Neutral Citation Number: [2023] EWHC 1794 (Admin)

Case No: CO/2743/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2023

Before :

THE HONOURABLE MRS JUSTICE STACEY

- -

Between :

Sarah Phillipa Rennie (1) **Georgie Hulme (2)** **Claddag (Leaseholder Disability Action Group) (3)**	**Claimants**
- and –	
Secretary Of State For The Home Department	**Defendant**

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- -

Mr Raj Desai (instructed by **Bhatt Murphy Solicitors**) for the **Claimants**
Alan Payne KC and Rob Harland (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 6-7 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 14 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Stacey :

1. This claim concerns the defendant's response to two inter—related public safety recommendations of the Rt Hon Sir Martin Moore-Bick, the chair of the Grenfell Tower public inquiry ("GTI") made in his Phase 1 report delivered to the Prime Minister on 28 October 2019 ("the Phase 1 Report"). The recommendations were that:

> ".33.22(e). the owner and manager of every high-rise residential building be required by law...to prepare personal emergency evacuation plans ["PEEPs"] for all residents whose ability to self-evacuate may be compromised (such as persons with reduced mobility or cognition)"; and
>
> 33.22(f). the owner and manager of every high-rise residential building be required by law to include up-to-date information about persons with reduced mobility and their associated PEEPs in the premises information box."
>
> ("the PEEPs recommendations").

2. The first and second claimants, Ms Sarah Rennie and Ms Georgie Hulme, are residents of high-rise and medium rise buildings, respectively, with physical disabilities which compromise their ability to evacuate in an emergency. The third claimant, Claddag, is an unincorporated association, set up by Ms Rennie and Ms Hulme, which campaigns on fire safety issues facing disabled residents. There is no dispute that all claimants have standing to bring this claim.

3. The defendant is the Secretary of State for the Home Department with responsibility for national fire safety legislation and guidance.

4. By a claim filed on 29th of July 2022 the claimants challenge what they say was a decision of the defendant communicated on 18 May 2022 not to implement the PEEPs recommendations and instead consult on a different set of proposals for Emergency Evacuation Information Sharing+ ("the EEIS+ proposals").

5. Mr Alan Payne KC for the defendant did not accept that the 18 May 2022 communication constituted a decision and asserted that the claim was premature as no decision on the implementation of the PEEPs recommendations has yet been made. The consultation period was ongoing. Whether a decision had been made and the stage reached in the formative process was a point of sharp disagreement between the parties. But in any event Mr Payne disputed that any of the grounds had been made out. Furthermore he relied on s.31(2A) Senior Courts Act 1981 (the 1981 Act) to say that even if the court were to find any breaches of public law, the outcome would not have been substantially different.

6. On 5 September 2022 Mrs Justice Steyn considered that the case was arguable and granted permission on all 5 grounds, ordered that the hearing be expedited and granted a costs capping order limiting the liability of the claimants to pay the defendant's costs to £20,000 including VAT and the liability of the defendant to pay the claimants' costs to £70,000 including VAT.

7. The parties had agreed a list of issues:

i) What has been decided, and in particular what has been decided in relation to implementation of the PEEPs recommendations following the PEEPs consultation and publication of the EEIS+ consultation.

ii) Pursuant to Ground 1:

a) Whether there was a failure to have regard to mandatory material considerations in reaching the decision; and

b) In particular, whether the matters pleaded by the claimants constitute mandatory material considerations and if so whether the defendant has failed to take these into account.

iii) Pursuant to Ground 2:

a) Whether a procedural legitimate expectation of consultation in respect of any departure from the PEEPs recommendations (and the reasons for it) was generated on either of the bases outlined by the claimants;

b) Whether any such legitimate expectation had been breached; and

c) Whether the defendant can justify any breach of legitimate expectation.

iv) Pursuant to Ground 3:

a) Whether the PEEPs consultation process was so unfair as to be unlawful; and

b) In particular, whether the EEIS+ consultation discharges the defendant's duty to re-consult.

v) Pursuant to Ground 4, whether the requirements of the public sector equality duty in s.149 of the Equality Act 2010 ("PSED") were breached.

vi) Pursuant to Ground 5:

a) Whether this ground is barred by ss.6(6) of the Human Rights Act 1998.

b) Whether, on the evidence before the Court, the relevant framework of laws and guidance applicable to stay put buildings discharges the State's positive systems duty under article 2 ECHR.

c) Whether, on the evidence before the Court, the relevant framework of laws and guidance applicable to stay put buildings violates article 14 ECHR (read with article 2).

vii) Whether the Court is required to refuse relief pursuant to ss.31(2A) of the Senior Courts Act 1981.

8. Grounds 1 to 4 were procedural and ground 5 substantive, since it was alleged that there was an unremediated gap in the state's obligation to protect life. Declaratory relief was sought and a quashing of the decision not to implement the PEEPs recommendations. The remedy sought was a procedurally fair consultation process prior to a decision concerning their implementation.

9. To set the scene, a PEEP is a specifically designed evacuation plan, tailored to meet the specific needs of a person with reduced mobility or who would have difficulty self-evacuating in the event of a fire. The aim of a PEEP is for residents and those responsible for the management of fire safety in a building to have thought through the available options in advance of any emergency, to consider how a resident who would have difficulty self-evacuating could evacuate safely in light of fire safety information and the existing fire safety strategy for the building. PEEPs are a familiar concept in workplaces such as offices, hospitals and care homes.

10. At the risk of stating the obvious, there is an important distinction between the concepts of "evacuation" and "rescue". An evacuation is the process whereby people leave a building in case of an incident, such as fire, to reach a place of safety, whereas a rescue is where a person receives physical assistance to get clear of the area involved in the incident. A PEEP is an evacuation plan that is intended to be executed without relying on intervention from the Fire and Rescue Service ("FRS") to make it work.

11. At the heart of the complaint, it was said that the defendant had repeatedly and publicly committed itself to implementing the PEEPs recommendations for high rise flats along with other urgent fire safety improvement actions identified by the Chair of the GTI in the Phase 1 report. It had also specifically undertaken to consult solely on the PEEPs recommendations and any proposed departure from them (in a consent order settling an earlier judicial review claim brought by the daughter of one of the Grenfell Tower victims, Ms Mona Aghlani). It was the claimants' case that the defendant must have accepted the Chair's basis for the recommendations which were predicated on the safety risks that required urgent remediation. However after consulting on *how to* implement the PEEPs recommendations, the defendant decided not to implement them, without ever having consulted on the question of *whether to* implement them. Their further consultation exercise on the EEIS+ proposals, which were said by the claimants to be of a wholly different nature to the PEEPs recommendations, did not address the lacuna and in any event took place too late, after a decision not to implement the PEEPs recommendations had been made. As a result, the claimants and any other interested members of the public had been denied the opportunity to input on the question of whether there should be a departure from the PEEPs recommendations through a consultation process.

History and background facts and the current position

12. The Regulatory Reform (Fire Safety) Order 2005 ("RRO") was laid before parliament pursuant to s.6 Regulatory Reform Act 2001 to reform the law relating to general fire safety in non-domestic premises and the common parts of multi-occupied residential buildings to consolidate and rationalise existing fire safety regulation. It imposes various fire safety duties on persons with control of non-domestic premises and the common parts of multi-occupied residential buildings ("responsible persons" ("RPs") as defined in article 3). There is a duty to take general fire precautions (article 4) and more specific duties (article 8-22) including a duty to relevant persons (which includes

all residents) to ensure an emergency plan and that it is possible for them to evacuate the premises in the event of danger (articles 15 and 14(2)(b)).

13. The RRO principally adopts a risk-based approach to fire safety requiring RPs to ensure that general fire precautions are in place (article 9) and states that the RPs need to record the prescribed information, specifically as outlined in article 7 (b) in relation to "any group of persons identified by the assessment as being especially at risk."

14. By article 50 the defendant must ensure that such guidance as she considers appropriate is available to assist RPs in the discharge of their duties under articles 8-22.

15. The Fire and Rescue Service ("FRS") has a statutory responsibility for extinguishing fires and protecting life and property in the event of fire (s.7 Fire and Rescue Services Act 2004). Rescue by the FRS is a matter of last resort.

16. Regulation 24 gives power to the Secretary of State to make regulations about fire precautions subject to the negative resolution procedure (RRO 24(5)).

17. In July 2011 the Local Government Association ("LGA") was commissioned by central government to produce a guide, "Fire Safety in purpose-built blocks of flats" ("the LGA Guidance"), which was published and endorsed as article 50 RRO guidance, to assist RPs with practical advice on how to assess the risk from fire and how to manage fire safety in purpose-built blocks of flats. It had been drafted by Mr Colin Todd (fire safety engineer) and his consultancy, who was one of the experts appointed to the GTI. It sets out two evacuation strategies in blocks of flats in the event of a fire: a 'stay put' or simultaneous evacuation (SE) strategy:

> "**18. Evacuation strategy**
>
> 18.1 The compartmentation between flats is analogous to the party wall separation between adjoining houses, which prevents fire-spread from one house to another. It also enshrines the principle that a person's actions, while they may affect their own safety, should not endanger their neighbours.
>
> 18.2 Compartmentation requires a higher standard of fire resistance than that normally considered necessary simply to protect the escape routes. This is to ensure that a fire should be contained within the flat of fire origin. Accordingly, those in flats remote from the fire are safe to stay where they are. Indeed, in the majority of fires in blocks of flats, residents of other flats never need to leave their flats.
>
> 18.3 This is the essence of the 'stay put' principle. It has underpinned fire safety design standards from even before the 1960s, when national standards were first drafted. It [is] still the basis upon which blocks of flats are designed today. In the majority of existing blocks, it remains entirely valid.
>
> 18.4 Inevitably, fires do occur in which, for operational reasons, the fire and rescue service decides to evacuate others in the

> building. Fires have been known to spread beyond the flat of origin to involve other flats or to spread across the top of blocks through the roof voids. In these cases, total evacuation of the block has sometimes been necessary. Fortunately, these fires are rare. They are usually the fault of failings in the construction.
>
> **19. 'Stay put' policy and evacuation**
>
> 19.1 A 'stay put' policy involves the following approach.
>
> • When a fire occurs within a flat, the occupants alert others in the flat, make their way out of the building and summon the fire and rescue service.
>
> • If a fire starts in the common parts, anyone in these areas makes their way out of the building and summons the fire and rescue service.
>
> • All other residents not directly affected by the fire would be expected to 'stay put' and remain in their flat unless directed to leave by the fire and rescue service.
>
> 19.2 It is not implied that those not directly involved who wish to leave the building should be prevented from doing so. Nor does this preclude those evacuating a flat that is on fire from alerting their neighbours so that they can also escape if they feel threatened.
>
> 19.3 The alternative to a 'stay put' policy is one involving simultaneous evacuation.
>
> 19.4 Simultaneous evacuation involves evacuating the residents of a number of flats together. It requires a means to alert all of these residents to the need to evacuate, ie a fire detection and alarm system. Purpose-built blocks of flats are not normally provided with such systems."

18. At the time of the Grenfell Tower Fire the LGA guide contained the following advice within the section 'Preparing for emergencies':

> " 79.9 In 'general needs' blocks of flats, it can equally be expected that a resident's physical and mental ability will vary. It is usually unrealistic to expect landlords and other responsible persons to plan for this or to have in place special arrangements, such as 'personal emergency evacuation plans'. Such plans rely on the presence of staff or others available to assist the person to escape in a fire.
>
> 79.10 ... in sheltered housing schemes, it is commonplace to hold information relating to any resident with particular mobility or other issues affecting their ability to escape. This can be made

> available to the fire and rescue service on arrival at the premises (eg by keeping it in a 'premises information box', which can only be unlocked by the fire and rescue service, at the main entrance)....
>
> 79.11 It is not realistic to expect such an approach to be adopted where there are disabled people and others requiring assistance in a 'general needs' block. Any attempts to keep information of this kind must be updated regularly as inaccurate information could potentially be more harmful than no information."

19. Paragraphs 79.9-79.11 were removed from the LGA Guidance on 24 September 2021 with the explanation that it is subject to developing policy through the PEEPs consultation.

20. The claimants relied on the defendant's equivocal attitude to the advice to strengthen their arguments in two ways: firstly, that removing it from the website demonstrated the advice was not appropriate and safe for disabled residents in acknowledgement that the status quo was unsafe, but secondly, the government's refusal to resile completely from the advice maintained the current unsafe standards.

21. Ms Rennie has first hand experience of having a residential PEEP and had to use it to evacuate her building when there was a fire on 12 December 2021. She has a number of personal assistants who are trained to help her evacuate with an evac chair which cost £400. With the help of one of her assistants she was able to evacuate safely without getting in the way of the firefighters or the other residents evacuating the building which has an SE strategy. Her PEEP is kept in an information box in the building available for FRS firefighters and the RP as and when necessary (the premises information box "PIB"). Ms Rennie has confidence in her PEEPs arrangements that enables her to evacuate along with the other residents in her building who are not mobility-impaired.

The Grenfell Tower fire and establishment of the GTI and the Phase 1 Report.

22. The Grenfell Tower fire occurred on 14 June 2017. 72 people died, the greatest loss of life in a residential fire in the UK since the Second World War. 203 adult residents were present in the building on the night of the fire, of whom 46 had sensory, mobility or cognitive impairments. Of these 46 residents, 19 died in the fire (41%) as compared to 28 of the 157 with no impairment (18%).

23. The next day, the then Prime Minister, The Rt Hon, Theresa May MP announced the GTI. It was tasked with investigating the circumstances of the fire and learning necessary lessons. After hearing extensive evidence the Phase 1 Report was delivered to the then Prime Minister, The Rt. Hon Boris Johnson MP on 28 October 2019 dealing with the events of 14 June 2017. It contained a detailed description of the events which occurred between the outbreak of the fire until the last survivor left Grenfell Tower just over 8 hours later with findings about the cause and origin of the fire, its subsequent development and the response of the London Fire Brigade and other emergency services. It also contained a number of urgent recommendations that the Chair was confident would improve the safety from fire of those who live in high-rise buildings. The report explained that:

> "33.1….[T]he evidence put before me in Phase 1 is already sufficient to demonstrate that a number of improvements can be made both in the way in which high-rise residential buildings are designed, constructed, approved and managed and in the way in which fire and rescue services respond to fires in such buildings.
>
> ….
>
> 33.2 …It is important that any recommendations I make at this, or indeed any other, stage should be based firmly on the facts that have emerged from the evidence obtained by the Inquiry in the course of its investigations. I also think it important that they command the support of those who have experiences of the matters to which they relate. Recommendations that are not grounded in the facts are of no value and recommendations that do not command the support of those who are experts in the field are likely to be ignored and, if not ignored, risk giving rise to adverse unintended consequences.
>
> 33.3 The recommendations set out below are therefore based entirely on the evidence I have heard in relation to the particular issues that were investigated in Phase 1 and on the findings and conclusions I have been able to reach in this report. ….[W]hen deciding what recommendations should be made at this stage I have had regard in particular to their capacity for making a significant contribution to the safety of those who live in high-rise buildings "

24. Prior to the fire, no plans had been in place for evacuating Grenfell Tower should the need arise. The Chair made a number of recommendations for evacuation of high-rise buildings (which in England are defined for the purposes of fire safety as buildings over 18 metres in height or over 6 storeys) at para 33.22 which included the two PEEPs recommendations the subject of this litigation and 5 others. One was addressed at Government to develop national guidelines for carrying out partial or total evacuations of high-rise residential buildings (33.22(a)). Two were addressed to the FRS: to develop policies for partial and total evacuation of high-rise residential buildings and training to support them and that all fire and rescue services be equipped with smoke hoods to assist in the evacuation of occupants through smoke-filled exit routes (33.22 (b) and (g)). The other recommendation was addressed to owners and managers of every high-rise building to draw up evacuation plans and keep them under regular review, provide them to their local FRS and have a copy in a PIB (33.22(c)). Under the recommendation some information in a PEEP could be utilised in a rescue situation hence the proposal for information to be made available to FRS in the premises information box.

25. In making the PEEPs recommendations the Chair of the GTI must have accepted the advice of three of the inquiry experts, Dr Barbara Lane (a chartered fire engineer), Professor Ed Galea (a fire safety engineer with expertise in emergency evacuation) and Professor Jose Torero (a Professor of Civil Engineering specialising in fire safety) in preference to Mr Todd who recommended a maintenance of the status quo and stood by the LGA guidance (produced by his consultancy) at phase 1 of the inquiry but recommended that it should be scrutinised more closely in part of phase 2. The nub of

the disagreement between them was the view of Mr Todd that for stay put buildings, compliance with the building regulations should ensure that evacuation is rarely necessary as a result of the compartmentation of fires within a flat. The other three experts were concerned about reliance solely on compartmentation and a stay put strategy and considered that there was a greater risk from fire spread and lack of resilience in high-rise residential buildings. The London Fire Brigade ("LFB") evidence, from Rita Dexter OBE was that discovery of building failure (which could result in failure of compartmentation and spread of fire) was not exceptional, as evidenced by what occurred in Grenfell Tower and Lakanal House in Camberwell a few years previously.

26. Following the advance notification of the Phase 1 Report to the Prime Minister 2 days earlier, the report was published on 30 October 2019. The Prime Minister stated in Parliament that day:

> "More widely, we plan to accept, in principle, all of the recommendations that Sir Martin makes of central government. We will set out how we do so as quickly as possible, but I can assure the House and all those affected by the Grenfell tragedy that where action is called for action will follow."

27. On the same day the Secretary of State for Housing, Communities and Local Government stated in Parliament:

> "As the Prime Minister said in his opening remarks, the Government will accept all of the findings of the report, and accept them in full We want to ensure that the recommendations are implemented without delay."

28. Within three months the Government published its response to the Phase 1 Report on 21 January 2020. It reiterated that the Government accepted in principle all of the recommendations although PEEPs were not specifically referred to in the section dealing with recommendations for government.

29. In a video address on 14 June 2020 the Prime Minister stated that:

> "We're working to implement every recommendation made by the first phase of the public inquiry."

The First Consultation

30. On 20 July 2020 the Government published a fire safety consultation on amendments to the FSO ("the first consultation") which repeated its commitment to implement the recommendations in the Phase 1 Report and set out how it proposed to do so. Under FSO Article 24(4), the SSHD is required to consult before making any regulations under her regulation making power under Article 24(1) FSO. The consultation period ran to 12 October 2020.

31. Mona Aghlani, whose disabled mother died in the Grenfell Tower fire, considered that, contrary to the stated intention to implement all the Phase 1 Report recommendations, the first consultation departed from them. On 16 October 2020 Ms Aghlani commenced

judicial review proceedings on the basis that the consultation was misleading and deprived those who supported implementation of the PEEPs recommendations of a fair opportunity to address the basis for the proposed departures. In response to the judicial review challenge, whilst remaining of the view that the first consultation was lawful and without admission of liability, the defendant decided to run a further consultation solely on PEEPs and terms were agreed for the withdrawal of the proceedings. The recitals to the consent order to that effect dated 13 November 2020 recorded that:

> "UPON the Defendant having agreed to undertake a further consultation solely on Personal Emergency Evacuation Plans (and any proposed departure from the recommendations in paragraph 33.22 (e) and (f) of the Phase 1 report of the Grenfell Tower Inquiry)"

PEEPs consultation

32. The consultation exercise agreed to by the defendant in the consent order entitled "Personal Emergency Evacuation Plans in high-rise residential buildings" ("the PEEPs consultation") was published on 8 June 2021 and ran to 19 July 2021.

33. The document explained that it sought views on implementing the PEEPs recommendations with the intention, subject to consideration of the responses to the consultation, to lay regulations later in 2021. The Government proposal was to build on the existing provisions in the RRO to place additional legal requirements on the RP and others who otherwise have control of high-rise residential buildings. The document contained 4 proposals which would implement the PEEPs recommendations and assist RPs to comply with the proposed duties to prepare PEEPs for relevant residents and keep the information up to date with template documentation.

34. The consultation states that it has included the Chair's rationale for the PEEPs recommendations and sets out the different features in residential buildings and workplaces, such as the likely presence of other employees present in workplaces who would facilitate an emergency evacuation plan, unlike the situation for most residential buildings. The document describes the purpose of a PEEP to provide people who would have difficulty self-evacuating with a tailored evacuation plan in case they need to do so in a fire emergency and that the aim is to think through the available options and consider how such a resident could evacuate safely in light of fire safety information. The difference between "evacuation" and "rescue" is set out in the document. The document sought views on the specific proposals in both a multiple choice tick box exercise (with a range of options from strongly agree to strongly disagree) and space to provide a brief explanation. There was also a more general, open, question at Q 17 inviting any further comments that the consultee thought would be important for policy officials to consider as part of the consultation (with a 400 word limit) and an opportunity to comment on the data to support the impact assessment (250 word limit).

35. The PEEPs impact assessment published on 8 June 2021 noted that government intervention was required to implement the Phase 1 report recommendations in relation to evacuation to ensure that residents who cannot evacuate from high-rise residential buildings by themselves can do so safely in the event of a fire incident. Three options were identified: Option 0 - do nothing, which it was noted did not meet the Phase 1 report recommendations nor the Government's objectives; Option 1 – PEEPs for all

residents whose ability to self-evacuate may be compromised, and place summary information in a PIB; and Option 2 – PEEPs for those residents whose ability to self-evacuate may be compromised who self-identify and agree to have one, with summary information placed in a PIB. The document set out the policy objective to reduce the societal harm caused by fires by improving evacuations for those unable to evacuate themselves to reduce fire-related injuries and fatalities. The document noted that the Phase 1 Report specifically recommended legislative changes. It was also clear in its understanding of the differences between the terms "evacuation" (the direction of people from a dangerous place to somewhere safe) and "rescue" (where a person has received physical assistance to get clear of the area involved in the incident) and that a PEEP is an evacuation plan that should not need intervention of the FRS to make it work. The document identified a number of practical concerns with Option 1 and stated that:

> "The proposal will be assessed following the consultation as it is expected to improve evacuations and therefore meet the Government's objective. However, implementing the GTI P1 [the Phase 1 Report] recommendations as written may be disproportionate to the risks the Inquiry identified, and potentially practically and operationally challenging to deliver."

36. As for Option 2, the impact assessment considered that it was expected to improve evacuations for those unable to evacuate themselves and took into account an initial assessment of practical and operational implications whilst assuring resident safety. The document explained that there was no preferred option at that stage since the purpose of the consultation was:

> "to seek views from those with experience of the FSO [RRO], PEEPs and/or are likely to be affected by these proposals. These views will be used to further the Government's understanding of PEEPs and inform future policy considerations. Option 2 is deemed to be a more effective and efficient option. However this consultation is genuinely seeking meaningful consultation and views on what is the most effective option to implement PEEPs."

37. The impact assessment was based on the assumption that there were 1,310,000 residents living in high-rise buildings of whom between 10% - 19% may be eligible for a PEEP, i.e. 131,000-248,900 individuals.

38. The then Fire Minister, Lord Greenhalgh met the claimants and Ms Aghlani's brother on her and her family's behalf shortly before the commencement of the PEEPs consultation to discuss their concerns.

39. 382 responses to the consultation were received. The responses were analysed by the Fire Safety Unit and an information to note (ITN) document prepared on 29 July 2021 which noted that although most individual responses welcomed the concept of PEEPs there appeared to be a lack of viable options to evacuate people who cannot manage stairs from high-rise residential buildings, other than by FRS or employing large numbers of staff. There was concern about a suggestion that neighbours could provide assistance in the event of fire which required further thought. There was also concern about the arbitrary cut off proposed in the PEEPs recommendations that PEEPs would

be required for all residents in high-rise buildings, whichever floor the resident lived in, but would not apply to any residents of medium rise buildings. As to the use of PIBs to share information there were concerns about putting information about vulnerable residents on site and the risk of misuse of the information, together with concerns about how, practically, the information could be kept up to date and the risk of harm from inaccurate information. Some consultees responded with other ideas – for example some local councils and RPs suggested it would be better to improve fire safety by measures in flats and making buildings safer. Some consultees raised concerns of the risk of practical difficulties with PEEPs in buildings with a stay put strategy that could result in evacuations that were not necessary and have a significant impact in buildings with narrow staircases as such buildings were not designed to allow evacuation to happen efficiently and effectively at the same time as firefighting. Cost was a concern – both of employing staff to assist with PEEPs evacuations should the need arise and for any structural changes required to assist with evacuation.

40. Many responses advocated other measures than evacuation as being preferable to improve fire safety. Suggestions included ensuring compartmentation is adequate to support a stay put policy, provision of sprinklers in all buildings over 11m, and better mandatory detection and warning systems. Some RPs favoured a Person Centred Risk Assessment which would consider multiple factors that may contribute to risk, including fire risk.

41. The emerging view from the Fire Safety Unit was that it would not be possible to take forward the PEEPs proposals in the proposed secondary legislation that autumn which was already in preparation following the first consultation. After further analysis of the consultation responses both quantitative and qualitative on 31 August 2021 the Fire Safety Unit made a submission to the Fire Minister recommending that there should be further policy development rather than the implementation of PEEPs regulations through a change in the law, as considerable issues had been raised in the consultation. The concern was that

> "…it would not be reasonable to lay regulations requiring Responsible Persons to do something when we have not established a practical means by which they could achieve this."

42. The submission considered that there may need to be a further consultation depending on the extent of the differences between the PEEPs proposals and any new proposals. Fire Safety Unit officials and the Minister met on 7 September to discuss the submission and his formal response was sent by email on 14 September 2021. His view was that the recommendation would be:

> "...tantamount to saying publicly we won't be able to fulfil a Grenfell Inquiry recommendation, and that this would be very politically difficult to justify…He thinks, in the first instance, we would be much better trying to scope the limitations of the recommendations appropriately."

43. There then followed a PEEPs options paper dated 22 September 2021 described as presenting "alternative options for taking forward PEEPs in a different way." One of the options proposed (option 2) was a PEEP to support FRS rescue, rather than to support self-evacuation by those who needed it, which became known as the FRS

option. The paper acknowledged that it would not meet the PEEPs recommendation since it was not about evacuation in advance of the FRS attending and also that it would potentially apply only to buildings with a simultaneous evacuation strategy, and not all high-rise buildings. After reviewing the options put forward the Fire Minister considered that the FRS rescue option was the "only credible way forward" and he had given:

> "…particular thought to his duties under the Equalities (sic) Act to consider the PSED implications. He gave a clear steer that he thought that where a building had a stay put strategy, that it was necessary (and crucially, non-discriminatory) to ask disabled people to stay put like their neighbours." (Ministerial Response to Options Paper, 23 September 2021)

44. He noted that the PEEPs recommendation was not therefore being implemented with the rest of the statutory instruments.

45. The message was repeated in an Information to Note (ITN) prepared the next day which recorded that:

> "having considered the consultation responses, it became apparent that implementing the [PEEPs recommendations] as proposed in the consultation or in full would be impracticable, or would require unreasonable and disproportionate costs to the individual, building owner or taxpayer….[H]aving carefully reviewed available options and already given particular thought to your [the Fire Minister's] duties under the Equalities (sic) Act to consider PSED implications, the Rescue Plan option is likely to be the most credible way forward to ensure the safety of disabled people in a way that is implementable and proportionate to cost and risk in the event of a fire.
>
> Under this option:
>
> - Where a building has a stay put strategy, there will be no differential/discriminatory treatment of resident as they will all be advised to stay put unless there is a fire risk in their own flat or if, for some unexpected reason, stay put fails (noting the ongoing programme of fire safety improvement to mitigate this post-Grenfell)
>
> - Where a building has a simultaneous evacuation strategy, then the Fire and Rescue Service should be made aware in advance of residents who will not be able to self evacuate, so they could respond accordingly in the case of fire."

46. It also noted that:

> "This consideration takes account of the consultation responses and discussion with FRSs that self-evacuation could also lead to

> risk to life, and that the financial cost associated with requiring costly alterations to an existing building may cause disabled residents to perceive they were, or to be, resented by their neighbours, which would not meet our policy objective or the spirit of the recommendation."

47. Over the following months, the FRS option was developed. Meetings were held with various stakeholders, officials and experts. In December 2021 the Fire Safety Unit ("FSU") was able to set out the next steps in a paper with a recommendation for review and endorsement by the Minister. By then the FSU was clear that PEEPs were not something that could be proportionately and practically legislated for in high rise residential buildings and they recommended a collection of initiatives instead. It was acknowledged that the package proposed would not directly implement the PEEPs recommendations, but the report expressed confidence that they would satisfy the principles behind the recommendations of enhancing the safety of residents in high rise residential buildings whose ability to self-evacuate may be compromised. The recommendations were to raise awareness and use of existing fire prevention interventions for vulnerable people and guidance, broader fire and building safety regulations, which were already in hand, and the FRS rescue option. In practice that would mean RPs would collect information on individuals who self-identified as unable to self-evacuate to pass on to the local FRS for possible use in a rescue situation.

48. In February 2022 the Fire Minister's permission was sought to publish the Government's response to the PEEPs consultation. The minister was asked to note that it would publicly rule out mandating PEEPs at this time and instead to commit to exploring alternative measures at a later date. The Minister did not agree to the publication without also explaining how they would bring forward an alternative package of measures. On 24 February 2022 the Fire Minister would not agree to the possibility of a third consultation on PEEPs on the basis that "doing so would simply bring distress to those (especially with vulnerabilities and protected characteristics) currently awaiting the Government's response and as such would not be compatible with his PSED duties; announcing our evidence-based measures however would on balance do so." By mid March 2022 it was agreed that the Government's response to the PEEPs consultation would be published simultaneously with the new policy direction in a readout of a Ministerial Meeting.

49. The FRS rescue option proposals became the EEIS+ proposals. Following further meetings with stakeholders and Professor Ed Galea and final approval, both the Government's response to the PEEPs recommendations and the new EEIS+ consultation were published on 18 May 2022 and the consultation period ran until midnight 21 August 2022.

50. The defendant served a judicial review pre-action protocol letter on 30 May and the claim was issued on 29 July 2022.

The Government's response to the PEEPs consultation published 18 May 2022

51. The consultation response noted that a large majority of respondents supported the PEEPs recommendations through mandatory obligations on RPs and stressed the importance of every resident being able to get out of a building in an emergency. However from the consultation responses, workshops and meetings, significant

concerns over the proportionality, practicality and fire safety case for PEEPs had been raised. On the safety case the Government concluded that the PEEPs recommendations were difficult in buildings with a stay put strategy as evacuation may not always be necessary and could increase the risk of harm to those being evacuated – both those with a PEEP and those able to self-evacuate.

52. The practical difficulties identified were the availability of personnel to support evacuation and the cost of on-site staff to perform evacuation if RPs were to be required to staff all their high rise buildings. The use of neighbours, or other third parties, to support evacuation was thought to be problematic and raise practical problems with potential issues, such as training, reliability, availability (for example, holidays, or being out when a fire is set) and legal issues around potential liability. Concerns around proportionality centred around cost and what was perceived as disproportionate costs falling on RPs and other leaseholders. The costs – administrative, for purchasing equipment, training and the making of reasonable adjustments – were thought by some consultees to have been underestimated in the impact assessment in the PEEPs consultation. There were concerns too about the arbitrary nature of the cut-off point of the PEEPs obligations applying only to high rise buildings. The defendant's consultation response reflected the concerns raised by some consultees who whilst supportive in principle of PEEPs were concerned about the practicalities of implementation.

53. The government concluded that the evidence base for PEEPs was not sufficient to mandate their implementation in high-rise residential buildings at this stage. The response document ended with an explanation of the next steps and the consultation on EEIS for buildings with a simultaneous evacuation strategy.

> "The new consultation includes a proposal on Emergency Evacuation Information Sharing (EEIS). This proposal focuses on residential blocks of flats with a simultaneous evacuation strategy in place. In these buildings, RPs would be required to ask residents to make themselves known if they feel they might need support to evacuate in the event of a fire. The RP would then be required to offer a Person-Centred Fire Risk Assessment (PCFRA) and connect them with a home fire safety visit from their local FRS. Once completed, the RP and resident would review the risk assessment and consider what interventions might be reasonable for them to implement to mitigate against the risks identified. Information about residents who could still not self-evacuate would then be shared with the local FRS who would factor it into their operational response, and could prioritise resources to further assist and effect these evacuations.
>
> Other measures are also explored in the consultation, including a toolkit (for all RPs but with a particular focus on stay put buildings) and a call for evidence for examples of practical, proportionate and safe PEEPs and other fire safety initiatives being undertaken in residential settings that meet these criteria. These measures will form a more holistic approach to ensuring fire safety that builds upon information gathered in this consultation."

EEIS+ consultation

54. The EEIS+ consultation document stated that it was seeking to deliver against the PEEPs recommendations by "an alternative package of initiatives that supports the fire safety of resident whose ability to self evacuate may be compromised – in a way that is proportionate, practical and safe." It set out the wider package of measures introduced in implementing other aspects of the GTI Chair's recommendations in his Phase 1 Report, such as the Fire Safety Act 2021, fires safety clause in the Building Safety Act 2022, research and operational evacuation strategy testing to inform the development of national guidelines, public information campaigns and grant funding of £7m.

55. 5 steps were identified in the EEIS+ consultation document. Step 1, already in existence, is the process of defining a building evacuation strategy of being either a stay put or simultaneous evacuation, in line with existing obligations of multi-occupied residential buildings to determine the most suitable evacuation strategy. Beyond sharing best practice and a range of voluntary initiatives and a voluntary toolkit to support RPs, nothing would change in relation to the 97% of buildings with a stay put strategy. Steps 2-5 would be applicable only to buildings with an SE strategy. However the proposals expressed an open mind to extending steps 2-5 more widely in the evaluation process.

56. Step 2 under the proposal would require an RP to ask residents to self-identify if they considered that they might need support to evacuate in the event of fire. Step 3 would require an RP to offer a Person-Centred Fire Risk Assessment (PCFRA) checklist to those who self-identify as needing evacuation support and connect them with a home fire safety visit from their local FRS. The RP and resident would then review the risk assessment and consider what might be reasonable for them to implement to mitigate against the risks identified. It was explained that:

> "This approach does not rule out the possibility of PEEPs (or similar) being put in place where the Responsible Person and resident agree that it is practical, proportionate and safe….we are of the view that these cases would be relatively rare. Where they do occur, we firmly believe they should not result in the instalment of on-site evacuation stewards or fire marshals simply to enact them as, for all the reasons outlined in the introduction section, this would be problematic with regards to practicality and proportionality. However, in cases where there are already building staff in place, it may be reasonable for the Responsible Person to ask them to perform some additional duties to aid fire safety of mobility impaired residents, for example checking on the resident's welfare, providing information and reassurance and meeting the Fire and Rescue Services on their arrival."

57. Step 4 concerned how the information obtained could be shared with the local FRS to execute an emergency evacuation if required and step 5 considered how the local FRS might best be able to access and use the information in the event of a fire.

58. The questions invited respondents to state the extent to which they agreed that the measures proposed would be an adequate way to identify suitable measures to mitigate against fire safety risks, including barriers to evacuation and to offer alternative adequate approaches.

59. There was a call for evidence under the heading of additional work in the following terms:

> "Call for evidence: It's important to note that the EEIS proposal does not rule out the possibility of PEEPs (or similar) being put in place where the Responsible Person and resident agree that this is practical, proportionate and safe.
>
> Whilst we are not mandating PEEPs (as described in the PEEPs consultation) at this stage, we want to be absolutely sure that we consider all viable options to support the fire safety of mobility impaired residents. That is why, as part of this consultation, we are also asking for evidence of any existing PEEPs that support the full evacuation of mobility-impaired residents, and that satisfy the principles of practicality, proportionality and safety as laid out in the government's response to the PEEPs consultation (https://www.gov.uk/government/consultations/personal-emergency-evacuation-plans). We are also asking for evidence of any further fire safety interventions that could be considered in addition to the proposals outlined.
>
> Voluntary third parties working group: As explained previously, concerns have been raised about relying on neighbours to help mobility impaired residents evacuate. We therefore propose to set up a working group with housing providers, disability groups and other key stakeholders to explore these issues and how they might be solved in the longer term."

60. The EEIS+ consultation fulfilled the undertaking in the Aghlani consent order to consult on any proposed departure from the PEEPs recommendations.

61. I did not understand it to be seriously disputed that the decision under challenge represented a significant departure from the PEEPs recommendations, since the EEIS+ proposals rule out mandatory PEEPs for any building. The first step in the proposed 5 step procedure already applies to all multi-occupancy residential buildings and steps 2-5 would only apply to buildings with an SE strategy in place and a PCFRA would assist if a need for rescue with the help of the FRS arose, rather than evacuation.

Equality Impact Assessments ("EIA")

62. It is perhaps helpful to take the narrative around consideration of the PSED and the EIAs out of the general chronology of events as a self-contained factual aspect of the case. EIAs were prepared for compliance with the PSED at various stages following the GTI Chair's Phase 1 report.

63. The EIA for the PEEPs consultation noted that the proposals were concerned with improving levels of fire safety for all and would specifically promote equality of opportunity for older people, disabled people and in relation to pregnancy and maternity, as people with those protected characteristics would be more likely to self-identify as requiring a PEEP. The PEEPs recommendations were assessed as being

neutral in relation to those with other protected characteristics. The EIA recorded anecdotal evidence that the cost of implementing the PEEPs recommendations could potentially be a source of resentment and tension between those with a protected characteristic likely to benefit from a PEEP, with those who do not, which was a matter that would be kept under review.

64. After an analysis of the responses to the PEEPs consultation led to the initial view that the PEEPs recommendations were not practical, on 27 August 2021 a further EIA was conducted to consider the impact of not implementing the PEEPs recommendations. It focussed on the protected characteristics likely to be impacted – disability, maternity/pregnancy and age - and considered the implications of maintaining the status quo, since that was what non-implementation of the PEEPs recommendation would mean in the short term pending development of any viable alternatives. It acknowledged the potential indirect discrimination in not proceeding, but concluded that risks would be minimised by actively developing alternative policy to assist individuals with relevant protected characteristics to evacuate premises safely where necessary. It was intended to advance equality of opportunity between people who share a protected characteristic and people who do not by highlighting RPs existing obligations to take general fire precautions and also by undertaking further work to assess the practicalities of implementing the Inquiry recommendations on PEEPs and improving fire safety for all. On the third limb of the PSED, fostering good relations, the EIA noted the anecdotal evidence that any increased cost to leaseholder service charges could lead to resentment between groups with a relevant protected characteristic and those from other groups. Any future work examining the practicability of implementing PEEPs would include steps to mitigate any such impact.

65. A further EIA was undertaken on 8 October 2021 to consider the equality impact of proceeding with the FRS rescue option instead of the PEEPs recommendations. The EIA explained that the Government did not see a way to overcome concerns over the practical delivery of the proposals and whether they would improve the fire safety of individuals intended to benefit. Instead the alternative option would be based on FRS rescue of people who cannot self-evacuate for residents of buildings with an SE strategy. As for residential buildings with a stay put strategy in place, there was a suggestion that "in the medium term there is a prospect that options closer to that envisaged by the Inquiry become practical." The document, like the EIA two months previously in August, did not consider that not proceeding with the implementation of PEEPs would constitute unlawful discrimination or other conduct prohibited by the Equality Act 2010. The EIA noted the potential for a disproportionate impact on individuals with any of the protected characteristics of disability, age and pregnancy and maternity in not implementing the PEEPs proposals but considered that the FRS rescue proposal would assist people with those protected characteristics. There would be no adverse effect in relation to the other protected characteristics. It was anticipated that since they would not be proceeding with the PEEPs proposals at that time, resentment from those who are not disabled would not occur and any negative impact on the fostering of good relations from the FRS rescue option would be minimal. Further updates were produced on 22 February 2022, 3 and 17 March 2022 which were not materially different. The most recent EIA from the Gov.uk website in the bundle is dated 20 April 2022. In addressing the first limb of the PSED the EIA explains, as previously, that the Government had decided that it was not possible to mandate PEEPs. It asserts that by focussing on a risk-based approach, concentrating efforts (in the main)

on the riskiest buildings which are those with an SE strategy, it represented a proportionate way to focus action and resources where they will add the most value. The document acknowledges the potential impact on those with the disability, maternity/pregnancy and age protected characteristics who are residents in 'stay put' strategy buildings.

Discussion and conclusions

Had a decision been made by 18 May 2022 and if so, what was it?

66. The factual narrative is not in dispute in this case, but the parties disagree about the interpretation of the facts. It is common ground that the defendant has decided, for now, not to adopt any of the four proposals in the PEEPs consultation, which would have implemented the PEEPs recommendations and that the EEIS+ consultation looks at "other ways in which support can be provided to individuals so as to evacuate their premises" as it is not thought by the government "to be practical at present to implement the initial proposals." The defendant's position is that they are seeking fire safety measures to support vulnerable people to establish an outcome that is proportionate, safe and practical.

67. The evidence of Ms Wilkinson, Head of the FSU and Deputy Director of the defendant, was clear that by 22 September 2021 the Fire Minister had made a decision not to mandate PEEPs "at that time", a decision which first became public on publication of the government's response to the PEEPs consultation on 18 May 2022. Ms Wilkinson's evidence was entirely consistent with the recently disclosed contemporaneous records that the advice the Fire Minister received was that the PEEPs recommendations were not a credible way forward and had been ruled out by May 2022. The careful use of phrases such as "at present" and "at this time" do not obscure the fact that a decision had been made not to implement the PEEPs recommendations and that something different was being consulted on in the EEIS+ consultation. It was for that reason that the PEEPs recommendations were omitted from the Fire Safety (England) Regulations 2022 and statutory instruments that brought into force many of the GTI Phase 1 recommendations. A vague reference to the possibility that at some unspecified future point in time, with no indication when that time might be, or what conditions would be necessary for that time to be ripe, or how it would be judged, does not obscure the fact that the decision had been made not to implement the PEEPs recommendations. The point is well-illustrated by the section of the EEIS+ consultation headed "additional work" which suggests a voluntary third parties working group to explore issues around the possibility of PEEPs or something similar, by agreement with the RP and resident, to explore issues and "how they might be solved in the longer term." It both makes explicit that mandatory PEEPs have been ruled out and it also demonstrates that even in the longer term only voluntary arrangements were anticipated.

68. The PEEPs recommendations were for explicit, legal duties mandating owners and managers of all high-rise buildings to prepare PEEPs and to include up-to-date information in the PIBs. The government's response to the PEEPs consultation and the EEIS+ consultation ruled out mandating PEEPs in high-rise buildings with a stay put policy, which accounts for 97% of the high-rise estate. As such it was a fundamental departure from a core component of the recommendations. There is a binary distinction between a voluntary and a mandatory scheme.

69. The claimants' claim therefore is not premature. Mr Payne is correct that no positive decision has yet been taken as to what will be done in light of the EEIS+ consultation, but a determination had been made which became public on 18 May 2022, not to implement the PEEPs recommendations, which is a decision in itself. His repeated assertion that no decision had been taken flew in the face of all the public documents produced by the defendant from 18 May 2022 onwards as well as the internal recently disclosed documents.

Ground 1: failure to have regard to mandatory material considerations.

70. There were two issues to be determined under this ground: whether the claimants had identified factors amounting to mandatory material considerations and, if so, the defendant had failed to take them into account. Both were in dispute. The consideration relied on as mandatory by the claimants was the rationale of the PEEPs recommendations (and the underlying evidence), in particular the public safety imperative for evacuation in a high-rise building both with a stay put and simultaneous evacuation strategy as the mandatory material consideration.

71. Whilst Mr Payne accepted that the Chair's rationale for the Phase 1 Report was a relevant consideration, he disputed that it amounted to a mandatory material consideration.

72. To put it bluntly, the rationale for the PEEPs recommendations was to assist residents who would have difficulty self evacuating in the event of a fire in order to reduce the risks of their being threatened by fire or smoke and becoming trapped in a burning building and was self-evident from the Phase 1 Report itself. It was set out in the PEEPs consultation. As stated by the Chair in the report:

> "I have had regard in particular to their [my recommendations] capacity for making a significant contribution to the safety of those who live in high-rise buildings"

73. It was clearly understood by the defendant. In spite of the width of the

> "margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process" (*R(Friends of the Earth Ltd and anor) v Secretary of State for Transport* [2020] UKSC, [2021] PTSR 190 at [118]-[119]

I find the Chair's rationale to be a minimum material consideration, one that is so obviously material to the decision that it cannot rationally be left out of account (*R(Friends of the Earth Ltd and anor) v Secretary of State for Transport* [2020] UKSC, [2021] PTSR 190 at [119]. If one asked oneself the question, could the defendant have ignored the safety rationale of the Phase 1 Report recommendations the answer would be of course not. It would have been irrational in the *Wednesbury* sense to have done so.

74. The Chair's rationale and the public safety imperative is therefore not a matter that would fall within the wide margin of appreciation open to the decision taker. I reject Mr Payne's submission.

75. As to whether the defendant had failed to take into account, or have regard for, the rationale for the PEEPs recommendations, Mr Desai for the claimant argued that the paucity of reasoning in the decision-making process demonstrates a failure to identify, address and grapple with the rationale in a number of respects. The Chair had identified an obvious and urgent public safety imperative for PEEPs to be implemented and the lack of any of the proposals for buildings with a stay put strategy demonstrates a failure to grapple with the Chair's rationale. There had been an oversimplification, almost to the point of misunderstanding, of the stay put strategy through insignificant recognition of the need for evacuation sometimes where a stay put strategy is in place. The overwhelming weight of the experts to the panel in support of PEEPs with the lone dissenting voice of Mr Todd was not addressed in the defendant's decision making process and a conflation and confusion at times between the different concepts of evacuation and rescue.

76. In response the defendant suggested it was the claimants who had oversimplified by treating the risk and safety imperative identified by the Chair as being a trump card when the defendant was required to take other relevant factors into account such as practicality, proportionality and cost. The safety threat of fire to those unable to self evacuate had not been overlooked and was at the heart of the PEEPs consultation, but when weighed in the balance with all the other factors gleaned from the wide-ranging consultation, workshops and input from experts, the decision was made not to follow the PEEPs recommendations. It was a decision well within the defendant's broad discretion and fell far short of *Wednesbury* unreasonableness.

Discussion and conclusion

77. It is evident from the factual narrative that the rationale was not ignored, but that when balanced with other factors such practicability, deliverability, complexity and cost that were highlighted in the consultation responses, the defendant made what was essentially a political judgment that the PEEPs recommendations should not be implemented because of the difficulties identified. I conclude that the defendant was entitled to consider those countervailing factors and weigh them in the balance. It is not a case of giving the safety imperative no weight, but of having regard to it but then concluding that the other factors carried more weight in what was essentially a political judgment. The eight points raised by the claimants do not demonstrate a wholesale failure to engage in the rationale of the Chair's recommendations but are a challenge to the intensity of the enquiry undertaken by the defendant, which, absent irrationality, is for the defendant to decide.

78. Even if one accepts that the defendant could not go behind the back of the GTI inquiry conclusion of the safety imperative for changes to be made, with the necessary implication that Mr Todd's evidence was rejected, it does not automatically follow that the PEEPs recommendations must be adopted.

79. I therefore conclude that the defendant did not fail to take the mandatory material considerations into account when reaching its decision not to implement the PEEPs recommendations. Ground 1 therefore fails.

Ground 2: breach of legitimate expectation of consultation process

80. The claimants' narrow ground and argument was that the repeated, clear and unequivocal assurances devoid of any relevant qualification that the government would implement all of the phase 1 recommendations, including the PEEPs recommendations, gave rise to a paradigm procedural legitimate expectation that if a departure from that commitment was being contemplated, there would be a fair opportunity to comment on it and the reasons for it *(R (Niazi) v the Secretary of State for the Home Department* [2008] EWCA civ 755). The point was reinforced by the consent order of 13 November 2020 settling Ms Aghlani's judicial review. However, the defendant had failed to consult on a departure from the PEEPs recommendations or provide a fair opportunity to respond to the reasons for the departure but instead launched straight into the EEIS+ consultation. The EEIS+ consultation did not discharge the claimants' procedural legitimate expectations since the decision not to implement the non-preferred option - the PEEPs recommendations - had already been taken. What was sought was an opportunity to be consulted on whether to depart from the PEEPs recommendations.

81. The defendant argued that even if the claimants had established that a substantive legitimate expectation had arisen, the consultation had not been so unfair as to be unlawful on the facts in this case. The bar was set high and the claimants had not shown that "something has gone clearly and radically wrong" (*R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA civ 2098). It is inherent in the consultation process that a decision-maker might change their mind and it would therefore be otiose for a consultation to tell a consultee that a proposal may or may not be pursued. There is no obligation on a decision-maker to provide information about any possible objections as part of the consultation and if negative responses emerge during the consultation there is no obligation on the decision-maker necessarily to provide a further opportunity to comment on the objections received *(R (Beale) v Camden LBC* [2004] EWHC 6 Admin at [19]). The key factor in determining whether there is a need to mention alternative options in a consultation document is whether the consultation was actively misleading *(R (on the application of Moseley) v Haringey LBC* [2014] LGR 823). Mr Payne accepted that if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt, then the decision maker will need to re-consult (per *Smith v East Kent Hospital NHS Trust and another* [2002] EWHC 2640 Admin).

82. The defendant had therefore acted entirely properly and lawfully by consulting on her preferred proposals (the PEEPs consultation), listening to the responses with an open mind that she then changed and reconsulted on her further proposals (the EEIS+ proposals).

83. It was submitted that on the facts of the case, the claimants and other consultees were aware from both the general context of the consultation and the nature of the responses that PEEPs might not be adopted and an alternative considered. The claim would thus fail on the facts of the case on this point.

Discussion and conclusion

84. There was no dispute as to the applicable legal principles which were as stated by both sides. I am in no doubt that the government's public commitment (including in the consent order settling the Aghlani judicial review proceedings) to implement all the

Phase 1 recommendations gave rise to a legitimate expectation that if the defendant contemplated not making good on their commitment, that there would be a fair opportunity to comment on a deviation (*Niazi*). It is a requirement of fairness and good administration, for trustworthiness and transparency purposes. This was an exceptional case where government ministers at every level had insisted that the Phase 1 Report recommendations would be implemented in full, without caveat or quibble and gave rise to the legitimate expectation that they would act on their announcements.

85. The heart of the question is to what extent did the two consultation exercises provide that opportunity which turns principally on the wording of the consultation exercises themselves. The PEEPs consultation was explicit in stating that its intention to implement PEEPs by regulation in the autumn of 2021 was subject to consideration of the responses to the consultation, even if it did not draw too much attention to it. It therefore envisaged the possibility that they might not be implemented and consultees would have been aware of it and can be expected to engage with the small print when considering a consultation document.

86. The format of the consultation questions provided the opportunity for consultees to provide brief reasons for their views which gave the chance to express alternative methods of improving safety for high-rise residents unable to self-evacuate. So too did question 17 which was drafted as an open question.

87. The responses to the PEEPs consultation are also revealing. Many of those responding had clearly understood that not implementing PEEPs was on the cards for discussion, since they suggested alternatives such as the PCFRA which came to form the basis of the EEIS+ consultation. The wording of the PEEPs consultation honours the first part of the consent order in Ms Aghlani's case - to undertake a further consultation solely on PEEPs - since the PEEPs recommendations had been left out of the first consultation. It was exactly that. I therefore conclude that the issue of whether to implement PEEPs was sufficiently presaged in the PEEPs consultation document.

88. The EEIS+ consultation process is discussed more fully below (since grounds 2 and 3 overlap to some extent) but I accept the claimants' argument that by the time of the 18 May 2022 EEIS+ consultation the decision had been made not to implement PEEPs and thus has no direct bearing on this ground of challenge. Mr Payne's submission that the decision not to implement PEEPs had not yet been taken was not consistent with the evidence and merits no further mention.

89. The next question therefore is if it was fair and proportionate for the defendant to change her mind (see *Re Finucane's application* [2019] UKSC 7, [2019] 3 All ER 191 at [62]) after analysing the responses to the PEEPs consultation, in light of the expectations of the claimants and others.

90. I am satisfied that the prospect of not implementing PEEPs whilst not trumpeted, was sufficiently heralded in the consultation document and the wording of the document would alert vigilant consultees to the possibility that the defendant's position might change after seeing the responses to the proposals. The Government was required to embark on the consultation with an open mind and the responses to the proposals provided sufficient reasons for a change of mind. The consultation was not so unfair as to be unlawful. Ground 2 is therefore rejected.

Ground 3: unfair consultation process

91. Ground 3 relied on the *Gunning* principles:

> "…. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals." *R v Brent London Borough Council ex parte Gunning* [1985] 84 LGR 168 in *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947).

92. The claimants' central argument was that since the defendant had decided not to implement PEEPs as recommended by the GTI Phase 1 Report before consulting on EEIS+ the decision failed on the first *Gunning* requirement. The decision not to implement the PEEPs recommendation was no longer at a formative stage. It was linked to the argument that the PEEPs consultation was addressed exclusively at how, not whether, to implement PEEPs which has been touched on above. It required a separate consultation exercise directly asking for submissions on whether to implement PEEPs.

93. The defendant argued that she had perfectly properly put forward the consultation with preferred proposals, listened to the responses and changed her mind. Since the implementation of the PEEPs recommendations was not practical and new proposals were devised (EEIS+), quite properly she had then consulted on the new proposals in a fresh exercise (*Smith v East Kent Hospital NHS Trust and another* [2002] EWHC 2640 Admin).

Discussion and conclusion

94. The legal principles were not disputed and this ground turns on the facts. I have already accepted the claimants' argument that the decision taken was to reject implementation of the PEEPs recommendations as formulated in the Phase 1 Report. But as explained in ground 2, respondents to the PEEPs consultation would, or should have been aware that the defendant might not adopt the PEEPs recommendations, even though the main thrust of the consultation exercise was addressed at how to adopt them. It follows that I have rejected the central argument of unfairness advanced by the claimants.

95. Once the defendant had decided not to implement PEEPs in the way recommended by the GTI Chair and alternatives were developed, the defendant was required to consult on the proposed alternatives, as per *Smith*. The new proposals were significantly and substantially different to the PEEPs recommendations.

96. In the particular facts and circumstances of this case I do not identify a breach of the first *Gunning* requirement for the defendant to have ruled out the PEEPs recommendations before embarking on the EEIS+ consultation. The PEEPs consultation was a sufficiently fair exercise to enable the decision to be made not to implement PEEPs in the form recommended in the Phase 1 Report. It was then necessary to embark on a fresh consultation exercise to obtain views on the proposed alternative. That is what the defendant did in the EEIS+ consultation.

97. There was much discussion during the hearing of the significance (or otherwise) of the withdrawn LGA guidance on preparing for emergencies. But it does not take matters further. The defendant acknowledges the safety risks and implications of the status quo for disabled people. It has decided that the PEEPs recommendations are not practical and is in the process of finding alternative measures that will increase the safety of disabled people and others unable to self-evacuate in the event of fire. I do not see the equivocations around the LGA advice to assist the claimants' arguments. Nor has the defendant misunderstood the distinction between rescue and evacuation. Even though they are far fewer in number there is a logic in focussing on buildings with an SE strategy, since in those buildings the safety of all residents has been assessed as being best achieved by all of them leaving the building at once, simultaneously. Although residents in buildings with a stay put strategy may need to leave the building, it is not a given, and so may be less likely to happen. The fact that the EEIS+ proposals will only apply to SE buildings does not mean that the problems in stay put buildings have been overlooked.

98. Ground three is not made out.

Ground 4: breach of PSED

99. The claimants alleged that the decision not to proceed with the PEEPs recommendation was illegal since it breached the defendant's statutory PSED to have due regard to the equality implications of the decision. It was argued that a "very high" regard was required because of both the large number of those affected and their vulnerable position and that the defendant failed in three respects:

i) Firstly, by failing to identify and analyse the central equality implications of the absence of any escape plan for disabled residents in stay put buildings. There was no acknowledgement in the EIA of 17 March 2022 of the potential impact of not progressing PEEPs for disabled people with a bland assertion that

> "In buildings where 'stay put' is the evacuation strategy, the advice that residents are safer in their own flats unless there is a fire within that flat applies to all regardless of any protected characteristic."

Which was said to have missed the point of both the rationale for the PEEPs recommendation and the disproportionate impact on disabled people of not implementing it. There had been a failure to engage with the detail of the implications of not implementing PEEPs such as the frequency of the need for residents in stay put buildings to escape, the implications of leaving disabled residents reliant on the FRS and the consequences of not sharing information with the FRS.

ii) There was a breach of the defendant's duty of enquiry as they had not consulted people with direct experience and expertise of evacuation plans and associated provision who hold indispensable information. Nor had they sought input from relevant experts on the concerns raised in the responses to the PEEPs consultation on safety, practicability and proportionality.

iii) The defendant had failed to consider steps to mitigate adverse equality implications of the decision not to proceed with the PEEPs recommendation.

100. The defendant accepted that the PSED was engaged but disagreed that it had been breached on a number of grounds. The first – that no decision had been reached not to implement the PEEPs recommendations - falls away since I have found that the decision had been made by 18 May 2022. The second was that the claimants had selectively quoted from the evidence when an objective assessment of all the EIAs and the Fire Minister's decision demonstrated that the equality implications had been grappled with. On the facts there had been no breach of the duty of enquiry. Their third point raised was that the purpose of the EEIS+ consultation was precisely to consider steps to mitigate adverse equality impacts from not implementing the PEEPs recommendations.

The law

101. Section 149(1) of the 2010 Act requires a public authority, "in the exercise of its functions", to have "due regard" to the equality needs to:

> " "(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act ;"
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it".

102. Section 149(3) provides that having "due regard" to the need identified in subsection (1)(b) "involves having due regard, in particular, to the need" to do three things:

> " "(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;"
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low".

103. Section 149(4) provides that

> "[the] steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities".

104. Compliance with the duties imposed by section 149

> "may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under EqA 2010" (section 149(5)).

105. The relevant "protected characteristics" include "disability", "age", and "pregnancy/ maternity" (section 149(7)).

106. The parties were not in significant disagreement as to the applicable law. It is the statute that is to be construed, not the case law, but *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 remains a key authority. Mr Payne drew the court's attention to the recent case of *R(on the application of Flinn Kays) v Secretary of State for Work and Pensions* [2022] EWCA Civ 1593. In that case it was found at first instance and upheld on appeal that the Secretary of State had had sufficient regard to the need to eliminate discrimination and advance equality of opportunity and Lewis LJ endorsed the observations of Swift J that:

> "Section 149 of the 2010 Act does not require a decision-maker to have considered every conceivable matter; what section 149 requires is coherent and robust consideration of the likely consequences of a proposed decision within the framework that section sets."

107. It is also important to bear in mind there is no one size fits all and all cases are fact and circumstance sensitive. As Lord Neuberger of Abbotsbury PSC observed at para 74 of his judgment in *Hotak v Southwark London Borough Council (Equality and Human Rights Commission intervening)* [2015] PTSR 1189 "the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment".

108. The judgment of the court in R (on the application of *Sofia Sheakh v London Borough of Lambeth Council* [2022] EWCA Civ 457) also helpfully set out the following five principles which are useful to bear in mind:

> "First, section 149 does not require a substantive result (see the judgment of Lord Justice Dyson in *R. (on the application of Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2009] PTSR 809 (at paragraph 31)). Second, it does not prescribe a particular procedure. It does not, for example, mandate the production of an equality impact assessment at any particular moment in a process of decision-making, or indeed at all (see *R. (on the application of Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158; [2009] PTSR 1506, at paragraph 89). Third, like other public law duties, it implies a duty of reasonable enquiry (see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] A.C. 1014). Fourth, it requires a decision-maker to understand the obvious equality impacts of a decision before adopting a policy (see the judgment of Lord Justice Pill, with which the other

> members of this court agreed, in *R. (on the application of Bailey) v Brent London Borough Council* [2011] EWCA Civ 1586; [2012] Eq. L.R. 168, at paragraphs 79, 81 and 82). And fifth, courts should not engage in an unduly legalistic investigation of the way in which a local authority has assessed the impact of a decision on the equality needs (see the judgment of Lord Justice Davis in *Bailey*, with which Lord Justice Richards agreed, at paragraph 102)."

Discussion

109. The defendant relied on the full contents of all the EIAs and the Fire Minister's written responses as evidencing compliance with PSED arguing that it was an ongoing process – the decision not to implement PEEPs ran in conjunction with the exploration of alternative ways to achieve improved safety for residents of high-rise buildings who are unable to self-evacuate. The difficulty with Mr Payne's argument was that PEEPs in the format recommended in the Phase 1 Report had been definitively ruled out before decisions were made on alternatives. Although I accept it is something of an iterative process, I shall consider only the EIAs and other relevant documents prepared prior to the decision under challenge being taken as being relevant and disregard those which post-date the decision. The GTI Phase 1 report is of course of central importance and the relevant EIAs are the PEEPs EIA dated 30 April 2021 and that of 27 August 2021, the EIA for progressing FRS Rescue Option of 8 October 2021, and also the "EIA for not progressing PEEPs as outlined in the summer 2021 consultation and potential future policy proposals" of 22 February 2022. It's something of a grey area when the decision was conclusively made not to implement the PEEPs recommendations. We can see from the narrative that the Minister had considerable doubts in the autumn of 2021, sufficient to start exploring alternatives, but I find that it was not finally made until the spring of 2022, late March. I agree with the claimants' submission that it has not been evidenced that the update of 17 March 2022 was before the Minister when the decision under challenge was made (and nor was the updated EIA of 20 April 2022, which post-dated the decision in any event and must therefore be disregarded) however these documents were not significantly different to the earlier documents.

110. It is necessary not only to look at the EIAs themselves, but also the other evidence explicitly considered as part of the PSED listed in the EIAs which included the GTI Phase 1 Report, (including the written evidence) and the responses to the PEEPs consultation (both the written responses and the stakeholder meetings), the impact assessment for the PEEPs consultation, the responses to the wider fire safety consultation of July 2020 and the Equality and Human Rights Commission report "Housing and disabled People: Britain's hidden crisis" of May 2018.

111. The claimants criticised the EIAs for not sufficiently drawing attention to safety imperative of the PEEPs recommendations and that buildings with an SE strategy are a tiny (3%) proportion of the number of high-rise residential buildings. Nor do they set out in detail an explanation of the difference between evacuation and rescue and that the way in which the FRS option/EEIS is a wholly different concept to a PEEP. Nor do the EIAs set out the statistics demonstrating the extent of the disproportionate impact on disabled people unable to self-evacuate in the event of fire when, for whatever reason, staying put is not a safe option. Nor is the extent of the U-turn from the public

statements committing to implement all of the Chair's recommendations foregrounded in the EIAs. The observation of Elias LJ in *Bracking* is apt:

> "I suspect also that part of the problem may be that these documents are for public consumption and give the impression that they have been drafted with at least half an eye to sending an up-beat message about the merits of the policy. This necessarily involves down-playing the adverse effects of the decision and exaggerating its benefits. As understandable as that may be from a political perspective, forensically it inevitably creates doubt whether the true impact of the decision has been properly appreciated. The Minister cannot then complain if the documents are taken at face value."[75]

112. The question is whether the decision passes muster forensically. Has there been a proper and conscientious focus on the statutory criteria? Has the decision maker been clear about precisely what the equality implications are when he puts them in the balance, even though it is ultimately for him to decide what weight they should be given in light of all the relevant factors? Are the shortcomings identified by the claimant actual, or merely presentational shortcomings and if so, do they demonstrate that the Minister fell short of his non-delegable responsibilities?

113. In this case the criticism has to be seen in the light of all the information taken into account by the Minister which included the GTI Phase 1 Report which was articulate and comprehensive in setting out the facts. There can be no doubting that everyone, including the defendant and the Minister was acutely aware of the implications from the Chair's Phase 1 report and the evidence from the statistics of the disproportionate impact of the Grenfell Tower fire on people with disabilities.

114. As well as the EIAs themselves and the documents referred to as having been taken into account as part of the exercise, the other crucial documents are those which explain the Minister's thinking such as the ministerial response of 23 September 2021. Together they provide a comprehensive picture of the regard had to the PSED.

115. That PEEPs would ameliorate the disadvantage considerably was well known and explained in the Chair's Phase 1 report. The concerns about practicality, proportionality and cost were real and evidenced in the consultation replies and outcome of the workshops. Most of the experts supported PEEPs, but not all, and it does not necessarily follow that PEEPs as envisaged by the GTI Phase 1 Report had to be adopted when there were other sources of evidence that the defendant was entitled to consider. It is important to bear in mind that it is the Minister's responsibility, not the Court's, to decide what weight should be given to all the relevant factors. The EIAs acknowledged the fact of the disproportionate impact on disabled people, even if it did not state or know the precise extent. The defendant was cognisant of the urgent public safety imperative of evacuation plans in every high rise residential building as identified in the Phase 1 report recommendations, but decided that it was outweighed by the practical considerations and would be disproportionate to introduce PEEPs. That was exactly the political decision that the Minister was entitled to make.

116. The defendant placed some weight on the risk of resentment from increased housing costs and charges from those who are able to self-evacuate and therefore do not need a

PEEP, towards those in need of a PEEP and the concern that it would be contrary to "the need to foster good relations between those who share a relevant protected characteristic and persons who do not share it" (s.149(1)(c)) as part of the PSED and a matter to which it is required to consider. It is important to note that the fostering of good relations includes having due regard, in particular, to the need to tackle prejudice and promote understanding (s.149(5)). There will be situations and cases where compliance with the public sector equality duty will require much to be done to educate and take steps to reduce neighbour or community resentments and tensions to advance equality and inclusion. The purpose of s.149(1)(c) is not to undermine, but to support, the duties under s.149(1)(a) and (b), hence subsection s.149(5). But this was not a point explored and developed before me and on the facts of this case the defendant was entitled to place some little weight on it.

117. There is one aspect of the Minister's thought process however that causes considerable concern:

> "He gave a clear steer that he thought where a building had a stay put strategy, that it was necessary (and crucially, non-discriminatory) to ask disabled people to stay put like their neighbours." (Ministerial Response to Options Paper, 23 September 2021)

118. It appears to demonstrate a misunderstanding of equality law and disability discrimination under the EqA 2010 and the PEEPs recommendation. It is trite law that disability rights under EqA are not symmetrical and that compliance with the law under the disability strand will often involve treating disabled people differently to those who are not disabled, so as to remove or reduce barriers to participation in, for example the labour market, or access to services and public functions or premises etc. The duty to make reasonable adjustments (s.20 EqA 2010) and discrimination arising from disability (s.15 EqA 2010) are classic examples: the legal duty to make reasonable adjustments applies only to those who are disabled within the statutory definition. It is a fundamental principle and central to the notion of equality that achieving equality for disabled people may involve treating disabled people differently as they are differently abled to those who are not disabled. It is specifically referred to in the PSED itself (see s.149(4) and (6) set out above). It is troubling that the Minister appears not to have understood this. It is not a point raised in the EIAs or any of the papers prepared by the civil servants and nor does it form any part of the documents relied on in support of the EIA and it is not clear how he formed the notion.

119. It could also appear to demonstrate an oversimplification at best, or a misunderstanding at worst, of the stay put strategy and the PEEPs recommendations. The PEEPs recommendation would not involve residents with PEEPs always being evacuated in a building with a stay put strategy, whenever there is a fire in any part of the building. Instead its purpose was to enable those residents who were unable to self-evacuate to evacuate, if necessary, in the circumstances provided for in a building with a stay put strategy. It is not the case that all residents will always need to stay put in the event of fire and the risk of the breakdown in compartmentation was thoroughly analysed and discussed in the Phase 1 Report and the evidence of the experts.

120. How to interpret the sentence - what was meant by it and what part did it play in the fulfilment of the PSED? I have given the matter much anxious scrutiny. It is perplexing

since on one analysis it could mean the Minister thought that it was necessary not to implement PEEPs in a stay put building in order to comply with discrimination law. If that was his belief, it was wrong. It would mean that the GTI Chair had made recommendations that would, if implemented, be unlawful. If that is what he thought it begs the question of why it was not raised earlier and only acted on at this late stage.

121. The sentence must be read and construed in the context of the entirety of the EIAs and source material that informed them and the other observations and reasons contained in the decision-making process. The sentence is an outlier which jars with the rest of the reasoning of the Minister contained both in other parts of that Ministerial response and elsewhere. I interpret it as a late addition and make-weight that is not central to the ratio of the decision, an idea that has come out of nowhere and which did not form part of the careful civil service advice which was what was followed.

122. I conclude that on a balanced reading overall, the defendant understood the rationale for the PEEPs recommendation and that the failure to implement PEEPs would have a disproportionate impact and could put those with the protected characteristics of disability, age and pregnancy/maternity at a particular disadvantage compared to those without those protected characteristics. But that the evidence from the PEEPs consultation exercise led the defendant to conclude that it would not be proportionate to introduce PEEPs as recommended, because of the practical difficulties and concerns raised by a number of RPs and building owners. The defendant reached the decision in the knowledge of the disproportionately high number of disabled people who lost their lives in the Grenfell Tower fire and with knowledge of the urgency and high evidential threshold applied by the Chair before making his fire safety recommendations.

123. The reasoning could have been fuller and engaged more closely with the detailed and thoughtful findings and conclusions in the Phase 1 report and careful advice of the experts appointed to assist the inquiry, but there has been a sufficient grappling with the Chair's rationale in all the circumstances sufficient to meet the legal threshold. The fact of the potential indirect discrimination is acknowledged in the EIAs which the minister took account of in reaching his decision and he had also had the benefit of meetings with members of the Aghlani family and the claimants in this case and various other stakeholder meetings, together with the responses to the consultation who were articulate in their concerns. The evidence demonstrates that it was not ignorance of the underlying rationale for the PEEPs recommendations, nor the risk and extent of any adverse impact, but fear of political fallout, that explains the way in which the reason was articulated. It was not unlawful.

124. On the second point of challenge under the PSED, it is not in dispute that there is a duty of enquiry that arises if required information is not available properly to inform a decision. Here, in broad terms, the criticism is of a failure to undertake further enquiries to test the views of the housing sector expressed in their PEEPs consultation responses that implementing PEEPs would not be practical or proportionate and that the costs in the proposal had been under-estimated and the difficulties minimised. Particular criticism is made of the failure to obtain further input from the academic experts about why they had supported and endorsed the PEEPs recommendations who may have had answers to the criticisms raised by the housing sector.

125. The defendant is criticised for not taking account of the relevant real life experience of persons such as Ms Rennie being evacuated during a fire in her building to realise that

PEEPs can be practical, effective and work in practice. However, it is one example, Ms Rennie's experience is personal and specific to her with her abilities and existing level of care. Another person with different abilities and physical features (such as weight) and with different care and assistance needs, perhaps without the need for PAs to assist may have a very different PEEP that might require very different arrangements to assist with a person's evacuation.

126. There was also criticism that more could have been done to explore ways to overcome the obvious difficulties of relying on trained neighbours to assist with a PEEPs evacuation, but this would be imposing too much of a magnifying glass to the decision-making process.

127. I agree however with the defendant's submission that the standard is not one of perfection. More can always be done but in this case there was sufficient information before the decision maker who had the relevant material to enable a reasonable decision to be made. The process of consulting and re-consulting could become endless. The experts, or at least all other than Mr Todd, disagreed with the housing sector's concerns. The Minister had enough information before him for him reasonably to conclude that it was sufficient to form a view. The *Tameside* test of reasonable enquiry is met.

128. The third challenge under this ground argues that the defendant did not consider the ways in which the risks and adverse impacts may be mitigated. Here there is no dispute that such a duty exists as part of the PSED. But the facts of the case do not support the claimants' argument. The fire safety measures introduced in response to the Chair's other Phase 1 recommendations, and the EEIS+ consultation were all aspects of the consideration of ways to mitigate the risk. It is a work in progress, a sequential process if you like. It does not seem to me to be unlawful to rule out one solution to improve fire safety for those unable to self-evacuate, and then to explore and consult on other ways in which fire-safety for the non-mobile and others may be met. Although the claimants have noted that the overwhelming majority of high-rise buildings have a stay put strategy, it is not unreasonable or irrational to consider that the risk may be greater in SE buildings, even if fewer people are potentially affected.

129. It is to be stressed that cases are fact sensitive. In very many cases it would be unlawful not to consider alternatives and mitigation possibilities, prior to deciding on a course of action: it would be necessary to consider alternatives first. But here, in the specific circumstances of this case, the nature of the concerns raised by the housing sector that compulsory PEEPs in all residential high rise buildings was unworkable and impractical entitled the defendant to decide not to implement before considering other ways to reduce the risk. Those further investigations are ongoing via the EEIS+ consultation.

Ground 5: breach of articles 2 and/or 14 European Convention on Human Rights ("ECHR")

130. The claimants argue that the decision not to implement the PEEPs recommendations, taken together with the absence of any alternative measures to address the disadvantaged position of disabled residents in high-rise residential buildings with a stay put strategy under the status quo breaches the positive duty to protect life under article 2 ECHR contrary to s.6 Human Rights Act 1998 ("HRA 1998"). It is an absolute right that imposes positive obligations on state parties to have in place an effective system to reduce risks to the right to life to a reasonable minimum.

131. Secondly, the claimants alleged breach of the duty of non-discrimination in enjoyment of ECHR rights under article 14 (read with article 2) contrary to s.6 HRA 1998. The four questions set out in *Thlimmenos v Greece* (2000) 31 EHRR 411 could be answered in the claimants' favour: (1) the subject matter of the complaint falls within the ambit of article 2 of the substantive Convention rights; (2) the ground upon which the complainants have been treated differently, or treated the same despite being in a relevantly different situation from others constitutes an "other status" under article 14; (3) they have been treated differently from other people not sharing that status who are similarly situated or, alternatively have been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs; and (4) the defendant cannot show that the difference or similarity in treatment has an objective and reasonable justification and very weighty reasons are required to justify the failure to secure equal enjoyment of rights in this case.

132. The claimants also drew on the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") which provides in article 10 that "…every human being has the inherent right to life and [State Parties] shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others" and article 11 requires that "State Parties shall take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk…" On well-established principles, the Court must have regard to and interpret the scope of article 2 in harmony with this specialist international instrument: *R (SC and ors) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 at [80]–[82]

133. The defendant disputed the factual premise of the challenge, arguing that it was incorrect that she had taken no alternative measures to address the disadvantaged position of disabled residents consequent to the decision not to implement PEEPs and that there had not been a "complete failure" to take any relevant steps in relation to stay put buildings. The question had been wrongly framed by the claimants.

134. Secondly it was submitted that the claim falls outside HRA 1998 since s.6(6)(a) provides that a failure "…to introduce or, or lay before, Parliament a proposal for legislation…." is not an act for s.6 purposes which includes secondary legislation (see *R (Rose) v Secretary of State for Health* [2002] EWHC 1593 (Admin)).

135. But in any event it was disputed that the issues complained of amounted to breach of article 2 given the wide margin of appreciation afforded to contracting states (see *Budayeva v Russia* 15339/02 [134 – 135]) and the very different facts in this case, to the circumstances and level of risk and facts in the ECHR case law.

136. In the article 14 claim, even if the first three *Thlimmenos* questions were answered as suggested by the claimants, the defendant's actions (or lack of them) were justified. There was a dispute between the parties as to how intense the level of scrutiny of the defendant's actions should be and the width of the margin of appreciation.

The law

137. By virtue of section 6(1) HRA 1998, "It is unlawful for a public authority to act in a way which is incompatible with a Convention right. Article 2 provides that everyone's

right to life shall be protected by law. The general principles to be applied have been summarised in *Kolyadenko and Ors v Russia* (2013) 56 EHRR 2 at [157] - [161].

> "The positive obligation to take all appropriate steps to safeguard life for the purposes of article 2 entails above all a primary duty to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life." [157].

(See also *Oneryildiz v Turkey* (2005) 41 EHRR 20))

138. The obligation:

> "must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake" [158]

139. The duty is "to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. …" ((*R (Middleton v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182 at [2]).

140. The system must reduce risk "to a reasonable minimum (*Stoyanovi v Bulgaria* App. No 42980/04 at [61]) However:

> "As to the choice of particular practical measures, the court has consistently held that where the state is required to take positive measures, the choice of means is in principal a matter that falls within the contracting state's margin of appreciation." *Kolyadenko* [160]

141. Cases are always fact sensitive and context specific:

> "In assessing whether the respondent state complied with its positive obligation, the court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities' acts or omissions, the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue, especially where conflicting convention interests are involved. The scope of the positive obligations imputable to the state in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation." *Kolyadenko* [161].

142. Article 14 ECHR provides that:

> "the enjoyment of the rights and freedoms set forth in [the ECHR] shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

143. Disability is an "other status" and well-recognised in the case law as a so-called "suspect" ground of discrimination. There is no dispute that the claimants have accurately set out the four *Thlimmenos* questions. To avoid repetition, the competing arguments as to what degree of scrutiny applies to this case and the parties' respective arguments are set out in the discussion below.

Discussion and conclusions

Article 2

144. The defendant's s.6(6)(a) HRA 1998 point is somewhat of a distraction. Firstly, as Mr Desai notes, the power of the defendant to make regulations about fire precautions under article 24 RRO is subject to the negative resolution procedure (see article 24(5) RRO) and thus falls outside the scope of s.6(6)(a): see *R(Rose) v Secretary of State for Health and anor* [2002] EWHC 1593

> "Where the primary legislation provides that a statutory instrument shall be subject to annulment by resolution of either house, but after being made, it would not be a proposal for legislation for the purposes of Section 6(6)(a) of the 1998 Act.)" [50]-[51]).

145. In any event, the claim is framed as challenging the decision not to implement the PEEPs recommendation, it is not prescriptive as to how that is to be achieved. There is more than one way to skin a cat and other means would be possible to secure the same objective, such as disclaiming the LGA Guide approach or issuing statutory guidance under article 50 RRO. I have therefore rejected the defendant's argument that the ECHR challenge falls within the s.6(6)(a) exclusion zone.

146. More valid is the defendant's criticism that the claimants have overlooked the steps that the defendant had taken to improve fire safety. I agree that the failure to implement the PEEPs recommendation must be seen in the context of the other measures that have been taken, which whilst not specifically addressed to the evacuation of high-rise buildings with a stay put strategy, are relevant to the overall picture of the defendant's systems in place to reduce the risks to life from fire. I have therefore included all the measures taken and those already in place before the Grenfell Tower fire, such as the Fire Safety Act 2021, Fire Safety (England) Regulations 2022, the relevant parts of the Building Safety Act 2022 and the grants for improving fire safety in buildings that have been made available, and taken them into account in assessing compliance with articles 2 and 14 (with article 2) ECHR.

147. In article 2, the difficulty for the claimants is the breadth of the margin of appreciation afforded to contracting states in complying with their duty to take positive measures in their systems to help preserve and protect life, especially in a difficult social and technical sphere, such as here. The technical difficulties are documented in the housing sector responses to the PEEPs consultation and in the social sphere the defendant placed some weight on the risk of resentment from increased housing costs and charges from those who are able to self-evacuate and therefore do not need a PEEP, towards those in need of a PEEP.

148. The ECtHR has repeatedly stated that the duty must not impose an excessive burden on the authorities, which would include local authority landlords as well as the FRS.

149. Although the chair of the GTI considered the recommendations, including the PEEPs recommendations to be necessary and urgent after applying a high evidential threshold, the political decision not to implement PEEPs, when seen in the context of the scope of the positive article 2 duties and the other measures taken that may indirectly assist those who cannot self-evacuate, falls within the margin of appreciation. For example, the Fire Safety Act 2021 and Fire Safety (England) Regulations 2022 have strengthened fire safety regulations and improved fire safety to reduce the risk of compartmentation breakdown which should reduce the need for evacuation in buildings with stay put strategies, whether residents are able to self-evacuate or not. In light of the extent of the deference afforded to contracting states I am satisfied that the failure to implement the PEEPs recommendations does not fall below the reasonable minimum. There are sufficient laws, precautions and procedures in place. More can be done and would no doubt be desirable, but enough has been done to comply with the legal minimum requirement.

Article 14

150. My conclusion on the article 2 claim is not fatal to the article 14 with article 2 complaint since article 14 is not limited to the contracting state's acts in fulfilling its other obligations under the ECHR. Here the alleged discrimination is in connection with the convention right to life. I accept the claimants' submissions that the first three *Thlimmenos* factors are made out: the subject matter of the complaint falls within the ambit of article 2 of the substantive Convention rights; disabled people constitute an "other status" under article 14; and they have been treated the same despite being in a relevantly different situation from others. The allegation under article 14 is of so-called *Thlimmenos* discrimination which could also amount to indirect discrimination – the failure to implement the PEEPs recommendations disproportionately disadvantages disabled people. It is no answer to the claim to say, as Mr Payne seeks to do, that there is no discrimination since some non-disabled people may also have difficulty self-evacuating (for example because they are heavy sleepers and fail to wake up during a fire). The outcome of the case will turn on the fourth *Thlimmenos* question of whether the defendant has proved objective justification for the failure to differentiate and identify the different needs of disabled people unable to self-evacuate in buildings with a stay put strategy.

151. The article 14 right is a qualified right and subject to the well-known justification test of whether the measure relied on is a proportionate means of achieving a legitimate aim. The claimants' submission that the defendant was required to prove "very weighty reasons" to discharge her burden of proof in cases where disability is relied on as the other status was challenged by Mr Payne who drew attention to the wide margin of appreciation that is applied to questions of social strategy. A nuanced approach is necessary. The wide margin of appreciation usually allowed to the state when it comes to general measures of social strategy, must be tempered or balanced with a recognition that some groups of society have historically been subject to stigmatisation, social exclusion and prejudice, so that very weighty reasons would be required to justify what would otherwise be discriminatory treatment. The preamble to the UNCRPD is a useful reminder of the difficulties faced by disabled people and the barriers that hinder their

full and effective participation in society on an equal basis with others. The guidance in *R(SC) v Work and Pensions Secretary* [2022] AC 223 at [115] is apt.

> "115. In summary, therefore, the court's approach to justification generally is a matter of some complexity, as a number of factors affecting the width of the margin of appreciation can arise from "the circumstances, the subject matter and its background". Notwithstanding that complexity, some general points can be identified.
>
> (1) One is that the court distinguishes between differences of treatment on certain grounds, discussed in paras 100-113 above, which for the reasons explained are regarded as especially serious and therefore call, in principle, for a strict test of justification (or, in the case of differences in treatment on the ground of race or ethnic origin, have been said to be incapable of justification), and differences of treatment on other grounds, which are in principle the subject of less intensive review.
>
> (2) Another, repeated in many of the judgments already cited, sometimes alongside a statement that "very weighty reasons" must be shown, is that a wide margin is usually allowed to the state when it comes to general measures of economic or social strategy. That was said, for example, in *Ponomaryov*, para 52, in relation to state provision of education; in *Schalk*, para 97, in relation to the legal recognition of same-sex relationships; in *Biao v Denmark* , para 93, in relation to the grant of residence permits; in *Guberina* , para 73, in relation to taxation; in *Bah v United Kingdom* , para 37, in relation to the provision of social housing; in *Stummer v Austria* , para 89, in relation to the provision of a state retirement pension; and in *Yiğit v Turkey* , para 70, in relation to a widow's pension. In some of these cases, the width of the margin of appreciation available in principle was reflected in the statement that the court "will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'": see *Bah* , para 37, and *Stummer* , para 89.
>
> (3) A third is that the width of the margin of appreciation can be affected to a considerable extent by the existence, or absence, of common standards among the contracting states: see *Petrovic* and *Markin* .
>
> (4) A fourth, linked to the third, is that a wide margin of appreciation is in principle available, even where there is differential treatment based on one of the so-called suspect grounds, where the state is taking steps to eliminate a historical inequality over a transitional period. Similarly, in areas of evolving rights, where there is no established consensus, a wide margin has been allowed in the timing of legislative changes: see *Inze v Austria , Schalk and Stummer v Austria*.

> (5) Finally, there may be a wide variety of other factors which bear on the width of the margin of appreciation in particular circumstances. The point is illustrated by such cases as *MS v Germany , Ponomaryov and Eweida v United Kingdom*."

152. The task is to look at the circumstances of the case and determine the level of scrutiny to be applied to make a balanced assessment of the proportionality test.

153. The proper approach starts with the following principle:

> "Whether that difference in treatment has an objective and reasonable justification will depend on whether the rule which results in the difference in treatment has a legitimate aim and is a proportionate means of realising that aim."(*R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 4 All ER 939, [2015] 1 WLR 1449 at [13]

154. It breaks down into 4 questions:

> "… (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter …In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure" (*Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2013] 4 All ER 533, [2014] AC 700 at [74])

155. The nuanced approach was succinctly encapsulated by Andrews LJ in *R (on the application of Salvato) v Secretary of State for Work and Pensions* [2021] EWCA Civ 1482, [2021] All ER (D) 57 (Oct) when she noted:

> "The importance of avoiding a mechanical approach based on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other facts as may be relevant. The Courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security, but as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification." [34]

156. In this case the relevant factors tending towards a wider margin of appreciation are that this case concerns an area of social policy, pleaded as so-called *Thlimmenos* it is a case of indirect (not direct) discrimination (see for example *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634, [2009] All ER (D) 09 (Jul) at [61]) and that the claim concerns an omission not an act since it is the failure to implement the PEEPs recommendation that is the matter of the challenge.

157. The factors tending towards very weighty reasons are that the suspect ground of disability is relied on in this case, which is informed by our obligations under UNCRPD and the importance of removing barriers to effective inclusion in all aspects of civil society for disabled people. The issue concerns a threat to life itself from an inability to self-evacuate from a residential building. As Mr Desai described it, nothing less than the equal enjoyment of the right to life is at stake in this case. A further factor leaning towards a more intense level of scrutiny is that the decision not to implement PEEPs was made before a final decision had been made about alternative ways of mitigating the risk. As I have noted above, on the facts of this case, it was not impermissible to rule out PEEPs before deciding on alternative measures, but it does mean that the decision warrants a high level of scrutiny. A further factor tending towards a more intense level of scrutiny is the degree of rigour and high evidential threshold applied by the GTI Chair in arriving at his fire safety recommendations which were firmly based on the facts and his findings in the Phase 1 report. The fact of the initial public pronouncements that all the recommendations would be adopted also militate towards entitling intense scrutiny on the defendant to establish why she changed her mind.

158. Balancing those factors together and adopting a nuanced approach I conclude that a high level of scrutiny is appropriate, and cogent, weighty, reasons are required to be shown by the defendant to prove objective justification in this case.

159. The justifications relied on are proportionality, practicality, safety and the cost. Practicality and cost together can be legitimate aims, but proportionality per se is not a legitimate aim as such, but rather the yardstick by which achievement of the aim identified is judged. I am satisfied that impracticality and cost are legitimate aims in this case. There were serious concerns about viability and the implications of staffing buildings with suitably trained individuals to be on hand should the need for evacuation to arise and acknowledged that the costs could not be borne only by those with PEEPs. Since the issue here is a failure to do something, the question can be posed thus: looking at the matter with the considerable rigour required, what has the defendant proved about the practical and cost implications of implementing PEEPs to show that it is justified in not taking the steps recommended by Sir Martin Moore-Bick? Have they done enough to investigation and research into finding a practical means of implementing the PEEPs recommendations? I shall look at this from two angles – firstly from the perspective of what the defendant did and then from the perspective of what the claimants say she should have done.

160. The defendant had the benefit of the Phase 1 Report and the evidence of the experts chosen by the inquiry and the reasons of the three experts for recommending PEEPs, and Mr Todd's reasons for recommending that the status quo should be maintained. The defendant had also had the responses to the PEEPs consultation, the workshop outcomes and further meetings when the decision was made.

161. Although the overwhelming majority of those who made representations in response to the PEEPs consultation document were in favour, there were also those who were not. Amongst those in favour in principle some expressed considerable concern about how PEEPs could be achieved and had misgivings about unintended consequences and implications. They were fewer in number than those who wholeheartedly supported the PEEPs proposals, but on the face of it, it was for the defendant to decide what weight to give them.

162. One strand of the claimants' argument was that the defendant had not engaged with the public safety imperative for the PEEPs recommendations and underlying evidence base. It is correct that the Chair made findings as to the level of risk and urgent need for changes to be made, from which it follows that he rejected Mr Todd's assessment of risk. It does not follow however that the defendant failed to understand the risks identified by the Phase 1 Report. The risks are explicitly acknowledged in all the government pronouncements and acceptance of the phase 1 Report findings. It does not follow that the defendant must have underestimated the safety risks in order to decide not to implement PEEPs at this stage. The decision was not made because the defendant reached a different view as to risk from the Chair, but that the defendant considered that the difficulties identified in implementing PEEPs set out in the government's consultation response document outweighed the safety reasons for implementation.

163. The submissions and views of many landlords, property owners and RPs were opinions that the defendant was bound to consider and to decide what weight they carried. Although the claimants can point to the fierce criticism of the objections to PEEPs from, in particular Professor Galea and Dr Lane, they were different views to be considered. It is not for the Court to say that the defendant was in legal error by not rejecting the criticisms made of the PEEPs proposals.

164. Ground 5 is not made out.

Final conclusions

165. The claim is not premature. A decision was made by late March 2022 not to implement the PEEPs recommendations which was communicated on 18 May 2022. Exploration of alternative ways of protecting the safety of residents in buildings who are unable to self-evacuate and to mitigate the implications of not implementing PEEPs are continuing with the EEIS+ consultation exercise and more general fire safety measures that have been adopted since the Grenfell Tower fire.

166. The rationale of the GTI PEEPs recommendations was a mandatory material consideration, but there was no failure to have regard to it when the defendant decided not to implement the PEEPs recommendation.

167. The claimants had a procedural legitimate expectation of consultation in respect of any departure from the PEEPs recommendations which was fulfilled by the PEEPs consultation and EEIS+ consultation exercises. Nor was the consultation process so unfair as to be unlawful.

168. The requirements of the PSED were not breached and due regard was had to the equality implications in the decision making process (ground 4). The curious wording of part of the Minister's decision that appeared to misunderstand the fundamental principles of

discrimination and equality law relating to disabled people was a matter of infelicitous wording and not reflective of the overall ratio of his engagement with the needs of equality, and was not an accurate representation of the overall approach to the duties to promote equality under EqA 2010.

169. The claimants are not precluded by s.6(6) HRA 1998 from raising complaints of breach of ECHR. However the defendant has established a framework of laws and guidance sufficient to satisfy a reasonable minimum protection of the right to life, given the wide margin of discretion open to her. The complaint under article 14 falls within the ambit of article 2 and the claimants have established *Thlimmenos* discrimination by the failure to implement PEEPs. An intense level of scrutiny is required to assess whether the defendant has objectively justified the discrimination and the defendant has demonstrated with very weighty reasons that she was entitled to reject the Chair's PEEPs recommendations, notwithstanding the Government's earlier public pronouncements that it would do so.

170. It is therefore not necessary to address the defendant's alternative argument under s.31(2A) Senior Courts Act 1981. Nor is it necessary to address the authorities and further arguments submitted by Mr Payne after the hearing had concluded.

171. This was essentially a political decision for the defendant to take and was not in breach of the requirements of public law and procedural fairness. It must have been desperately disappointing for the claimants and many others that the carefully considered PEEPs recommendations contained in the Phase 1 Report have not been implemented, but it was not an unlawful decision.

172. The claim is dismissed.