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Case No: CO/4240/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 February 2022

Before

LORD JUSTICE SINGH
MR JUSTICE SWIFT

- -

Between

THE QUEEN (on the application of (1) GOOD LAW PROJECT LIMITED (2) RUNNYMEDE TRUST)	**Claimants**
- and -	
(1) THE PRIME MINISTER (2) SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendants**

- -

Jason Coppel QC and Hannah Slarks (instructed by **Rook Irwin Sweeney**) for the **Claimants**
Sir James Eadie QC, Julian Milford QC, Julian Blake and Jason Pobjoy (instructed by **the Treasury Solicitor**) for the **Defendants**

Hearing dates: 14 and 15 December 2021

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Approved Judgment

A. Introduction

1. The Claimants contend that the government has a policy or practice by which people have been appointed to positions critical to the government's response to the COVID-19 pandemic without open competition, that only candidates with some relevant personal or political connection to the decision-maker are appointed, and that, even though the positions to be filled are senior and strategically important, the person appointed must be unpaid. The Claimants say this gives rise to indirect discrimination on grounds of race and/or disability and make other complaints about the process used by the Defendants.

2. The Claimants' claim was issued in November 2020. As originally pleaded, the claim identified four appointment decisions as evidence of the policy or practices claimed to exist: *first*, the decision in May 2020 to appoint Baroness Harding of Winscombe (Dido Harding) as Chair of the Test and Trace Task Force (later known as NHS Test and Trace); *second* the decision (also in May 2020) to appoint Kate Bingham to lead the Vaccines Task Force; *third*, the decision in August 2020 to appoint Baroness Harding to be the Interim Chair of the National Institute for Health Protection; and *fourth* the decision in September 2020 to appoint Mike Coupe to be director of testing at NHS Test and Trace.

3. The Claimants' discrimination claim, put on the basis of both sections 29 and 50 of the Equality Act 2010 ("the Act"), is that the policy or practice they allege to exist is unlawful, and also that each decision to appoint was unlawful because the decision to appoint was made in exercise of the discriminatory policy or practice. By an Amended Statement of Facts and Grounds dated 4 October 2021, the Claimants withdrew any reliance on the decision to appoint Ms Bingham, either for the purpose of establishing the policy or practices relied on or for the purpose of asserting that the decision to appoint her was, on its own terms, unlawful.

4. The Claimants also contend that the policy or practice they assert was adopted in breach of section 149 of the Act ("the public sector equality duty") – i.e. the obligation, in the exercise of public functions, to have due regard amongst other matters to the need to eliminate discrimination and to advance equality of opportunities, and that the decisions in each instance on the method of appointment to be used were also taken without compliance with the public sector equality duty.

5. Lastly, the Claimants contend that the decision to appoint Mr Coupe was unlawful because it was taken in breach of the rules of procedural fairness. Baroness Harding was involved in the appointment process and was one of three people involved in the final decision to appoint Mr Coupe; between 2008 and 2010 she had been an executive director of J Sainsbury plc; between 2004 and May 2020 Mr Coupe also worked at J Sainsbury plc, including as Chief Executive of the company. The Claimants' submission is that these circumstances invalidated the decision to appoint Mr Coupe on the ground of apparent bias.

6. The Defendants dispute all these claims on their merits. In addition, they contend (a) that the matters complained of have now been overtaken by events rendering the claims academic, and that for that reason, the claims should not be determined by the court; (b) that the claims have been brought too late and should be dismissed for that reason; and (c) that the Claimants lack standing to bring the claims. There is also one further

matter, which we consider below in the context of the standing issue, although it is conceptually distinct. That is whether the decisions challenged are amenable to judicial review. Each of the decisions challenged in these proceedings is an employment decision. Employment decisions, even when taken by public authorities, are not ordinarily challengeable by application for judicial review unless the decision challenged is one of general application: see *McClaren v Home Office* [1990] ICR 824 per Woolf LJ at page 837B-D, and *R v London Borough Hammersmith and Fulham, ex p. NALGO* [1991] IRLR 249 per Nolan LJ at paragraphs 25-28.

B. Is the challenge academic?

7. The first preliminary point is that because each of the appointments challenged has now come to an end, the claim has become academic and should not be determined by the court.

8. We reject this submission. The present case is not one in which either passage of time or changing circumstances have rendered the grounds of challenge redundant. The position would be different if, for example, the response to the claim had been that the practices alleged by the Claimants had existed but had now been abandoned. But that is not this case. The Claimants' challenge to the legality of the Defendants' conduct should be determined on its merits. The challenge does not depend on any hypothetical matter. Were the Claimants to be correct in their assertion that the policy or practices relied on exist, or were they to succeed on the ground that there was a breach of the public sector equality duty, adjudication on the legal merits would serve a practical purpose and were the claim to succeed it is possible that declaratory relief might be granted.

C. Delay

9. The Defendants contend that any challenge to the specific decision in May 2020 to appoint Baroness Harding to NHS Test and Trace (NHSTT), whether a claim of indirect discrimination or a claim that the decision was in breach of the public sector equality duty, is out of time. They also submit that any challenge to the decision announced on 18 August 2020 to appoint Baroness Harding as Interim Executive Chair of the National Institute for Health Protection (NIHP) was not commenced promptly. The Defendants further submit that the public sector equality duty challenge was commenced out of time. The Defendants do not take any point on delay so far as concerns the challenge to Mr Coupe's appointment as Director of Testing at NHSTT in September 2020.

10. The Claim Form was filed on 17 November 2020. The obligation is to commence any claim promptly, and in any event within 3 months of the date of the decision challenged: see CPR 54.5(1). *Prima facie*, the challenge to the May 2020 decision was commenced out of time, and the challenge to the August 2020 decision was commenced on the last day of the 3-month long-stop period. The Claimants contend that all claims were commenced in time because the indirect discrimination claims and the claims under section 149 of the Act concern "continuing duties".

11. Our conclusion on the time issues lies between the positions adopted by the parties. To the extent that the Claimants' challenge is to the legality of a policy, on the assumption that any such policy existed, the challenge was commenced in time. If it exists, the policy will have an existence independent of the specific occasions when it was applied. Events such as the May 2020 decision to appoint Baroness Harding to NHSTT and the decision in August 2020 to appoint her to the NIHP could be relied on as evidence of the existence of the policy.

12. The individual decisions on how each appointment should be made are not, however, continuing acts. Each was a specific event that took place at a specific time. It is irrelevant that the appointment, once made, continued thereafter. The challenge is to the decision to adopt the process that was used to make the individual appointment. The continuation of the employment is a consequence of the decision challenged, not a continuation of that decision. For this reason, any free-standing challenge to the May 2020 decision appointing Baroness Harding to NHSTT was commenced out of time. The Claimants have made no application to extend time, and, in any event, we can see no basis on which any such application might succeed. Although we consider the challenge to this appointment on its merits, delay on its own provides a sufficient reason to dismiss the Claimant's challenge to this appointment decision.

13. We have reached a different conclusion so far as concerns the challenge to the appointment process by which Baroness Harding became the Interim Executive Chair of NIHP. Even though the challenge to this decision was not commenced promptly, only on the last day of the 3-month long-stop period, we do not consider it has been commenced too late. In this case, commencing the challenge to the decision on the mode of appointment on the final day of the 3-month period does not give rise to prejudice to the interests of good public administration.

14. The position so far as concerns the public sector equality duty claim, to the effect that a policy was adopted without compliance with the duty, is that that claim was also commenced out of time. The Claimants' policy challenge case relies on the May 2020 decision as evidence that the policy existed. Any decision to adopt the policy asserted must have been taken by then, at the latest. Contrary to the Claimants' submission, the public sector equality duty claim in this case is not a claim about a "continuing duty". The duty attaches to the exercise of any function. In this case, so far as concerns the challenge to the formation of a policy, the relevant exercise of functions was completed by the time the decision was made to adopt the policy. The duty to comply with the public sector equality duty crystallised by that date, at the latest.

15. The public sector equality duty complaints attaching to each appointment decision arise (again, at the latest) at the time of each decision. Thus, this complaint, so far as it relates to the May 2020 decision, was brought out of time; the complaint concerning the August 2020 decision was brought within time.

D. Standing and amenability to judicial review

(1) Standing: general points

16. Section 31(3) of the Senior Courts Act 1981 provides:

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

17. Although on its face that provision might suggest that the question of standing is to be determined at the permission stage only, it is well established that it may also have to be considered at the substantive stage, since sometimes it will be closely linked to the legal and factual merits of the claim: see the decision of the House of Lords in *R v Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

18. Before that decision there were differences in the test for standing as between the different prerogative orders; and the test for a declaration or an injunction was stricter. The House of Lords held that that distinction had been fundamentally changed when Order 53 of the Rules of the Supreme Court was reformed in 1977. The equivalent rules are now to be found in Part 54 of the Civil Procedure Rules.

19. As we have said, in the *National Federation* case the House of Lords made it clear that standing and the merits of the issues could often not be separated. As Professor Paul Craig puts it in Administrative Law (9th ed., 2021), page 783, at paragraph 25-017:

> "… For more complex cases it would be necessary to consider the whole legal and factual context to determine whether an applicant possessed a sufficient interest. The term merits here meant that the court would look to the substance of the allegation to determine whether the applicant had standing. This included *the nature of the relevant power or duty, the alleged breach, and the subject-matter of the claim*." (Emphasis in original)

20. At paragraph 25-023, Professor Craig refers to the thesis of Professor Peter Cane that there are three kinds of group challenge: "associational", "surrogate" and "public interest". Associational standing is typified by an organisation suing on behalf of its members. Surrogate standing covers the case where a pressure group represents the interests of others, who may not be well placed to bring the action, for example the Child Poverty Action Group in cases concerning social security benefits. Public interest standing is asserted by those claiming to represent the wider public interest, rather than merely that of a group with an identifiable membership. As Professor Craig puts it:

> "In this type of case the decision may affect the public generally, or a section thereof, but no one particular individual has any more immediate interest than any other, and a group seeks to contest the matter before the courts."

21. The Claimants have drawn our attention to the trend, since the decision in *National Federation*, towards "liberalisation" of the test for standing in practice. It is correct that in a number of cases the courts have accepted that claimants had standing even though they were not directly affected by a decision: e.g., pressure groups and even public-spirited individuals have been recognised as having standing in appropriate cases. But what is notable, is that, as the Claimants themselves say in their written submissions, such examples of judicial review challenges have been brought by NGOs "in their fields of interest". Numerous examples can be found, some of which are set out by the Claimants: e.g., *R v Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement Ltd* [1995] 1 WLR 386; *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219; and *R (Motherhood Plan) v HM Treasury* [2021] EWCA Civ 1703. The last case is of particular interest because it shows that even a newly established campaigning organisation may be permitted to complain of a breach of the public sector equality duty, or other ground of public law. What is of importance is that in all such cases of which we are aware the NGO concerned did have a particular interest and in a sense was representative of an identifiable group in society which was affected by the decision or policy in question. Even in the case of Lord Rees-Mogg, we note that he was a member of the House of Lords and therefore had a particular interest, as a member of the UK's legislature, in ensuring that the Government acted in accordance with constitutional law: see *R v Secretary of State for Foreign and Commonwealth Affairs, ex p. Rees-Mogg* [1994] QB 552. In that case, there was no dispute as to the applicant's standing: see page 561 (per Lloyd LJ). The Divisional Court accepted "without question that Lord Rees-Mogg brings the proceedings because of his sincere concerns for constitutional issues": see page 562.

22. Mr Jason Coppel QC, for the Claimants, relied on the decision of the Court of Appeal in *R (Independent Workers Union of Great Britain) v Mayor of London* [2020] EWCA Civ 1046; [2020] 4 WLR 112. In that case the challenge was directed to changes made in the London congestion charge scheme. The claim was brought under sections 19 and 29 of the Act. Although the claim ultimately failed and the appeal was dismissed, Mr Coppel points out that no-one suggested that the claimant union lacked standing to bring the proceedings, including an argument that the legislation in question gave rise to indirect discrimination. But, in our judgement, that was an example of what Professors Cane and Craig call "associational" standing: the union was seeking to vindicate the interests of its members, who were individually affected. Furthermore, that was a case of a public law decision, not a decision relating to an individual appointment to a post. In cases of individual employment, it is obvious that an individual could bring proceedings in the Employment Tribunal under the Act. Where no individual has done so, we find it difficult to accept that a claim for judicial review could nevertheless be brought by other individuals or an NGO.

23. We have found helpful the statements of principle as to the correct approach to standing in two decisions of the Supreme Court.

24. In *AXA General Insurance Ltd v HM Advocates* [2011] UKSC 46; [2012] 1 AC 868 the Supreme Court aligned the test for standing in claims for judicial review in Scotland with the position in England and Wales. Although in Scotland the question is whether a person is "directly affected" by the issue raised, the Supreme Court held that this was

in substance the same as the question whether they have a sufficient interest. At paragraph 170, Lord Reed JSC said:

> "For the reasons I have explained, such an approach cannot be based upon the concept of rights and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of the type of interest, which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say 'might', because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context."

At paragraph 172, Lord Reed explained that "standing should depend upon demonstrating a sufficient interest in the issues raised by the applications." (In the specific context of the Scottish procedural rules applicable in that case he concluded, at paragraph 174, that the insertion into Rule 58.8(2) of the stipulation that the person must be "directly affected by any issue raised" should be understood as reflecting the pre-existing requirement that the person must have a sufficient interest.)

25. Lord Reed returned to this theme in *Walton v Scottish Ministers* [2012] UKSC 44; 2013 SC 67, at paragraphs 89 and following. At paragraph 92, Lord Reed said:

> "As is clear from that passage, a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates. The words 'directly affected', upon which the Extra Division focused, were intended to enable the court to draw that distinction. A busybody is someone who interferes in something with which he has no legitimate concern. The circumstances which justify the conclusion that a person is affected by the matter to which an application relates, or has a reasonable

> concern in it, or is on the other hand interfering in a matter with which he has no legitimate concern, will plainly differ from one case to another, depending upon the particular context and the grounds of the application. As Lord Hope made plain in the final sentence, there are circumstances in which a personal interest need not be shown."

26. At paragraph 94, he continued:

> "In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it."

27. Importantly, at paragraph 95, Lord Reed emphasised that the interest of the applicant was not merely a threshold issue, which ceased to be material once the requirement of standing was satisfied: it could also bear upon the court's exercise of its discretion as to what, if any, remedy to grant if the challenge succeeded.

28. We also note that not everyone who has a strong and sincere interest in an issue will necessarily have standing, not even a public official such as the Mayor of London, who had an obvious interest in tackling crime and in the operation of the criminal justice system as it applies to London, including in relation to support provided for victims of crime: see *R (D) v Parole Board* [2018] EWHC 694 (Admin); [2019] QB 285, at paragraphs 105-111. As the Divisional Court (Sir Brian Leveson P, Jay and Garnham JJ) noted in that case, at paragraph 111:

> "The test for standing is discretionary and not hard-edged."

One consideration which the Court took account of when reaching that conclusion was that there are, or would be, "obviously better-placed challengers": see paragraph 110.

29. Furthermore, it is important to recall that the issue of standing is one which goes to the court's jurisdiction and therefore the parties are not entitled to confer jurisdiction on the court by consent where it does not have such jurisdiction: see *R v Secretary of State for Social Services, ex p. Child Poverty Action Group* [1990] 2 QB 540, at 556 (per Woolf LJ, giving the judgment of the Court of Appeal).

(2) Ground 1: the indirect discrimination claim

30. Whether the Claimants' indirect discrimination claims can be pursued in the proceedings in the Administrative Court is not a matter of jurisdiction as such. Section 113 of the Act identifies where discrimination claims should be pursued; it is made clear by section 113(3)(a) that, where appropriate, complaints of discrimination contrary to the provisions of the Act can be made by application for judicial review. However, this only begs obvious questions, if in fact an application for judicial review is filed: does the person who brings the claim for judicial review have standing to do so; is the subject matter amenable to judicial review; is no adequate alternative remedy available?

31. We do not consider that either of the Claimants before us has standing to pursue the indirect discrimination claims. *First*, this is not a case where all members of the public are equally affected. There were individuals, directly and personally affected by the decisions under challenge, who would be capable of bringing proceedings alleging unlawful discrimination: those who were considered (or perhaps feel that they should have been considered) for appointment to one of the posts in question but were not appointed. This is not a fanciful point. The facts of cases such as *Coker and Osamor* (see below for consideration of this case) demonstrate that individual complainants can and will come forward. The two applicants in that case were perfectly able to bring proceedings under the discrimination legislation which preceded the Act and rightly did so in the appropriate forum, which is the Employment Tribunal.

32. *Second*, the question of standing so far as it concerns the Claimants' discrimination challenge in this case, must be closely related to the statutory definition of indirect discrimination. By section 19 of the Act, indirect discrimination is defined in terms of the application by person "A" of a "provision, criterion or practice" to a person (referred to in the Act as "B") in relation to a relevant protected characteristic of B's (see section 4 of the Act, including race and disability) which puts B (the person with a protected characteristic) at a particular disadvantage. The obvious person to bring legal proceedings is therefore that person B.

33. These two points, taken together, strongly point to the conclusion that the Claimants before us do not have the sufficient interest of the sort referred to by Lord Reed in the passages we have set out above.

34. *Third*, there is no practical consideration pointing in favour of a conclusion that these Claimants should be recognised to have standing to bring this claim before this court. In fact, practical considerations point in the other direction. The Employment Tribunal – where the relevant cause of action more appropriately exists – is far better suited than the Administrative Court to adjudicate on disputes of fact likely to be material to the outcome of any discrimination claim. It has procedures appropriate to the task. Moreover, the Employment Tribunal is a specialist tribunal.

35. Mr Coppel relied on the decision of the Court of Justice of the European Communities in Case C-54/07 *Centrum voor Gelijkheid van Kanser en voor Racismebestrijding v Firma Feryn NV* [2008] ICR 1390, in support of a submission that EU law required the conclusion that discrimination claims could be raised by his clients in the Administrative Court. That case concerned Council Directive 2000/43/EC, on the equal treatment of persons irrespective of racial or ethnic origin. An employer had made

public statements concerning its recruitment policy. These were challenged as discriminatory by an NGO which was concerned with equal opportunities and anti-racism. The question in that case was whether a direct discrimination claim could be pursued if there was no identifiable individual complainant contending that he had been the victim of discrimination.

36. The Court of Justice (at paragraphs 21-28) concluded that, as a matter of substantive law, there could be direct discrimination under the Directive even if there was no identifiable individual who had been treated less favourably than others. But that did not answer the separate and distinct procedural question as to the appropriate person who had standing to bring proceedings. The answer to that question turned on the interpretation of Article 7 of the Directive, which states:

> "(1) Member states shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to *all persons who consider themselves wronged by failure to apply the principle of equal treatment to them*, even after the relationship in which the discrimination is alleged to have occurred has ended.
>
> (2) Member states shall ensure that *associations, organisations or other legal entities, which have, in accordance with the criteria laid down by the national law, a legitimate interest in ensuring that the provisions of this Directive are complied with*, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligation under this Directive …" (Emphasis added)

At paragraph 26, the Court said that the question of what constitutes direct discrimination within the meaning of the Directive must be distinguished from that of the legal procedures provided for in Article 7 for a finding of failure to comply with the principle of equal treatment. The Court said:

> "Those legal procedures must, in accordance with the provisions of that Article, be available to persons who consider that they have suffered discrimination. However, the requirements of Article 7 … are, as stated in Article 6 thereof, only minimum requirements and the Directive does not preclude member states from introducing or maintaining provisions which are more favourable to the protection of the principle of equal treatment."

37. The Court emphasised, however, that it is solely for national courts to assess whether national legislation allows such a possibility. In Belgium there was such national legislation: see paragraphs 11 – 14 of the judgment. The association in that case therefore had standing but this was a consequence of national law, not EU law. In the premises this decision is not authority for the proposition that the Directive requires that

NGOs must have standing to bring discrimination claims where there is no individual complainant.

38. As it happens, there is statutory provision in this country for the Equality and Human Rights Commission (which is a statutory body and not an NGO) to be able to bring proceedings in its own name. Section 30(1) of the Equality Act 2006 provides:

> "The Commission shall have capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function."

39. However, that is immaterial for present purposes. The crucial question in the present case is whether either or both these two Claimants has standing to complain of a breach of section 19, read with section 50, of the Act in the Administrative Court in circumstances where no individual complainant has come forward. For the reasons we have given above, they do not.

(3) Amenability to judicial review

40. There is a further, linked matter that is relevant. As was made clear by the House of Lords in the *National Federation* case, the issue of standing is often closely associated with the legal and factual merits of the case. This must include consideration of whether the decision challenged is in fact amenable to judicial review at all.

41. A notion of amenability informs the well-known principle that, as a matter of discretion, judicial review will not usually be permitted in circumstances where there is an adequate alternative remedy available. Take the example of an individual employee or applicant for employment who wishes to argue that they were unlawfully discriminated against by an employer. That person can bring proceedings in the Employment Tribunal under the Act. Ordinarily, if the individual sought to bring a claim for judicial review, they would be unable to do so, certainly on the ground that there was an adequate alternative remedy available in the Employment Tribunal.

42. An express principle of amenability has also been formulated to address how employment claims arising against public authority employers should be determined. The position was explained by Woolf LJ in *McClaren v Home Office*, at pages 836-837. Woolf LJ divided possible claims into four categories, which we will merely summarise here, although the detail of his judgment is important.

43. His first category is where, in relation to his personal claims against an employer, an employee of a public body is normally in the same situation as employees of a private sector employer. If he has a cause of action, he can bring proceedings in the ordinary way, in an appropriate court or tribunal. Woolf LJ said that, even if he is an office holder, under an appointment made by the Crown exercising a prerogative power or a statutory power, his normal remedy will be by an ordinary action: "Not only will it not

be necessary for him to seek relief by way of judicial review, it will normally be inappropriate for him to do so".

44. Woolf LJ's second category, where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector, comprises situations where there exists some disciplinary or other body established under the prerogative or by statute to which the public authority employer or the employee is entitled or required to refer disputes affecting their relationship. The procedure of judicial review can be appropriately directed to decisions of that body because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals. That situation is obviously not relevant in the present case.

45. This second category is to be contrasted with Woolf LJ's fourth category. This was that judicial review would not be available in respect of decisions taken within the confines of disciplinary procedures applicable for public sector employments when the procedure is of a purely domestic nature.

46. The third category of case is where an employee of the Crown or other public body is adversely affected by a decision of general application taken by his employer but contends that the decision is flawed on "*Wednesbury*" grounds: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. A famous example of that scenario is the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, in which the ban on trade union membership at GCHQ was challenged. The ban had been put in place by way of an Order in Council made under the prerogative. As Woolf LJ said:

> "Although the decision affected individual members of the staff, it was a decision which was taken as a matter of policy, not in relation to a particular member of staff, but in relation to staff in general and so it could be the subject of judicial review."

47. Applying this analysis to the present case, the Claimants' indirect discrimination claim directed to the specific appointment decisions does not raise issues that are amenable to judicial review. These claims are clearly not within Woolf LJ's Category 1 or 3. If there had been a suitable individual who wished to challenge those individual decisions, the appropriate place for them to do so would have been in the Employment Tribunal and not in this court. The position of the Claimants so far as concerns proceedings in the Administrative Court cannot be improved by the fact that they themselves could not have brought proceedings in the Employment Tribunal. To the contrary, this underlines the fundamental point that this aspect of the case is simply not amenable to judicial review.

48. In his submissions to the contrary, Mr Coppel relied on the decision of the Court of Appeal in *R (Shoesmith) v Ofsted and Others* [2011] EWCA Civ 642; [2011] ICR 1195. In that case the Court (a) agreed with Foskett J that the decision of the Secretary of State under section 497A(4B) of the Education Act 1996, that a local authority should appoint an Interim Director of Children's Services to replace the claimant, was amenable to judicial review; but (b) disagreed with Foskett J that there was an adequate alternative remedy in the Employment Tribunal.

49. In giving the main judgment, Maurice Kay LJ said, at paragraph 77:

> "Common law did not have a concept of unfair dismissal. Its usual concern was with whether a dismissal was wrongful, that is in breach of contract. The statutory concept of unfair dismissal, which gives rise to a remedy exclusively in the employment tribunal, was first introduced by the Industrial Relations Act 1971 and is now governed by the Employment Rights Act 1996. Its protection extends to both substantive and procedural unfairness. However, even before 1971 some employees were accorded a degree of procedural protection. These included 'office-holders'. The leading modern authority was *Ridge v Baldwin* [1964] AC 40 which concerned the dismissal of a chief constable who fell within the concept of office-holder. Lord Reid said, at p 66:
>
> > 'There I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation.'"

50. Having considered subsequent authorities, including *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 and *R v East Berkshire Health Authority, ex p. Walsh* [1984] ICR 743, Maurice Kay LJ said, at paragraph 87:

> "… It is now obvious that in the great majority of cases proceedings in the Employment Tribunal will be the better, if not the only, remedy. But there will still remain cases which are amenable to judicial review and in relation to which the alternative remedy in the Employment Tribunal will be inappropriate or less appropriate. …"

At paragraphs 92-99, Maurice Kay LJ considered the "axiomatic" principle that, if other means of redress are conveniently and effectively available to a party, they ought ordinarily to be used before resort to judicial review: see *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 456, at paragraph 30 (Lord Bingham of Cornhill). On the facts of *Shoesmith* the Court of Appeal applied that principle in such a way as to permit the claimant to keep all of the relevant proceedings in one forum, namely the Administrative Court.

51. In our judgement, the crucial factor which distinguishes the decision in *Shoesmith* from the present case is that that case concerned the removal of a statutory office holder from her office by the Secretary of State. That was clearly a public law decision, with a statutory underpinning. Hence the conclusion that there was an issue that was, in principle, amenable to judicial review. The facts in *Shoesmith* gave rise to the application of the well-established principle from cases such as *Ridge v Baldwin* that the rules of natural justice apply to such a decision-making process. In the present case, however, there is no such individual who makes a similar complaint. No one was

removed from a statutory office. Furthermore, this is linked to the issue of standing. If the facts of *Ridge v Baldwin* were to occur today but the Chief Constable did not bring proceedings himself or, if the Director of Children's Services in *Shoesmith* had not brought proceedings, it is very difficult to see how an NGO could bring those proceedings.

52. The other part of the indirect discrimination claim before us is the challenge to the legality of the policy/practice the Claimants contend existed (for which, see above at paragraph 1). Considerations of amenability would not prevent this part of the Claimants' challenge being determined on an application for judicial review. The decision challenged falls within Woolf LJ's Category 3. However, in this case, this part of the Claimants' challenge founders (a) because of our conclusion on delay; (b) because the Claimants lack standing to bring the challenge; and (c) because, for the reasons we set out below, the policy/practice alleged did not in fact exist.

(4) Ground 2: the public sector equality duty claim

53. No point on amenability arises in respect of the public sector equality duty claim. *First*, it is common ground that an allegation that a public authority has failed to comply with the public sector equality duty can properly be brought by way of a claim for judicial review, and that there is no other natural forum for such a claim. *Second*, section 149(1) of the Act applies to a public authority "in the exercise of its functions". This is not limited to the exercise of "public functions". The duty applies to all functions of a public authority, including its employment functions. Thus, the focus here must be on the Claimants' standing to bring this claim.

54. Mr Coppel points out that in several cases which have now come before the courts, it has been recognised that the Good Law Project does have standing: e.g., *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin); [2021] PTSR 1251, per Chamberlain J at paragraph 104. We consider that caution needs to be exercised in relation to such dicta in the light of the judgment (delivered after the hearing in the present case) in *R (Good Law Project Ltd) v Minister for the Cabinet Office* [2022] EWCA Civ 21, on which we received written submissions from the parties. At paragraph 6 of his judgment, Lord Burnett of Maldon CJ said:

> "No challenge or complaint was ever raised to the award of the contract by any potential competitor of Public First. The judge held that Good Law had sufficient standing to bring proceedings for the purpose of section 31(3) of the Senior Courts Act 1981 and rely upon the Regulations, as might a commercial entity which considered that it had been deprived unlawfully of the opportunity to bid for the contract. She also concluded that Good Law had standing to mount the public law challenge based on apparent bias despite having no interest in the letting of the contract. The Minister has not appealed that part of the judge's decision. It was based, so far as concerns the Regulations, on the *obiter dicta* of this court in *R (Chandler) v. Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011 at [77] and [78]. They were summarised in *R (The Good Law Project Limited and others) v. Secretary of State for Health and Social Care* [2021] EWHC 346

> (Admin) by Chamberlain J at [99]. The arguments on standing below did not distinguish between the claim based on the Regulations and the public law challenge based on apparent bias. *The question of standing for complete strangers to the procurement process with no commercial interest both under the Regulations and on public law grounds is a question ripe for review when it next arises*." (Emphasis added)

55. In the present case, the question of the First Claimant's standing is a live issue and so we will address it in more detail than appears to have occurred in other cases. The Good Law Project Limited (GLP) is a private company limited by guarantee. At the request of the Court, we have been provided with the Articles of Association which were adopted on 24 July 2018, by a special resolution. The date of that resolution is also recorded as being 27 July 2018 but that may simply be a typographical error. The resolution was passed by Mr Jolyon Maugham "being the sole person entitled to vote on the resolution on the circulation date". Article 3 of the Articles ('Objects') simply provided that:

> "The Company is established for the purposes expressed in the Memorandum of Association."

This Court has not been provided with a copy of that Memorandum of Association, but it is accepted that the objects were not set out in the terms which they now are in the current version of the Articles which we have been shown.

56. We are told that the organisation was still in its infancy in 2018, when the first set of Articles were drafted, and they did not in fact define its objects. Those were the Articles which were in place at the time when this claim was first issued. The current set of Articles were drafted during 2021. They were approved by the GLP Board on 30 November 2021 and were formally adopted on 15 December 2021 (coincidentally, that was the final day of the hearing in this court). The Articles were registered at Companies House on 20 December 2021. Those Articles define the objects of the GLP as follows:

> "2.1 to provide the sound administration of the law and to challenge injustice and inequality;
>
> 2.2 to uphold democracy and promote changes to the law and public administration with the aim of improving social justice, equality and inclusion;
>
> 2.3 to uphold high standards in public administration in accordance with democratic principles;
>
> 2.4 to enable and promote access to justice and the law, particularly for those whose access is curtailed because of poverty, social or economic disadvantage or discrimination;
>
> 2.5 to protect and preserve the environment for benefit of mankind now and in the future;

> 2.6 to advance education and research into good application and development of the law and of administrative practice;
>
> 2.7 to promote compliance with the law by public and private actors and to address imbalances of economic power in the application of the law; and
>
> 2.8 to further any other philanthropic or benevolent purpose ancillary to the above proposes."

57. No individual, even with a sincere interest in public law issues, would be regarded as having standing in all cases. We do not consider that the position differs simply because there is a limited company which brings the claim. It also cannot be right as a matter of principle that an organisation could in effect confer standing upon itself by drafting its objects clause so widely that just about any conceivable public law error by any public authority falls within its remit.

58. In all the circumstances of this case, we are not persuaded that such a general statement of objects as is now set out in the GLP's Articles of Association can confer standing on an organisation. That would be tantamount to saying that the GLP has standing to bring judicial review proceedings in any public law case. This can be contrasted with the approach which was taken by the Divisional Court in the case of *D*, where even a statutory authority (the Mayor of London) was not regarded as having a sufficient interest in the matter in issue in that case. It cannot be supposed that the GLP now has *carte blanche* to bring any claim for judicial review no matter what the issues and no matter what the circumstances.

59. In the circumstances of the present case we have reached the conclusion that the obviously better-placed claimant for judicial review for the purposes of the public sector equality duty challenge is the Runnymede Trust, an organisation which exists specifically to promote the cause of racial equality. We consider that the Runnymede Trust has standing to bring the public sector equality duty challenge, but the Good Law Project does not.

(5) Ground 3: The apparent bias challenge

60. This ground of challenge is directed only to the decision to appoint Mr Coupe as Director of Testing at NHSTT. The reasons above, at paragraphs 30-33 and 47, apply equally to this ground of challenge. Neither the Good Law Project nor the Runnymede Trust has standing to challenge this decision; and in any event, the decision challenged is not a decision amenable to challenge by way of judicial review.

61. Taken together, our conclusions so far, produce the outcome that all the claims brought by the Claimants fail either because they were brought late, or because the decisions challenged are not amenable to judicial review, or because the Claimants lack standing, save for the public sector equality duty claims directed to the decisions to appoint Baroness Harding to the position as Interim Chair of the NIHP, and Mr Coupe to the

position of Director of Testing at NHSTT. These two claims are matters that can be pursued, but only by the Runnymede Trust. Nevertheless, since we have heard detailed submissions on the substance of all the claims, we will deal with those claims, on their merits.

E Ground 1: Indirect discrimination

(1) Provisions of the Equality Act 2010

62. Section 19 of the Act defines the concept of indirect discrimination as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> > (a) A applies, or would apply it to persons with whom B does not share the characteristic,
> >
> > (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> >
> > (c) it puts, or would put, B at that disadvantage, and
> >
> > (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

The relevant protected characteristics are set out in subsection (3) and include both race and disability, on which the Claimants rely in the present case.

63. Section 19 simply defines the concept of indirect discrimination. It does not make anything unlawful. For that one must turn to a relevant operative provision of the Act, which makes something unlawful in a particular sphere of human activity. In this case the Claimants rely in part on section 29(6) of the Act, which provides that:

> "A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination …"

The Claimants contend that the three appointments in this case were decisions made "in the exercise of a public function", and therefore fall within the scope of the prohibition at section 29(6) of the Act.

64. We disagree. Section 29 appears in Part 3 of the Act, which is concerned with services and public functions. Section 28(2) makes it clear that Part 3 does not apply to discrimination that is prohibited by (among other things) Part 5 (which is concerned with work). Part 5 of the Act includes section 50, which is concerned with public offices. A public office is defined by subsection (2)(a) as, among other things, an office or post, appointment to which is made by a member of the executive. Section 50(3) provides:

> "A person (A) who has the power to make an appointment to a public office within subsection (2)(a) … must not discriminate against a person (B) –
>
> (a) in the arrangements A makes for deciding to whom to offer the appointment;
>
> (b) as to the terms on which A offers B the appointment;
>
> (c) by not offering B the appointment."

65. Section 29(6) is not applicable in these proceedings because the appointments under challenge fall naturally within the terms of section 50 of the Act, which is concerned with appointments to public offices.

(2) The claim in this case

66. At paragraph 1 of their Skeleton Argument, the Claimants describe the challenge as:

> "a challenge … to the policy or practice of Government of making appointments to posts critical to the pandemic response, (a) without adopting any (or any sufficient) fair or open competitive processes, thereby putting at a disadvantage those less likely to be known or connected to decision-makers; and (b) failing to offer remuneration for high-level full-time roles, thus excluding all candidates who were not already wealthy and/or held other posts for which they would continue to be paid."

It is also alleged that, while the challenge focusses on three examples of this "policy or practice", the evidence shows that it has been applied more widely. In addition, or alternatively, the three specific appointments are challenged "as decisions in their own right".

67. At paragraph 46 of the Skeleton Argument, the Claimants submit that for each of the appointments the Government adopted policies or practices of (a) appointment without open competition; and/or (b) that appointees should be personally, professionally or politically connected with or known to the appointing decision-makers or senior politicians or members of the Conservative Party; and/or (c) not offering remuneration

for new, leading public health administrative roles, created during the pandemic, despite their being full-time jobs.

68. At paragraph 51 it is submitted that both (a) and (b) (described by the Claimants collectively as a practice or policy of "closed recruitment") placed those with certain protected characteristics at a particular disadvantage. The Claimants rely upon the characteristics of race and disability.

69. The parties essentially agree on the relevant group or pool, that being "those people with the necessary expertise and experience, and the availability, to do the job". The Claimants submit that it is "self-evident" that those within this group who have no personal connection to the appointers, or their agents are put at a particular disadvantage by a closed recruitment process. They contend that the Defendants have not attempted to deny on the facts that closed recruitment does place those without pre-existing connection to the decision-makers at a particular disadvantage. The Claimants also submit that it is equally self-evident that those with the identified protected characteristics are less likely to move in circles where they are known to the decision-makers.

(3) Authority

70. Both sides rely on the decision of the Court of Appeal in *Coker and Osamor v Lord Chancellor* [2001] EWCA Civ 1756; [2002] ICR 321 (judgment of the Court given by Lord Phillips of Worth Matravers MR). That case arose under earlier legislation (section 1(1)(b) of the Sex Discrimination Act 1975 and section 1(1)(b) of the Race Relations Act 1976). The facts were that the then Lord Chancellor appointed a solicitor whom he knew well to be his Special Advisor. The post was not advertised; applications were not sought. The Lord Chancellor considered that the appointee had the necessary judgement, ability and commitment to his own political viewpoint. The applicants commenced proceedings in the Employment Tribunal. Their main argument was that the Lord Chancellor had in substance imposed a "requirement" (that being the language of the legislation relating to indirect discrimination at the time) that the appointee had to be personally known to him; and that this indirectly discriminated against women and people from ethnic minorities. The first applicant succeeded before the Employment Tribunal but the Lord Chancellor's appeal was allowed by the Employment Appeal Tribunal. The second applicant failed before both tribunals. On their appeal the Court of Appeal dismissed both appeals. It is interesting to note that, at paragraph 7 of the judgment, the object of the proceedings was recorded to be "to challenge the practice of closed, or internal recruitment."

71. The crux of the reasoning of the Court of Appeal can be found at paragraphs 37-40:

> "37. … We believe that the tribunal must have concluded … that the requirement that candidates should be personally known to the Lord Chancellor would have screened out a considerably larger proportion of women and of the racial minorities than of white men.

> 38. If this was the reasoning of the tribunal it was fundamentally flawed. The test of indirect discrimination focuses on the effect that the requirement objected to has on the pool of potential candidates. It can only have a discriminatory effect within the two statutes if a significant proportion of the pool are able to satisfy the requirement. Only in that situation will it be possible for the requirement to have a disproportionate effect on the men and the women, or the racial groups, which form the pool. Where the requirement excludes almost the entirety of the pool it cannot constitute indirect discrimination within the statutes.
>
> 39. For this reason, making an appointment from within a circle of family, friends and personal acquaintances is seldom likely to constitute indirect discrimination. Those known to the employer are likely to represent a minute proportion of those who would otherwise be qualified to fill the post. The requirement of personal knowledge will exclude the vast proportion of the pool, be they men, women, white or another racial group.
>
> 40. If the above proposition will be true in most cases of appointments made on the basis of personal acquaintanceship, it was certainly true of the appointment of Mr Hart by the Lord Chancellor. This was because those members of the elite pool who were personally known to the Lord Chancellor were, on the unchallenged evidence, reduced to a single man. However many other persons there may have been who were potential candidates, whatever the proportions of men and women or racial groups in the pool, the requirement excluded the lot of them, except Mr Hart. Plainly it can have had no *disproportionate* effect on the different groupings within the pool." (Emphasis in original)

72. On the face of it that passage, in particular paragraph 39, would appear to be against the Claimants in the present case. They submit, however, that the *ratio* of that case can be distinguished on three grounds. First, on the facts, the Defendants in the present case have accepted that the pool of potential candidates for appointment was significantly wider than the one person appointed in each case. Secondly, the legal analysis in *Coker and Osamor* is reliant on the different way in which the law was formulated prior to the Act, which required a statistical analysis of pools. They submit that the statistical approach was abandoned by that Act. Thirdly, the Claimants submit that there is an obvious question which arises as to whether the approach underlying the *ratio* of *Coker and Osamor* in 1997 can apply in 2020. Furthermore, the Claimants rely on the *obiter* comments of the Court at paragraph 57:

> "It is possible that a recruitment exercise conducted by word of mouth, by personal recommendation or by other informal recruitment method will constitute indirect discrimination within

> the meaning of sections 1(1)(b) of the statutes. If the arrangements made for the purpose of determining who should be offered employment or promotion involve the application of a requirement or condition to an applicant that he or she should be personally recommended by a member of the existing workforce that may, depending of course on all the facts, have the specified disproportionately adverse impact on one sex or on a particular ethnic group and so infringe section 1(1)(b)."

73. The Defendants did not submit that the decision in *Coker and Osamor* is dispositive in their favour in the present case. We agree that it provides only limited assistance in resolving the issues which arise in this case. This is not only because the wording of the legislation has changed but, more fundamentally, because it has first to be established that the alleged practices or policy existed. That is an issue of fact and not one of law.

(4) Approach to the evidence

74. In approaching the evidence in this case, we bear in mind, first, that these are judicial review proceedings; and, secondly, that no application has been made to cross-examine the Defendants' witnesses. The correct approach is summarised as follows by Sir Clive Lewis in Judicial Remedies in Public Law (6th ed., 2020), at paragraph 9-121:

> "… If there is a dispute of fact and no cross-examination is allowed, the courts will proceed on the basis of the written evidence presented by the person who does not have the onus of proof. As the onus is on the claimant to make out his case for judicial review, this means that in cases of conflict on a critical matter which are not resolved by oral evidence and cross-examination, the courts will proceed on the basis of the defendant's written evidence."

75. This is the same approach reiterated by the Court of Appeal in *R (End Violence Against Women Coalition) v Director of Public Prosecutions* [2021] EWCA Civ 350; [2021] 1 WLR 5829, at paragraph 18 (Lord Burnett of Maldon CJ); and *R (Good Law Project Ltd) v Minister for the Cabinet Office* [2022] EWCA Civ 21, where Lord Burnett of Maldon CJ said, at paragraph 86:

> "The general rule is that the evidence of a witness is accepted unless given the opportunity to rebut the allegation made against them, or there is undisputed objective evidence inconsistent with that of the witness that cannot sensibly be explained away so that the witness's testimony is manifestly wrong. A court hearing a judicial review will generally accept the evidence of the public authority: and will not normally decide contested issues of fact:

> see, for example, *R v. Board of Visitors of Hull Prison ex p St. Germain (No. 2)* [1979] 1 WLR 1401 at page 1410H and *R (Watkins-Smith) v. Aberdare Girls High School* [2008] EWHC 1865 (Admin), [2008] FCR 203 at [135]; *R (Safeer) v Secretary of State for the Home Department* [2018] EWCA Civ 2518 at [18])."

76. To meet this difficulty Mr Coppel relies on the provisions of section 136 of the Act, which relate to the burden of proof. Subsection (2) provides:

> "If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

Subsection (3) provides:

> "But subsection (2) does not apply if A shows that A did not contravene the provision."

77. These provisions do not assist the Claimants in the present case. The Supreme Court has confirmed that the burden of proof provisions in section 136 are no different from those in the previous legislation. There is a two-stage process for analysing complaints of discrimination. At the first stage, the burden is on the claimant to prove, on the balance of probabilities, "facts" from which a court or tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination has been committed. Facts are not the same thing as assertions. If such facts are proved, the burden moves to the respondent at the second stage to explain the reason for the alleged discriminatory treatment and satisfy the court or tribunal that the protected characteristic played no part in those reasons: see *Efobi v Royal Mail Group Ltd* [2021] UKSC 33; [2021] 1 WLR 3863, at paragraph 30 (per Lord Leggatt JSC).

78. As we will explain, on the evidence in the present case before us, we are not satisfied that there have been proved to be "facts" from which this court could conclude that there was unlawful discrimination. Accordingly, the reverse burden of proof simply does not arise.

(5) The facts – was there a policy or practice as alleged?

79. As we have stated, it is critical to the merits of much of the Claimants' case whether the appointment decisions relied on evidence the policy or practices they contend existed and were applied. If they do not, the first premise of the claim for indirect discrimination under section 19 of the Act is not made out. Section 19(1) of the Act defines indirect discrimination as involving a decision taken in application of a "… provision, criterion or practice …" that is discriminatory in the sense described in the remainder of the section.

80. For a relevant provision, criterion or practice to exist there must be evidence showing, or from which it can be inferred, that what happened on the occasion complained of represented something of more general application. In *Ishola v Transport for London* [2020] EWCA 112; [2020] ICR 1204 Simler LJ summarised the position as follows (at paragraph 38 of her judgment):

> "In context, and having regard to the function and purpose of the [provision, criterion or practice] in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that *it is the way in which things generally are or will be done*. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. … [A]lthough a one-off decision or act can be a practice, it is not necessarily one." (Emphasis added)

81. The Defendants have provided witness statements and exhibits explaining how each appointment under challenge came to be made. Based on that evidence we have reached the following conclusions.

(a) Baroness Harding: NHS Test and Trace

82. The outbreak of COVID-19 took hold in the United Kingdom during March 2020. By the end of that month the first "lockdown" regulations were in force (the Health Protection (Coronavirus, Restriction) (England) Regulations SI 2020/350, in force 26 March 2020), and the Secretary of State for Health and Social Care had also identified increased testing as a key part of the public health measures required to understand the nature of COVID transmission and contain it. On 4 April 2020 the Department for Health and Social Care published a document "*Coronavirus… scaling up our testing programme*". That document set out a programme comprising a five "pillar" testing strategy. Testing for infection and tracing those who had been in contact with infected persons was one of several areas where new capability and capacity had to be developed at speed. The programme for this was initially led from within the Department for Health and Social Care, but the Secretary of State decided it would not be possible for the capacity required to be developed at speed either within his department or by Public Health England, the organisation which then had responsibility for diagnostic testing. He decided a new organisation was required with dedicated leadership. This organisation came to be known as NHS Test and Trace (NHSTT). The work to appoint a person to lead NHSTT took place at the beginning of May 2020, at the same time as work to appoint heads of two other new organisations, the Vaccines Task Force and the PPE Task Force.

83. On 4 May 2020 the Prime Minister and the Cabinet Secretary discussed and agreed the need to appoint a person to lead NHSTT. By the morning of the next day a description of the role had been prepared, and recruitment consultants (Russell Reynolds) had been engaged to assist in identifying candidates. The names of six potential candidates (not including Baroness Harding) were provided to the consultants together with the role description document. By the end of that morning, the consultants provided a report. The report included a "main list" of 21 candidates, including Baroness Harding. On that list she was described as

> "Current: NHS Improvement Chair, Bank of England Deputy Chair, Mind Gym SID
>
> Former: TalkTalk Telecom CEO.
>
> Plural Non-Executive with a busy portfolio. Unlikely to be available."

Baroness Harding had been Chair of NHS Improvement since October 2017. NHS Improvement is the body responsible for overseeing NHS hospitals and private sector organisations that provide NHS-funded health care.

84. The consultants' report was considered by civil servants, including the Cabinet Secretary. A shortlist was prepared, comprising six candidates, including Baroness Harding. In the afternoon of the same day the list was considered by the Cabinet Secretary. Baroness Harding was his preferred candidate. The list was then provided to the Secretary of State for Health and Social Care. He put forward three candidates for consideration by the Prime Minister. He recommended Baroness Harding on the basis that she had both experience of mass retail operations and experience of the NHS. On 6 May 2020 the Prime Minister accepted this recommendation.

85. Baroness Harding accepted the position. To take it up she took leave of absence from her role at NHS Improvement (one that required two to three days' work per week). Baroness Harding was not paid for her work with NHSTT. The evidence before us is that during the period she worked at NHSTT she continued to receive the salary for her position at NHS Improvement. It was Baroness Harding's decision not to take any further salary for the NHSTT post. Her appointment was announced on 7 May 2020. A formal letter of appointment was sent on 12 May 2020. NHSTT was formally launched on 28 May 2020. Although the period of her appointment was not specified (because the scale of the work to be undertaken was not then clear), Baroness Harding's appointment was regarded as a temporary one.

(b) Baroness Harding: National Institute for Health Protection

86. In July 2020 the Secretary of State proposed a new organisation, then referred to as the Centre for Health Protection, to combine the work of NHSTT, that of the Joint Biosecurity Centre (established in May 2020 to undertake data analysis about infection outbreaks and provide advice on responsive measures), and the health protection functions of Public Health England. The name of the proposed new organisation was shortly changed to the National Institute for Health Protection (NIHP). (By the time the organisation was launched in April 2021, it was known by a different name, the UK Health Security Agency.)

87. On 18 August 2020 the Secretary of State announced that the NIHP was to be established, and that Baroness Harding would lead the work of putting the organisation together. The announcement also referred to Baroness Harding undertaking "the global search for [the organisation's] future leadership". At the request of the Secretary of State, Baroness Harding acted as "Interim Executive Chair" of NIHP. In the witness evidence prepared on behalf of the Defendants for these proceedings, this role is described as an extension of her existing responsibilities with NHSTT while the new organisation, NIHP, was created. Further, Baroness Harding's position at NIHP was always considered a temporary position. The recruitment process to appoint a permanent Executive Chair commenced on 5 September 2020. The new appointment (designated as Chief Executive) was made on 24 March 2021. Following a hand-over period, Baroness Harding left her role on 7 May 2021. The UK Health Security Agency became fully operational from 1 October 2021.

(c) Mike Coupe: Director of Testing, NHSTT

88. Mr Coupe's predecessor as Head of Testing at NHSTT had started work in May 2020 on secondment from an NHS Hospital Trust. That secondment, although not for a fixed period, had always been intended to be a short-term arrangement. In September 2020 the person who had been seconded decided she wanted to return to her work at the Trust, within a few weeks.

89. The search for her replacement started on 15 September 2020, when Baroness Harding and Gareth Williams (Chief People Officer at NHSTT) provided a brief to recruitment consultants. On 17 September 2020 Baroness Harding and Mr Williams met with the consultants to discuss the consultants' "longlist" of thirteen potential candidates. The longlist comprised people with experience at very senior level in logistics, retail, or finance businesses. Mr Coupe's name was not on the list. Three candidates were short-listed. At the meeting Baroness Harding suggested Mr Coupe was a further candidate who should be approached. There were three rounds of interviews. Baroness Harding conducted the third-round interviews. She interviewed three candidates including Mr Coupe.

90. Mr Coupe was appointed Director of Testing on 23 September 2020. The decision to appoint him was made by Baroness Harding, Mr Williams and the Second Permanent Secretary at the Department for Health and Social Care. Mr Coupe agreed to take the position for a maximum of three months. He commenced work on 29 September 2020; his last working day was 24 December 2020; his appointment formally terminated on 31 December 2020. He worked under the terms of what was referred to as a "Volunteer Agreement". This was because he had (as it is put in the Defendants' witness evidence) "… made it very clear from the outset that he did not want payment for the role."

(d) Was there a policy, or any provision, criterion, or practice?

91. We have identified the Claimants' case as to the policy or practice they claim existed: see above at paragraphs 66 – 68. We do not accept that the appointments relied on reveal the existence of any such policy, or that there were any provisions, criteria, or practices as alleged.

92. There is no evidence that the three appointments processes relied on were connected in any material way, to be part of any relevant pattern or practice, let alone appointments

made in pursuance of anything capable of being described as a policy. Rather, each of the appointment processes relied on was shaped only by the specific circumstances in which it arose, not by any common plan or practice of more general application.

93. Baroness Harding's first appointment in May 2020 was one of three appointments to strategic positions central to the government's response to the COVID pandemic. The other appointments from that time were those of Kate Bingham to lead the Vaccine Task Force, and Lord Deighton to lead the PPE Task Force. Baroness Harding's appointment to NHSTT was of a piece with these other two appointments, neither of which is relied on by the Claimants as evidencing the policy or practices they allege. The subsequent appointment of Baroness Harding to the interim post, leading the work to establish the NIHP arose from the decision to merge the work of NHSTT with that of the Joint Biosecurity Centre, and part of the work of Public Health England. We accept the Defendants' evidence that her appointment as Interim Executive Chair of NIHP was a temporary extension of her work as Executive Chair of NHSTT. Baroness Harding held the ring pending the appointment of a permanent chief executive. Mr Coupe's appointment temporarily to fill the position of the Director of Testing at NHSTT arose from discrete circumstances, namely the decision of the then Director of Testing to bring her secondment to an end. Those circumstances explain the process followed to recruit her replacement in short order.

94. We accept that it is possible to pick out aspects of any one of the processes that also feature in one or more of the others. For example, none of the appointments involved a process of public advertisement and consideration of applications submitted in response. In two instances, recruitment consultants were engaged. Mr Coupe was not paid for his work. Baroness Harding took no salary in addition to that payable for her work at NHS Improvement (from which she was given leave of absence). It is also correct that Baroness Harding's husband is a Conservative MP, and that Baroness Harding was on the board of J Sainsbury plc when Mr Coupe was the company's Chief Executive.

95. However, considering the circumstances in the round, it is not possible to leap from such common features to the conclusion the Claimants contend for: that each appointment was made in pursuance of (for example) policies or practices that appointment was to be made without open competition, that only persons known to decision makers or politicians could be appointed, or that no remuneration would be offered. As to the open competition submission, the process applied to Baroness Harding's appointment in May 2020 was similar to that applied for the appointment of Ms Bingham. All three appointments made at that time (including the appointment of Lord Deighton) were made in response to urgent need. That is sufficient to explain (and in our view better explains) why a process of advertisement and response was not followed. The point is not whether an advertisement-led process could have been conducted quickly. The point is only whether what happened in these circumstances evidences something recognisable as a practice rather than being indicative only of the decisions made on the occasions in hand. The same point applies to Mr Coupe's appointment. A replacement for the existing Director of Testing had to be identified quickly. What happened is properly explained by that imperative. There is no evidence from which we can infer the existence of the practice the Claimants assert. The Claimants' next point is the requirement for personal or political connections with the decision-maker. The evidence provides no support for this at all. Baroness Harding had

previous relevant experience of senior positions in large retail businesses and in the NHS. Mr Coupe had vast experience of managing complex public-facing organisations. Moreover, senior civil servants were involved, at least in the May 2020 decision to appoint Baroness Harding and Mr Coupe's appointment in September 2020. The Claimants' case requires their complicity in decisions that only placemen be appointed. There is simply no evidence at all to support such a claim. The last practice the Claimants allege is that the appointments be unpaid. The evidence we have is that both Baroness Harding and Mr Coupe declined payment. We accept this evidence. There was no policy or practice that only those able to work at their own expense would be appointed.

96. In his evidence in support of the claim Mr Maugham, the Director of the Good Law Project, referred to appointments of four unpaid advisors to ministers as evidence in support of the practices alleged. We do not consider this evidence supports the Claimants' case. Each appointment referred to was consistent with Cabinet Office Guidance in the form of a "Desk Note on Making Direct Appointments", dated March 2020. If these appointments are evidence of anything it is of the guidance in that document, not of any of the practices asserted by the Claimants in this claim.

(6) The facts – evidence of particular disadvantage

97. The Claimants' case on the "particular disadvantage" element of the indirect discrimination case is set out in witness statements by Dr Halima Begum of the Runnymede Trust, Dave Penman, the General Secretary of the First Division Association, Fazilel Hadi of Disability Rights UK and Jolyon Maugham of the Good Law Project. The material matters are as follows.

98. In her first witness statement Dr Begum says that: (a) estimates suggest that only 6.3% of all peers are from black and minority ethnic ("BAME") backgrounds (50 out of 798); (b) only 6% of Conservative MPs are BAME (22 out of 364); (c) there are only five disabled MPs in Parliament, and only 0.5% of Conservative MPs are disabled (two out of 364); and (d) white people are, in general, far more likely to be friends with other white people and have, statistically, very few BAME friends.

99. For that last proposition reliance is placed on a survey done in 2018 by YouGov. That survey found that one in three white Britons (35%) have no friends from an ethnic minority background. It also found that Britain's ethnic minority populations are more concentrated in a smaller number of areas – namely cities – than the white population. For instance, white Londoners are much more likely to have ethnic minority friends, with only 16% having no friends from an ethnic minority compared to 34 – 46% of white people across the other areas of Britain. At the hearing we were informed that this was based on a sample of 1,630 people. It was a national survey and, of course, is highly general: it applies to all walks of life and all sectors of society. In our judgement, it does not establish the facts which would be required for us to draw any appropriate inferences in the context before us. We can also take judicial notice of the fact that several members of the present Cabinet (and the Cabinet as it was in 2020) are from ethnic minorities. Indeed, the current occupant of the office of Secretary of State for Health and Social Care (Sajid Javid) is from an ethnic minority, although his predecessor who was in post in 2020 at the time of these appointments (Matt Hancock)

was white. In our view, the highly generalised evidence which has been adduced before us simply does not establish what would have to be proved by way of particular disadvantage and disproportionate impact on certain groups under section 19 of the Act.

100. Mr Penman's evidence is that, whilst the Civil Service as a whole is broadly representative of the UK's working population, this is not consistent across departments or professions. For example, the proportion of BAME Civil Servants ranges from 2.1% to 12.9% across departments. The Government has set targets for the diversity of new entrants to the Senior Civil Service ("SCS"). By 2025, it is aiming for 13.2% of new recruits to the SCS to be from an ethnic minority background, and for 11.3% to be disabled. Open and fair selection is critical, says Mr Penman, to delivering a truly representative and diverse workforce. Recruiting on merit, through open and fair selection which is free from bias or discrimination, is essential to deliver a truly representative workforce. In our judgement, those statements do not come close to establishing the facts which would be necessary to make out a claim under section 19 of indirect discrimination on the facts of this case. They are highly general statements.

101. Mr Maugham cites a report by the Department for Business, Innovation and Skills in 2016 which explained the benefits of open recruitment. Again, in our view, this is highly general material and does not prove the facts which are necessary in this case. Mr Maugham also refers to the Civil Service Commission's Recruitment Principles, which have been issued under the Constitutional Reform and Governance Act 2010. The Commission has a statutory duty to ensure that the merit requirement is upheld and is not being undermined. The Recruitment Principles, in particular Principles 3-6, set out the importance of open competition. Again, in our view, this is highly general material and does not relate to the specific allegations of fact which are made in the present case. Mr Maugham then refers to the Governance Code on Public Appointments, first published in 2016 and last updated in April 2019. This includes, at paragraphs 4-6, public appointment principles, which emphasise the importance of appointments on merit, openness, and reflection of the diversity of the society in which we live. Again, it seems to us that, while these are no doubt laudable aims at a general level, they do not prove the specific facts which are required in the case before us.

102. In her second witness statement, Dr Begum states (at paragraph 6):

> "The Court will appreciate that when certain groups are currently under-represented in positions of power and powerful circles, they are necessarily less likely to have been known or connected to those in power. They are therefore less likely to be considered by those conducting closed recruitment."

Further, she observes that the same problem of under-representation exists in the Civil Service. She refers to statistics produced by the Government in July 2021 in a document called 'Civil Service Employment by Ethnicity and Responsibility Level' which are to the effect that, whilst 14.3% of all Civil Service employees are reported as being from an ethnic minority, only 10.6% of those in Senior Civil Servant positions are from an ethnic minority. Dr Begum also refers to the Civil Service Diversity and Inclusion Strategy from 2017 called '*A Brilliant Civil Service: becoming the UK's most inclusive employer*'. This document acknowledges that the representation of ethnic minorities as being steadily increasing at all grades below the SCS and, at 11.6%, is now close to the 12.8% of the UK's economically active population who are from an ethnic minority

background, but a change is needed at more senior levels. However, this too is evidence of the general picture across the Civil Service and does not assist in resolving the issues of fact which arise in this case.

103. Drawing this evidence together, even if the Claimants had satisfied us that the policy or practices they relied on did exist, the Claimants have not provided evidence sufficient to demonstrate the "particular disadvantage" requirement. The particular disadvantage required for the purposes of a claim alleging indirect discrimination must be measured in specifics. The Claimants' evidence in this case does not meet the standard required.

(7) Conclusion on Ground 1

104. For the reasons set out above, Ground 1 fails on its merits. On the evidence the Claimants have failed to demonstrate a *prima facie* case of indirect discrimination.

F. Ground 2: The public sector equality duty claim

(1) Legislation and principles

105. Section 149(1) of the Act contains the public sector equality duty:

> "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 or 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."

Section 149(7) makes clear that the "protected characteristics" include disability and race.

106. The relevant principles which govern the public sector equality duty were not in dispute. They are summarised in the judgment of the Court of Appeal (Sir Terence Etherton MR, Dame Victoria Sharp P and Singh LJ) in *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058; [2020] 1 WLR 5037, at paragraphs 174-175:

> "174. … [T]hose principles were set out by McCombe LJ in *R (Bracking) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2014] Eq LR 60, para 26. It is unnecessary to set out that passage in full here. It is well known and has frequently been cited with

approval since, including in *Hotak v Southwark London Borough Council* [2016] AC811, para 73 (Lord Neuberger PSC).

> 175. In that summary McCombe LJ referred to earlier important decisions, including those of the Divisional Court in *R (Brown) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] PTSR 1506, in which the judgment was given by Aikens LJ; and *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] HRLR 13, in which the judgment was given by Elias LJ. For present purposes we would emphasise the following principles, which were set out in McCombe LJ's summary in *Bracking* and are supported by the earlier authorities:
>
> (1) The PSED must be fulfilled before and at the time when a particular policy is being considered.
>
> (2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
>
> (3) The duty is non-delegable.
>
> (4) The duty is a continuing one.
>
> (5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.
>
> (6) 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 it is for the decision-maker to decide how much weight should be given to the various factors informing the decision."

107. We also emphasise what was said by the Court in that case at paragraph 181: what is needed to comply with the duty depends on context, and there is no requirement to do the impossible.

> "It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics …"

(2) The parties' contentions

108. On behalf of the Claimants it is submitted that this is exactly the kind of case in which careful consideration of the public sector equality duty had the potential to enable the

decision-makers to take straightforward steps to avoid the risk of discriminatory impact. It is submitted that it is essential that proper thought should be given to how to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. The Claimants submit the Defendants have provided no evidence of compliance with the duty, only witness statements containing generalised assertions about corporate commitments to diversity and given unrelated examples of that commitment: see (it is submitted) Mr Ridley's first witness statement, at paragraphs 48-51 and 59-62.

109. We have already concluded, as a matter of fact, that the practices/policy alleged did not exist; but the Claimants' submission that the public sector equality duty was not complied with in relation to the decisions on how each of the three appointments should be made raises a different issue and does need to be addressed. In this regard, the Claimants submit (a) that the Defendants admit that the recruitment agency involved in the appointment of Baroness Harding to her first role was not given any instructions in respect of diversity; and (b) that the Defendants do not claim otherwise in respect of the instructions given before Mr Coupe was recruited (see, say the Claimants, Mr Ridley's first witness statement, at paragraph 71). The Claimants submit the Defendants have tried to "bat away" any need to comply with the duty by relying on the urgency of the appointments, going so far as to assert that open recruitment was an impossibility.

110. The Defendants' submissions emphasise that the public sector equality duty is a duty of process, not of outcome. We accept that but that does not diminish its importance, as the Court of Appeal explained in *Bridges*, at paragraph 176.

111. Next, it is emphasised on behalf of the Defendants that what is required by the duty is a "realistic and proportionate approach to evidence of compliance", "not micro-management or a detailed forensic analysis by the court … the court should only interfere in circumstances where the approach adopted by the relevant public authority was unreasonable or perverse": see *R (SG) v Secretary of State for the Home Department* [2016] EWHC 2639, at paragraph 329 (per Flaux J). Further, the Defendants submit that the specific requirements of the duty must be responsive to the circumstances of a given case and the practical constraints which applied. In the circumstances of the present case, it would have been wholly impractical for the Government to adopt an open recruitment policy or to consider the various factors listed in section 149 in respect of the individual appointments under challenge.

(3) Our conclusion on Ground 2

112. What the public sector equality duty requires is not necessarily a particular outcome, for example an open recruitment policy. Nevertheless, there must be some evidence of what precisely the decision-maker did in the circumstances of these cases to discharge the obligation when deciding the method by which each relevant appointment was to be made. Even in the context of direct appointments, the Desk Note from the Cabinet Office makes it clear, at paragraph 8(d), that the factors which should be considered when selecting an appointee for a direct appointment include "how discrimination law, including the Public Sector Equality Duty, is complied with".

113. We have considered with care the evidence filed on behalf of the Defendants and cannot find any such evidence.

114. The evidence in this case goes no further than generalities. It sets out how recruitment agencies are governed by the Crown Commercial Service Framework ("CCSF"), which operates procurement processes on behalf of the public sector. This is an executive agency and trading fund of the Cabinet Office. Russell Reynolds, the consultants used for the purposes of Baroness Harding's appointment in May 2020 and Mr Coupe's appointment in September 2020, were appointed pursuant to this procurement process. The procurement process documentation contains a Frequently Asked Questions section. This includes the question: "does the Framework consider diversity and inclusion objectives?" It then explains that the Framework was built around the increasing diversity and inclusion ambitions of the public sector. It is a requirement for all suppliers to gain understanding of organisations' ambitions and objectives prior to the provision of services. It is a mandatory requirement that suppliers are committed to supporting customers in complying with the Civil Service Diversity and Inclusion Strategy. Suppliers are required to report back on diversity and inclusion results. The Invitation to Tender includes mandatory requirements concerning diversity and inclusion and suppliers must be committed to supporting customers in complying with the Civil Service Diversity and Inclusion Strategy. This is reflected in Russell Reynolds' own documentation about their work within the CCSF.

115. Based on this, Mr Ridley concludes, at paragraph 51 of his first witness statement:

> "By using a firm such as Russell Reynolds HMG can be sure that we are using a company with a proven track record in respect of diversity and inclusion. This feeds into HMG's broader consideration of equalities duties."

116. That goes only so far, which is nowhere near far enough. There is no evidence from anyone saying exactly what was done to comply with the public sector equality duty when decisions were taken on how each appointment was to be made. So far as concerns the first appointment of Baroness Harding in May 2020, the relevant part of Mr Ridley's evidence (paragraphs 85 – 86 of his first statement) simply does not address the issue. Rather he addresses a different point: whether it would have been possible to hold an open appointments process. He concludes (at paragraph 86) that it would not have been "remotely feasible to do this in Baroness Harding's case." With respect, this misses the point of the public sector equality duty, precisely because it is concerned with process and not outcome. The same applies when it comes to Mr Coupe's appointment. Here the relevant witness statement is from Mr Bhasin, but it does not address what was done by way of compliance with the public sector equality duty. No specific evidential case is advanced so far as concerns Baroness Harding's appointment as Interim Executive Chair of NIHP. The Defendants' position is that this appointment was no more than a temporary variation of the appointment decision made in May 2020. Although we accept that description of the decision taken in August 2020, that does not take the decision beyond the reach of the duty imposed by section 149 of the Act.

117. Taking account of all the conclusions we have set out so far, Ground 2 succeeds on its facts so far as it concerns the decision to appoint Mr Coupe as Director of Testing for NHSTT; and the decision in August 2020 that Baroness Harding should become the

Interim Chair of the NIHP. The complaint about the May 2020 decision to appoint Baroness Harding to NHSTT was commenced out of time.

G Ground 3: Apparent bias

118. This complaint arises from Baroness Harding's involvement in Mr Coupe's appointment as Director of Testing at NHSTT. The Claimants' pleaded case is that Mr Coupe "… is a former colleague and friend of Baroness Harding who worked with him at Sainsbury's" (Amended Statement of Facts and Grounds, at paragraph 27). In his witness statement dated 17 November 2020, Mr Maugham recites the same facts (see paragraph 62). The Claimants advance no further evidence in support of this claim. It is public knowledge that both worked at J Sainsbury plc. Mr Coupe worked there from 2004 to 2020. He held senior positions, and from 2014 was Chief Executive Officer. Baroness Harding worked at J Sainsbury plc between 2007 and 2010. She was appointed to the company's Operating Board in 2008. The Claimants make no attempt to identify the extent or nature of any working relationship between Mr Coupe and Baroness Harding (presumably in the period 2007 to 2010). Mr Maugham asserts that Mr Coupe is a "friend" of Baroness Harding but provides no further detail. Nevertheless, the Claimants advance a case that, because Baroness Harding suggested that Mr Coupe be considered for the Director of Testing position, and then conducted the third-round interviews, and was then, with Mr Williams and the Second Permanent Secretary at the Department for Health and Social Care, responsible for the appointment decision, the notional fair-minded and informed observer would conclude there was a real possibility she was biased in favour of Mr Coupe.

119. This ground of challenge fails for two reasons. First it fails on its facts. The principles relevant to claims of apparent bias have recently been summarised by the Court of Appeal in *R (Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21, per Lord Burnett CJ at paragraphs 63-65. The benchmark is the fair-minded and informed observer. As Lord Burnett observed:

> "65. The fair-minded and informed observer is someone who reserves judgment until both sides of any argument are apparent, is not unduly sensitive or suspicious, and is not to be confused with the person raising the complaint. This observer considers the evidence carefully, having particular regard to the specific factual circumstances, taking a balanced approach and appreciating that context forms an important part of the material to be considered …"

The question is whether, in the circumstances of the decision to appoint Mr Coupe, the fair-minded observer would conclude there was a real possibility that Baroness Harding was biased.

120. The fair-minded observer would not reach that conclusion in this case. There was a work connection between Mr Coupe and Baroness Harding but that had not been over an extended period and was 10 years ago. Mr Coupe had significant relevant experience: he had been the chief executive officer of a major retailer for six years and had only stepped down from that position in May 2020. Baroness Harding had

suggested that Mr Coupe be approached to be a candidate. That would not be a cause of any particular concern to an informed and fair-minded observer. That sort of approach is not uncommon in the context of recruitment to senior positions, particularly when the appointment needs to be made quickly. In this case, the other candidates had been selected by recruitment consultants, at speed. In that context there is no obvious reason why others involved in the appointment process could not make suggestions, including suggesting people they had knowledge of and/or had previously worked with. Baroness Harding and Mr Coupe had not worked in the same organisation since 2010, but it is entirely possible Baroness Harding was able to draw some impression of Mr Coupe from her time at J Sainsbury plc or her knowledge of his work at that company since she left. It was not improper for her to take that into account alongside Mr Coupe's more recent record as chief executive of that company. The Claimants point to the fact that Baroness Harding interviewed Mr Coupe and that the interview took place face-to-face while other interviews took place by video call. No significance can attach to that latter point. As at September 2020 business was frequently conducted by video call. In this case there is no evidence one way or the other as to why some interviews took place in person while others were by video. As to the former point, whoever was appointed Director of Testing would report to and work closely with Baroness Harding. The informed observer would not attach any particular significance to Baroness Harding's conducting the final round of interviews. The other matter important to the evaluation of this ground of challenge is the context. The decision was a recruitment decision. It is relatively common for people taking part in recruitment exercises, deciding who should be interviewed, conducting interviews, or taking final decisions, to have some prior knowledge of some candidates. The obvious example is when the candidate for the post is an internal candidate. It would not ordinarily be suggested that knowledge of a candidate would disqualify a person from involvement in an appointment process. Taking a step back and considering all these matters in the round, the evidence does not support this ground of challenge.

121. The second reason why this ground of challenge fails is because the principles of apparent bias have no application to employment recruitment exercises. The Claimants rely on the judgment in *R v Secretary of State for the Environment, ex p. Kirkstall Valley Campaign Limited* [1996] 3 All ER 304 as authority for the proposition that the principles of apparent bias can be applied to decisions other than judicial or quasi-judicial decisions. In that case, Sedley J applied the apparent bias principle to a decision taken by members of an urban development corporation deciding whether to approve an application for planning permission. While he rejected any hard and fast distinction between administrative decision-making and either judicial or quasi-judicial processes, he recognised that any attempt to apply the principles of apparent bias outside the context of judicial or quasi-judicial decision-making had to be sensitive to context. Sedley J accepted that, when considering a planning decision, it was important to recognise that decision-makers such as elected councillors or members of an urban development corporation might have legitimate prior interests. For example, they will come to their positions (elected or appointed) because of local knowledge. The principles of apparent bias could only operate in this context to the extent that any prior interest could be identified as illegitimate. In his judgment in the *Kirkstall* case Sedley J concluded that illegitimate prior interests extended so far as pecuniary interests, and personal interests comprising actual involvement in an organisation interested in the outcome of the planning application.

122. Context, therefore, is important. *Kirkstall* is not authority for the general application of the principles of apparent bias across all administrative decision-making. Moreover, in *Public First Limited*, Lord Burnett CJ noted that the principles had only been applied outside the context of judicial or quasi-judicial decision-making when the decision was genuinely adjudicative in nature. He considered *Kirkstall* to be an example of this conclusion: see his judgment at paragraphs 66-68.

123. Even if it were to be assumed that employment decisions such as those in issue in this litigation could be the subject of judicial review claims, we do not consider the principles of apparent bias to have any application to such decisions. Such decisions are not adjudicative in any relevant sense. The assessments made, of one candidate against the other, are of an entirely different nature.

124. Further, if the Claimants' submission on this point is correct it would prove too much. There would be no reason why the same would not go for any other decision in any other appointment process, and any other decision taken within the confines of an employment contract. There is no material distinction to be drawn between appointment decisions and any subsequent decision in the course of the employment. Yet applying the principles of apparent bias to any of those decisions would serve no readily identifiable purpose.

125. In *Kirkstall*, Sedley J accepted that the apparent bias principles could only be applied in the context of planning decisions if proper allowance was made for interests and connections elected councillors or appointed members of development corporations might have which were nevertheless legitimate. In the context of employment decisions, we can see no obvious yardstick that would readily distinguish appropriate from inappropriate influences. No doubt this is because decisions of this type are not adjudicative decisions. Moreover, decision-making in this context is already heavily over-laid by statute. This strongly militates against any attempt to strain the principles of apparent bias and apply them in an entirely unfamiliar context. For all these reasons the challenge under Ground 3 fails.

H. Disposal

126. The collective effect of the conclusions set out during this judgment is that the claim brought by Good Law Project fails in its entirety. The claim by the Runnymede Trust fails on Grounds 1 and 3; it succeeds on Ground 2 only to the extent that the decisions on the process to be used when appointing to the positions of Interim Chair of NIHP in August 2020, and Director of Testing at NHSTT in September 2020 were made without compliance with the public sector equality duty.

127. As to remedy, the Defendants rely on section 31 of the Senior Courts Act 1981 ("the 1981 Act"). They submit that compliance with the public sector equality duty would have been highly unlikely to make any substantive difference to either decision. Both were urgent recruitment processes which needed to find highly specialised, experienced and available candidates within a short period of time.

128. Section 31 of the 1981 Act, as amended by section 84 of the Criminal Justice and Courts Act 2015, provides:

> "(2A) The High Court – (a) must refuse to grant relief on an application for judicial review … if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The Court may disregard the requirements of subsection (2A) … if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C) If the court grants relief …, the court must certify that the condition in subsection (2B) is satisfied."

129. The effect of these provisions was explained by the Court of Appeal (Lindblom, Singh and Haddon-Cave LJJ) in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1146, at paragraphs 272-273:

> "272. The new statutory test modifies the *Simplex* test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of 'exceptional public interest'. Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely 'highly likely'. And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been 'substantially different' for the claimant.
>
> 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 LJ, as he then was, in *R (Public and*

> *Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269, para 89) ['*PCSU*']."

Such a conclusion needs to be based on evidence and not on *ex post facto* speculation: see *PCSU*, at paragraph 91 (per Sales LJ).

130. We must bear in mind the language of section 31(2A), and that the Runnymede Trust was not (nor could have been) a candidate for appointment. Rather it brings this claim for judicial review in the public interest. The fact that compliance with the public sector equality duty would not necessarily have made a difference to either decision is not therefore a sufficient answer to the complaint that there has been a breach of that duty.

131. This is particularly so when one bears in mind the flexible nature of the remedy of a declaration. For example, in *Bridges*, the outcome was that the Court of Appeal granted a declaration which for relevant purposes stated:

> "The defendant did not comply with the Public Sector Equality Duty in section 149 of the Equality Act 2010 prior to or in the course of …"

132. In the circumstances of the present case also we can see no reason why this court should not mark the fact that there have been breaches of the public sector equality duty in appropriate terms. This court is not required by section 31(2A) of the 1981 Act to refuse such relief.

133. We turn to consider the parties' submissions as to the terms of an appropriate declaration. The Claimants' primary position is that, since the Runnymede Trust has succeeded in its claim that the second Defendant failed to comply with the public sector equality duty in respect of two of the appointments under challenge, it is entitled to a declaration that those appointments were unlawful. It is submitted that it is a basic principle of public law that, where the process resulting in a decision is unlawful, the decision itself is unlawful (although it is recognised that the court has a discretion as to remedy). The Claimants cite a number of decided cases in which a breach of the public sector equality duty has led to the resulting decision either being quashed or declared to be unlawful.

134. In the alternative, the Claimants seek a declaration to the effect that "the Secretary of State for Health and Social Care acted unlawfully by failing to comply with the public sector equality duty in the process of making the appointments." As the Claimants observe, this is in substance the sort of declaration which the Court of Appeal granted in *Bridges*. It accurately states the effect of this Court's conclusion and also serves to mark the significance of a breach of the public sector equality duty.

135. On behalf of the Defendants, it is first submitted that no remedy should be granted as against the first Defendant, the Prime Minister, since it is clear on the facts as found by this Court that he played no part in the two appointments which are under consideration: the appointments of Baroness Harding in August 2020 and Mr Coupe in September 2020. We agree and indeed it appears to be common ground that only the Secretary of State is the relevant Defendant for the purpose of any remedy to be granted.

136. The Defendants next submit that the appropriate declaration should be similar to that which was granted in *Bridges*, i.e. a declaration that the Secretary of State for Health and Social Care did not comply with the public sector equality duty in relation to the decisions how to appoint Baroness Harding in August 2020 and Mr Coupe in September 2020.

137. We have reached the conclusion that the Defendants' formulation of an appropriate declaration, which is in substance the same as that proposed by the Claimants in their alternative submission, more accurately reflects the terms of this judgment. We have already held that the individual appointment decisions themselves are not amenable to judicial review and the Runnymede Trust has no standing to challenge them as such. It is the process leading up to the two decisions which has been found by this Court to be in breach of the public sector equality duty.

138. For those reasons we will grant a declaration to the Runnymede Trust that the Secretary of State for Health and Social Care did not comply with the public sector equality duty in relation to the decisions how to appoint Baroness Harding as Interim Executive Chair of the NIHP in August 2020 and Mr Coupe as Director of Testing for NHSTT in September 2020.