

No substantial difference

**When does the "no substantial difference test" make a difference in JR applications?
Does the outcome differ, depending on whether the case is based on EU or UK law?**

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1. The Court of Appeal has described the court's role in judicial review of being comprised of two functions: "*assessing the legality of actions by administrators and, if it finds unlawfulness on the administrators' part, deciding what relief it should give*".¹ The existence of a discretion on the part of the Court as to the relief, if any, to be granted in circumstances where a public law wrong is made out is a notable point of distinction from the Court's ordinary function in private law proceedings, where relief would ordinarily follow as of right. This reflects the nature of judicial review. Judicial review is (in constitutional theory terms) an intra-governmental process of one branch of government reviewing the actions of another, the role of the court being "*principally to correct errors of law made by public authorities and ensure that fair procedures have been complied with*" and thereby uphold the rule of law.² By dint of this aspect of judicial review, and the fact that the court will not be adjudicating simply between the competing interests of private parties but be dealing with situations in which a wide range of, often competing, public interests are at play, there is a logical role for a residual discretion that allows the Court to ensure that the grant of relief is truly appropriate in all the circumstances. It is "*a first principle of judicial review that remedies are discretionary*"³.
2. This paper will consider the effects of legislative changes introduced by the Criminal Justice and Courts Act 2015 ("the CJCA") which modify, if that is the right word, the Court's discretion to withhold a remedy in judicial review proceedings such that the Court is *obliged* to either refuse permission or relief where it appears to the Court that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred (that is, the not substantially different test or "the NSD test"). The constitutional implications of the changes introduced have been heavily criticised.⁴ This paper will:
 - (i) Describe the position prior to the passing of the CJCA in relation to the Court's discretion to withhold relief where a public law wrong is made out;
 - (ii) Set out the Government's justification for the introduction of the NSD;
 - (iii) Review the way in which the NSD has been applied by the courts thus far.

THE POSITION PRIOR TO THE PASSING OF THE CRIMINAL JUSTICE AND COURTS ACT 2015

The Court's discretion to withhold relief

3. Prior to the reforms introduced by the 2015 Act, the Court's discretion to refuse to quash an ultra vires act was described as "*very narrow*".⁵ In the words of Glidewell LJ in *Bolton Metropolitan Borough Council v Secretary of State For the Environment* (1991) 61 P. & C.R. 343 at p.353, where a judge "*has concluded that he could hold that the decision is invalid, in exceptional*

¹ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 [2002] 1 WLR 237 at [40].

² *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 at [64].

³ See Fordham, *Judicial Review Handbook*, 6th ed. at para. 24.3.

⁴ See, for example, B. Jaffey and T. Hickman, '*Loading the Dice in Judicial Review: The Crime and Courts Bill 2014.*' U.K. Const. L. Blog (6th February 2014); available at <https://ukconstitutionalaw.org/2014/02/06/ben-jaffey-and-tom-hickman-loading-the-dice-in-judicial-review-the-criminal-justice-and-courts-bill-2014/> (accessed 25 April 2019).

⁵ *South Gloucestershire Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 74; [2016] J.P.L. 798 per Lindblom LJ at [24].

circumstances he is entitled nevertheless, in the exercise of his discretion, not to grant any relief." In exercising this discretion, however, the Court could take into account a wide range of factors, "including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy".⁶

4. An important part of the context for understanding the nature of the Court's discretion to grant relief is the fact that many public law challenges are not to the outcome of a decision-making process but the way in which that decision was made. Thus, a significant proportion of public law challenges entail at least the possibility that success on the challenge may not alter the final outcome in question. The logic behind the Court's interest in ensuring procedural fairness was eloquently set out by Megarry J in *John v Rees* [1970] Ch 345 at 402:

"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

5. Similar points were made by Bingham LJ in *R v Chief Constable of Thames Valley Police ex p Cotton* [1990] IRLR 344 at pp. 351-2:

"While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:

- (1) *Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.*
- (2) *As memorably pointed out by Megarry J in **John v Rees** [1970] Ch 345 at 402, experience shows that that which is confidently expected is by no means always that which happens.*
- (3) *It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.*
- (4) *In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.*
- (5) *This is a field in which appearances are generally thought to matter.*
- (6) *Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied. Accordingly if, in the present case, I had concluded that Mr. Cotton had been treated unfairly in being denied an adequate opportunity to put his case to the Acting Chief Constable, I would not for my part have been willing to dismiss this appeal on the basis that it would have made no difference if he had had such an opportunity (although the court's discretion as to what, if any, relief it should grant would of course have remained)."*

6. Against such pronouncements on the importance of observing procedural requirements, the Court's discretion to refuse to grant relief is very much a countervailing feature⁷. The key

⁶ *Crédit Suisse v Allerdale Borough Council* [1997] Q.B. 306 at 355D.

⁷ Note though what was said by Lord Hoffmann in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 A.C. 269 at [73] namely that "[i]t is true that a case which appears, on the basis of one side's evidence, to be incapable of rebuttal can sometimes be destroyed. The remarks of Megarry J in *John v Rees* [1970] Ch 345, 402 about "unanswerable

decision is that of the Court of Appeal in *Simplex GE (Holdings) v Secretary of State for the Environment* (1989) 57 P. & C.R. 306, which is generally cited as imposing a test that the Court exercise its discretion where the decision-maker “*would necessarily, or inevitably, have reached the same decision if he had not committed the legal error which has been acknowledged*”.⁸

7. *Simplex* was an appeal against (inter alia) the decision of the judge at first instance to refuse to grant relief notwithstanding the finding that the respondents had failed to comply with a statutory duty to provide reasons. *Simplex* was not a judicial review but a statutory review under the Planning Acts where an identical discretion to quash exists.⁹ *Simplex* was applied many times in judicial review cases before the CJCA came into force. In support of the appellant’s case on this ground in *Simplex*, it relied on the following excerpt from the case of *R v. Secretary of State for the Environment, ex p Brent London Borough Council* [1982] 1 Q.B. 593 at page 646:

“... it would of course be unrealistic not to accept that it is certainly probable that if the representations had been listened to by the Secretary of State, he would nevertheless have adhered to his policy. However we are not satisfied that such a result must inevitably have followed ... It would in our view be wrong for this court to speculate as to how the Secretary of State would have exercised his discretion if he had heard the representations. We respectfully adopt the words of Megarry J. in *John v. Rees* (...)

...The importance of the principles to which we have referred to above far transcend the significance of this case. If our decision is inconvenient, it cannot be helped. Convenience and justice are often not on speaking terms: per Lord Atkin in *General Medical Council v. Spackman* [1943] A.C. 627, 638.”¹⁰

8. The relevant test was expressed in a number of ways in *Simplex*:
 - (i) Purchas LJ, who gave the main judgment, described himself as approving the formulation of May LJ in *R v Broadcasting Complaints Commission* [1985] 1 Q.B. 1153, in which the test was expressed as being whether “*the statutory body would have been bound to come to precisely the same conclusion on valid grounds*”. Purchas LJ continued: “*I now turn to the test suggested by Lord Justice May, namely would the Minister have come to the same conclusion if the erroneous reason had been excluded altogether? If not, then on the approach adopted by Lord Justice May the decision should be quashed (...)* *It is not necessary for Mr. Barnes to show that the Minister would, or even*

charges which, in the event, were completely answered” is often cited. Most lawyers will have heard or read of or even experienced such cases but most will also know how rare they are ...”.

⁸ *Castelite Limited v Secretary of State for Communities and Local Government* [2016] EWHC 1479 (Admin) per Holgate J at [24].

⁹ Statutory provisions provide a court or tribunal with quashing power normally frame that power as a discretion: see, for example, s. 288(5)(b) of the Town and Country Planning Act 1990, relating to the High Court’s powers on statutory reviews of certain planning decisions; and Schedule 2 of the Roads (Scotland) Act 1984, considered in *Walton* (above). There are exceptions: see, for example, the Court’s obligation to quash an obviously flawed notice under the Terrorism Prevention and Investigation Measures Act 2011 as set out at Schedule 2, para.4 of the act.

¹⁰ For a different approach see the decision of Ouseley J. in *R (Midcounties Co-Operative Limited) v Wyre Forest District Council* [2009] EWHC 964 (Admin) where it was contended that there had been a failure to consult on a s. 106 agreement before granting a planning permission. The Judge said:

“104 Fifth, and crucially, as Mr Richards and Mr Harris point out, there is no evidence at all that Midcounties would have said anything on the detail of the drafts, let alone any evidence as to what it would have said. As Mr Holgate conceded, there is no evidence in any of the extensive post-decision evidence before the court that Midcounties says that it would have said something, or what it would have said if it had more time. Notwithstanding that it has now had nearly a year to put in evidence, that remains the position.

105 This is not a mere technical point and it is rather different from the *Lichfield Securities* case on the facts. Midcounties is an experienced retailer. It had lawyers already engaged. There was substantial pre-judicial review application correspondence. This said nothing about whether anything would have been said, or what would have been said. There was nothing in the judicial review claim form which casts any light on the matter. It merely echoes the pre-action correspondence. There is nothing in the array of evidence, mostly irrelevant, filed on its behalf. Its highway consultant filed a witness statement in August 2008 running to 39-pages to which Mr Holgate drew attention, but the highway consultant says nothing to the effect that he would have said something, or what he would have said, in relation to the detail of the section 106.”

probably would, have come to a different conclusion. He has to exclude only the contrary contention, whether the Minister necessarily would still have made the same decision”;

- (ii) Staughton LJ, who gave a concurring judgment, put it as follows: “the authorities cited by Lord Justice Purchas show that, where one of the reasons given for a decision is bad, it can still stand if the court is satisfied that the decision-making authority would have reached the same conclusion without regard to that reason”.¹¹

9. The position was summarised recently by Holgate J. in *Castelite Limited v Secretary of State for Communities and Local Government* [2016] EWHC 1479 (Admin) (at [24], emphasis added):

“... the test to be applied is that laid down by the Court of Appeal in decisions such as *Simplex GE (Holdings) Limited v Secretary of State for the Environment* [1989] 57 P & CR 306 ; *R (Smith) v North East Derbyshire Primary Care Trust* [2006] 1 WLR 3315¹²; and *Secretary of State for Communities and Local Government v South Gloucestershire Council* [2016] EWCA Civ 74, that is whether the Secretary of State can satisfy the court that the Inspector would necessarily, or inevitably, have reached the same decision if he had not committed the legal error which has been acknowledged.”

10. Thus, while the *Simplex* test has become part of the basic lexicon of the public lawyer, the word “inevitable” does not actually appear in the Court’s judgment in *Simplex* save for in the citation from the *Brent* case above (and in the transcript of counsel’s post-hearing submissions).

EU law

11. In the context of obligations deriving from EU law, it was rather clearly suggested by the House of Lords in *Berkeley v Secretary of State for the Environment and another* [2001] 2 AC 603 that the Court’s discretion not to quash might be narrower still where EU obligations are in play. The background to *Berkeley* is as follows. The High Court had, notwithstanding a finding that the Secretary of State had acted contrary to EU law in failing to carry out an environmental impact assessment (EIA) in relation to an application for planning permission,¹³ refused to quash the grant of planning permission on the basis that the absence of EIA had made no difference to the outcome. The Court of Appeal upheld the decision to refuse relief. The House of Lords allowed the appeal. Per Lord Bingham at p.608:

“(...) Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow. In the Community context, unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still: the duty laid on member states by article 10 of the EC Treaty, the obligation of national courts to ensure that Community rights are fully and effectively enforced, the strict conditions attached by article 2(3) of the Directive to exercise of the power to exempt and the absence of any power in the Secretary of State to waive compliance E (otherwise than by way of exemption) with the requirements of the Regulations in the case of any urban

¹¹ The third judge, Sir Roualeyn Cumming-Bruce, agreed with both judgments.

¹² “10 I have already noted that neither Mr Pittaway nor Mr Post contended that the judge’s second reason, that is that the decision would probably have been the same anyway, was alone sufficient to sustain his conclusion. That is a proper concession. Probability is not enough. The defendant would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision. Authority for this synthesis may be found in *R v Chief Constable of the Thames Valley Police, Ex p Cotton* [1990] IRLR 344 , 352, *Simplex GE (Holdings) v Secretary of State for the Environment* (1988) 57 P & CR 306 , 327, *R v Secretary of State for the Environment, Ex p Brent London Borough Council* [1982] QB 593 , 646, and see also Fordham, *Judicial Review Handbook*, 4th ed (2004), para 4.5 and Lewis, *Judicial Remedies in Public Law* , 3rd ed (2004), para 11–027. In the light of this, I think that Collins J applied a wrong principle in para 27 of his judgment”. This is just one example of *Simplex* being applied in a judicial review.

¹³ The Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, implementing Council Directive (85/337/EEC).

development project which in his opinion would be likely to have significant effects on the environment by virtue of the factors mentioned, all point towards an order to quash as the proper response to a contravention such as admittedly occurred in this case. For reasons given in more detail by Lord Hoffmann, I do not in any event agree that there was substantial compliance with the requirements of the Directive and the Regulations in this case. (...)"

12. Lord Hoffmann gave a similar analysis at p.616:

"Although section 288(5)(b)¹⁴, in providing that the court "may" quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds."¹⁵

13. In the subsequent decision of the Supreme Court in *Walton v Scottish Ministers* [2012] UKSC 44; [2013] P.T.S.R. 51, however, Lord Carnwath strongly cautioned against an interpretation of *Berkeley* to the effect that it established a general proposition that the Court's discretion to refuse a remedy was narrower simply by virtue of the presence of an EU law obligation. Having referred to the statements of Lords Bingham and Hoffmann cited above, Lord Carnwath made the following points:

"127 Although of course these statements carry great persuasive weight, care is needed in applying them in other statutory contexts and other factual circumstances. Not only did they rest in part on concessions by counsel for the Secretary of State, but the circumstances were very unusual in that, by the time the case reached the House of Lords, the developer had abandoned the project, and the decision had lost any practical significance.

128 In *Bown v Secretary of State for Transport, Local Government and the Regions* [2003] EWCA Civ 1170; [2004] Env LR 509, 526 I said (with the agreement of Lord Phillips MR and Waller LJ):

"The speeches [in *Berkeley*] need to be read in context. Lord Bingham emphasised the very narrow basis on which the case was argued in the House (p 607F-608A). The developer was not represented in the House, and there was no reference to any evidence of actual prejudice to his or any other interests. Care is needed in applying the principles there decided to other circumstances, such as cases where as here there is clear evidence of a pressing public need for the scheme which is under attack." (para 47)

129 That passage was noted with approval by the House of Lords in *R (Edwards) v Environment Agency* [2008] UKHL 22; [2009] 1 All ER 57, paras 63-65. Having referred to the background and reasoning of the decision in *Berkeley*, including the provision by which the grant of permission was to be treated as not within the powers of the planning Act, Lord Hoffmann added:

"But I agree with the observation of Carnwath LJ in *Bown v Secretary of State for Transport, Local Government and the Regions* ..., that the speeches in *Berkeley* need to be read in context. Both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered. In *Berkeley*, the flaw was the complete absence of an EIA and the sole ground for the exercise of the discretion was that the result was bound to have been the same."

¹⁴ See the footnote above on statutory review powers and the discretion not to quash.

¹⁵ See also similar comments per Lord Bingham in the same judgment at p.608.

130 In *Edwards*, by contrast with *Berkeley*, there had been no breach of European law, and the only breach of domestic law was the failure to disclose information about the predicted effect of certain emissions. Since then, however, the actual emissions from the plant had been monitored, and taken into account, and it would be “pointless to quash the permit simply to enable the public to be consulted on out-of-date data” (para 65). Lord Hoffmann added:

“To this pointlessness must be added the waste of time and resources, both for the company and the Agency, of going through another process of application, consultation and decision.”

The courts below had accordingly been right to exercise their discretion against quashing the permit.

131 In the present case, both the statutory context and the factual circumstances are again distinguishable from those applicable in *Berkeley*. The factual differences are dramatic. In *Berkeley* there was no countervailing prejudice to public or private interests to weigh against the breach of the directive on which Lady Berkeley relied. The countervailing case advanced by the Secretary of State was one of pure principle. Here by contrast the potential prejudice to public and private interests 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.”

14. Lord Carnwath also considered whether the EU law principle of effectiveness necessitated a different approach to the issue of the Court’s discretion to withhold relief. In addressing this point, he considered the CJEU decision in *Inter-Environnement Wallonie ASBL v Région Wallonie* (Case C-41/11) [2012] 2 CMLR 623, where the CJEU had held that, notwithstanding the obligation under Strategic Environmental Assessment Directive (2001/42) to take measures to remedy a failure to carry out an assessment, the defendant, a Belgian regional administration, was entitled to ‘exceptionally’ maintain the impugned plan in force “only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied” and providing certain other conditions were met, including possibly that the countervailing interest was related to environmental protection: [58]-[62].
15. In *Walton*, the appellant relied on the CJEU’s judgment to support the proposition that the EU principle of effectiveness materially affected the position on the discretion not to quash. Lord Carnwath rejected this submission, saying at [137]-[139]:

“137 The factual context of [*Inter-Environnement Wallonie ASBL*] was again very different. However, it is to be noted that even there practical considerations had a part to play. Having found a breach, the court accepted that, to avoid a “legal vacuum” (para 61), the order in question could “exceptionally” (para 62) be left in operation for the short period required to carry out the SEA.

138 It would be a mistake in my view to read these cases as requiring automatic “nullification” or quashing of any schemes or orders adopted under the 1984 Act where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests. As Wells makes clear, the basic requirement of European law is that the remedies should be “effective” and “not less favourable” than those governing similar domestic situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered “impossible in practice or excessively difficult”. Proportionality is also an important principle of European law.

139 Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source.”

16. In light of *Walton*, therefore, the position remains simply that the presence of an EU law right, while adding a further dimension in the assessment of discretion, by no means necessitates a

narrowing or extinguishment of that discretion and, if Lord Carnwath's judgment is to be closely applied, makes no real material difference.¹⁶

17. Lord Hope expressed agreement with the judgment of Lord Carnwath, saying at [155] that *"The fact that an individual may bring an objection on environmental grounds derived from European directives does not mean that the court is deprived of the discretion which it would have at common law, having considered the merits and assessed where the balance is to be struck, to refuse to give effect to the objection."* In the subsequent case of *R (Champion) v North Norfolk DC* [2015] UKSC 52; [2015] 1 W.L.R. 3710 Lord Carnwath expressed the position as follows at [54]: *"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"*.
18. It should be noted that in a later case Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* the Advocate-General has taken a view which could be said to be different to that in *Walton*, although it might also be said the test laid down in para 214 has parallels with *Simplex*.

"209. Nevertheless, such decisions are not necessarily contrary in substance to EU law when they are adopted in breach of procedural requirements of EU law. EU law does not therefore preclude national legislation which, in certain cases, permits the regularisation of operations or measures which are unlawful in the light of EU law.

210. Bearing in mind this possibility, it could be disproportionate in some cases, on the basis of a finding of a procedural error, to eliminate the effects of the decision concerned, with the result that the activity at issue can no longer be carried out at least temporarily. Rather, it could be necessary to weigh up the conflicting interests and, in some cases, to maintain the effects of the decision until it is subsequently regularised.

211. However, a good degree of caution must be exercised.

212. The possibility of a posteriori regularisation is limited to exceptional cases and may not offer the opportunity to circumvent EU law or dispense with applying it. However, there would be a danger of circumvention especially if before regularisation the effect of decisions adopted in breach of procedural rules was maintained too generously.

213. It must also be ensured that maintenance of the effects of a decision taken without the necessary environmental assessment does not result in environmental damage which the environmental assessment is specifically intended to prevent.

214. Consequently, the effects of such a decision may be maintained only if, on the basis of the available information and the applicable provisions, it is highly likely that the decision will be confirmed in the same form following the retrospective carrying out of the environmental assessment. If, however, there is reasonable doubt as to such confirmation, maintaining the effects should be ruled out. Crucial to the assessment are the substantive conditions for the exercise of the activity in question, in this case, aside from the applicable rules governing the operation of nuclear power stations, Article 6 of the Habitats Directive for example."

19. EU law can introduce other issues relevant to the Court's discretion, particularly in the overlap between issues of standing and discretion to grant relief, an overlap Lord Carnwath recognised in *Walton*.¹⁷ The EU law context may, in particular, introduce particularly relevant considerations in terms of the need for the Court to ensure that the grant of relief is appropriate

¹⁶ Lord Carnwath also stressed the differing statutory context in *Walton*.

¹⁷ At [103]: *"...the issue of discretion, which in practice may be closely linked with that of standing, and may be important in maintaining the overall balance of public interest in appropriate cases (...). In this respect, I see discretion to some extent as a necessary counterbalance to the widening of rules of standing."*

in light of the nature of the claimant's interest in the proceedings. An example can be seen in the case of *R (Gibraltar Betting and Gaming Association Limited) v Secretary of State for Culture, Media and Sport* [2014] EWHC 3236 (Admin), a challenge to the regulatory regime introduced in relation to remote gambling on the basis that it was in breach of Art.56 of the TFEU guaranteeing the freedom to provide services within the Union. The Claimant, an association at least one member of which had EU rights, sought a declaration that the regulatory regime was unlawful. Green J indicated in his judgment that, had he been minded to grant any relief, "I would not have granted relief in such broad terms, operating *erga omnes*¹⁸. I would have sought submissions as to the proper way to limit the declaratory relief to reflect the Claimants member's specific interests in the outcome of the litigation.": [220]. Alternatively, the appropriate relief where a measure is found to be incompatible with a person's EU rights may be to treat it as inapplicable to any person with such rights, but with such relief having no necessary effect on the application of the measure to those who do not have such rights. An example of such an approach can be found in *Imperial Chemical Industries Plc v Colmer (Inspector of Taxes)* [1999] 1 WLR 2035, wherein ICI challenged s.258(5)(b)(7) of the Income and Corporation Taxes Act 1970, which imposed as a criterion for tax relief that the business in question "consist wholly or mainly in the holding of shares or securities of subsidiary companies resident in the United Kingdom"; most of ICI's subsidiaries were located outside the EU. Following a reference, the CJEU found that the criterion was contrary to the EU right to freedom of establishment, but only in relation to companies with subsidiaries mainly within the EU. The House of Lords refused relief in the form of a declaration interpreting the provision in line with the CJEU's finding, that is, operating *erga omnes*.

CRIMINAL JUSTICE AND COURTS ACT 2015: THE GOVERNMENT'S CASE FOR REFORM AND INTRODUCTION OF THE NEW TEST

20. In September 2013, the then-Justice Secretary, Chris Grayling MP, wrote an article which was published in the Daily Mail entitled 'The judicial review system is not a promotional tool for countless Left-wing campaigners',¹⁹ in which Mr Grayling said:

"Campaign groups have taken it for granted that courts will expect the public body involved to pick up most of the costs. But I believe that it is time we put a stop to this.

Of course, the judicial review system is an important way to right wrongs, but it is not a promotional tool for countless Left-wing campaigners. So that is why we are publishing our proposals for change.

We will protect the parts of judicial review that are essential to justice, but stop the abuse.

Britain cannot afford to allow a culture of Left-wing-dominated, single-issue activism to hold back our country from investing in infrastructure and new sources of energy and from bringing down the cost of our welfare state."

21. The Ministry of Justice document *Judicial Review: Proposals for further reform (September 2013)* ("the MOJ Report"), published at around the same time, set out the Government's case for introduction of what were to become the provisions of the CJCA introducing the NSD test.
22. In relation to the proposed NSD test, the MOJ Report sets out the the existing case law, noting that, "at the permission stage the court is unlikely in many cases to be able to properly consider such arguments, given the need to understand both the nature of the potential flaw and the factual context in which it took place" (§97). The MOJ document goes on to say, at §99:

¹⁸ Meaning "towards all" or towards everyone".

¹⁹ 6 September 2013, available at <https://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html>.

“The Government considers that judicial review can too often be used to delay perfectly reasonable decisions or actions. Often this will be part of a campaign or other public relations activity and the judicial review will be founded on a procedural defect rather than a substantive illegality. The Government is considering strengthening the law and practice to enable the Courts to deal more swiftly with applications where the alleged flaw complained of would have made ‘no difference’.”

23. The MOJ report also highlighted the Government’s desire to introduce “a new statutory threshold to judge whether a case based on a procedural flaw should be dismissed. Rather than the current requirement of inevitability ...it would be sufficient that it was reasonably clear that the flaw would not or could not make a difference. This would be a lower test of probability for example a ‘high likelihood’” (§104).
24. The Government’s reforms were eventually introduced in s.84 of the CJCA, which introduced the following new subsections (highlighted) into s.31 of the Senior Courts Act 1981:

Application for judicial review

(...)

(2A) The High Court –

(a) must refuse to grant relief on an application for judicial review, and
(b) may not make an award under subsection (4) on such an application,
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.

(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.

(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates

(3C) When considering whether to grant leave to make an application for judicial review, the High Court –

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and
(b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.

(3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied.

(4) On an application for judicial review the High Court may award to the applicant damages, restitution or the recovery of a sum (...)

(...)

(8) In this section “the conduct complained of”, in relation to an application for judicial review, means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief.

25. Thus, the NSD test falls to be applied at two stages: at the permission stage, by virtue of s.31(3C)-(3F); and at the substantive stage, by virtue of s.31(2A)-(2C).
26. Section 84(5) provides, by the insertion of parallel provisions into ss.15 and 16 of the Tribunals, Courts and Enforcement Act 2007 (“the Tribunals Act”), that the position is replicated with respect to the Upper Tribunal’s exercise of its judicial review jurisdiction.
27. It is noteworthy that, while the Government’s proposals had focused on what it referred to as “procedural” defects or flaws, as opposed to “substantive illegality”, the actual wording of the NSD test as introduced by s.84 of the CJA made no such distinction. This point was commented on at the Bill stage by the Joint Committee on Human Rights, which noted, in relation to what was then Clause 52 of the Bill:

“We also point out that the scope of clause 52, as currently drafted, is significantly broader than the proposal on which the Government consulted. (...) This wide definition covers not merely procedural defects, but all possible grounds on which an application for judicial review could be based, and opens up the possibility of defendants relying on the “no substantial difference” argument in response to claims based on other, more substantive grounds, such as that the decision-maker made an error of law, acted irrationally or incompatibly with a Convention right.”

28. With the caveat of some uncertainty around the effect on Convention rights, it will be seen that that this is precisely how the changes introduced by s.84 have been interpreted, and that an argument that the provisions be interpreted in a manner akin to the changes as originally proposed by the Government has been rejected by the courts.

APPLYING THE NEW TEST

29. This section will consider the application of the NSD test in the case law under the following headings:
 - (i) The scope of the NSD test;
 - (ii) The general approach to the NSD test;
 - (iii) The Court’s approach to the counterfactual question posed by the NSD test (see below);
 - (iv) Examples of application of the NSD test/themes;
 - (v) EU law;
 - (vi) The NSD test at the permission stage/exceptional circumstances test.
30. By way of overview, the following points can be made.
31. As to the central question of whether the NSD test has made a difference, it appears tolerably clear that it has, and to the effect sought by Government, namely in precluding relief in circumstances where an otherwise successful judicial review claim is made out. It is now clear that the NSD test imposes a lower threshold for a defendant seeking to obtain a refusal to grant relief than the *Simplex* test. It is also clear from judicial interpretation that the courts recognise that the counterfactual question the court is required to ask itself under the NSD test is a materially different exercise from the more high-level *Simplex* test. This is evidenced in two respects.
 - (i) In the appeal courts having to give guidance on what approach the court is to take to the counterfactual question, which has been described as an objective approach to

the decision-making process; but not considering matters as if the court itself is the decision-maker.

- (ii) In a number of statements by judges who, in concluding that the NSD test is not made out, have emphasised discomfort at having to stray into considering the underlying merits of the decision under challenge. There are, however, certain notable trends in relation to circumstances in which the courts are less likely to find the NSD test met. One of those appears to be in situations where a court is not reviewing an exercise of executive discretion but considering for itself the lawfulness of the administrative act. Another appears to be in consultation challenges, where the requirement to conscientiously take into account the products of consultation appear to be being taken as a significant barrier to satisfaction of the NSD test.
32. The effect of the NSD test at the permission stage is more difficult to document for obvious reasons, and case law on the application of s.31(3C)-(3F) is rarer. However, there is reason to suppose that the effect of the NSD test at the permission stage might be less drastic than was feared as the courts have tended to emphasise that relief would not be refused on the basis of the NSD test without clear submissions and, in particular, evidence to assist the court in answering the counterfactual question of what the result of the decision-making process would have been absent the legal error. Of course, at the permission stage evidence from the defendant is not the norm. Moreover, the ability of defendant public authorities to rely on s.31(3C)-(3F) is dependent on the Administrative Court's appetite for considering such matters in the context of a paper determination of permission or a short renewal hearing. The risk of such an exercise leading to satellite litigation and drawing out the permission stage was noted in an early decision considering the NSD test.²⁰

The scope of the NSD test

33. The first matter relevant to scope is that the NSD test only applies to "judicial review". It does not apply to statutory review cases (e.g. s. 288 of the Town and Country Planning Act 1990 and similar). In such cases the text remains *Simplex*. However, in *Save Our Greenhills Community Group v SSCLG* [2016] EWHC 1929 (Admin) it was said by Dove J. at [44] that "I leave open for consideration in another case whether the principles set out in section 31(2A), (3C) and (3D) should be read across into a challenge under section 288 of the 1990 Act or other similar statutory challenges."
34. There was some indication, especially initially, of a tendency to deal with the NSD test and the *Simplex* test together. For an example of the NSD test being treated by as essentially interchangeable with the *Simplex* test, see the judgment of Gilbert J in *R (Irving) v Mid-Sussex District Council* [2016] EWHC 1529 (Admin) at [71].²¹ There now seems a reasonable amount of clarity that the NSD test imposes a lower test for a refusal to grant relief, as was the clear aim of the Government in proposing the NSD test. See, for example:
- (i) "Section 31(2A) alters the previous position (*Simplex* ...) in three ways. First, the test is modified in that the court no longer needs to be satisfied that the outcome would have been the same, only that it is highly likely. Secondly, the outcome need not be exactly the same, provided it would not have been substantially different. Thirdly, the court does not have a discretion; where the conditions set out in the statutory provision are met, it is under a duty

²⁰ *Logan* (above) per Blake J at [59]: "I do not rejoice in the prospect of having to make such assessments in cases like the present at the permission stage. It seems to me to have the potential for increasing the length, cost and complexity of the proceedings and bringing an unwelcome constraint on the court's flexible assessment of the interests of justice. In the absence of clear pointers at the time that the flaw was a technical one that made no difference, the court will inevitably be drawn into some degree of speculation or second guessing the decision of the public authority that has the institutional competence to make it."

²¹ "Finally, I have considered whether this is a case for the application of section 31(2A) of the Senior Courts Act 1981 as amended by Criminal Justice and Courts Act 2015 or whether the *Simplex* test applies. In other words, would the decision have been the same had the officer approached the Conservation Area issue properly? I am by no means persuaded that it would have been."

to refuse relief.”: **R (Wet Finishing Works Ltd) v Taunton Deane BC** [2017] EWHC 1837 (Admin) at [74];

- (ii) “Although section 31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as **Simplex GE Holdings Ltd v Secretary of State for the Environment** [1988] 3 PLR 25, the threshold remains a high one: that it is highly likely that the outcome would not have been substantially different. This involves an evaluation of the counter-factual world in which the identified unlawful conduct by the public authority is assumed not to have occurred.”: **R (Public and Commercial Services Union) v Minister for the Cabinet Office (“PCSU”)** [2017] EWHC 1787 (Admin) at [89]

35. The NSD test under s.31(2A) applies to all forms of relief that may be granted on an application for judicial review, including declarations, but not declaratory judgments: see **R (Logan) v London Borough of Havering** [2015] EWHC 3193 (Admin) at [58]; **R (Hawke) v Secretary of State for Justice** [2015] EWHC 3599 (Admin) per Holman J at [65]. In other words, the fact of s.31(2A) being satisfied does not preclude the giving of judgment setting out the existence of an error of law.

36. The ‘conduct’ in relation to which the NSD test is to be applied, per Jay J, “can only be a reference to the legal errors (in the *Anisminic* sense) which have given rise to the claim”: **R (Skipton Properties Limited) v Craven District Council** [2017] EWHC 534 (Admin) at [97]. Similarly, in **R (Cooper) v Ashford BC** [2016] EWHC 1525 (Admin) John Howell QC sitting as a Deputy High Court Judge said at [105]:

“... for present purposes, when final relief is being considered, in my judgment “the conduct complained of” must refer to the conduct complained of in so far as the conduct is found to be unlawful. It is true that section 31(8), as inserted by section 84(3) of the Criminal Justice and Courts Act 2015, defines the relevant conduct as “the conduct (or alleged conduct) of the defendant which the applicant [for judicial review] claims justifies the High Court granting relief.” But no applicant can claim that conduct that the court has not found unlawful justifies the grant of any relief.

37. This approach is logical, and has been consistently applied. Section 31(8), however, does seem to define ‘conduct’ more broadly, as “the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief”. This would, on the face of it, seem to include those matters which form part of the claim but are not made out as legal errors. This would appear a somewhat unworkable definition for the purposes of s.31(2A), as it would require the Court to disregard lawful aspects of the decision-making process as well as unlawful ones. John Howell QC’s approach avoids this. Moreover, the comments of Laing J that “the wider definition in section 31(8) ... seems more apposite to the considerations which arise at the permission stage”²² appears, with respect, a sensible approach to the issue.

38. There are limits to the scope of the NSD test. In **R (Harvey) v Mendip District Council** [2017] EWCA Civ 1784, the planning authority granted permission for a development comprising six dwellings in a small village where the relevant policy required permission to be granted on the basis of need, and the then-current identified need was for five dwellings. The permission was found to have been granted unlawfully and contrary to the policy, and s. 31(2A) was raised. Sales LJ said:

“46. The Planning Board thought that they were acting in accordance with the Local Plan, whereas in fact the proposed development contravened it. They did not attempt to identify any reasons which might have been sufficient to counterbalance the weight they should have given to policy DP12, which on its

²² See **DAT** (above) at [65] “...Counsel agreed, in my judgment rightly, that that ‘conduct’ must be the conduct of the Council in so far as I have held that it was unlawful (I note the wider definition in section 31(8) but that seems more apposite to the considerations which arise at the permission stage).”

proper interpretation indicated that planning permission for this development should be refused. They had been given good reasons by the Council's planning officer why the application should be refused. Also, the Council's housing officer had called the actual need for affordable housing in North Wootton into serious question. In those circumstances I find it impossible to say that it is "highly likely" that if the Planning Board had appreciated that they were acting in breach of the Local Plan they would nonetheless have granted the outline planning permission they did for up to six affordable homes and the open market home."

39. It was also argued that "the outcome for the applicant would not have been substantially different" because the Council could, in determining the application, have granted planning permission with a condition restricting the number of affordable homes to five affordable homes, and the difference between five homes and six homes would have had a negligible impact on the appellant". Sales LJ rejected this submission at [49]:

"I should say that I am again very doubtful that this argument can be right, since it seems to me that the Council was obliged to consider the planning application which was actually made to it and to grant or refuse it in the terms it was made, i.e. as an application for permission for up to 6 affordable homes and an open market home."

The general approach to the NSD test

40. The courts have provided the following guidance on the general approach to the application of the NSD test:

- (i) The question is, in effect whether "it is highly likely that the same decision would be have been reached by the Secretary of State": **R (Pow Campaign Ltd and others) v Waverley Borough Council and others** [2018] EWHC 2162 (Admin) at [67];
- (ii) "Section 31(2A) does not expressly impose a burden of proof on a defendant, but it seems to me, in accordance with general principle, that he who asserts must prove. In other words, if the Council asserts that section 31(2A) applies, it must satisfy me that that does.": **Bokrosova v London Borough of Lambeth** [2015] EWHC 3386 (Admin) at [88].
- (iii) "... although the court must consider section 31(2A) of its own initiative when considering final relief (as opposed to the grant of permission when it may have a discretion whether or not to do under section 31(3C)), the court must still be satisfied on the balance of probabilities that it is highly likely that (in this case) permission would have been granted had the unlawful conduct found had not occurred.": see **Cooper** (above) at [107].

41. Further, it has been emphasised repeatedly that the Court is unlikely to grant relief on the basis of the NSD test without clear submissions and, in particular, evidence to assist it in answering the counterfactual question of what the result of the decision-making process would have been absent the legal error:

- (i) The starting point is that the assessment should "normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision maker": **Logan** (above) at [55]. Blake J. went on to say:
"... Any other course runs the risk of reducing the importance of compliance with duties of procedural fairness and statutory or other requirements that certain matters be taken into account and others disregarded. Indeed, it would undermine the efficacy of judicial review as an instrument to ensure that the rule of law applies to decision-making by public authorities, by deterring claimants from bringing a case or the court from granting permission by a declaration by a decision-maker who has failed to obey the law to the effect that obedience would have made no difference. Whatever else Parliament may have intended to achieve by this legislation, I cannot infer that it included so draconian a modification of constitutional principles. It may well be that the new provision was only intended to apply to somewhat trivial procedural failings that could be said to be incapable of making a material difference to the decision made. If recourse can be had to the drafting history and statements of sponsoring ministers to assess the purpose of the legislation and the mischief to be cured there may be

material support for such a conclusion. Such an approach is permissible without impugning parliamentary privilege where the issues of justification, proportionality and compatibility with European norms are engaged: see for example **R (Age UK) v Department for Business, Innovation and Skills (Equality and Human Rights Commission intervening)** [2010] ICR 260, paras 42-59."

- (ii) **R (Enfield) v Secretary of State for Transport** [2016] EWHC 3758 (Admin) per Laing J at [106]: "...the threshold stated in the amendments is relatively high. For that reason, and for the reasons alluded to by Blake J in **Logan**, it seems to me that a court should normally expect a witness statement or other document with a statement of truth to support a defendant's reliance on these amendments. There is no such material here. For that reason alone, I do not consider that the test in section 31(3C) or (2A) is met in this case. That means that I do not consider that either the fact, or the outcome, of the Defendant's reconsideration means that I am bound to refuse permission to apply for judicial review on the argument about relevant considerations."
- (iii) An example of the effect of evidence from the planning officer in a challenge to a planning decision can be seen in the decision in **R (Rogers) v Wycombe District Council** [2017] EWHC 3317 (Admin) at [70]: "...I must refuse relief. There are no reasons of exceptional public interest to the contrary. I base these conclusions upon Mr Martin's evidence, which was supported by the views of the Council expressed in the officer report recommending discharge. ... Mr Martin, in his evidence, considered that, even if the application had been decided by the Planning Committee, it was highly likely the outcome would have been the same, for the reasons he gave.":
- (iv) In **(Harvey)** (above), the Court of Appeal said at [47] "...it is relevant that [counsel for the defendant Council] presented no positive argument on behalf of the Council in support of such a view and the Council adduced no evidence to support it. Although a court will be appropriately careful in reviewing evidence produced by a decision-maker long after the decision to say how they would have proceeded in the sort of hypothetical scenario on which application of section 31(2A) depends, and will evaluate it carefully in light of the contemporaneous materials in the case, it is nonetheless telling that none of the decision-makers in this case have felt able to put before the court any witness statements to support the contention that they would have granted outline planning permission for the development even if they had appreciated that it was in breach of the Local Plan. In the absence of submissions and evidence from the Council, I simply do not know whether the decision-makers on the Planning Board would say there were material considerations which might have caused them to think it right to depart from the Local Plan and if so what those considerations were."
- (v) **PCSU** (above), per Sales LJ (as he then was) at [91] deprecated a witness statement from the responsible official that was "not evidence of past facts by a witness with knowledge of those facts, but an exercise in speculation about how things might have worked out if no unlawfulness had occurred. It is true that Mr Jinks's speculation is informed by a background understanding of the parameters within which the Minister was working and thus is entitled to some weight. However, self-interested speculations of this kind by an official of the public authority which has been found to have acted unlawfully should be approached with a degree of scepticism by a court. That is especially so where the public authority has not provided a full evidential picture of all matters which bear upon such parameters."
- (vi) However, the Court has emphasised that evidence is not a strict requirement as such: "I reject Mr Broach's submission (based in part on an obiter passage of a decision of mine in another case) that a defendant cannot rely on this provision unless it has a witness statement showing that the section 31(3C) test is met. Whether a witness statement is necessary will depend on the facts.": **R (DAT) v West Berkshire Council** [2016] EWHC 1876 (Admin) at [73].

42. The last point is related to the point that s. 31(2A) imposes a duty on the Court not to grant relief if the NSD test is met. This is why there is no bar to the application of s. 31(2A) just because a defendant and/or interested party fails to plead it. The position in relation to the statutory provisions at the permission stage is different. There the Court has a discretion to consider the

NSD test unless the defendant asks it to consider this whereupon it must do so. The defendant need not, but can, ask for this in its summary grounds. It could though ask for this to be done at some other stage e.g. the oral renewal hearing.

The Court's approach to the counterfactual question

43. In applying the NSD test, the Court must consider whether or not it was highly likely that the outcome would not have been substantially different had the conduct not occurred - the counterfactual question. In light of the decision of the Court of Appeal in *R (Goring-on-Thames PC) v South Oxfordshire DC* [2018] EWCA Civ 860 [2018] 1 W.L.R. 5161, it appears relatively clear that the approach that the Court is to take to the counterfactual inquiry is an 'objective' one in which it considers the evidence as to the decision-making process and forms its own view as to what the counterfactual position would have been, but without putting itself in the position of the decision-maker in doing so. There remains, however, some tension between the counterfactual that the NSD requires the Court to consider and the constitutional reluctance of the courts to stray into consideration of the underlying merits of a decision.
44. *Goring*, one of the relatively few Court of Appeal authorities on the NSD test, concerned an unsuccessful application, under CPR r.52.30, to reopen the refusal of permission to appeal by a Court of Appeal judge against the decision at first instance of Cranston J. Cranston J had held that the planning authority had failed to discharge their statutory duty under s.72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to give considerable importance and weight to harm to the conservation area, but nevertheless refused to grant relief on the basis of s.31(2A). Cranston J said this at [69]:

"In my view it is highly likely that the outcome would not have been substantially different if the Council had applied the correct test. If there was any harm to heritage assets the response of both conservation officers, from the Council and West Berkshire Council, was that it was, at most, minor harm. That approach then became part of the officer's report. More importantly, the factors weighing in favour of the grant of planning permission were weighty, the opportunity of generating renewable energy from an existing water source. In my view there is simply no prospect that this issue would make any difference to the overall planning balance if the decision had been taken in accordance with section 72."

45. Before considering the approach to the counterfactual, another point dealt with on the appeal can be highlighted. The appellant had argued that the s.31(2A) had no application when a claimant succeeded in establishing a substantive error of law as opposed to "a minor procedural technicality". This was said to be on the basis that the s.31(2A) ousted the High Court's jurisdiction in claims for judicial review and, as such, the term 'conduct' in s.31(8) should be narrowly construed so as to exclude substantive errors of law. It will be noted that this mirrors the original stated intent behind the introduction of the NSD test as set out in the MOJ Report. The Court of Appeal, despite the fact that the high threshold under CPR r.52.30 did not require it to resolve the substantive issue, roundly rejected the appellant's argument as follows at [47]:

"...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 (...). 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. ... 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 decision-making. It is not expressly limited to "procedural" conduct. Nor, in our view, is such a qualification implied."

46. The appellant's second argument was concerned with the approach that should be taken to the counterfactual question. The appellant argued that, in performing the s.31(2A) procedure, the

judge had “ventured into the planning merits, offending the basic principle that questions of planning judgment lie within the sole competence of the planning decision-maker, subject only to the court’s intervention on public law grounds ... To describe the factors weighing in favour of planning permission, including the benefit of generating renewable energy, as “weighty”, which the judge did at [69], was to attribute weight of his own choosing to those considerations”. The Court of Appeal also rejected this argument, at [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.”*

47. The Court’s terminology of an “objective assessment of the decision-making process” combined with warning against the Court casting itself as decision-maker should sensibly be interpreted as requiring a rigorous approach to the evidence as to the counterfactual which, realistically, is only going to be presented by the public authority itself. This is consistent with the approach that the courts have generally taken to evidence on the counterfactual position. In **Cooper** (above) John Howell QC sitting as a Deputy High Court Judge said at [107]:

“In determining whether it appears that it is highly likely that would have occurred, the question is not whether it is highly likely that the judge hearing the case would have taken the same decision. Section 31(2A) of the 1981 Act does not require the court to treat itself as the decision maker. Moreover the court must act on the evidence it has or on reasonable inferences from it.”

48. Against the above citation from [55] of the judgment in the **Goring** decision must be weighed a number of significantly more reluctant judicial pronouncements in regard to the prospect of conducting the kind of exercise that was carried out by Cranston J, including at the level of the Court of Appeal. In **R (Graham Williams) v Powys County Council** [2017] EWCA Civ 427, Lindblom LJ expressed the view that the courts should take a cautious approach in relation to exercising their discretion under s.31(2A) in such situations, at [72]:

“It seems to me that in this case the interests of a lawfully taken decision must prevail, as normally they should, and that the planning permission must therefore be quashed so that the county council can take the decision again, properly directing itself on the duty under section 66(1). Of course, it is quite possible that when this is done the outcome will be the same, and Mr Williams should not be surprised if it is. But in exercising its discretion in a case where the critical issue involves matters not merely of fact and planning judgment but of aesthetic judgment as well, in the performance of a duty imposed by statute, the court should be very careful to avoid trespassing into the domain of the decision-maker – here the county council as local planning authority. With this in mind, I do not think it is possible for us to conclude that the county council’s decision in this case should be allowed to stand, even on the more generous basis of section 31(2A) of the 1981 Act.”

49. Singh J (as he then was) expressed a similar view in **R (Midcounties Co-operative Limited) v Forest of Dean District Council and another** [2017] EWHC 2056 (Admin):

“117 ... I am not of the view that it is “highly likely” that the outcome would not be substantially different for the Claimant. The errors which I have found to have occurred in the Defendant’s approach in this case in Grounds 2 and 3 are such that, in my judgement, the statutory test is not met. I do not know what view the Defendant will take if it directs itself correctly according to law. It did not ask itself the right questions, in particular in respect of the retail impact issue which has been raised under Ground 3. If it did direct itself correctly as a matter of law it would have to reach a planning judgement.

118 That leads me on to my second reason for concluding that the statutory test is not met in the present case. As is well known and well established on the authorities, matters of planning judgement are essentially ones for the democratically elected planning authority. It is not for this Court generally speaking to anticipate what the outcome would be if a planning authority directs itself correctly according to law. In my judgement, this is not a case where the Court can say that the statutory test is met.”

50. Further, per HHJ Belcher in *R (Piffs ELM Ltd) v Tewkesbury Borough Council* [2016] EWHC 3248 (Admin) at [54]:

“I cannot come to the conclusion that it would be highly likely that the decision would have been the same without Miss Desmond's involvement. Issues between jobs on the one hand and countryside on the other are classic issues of planning judgment, but different people may come to different conclusions. It is pertinent to note, in my judgment, that the vote in the Planning Committee in February 2016 was close.”²³

51. The Court of Appeal cites Lindblom LJ's judgment in *Williams* at [55] of *Goring*, suggesting the two decisions are consistent with one another. On the face of it, the above judgments are reconcilable with *Goring* on the basis that the former cases, consistent with *Williams*, deprecate straying into matters of planning judgment; whereas *Goring* indicates that the judge should undertake their own objective assessment. What is perhaps less clear is identifying the dividing line between those situations where it is permissible and impermissible to conduct the counterfactual assessment. It could, for example, all too easily be said that both the *Williams* and *Goring* judgments simply describe the same activity of considering the counterfactual but in diametrically opposed and, as such, contradictory, ways. While it is possible that an appeal court will seek to clarify the applicable principles, it is perhaps at least as likely that the current position, which can be said to provide for a significant degree of judicial flexibility in the application of the NSD test, will simply be maintained.

Examples of application of the NSD test/themes

52. Examples of the NSD test being met:

- (i) *R (B) v Office of the Independent Adjudicator* [2018] EWHC 1971 (Admin). A medical student applied for judicial review of a decision of the Office of the Independent Adjudicator for Higher Education (“OIA”) that his complaint about a decision of his University's fitness to practise committee was ineligible for its consideration because the subject matter of the complaint had already been considered in earlier court proceedings. The OIA also though had gone on to conclude that even if the complaint had been eligible, it would have refused to uphold it because the university had acted reasonably in refusing to re-open the fitness proceedings. The Court held that it was highly likely that the result would have been the same even if the OIA had considered the complaint;
- (ii) In a challenge on the basis of (inter alia) a failure to give adequate reasons for the giving of a charging notice by HMRC, the claim would have failed under s.31(2A) in any event because “[t]he designated officer had full and proper reasons in mind when deciding to issue the charging notice and could have set them out.” *R (Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716 at [88];

²³ See also the comments of HHJ Belcher in *R (Tate) v Northumberland CC* [2017] EWHC 664 (Admin) at [58], concluding that s.31(2A) did not assist: “...having reminded me, repeatedly and perfectly properly, during the course of his submissions, that matters of planning judgement are matters for the decision-makers and not for this court, it seems to me that in seeking to rely on Section 31(2A), [counsel for the planning authority] is inviting me to substitute my own subjective conclusion as to whether this is limited landfill, in order to decide that the lack of reasoning would not have made any difference. I recognise that in making a further reasoned decision in relation to this planning application, the planning committee may decide that the proposal does indeed amount to limited infill, but that is truly a planning judgement to be made by them and not by me. In my judgment, I cannot properly conclude that the outcome for the applicant in this case would not have been substantially different if the conduct complained of had not occurred.”

- (iii) In *Mpiani v Highbury Corner Magistrates' Court* [2019] EWHC 449 (Admin), a single justice of the peace had acceded to an application extend the appellant's bail conditions in circumstances where the relevant statutory provision required such an application be considered by two justices of the peace. Stuart-Smith J held that relief should be refused on the basis of s.31(2A) because "*there is no reason to speculate that two justices would have reached a result on the balance of hardship or the conditions to be applied that would have differed materially from that reached by the single judge*".
- (iv) A challenge on the basis that the Secretary of State's refusal to approve a journey for the export of sheep to continental Europe that did not take the shortest route, in contravention of Regulation 1/2005, failed to take into account commercial considerations, would have failed on the basis of s.31(2A) in any event: *R (MAS Group Holdings Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2019] EWHC 158 (Admin).
- (v) *Hoare v Vale of White Horse District Council* [2017] EWHC 1711: Defendant wrongly concluded that the one of the policies in a local neighbourhood plan was in conformity with the local plan. However, the Court held that, even in these circumstances, it was highly likely that the examiner and district council would have concluded that the neighbourhood plan was in *general* conformity with the local plan and that was the relevant test. Accordingly, relief was denied.
- (vi) *R (Bruton) v Secretary of State for Justice* [2017] EWHC 1967 (Admin): judicial review of a refusal to release a prisoner early on compassionate grounds. The Court found procedural unfairness. But also found that breach not serious, and that the decision was likely to be no different. Relief was refused.
- (vii) *CK Properties (Theydon Bois) Limited v Epping Forest District Council* [2018] EWHC 1649 (Admin) at [90]: alleging failure to make documents available before publishing a draft Development Plan. Supperstone J. refused to quash saying "*Mr Sullivan says that if he had been provided with Appendix B prior to 14 December 2017 he would have been able to explore with his planning consultant and professional advisers the ability to provide a SANG and discuss it with the council. It appears to me that it is highly likely that the council would have made the same decision on 14 December 2017 if Appendix B had been available. Even without Appendix B the council's reasons for not allocating the claimant's site were clear from the report, the sustainability appraisal, the SSR and the explanation given to councillors who attended the member briefing on 28 November 2017, as demonstrated by the transcript of the debate at the ECM. In any event the council, having *202 debated the proposed amendment, took its decision on the basis of the legal advice given as they were entitled to do, which was for a reason unconnected with the unavailability of Appendix B*". The Court also had regard to the availability of an alternative remedy ([91]) namely the independent examination process that was to follow.

53. Examples where the Court has held that the NSD test has not been met:

- (i) *R (Liverpool Open and Green Spaces Community Interest Co) v Liverpool City Council* [2019] EWHC 55 (Admin). In refusing to apply s.31(2A) in a successful judicial review of a decision to grant planning permission on the basis of a failure to adequately consider heritage assets: "*I do not know what the outcome would have been if the decision had been lawfully taken. The conduct complained of was not cosmetic or insignificant. Nor was the decision an easy one for the LPA. The objections were significant and extended to substantial heritage concerns entertained by the LPA's own officers. The OR itself, strongly partisan in favour of the development proposal, described the application in the conclusion section as "finely balanced".*"
- (ii) In *Cemex (UK) Operations Ltd v Richmondshire DC* [2018] EWHC 3526 (Admin), a grant of planning permission was quashed where the local authority had failed to have regard to planning policy and guidance on the undesirability of managing

noise by keeping windows at the property closed. HHJ Belcher at [65]: “I do not consider Section 31(2A) assists me in this case. In my judgment I cannot possibly conclude that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Had the PPG²⁴ guidance been considered in the context of the need to avoid closing windows as a way of controlling noise, it might be the case that mechanical ventilation would have been required as recommended in the Apex Report. Equally, some other form of mitigation might have been proposed. These are matters of planning judgement, properly within the sphere of those qualified to make these decisions, and not matters upon which I could or should make any judgment.”

- (iii) **R (Sefton Metropolitan Borough Council) v Highways England** [2018] EWHC 3059 (Admin) at [91]: “The conduct complained of was the alleged unfairness of excluding the option of a tunnel from the consultation. If that conduct had not occurred, the tunnel option would have been included within the consultation despite the high estimated cost of building one. Had it been included, I do not know what the outcome would have been. It does not appear to me highly likely that it would necessarily have been substantially the same.”
- (iv) **R (Sabine Guerry) v London Borough of Hammersmith & Fulham** [2018] EWHC 2899 (Admin) at [55]: “I am not satisfied that the decision would necessarily have been the same. The main objections to new development in the borough relate to loss of sunlight, daylight, outlook and privacy. A number of properties on Pennard Road were already reporting deviations from the VSC²⁵ guideline. Had Councillors been made aware of a separate distinct reason why daylight at the Pennard Road properties might be adversely affected by the development they may have sought more information about the implications for the Pennard Road properties and requested further revisions to the design. Alternatively they might not have done. It is a matter of speculation. It cannot however be said that they would necessarily have come to the same conclusion. For the same reasons, it does not appear to me to be highly likely that the outcome would not have been substantially different if Councillors had been made aware of a separate distinct reason why daylight at the Pennard Road properties might be adversely affected by the proposed development.”
- (v) **R (Noye) v Secretary of state for Justice** [2017] EWHC 267 (Admin): Judicial review of decision not to transfer a prisoner to an open prison. The Secretary of State was found to have made an error by departing from a Panel finding without good reason. It was possible that the Secretary of State, if he had not made the error of law identified, might have reached the same conclusion. However, it was not highly likely that he would have done so. Relief was thus granted.
- (vi) **Skipton** (above): Local planning authority adopts a document on affordable. The Court holds it was a development plan document and should have been subject to the statutory procedures applicable to such plans before adoption (e.g. consultation, strategic environmental assessment (“SEA”), examination etc.). It was held, not surprisingly, that the failure to consult, carry out SEA and submit the document for examination meant that the outcome but for error could not be known. Relief was granted.
- (vii) **PCSU** (above): The Court found a failure to consult unions under the Superannuation Act 1972. Held it was possible for Court to critically assess the difference the Union’s involvement would have made. Relief was granted.

54. The courts appear particularly resistant to finding the NSD test met in certain categories of case. The first of these are challenges where the Court takes the primary role in determining whether an administrative act was unlawful, rather than simply reviewing the way in which a decision was made. Challenges in relation to unlawful detention provide the clearest illustration of this trend.

55. Where the Court is assessing the lawfulness of detention, it has been said that there is “no room for the application of section 31(2A)”: **R (Sheikh) v SSHD** [2019] EWHC 147 (Admin) at [110], a successful challenge on **Hardial Singh** principles. In **R (SW) v SSHD** [2018] EWHC 2684

²⁴ Planning Practice Guidance: <https://www.gov.uk/government/collections/planning-practice-guidance>.

²⁵ “Very Special Circumstances” – the relevant Green Belt planning test.

(Admin) a challenge on the basis of lack of vires and failure to refer the claimant in line with anti-trafficking obligations, the judge said at [60]:

“If I had ... taken the view that the Claimant's detention was unlawful because of the failure to serve written notice of curtailment, I would not have accepted the submission that this is an appropriate case to decline to grant relief. This is not like a case in which a public authority, which has a statutory power to take a particular decision, has failed to take a relevant consideration into account when reaching the decision, but where it is clear that the decision would have been the same even if the consideration had been taken into account. Rather, this is a case in which it was alleged that the Claimant was detained unlawfully, in circumstances in which there was no statutory power to detain her. If I had accepted the Claimant's argument on this Ground, I would not have been prepared to decline to grant relief on the basis that the Defendant could have detained her on 19 September 2017, if it had acted lawfully.”²⁶

56. By parity of reasoning, it would appear likely that a similar approach would be applied in cases where a breach of an ECHR right were made out. In *R (Balajigari and others) v Secretary of State for the Home Department* [2019] EWCA Civ 673, the Court of Appeal found that the Secretary of State was obliged, where minded to refuse indefinite leave on the basis of dishonesty, to indicate that suspicion to the applicant, give them an opportunity to respond, and take that response into account. The Secretary of State argued that relief should be refused on the basis of s.31(2A). Underhill LJ, while accepting in principle that it may be open to the Upper Tribunal to refuse relief on the equivalent provision to s.31(2A) in the Tribunals Act, on the basis that the decision-maker would have been bound to refuse the decision even had they had an opportunity to consider an innocent explanation for the issue in question, noted that, where human rights came into play, “the focus will shift from procedural fairness to the question whether [the appellant] did indeed act dishonestly, and the issue of materiality will fall away”: [141]
57. Part of the reason for that is that a breach of many ECHR rights would surely be considered to be the breach of the right itself; otherwise, it may be possible to argue, for example, that relief could be refused where the executive relies on evidence obtained by torture for some decision-making process where that evidence is not decisive of the outcome of that decision-making process. Such an approach would appear inconsistent with, and contrary to the spirit of, existing case law on ECHR rights. It is, however, noteworthy, that this analytical approach has many parallels with the strict protection to procedural rights set out in cases such as *John v Rees* and *ex p Cotton*, with which the NSD test is in significant tension.
58. The second category of cases in which the courts appear particularly resistant to finding the NSD test met are consultation challenges, where the requirement for the public authority to conscientiously take into account the product of consultation presents significant difficulties for a conclusion that the NSD test has been met.
59. In *R (Law Society) v The Lord Chancellor* [2018] EWHC 2094 (Admin) [2019] 1 W.L.R. 1649, a Divisional Court refused to apply s.31(2A) in the context of a challenge on the basis of the Lord Chancellor's failure to disclose information which was central to the justification for a reduction in legal aid available in criminal matters. The Lord Chancellor submitted that, had the information in question been disclosed, it would have in any event have been possible to rebut the criticisms of the factual basis for the reduction in fees. The Court, citing Lindblom LJ in *Powis*, said that “[i]t would be wrong in principle for the court in a case where the hypothetical decision would have been made on the basis of materially different information and advice from the actual decision to make a judgment expressed as a high likelihood about what the Lord Chancellor would have decided.”: [141].

²⁶ This is not, however, an objection in principle; a particular case may justify the application of s.31(2A). See, for example, *Omed Abid* (above) where the NSD test was (in principle) said to be met at the permission stage. See below for further discussion of this case.

60. Similar reasoning in evidence in *R (Holborn Studios Limited) v The Council of the London Borough of Hackney and GHJ (Eagle Wharf Road) Limited* [2017] EWHC 2823 (Admin) [161]: “...the main conduct complained of (which I have found to be unlawful) is the failure to re-consult the public in May 2016 on the amendments made to the 2015 planning application. I have already explained why I am not satisfied that such consultation would have made no difference to the Claimants. Moreover, had public consultation occurred, what would have been said would have had to have been assessed and such matters of planning judgement are essentially ones for the democratically elected planning authority. It is not for this Court generally speaking to anticipate what the outcome would be if a planning authority had had regard to representations which they have not considered”. It was also relevant that the representation in question may have led to amendment of the application for planning permission that was submitted in due course: *R (Bishop) v Westminster Council* [2017] EWHC 3102 (Admin) at [28]
61. Below are examples of certain factors that the courts have considered to be relevant to the question of whether the NSD test is satisfied:
- (i) The strictness with which a policy that has been misapplied was expressed and the importance of the public interest protected: see *R (Lensbury Limited) v Richmond-Upon-Thames London Borough Council* [2016] EWCA Civ 814, where the policy in question provided that “The strongest protection should be given to London’s Metropolitan Open Land and inappropriate development refused, except in very special circumstances, giving the same level of protection as in the Green Belt.”
 - (ii) The presence of a statutory duty. Thus Rhodri Price Lewis QC sitting as a Deputy High Court Judge in *R (Katharine Butler) v East Dorset District Council* [2016] EWHC 1527 (Admin) had to consider a failure to consider whether the proposal was in accordance with the Development Plan as required by s. 38(6) of the Planning and Compulsory Purchase Act 2004. This a key cornerstone of the planning system. The Judge said at [36]-[37]:

“36 Mr Edwards urges that even if I did make those findings I should refuse relief because the substance of all those issues namely the harm to heritage assets was before the committee. The committee members knew what the heritage assets in question were, they understood the nature of the identified harm and that officers considered it less than substantial. They understood that it was for them to judge that harm against the public benefits of the proposal and they agreed with the officer that the benefits set out before them in the OR outweighed the identified less than substantial harm. So, Mr Edwards argues, the decision to grant planning permission would have been the same even if they had properly understood the position in relation to the development plan or at the least it is highly likely that planning permission would have been granted even if the errors in relation to the development plan had not been made.

37 I do not accept that submission. The exercise of deciding whether an application for planning permission for a proposed development is in accordance with the development plan “is an essential part of the decision-making process”: see *Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin) at [27]. The Defendant needed to understand the nature and extent of any departure from the development plan in order to consider on a proper basis whether such departure was justified by other material considerations: see *Hampton Bishop* at [33]. It is only in that way that the Defendant could give the development plan its statutory priority. Policies HE1 and ME5 are policies of a development plan that enjoys statutory priority. Paragraph 134 of the NPPF and its balancing exercise is a material consideration to be taken into account but it is not part of the development plan. In my judgment it cannot be said that the members would have been highly likely to vote to grant planning permission if they had properly been advised that the proposal before them was in breach of the key policy of the development plan dealing with heritage assets, HE1, and in breach of the key policy in the development plan on renewable energy, ME5. Of course on a redetermination of the application for planning

permission it will be open to them so to decide in their planning judgment having properly considered the development plan and all material considerations but that will be for them to decide having properly understood and considered the development plan."

- (iii) Where the Minister is departing from the advice of a body/ his officials. It is suggested that it may be more difficult for a defendant to persuade the Court to apply s.31(2A) in circumstances where the Minister is departing from his officials' advice: see *Noye* (above) at [52].²⁷

EU law

62. There does not appear to have been consideration of whether the existence of an EU law obligation would affect the operation of the NSD test. In *R (Langton) v Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 2190 (Admin), a challenge to Natural England's failure, in reach of the Habitats Regulations, to conduct assessments on the indirect effect on birds at protected sites close to badger cull areas prior to issuing licences, Sir Ross Cranston found that the breach of the Habitats Regulations were made out, but declined to grant relief on the basis of s.31(2A) because Natural England had established the NSD test through its evidence. There does not appear to have been any consideration of the question of whether the fact of Natural England's obligations arising from EU law should affect the Court's discretion.
63. The position in relation to EU law appears to be a reasonably moot point as the non-discretionary effect of the s.31(2A) test, the pre-emptive nature of the NSD test if applied at the permission test, and the lower threshold for refusing relief all seem like matters would be relevant for EU law purposes, and in the context of the principle of effectiveness in particular.

The NSD test at the permission stage/exceptional circumstances test

64. There is limited case law on the application of the NSD test at the permission stage. In *R (Omed Abid) v SSHD* [2017] EWHC 1962 (Admin) was a case in which the Secretary of State made a number of errors in detaining an Iraqi national. The Court, however, on a proper application of the Secretary of State's policy, the claimant would have been detained in any event. In relation to a new ground raised by the claimant, the judge found the NSD test under s.31(3C)-(3D) but that there were exceptional circumstances:

"...Although it seems to me highly likely that the outcome would not have been substantially different if the errors complained of had not occurred, this is a case where in my judgment section 31(3E) is in play. As I stated earlier in this judgment, there is a great public interest in the state detaining people indefinitely for the purposes of effecting removal from the jurisdiction only where the conditions for doing so are clearly made out. That was not the case here. It is wrong for casual and careless risk assessments to form the basis for detention. It is wrong for simple steps (such as transmission of documents) to take four weeks because of technology failures. A few days' delay may be justified by a broken fax. Four weeks are not. It is wrong for pre-action responses and indeed Summary Grounds of Resistance to be drafted on the basis of seriously misleading facts because due care has not been taken to instruct the Government Legal Department what the facts are, or to read OASys records with sufficient care. Where, as here, there have been errors of law in administrative detention, there is an exceptional public interest in the court saying so and disapplying section 31(3D) of the Senior Courts Act 1981 ."

²⁷ "It is certainly possible that the Secretary of State, if he had not made the error of law which I have identified in paragraph 9 of his Statement of Reasons, might have reached the same conclusion for reasons along the lines suggested by Mr. Weisselberg. However, I cannot say that it is highly likely that he would have done so, especially having regard to the fact that this is a case in which the Secretary of State was departing from the advice not only of the Parole Board but also of his own civil servants."

65. There do not appear to be any other reported decisions in which the exceptional circumstances test has been met. The only other reported example of the test being applied appears to be in *Hawke* (above), where Holman J rejected an argument that the fact of a breach of the public sector equality duty under s.149 of the Equality Act 2010 would not, in itself, constitute exceptional circumstances:

“325 ...Mr Straw submits that this is a case in which the embargo should be disregarded and that “it is appropriate to do so for reasons of exceptional public interest”. He stresses, first, the considerable importance of the statutory public sector equality duty. I fully recognise the importance of that duty, but it is only one of hundreds if not thousands of statutory duties upon the whole spectrum of public authorities. There is nothing in fact in section 149 to elevate the public sector equality duty to some specially prestigious position above many other no less important statutory duties upon public authorities. It does not seem to me that there is about the present case some “exceptional public interest”, although there is obviously significant public interest.

326 Mr Straw submits, however, that if the claimants in this case cannot get a declaration then no one can get a declaration who cannot show that the outcome for them would have been substantially different. Essentially, that is the intended purpose and effect of subsection (2A) . I agree with him that if my judgment stands, then it may be difficult for individual claimants, who cannot show that the outcome for them would have been substantially different if the conduct complained of had not occurred, to obtain a freestanding declaration that there has been a breach of section 149. That, as I say, appears to me to be the intended purpose and effect of these recently added provisions.”

66. For an example of consideration of the NSD test at the permission stage see *R (Wiggins) v Neath Port Talbot CBC* [2015] EWHC 2266 (Admin) per Gilbert J. This was a rolled-up hearing concerning school closures. The Judge found one arguable point namely that redundancy costs were not taken into account. He said:

“ ... what I am bound to do, is to consider whether, if the costs of redundancy had been taken into account, it is highly likely that the decision would not have been substantially different ... the fact of the matter is that no assessment was made at the time. I therefore consider it appropriate to look at the worst case figures ... the figures produced at the hearing, which were not the subject of challenge, show that there would still have been savings as a result of the proposal, plus some but unspecified amount for the disposal of the buildings. One must not lose sight of the fact that the reasons for the proposals were not only based on costs. These are two schools operating at well below capacity, where there was quite a substantial amount of material, relied on by NPTCBC, that the quality of educational provision would be improved as a result of the proposals”.

67. He thus refused permission under s. 31(3)(C)-(D).

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1 May 2019**