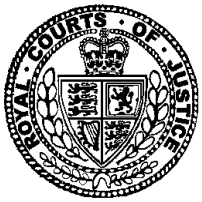

Neutral Citation Number: [2024] EWHC 3252 (Admin)

Case No: AC-2023-LON-003756

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 December 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE KING	**Claimants**
on the application of	
(1) SOPHIE COULTHARD **(2) LICENCEME GROUP LIMITED**	
- and -	
SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Defendant**

- -
- -

Cathryn McGahey KC and Samuel March (instructed by **Tuckers**) for the **Claimants**
Sir James Eadie KC, Ned Westaway and Horatio Waller (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 26 & 27 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 11 am on 17 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE LANG DBE

Mrs Justice Lang :

1. The Claimants seek judicial review of the Defendant's decisions, on various dates in 2023, to make statutory instruments and issue guidance under the Dangerous Dogs Act 1991 ("DDA 1991") which prohibit and restrict ownership of XL Bully type dogs ("XL Bully"). For the avoidance of doubt, references in this judgment to "XL Bully" or "XL Bullies" should be read as if they included the term "type".

2. The challenged statutory instruments are as follows:

   i) The Dangerous Dogs (Designated Types) (England and Wales) Order 2023 (SI 2023 No 1164) ("the Designation Order") which was laid before Parliament on 31 October 2023.

   ii) The Dangerous Dogs (Compensation and Exemption Schemes) (England and Wales) Order 2023 (SI 2023 No 1204) ("the Compensation and Exemption Order"), which was laid before Parliament on 13 November 2023.

   iii) The Dangerous Dogs (Exemption Schemes and Miscellaneous Provisions) (England and Wales) Order 2023 (SI 2023 No 1407) ("the Rehoming Order") which was laid before Parliament on 19 December 2023.

3. The Claimants also challenge the Defendant's "Guidance: Applying the XL Bully breed type conformation standard", last updated on 1 February 2024, ("the Conformation Standard").

4. The First Claimant is the director of the Second Claimant, which campaigns generally against the breed-specific approach to dog control adopted by Parliament in the DDA 1991, and specifically against the designation of XL Bullies under section 1 DDA 1991.

Preliminary issues

5. Permission to apply for judicial review was refused on the papers by Linden J. in an order sealed on 29 January 2024. At a renewal hearing on 24 April 2024, Dias J. granted permission in part, as set out in paragraph 1 of the order (sealed on 13 May 2024):

> "1. The application for permission to bring judicial review is granted save that permission to proceed with judicial review is refused in respect of the following grounds:
>
> a. The claim that the Defendant unlawfully fettered her discretion;
>
> b. The claim that the Defendant's actions amounted to breaches of rights of the First Claimant and others under Articles 8, 14 and/or Article 1 Protocol 1 of the European Convention on Human Rights **[Ground A (v)]**;
>
> c. The claim that it was irrational for the Defendant to impose a statutory regime under which a single person could transport an

> XL bully in a vehicle without breaking the law **[Ground B (iv)]**; and
>
> d. The claim that the Defendant was operating an unpublished policy **[Ground D**]."

6. In their skeleton argument for the substantive hearing fixed for July 2024, the Claimants asked for permission to rely on the ground that the Defendant fettered her discretion (paragraphs 48 to 54 under the heading "(f) The fettering of the Defendant's discretion"). This was resisted by the Defendant and the Claimants did not pursue the application orally at the hearing before Swift J. on 17 July 2024.

7. At the hearing on 17 July 2024, Swift J. refused the Claimants' application to rely on expert evidence (paragraph 1 of his order); refused the Claimants' application for disclosure (paragraph 2 of his order); ordered the Defendant to file a witness statement explaining the reasons for redactions made to disclosed documents (paragraph 3 of his order); and adjourned the substantive hearing with an increased time estimate. The order was made on 17 July 2024 and sealed on 23 July 2024.

8. On 25 October 2024, the Court of Appeal refused the Claimants' application for permission to appeal against paragraphs 1 and 2 of Swift J.'s order dated 17 July 2024. The Court of Appeal also refused an extension of time to appeal against paragraph 1(a) of Dias J.'s order, sealed on 13 May 2024, on grounds of delay (i.e. unlawful fettering of discretion). Arnold LJ considered that the appeal had no real prospect of success.

9. In response to a pre-hearing query from this Court, the Claimants sent an email dated 25 November 2024 explaining that unlawful fettering of discretion had not been pleaded as a freestanding ground; it was part of Ground A(i). It was particularised at paragraph 34 of the Revised Statement of Facts and Grounds. The Claimants accepted that Dias J. refused permission for this ground.

10. In the light of this history, I conclude that the Claimants do not have permission to pursue the submission that the Defendant unlawfully fettered her discretion (pleaded under Ground A(i), at paragraph 34 of the "Revised Statement of Facts and Grounds" dated 5th February 2024, and repeated at paragraphs 31 to 36 of the Claimants' skeleton argument, dated 21 November 2024), in apparent disregard of the Court of Appeal's order.

The statutory scheme

DDA 1991

11. The DDA 1991 was introduced in response to a number of dog attacks, including fatal attacks. The objectives of section 1 DDA 1991 are to reduce the population of dogs of designated types who are bred for fighting, or have the characteristics of a type bred for

that purpose, in the interests of public safety, because of their dangerous characteristics, and to impose strict controls on those that remain.[1]

12. The Preamble to the DDA 1991 states:

> "An Act to prohibit persons from having in their possession or custody dogs belong to types bred for fighting; to impose restrictions in respect of such dogs pending the coming into force of the prohibition; to enable restrictions to be imposed in relation to other types of dog which present a serious danger to the public; to make further provision for securing that dogs are kept under proper control; and for connected purposes."

13. The DDA 1991 is to be read with the Dangerous Dogs Exemption Schemes (England and Wales) Order 2015 ("the 2015 Order").

14. Section 1 DDA 1991 provides for controls on dogs bred for fighting or having the characteristics of dogs bred for fighting, in the following terms:

> "**1. Dogs bred for fighting**.
>
> (1) This section applies to -
>
> (a) any dog of the type known as the pit bull terrier;
>
> (b) any dog of the type known as the Japanese tosa; and
>
> (c) any dog of any type designated for the purposes of this section by an order of the Secretary of State, being a type appearing to him to be bred for fighting or to have the characteristics of a type bred for that purpose.
>
> (2) No person shall -
>
> (a) breed, or breed from, a dog to which this section applies;
>
> (b) sell or exchange such a dog or offer, advertise or expose such a dog for sale or exchange;
>
> (c) make or offer to make a gift of such a dog or advertise or expose such a dog as a gift;
>
> (d) allow such a dog of which he is the owner or of which he is for the time being in charge to be in a public place without being muzzled and kept on a lead; or

[1] These objectives were confirmed by the Secretary of State for the Home Department when introducing the bill to the House of Commons. See Hansard debate on Dangerous Dogs Bill. Volume 191. Wednesday 22 May 1991.

(e) abandon such a dog of which he is the owner or, being the owner or for the time being in charge of such a dog, allow it to stray.

(3) After such day as the Secretary of State may by order appoint for the purposes of this subsection no person shall have any dog to which this section applies in his possession or custody except-

(a) in pursuance of the power of seizure conferred by the subsequent provisions of this Act; or

(b) in accordance with an order for its destruction made under those provisions;

but the Secretary of State shall by order make a scheme for the payment to the owners of such dogs who arrange for them to be destroyed before that day of sums specified in or determined under the scheme in respect of those dogs and the cost of their destruction.

(4) …..

(5) The Secretary of State may by order provide that the prohibition in subsection (3) above shall not apply in such cases and subject to compliance with such conditions as are specified in the order and any such provision may take the form of a scheme of exemption containing such arrangements (including provision for the payment of charges or fees) as he thinks appropriate.

(6) A scheme under subsection (3) or (5) above may provide for specified functions under the scheme to be discharged by such persons or bodies as the Secretary of State thinks appropriate.

(6A) …..

(7) Any person who contravenes this section is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both except that a person who publishes an advertisement in contravention of subsection (2)(b) or (c) -

(a) shall not on being convicted be liable to imprisonment if he shows that he published the advertisement to the order of someone else and did not himself devise it; and

(b) shall not be convicted if, in addition, he shows that he did not know and had no reasonable cause to suspect that it related to a dog to which this section applies.

(8) An order under subsection (1)(c) above adding dogs of any type to those to which this section applies may provide that

> subsections (3) and (4) above shall apply in relation to those dogs with the substitution for the day appointed under subsection (3) of a later day specified in the order.
>
> (9) The power to make orders under this section shall be exercisable by statutory instrument which, in the case of an order under subsection (1) or (5) or an order containing a scheme under subsection (3), shall be subject to annulment in pursuance of a resolution of either House of Parliament."

15. Under the Dangerous Dogs (Designated Types) Order 1991, two further breed types were designated as appearing to be bred for fighting or to have the characteristics of types bred for that purpose, namely the types known as the Dogo Argentino and the Fila Braziliero (Article 2). Under the Designation Order 2023, XL Bullies are the fifth type to be included.

16. Section 2 DDA 1991 confers power on the Defendant to make an order in relation to "other specially dangerous dogs" to which section 1 DDA 1991 does not apply. It states:

> "**2 Other specially dangerous dogs**.
>
> (1) If it appears to the Secretary of State that dogs of any type to which section 1 above does not apply present a serious danger to the public he may by order impose in relation to dogs of that type restrictions corresponding, with such modifications, if any, as he thinks appropriate, to all or any of those in subsection (2)(d) and (e) of that section.
>
> (2) An order under this section may provide for exceptions from any restriction imposed by the order in such cases and subject to compliance with such conditions as are specified in the order.
>
> (3) An order under this section may contain such supplementary or transitional provisions as the Secretary of State thinks necessary or expedient and may create offences punishable on summary conviction with imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both.
>
> (4) In determining whether to make an order under this section in relation to dogs of any type and, if so, what the provisions of the order should be, the Secretary of State shall consult with such persons or bodies as appear to him to have relevant knowledge or experience, including a body concerned with animal welfare, a body concerned with veterinary science and practice and a body concerned with breeds of dogs.
>
> (5) The power to make an order under this section shall be exercisable by statutory instrument and no such order shall be

> made unless a draft of it has been laid before and approved by a resolution of each House of Parliament."

17. As the Defendant correctly submitted, an order made under section 2 DDA 1991 is limited to the type of restrictions listed in subsection 1(2)(d) and (e) DDA 1991 (i.e. use of a muzzle and lead in a public place, and a ban on abandoning such a dog or allowing it to stray), subject only to appropriate modifications (subsection 2(1) DDA 1991), and such "supplementary or transitional provisions as the Secretary of State thinks necessary or expedient" (subsection 2(4) DDA 1991).

18. Stroud's Judicial Dictionary (11th ed.) defines the term "supplementary" by reference to a citation from *R (Public Law Project) v Secretary of State for Justice* [2014] EWHC 2365 (Admin), per Moses J. at [49]:

> "49. …. Supplementary means what it says: it is added to the power in s.9 to fill in details or machinery for that which the Act, and in particular section 9(2), does not itself provide. It enables that which the Act empowers to be effective."

In my view, this citation aptly describes the purpose and extent of any supplementary provisions required under subsection 2(4) DDA 1991. Supplementary provisions could not, for example, extend to a prohibition on breeding, or the sale of such a dog.

19. Section 2 DDA 1991, unlike section 1 DDA 1991, expressly provides for consultation and use of the affirmative resolution procedure. The likely explanation for this is that an order under section 2 DDA 1991 would be controversial if made in respect of a recognised breed of pet dog.

20. The legislation uses the word "type" rather than "breed". In *R v Knightsbridge Crown Court ex p Dunne* [1993] 4 All ER 491 the Divisional Court held that "type" has a different and wider meaning than "breed". Glidewell LJ concluded, at 496-498:

> "Conclusion
>
> Interpreting the phrase 'of the type known as the pit bull terrier' in s.1(1) of the statute simply by the normal canon of construction, i.e. by giving the words their ordinary meaning, I entirely agree with the decision of the Crown Court in both cases that the word 'type' is not synonymous with the word 'breed'. The definition of a breed is normally that of some recognised body such as the Kennel Club in the United Kingdom. I agree with the Crown Court in both cases that the word 'type' in this context has a meaning different from and wider than the word 'breed'. I would so conclude by reading only s 1 of the 1991 Act. But that this is so is made even clearer by reference to a subsection to which I have not so far referred, namely s 2(4) of the 1991 Act. This provides:
>
> 'In determining whether to make an order under this section in relation to dogs of any type ... the Secretary of State shall consult with such persons or bodies as appear to him to have relevant

knowledge or experience, including ... a body concerned with breeds of dogs.'

In that subsection the two words are being used in contradistinction to each other.

We have been referred to two judgments of the High Court in Scotland on appeals by case stated from decisions of the Sheriff Court at Linlithgow in trials for offences against s 1(3) of the 1991 Act. Both judgments were given by the Lord Justice General (Hope) on 17 December 1992. In *Parker v Annan* 1993 SCCR 185, the first of the two judgments to be delivered, the question whether the word 'type' in s.1 is synonymous with the word breed was considered. In his judgment, the Lord Justice General said (at 190-191):

'There is an absence of any precise criteria by which a pit bull terrier may be identified positively as a breed and by this means distinguished from all other dogs. One must of course be careful not to extend the application of the section to dogs other than those which are described in it. A dog must be of the type known as the pit bull terrier if the section is to apply to it. But the phrase used by the statute enables a broad and practical approach to be taken, in a field in which it has been recognised that the pit bull terrier cannot, in this country at least, be precisely defined by breed or pedigree.

For these reasons we do not think that the sheriff misdirected himself when he regarded as highly significant Mr Hayworth's evidence that Kim resembled a pit bull terrier more than any other type of dog and declined to rely on Dr Peachey's opinion that although she resembled a pit bull terrier she was not in fact one but was a mongrel. He was right to approach the case on the basis that a dog could be of the type known as the pit bull terrier although it was not purebred as such on both sides. We do not find anything in his use of words to suggest that he applied the wrong test in his approach to the evidence. The question whether the evidence as to Kim's characteristics was sufficient to show that she was not a dog of this type was a question of fact for him to decide.'

I would respectfully agree with and adopt that passage.

Having decided that the word 'type' has a wider meaning than the word 'breed', a court then has to adopt some guide for determining the limits of the phrase 'any dog of the type known as the pit bull terrier'. What that guide should be, and where those limits lie, are questions of fact for the decision of the magistrates or the Crown Court, on the evidence. In these matters, the courts

> in both cases heard evidence that the ADBA[2] laid down a breed standard for pit bull terriers in the USA. The Crown Court in both cases was therefore entitled to use the ADBA standard as a guide. However, both courts were also entitled to find, on the evidence before them, that the fact that a dog does not meet that standard in every respect is not conclusive. Thus both courts could properly conclude that a dog was of the type known as the pit bull terrier if, as the Crown Court at Wood Green found, its characteristics substantially conformed to the ADBA's standard or, to use the words of the Crown Court at Knightsbridge, if the dog approximately amounted to, was near to, or had a substantial number of the 8 characteristics of the pit bull terrier as set out in the ADBA's standard."

21. The Court went on to hold that behavioural characteristics were of potential relevance, and the lower courts had not been wrong to have regard to them, albeit that the ADBA standard focused on physical characteristics.

22. Sections 1(3) and 1(5) DDA 1991 provide for compensation to be paid to owners whose dogs are euthanised prior to the relevant appointed day and the creation of schemes for exemption to enable dogs to be retained if prescribed conditions are satisfied. Section 1(9) provides that the powers to make orders under these provisions are exercisable by statutory instrument, pursuant to the negative resolution procedure.

23. The responsibility for the enforcement of the DDA 1991 falls upon the police and local authorities. Section 5(1) confers powers upon a constable and certain officers of a local authority to seize prohibited dogs, the extent of those powers depending upon whether the dog is in a public or private place.

24. Where a prohibited dog is seized it will not automatically be destroyed. Where satisfied of prescribed conditions including that the prohibited dog will not constitute a danger to public safety, the court has a power to make a contingent destruction order that allows the prohibited dog to be exempted: sections 4A and 4B DDA 1991 and Parts 2 and 3 of the 2015 Order. A prohibited dog that is seized may be released on an interim basis before a court makes a final determination where the Chief Officer of Police for the area determines that the dog is not a danger to public safety: Part 4 of the 2015 Order.

The Designation Order

25. The Designation Order was made under section 1(1)(c) DDA 1991 and laid before Parliament on 31 October 2023. It provides:

> "2. The type of dog known as the XL Bully is designated for the purposes of section 1 of the Dangerous Dogs Act 1991, being a type appearing to the Secretary of State to be bred for fighting or to have the characteristics of a type bred for that purpose."

[2] American Dog Breeders' Association

26. The Designation Order came into force on 31 December 2023. Therefore, from 31 December 2023, no person may lawfully breed or breed from, sell, exchange or advertise or gift XL Bullies. In addition, XL Bullies must be muzzled and kept on a lead when in a public place and they may not be abandoned or allowed to stray.

27. The offences in section 1(2) DDA 1991 apply to XL Bullies. By virtue of Article 3 of the Designation Order, the offence in section 1(3) DDA 1991 of possessing a prohibited dog or having such a dog in one's custody applied to XL Bullies from 1 February 2024.

28. The policy objective of the Designation Order is set out in the Explanatory Memorandum as follows, at paragraph 7.3:

> "The principal objective is to introduce controls on the existing population of the XL Bully dog type to reduce the risk that they pose to public safety and to reduce the overall number of dogs of the XL Bully type in the dog population."

The Conformation Standard

29. On 31 October 2023, at the same time as making the Designation Order, the Defendant published non-statutory guidance on an XL Bully breed type conformation standard to assist in the identification of XL Bullies. The Conformation Standard was subsequently updated on 13 November 2023 to include additional photographs of XL Bullies.

30. The Explanatory Memorandum to the Designation Order explains, at paragraph 7.5:

> "An expert group was convened to develop a conformation standard for the XL Bully dog type to help with the identification of this type of dog as there is no recognised Royal Kennel Club breed standard for the XL Bully (which is also sometimes described as the American XL Bully or American Bully XL). This expert group contained representatives from the police, local authorities, vets and other animal welfare experts."

The Compensation and Exemption Order

31. The Compensation and Exemption Order was laid before Parliament on 13 November 2023 and came into force on 14 November 2023. Part 2 of the order established a scheme for the payment of compensation to owners who arranged for XL Bullies to be destroyed before the appointed day (31 January 2024). Part 3 established an exemption scheme to enable individual owners to obtain an exemption from the prohibition in section 1(3) that would allow them lawfully to keep their dogs from 1 February 2024.

32. Article 6 of the Compensation and Exemption Order provided for applications for exemptions to the prohibition on keeping XL Bullies to be made to the Secretary of State. It required (among other things) that the Secretary of State grant an application and issue a certificate of exemption if certain criteria were satisfied, including that the application contained necessary particulars and was submitted before 15 January 2024 if the application was sent by post or by email, or by 31 January 2024 if the application was submitted through an online portal (see Article 6(5)).

33. To retain the exemption, the owner must comply with the conditions stated within the certificate of exemption (listed in Article 7(c) of the Compensations and Exemptions Order), and with other requirements stated in the order with respect to third-party insurance, neutering and microchipping (see Articles 8-10). The requirements include:

    i) The requirement to keep the dog at the same address as the holder of the certificate of exemption except for any 30 days in a 12-month period (Article 7(c)(i)).

    ii) The requirements to keep the dog muzzled and on a lead when in a public place (Article 7(c)(v)).

    iii) The requirement to have insurance in place in respect of the death of, or bodily injury to, any person caused by the dog (Articles 7(c)(iv) and 8).

    iv) The requirement that XL Bullies must be neutered on or before 30 June 2024 (for dogs that were at least 12 months old on 31 January 2024), or on or before 31 December 2024 (for dogs that were under 12 months old on 31 January 2024) (see Articles 7(c)(x) and 9).

The Dangerous Dogs (Exemption Schemes and Miscellaneous Provisions) (England and Wales) Order 2023 ("the Rehoming Order")

34. The exemption schemes established under the Compensation and Exemption Order and the 2015 Order are available only to "natural persons" who own XL Bullies (see Article 6(1)-(2) of the Compensation and Exemption Order 2023).

35. The Rehoming Order, which was laid before Parliament on 19 December 2023, created a similar exemption scheme for organisations that rescue and rehome dogs.

36. The Rehoming Order was challenged in a claim brought by Carla Lane Animals in Need. The Dangerous Dogs (Exemption Schemes and Miscellaneous Provisions) (England and Wales) (Amendment) Order 2024 amended the Rehoming Order, to seek to resolve the difficulties rehoming organisations were experiencing. In the light of the amendments, the Claimants no longer pursue their challenge to the Rehoming Order on the basis of breach of a legitimate expectation, originally pleaded under Ground B(v).

Further amendments to the scheme

37. The Dangerous Dogs (Exemption Schemes) (England and Wales) (Amendment) Order 2024 was made on 28 May 2024. This provides additional time for the receipt of completed neutering forms for dogs that were 12 months or older on 31 January 2024 and have been neutered on or before 30 June 2024.

38. The Dangerous Dogs (Exemption Schemes) (England and Wales) (Amendment) (No.2) Order 2024, which was made on 12 November 2024 extends the neutering deadline for the youngest XL Bullies. It also made other changes to operational aspects of the scheme. For example, it is now possible to substitute the person in charge of an exempted XL Bully dog in the event of death or serious illness of the exemption holder.

Grounds of challenge

39. I set out below a summary of the Claimants' pleaded case. Those grounds for which permission has been refused, or which the Claimants no longer pursue, are crossed through.

40. **A. The decision to prohibit XL bullies was unlawful**.

i) The Defendant failed to take into account material that she should have taken into account and accordingly was in breach of her *Tameside* duty to make proper enquiry and obtain the material she needed to make a properly informed decision. *Permission refused for submissions based upon unlawful fettering of discretion.*

ii) The Defendant took into account material that she should not have taken into account.

iii) The Defendant, in reaching her decision, relied on assumptions that were demonstrably wrong or baseless.

iv) The Defendant failed to comply with her/his public sector equality duty ("PSED") under section 149 of the Equality Act 2010.

v) ~~The Defendant has acted in breach of the rights of the First Claimant and others under Articles 8 and 14 and Article 1 Protocol 1 of the European Convention on Human Rights~~. *Permission refused.*

vi) Irrationality.

41. **B. Unlawfulness of the statutory instruments implementing the ban**.

i) The Orders were ultra vires.

ii) The Orders were unlawful as a result of the public errors identified under Ground A above.

iii) The Orders were unlawful because the Defendant, before placing each statutory instrument before Parliament, failed to comply with the PSED.

iv) ~~The Compensation and Exemption Schemes Order was unlawful because it was discriminatory against single people and/or imposed requirements that would compel such individuals to commit an offence~~. *Permission refused.*

v) ~~The Rehoming Order was unlawful because it sought to impose conditions that the Defendant had not previously announced and its implementation would be contrary to the legitimate expectation of those affected by it.~~ *This ground has not been pursued by the Claimants in the light of the further Order made by the Defendant (see Judgment/36).*

42. **C. The Conformation Standard issued by the Defendant is unlawful**.

43. The Conformation Standard lacks legal certainty, and places individuals at risk of:

i) committing criminal offences without being aware that their conduct is criminal; or

ii) being compelled to take a precautionary approach and to take steps that are detrimental to them when the law does not in fact require them to do so.

44. ~~D. The Defendant has unlawfully operated an unpublished policy~~. *Permission refused.*

Grounds A and B

45. Because of the overlap between Grounds A and B, it is convenient to consider them together, by reference to the issues raised.

46. The starting point of the Claimants' submissions on Ground A, in paragraph 7 of their skeleton argument, was as follows:

> "A type of dog may be prohibited under section 1 if, and only if, it is a dog bred for fighting or has the characteristics of a dog bred for that purpose. The Claimants' case is that the XL bully is not such a dog and that the Defendant erred in law in deciding that it was."

47. This is also the basis for the Claimants' *ultra vires* ground of challenge (Ground B(i)). In my view, this submission betrays a fundamental flaw in the Claimants' approach. This Court is not hearing an appeal on the merits of the Defendant's decision to designate XL Bullies. Furthermore, as the Defendant observed, whether or not XL Bullies are dogs bred for fighting or have the characteristics of a dog bred for that purpose is not a precedent fact which goes to jurisdiction. Parliament has conferred on the Defendant, under section 1(1)(c) DDA 1991, the task of designating any dog of any type for the purposes of section 1, **if it appears to the Defendant** to be a type bred for fighting, or to have the characteristics of a type bred for that purpose. The words emphasised in bold clearly indicate that this is a decision to be made by the Defendant, in the exercise of his or her judgment. The Court can only interfere if the Defendant's decision discloses a public law error.

48. Section 1 DDA 1991 also confers on the Defendant the responsibility for making consequential Orders by way of statutory instrument, pursuant to subsections 1(3) and (5) DDA 1991, which she has duly done. These Orders can only be quashed if they disclose a public law error.

Failing to consider and determine the question posed by section 1(1)(c) DDA 1991

49. The Claimants submitted that the Defendant failed to consider and determine the question posed by section 1(1)(c) DDA 1991, namely, whether XL Bullies are a dog bred for fighting or have the characteristics of a dog bred for that purpose.

50. In my view, this submission is unsustainable. The evidence of Mr Gareth Baynham-Hughes, Director of Animal and Plant Health and Welfare Directorate in the Department for Environment, Food and Rural Affairs ("Defra") demonstrates, at

paragraphs 6 to 16 of his third witness statement ("GBH WS3"), that the Defendant and the Prime Minister sought advice on the Defendant's powers under section 1 DDA 1991 and they were provided with such advice in briefings from Defra officials, for example:

i) 'Defra information note on the Dangerous Dogs Act (DDA) 1991', dated 11 September 2023;

ii) 'Policy Options Paper', dated 12 September 2023;

iii) 'No. 10 XL Bullies briefing note', dated 12 September 2023;

iv) 'No. 10 XL Bullies briefing note – follow up', signed off by the Defendant, dated 14 September 2023;

v) 'XL Bullies ban: Way forward' (see paragraph 12), dated 29 September 2023, with an annex headed 'Legal note on the designation of XL Bullies under section 1(1)(c) Dangerous Dogs Act 1991'.

51. I am satisfied that the Defendant would have been aware of the distinction between the powers conferred by section 1 and section 2 DDA 1991, and the requirement for consultation and an affirmative resolution procedure under section 2, from her reading of the legislation and briefings from Defra officials (see, for example, the No. 10 XL Bullies briefing note, dated 12 September 2023).

52. The Defendant's conclusion that XL Bullies should be designated under subsection 1(1)(c) is apparent from the internal contemporaneous documents created by officials which refer to it (e.g. 'XL Bullies ban: Way forward', dated 29 September 2023). The Prime Minister made a public announcement on 15 September 2023. A press release was issued by Defra and the Defendant on 15 September 2023, and the Defendant announced it in Parliament on 18 September 2023.

53. When the Defendant was sent the Designation Order to review and sign on 30 October 2023, she was also provided with De Minimis Assessments and a draft of the Explanatory Memorandum.

54. The Defendant's decision was formally made when the Designation Order was made on 31 October 2023.

55. Article 2 of the Designation Order provided:

> "**Designation for the purposes of section 1 of the Dangerous Dogs Act 1991**
>
> 2. The type of dog known as the XL Bully is designated for the purposes of section 1 of the Dangerous Dogs Act 1991, being a type appearing to the Secretary of State to be bred for fighting or to have the characteristics of a type bred for that purpose."

56. The Designation Order was accompanied by a lengthy Explanatory Memorandum which set out the legislative provisions and the reasons for the designation:

"**6. Legislative Context**

6.1 The Secretary of State makes this Order in exercise of the powers conferred by section 1(1)(c) and (8) of the Dangerous Dogs Act 1991.

6.2 Article 1 of the Order sets out the coming into force date and the extent of the legislation (England and Wales).

6.3 Section 1(1)(c) of the 1991 Act enables the Secretary of State to designate by order, for the purposes of section 1 of that Act, any dog of a type being a type appearing to the Secretary of State as being bred for fighting or to have the characteristics of a type bred for that purpose. Article 2 of the Order designates any dog of the type known as the XL Bully for the purposes of Section 1 of the 1991 Act. Once this Order comes into force, it will be an offence to breed, sell, advertise, transfer, offer for sale, gift, abandon or let such dogs stray. It will be an offence for owners of dogs of the XL Bully type not to keep their dogs on a lead and muzzled when in a public space.

6.4 Article 3 of the Order sets out the end date of the "transition period", after which it will be an offence to possess an XL Bully type dog.

7. Policy background

What is being done and why?

7.1 Following the announcement of the Prime Minister on the 15 September, we are taking urgent action to bring forward certain prohibitions and other controls relating to XL Bully dog types under Section 1 of the Dangerous Dogs Act 1991.

7.2 This follows a concerning rise in serious attacks and fatalities, which appear to be driven by this type of dog.

7.3 The principal objective is to introduce controls on the existing population of the XL Bully dog type to reduce the risk that they pose to public safety and to reduce the overall number of dogs of the XL Bully type in the dog population.

7.4 The instrument will add the XL Bully type of dog to the list of types of dog to which the offences in Section 1 of the Dangerous Dogs Act 1991 apply.

7.5 An expert group was convened to develop a conformation standard for the XL Bully dog type to help with the identification of this type of dog as there is no recognised Royal Kennel Club breed standard for the XL Bully (which is also sometimes described as the American XL Bully or American Bully XL).

> This expert group contained representatives from the police, local authorities, vets and other animal welfare experts. The conformation standard will be published in guidance alongside this instrument.
>
> 7.6 Once it comes into force on 31st December 2023 the offences in section 1(2) of the 1991 Act will apply to the XL Bully type. This will mean that all owners of dogs of the XL Bully type must keep their dogs on a lead and muzzled when in a public space. This will reduce the risk that they pose to public safety. It will also mean that anyone doing any of the following will be committing an offence under section 1(2) of the 1991 Act:
>
> • breeding, or breeding from, a dog of the XL Bully type.
>
> • selling, gifting or exchanging XL Bully type dogs (this will include rehoming).
>
> • abandoning or allowing XL Bully type dogs to stray.
>
> • advertising XL Bully type dogs for sale, exchange or gifting.
>
> 7.7 These measures should lead to a significant reduction in the number of these dogs in England and Wales over time.
>
> 7.8 The offence in section 1(3) of the 1991 Act of possessing a dog to which section 1(1) of the 1991 Act applies or having custody of such a dog will only apply on or after 1st February 2024.
>
> 7.9 We intend to set out in a further statutory instrument what owners will be required to do to ensure that they are not committing an offence under section 1(3) from 1st February 2024. A compensation scheme will be set up in accordance with section 1(3) of the 1991 Act for the payment of compensation to owners of XL Bully types who arrange for them to be destroyed on or before 31st January 2024."

57. It is clear from the briefings and the Explanatory Memorandum to the Designation Order, at paragraphs 7.2 and 7.7, that a primary objective of the Designation Order was to reduce the XL Bully population in England and Wales, by destruction, neutering and prohibition of breeding, in the interests of public safety. This is consistent with the purpose of section 1 DDA 1991. Wide powers to achieve this objective are contained in section 1 DDA 1991, but not section 2 DDA 1991, as explained at Judgment/16-18.

58. I am satisfied that the Defendant was sufficiently informed of the relevant legal issues when she made the Designation Order. There is no evidence to support the submission that she failed to consider the application of section 1(1)(c) DDA 1991, either through lack of time or for any other reason. Furthermore, there was no legal requirement for the Defendant to record her conclusions, or to take any further steps to announce or make her decision.

59. I accept the Defendant's submission that there was sufficient material on which the Defendant could rationally take the view that XL Bully type dogs appear to have the characteristics of fighting dogs, in particular, because of the shared characteristics with Pit Bull Terrier types (see GBH WS3/84-93). The question was one of broad judgment. The fact that the Claimants and their witnesses, including Ms Helen Howell, a Canine Behaviour Consultant, disagree with the judgment made by the Defendant, is not a sufficient basis upon which to find that the Defendant has acted irrationally.

Failure to take into account relevant considerations and failure to discharge the *Tameside* duty of enquiry

60. The Claimants submitted that, in deciding to designate XL Bullies under section 1(1)(c) DDA 1991, the Defendant failed to take into account relevant considerations and was in breach of the *Tameside* duty of enquiry.

Legal principles

Material considerations

61. The Supreme Court gave guidance on material considerations in *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52, per Lord Hodge and Lord Sales, at [116]-[121]:

> "116. ….. A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:
>
> > "… [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however, … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process."
>
> 117. The three categories of consideration were identified by Cooke J in the *New Zealand Court of Appeal in CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:
>
> > "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public

> authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act."

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333-334. See also *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55-59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, paras 29-32 (Lord Carnwath, with whom the other members of the court agreed). In the Hurst case, Lord Brown pointed out that it is usually lawful for a decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar Wednesbury irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 per Lord Diplock).

120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the

> decision they have to take and positively decide to discount it in the exercise of their discretion.
>
> 121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), 780 (Lord Hoffmann)."

The Tameside duty of enquiry

62. In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1997] AC 1014, at 1065B, Lord Diplock said "the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?".

63. The decision-maker is entitled to decide upon the extent of the enquiry, subject only to the supervisory jurisdiction of the court. The principles were helpfully explained by Laws LJ in *R (Khatun) v London Borough of Newham* [2004] EWCA Civ 55, [2005] QB 37, at [35]:

> "… it is for the decision-maker and not the court, subject again to Wednesbury review, to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such. This view is I think supported by the judgment of Schiemann J in *R v Nottingham City Council, Ex p Costello* (1989) 21 HLR 301, to which Mr Luba referred us. That case concerned the degree of inquiry which an authority was obliged to undertake into issues of priority need and intentional homelessness. Schiemann J said, at p 309:
>
> > "In my view the court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient."
>
> This approach is lent authoritative support by the decision of this court in *R v Kensington and Chelsea Royal London Borough Council, Ex p Bayani* (1990) 22 HLR 406, which was concerned

with the authority's duty of inquiry in a homelessness case. Neill LJ said, at p 415:

> "The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable housing authority could have been satisfied on the basis of the inquiries made."

Claimants' submissions

64. The Claimants submitted that the Defendant failed to consider, adequately or at all, the matters listed below that she should have taken into account, and accordingly she was in breach of the *Tameside* duty of enquiry:

i) The fact that there is no reliable evidence as to the identity of the breeds or types of dogs involved in recent (or any) attacks, since this information is not collated by anyone;

ii) The evidence available and offered to her to the effect that seeking to define a dog of this sort without inadvertently capturing other dogs was extremely difficult;

iii) The wealth of evidence that banning specific breeds or types of dogs is ineffectual, and that alternative methods of control of breeders and owners would be more effective;

iv) The effects that the prohibition would have on the mental health of owners and rescue centre staff and volunteers, and on veterinary surgeons required to euthanise healthy dogs;

v) Whether the restrictions that she was considering imposing on the keeping of XL Bullies would have detrimental effects on the dogs welfare, as a result of which the risk posed by such dogs could even increase. In particular, the requirements for muzzling and the use at all times in public of a lead would reduce the dogs opportunities for socialisation and inevitably restrict the amount of exercise available to them, potentially leading to frustration. Further, the decisions of insurance companies to refuse insurance to dog daycare providers and to providers of secure exercise areas would further reduce opportunities for socialisation and exercise, again increasing risk.

Conclusions

65. It appears that the Claimants contended that these matters were within the third category ("obviously material considerations"), identified in *Friends of the Earth*. Matter (i) asserts that there is no reliable evidence as to the identity of the breeds or types of dogs involved in recent or any attacks.

66. Mr Baynham-Hughes helpfully summarised the Defendant's evidence regarding the involvement of XL Bullies in fatal dog attacks, at GBH WS3/17 -23:

"**C. EVIDENCE OF DISPROPORTIONATE INVOLVEMENT IN FATAL DOG ATTACKS**

17. The Policy Options Paper set out that since 2005 Defra had recorded 60 fatalities due to dog attacks, nine of which had been caused by XL Bully breed types at the time of writing (with an additional suspected death caused by an XL bully breed type). It also stated that the majority of fatalities involving XL Bully type dogs that Defra had recorded had taken place over the past two years. This information was sourced from a data table maintained by Defra ("Data Table"). The latest Data Table is exhibited [GBH3/06/22]. Since the Policy Options Paper was prepared, there have been five further fatalities which are recorded in the Data Table I exhibit (dated 20 May 2024, 3 February 2024, 25 November 2024, 3 October 2023, 14 September 2023 . Of these five recent fatalities four resulted from an attack by an XL Bully dog(s)). The police have provided permission to disclose partially redacted versions of the reports they provided to Defra of the incidents on 14 September 2023 [GBH3/07/34] and 3 October 2023 [GBH3/08/36]. Names and certain other information provided within the confidential police report have been redacted so as not to prejudice any ongoing investigations. In the majority of cases, where this information is available, the Data Table records the setting of the incident as a home or specifically the dog owner's home. Notably, however, there are five cases where the incident is recorded as taking place in a public location, and five cases where the incident reportedly took place in a garden, outside the owners' premises or in a scrap yard that belonged to the owner of the dog.

18. Police forces are not required to report dog attack incidents or fatalities to Defra. However, when a fatality from a dog attack occurs the National Police Chiefs' Council dangerous dogs working group prepares confidential reports from the relevant DLOs for Defra Ministers. These reports outline the circumstances of the fatality and confirm whether or not the dog was a banned breed type. DLOs are specially trained in all dog-related legislation and are trained in and have a good knowledge of the identification of the prohibited types. DLOs only formally assess whether a dog is a prohibited breed type against the existing guidance and standards for prohibited breed types. However, they also have a good knowledge in identifying dog breeds more widely due to their professional experience investigating and handling a range of dog breeds which may be involved in wider dog control offences that can involve any breed of dog.

19. In the absence of a centralised data collection system, Defra uses publicly available information in the press or media and these confidential police reports as the best available data to

> monitor dog attack fatalities and breed types involved. Each time a dog attack fatality occurs the Secretary of State and other Defra Ministers are briefed on the individual incident based on the details provided by the local DLOs and/or press reports. The briefing is provided in the form of a written summary of the circumstances of the incident (details typically provided by the police), the breed type involved (details typically provided by the police), and an update to the Data Table which is continuously updated as a working document. When a dog related fatality occurs, the Secretary of State is sent the updated Data Table in full so that any broader trends are apparent. From 2022 onwards the table distinguishes between the media and the police as the source of information about the incidents.
>
> 20. In the First De Minimis Assessment ("the First DMA") that officials completed for the Dangerous Dogs (Designated Types) (England and Wales) Order 2023 ("the Designation Order") it was stated that attacks by XL Bully type dogs had accounted for 11 of the 24 deaths resulting from dog attacks in the UK since 2020 [RCB/419]. These figures were informed by collated data from the tracking of police and press reports mentioned above.
>
> 21. Unfortunately, two dog attacks occurred in the days leading up to the announcement on 15 September 2023. A dog attack fatality occurred on 14 September 2023 in Staffordshire. The police informed Defra on the day of the incident that it involved two suspected XL Bully type dogs [GBH3/09/38]. The Data Table records that incident as taking place in a public location. This was relayed to Ministers on the 15 September 2023 from a confidential police report to Defra [GBH3/07/34]. Also, on 15 September 2023 Defra officials informed the Secretary of State of the details of a non-fatal attack on 11 September 2023 in Newham, London, referring to the report in the media that a boy had been attacked by an XL Bully type dog [GBH3/10/39].
>
> 22. Another dog attack fatality occurred on 3 October 2023. The fatality was later confirmed by the police on 13 October 2023 to have involved two XL Bully breed types [GBH3/08/36]. This fatality was not included in the figures prepared for the First DMA however it appears in the Data Table. The Data Table records that incident as taking place outside a home.
>
> 23. The report by the campaigning organisation Bully Watch, to which the Claimants refer, was cited in the First DMA but was not provided to the Secretary of State by Defra officials. As is stated above, the Secretary of State is routinely provided with updates to the Data Table."

67. At the hearing, counsel for both parties made submissions on the Data Table entries for attacks attributed to XL Bullies or XL Bullies cross breeds. They took me through the recent entries in the Data Table for the period between 1 January 2020 and 29

September 2023, which was the period considered in the initial draft De Minimis Assessment ("DMA"). The extracts shown to me identified a total of 11 deaths, mostly on the basis of police reports. The Claimants challenged the identification of the dog breed/type in a number of these cases, which largely turned on the reliability of press reports. The police reports were not available. It would not be appropriate for me to express a concluded view as to breed/type in the disputed cases as the information before me was incomplete. Suffice it to say that, even excluding those cases where there was legitimate doubt as to whether an XL Bully was involved, there was sufficient evidence of an alarmingly high level of fatal attacks by XL Bullies or XL Bullies cross-breeds to justify the Defendant's concerns. Furthermore, there was a noticeable and worrying increase in the number of recorded fatalities involving XL Bullies in this recent period. The data for the earlier period, 2005 to 12 September 2023, which was considered in the Policy Options Paper dated 12 September 2023, showed 10 fatalities over a much longer period. The likely explanation for this is the increase in ownership of XL Bullies in recent years.

68. Matter (ii) states that defining a dog of this nature without inadvertently capturing other dogs is extremely difficult. This challenge is inherent in the statutory scheme which refers in broad terms to "type" rather than specific breeds. I consider that this challenge was recognised by the Defendant, and is evidenced by the work that was done to prepare the Conformation Standard. The Defendant did not consider the task to be impossible.

69. Matter (iii) is a restatement of the Claimants' critique of the approach taken in the DDA 1991. Permission to apply for judicial review was refused on this issue (see paragraphs 2 and 3 of the judgment of Dias J.) and therefore the Claimants cannot rely upon it.

70. Matter (iv) concerns the mental health of those involved in euthanasia. The Defendant was well aware that some dogs would need to be euthanised and this was referred to in the DMA. I accept that the Defendant considered the human impacts but considered them to be justified by the benefits to public safety.

71. Matter (v) concerns the potentially detrimental effects of the proposed restrictions on the welfare of dogs. I consider that the disadvantages of the restrictions would have been obvious to the Defendant as they are derived from the DDA 1991 and have been the basis for controls on dangerous dogs for some time. She was entitled to weigh these disadvantages against the alternatives, namely, the risk of attacks by XL Bullies, or a more widespread programme of destruction of XL Bullies.

72. Applying the principles in *Friends of the Earth*, at [120], the Defendant was not required to set out a response to every consideration that might conceivably be raised as relevant. The weight which the Defendant accorded to "obviously material considerations" was a matter for her discretion, and subject only to challenge on grounds of irrationality. That high threshold has not been met here.

73. In discharging the *Tameside* duty, it was a matter for the Defendant to decide upon the manner and intensity of the enquiry to be undertaken before making the Orders (see *Khatun* at [35]). In my view, it was rational for the Defendant to assess and act upon the available evidence on dog attacks and fatalities. It was not necessary for her to interrogate each reported case of a dog attack or fatality for verification. It was not necessary for her to delay the decision until an official definition of the XL Bully was prepared. The basic characteristics of an XL Bully were already well known before the

Defendant published the Conformation Standard. Mr Baynham-Hughes explained, at GBH WS3/41:

> "41. The XL Bully type dog was a relatively well understood type before development by Defra of a conformation standard. The XL Bully had been bred and sold as a distinct type of dog for many years, and the population within the UK is now significant in size. Breed standards existed for the American Bully type dog that were published by hobbyist breed registries and which informed the development of the Defra standard. Whilst there was no existing detailed specification for the XL Bully breed type, some of the American Bully standards did include brief descriptions of the XL size of the American Bully. Thus, there was a general understanding of the basic characteristics of the XL Bully (for example, large, powerfully built and blocky) even before those characteristics were articulated by Defra into guidance. The initial draft of the conformation standard was prepared by police enforcement experts with knowledge of those characteristics [GBH3/16/93]."

74. In my judgment, the Claimants have not established that the Defendant acted irrationally in making her decision on the basis of the information available to her and therefore I reject the submission that she acted in breach of the *Tameside* duty.

Reliance on assumptions that were demonstrably wrong or baseless

Claimants' submissions

75. The Claimants submitted that the Defendant relied on assumptions that were demonstrably wrong or baseless.

76. **First assumption**. The Defendant estimated that there were 10,000 XL Bullies in the UK. However, at least 57,301 dogs have been registered as XL Bullies, indicating that the Defendant under-estimated the number by at least a factor of five. That was an error of objective fact which amounted to an error of law, applying *E v Secretary of State for the Home Department* [2004] EWCA Civ 49. The error was significant because the Defendant could only make a rational decision as to whether XL Bullies were disproportionately involved in fatal attacks if she knew the number of XL Bullies in the UK.

77. Furthermore, before seeking to impose a ban, the Defendant should have conducted proper research into the types of dogs in fact involved in serious attacks, and not merely relied on police and press reports. The information that the Defendant was given in the Impact Assessment of 29 September 2023 and the De Minimis Assessments of 11 and 29 October 2023 was incorrect as it assumed that XL Bullies were 0.1% of the population but had been responsible for 46% of deaths since 2020.

78. **Second assumption**. The Defendant's decisions on specification were irrational. The Defendant has prohibited a dog of bully type that is 20 inches in height at the withers if male, or 19 inches if female. There is no evidence that the dogs involved in recent

attacks met that height requirement. Prior to the ban the police received no training in identifying an XL Bully and did not measure the dogs seized. The ban will not cover dogs below the specified height requirement.

79. **Third assumption**. The vast majority of fatal attacks take place within the home or on private property. None of these attacks would be prevented by the restrictions put in place.

Conclusions

80. **First assumption**. Mr Baynham-Hughes has given extensive evidence to explain how the population estimate of 10,000 XL Bullies was reached: see GBH WS3/94 – 100. I accept the Defendant's submission that the estimate was rationally based upon the evidence available at the time and that the analysts were making a predictive assessment in an uncertain area. The information that 57,000 certificates of exemption have since been granted was only available after the Designation Order was made, and is likely to include registrations made on a precautionary basis where the breed/type is uncertain. There is no legal requirement that the Defendant must enumerate the number of dogs that belong to a dog type before it is designated under section 1(1)(c) DDA 1991 and therefore the apparent under-estimate does not, of itself, affect the lawfulness of the Designation Order.

81. In *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, Carnwath LJ, at [66], identified the requirements of a material mistake of fact leading to unfairness as follows: (1) there must have been a mistake as to existing fact; (2) the fact must have been "established", in the sense that it was uncontentious and objectively verifiable; (3) the appellant must not be responsible for the mistake; and (4) the mistake must have played a material, though not necessarily decisive, part in the tribunal's reasoning.

82. I agree with the Defendant that the criteria in *E* are not met in this case. It is apparent from Mr Baynham-Hughes' evidence that, at the time the Designation Order was made, there was no established fact, in the sense that the population of XL Bullies was uncontentious and verifiable. Nor did any mistake as to the size of the population play a material part in the reasoning. The quantification was primarily relevant to the costs of the restrictions rather than their perceived benefit. The conclusion in the DMA that XL Bullies are "disproportionately responsible for recent dog fatalities" did not depend on the dog population size, and no comparative exercise with other dog types was undertaken. It would not have been practicable to do so, given the large size of the dog population, and the lack of any dog licensing or registration data. Moreover, given the predominance of XL Bullies in the reported attacks, it is highly unlikely that a higher initial assessment of the XL Bully population would have affected the Defendant's conclusions. The issue was the danger posed by XL Bullies, not whether they were more or less dangerous than other dog types.

83. I refer to the evidence of Mr Baynham-Hughes (GBH WS3/17-23) which is set out in Judgment/66. I agree with his view, at paragraph 19, that the police and media reports are the best available data to monitor dog attack fatalities and breed involved. I also refer to my conclusions at Judgment/67, where I found that even if some of the attacks had been misattributed to XL Bullies, on the basis of inaccurate press reports, there was

sufficient evidence of an alarmingly high and increasing level of attacks to justify the Defendant's concerns.

84. **Second assumption**. The Claimants' submissions on the specification of XL Bullies[3] do not demonstrate any unlawfulness. The identification of dogs involved in recent attacks as XL Bully types, by police and others, carries the implication that they were of a larger size. The Defendant was plainly entitled to adopt a height requirement to assist in the identification of the XL Bully. American Bullies come in a range of sizes (standard, pocket etc.). The fact that a dog below the height requirement would not be covered by the ban has no bearing on the rationality of the height requirement.

85. **Third assumption**. As I explained at Judgment/11, the primary aim of section 1 DDA 1991 is to reduce the population of designated dog types, in the interests of public safety. Hence the provisions regarding breeding, neutering and destruction. This objective will be achieved wherever attacks take place. Moreover, the Data Table includes attacks which occurred outside private homes. The fact that the majority of attacks by XL Bullies are in private homes, often against their caring owners, is a worrying feature of attacks by this dog type, and not a rational reason for excluding them from designation.

86. For the reasons set out above, the Claimants' submissions that the Defendant relied upon assumptions that were demonstrably wrong or baseless do not succeed.

Breach of the PSED

Legal principles

87. Section 149(1) of the Equality Act 2010 provides:

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

[3] Pleaded under the heading of "Irrationality" in the Statement of Facts and Grounds

88. The relevant principles were summarised in *Bracking v Secretary of State* [2013] EWCA Civ 1345, [2014] Eq LR 60, per McCombe LJ, at [26]:

> "(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements*: R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
>
> (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.
>
> (4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].
>
> (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:
>
> i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;
>
> ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
>
> iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
>
> iv) The duty is non-delegable; and
>
> v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74–75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

> "[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.
>
> [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89–90]

> "[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):
>
> '….the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
>
> [90] I respectfully agree….""

89. This passage in *Bracking* was approved by Lord Neuberger in *Hotack v Southwark LBC* [2015] UKSC 30, [2016] AC 811, at [73], who added, at [75]:

> "75. As was made clear in a passage quoted in *Bracking*, the duty "must be exercised in substance, with rigour, and with an open mind" (per Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506, para 92. And, as Elias LJ said in *Hurley and Moore*, it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said that "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision"."

90. These passages were cited with approval by the Court of Appeal in *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058; [2021] 1 Cr. App.R 4 at [174]-[175]. The Court of Appeal added, at [176]:

> "We accept (as is common ground) that the PSED is a duty of process and not outcome. That does not, however, diminish its importance…."

The grant of relief and section 31(2A) Senior Courts Act 1981 ("SCA 1981")

91. In *R (Friends of the Earth) v SSEFRA* [2024] EWHC 2707 (Admin), Chamberlain J. set out the principles to be applied where the PSED had not been discharged at the time of the decision but was met subsequently. He said, at [134], [135] and [139]:

> "134. Mr Westmoreland Smith sensibly concentrated in his oral submissions on arguing that I should refuse relief under s. 31(2A) or (3C) of the SCA 1981. Even before that provision came into force, there were dicta indicating that the court should be slow to quash decisions in circumstances where the duty had been substantively complied with after the event: see e.g. *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), [2012] HRLR 13, at [98]-[99] and [102] (Elias LJ and King J). In *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441, [2016] 1 WLR 3923, [87] Laws and Treacy LJJ, with whom Lord Dyson MR agreed, said this at [87]:
>
> > "…we have strong reservations about the proposition that the court should necessarily exercise its discretion to quash a decision as a form of disciplinary measure. During the course of argument, [counsel for the claimant] accepted that if an assessment, subsequently carried out, satisfied the court, there would be no point in quashing the decision if the effect of doing that and requiring a fresh consideration would not have led to a different decision. We think this was a correct concession. The court's approach should not ordinarily be that of a disciplinarian, punishing for the sake of it, in these circumstances. The focus should be on the adequacy and good faith of the later assessment, although the court is entitled to look at the overall circumstances in which that assessment was carried out."
>
> 135. That can be taken as an authoritative statement of the principles governing the exercise of the court's remedial discretion in this area. However, since the coming into force of s. 31(2A), (2B), (3C) and (3D) of the SCA 1981, the position is no longer one of discretion. As Coulson LJ pointed out in *Gathercole* at [38], those provisions impose a duty, which the court cannot shirk.
>
> …
>
> 139. In those circumstances, if I were to quash EQIA1 and remit the matter to the Secretary of State, I would be requiring a re-run of a process which has already been undertaken. The outcome of the decision following consideration of EQIA2 shows that the

> result is highly likely to be the same. There would be no point in doing that. …"

92. Section 31(2A) of the SCA 1981 provides:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

93. In *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, the Court of Appeal considered the scope of section 31(2A) SCA 1981 at [267] – [273] and gave the following guidance:

> "273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales L.J., as he then was, in *R. (on the application of Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin); [2018] 1 All E.R. 142, at paragraph 89)."

94. In *R (Cava Bien Ltd) v Milton Keynes Council* [2021] EWHC 3003 (Admin), Kate Grange KC, sitting as a Deputy Judge of the High Court, set out a helpful summary of the case law at [52]:

> "52. The proper approach to this test is not in dispute between the parties. It has been considered in a number of authorities and

it seems to me that the central points can be summarised as follows:

i) The burden of proof is on the defendant: *R (Bokrosova) v Lambeth Borough Council* [2016] PTSR 355 [8];

ii) The "highly likely" standard of proof sets a high hurdle. Although s. 31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306, the threshold remains a high one: *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269 at [89] per Sales LJ, approved by Lindblom, Singh and Haddon-Cave LLJJ in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446 at [273].

iii) The "highly likely" test expresses a standard somewhere between the civil standard (the balance of probabilities) and the criminal standard (beyond reasonable doubt): *R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group* [2021] EWHC 12 (Admin) at [98] per Kerr J.

iv) The court is required to undertake an evaluation of the hypothetical or counterfactual world in which the identified unlawful conduct by the public authority is assumed not to have occurred: *R (Public and Commercial Services Union) v Minister for the Cabinet Office (supra)* [89], *R (Plan B Earth) v Secretary of State for Transport (supra)* [273], *R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group* (supra) [98].

v) The court must undertake its own objective assessment of the decision-making process and what the result would have been if the decision-maker had not erred in law: *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] 1 WLR 5161, judgment of the whole court at [55], *R (Gathercole) v Suffolk County Council* [2020] EWCA Civ 1179, [2021] PTSR 359 at [38] per Coulson LJ, (Asplin and Floyd LLJJ concurring at [78] and [79]).

vi) The test is not always easy to apply. The court has the unenviable task of (i) assessing objectively the decision and the process leading to it, (ii) identifying and then stripping out the "conduct complained of" (iii) deciding what on that footing the outcome for the applicant is "highly likely" to have been and/or (iv) deciding whether, for the applicant, the "highly likely" outcome is "substantially different" from the

actual outcome': *R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group* (supra) [98]-[99].

vii) It is important that a court faced with an application for judicial review does not shirk the obligation imposed by section 31(2A); the matter is not simply one of discretion but becomes one of duty provided the statutory criteria are satisfied: *R (Gathercole) v Suffolk County Council* (supra) at [38], [78] and [79] and *R (Plan B Earth) v Secretary of State for Transport* (supra) at [272].

viii) The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic: *R (Gathercole) v Suffolk County Council* (supra) at [38], [78] and [79].

ix) The provisions 'require the court to look backwards to the situation at the date of the decision under challenge' and the 'conduct complained of' means the legal errors that have given rise to the claim: *R (KE) v Bristol City Council* [2018] EWHC 2103 (Admin) at [139] per HHJ Cotter QC, citing Jay J in *R (Skipton Properties Ltd) v Craven DC* [2017] EWHC 534 (Admin) at [97]-[98].

x) The Court can, with due caution, take account of evidence as to how the decision-making process would have been approached if the identified errors had not occurred. Section 31(2A) is not prescriptive as to material which the Court may consider in determining the "highly likely" issue: *R (Enfield LBC) v Secretary of State for Transport* [2015] EWHC 3758 at [106], per Laing J. Furthermore, a witness statement could be a very important aspect of such evidence: *R (Harvey) v Mendip District Council* [2017] EWCA Civ 1784 at [47], per Sales LJ, although the court should approach with a degree of scepticism self-interested speculations by an official of the public authority which is found to have acted unlawfully about how things might have worked out if no unlawfulness had occurred: *R (Public and Commercial Services Union) v Minister for the Cabinet Office* (supra) [91].

xi) Importantly, the court must not cast itself in the role of the decision-maker: *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* (supra) at [55]. While

much will depend on the particular facts of the case before the court, 'nevertheless the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law.' *R (Plan B Earth) v Secretary of State for Transport* (supra) [273].

xii) It follows that where particular facts relevant to the substantive decision are in dispute, the court must not 'take on a fact- finding role, which is inappropriate for judicial review proceedings' where the 'issue raised…is not an issue of jurisdictional fact'. The court must not be enticed 'into forbidden territory which belongs to the decision-maker, reaching decisions on the basis of material before it *at the time of the decision under challenge*, and not additional evidence after the event when a challenge is brought'. To do otherwise would be to use s.31(2A) in a way which was never intended by Parliament: *R (Zoe Dawes) v Birmingham City Council* [2021] EWHC 1676 (Admin), unrep., at [79] – [81] per Holgate J.

xiii) The impermissibility of the court assuming the mantle of the decision-maker has been particularly emphasised in the planning context where e.g. it may require an assessment of aesthetic judgment or adjudicating on matters of expert evidence: *R (Williams) v Powys CC* [2018] 1 WLR 439 per Lindblom J at [72] and *R (Thurloe Lodge Ltd) v Royal Borough of Kensington & Chelsea* [2020] EWHC 2381 (Admin) at [26] per David Elvin QC (sitting as a Deputy High Court Judge).

xiv) Finally, the contention that the s.31(2A) duty is restricted to situations in which there have been trivial procedural or technical errors (see e.g. the dicta of Blake J in *R (Logan) v Havering LBC* [2015] EWHC 3193 (Admin) at [55]) was rejected by the Court of Appeal in *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] 1 WLR 5161 [47] and [55] and in *R (Gathercole) v Suffolk County Council* (supra) [36], [77] and [78]."

Claimants' submissions

95. The Claimants submitted that the Defendant failed to discharge the PSED before making the Orders.

96. The submission to the Defendant titled 'XL Bullies ban-Way forward', dated 29 September 2023, included a PSED assessment which summarised the legal requirements and concluded:

> "**Methodology and Findings**
>
> 3. In completing this assessment, we have considered correspondence received on the issue of XL bully breed types.
>
> 4. We are not aware of any evidence that XL bully breed types are disproportionately owned by individuals with protected characteristics and so we do not consider that the proposed measures would impact unfairly on individuals with protected characteristics.
>
> 5. A further assessment will be completed on the introduction of the compensation scheme."

97. A submission sent by Defra officials to the Defendant on 20 October 2023, headed 'XL Bully dog ban: transition period', concerning the proposed compensation scheme, included a further PSED assessment, in the same terms as paragraphs 3 and 5 of the assessment dated 29 September 2023.

98. A submission sent by Defra officials to the Defendant on 26 October 2023, headed 'Final policy decisions: XL Bully compensation scheme and exemption scheme (second SI)', included a further PSED assessment, in the same terms as paragraphs 3 and 5 of the assessment dated 29 September 2023.

99. In May 2024, prior to the making of the Dangerous Dogs (Exemption Schemes) (England and Wales) (Amendment) Order 2024 on 28 May 2024 ("the May 2024 Order"), the Defendant produced a much more comprehensive assessment, headed 'Public Sector Equality Duty Impact Assessment for the ban of XL Bully type dogs', which identified potential concerns, in part raised by the Claimants in this claim.

100. The Claimants submitted that the assessments undertaken in September and October 2023 were inadequate. No specific thought was given to the potential impacts of the ban and the restrictions to be imposed on owners. For example, the prohibition on an XL Bully being away from the same address as its owner for more than 30 days in any one year could cause difficulties for those with disabilities or health conditions that require them to be away from their homes for medical reasons, or may mean that they are unable to care for their dogs at their own homes.

101. There was no PSED assessment in respect of the Rehoming Order.

102. The Claimants made the following specific criticisms of the May 2024 equality impact assessment ("EIA").

103. First, the EIA post-dated the first three Orders and so was not considered by the Defendant before she made them. The May 2024 Order was only concerned with amending the time for the receipt of completed neutering forms.

104. Second, the EIA was inadequate because it identified information that the Defendant did not have (and by implication needed) but went on to reach conclusions without this information. For example, it stated that was not possible to identify the number of social housing tenants who had protected characteristics and own an XL Bully (Hearing bundle/662). It also recognised that individuals might be emotionally impacted by the ban and this might have an impact on vulnerable individuals with disabilities but it considered the impact on owners generally, as the assessors stated that they had no evidence that the ban would impact disproportionately on individuals with disabilities (Hearing bundle/664).

105. Third, the EIA stated incorrectly that Defra did not have access to data about the proportion of people in social housing with protected characteristics in October 2023, when that data had been published by the Office for National Statistics.

106. Fourth, the EIA relied on an analysis of correspondence received by Defra from 14 November 2023 to 1 May 2024. This correspondence post-dated the prohibition on XL Bullies and so was unlikely to include information from people objecting to the ban. It excluded telephone calls. It came from a self-selected group of those who contacted Defra which was not a reliable method of identifying the impact of a measure on those with protected characteristics.

Defendant's submissions

107. The Defendant submitted that the "high level" assessments in October/November 2023 were appropriate and met the required standard because the ban was a general one to which individual circumstances would vary but there was no particular or disproportionate impact on individuals with protected characteristics. The general or high level nature of the ban is relevant to the nature of any assessment required: see *R (Transport Action Network Limited) v Secretary of State for Transport* [2024] EWHC 1405 (Admin), per Kerr J. at [80] – [83].

108. The Defendant also submitted that a PSED "does not require a precise mathematical exercise" (*R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923 at [83]), or any particular form of assessment: "relatively brief consideration" may suffice (*R (United Trade Action Group Ltd) v Transport for London* [2022] RTR 2, at [71]).

109. The Defendant also relied upon the DMAs undertaken in respect of the main statutory instruments which assessed potential costs, risks and unintended consequences arising from the measures, including those falling upon owners of XL Bully type dogs. These assessments were concerned with owners generally, which included individuals with protected characteristics. However, specific consideration was given to individuals with protected characteristics during the development of the application process and supporting guidance that accompanied the compensation and exemption schemes. For example, accessible versions of guidance were published to cater for the needs of

certain disabled people (GBH WS3/50 first bullet point at Hearing bundle/443 and second bullet point at Hearing bundle/444).

110. The Defendant submitted that the duty is a continuing one and there is no prohibition on the carrying out of retrospective assessments provided that due regard is given: see *R (Rowley) v Minister for the Cabinet Office* [2022] 1 WLR 1224, per Fordham J. at [43]. It is commonplace for formal or further PSED assessments to be produced after a decision is taken: see *West Berks* and *Rowley*. Here, the PSED was an ongoing review of the whole ban.

111. If there was a failure to discharge the duty in October 2023, given the updated assessment, it is highly likely that the outcome would not have been substantially different had that failure not occurred. Section 31(2A) of the SCA 1981 therefore applies. Even where no adequate assessment has been done, a quashing order may be unwarranted: see e.g. *Bridges* at [210], granting declaratory relief only.

Conclusions

112. Whilst I acknowledge that the Defendant had well in mind the need for PSEDs from September 2023 onwards, I do not consider that the perfunctory assessments that were carried out in September and October 2023 were sufficient to discharge the duty, as they did not amount to the "rigorous consideration" which is required (see Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), cited in *Bracking* (above)). The inadequacy of those early assessments, which did not assess any potential impacts, is convincingly demonstrated by the contrast with the comprehensive EIA undertaken in May 2024, which did assess potential impacts thoroughly and concluded, as follows:

> "**Conclusions on the XL Bully ban**
>
> We conclude that the decisions to designate the breed and to introduce an exemption and a compensation scheme could have potentially impacted on a small number of people living with disabilities and could potentially continue to have an impact on this group of people. We also conclude that the steps we have put in place are sufficient to minimise this impact on individuals with protected characteristics. In summary, for the reasons set out more fully above:
>
> 1. People in social housing who may have protected characteristics might not have been allowed by their housing provider to keep their dog. Ultimately, however, this was a decision for the housing provider.
>
> 2. A person who uses assistance dogs that are XL Bully type dogs might not have been able to continue to use their current assistance dogs because of the new restrictions. However, no individuals have been identified that have been affected. Some owners may also have experienced emotional distress as a result of the ban, but there is no evidence that this has had a greater

> impact on individuals with protected characteristics. In any case, exceptions would not be possible while maintaining public safety.
>
> 3. Considerable steps have been put in place to make the guidance and application process accessible and to support any owners that were struggling with the transition period and application processes under the exemption and compensation schemes.
>
> 4. Some owners might have struggled to pay the cost associated with the XL Bully ban, and this may conceivably have had a greater impact on those with protected characteristics, but the measures were introduced in a staged way which spread the costs and there is no evidence that individuals with protected characteristics were disproportionately affected.
>
> 5. A small number of individuals may be affected by the condition requiring dogs to be kept at the same address as their owners except for any 30 days in a 12-month period, but exceptions to this would not be possible while maintaining public safety.
>
> 6. Compliance with the neutering requirement in the exemption scheme may present challenges, including for some individuals with disabilities or non-English speakers. The proposed extension to the deadline for the receipt of neutering forms will mitigate any potential impacts on individuals with protected characteristics with complying with the neutering condition.
>
> Defra will continue to monitor the impacts of all of the measures introduced as part of the XL Bully ban, including through monitoring emails, calls, and correspondence from XL Bully owners to understand how the ban is affecting them. Defra will continue to engage with vets, animal welfare stakeholders, the police, local authorities, and the devolved administrations to identify and mitigate any future risks.
>
> Defra will continue to launch targeted communication pushes including on social media and via stakeholders, including dog welfare charities, to ensure XL Bully owners are aware of any changes to exemption requirements and upcoming neutering deadlines. Defra will also continue to update our GOV.UK webpage using easily accessible language and continue to keep the dedicated helplines available to provide support and reasonable adjustments to individual owners if requested."

113. The DMAs were sufficient for their intended purpose but they did not address the PSED issues.

114. I accept that the May 2024 EIA was an assessment of the entirety of the four Orders that had been made, which were listed in Annex A. It was not limited to consideration of the narrow issues covered by the May 2024 Order. However, the PSED ought to have been discharged at or before the time when the Orders were made, so that the Defendant was made aware of potential adverse impacts before she made her final decisions.

115. Therefore, I conclude that the Defendant was in breach of the requirements of the PSED when she made the Designation Order, the Compensation and Exemption Order and the Rehoming Order.

116. I turn now to consider the question of relief and section 31(2A) SCA 1981.

117. In the light of the Claimants' criticisms, the first issue is whether the May 2024 EIA was a lawful discharge of the PSED.

118. The manner and intensity of the enquiry undertaken was a matter for the Defendant to decide, subject only to *Wednesbury* review (see *Khatun*, per Laws LJ at [35]). The authorities on PSED recognise that the depth of analysis and inquiry undertaken will vary with the circumstances. In *R (British Medical Association) v HM Treasury* [2024] EWCA Civ 355; [2024] ICR 922 the Court of Appeal observed that "what regard to [equality needs] is due in any particular context is a question, in the first instance, for the decision-maker", per Elisabeth Laing LJ at [162].

119. Contrary to the Claimants' second criticism, I do not accept that the May 2024 EIA was inadequate because it reached conclusions without obtaining the required information. The Defendant was entitled to conclude that it was not reasonably possible to enumerate the number of social housing tenants with protected characteristics that own an XL Bully type dog and Defra did not have information about the emotional impact on individuals with disabilities, but nonetheless went on to consider the issue generally. This was a reasonable approach to adopt.

120. The Claimants' third criticism appears to misunderstand the Defendant's position. In October 2023, Defra did not obtain data on the proportion of people in social housing with protected characteristics. However, it did obtain that data from the Office for National Statistics in May 2024.

121. As to the Claimants' fourth criticism, it was not objectionable for the Defendant to identify relevant issues from the communications sent to it. In any event, correspondence was only one source relied upon. In my view, the Defendant took reasonable steps to gather sufficient evidence from the sources available to her. The process was described in the EIA as follows:

> "**Outline of evidence gathering process**
>
> Following the announcement of the intention to ban the XL Bully type dog on 15th September 2023, we engaged immediately with stakeholders to monitor implementation of the new legislation, including the impact on owners.

We arranged weekly meetings starting on the 26th September 2023 with expert stakeholders which included representatives from the British Veterinary Association (BVA) (the UK's largest membership community for the veterinary profession), animal welfare charities and experts including the Dogs Trust, RSPCA, Battersea and the Blue Cross and the Kennel Club (the UK's largest organisation devoted to dog health, welfare and training). These meetings continued on a weekly basis until March 2024 at which point the meetings moved to twice a month. During this time conversations between these stakeholders and Defra officials continued via emails and on individual calls. Defra officials still meet these stakeholders twice a month to discuss the implementation of the policy.

Separately, Defra officials have also met regularly with colleagues from the Local Government Association, representatives from local authorities and the police as we developed the measures and, following their introduction, to understand how the ban is being implemented and enforced in practice.

We have also continued to monitor the correspondence, emails and phone calls from the public and XL Bully owners received since the announcement of the ban. For the purposes of preparing this assessment, on 1st May 2024 officials conducted a review of correspondence, helpline conversations and emails received through our public shared mailboxes. From 14th November 2023 (the launch date of the exemption scheme) until 1st May 2024, we received approximately 45,000 emails to the index inbox. The email address to the index inbox was included in the guidance on GOV.UK so that owners could contact us with queries or concerns. This is separate to the applications that we received to the exemption scheme. 107 of the emails to the index inbox included a reference to a disability, 105 to low income, 43 to social housing and 322 referenced mental health.

In addition to the index inbox, owners could call the Defra helpline. Our helpline staff informed us they have not identified any cases of individuals being unable to apply for the exemption or compensation schemes because they were not able to access or use online content. Two individuals raised concerns about their ability to apply for the exemption scheme and were provided with advice on how to do this. No requests were made for an interpreter to provide advice in a different language other than English.

The correspondence team also analysed 290 items of ministerial correspondence received from 15th September 2023 to 29th February 2024. In these cases, disability is mentioned in 10 letters, domestic abuse in 1, financial difficulties in 8, mental health in 13 and impacting on their tenancy in 7 letters."

122. Therefore, I reject the Claimants' criticisms of the May 2024 EIA and I conclude that it was a lawful discharge of the PSED.

123. I have carefully considered the principles set out above at Judgment/91-94, and applied them to this case. I am satisfied, in the light of the comprehensive May 2024 EIA, that it is highly likely that the outcome for the Claimants would not have been substantially different if the conduct complained of had not occurred. Therefore, Section 31(2A)(a) SCA 1981 applies, and I must refuse the grant of relief on this ground. There are no reasons of exceptional public interest which make it appropriate to depart from the general rule.

124. For the reasons set out above, Grounds A and B do not succeed, save in respect of the breach of the PSED.

C: The Conformation Standard

Claimants' submissions

125. The Claimants submitted that the Conformation Standard was unlawful because it contravened the principles of legal certainty. A dog owner should be able to tell by reading the standard whether a dog is or is not an XL Bully. This is crucial because keeping an unregistered XL Bully is a criminal offence. Owners of bully type dogs have felt compelled to take a precautionary approach, registering a dog even though it might not be an XL Bully. Members of the Dog Control Coalition withdrew from discussions on the Conformation Standard on 2 October 2023 because they felt that their concerns about the scope of the standard being too broad were not being heeded. See also the citation from *Parker v Annan* in *ex parte Dunne* in Judgment/20.

126. The Claimants made the following specific criticisms:

i) The Defendant adopted her own vague Conformation Standard instead of the detailed conformation standard issued by the American Bully Kennel Club ("ABKC").

ii) The Defendant's Conformation Standard applies to a male dog "from" 20 inches in height at the withers (from 19 inches if female). The smaller variants of the Bully (classic or standard) who are not designated can reach this height too. The wording of the ABKC conformation standard – "over" 20 or 19 inches – is preferable.

iii) No maximum height is specified, and so dog types that are larger than XL Bullies may be inadvertently registered.

iv) The position of puppies is uncertain. They will not reach the height requirement until they are mature, but the Defendant has stated that puppies, if registered as XL Bullies, must be muzzled and on a lead in public.

v) The Defendant has stated that there will be provision for dogs to be de-registered, for example, if a registered puppy did not grow tall enough to be an

XL Bully. However, there has been delay in introducing a de-registration scheme.

Conclusions

127. A Conformation Standard is not a statutory requirement. The Defendant was entitled to exercise a broad discretionary judgment in deciding on its scope and content. In particular, the Defendant was entitled to decide to commission a bespoke Conformation Standard and not to adopt the ABKC conformation standard.

128. In *Parker* and e*x parte Dunne*, the Court recognised that a dog type designated under section 1 DDA 1991 may not be capable of being defined by precise criteria, and the wording of the statute enables a broad and practical approach to be taken, by reference to the recognised characteristics of that type of dog, not a breed of dog. The Conformation Standard is consistent with that approach, and provides a sufficient level of certainty to be lawful. Absolute certainty cannot be achieved and there will always be difficult cases.

129. Mr Baynham-Hughes described the detailed work involved in drawing up the Conformation Standard at GBH WS3/41-50. The aim was to define the physical characteristics of XL Bullies with sufficient clarity for enforcers, owners and businesses. The photographs provided were also intended to assist existing owners in judging whether their dog was an XL Bully.

130. An expert group was convened, which examined the evidence. Careful consideration was given to the characteristics of the XL Bully and how best to describe them. This exercise necessarily involved a degree of judgment. In my view, the Claimants' criticisms of the Conformation Standard, for example, in regard to height standards, express their disagreement with the Defendant's judgments, but do not disclose any arguable public law error.

131. For these reasons, Ground C does not succeed.

Final conclusions

132. The claim for judicial review is allowed in respect of Grounds A(iv) and B(iii) as the Defendant was in breach of the requirements of the PSED when she made the Designation Order, the Compensation and Exemption Order and the Rehoming Order.

133. However, in the light of the comprehensive May 2024 EIA, it is highly likely that the outcome for the Claimants would not have been substantially different if the conduct complained of had not occurred. Therefore, Section 31(2A)(a) SCA 1981 applies, and relief is refused.

134. The claim for judicial review is dismissed on all other Grounds.