:

78. I agree.

LORD JUSTICE FLOYD:

79. I also agree.

[4] See for example the passage from the PC's email cited at paragraph 13b) above.