Neutral Citation Number: [2024] EWHC 604 (Admin)

AC-2024-LON-000596

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2024

Before

MR JUSTICE SWIFT

- -

Between

THE KING
on the application of the

POLICE AND CRIME COMMISSIONER FOR THE WEST MIDLANDS
Claimant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

-and-

(1) THE MAYOR OF THE WEST MIDLANDS
(2) THE WEST MIDLANDS COMBINED AUTHORITY
(3)-(9) WEST MIDLANDS CONSTITUENT COUNCILS
Interested Parties

- -

Sarah Hannett KC and James Stansfeld (instructed by **Kingsley Napley**) for the **Claimant**
Alan Payne KC and Jack Anderson (instructed by **Government Legal Department**) for the **Defendant**
The Interested Parties were not represented and did not appear.

Hearing date: 12 March 2024

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Approved Judgment

MR JUSTICE SWIFT

A. Introduction

1. The Police and Crime Commissioner for the West Midlands ("the Commissioner") challenges the order of the Home Secretary made on 6 February 2024 under section 107F of the Local Democracy, Economic and Development Construction Act 2009 ("the 2009 Act) to transfer his powers to the Mayor of West Midlands ("the Mayor"). By section 117 of the 2009 Act, orders under section 107F must be made by statutory instrument. The statutory instrument has not yet been made, but is expected to be made shortly. When the Home Secretary's order takes effect the office of Police and Crime Commissioner for the West Midlands will cease to exist as a separate office and the Commissioner's existing powers will transfer to the Mayor.

2. The general direction of policy effecting political oversight of police forces is well-known. The Police Reform and Social Responsibility Act 2011 provided for elected police and crime commissioners to take over responsibilities previously exercised by police authorities. The first police and crime commissioner for the West Midlands was elected in 2012. Section 107A of the 2009 Act, which has been in force since January 2016, provides for the creation, by order of the Home Secretary, of elected mayors. Each mayor is responsible for the area of a combined authority. The West Midlands Combined Authority ("the WMCA") was established in June 2016 by an order made in exercise of powers in the 2009 Act, the Transport Act 1985 and the Local Transport Act 2008. In September 2016 the Home Secretary made an order under section 107A of the 2009 Act providing for the election of a mayor for the area of the WMCA. The first Mayor of the West Midlands was elected in May 2017.

3. In February 2022 the government published its White Paper "Levelling Up the United Kingdom". One part of that document (in Chapter 2) is headed "Empowering Local Decision-making". Towards the end of that section is the following:

> "The UK Government will take steps to remove barriers to combined authority mayors taking on public safety functions. Where there are existing or planned mayoral combined authorities with coterminous boundaries to PCCs and Fire and Rescue Authorities, the UK Government will look to transfer the functions to the Mayor. For remaining MCAs, resolution to any challenges will be sought, including exploring aligning boundaries."

A power to achieve that, to provide for elected mayors to exercise the functions of police and crime commissioners, already existed in section 107F of the 2009 Act. That section had been added to the 2009 Act, in January 2016, by the Cities and Local Government Devolution Act 2016. With effect from 26 October 2023, section 107F of the 2009 Act was amended by the Levelling-up and Regeneration Act 2023. As presently in force, section 107F is as follows:

"**107F Functions of mayors: policing**

(1) The Secretary of State may by order provide for the mayor for the area of a combined authority to exercise functions of a police and crime commissioner in relation to that area.

(2) The reference in subsection (1) to functions of a police and crime commissioner is to any functions conferred on police and crime commissioners by or under—

(a) Part 1 of the Police Reform and Social Responsibility Act 2011, or

(b) any other Act (whenever passed).

(3) In this Part references to *"PCC functions"*, in relation to a mayor for the area of a combined authority, are to the functions of a police and crime commissioner that are exercisable by the mayor by virtue of subsection (1).

(4) An order under subsection (1) may be made in relation to an existing mayoral combined authority only with the consent of the mayor of the authority.

(5) If an order is made under subsection (1) in relation to a combined authority's area—

(a) the Secretary of State must by order provide that there is to be no police and crime commissioner for that area as from a specified date;

(b) the Secretary of State may by order provide that any election of a police and crime commissioner for that area that would otherwise take place (whether before or after the specified date) by virtue of section 50(1)(b) of the Police Reform and Social Responsibility Act 2011 is not to take place.

(6) An order under subsection (5) may include provision—

(a) for the term of office of a police and crime commissioner to continue until the date specified under subsection (5)(a) (in spite of section 50(7)(b) of the Police Reform and Social Responsibility Act 2011);

(b) for an election to fill a vacancy in the office of a police and crime commissioner, which otherwise would take place under section 51 of that Act, not to take place if the vacancy

> occurs within a period of six months ending with the specified date.
>
> (7) Schedule 5C contains further provision in connection with orders under this section.
>
> (8) Any PCC function exercisable by the mayor for the area of a combined authority by virtue of this Act is to be taken to be a function of the combined authority exercisable—
>
> (a) by the mayor acting individually, or
>
> (b) by a person acting under arrangements with the mayor made in accordance with provision made under Schedule 5C."

4. These proceedings were issued on 14 February 2024, and the claim comes before the court as a matter of urgency. In the ordinary course, the elections for a new police and crime commissioner and mayor for the West Midlands will take place in May 2024, and preparations for those elections need to commence by the end of this week. If the Home Secretary's decision is lawful, the election of a police and crime commissioner will not need to take place, and the mayor elected will have responsibility for political oversight of policing in the West Midlands. If the Home Secretary's decision is unlawful, the premises for the elections will be different. I am grateful to counsel, solicitors and all others who have worked on the preparation of this case to allow it to come on for hearing promptly. They have ensured that all matters raised by the claim have been presented clearly and concisely.

5. The focus of the Commissioner's challenge is a consultation exercise undertaken by the Home Secretary in December 2023 and January 2024. The context for this challenge is what may be described as a 'false start' by the Home Secretary. On 6 December 2023 the Home Secretary wrote separate letters to the Commissioner and the Mayor purporting to take a decision in exercise of his powers under section 107F of the 2009 Act. His letter to the Commissioner included the following:

> "As you are aware, Police and Crime Commissioners (PCCs) were introduced to bring greater public accountability to policing and community safety. In 2017, an amendment to the Local Democracy Economic Development and Construction Act 2009 was introduced to enable combined authority mayors to exercise the functions of the PCC for their area. There are currently two combined authority mayors who exercise PCC functions.
> …
>
> The Government's PCC review cemented our view that the join up of public safety functions under a combined authority mayor has the potential to offer wider levers to prevent crime. Levelling Up is a key priority of this government, and the reduction of crime is an important part of that agenda. That is

> why our Levelling Up White Paper set out our ambition to see all combined authority mayors lead on public safety taking on the PCC role, where boundaries of the police forces and combined authorities align. We also committed to removing barriers to achieving this aspiration.
>
> I believe in democratically elected directly accountable PCCs. I also support the transfer of PCC functions to combined authority mayors. Mayors who exercise PCC functions are held to account in the same way that PCCs are. Their actions and decisions are scrutinised by their police and crime panel, and they are ultimately directly accountable to the public by the ballot box. The PCC model of direct accountability is reserved under the mayoral model.
>
> …
>
> I have decided to approve the Mayor's request for a transfer of PCC functions and my officials will shortly lay the required secondary legislation before Parliament. Subject to Parliamentary approval, this will mean the first Mayor to exercise PCC functions in the West Midlands will be elected in May 2024."

The reference to the Mayor's request was to a request made in a letter to the Home Secretary dated 2 November 2023. In his letter dated 6 December 2023 to the Mayor, the Home Secretary said this:

> "Thank you for your letter of 2 November to my predecessor requesting the functions of the Police and Crime Commissioner (PCC) for the West Midlands be transferred to the West Midlands Mayoralty in May 2024.
>
> As you set out, it is Government's ambition to expand the benefits of devolution across England. The oversight of policing by combined authority mayor not only preserves the democratic accountability already established under the PCC model but, by joining up oversight of public services, also promotes greater collaboration. This can help ensure that a wider perspective is taken into consideration when tackling crime and public safety.
>
> You will have seen the letter that the West Midlands PCC wrote to my predecessor following your request. I have given careful consideration to the points that he has raised in opposition to the transfer of PCC functions to the West Midlands Mayoralty, and I will respond directly to him. I do, however, support the transfer of PCC functions to the West Midlands Mayoralty in May 2024. … I appreciate the careful consideration that has gone in to your decision to make this request, and I am satisfied that it is right we should proceed to transfer the functions exercised by the

> Mayor of West Midlands from the point of the May 2024 elections.
>
> We will be required to make secondary legislation to seek the approval of Parliament to implement these changes, and officials in the Home Office and Department for Levelling Up, Housing and Communities will continue to engage with your office, the office of the West Midlands PCC and the West Midlands Police to prepare for the transfer."

6. However, that decision rested on a misunderstanding of provisions in the 2009 Act. Prior to 26 October 2023, the Home Secretary could make an order under section 107F of the 2009 Act only with the consent of the mayor and of the "appropriate authorities": see section 107F(4) as in force prior to 26 October 2023, read with section 107B(5). For present purposes, the appropriate authorities were the local authorities comprising the WMCA. Although the Mayor favoured a transfer of the Commissioner's powers, the WMCA did not. In 2019 the board of the WMCA had decided against making a proposal under section 112A of the 2009 Act to the Home Secretary for transfer of the Commissioner's powers to the Mayor. With effect from 26 October 2023 amendments were made to the 2009 Act by the Levelling-up and Regeneration Act 2023 ("the 2023 Act"). So far as concerned section 107F of the 2009 Act, the amendment removed the requirement for consent of the relevant combined authority. Only the consent of the relevant mayor is now required. It was this change in the law that prompted the Mayor to write to the Home Secretary on 2 November 2023 requesting the Commissioner's powers be transferred to him. However, the 2023 Act also made a further relevant change in that section 113 of the 2009 Act was amended (with effect from 26 October 2023), to include for the first time a reference to section 107F. As amended, section 113 of the 2009 Act is as follows:

> "**113 Requirements in connection with changes to existing combined arrangements**
>
> (1) The Secretary of State may make an order under section 104, 105, 105A, 106, 107, 107A, 107D or 107F in relation to an existing combined authority only if—
>
> (a) the Secretary of State considers that to do so is likely to improve the economic, social, and environmental well-being of some or all of the people who live or work in the area,
>
> (aa) the Secretary of State considers that to do so is appropriate having regard to the need—
>
> (i) to secure effective and convenient local government, and
>
> (ii) to reflect the identities and interests of local communities,

> (ab) where a proposal for the making of the order has been submitted under section 112A, the Secretary of State considers that making the order will achieve the purposes specified under subsection (9) of that section, and
>
> (b) any consultation required by subsection (2) has been carried out.
>
> (1A) If a proposal for the making of the order has been submitted under section 112A, the Secretary of State must have regard to the proposal in making the order.
>
> (2) The Secretary of State must carry out a public consultation unless—
>
> (a) a proposal has been prepared under section 112A,
>
> (b) a public consultation has been carried out in connection with the proposal and the Secretary of State has been provided with a summary of the consultation responses, and
>
> (c) the Secretary of State considers that no further consultation is necessary.
>
> (2A) Subsection (2B) applies where the Secretary of State is considering whether to make an order under section 106 and—
>
> (a) part of the area to be created is separated from the rest of it by one or more local government areas that are not within the area, or
>
> (b) a local government area that is not within the area to be created is surrounded by local government areas that are within the area.
>
> (2B) In deciding whether to make the order under section 106, the Secretary of State must have regard to the likely effect of the change to the combined authority's area on the exercise of functions equivalent to those of the combined authority's functions in each local government area that is next to any part of the area to be created by the order.
>
> (4) This section does not apply to an order under section 106(1)(b) that is made as a result of the duty in section 105B(5) or 107B(4).”

The situation now in hand does not involve any proposal made under section 112A of the 2009 Act. Nevertheless, the amendment made to section 113 of the 2009 Act required the Home Secretary: first to be satisfied that the conditions in section 113(1)(a)

and (aa) were met; and second to "carry out a public consultation". I have been told that the amendment to section 113 of the 2009 Act which added section 107F to the list of powers subject to the provisions of section 113 was put forward in error. Be that as it may, as at the time the Home Secretary took the decision referred to in his 6 December 2023 letters to the Commissioner and the Mayor, respectively, the requirements of section 113 of the 2009 Act applied and the decision was made without reference to them. This was the false start. This error was pointed out in a letter written by the Commissioner's solicitors on 8 December 2023.

7. Thereafter, the Home Secretary undertook a consultation process and then exercised his section 107F power again, taking the decision now challenged in these proceedings. This further decision is evidenced by a letter from the Home Secretary to the Commissioner dated 6 February 2024, which includes the following:

> "As you know, I launched a public consultation on 20 December on the proposed transfer of PCC functions to the West Midlands Mayoralty which ran to 31 January. This consultation has now closed. In considering whether to make an order transferring PCC functions to the West Midlands Mayor, I have had due regard to the tests required of me under S113 of the Local Democracy, Economic Development and Construction Act 2009, and the responses to the public consultation.
>
> After careful consideration, I am satisfied that we should proceed to transfer PCC functions to be exercised by the Mayor of the West Midlands from the point of the May 2024 elections. It remains my view that transferring PCC functions to the Mayoralty presents wider levers to prevent crime and provides greater accountability locally through a single directly elected individual responsible for a wider range of functions. The Governments response to the consultation will be published shortly on Gov.UK."

8. In these proceedings the Commissioner contends that the consultation was not undertaken lawfully: (a) because it was not undertaken at a formative stage but only at a time when the Home Secretary had a closed mind, having already decided to make an order under 107F (Ground 1); (b) because when the consultation took place no sufficient information was provided to permit the public a fair opportunity to participate (Ground 2); and (c) because the responses to the consultation were not conscientiously considered (Ground 3). Points (a) and (c) are connected since the contention that underlies each is that notwithstanding the consultation undertaken in December 2023 and January 2024, the decision made on 6 February 2024 was a foregone conclusion, the die having been cast by the decision contained in the 6 December 2023 letters. The Commissioner further contends that when taking his decision in February 2024 the Home Secretary failed to comply with the obligation summarised in the speech of Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at p. 1065B, that decision-makers must "take reasonable steps to acquaint [themselves] with relevant information …" (Ground 5 of the Commissioner's case).

B. Decision

(1) Grounds 1 and 3. Was the consultation undertaken with an open mind?

9. The Commissioner relies on the principles, set out by Hodgson J in his judgment in *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168 ("the *Gunning* principles").

> "First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

These principles have been affirmed and applied on many occasions. The authority of these propositions was recognised by Lord Wilson in his judgment in *R(Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947. Grounds 1 and 3 rely on the first and fourth principles, respectively. These grounds can be considered together as each is an aspect of the Commissioner's overall contention that the consultation in December 2023 and January 2024 was not undertaken with an open mind.

10. There is little between the parties on the law. I was referred to the judgments of the Court of Appeal in *R(Lewis) v Redcar Cleveland Borough Council* [2009] 1 WLR 83. The three judgments in that case provide a wide-ranging discussion of the authorities: see per Pill LJ at paragraphs 43 – 60 (his review of the case law) and 62, 63 and 66 – 69 (his conclusions); per Rix LJ at paragraphs 95 – 98; and per Longmore LJ at paragraphs 105 – 108. The issue considered by each judge was whether and how the judgment of the House of Lords in *Porter v Magill* [2002] 2 AC 357 may have affected the approach to claims of pre-determination directed to administrative decision making.

11. The central point was whether the legal standard preventing pre-determination was that administrative decision-makers should not approach decisions with a closed mind or, whether the requirement went wider such that decisions could be unlawful if the evidence showed a real possibility of a closed mind, assessed from the point of view of the notional fair-minded and informed observer. The upshot of the judgments in *Lewis* was that the fair-minded and informed observer standard had some role to play when determining the legality of an administrative decision, albeit in an attenuated form since, for this purpose, the fair-minded and informed observer would recognise that pre-disposition towards a specific outcome, for example because of support for a general policy, was not of itself evidence of pre-determination. It is apparent from the judgments that in the context of administrative decision making the real possibility standard is a high bar, and that the difference between that standard and simple consideration whether the decision maker had a closed mind will be small.

12. For the purposes of this case I consider two further matters are relevant. *First*, for this purpose not all administrative decisions are the same. *Lewis* concerned a decision on a

planning application, and many, if not all cases considered in the judgements in *Lewis* were also decisions taken by planning committees. The decision in this case, the decision of the Home Secretary on the exercise of the power at section 107F of the 2009 Act is, by its nature, some way distant. For instance, it is not a decision that will have any direct impact on any private law interest. *Second*, the substance of the complaint here is that the Home Secretary failed properly to conduct a consultation exercise. The first *Gunning* principle requires that consultation take place when a proposal is at a formative stage, i.e. when the decision-maker's mind remains open. It is somewhat artificial to reframe this requirement as an issue of bias. Each of these considerations weighs against there being any strong reason in favour of determining the legality of the Home Secretary's decision against a standard of "real possibility" rather than simply asking whether by the time the consultation took place the Home Secretary had already closed his mind to the option of leaving matters as they were, and not transferring the Commissioner's powers to the Mayor.

13. Nevertheless, out of an abundance of caution, I will apply the standard set by the Court of Appeal in *Lewis*, without modification. As stated in *Lewis*, there must be "clear pointers" that the Home Secretary would not consider the exercise of the section 107F power on its merits: something to suggest that the Home Secretary had abandoned his obligation to consider the exercise of that power having considered the outcome of the consultation process. Simple political pre-disposition is not sufficient.

14. The Commissioner's submission relies on the cumulative effect of several matters but focuses on documents and emails written in the period 11 December 2023 to 15 December 2023, immediately after it was recognised the 6 December 2023 decision had been taken on false premises. These documents and emails were prepared by and passed between civil servants, and the Minister of State for Crime Policing and Fire ("the Minister"), and the Home Secretary. There was an "Information Note" dated 11 December 2023; a response from the Minister by email dated 12 December 2023; a ministerial submission dated 12 December 2023; the responses to that submission from the Minister and the Home Secretary (recorded in emails sent on their behalf); advice given to the Minister on 14 December 2023 concerning the consultation process; and a further ministerial submission of 15 December 2023 which was the submission that recommended consultation take place to an expedited timetable. The Minister and Home Secretary accepted this recommendation. The Commissioner further relies on more general matters: that the Home Secretary did not formally withdraw his 6 December 2023 decision; that in January 2024 during the consultation and before the end of the consultation response period, the Home Secretary produced and circulated a draft of the statutory instrument that would be required to give effect to a decision pursuant to section 107F to transfer the Commissioner's powers to the Mayor; and on the general speed of events between the second week of December when the first section 107F decision was taken, and 6 February 2024 when the decision now subject to challenge was made. Taking these matters in the round, the Commissioner submits that although the outward signs of consultation were present the outcome was a foregone conclusion. It is said that all the documentation produced prior to 15 December 2023 was directed to ensuring transfer of the Commissioner's powers to the Mayor in time for the May 2024 mayoral election. No other outcome was either contemplated or entertained.

15. I have considered these points carefully but, looking at the evidence in the round, I do not consider it warrants either the conclusion that the Home Secretary undertook the consultation with a closed mind, or the conclusion that there was a real possibility that he did. The 11 December 2023 Information Note presented three options as possible courses of action. These options were further developed in the submissions and advice that followed. The first option was further to amend the 2009 Act to remove the error made by the 2023 Act, i.e. the application of section 113 of the 2009 Act to the section 107F power. The second option was to undertake an expedited consultation so that a section 107F decision could be made and put into effect in time for the May 2024 mayoral election. The third option was to consult in slower time and delay the 2024 mayoral election. By the time of the 12 December 2023 ministerial submission the third option had been ruled out. It is common ground that the date for the May 2024 mayoral election was a 'hard stop'. The Home Secretary realised that whether or not the Mayor's powers included the Commissioner's powers would needed to be settled in time for the May 2024 mayoral election or, if that was not so, that any transfer of powers would need to await the next electoral cycle.

16. The strongest point in support of the Commissioner's submission is that these options were all presented as ways of "delivering transfer of [the Commissioner's] function to … [the Mayor]": see, the 12 December 2023 ministerial submission. The Commissioner characterises this as meaning that the stated end point was to reach the same outcome as the 6 December 2023 decision and not reconsider the matter taking account of the requirements of section 113 of the 2009 Act that had previously been overlooked. When referring to the expedited consultation option the 12 December 2023 submission also refers to "… the need to demonstrate that we had given [the consultation responses] proper consideration". It is possible to read this as referring to the need for a show of compliance with the obligation to consult rather than actual compliance with that obligation. In a similar vein, the submission for the Commissioner drew attention to two versions of a timeline document prepared for ministers to demonstrate how it would be possible to take the steps required by section 113 and the steps necessary to make the statutory instrument required to give effect to a decision under section 107F, all in time for the May 2024 mayoral election. In the first version of this document, prepared in support of the 12 December 2023 ministerial submission, the entry for the "7 February 2024" read "Response received from Minister, clearance to lay SIs". The entry for 7 February 2024 in a further version of the timeline, prepared for the 15 December 2023 ministerial submission, reads "Response to advice from Ministers, subject to agreeing to proceed, register SI for laying" (emphasis added). Thus, submits the Commissioner, it is striking that the first version of the timeline did not refer to the possibility that the 107F transfer decision might not be made.

17. While there is force in these submissions, I think they place weight on documents and events that they cannot bear. The Home Secretary's intention when making the original decision in exercise of the section 107F power in December 2023 had been to transfer the Commissioner's powers to the Mayor in time for the May 2024 mayoral election. Once it had been become apparent that the 6 December 2023 decision had been ineffective, there was nothing untoward in options being presented that would enable the Home Secretary to achieve his objective in time for the election. The Home Secretary's policy favoured consolidation of the powers of police and crime commissioners with the powers of the mayors of combined authorities and, so far as concerned the West Midlands, if the opportunity was not taken before the May 2024

election it would need to wait for the election that followed. The focus on taking a decision in time for the 2024 election is not the same as the intention to take the decision in disregard of an obligation to consult, notwithstanding that that obligation had previously been overlooked. The reference to the "need to demonstrate" consideration of consultation responses might be considered somewhat awkward, but it is no more than that. In context, where a decision subject to a consultation requirement had been taken without consultation, the words are no more than a clear reminder of the importance of being able to evidence that the obligation to consult has been discharged. The same conclusion goes for the timeline document which, it should be noted, in both versions includes time for consideration of the consultation responses. As for the circulation, during the consultation period, of a draft of the required statutory instrument, that is better explained as a step taken to deal with a contingency – i.e. to ensure that if the decision was that the Commissioner's powers should transfer to the Mayor the practical arrangements to give effect to that decision (which were contained in the draft statutory instrument) could be put in place in good time.

18. Whether the inference the Commissioner contends for is properly to be drawn from the December 2023 documents must also depend on considering what happened during and after the consultation process. In a letter from the Minister to the Mayor, dated 21 December 2023, explaining the steps that were to be taken, consultation was described as "integral" to the process. More significantly, I am satisfied that the responses to the consultation were conscientiously considered. The evidence is that this consideration commenced during the consultation response period as the responses arrived. This undermines the suggestion that the speed with which the response to consultation document was produced suggests that responses were not properly considered. In fact, both the ministerial submission of 5 February 2024 (the submission that recommended the decision then made by the Home Secretary on 6 February 2024) and the draft consultation response document provided with that ministerial submission, support the conclusion that the responses were thoroughly looked at and evaluated. All this cuts directly against the contention that the Home Secretary had closed his mind before the consultation started, and in turn undermines the Commissioner's submission that this is the inference to be drawn by reference to the December 2023 documents.

19. Both decisions taken (on 6 December 2023 and 6 February 2024) were taken by the Home Secretary personally. To the extent the question for me is whether the Home Secretary's mind was made up before the December 2023/January 2024 consultation exercise took place, or whether there was a real possibility that that was so, there is an element of artificiality in the exercise I have just undertaken. The evidence going directly to the Home Secretary's state of mind is sparse. On the one hand, the Commissioner relies on the December 2023 documents, largely the work of the civil servants, and invites me to infer from those that following his December 2023 decision the Home Secretary did no more than go through the motions. On the other hand, the submission for the Home Secretary relies on the work of civil servants (for example on consideration of the consultation responses) and invites me to reach the opposite conclusion. Neither approach is entirely satisfactory. Nevertheless, on consideration of all the evidence available I am not satisfied that the December 2023 documents should be read as suggesting that the consultation undertaken was not in aid of a genuine re-taking of the decision first made on 6 December 2023.

20. All this being so, the Commissioner's first and third grounds of challenge fail.

(2) Ground 2. Was sufficient information given in the consultation document to permit appropriate consideration and response?

21. This ground rests on the third *Gunning* principle. What amounts to sufficient information for this purpose must depend on the context in which the consultation occurs. In this instance the consultation was required by statute and the context is provided by section 113 of the 2009 Act. In his judgment in *Moseley*, Lord Reed identified the need, when an obligation to consult arises from statute, to identify the purpose of the statutory provision and to judge from that whether the consultation undertaken met that purpose: see his judgment at paragraphs 36 – 40.

22. In the circumstances of this case the effect of section 113 of the 2009 Act was that before the Home Secretary could make an order under section 107F transferring the powers of a police and crime commissioner to a mayor, he had to be of the view that transfer of the functions was likely to improve the economic, social and environmental well-being of some or all of the people who live or work in the area (the condition at section 113(1)(a)), and that the transfer of functions was appropriate having regard for the need "to secure effective and convenient local government, and … to reflect the identities and interests of local communities" (the condition at section 113(1)(aa)). The Home Secretary also had to consult the public: the requirement at 113(2).

23. Section 113 of the 2009 Act must be read in the round. There is an obvious connection between the conditions attaching to the Home Secretary's exercise of his power to transfer functions and the obligation to consult. Whatever else the consultation might cover, it ought to provide the occasion for consideration of and comment on the Home Secretary's reasons why the conditions at section 113(1)(a) and (aa) are met. Put another way, section 113 may be seen as plotting a sequence of events when the Home Secretary, in exercise of the section 107F power, proposes to re-organise arrangements for local democracy: first, the Home Secretary considers for himself the reasons why the two conditions are met; then, there is public consideration of those reasons through a consultation process (which may also include any other matters on which the Home Secretary might choose to consult); and finally the Home Secretary's decision whether to exercise his section 107F power having taken account of the consultation responses.

24. This approach to section 113 also fits the alternative scenario that section caters for. By section 112A, relevant local authorities (including combined authorities such as the WMCA) may prepare and submit proposals to the Home Secretary to exercise his section 107F power. By section 112A(9) the proposal "must specify the purposes to be achieved by the order which it proposes should be made". Where such a proposal has been prepared the relevant proposing authority must carry out a public consultation before submitting the proposal to the Home Secretary: see section 112A(3). In that context, it is obvious that the proposal would be the subject of the consultation. The clear expectation is that the proposing authority would explain its reasons for the proposal including the purposes to be achieved, and then invite public comment on it. When such a proposal goes to the Home Secretary, he may decide that the consultation undertaken by the proposing authority removes the need for further consultation: see section 113(2)(a) – (c).

25. Thus, regardless of how a proposal for transfer of powers comes forward, whether from a local authority or at the instigation of the Home Secretary, the expectation in section 113 (whether read on its own or together with section 112A) is that there will be an opportunity for members of the public to express their views on the reasons for using the section 107F power. It is difficult to see how members of the public can be afforded the opportunity to express intelligent and informed opinion unless they are told why the transfer of functions should take place. When, as in this case, the matter comes forward at the initiative of the Home Secretary, he should, as a minimum for the purposes of the consultation, explain why he considers the conditions specified in section 113(1) of the 2009 Act are met. This is what the purpose of section 113 requires.

26. In this case the Consultation Document published on 20 December 2023 contained all the information provided in support of the consultation exercise. That information, in the "Executive Summary" part of the document under the heading "Background" was as follows:

> "**Background**
>
> 1. The Police Reform and Social Responsibility Act 2011 established directly elected PCCs in 41 forces, replacing Police Authorities. The first PCC for West Midlands was elected in 2012.
>
> 2. PCCs are responsible for holding the Chief Constable of their police force to account for the full range of their responsibilities. They are directly accountable to the electorate through the ballot box and their decisions are scrutinised by the local Police and Crime Panel.
>
> 3. The Cities and Local Government Devolution Act 2016 amended the Local Democracy, Economic Development and Construction Act 2009 to enable PCC functions to be transferred to combined authority mayors, creating one directly elected leader accountable for both combined authority and PCC functions. Part One of the Government's Review into the role of PCCs cemented the view that bringing public safety functions under the leadership of a combined authority mayor has the potential to offer wider levers and a more joined-up approach to preventing crime. Under the mayoral PCC model, the democratic accountability of the PCC model is preserved as mayors who exercise these functions remain directly accountable to the electorate via the ballot box. The Levelling Up White Paper outlines the key leadership role that combined authority mayors have in public safety and improving public health. It sets out the Government's aspiration to have combined authority mayors take on the PCC role, where feasible.
>
> 4. There are currently two combined authority mayors that exercise PCC functions, the Greater Manchester Mayor who took them on in 2017, and the West Yorkshire Mayor who took

them on in 2021. The Mayor of London also exercises functions equivalent to a PCC. As part of the York and North Yorkshire Devolution Deal, the first directly elected Mayor of the York and North Yorkshire Combined Authority will exercise the functions of the Police, Fire and Crime Commissioner from May 2024 onwards.

5. The Levelling-up and Regeneration Act 2023 places new requirements on the Home Secretary when making a decision to transfer the functions of a PCC to a combined authority mayor. The Home Secretary must, before making an order to enable such a transfer: conduct a public consultation (unless one has been conducted by the Combined Authority as part of their proposal for an order); consider that the transfer is likely to improve the economic, social and environmental well-being of some or all of the people who live or work in the area; and consider that it is appropriate having regard to the need to secure effective and convenient local government and to reflect the identities and interests of local communities.

6. The Home Secretary is therefore gathering views to allow him to make a decision on whether to lay an order before Parliament to transfer PCC functions to the Mayor of the West Midlands from the point of the next mayoral election in May 2024. This will maintain democratic accountability by ensuring that PCC functions are only exercised by a mayor who was elected on that basis.

7. This transfer presents opportunities to align police and crime priorities with transport, regeneration and skills and to improve outcomes for the public. Joining police and crime functions with oversight of other public services in the Mayoral Combined Authority would also promote further collaboration within the region. The Mayor would become the elected local policing body. A Mayor exercising police and crime functions continues to provide a single, directly accountable individual who is responsible for securing efficient and effective police service in West Midlands.

8. If a transfer took place, the Mayor's PCC functions would include:

- issuing a Police and Crime Plan for West Midlands
- setting the police budget including the PCC council tax precept requirements
- appointing (and if necessary, suspending or dismissing) the Chief Constable
- addressing complaints about policing services
- providing and commissioning services for victims and vulnerable people

> • working in partnership to ensure that the local criminal justice system is efficient and effective.
>
> 9. The Mayor may appoint a Deputy Mayor for Policing and Crime, to whom they may delegate functions, but the Mayor remains accountable to the public.
>
> 10. If the Home Secretary decides to proceed with the transfer, and the necessary secondary legislation is approved by Parliament, these functions will be transferred from the existing PCC for West Midlands to the Mayor, integrating the roles at the May 2024 election. There would therefore not be a PCC election in May 2024 or in future years. The Police and Crime Panel, populated by councillors from West Midlands local authorities will scrutinise the actions and decisions of the Mayor and support them in the effective exercise of their functions. This replicates the current arrangements where a Police and Crime Panel scrutinises the actions and decisions of the PCC and supports them in the effective exercise of their functions."

I have added paragraph numbers for ease of reference. The consultation questions followed.

> "**Q1. The Government proposes that the functions of Police and Crime Commissioner for West Midlands are exercised by the Mayor of the West Midlands from the May 2024 Mayoral election onwards.**
>
> **Do you agree or disagree with the transfer of PCC functions to the Mayor of the West Midlands?**

Agree	**Disagree**	**Don't know**

> **Q2. Why do you think this?**
> [Insert text here – 250-word limit]
>
> **Q3. Are there any other comments you would like to make?**
> [Insert text here – 250-word limit]"

27. I do not consider the information provided in support of this consultation was sufficient for the purposes of the consultation envisaged and required by section 113 of the 2009 Act. The information provided ought to have explained why the Home Secretary considered the section 113(1) conditions to the use of the section 107F power were met – i.e., why the transfer of powers from the Commissioner to the Mayor would be likely to improve the social, economic and environmental wellbeing of some or all of those living or working in the WMCA area, and why the Home Secretary considered the

transfer would be appropriate for the purpose of effective and convenient local government and reflecting "the identities and interests" of communities in the area. These criteria are, quite clearly, very wide-ranging. For instance, the notion of "economic, social and environmental well-being" could embrace almost every aspect of the lives of those living or working in the area concerned. I accept that the breadth of such matters must give the Home Secretary significant latitude to choose which matters to include in a consultation document. Nevertheless, the information provided in support of the consultation must in some way or other, address the conditions for the exercise of the section 107F power.

28. The information provided on this occasion falls well short of this mark. Paragraphs 1 and 2 explain the role of the Commissioner in general terms. The first sentence of paragraph 3 refers to the Home Secretary's power to transfer the functions of police and crime commissioners to mayors. The next sentence refers to a potential advantage if powers are consolidated in a mayor: "the potential to offer wider levers and a more joined-up approach to preventing crime". This is relevant to the well-being criterion in the condition at section 113(1)(a). But it is left entirely unexplained.

29. There is a reference to the "Government's review into the role of PCCs", but this document is not provided. I am told, it is not a document that has ever been published. In any event, the relevance of the views contained in it to the proposed transfer of functions from the Commissioner to the Mayor is not further explained. The submission for the Home Secretary was that if the consultation document referred to another document or source it was reasonable to expect those wishing to respond to the consultation to find that document for themselves and consider its contents. The same submission was also made in respect of the Levelling Up White Paper referred to later in paragraph 3, and the references in paragraph 4 to transfers of power that had already taken place in Greater Manchester and West Yorkshire. I do not accept this submission. There is no reason why a consultation document may not refer to another document. But when that happens the cross-reference should be clear and specific, and the document should be readily available for the purpose of the consultation. For example, a link to the document could be provided on the consultation web page. The process of responding to a consultation ought not to become a treasure hunt. Similarly, so far as concerns the references in paragraph 4 to the other areas where powers have been consolidated in a mayor, the submission that those wishing to respond to this consultation could do their own research on what had happened in those areas and respond accordingly, misses the point of a consultation exercise. In this instance it was for the Home Secretary to explain why he thought the experience of what had happened in Greater Manchester or West Yorkshire supported his view that when it came to the West Midlands the conditions in section 113(1) were met. That could then be the premise for response. In this case there is a further point relevant to the submission that those wishing to respond to this consultation could look things up for themselves. This consultation was conducted to an expedited timetable. The response period was shorter than normal and included the Christmas and New Year period. In these circumstances the need for relevant information to be readily available to those wishing to respond to the consultation was particularly important.

30. Returning to paragraph 3 of the consultation information, the third sentence makes the point that mayors are democratically accountable, which is something relevant to the section 13(1)(aa) condition. The fourth and fifth sentences, referring to the Levelling

Up White Paper, mention the role of mayors in "public safety and improving public health". However, how this explains how the proposed transfer of powers might improve economic, social, or environmental well-being or effective local government in the West Midlands is not further explained. The reference to the White Paper does not assist. In submissions I was told the only material passage in the White Paper is the one set out above at paragraph 3, but that passage provides no information that explains why the Home Secretary considered the section 113(1) conditions were met, whether generally or in this instance.

31. Paragraph 4 of the consultation document refers to the two other areas where transfers have occurred but provides no information other than that powers have been consolidated and are the responsibility of an elected mayor.

32. Paragraph 5 is a summary of section 113(1) of the 2009 Act. Paragraph 6 refers to the possibility that the functions of the Commissioner could be transferred to the Mayor from the time of the 2024 Mayoral election, and that the Home Secretary is "gathering views". This information explains why the consultation is happening but for present purposes, adds nothing.

33. Paragraph 7 does provide some information material to the purpose of the consultation, referring to the opportunity to "align police and crime priorities with transport, regeneration and skill", and states that consolidation of power would "promote further collaboration within the region". But that is all that is said.

34. The remaining paragraphs (8, 9 and 10) provide narrative information about the powers the Mayor would have, the possible appointment of a Deputy Mayor for Policing and Crime and the continuing role of the Police and Crime Panel. This information provides helpful context, but it does not go to explain the Home Secretary's views on the conditions at section 113(1)(a) and (aa).

35. The Commissioner raises three further points. The first is that information explaining the Home Secretary's views on why the conditions in section 113(1) were met was available to him and could have been provided for the purposes of the consultation. The Commissioner points to the contents of a document titled "*Transfer of Police and Crime Commissioner functions to the Mayor of the West Midlands. Assessment against the statutory tests*" ("the assessment document") dated 5 February 2024 which was annexed to the 5 February 2024 submission to the Home Secretary. This point has some force. It appears that only a small part of the information in this document arose from responses given the course of the consultation exercise. The Home Secretary did not suggest otherwise. It could not therefore be said that the explanation for the level of information in the consultation document was that prior to the consultation the Home Secretary had no information on which he could have formed a view on the application of the conditions in section 113(1) (though it seems to me to be inherently unlikely that the Home Secretary might make such a point, and in fact he did not in these proceedings).

36. The Commissioner's second point is that the consultation document does not explain that one consequence of the transfer of powers would be that WMCA would bear some additional costs arising from the mayoral election. It appears this is factually correct. The cost of police and crime commissioner elections is met by central government.

When police and crime commissioner and mayoral elections are held together there is a cost saving to WMCA because the costs of matters common to both elections are treated as costs of the police and crime commissioner election and met from central funds. If in future there is only one, mayoral, election, WMCA will have to meet the entire cost of that election. This matter is not mentioned in the consultation document. However, had the consultation document otherwise provided information concerning the likely effects on economic, social, and environmental well-being, etc., I would not have concluded the absence of this information about electoral expenses to be critical. In the context of WMCA's budget the amount involved seems marginal; the likely impact of such expenditure on the economic, social, and environmental well-being of persons living or working in the West Midlands seems very marginal indeed. Whether or not to include that point in a consultation document would fall within the discretion necessarily afforded to the Home Secretary on such matters.

37. The Commissioner's third point was that the consultation document contained insufficient information on the possible role of an unelected Deputy Mayor for Policing and Crime. My conclusion on this point is the same as on the Commissioner's second point. The absence of further information on this matter is not such as to invalidate the consultation process.

38. However, my conclusion is that Ground 2 of the claim succeeds. The Home Secretary did not, when consulting, provide sufficient information to permit intelligent and informed response. The consultation information ought to have explained why in the Home Secretary's view the section 113(1) conditions for the transfer of the Commissioner's powers to the Mayor were met. Some of the information provided in support of the consultation did relate to those conditions (see above at paragraphs 28 – 31 and 33), but that information was perfunctory.

39. The Home Secretary's fallback submission, relying on section 31(2A) of the Senior Courts Act 1981, is that even if the consultation was conducted unlawfully, the 6 February 2024 decision must not be quashed because, in the words of section 31(2A), it is "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". Put into the context of my conclusion on Ground 2, the submission is that even if the consultation had been supported by sufficient information and even if that had resulted in more or better-informed consultation responses, the Home Secretary would still, in exercise of the section 107F power, have decided to transfer the Commissioner's powers to the Mayor.

40. Section 31(2A) of the 1981 Act sets a high bar. In *R(Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446, the Court of Appeal (Lindblom, Singh and Haddon-Cave LJJ) said this:

> "273. It would not be appropriate to give any exhaustive guidance on how [section 31(2A)] should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the

> merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ, as he then was, in *R(Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269, para 89)."

Where, as in this case, the error that has occurred concerns the conduct of consultation, the counterfactual that section 31(2A) requires must include the assumption that the decision-maker will comply with the requirement conscientiously to consider the consultation responses provided in response to the putative different consultation document.

41. I do not consider the test in section 31(2A) is met on the evidence available in this case. Every section 31(2A) submission rests on speculation but in this case the nature of the error that has occurred renders the submission very speculative indeed. The starting assumption is that different (unspecified) information is provided in support of the consultation required by section 113(2) of the 2009 Act. This may well have resulted in different points being made in response to the consultation. I am asked to consider whether it is "highly likely" that on conscientious consideration of such responses, the Home Secretary would have reached the same conclusion. The extent of the uncertainties in this scenario is so great that I am not satisfied the requirements of 31(2A) are met. In reaching this conclusion I have had regard to the analysis set out in support of the decision reached by the Home Secretary that the conditions in section 113(1) of the 2009 Act were met, in the 5 February 2024 submission and the assessment document annexed to that submission. Had that analysis provided a compelling or even strong case to explain how in the circumstances of the WMCA area, the conditions in section 113(1) were met, that could provide significant support to the submission that different, better informed, consultation responses, conscientiously considered would not have led to a substantially different outcome. However, as I explain in the next section of this judgment that is not the case. The analysis relied on to support the conclusion that the section 113(1) conditions are met is very narrowly focused indeed and does not grapple with the full breadth of those two conditions.

42. For these reasons, the section 31(2A) submission fails. This is not a case where relief must be refused.

(3) Ground 5. The Tameside obligation

43. The Commissioner relies on two matters each concerning possible costs consequences of transferring his powers to the Mayor. The first is that the Home Secretary ought to

have equipped himself with better information about the additional costs that would be incurred by WMCA – namely the costs relating to the mayoral elections, which I have referred to above at paragraph 36. The second matter arises from the response to consultation provided by the National Police Chiefs' Council. This response referred to the experience of West Yorkshire Police following transfer of the police and crime commissioner's functions to the mayor in that area. The response was as follows:

> "West Yorkshire Police (WYP) added that, as a force that has already seen the PCC functions transferred to the mayor, the costs has been significant for WYP and has fallen entirely on the force with no contribution from the Gain Share funding that was provided to The West Yorkshire Combined Authority. Whenever the question was asked regarding the lack of funding the Home Office stated that it should be covered by the Gain Share funding. It has not been."

Subsequently the National Police Chiefs' Council added, "It is our view that the points made can be applied to any transfer of PCC functions". The matter was not further explained. The Commissioner submits the Home Secretary ought to have taken steps to look further into these two matters because, applying the *Tameside* obligation these matters were, as a matter of law, relevant to his decision on whether the conditions at section 113(1) were met.

44. Given the conclusion that I have already reached on Ground 2 it is not necessary for me to decide this part of the Commissioner's case. That being so, I make only the following brief observations on this ground of challenge and the Home Secretary's consideration of the section 113(1) conditions in this case.

45. It is trite that the obligation Lord Diplock referred to in *Tameside* is not an obligation of perfection. Save where, for instance, a statute provides otherwise or the decision-maker has committed itself to take a particular matter into account, a public authority may, subject to ordinary public law principles, decide for itself which matters are relevant to the exercise of a power: see *Re Findlay* [1985] AC 318 per Lord Scarman at pages 333F to 334D. Applying this approach to the power at section 107F of the 2009 Act read with section 113 of that Act does not seem to place the Commissioner's submissions in a favourable light. The matters that the Home Secretary must consider as a matter of statute, are the ones referred to at section 113(1)(a) and (aa), and each is wide-ranging. Taking section 113(1)(a) as the example, while it is possible to make the case that imposing additional costs on either the WMCA or the West Midlands Police could be a matter impinging on the economic well-being on persons who live or work in the West Midlands, the notion of well-being in section 113(1)(a) is so all-encompassing that it would be open to the Home Secretary, entirely consistently with the *Tameside* obligation, not to investigate further matters such as those the Commissioner now relies on.

46. However, matters start to look a little different on consideration of the Home Secretary's approach to the section 113(1) conditions in this case. The section of the assessment document that considered the economic well-being of persons working or living in the West Midlands focussed almost exclusively on efficiency savings which

would be a consequence of the integration of the Commissioner's functions into the Mayor's office and the savings that would be achieved on the abolition of the separate police and crime commissioner role, for example the Commissioner's salary and the cost of running the election for the police and crime commissioner position. The conclusion was as follows:

> "On balance, it is our view that the transfer of PCC functions to the Mayor of the West Midlands is likely to improve the economic well-being of those who live or work in the area. The reduction in number of elected posts, potential for consolidation of resources and streamlining of processes and the potential for a more effective form of local government outweigh the initial one-off work required for the transfer process. Ultimately, through the merging of the two roles there are some savings to the public purse. Our economists have estimated the measurable monetised benefit through the savings of the PCC salary as between £520,800 and £691,000 with a central estimate of £605,900 in present value terms over 9 years."

This approach seems a very narrow approach to the economic well-being criterion. Even assuming some correlation between the economic well-being of those living and working in the West Midlands and the funds available to public authorities the sums under consideration seem very small. Yet if the notion of economic well-being is seen only through the lens of public expenditure, the approach taken in the assessment document which places significant importance on relatively small financial gains might suggest there could be real force in the points the Commissioner says the Home Secretary ought to have looked at more carefully. I would be reluctant to reach such a conclusion as it might tend to endorse an approach to the section 113(1)(a) condition that is far too narrow. Should he come to reconsider this decision, the Home Secretary may wish to consider whether the notion of economic well-being for the purpose of section 113(1) is so narrowly confined.

(4) Outstanding interlocutory applications

47. At the time of the hearing some interlocutory applications remained outstanding, all arising out of the directions made for expedition of this hearing in an order dated 19 February 2024 ("the Directions"). By an application made on 28 February 2024 the Home Secretary applied for an extension of time to file Detailed Grounds of Defence and evidence in response to the claim. The Directions required these to be filed and served on 28 February 2024. The Home Secretary sought an extension of time until 29 February 2024. By a further application on 1 March 2024 the Home Secretary requested a further extension of time and relief from sanctions, having served his Detailed Grounds of Defence and evidence on 1 March 2024. On 5 March 2024 the Commissioner requested variation of the pre-trial timetable in the Directions to take account of the late service of the Home Secretary's case. On 8 March 2024 the Commissioner applied for permission to rely on his second witness statement which contained evidence in reply to the Home Secretary's case.

48. Three of these four applications have now gone by consent. The only matter still contested is the Home Secretary's 1 March 2024 application. The Commissioner's submission is that the conditions for relief from sanctions set by the Court of Appeal in *Denton v TH White Limited* [2014] 1 WLR 3926 are not met.

49. It is important to have well in mind that all parties requested an expedited hearing, and all have put in great effort to ensure that the hearing took place as soon as possible. That is a credit to all concerned. The Commissioner now accepts, entirely realistically, that in these circumstances it would not be proportionate for the court to prevent the Home Secretary from relying on his Detailed Grounds of Defence and evidence. The furthest the Commissioner now goes is to contend that I should order the Home Secretary to pay the Commissioner's costs of responding to the 1 March 2024 application notice.

50. I am not satisfied that the Home Secretary's reason for not complying with the Directions was sufficient. The essence of the reason given both in the 28 February 2024 Application Notice and in the 1 March application notice came to no more than 'things took longer than expected'. Yet that is no more than a reflection of the ordinary human experience: things often (if not always) take longer than expected and that is why any plan of work, especially one made to get something done quickly, must take that into account from the start. The Home Secretary wanted this case to be expedited to obtain a judgment in time to allow preparations for the May 2024 police and crime commissioner elections either to be put into effect or abandoned as unnecessary. The Home Secretary ought to have stuck to the timetable in the Directions. However, as matters have turned out on this occasion, I do not consider it to be appropriate to make a separate costs order in favour of the Commissioner in respect of the 1 March 2024 application. Where and to what extent costs of these proceedings should fall is better considered in the round.

C. Disposal

51. The Commissioner's claim succeeds on Ground 2 but fails on the remaining grounds. It follows from my conclusion on the section 31(2A) submission above at paragraph 41 that the Home Secretary's decision of 6 February 2024 will be quashed. Any statutory instrument made in accordance with the requirement at section 117 of the 2009 Act would fall to be treated the same way.
