Neutral Citation Number: [2026] EWHC 984 (Admin)

Case No: AC-2025-LON-001462

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2026

Before :

THE HONOURABLE MRS JUSTICE LIEVEN

- -

Between :

THE KING (on the application of THE UNIVERSITY OF SUSSEX)	**Claimant**
- and -	
THE OFFICE FOR STUDENTS	**Defendant**
- and -	
THE FREE SPEECH UNION LTD	**Intervener**

- -
- -

Chris Buttler KC, Katy Sheridan and **Jack Boswell** (instructed by **Ms Laila El Baradei** the General Counsel and Director of Governance and Compliance of the University of Sussex, with **Mills & Reeve LLP** acting as solicitors on the record) for the **Claimant**
Monica Carss-Frisk KC, Tom Lowenthal, and Emmeline Plews (instructed by **the OfS**) for the **Defendant**
Tom Cross KC and Zoe Gannon (instructed by **Sharpe Pritchard LLP**) for the **Intervener (on written submissions only)**

Hearing dates: 03rd-05th February 2026

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Approved Judgment

This judgment was handed down remotely at 11.30am on Wednesday 29th April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE LIEVEN

Judgment Approved by the court for handing down.

The Honourable Mrs Justice Lieven :

1. This is an application for Judicial Review of the decision of the Office for Students ("*OfS*") that the University of Sussex (the "*University*") was in breach of two registration conditions, and to fine the University £585,000 in respect of those breaches. The decision was issued to the University on 27 March 2025. The OfS exercised its powers under the Higher Education and Research Act 2017 ("*HERA*").

2. The University was represented by Chris Buttler KC, Katy Sheridan, and Jack Boswell; the OfS was represented by Monica Carss-Frisk KC, Tom Lowenthal, and Emmeline Plews.

3. The Free Speech Union Ltd ("*FSU*") was permitted to intervene on paper by Chamberlain J on 28 January 2026. The FSU was represented by Tom Cross KC and Zoe Gannon. They have made submissions on Ground Three. The FSU sought permission to admit further written submissions. However, I have reached the view that, given its limited role in the case, that would introduce further unnecessary complexity into the proceedings. I deal with the FSU permission under Ground 3D below.

4. This judgment is structured as follows:

   a. Background Facts
   b. Statutory Scheme
   c. The OfS Regulatory Framework, including the registration conditions and ancillary regulatory documents
   d. The relevant University policies, including The Trans and Non-Binary Equality Policy Statement ("*the Policy Statement*" or "*TNBEPS*")
   e. The Final Decision (*"FD"*)
   f. Overview of the Grounds
   g. Issue One/Ground One – The meaning of *"governing documents"* in HERA
   h. Issue Two/Ground Two – The impact on the Visitorial Jurisdiction
   i. Issue Three (various Grounds) – Breach of condition E1 (freedom of speech and academic freedom)
   j. Issue Four (various Grounds) – Should the OfS have made findings of breach and sanction?
   k. Issue Five (Ground 6C) – Bias and Predetermination.
   l. Final Conclusions.

5. The University reordered its Grounds in submissions, and the format of this judgment follows that reordering. The University withdrew grounds 3B and 6B (in its skeleton argument and at the hearing respectively) and indicated that it was content to treat ground 5D as part of Ground 4.

6. There is a Glossary at the end of the judgment as the case is replete with acronyms.

SECTION A: BACKGROUND FACTS

Up to October 2021

7. The University was established by Royal Charter in 1961. The Charter sets out the objects of the University, establishes the King as the Visitor and sets out its foundational principles.

8. The Charter establishes the Council as the governing body of the University (paragraph 7). The Council is empowered to make (i) Statutes, subject to the approval of the Privy Council (paragraph 12); and (ii) Regulations (paragraph 13). No changes may be made to the Charter or Statutes without the approval of the Privy Council.

9. The University's Statutes include Statute VII which applies to all staff employed by the University. Relevantly, Statute VII.6 provides:

"In determining the procedures to be adopted under Statutes VII.3 and 4, the Council shall apply the following guiding principles:

(1) to uphold the right of any member of staff to express political, religious, social and professional views, both privately and in public, provided that this is within the law and is done explicitly in his or her own name and not in that of the University;

(2) to ensure that academic staff have freedom, within the law, to carry out teaching and research, including the publication of the outcomes of research, in a way which questions and tests established ideas and received wisdom, and presents controversial or unpopular points of view, without placing themselves in jeopardy of losing their jobs or privileges;

(3) to enable the University to provide education, promote learning and engage in research efficiently and economically, while seeking, so far as practicable and consistent with that aim, to maintain staff in employment…"

10. Paragraph 7 of Statute VII provides, *"Any Regulation made under this Statute VII shall be construed in every case to give effect to the guiding principles in Statute VII.6."*

11. The Council has made Regulations providing for staff grievances and discipline. These have some relevance to Ground 3C and 4 and as relevant will be set out there.

12. HERA received Royal Assent on 27 April 2017. The provisions in relation to the OfS came into force on 1 April 2018.

13. On 17 September 2018 the OfS registered the University as an English higher education provider (*"HE provider"*) pursuant to s.3 of HERA.

14. On 14 November 2018 the first version of the Policy Statement/TNBEPS was approved by the University Executive Group. There are four versions of this Policy (2018, 2022, 2023 and 2024), see Section D below. This Policy lies at the heart of the case.

15. On 1 August 2019 the OfS conditions of registration came into effect under s.5(1) of HERA.

16. Parts of the University's Freedom of Speech Code of Practice (*"FOSCOP"*) and External Speakers Procedure (*"ESP"*) are also relevant to the issues in the case. The University has had a FOSCOP at all relevant times. These documents were amended in 2021, 2023, and 2024. The amendments to these documents have no impact on this case (unlike the amendments to the Policy Statement).

Events concerning Professor Kathleen Stock

17. As Ms Lapworth, the OfS's chief executive, explains, the initiating events for the OfS's investigation, which ultimately led to the FD, were matters concerning Professor Kathleen Stock at the University. Although these events form the backdrop to the OfS investigation I am not adjudicating on any issues relating to the events surrounding Professor Stock. That was not the subject of the OfS investigation, or its decision.

18. Professor Stock is a gender critical feminist, by her own description. She started working at the University in 2003 as a lecturer and senior lecturer specialising in philosophy. From 2010 to 2014, she served as Head of the Philosophy Department. In 2013, she was promoted to Reader. From 2016 to 2020, she served as Director of Teaching and Learning for the School of History, Art History and Philosophy. In 2019, she was promoted to Professor. In 2021, she was awarded an OBE in recognition of her services to the higher education sector in the UK.

19. Professor Stock provided two witness statements to the OfS during the course of the investigation, dated 3 November 2023 and 16 December 2024. The information set out here is taken from those witness statements.

20. In March 2019 Professor Stock contacted the University's Human Resources department to register her concerns with the 2018 Policy Statement, and particularly the Positive Representation Statement (see below at paragraph 81). Sarah Cox (Head of Employee Policy and Relations) responded in an email dated 24 April 2019;

    "2) Trans and Non-Binary Equality Policy Statement

    I have spoken with the Equality, Diversity and Inclusion Unit and they have said that they have no plans to revise the current Policy Statement, which was produced from a template provided by the Equality Challenge Unit. They will however be producing separate guidance on supporting those who are going through a gender transition.

    You were concerned about the statement that the curriculum would 'positively represent trans people and trans lives' because some courses use historical material that is transphobic in order to demonstrate historical attitudes. The EDI Unit have clarified that the Policy does not require such material to be automatically removed from a course, but where it is used, the context should be clearly defined. Clearly, sensitive material can lead to differences of opinion, and any complaint that such material contravenes the policy would be investigated giving full consideration to the context in which it is being used. You also raised concern that the policy did not define transphobia and that students or staff could point towards some elements of your work in order to invoke the policy against you. Again, in these circumstances the University would consider the content of the complaint and the context of your work when assessing how to respond to any such complaint.

    The policy itself does not make reference to academic freedom or debate, but neither do other University policies including the Staff Disciplinary Procedure. These principles are enshrined in Statute VII, which is the overarching Statute covering all staff of the University https://www.sussex.ac.uk/webteam/gateway/fle.php?name=statutes.pdf&site=76.

    Specifically, Statute VII sets out that all staff procedures that include provisions for the dismissal of a member of staff apply the following principles:

    6 (1) to uphold the right of any member of staff to express political, religious, social and professional views, both privately and in public, provided that this is within the law and is done explicitly in his or her own name and not in that of the University

    6 (2) to ensure that academic staff have freedom, within the law, to carry out teaching and research, including the publication of the outcomes of research, in a way which questions and tests established ideas and received wisdom, and presents controversial or unpopular points of view, without placing themselves in jeopardy of losing their jobs or privileges
    I hope that this clarifies, but please do let me know if you have any queries."

21. Later that year, Professor Stock met with the Pro-Vice-Chancellor for Education and Students, Professor Coate. The meeting concerned a student deputation in 2019, led by the Sussex Student Union Executive, requesting that Professor Stock should not be allowed to teach a Feminist Philosophy module in the next academic year. Professor Coate raised Professor Stock's complaint about the Positive Representation Statement, and Professor Stock remembers being asked whether this meant that she wanted to represent trans people negatively. Professor Stock describes feeling hopeless after this meeting.

22. Also, in 2019 a group of University of Sussex Philosophy students set up a public Facebook group called *"Sussex Philosophy Students in Solidarity with Trans Students"* (*"SPSSTS"*), where Professor Stock was subjected to abusive comments.

23. In one particularly serious example from 2020, a University of Sussex student posted a picture of a man with a gun to his head and the overlaying words, *"LAY YOUR WEARY HEAD DOWN KATHLEEN"*. Professor Stock made a disciplinary complaint against the student. An investigation ensued, but Professor Stock was informed by the University that she was not entitled to know the outcome.

24. Another notable incident occurred on 26 March 2021, when a group of PhD students organised a research talk to coincide with an event organised by Professor Stock. They invited a speaker who had been highly critical of Professor Stock. In response, Professor Stock cancelled her event. Upon hearing what was said about her at the talk, she experienced what she describes as a short breakdown and was off sick for a period.

25. On 13 April 2021 Professor Stock submitted a grievance against the University. In the investigation that followed, the independent reviewer recommended a review of the 2018 Positive Representation Statement. However, the Positive Representation Statement was not removed from the Policy Statement until August 2022, as described below at paragraph 82.

26. In October 2021 a group of University of Sussex students began protesting against Professor Stock and calling for the termination of her employment. These protests were covered in the national media and drew very wide public attention. It was these events that prompted the OfS to consider whether the University warranted further regulatory attention, as is explained in Ms Lapworth's first witness statement.

27. On 28 October 2021 Professor Stock resigned from the University. She explains in her witness statements the very significant psychological impact that these events had upon her. She describes feeling isolated, distressed and unsupported.

28. The University has expressed regret at the circumstances of Professor Stock's departure. On 28 October 2021 the then Vice-Chancellor, Professor Adam Tickell, wrote to all staff at the University saying, *"her departure is a loss to us all."* The current Vice-Chancellor, Professor Roseneil, says in her witness statement, *"the University deeply regrets that Dr Stock ultimately decided not to continue working at the University […] I agree that her departure was a loss to the University."* Mr Buttler in his submissions made very clear that the University regretted Professor Stock's departure.

29. This is not a fact-finding case as to the circumstances of Professor Stock's departure from the University. I outline the events surrounding Professor Stock as that was the catalyst and the context of the OfS investigation.

OfS investigation from 7 October 2021

30. On 7 October 2021 the OfS informed the University that it had become aware of protests in relation to Professor Stock. The OfS requested an explanation of actions taken by the University to *"ensure that free speech and academic freedom are not being explicitly or implicitly curtailed for Professor Stock, or others who share her views…"*. The OfS began reviewing the University's publicly available documents. Further details of some aspects of this investigation are set out under Ground 6C/Issue Five below.

31. On 11 October 2021 the University responded to the OfS explaining the immediate actions taken following the protests about Professor Stock.

32. On 13 October 2021 the University informed the OfS that it had undertaken a review of the FOSCOP/ESP, and the revised 2021 versions of FOSCOP/ESP were submitted to the OfS. These reviewed policies had been approved by the University's Prevent Steering Group on 9 August 2021.

33. On 21 October 2021 a committee of the OfS Board met to consider prioritising an investigation into the University.

34. On 22 October 2021 the OfS opened an investigation into the University's compliance with general ongoing conditions of registration E1, E2 and E3.

35. In November 2021 the University responded to the OfS's initial enquiries with details of action the University had taken to protect free speech.

36. In December 2021 Professor Adam Tickell stepped down as Vice Chancellor of the University.

37. In early August 2022 Professor Roseneil started her tenure as Vice Chancellor of the University.

38. On 16 August 2022 the University amended the Policy Statement to remove the *"Positive Representation Statement"* and approved the amended *"Stereotyping Statement"*. I will explain these matters further below, at Section D. The 2022 version of the Policy Statement was approved by the University Executive Group (*"UEG"*) on 16 August 2022.

39. On 6 October 2022 the OfS wrote to the University about a potential settlement. Between this date and 9 January 2023 there is correspondence between the parties about settlement. There is then further correspondence about holding a settlement meeting. It would be fair to say both parties blame the other for the fact that no meeting took place. This correspondence has some relevance to Issue Five/Ground 6C, and I set it out in detail there (see paragraphs 369-371).

40. On 14 November 2022 the University Council received an Academic Freedom and Freedom of Speech Commitment Report and approved the approach therein to ensure that these principles were understood across the University.

41. On 17 January 2023 the UEG approved the 2023 versions of the Policy Statement and the ESP. On 20 January 2023, the University's Council approved the revised 2023 version of FOSCOP. It appears to be uncontentious that the approval of FOSCOP 2023 was in accordance with the University's internal laws and therefore must have remedied any issue in relation to condition E2.

42. On 27 January 2023 the University wrote to the OfS making a without prejudice offer to accept that:

    "1. The University breached condition E1 in that the requirement in the Trans and Non-Binary Equality Statement, up to 16 August 2022, that "any materials within relevant courses and modules will positively represent trans people and trans lives" was inconsistent with the principles of freedom of speech within the law and academic freedom.

    2. The University recognises that the freedom of speech Code of Practice and Trans and Non-Binary Equality Statement could have stated more clearly that they were subject to the rights to freedom of speech and academic freedom.

    3. The OfS no longer has concerns about the University's compliance with conditions E1 or E2."

43. On 6 July 2023 Ms Lapworth established the University of Sussex Compliance and Enforcement Committee (*"USCEC"*), who would be responsible for making the FD on the investigation. There then followed a number of meetings of the USCEC.

44. In August 2023 Dr Ahmed joined the OfS as Director for Freedom of Speech and Academic Freedom. I will set out the details of Dr Ahmed's role, and his previous involvement with Professor Stock, under Issue Five/Ground 6C below.

45. On 3 November 2023 Professor Stock signed her first witness statement.

46. On 1 March 2024 the USCEC met and made the Provisional Decision (*"PD"*).

47. On 23 March 2024 the OfS Deputy Director David Smy took the final PD, following minor amendments, superseding the USCEC's previous PD of 1 March 2024. The OfS issued the Notice of the PD and invited the University to make representations.

48. On 20 May 2024 the University's Council approved the 2024 versions of the Policy Statement, FOSCOP and ESP. It is the University's case that at this point there could be no dispute that any breach in relation to condition E2 (the scheme of delegation) must have been remedied. The University also submits that the 2024 version of the Policy Statement remedied any continuing breaches of condition E1 (freedom of speech and academic freedom).

49. On 30 May 2024 the University sent its representations on the PD (*"the Representations"*), witness statements and accompanying documents to the OfS, and on 7 June 2024 sent two additional witness statements.

50. On 15 October 2024 Dr Ahmed joined the OfS investigation team, in effect leading the team, subject to Ms Lapworth's oversight. Although he is not formally described as head of the team, Ms Lapworth says he was acting on her behalf to "*step in for me and shepherd the case to its conclusion".*

51. On 16 December 2024 Professor Stock signed her second witness statement. The OfS had approached her to ask if she wished to respond to several points made by the University in its Representations of 30 May 2024.

52. On 24 December 2024 the OfS investigation team dispatched its recommendation pack on final decisions to the USCEC (which included the University's Representations and accompanying evidence in their entirety).

53. On 15 January 2025 a meeting of the USCEC took place, during which the USCEC took final decisions to find breaches of conditions E1 and E2(i). Decisions on the monetary penalty and wider regulatory concerns were tabled for a future meeting. On 14 February 2025, a further meeting of the USCEC took place where final decisions superseding the previous final decisions were taken on breaches on conditions E1 and E2(i), as well as final decisions on the monetary penalty and wider regulatory concerns.

54. On 27 March 2025 the OfS issued the Notice of FD on Substantive Matters.

55. Between 27 March and 3 April 2025 Dr Ahmed wrote to Vice-Chancellors of other universities, which had policies similar or materially identical to the Policy Statement, asking them to review their policies in light of the OfS's findings on the University, and offering to meet and support their work as appropriate.

56. On 9 May 2025 the Judicial Review claim was filed.

SECTION B: THE STATUTORY SCHEME UNDER THE HIGHER EDUCATION AND RESEARCH ACT 2017 ("*HERA*")

57. The relevant provisions are set out below.

58. Section 1 of HERA creates the Office for Students.

59. Section 2 of HERA sets out the general duties of the OfS, and stated as relevant (pre amendments coming into force on 1 August 2025);

"(1) In performing its functions, the OfS must have regard to—

(a) the need to protect the institutional autonomy of English higher education providers,

(b) the need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers,

(c) the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers,

(d) the need to promote value for money in the provision of higher education by English higher education providers,

(e) the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers,

(f) the need to use the OfS's resources in an efficient, effective and economic way, and

(g) so far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be—

(i) transparent, accountable, proportionate and consistent, and

(ii) targeted only at cases in which action is needed.

...

(8) In this Part, "the institutional autonomy of English higher education providers" means—

(a) the freedom of English higher education providers within the law to conduct their day to day management in an effective and competent way,

(b) the freedom of English higher education providers—

(i) to determine the content of particular courses and the manner in which they are taught, supervised and assessed,

...

(c) the freedom within the law of academic staff at English higher education providers—

(i) to question and test received wisdom, and

(ii) to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers."

60. Section 3 of HERA, as relevant, provides;

"(3) The OfS must register an institution in the register (or, where it has been divided into parts, in a particular part of the register) if—

(a) its governing body applies for it to be registered in the register (or in that part),

(b) it is, or intends to become, an English higher education provider,

(c) it satisfies the initial registration conditions applicable to it in respect of the registration sought (see section 5), and

(d) the application complies with any requirements imposed under subsection (5).

(4) The OfS may not otherwise register an institution in the register."

61. Section 5(1) of HERA provides;

"(1) The OfS must determine and publish –

(a) the initial registration conditions, and

(b) the general ongoing registration conditions.

(2) Different conditions may be determined –

(a) for different descriptions of provider…"

62. Section 13(1) of HERA provides, in relevant part;

"The initial or ongoing registration conditions may, in particular, include –
…

(b) a public interest governance condition (see section 14)."

63. Section 14 of HERA provides, in relevant part;

"(1) For the purposes of section 13(1)(b), "a public interest governance condition" in relation to a provider means a condition requiring the provider's governing documents to be consistent with the principles in the list published under this section, so far as applicable to the provider.

(2) The OfS must determine and publish a list of principles applicable to the governance of English higher education providers.

(3) The principles must be those that the OfS considers will help to ensure that English higher education providers perform their functions in the public interest."

64. Section 15 of HERA provides, in relevant part;

"(1) The OfS may impose a monetary penalty on a registered higher education provider if it appears to the OfS that there is or has been a breach of one of its ongoing registration conditions.

(2) A "monetary penalty" is a requirement to pay the OfS a penalty of an amount determined by the OfS in accordance with regulations made by the Secretary of State."

65. Section 75 of HERA provides, in relevant part;

"(1) The OfS must, from time to time, prepare and publish a regulatory framework.

(2) The OfS must have regard to it when exercising its functions.

(3) The regulatory framework is to consist of –

(a) a statement of how it intends to perform its functions,

(b) guidance for registered higher education providers on the general ongoing registration conditions, and

(c) guidance for students' unions to which sections A5 and A6 apply on their duties under those sections."

66. Schedule 3 of HERA sets out the procedure where the OfS is proposing to impose a monetary penalty on a HE provider. Paragraph 2 states;

"2 Procedure

(1) Before imposing a monetary penalty on the provider under that section, the OfS must notify the provider of its intention to do so.

(2) The notice must—

(a) specify the proposed amount of the penalty,

(b) specify the OfS's reasons for proposing to impose the penalty,

(c) specify the period during which the provider may make representations about the proposal ("the specified period"), and

(d) specify the way in which those representations may be made.

(3) The specified period must not be less than 28 days beginning with the date on which the notice is received.

(4) The OfS must have regard to any representations made by the provider during the specified period in deciding whether to impose a monetary penalty on it."

67. There is a right of appeal under paragraph 3 to the First-tier Tribunal. The University has appealed but the appeal is stayed pending this Judicial Review.

68. HERA was amended by the Higher Education (Freedom of Speech) Act 2023 ("*HE(FS)A 2023*") to include further duties, such as the duty under Section A1 for HE providers to *"take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to achieve the objective in subsection (2)"* (that objective is securing freedom of speech within the law). This is similar to the existing freedom of speech provisions in the Education Act (No 2) 1986, which provide under Section 43(1) that, *"Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers."* Although the Intervener seeks to rely on parts of HE(FS)A 2023 for the purposes of interpreting HERA, for the reasons I explain under Ground 3D I consider this to be of no assistance.

SECTION C: THE OFS REGULATORY FRAMEWORK AND ANCILLARY REGULATORY DOCUMENTS

The Regulatory Framework (*"RF"*)

69. Pursuant to s.5 of HERA, the OfS has determined and published two conditions relevant to this case, conditions E1 and E2. These are produced in the OfS's Regulatory Framework (*"RF"*) at Annex A:

    a. Condition E1 provides that the *"provider's governing documents must uphold the public interest governance principles* [PIGPs] *that are applicable to the provider"*; and

    b. Condition E2(i) provides that the *"provider must have in place adequate and effective management and governance arrangements to: i. operate in accordance with its governing documents…"*.

70. Pursuant to s.75 of HERA the OfS produced the RF. This sets out the conditions of registration at Part V, together with guidance thereon.

71. The PIGPs are set out in Annex B of the RF (p.197 of the 2022 version), and as referred to in condition E1 are as follows:

    *"**I. Academic freedom:** Academic staff at an English higher education provider have freedom within the law:*

    - *to question and test received wisdom; and*

    - *to put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges they may have at the provider.*

    …

    ***VII. Freedom of speech:** The governing body takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider."*

72. It is important for understanding the scope of the OfS's powers and duties to appreciate that there are a large number of other conditions and PIGPs that go to matters such as quality and standards, student engagement, value for money, and a wide range of other matters.

73. The RF at paragraph 167 lists a number of "*intervention factors*", which are central to the OfS's decision as to whether to make findings and impose sanctions. These are dealt with under Grounds 5A and 5E below.

Regulatory Advice 24 (*"RA24"*)

74. The OfS has also produced a suite of regulatory advice documents. Regulatory Advice 24 on *"Guidance related to freedom of speech"* (*"RA24"*) was published on 19 June 2025. Although it postdates the decision, both parties agree that the analysis it sets out as to the approach to *"freedom of speech within the law*" is the correct one.

75. RA24 sets out a three-stage process of analysis which the OfS will follow when considering whether a provider has complied with the Secure Duty (i.e. the new statutory duty introduced in s.A1 of HERA, which came into force on 1 August 2025). The Secure Duty is for these purposes the same as the PIGP to uphold freedom of speech, referred to above at paragraph 71. The three stages are as follows:

    "3. This guidance is in three main sections.

4. Section 1 says what we mean by 'freedom of speech' and 'academic freedom'.

5. Section 2 sets out a three-step framework for assessing compliance with the 'secure' duty. These steps apply to any measure or decision that might affect speech or types of speech. The steps are:

*a. Step 1: **Is the speech 'within the law'?** The guidance sets out what this means and gives examples of laws that make speech unlawful.*

*b. Step 2: **Are there any 'reasonably practicable steps' to secure the speech?** If yes, take those steps. Do not restrict the speech. The guidance illustrates factors that are likely or unlikely to affect what is 'reasonably practicable'.*

*c. Step 3: **Are any restrictions 'prescribed by law' and proportionate under the European Convention on Human Rights?** The guidance sets out that any restrictions on speech must be compatible with these requirements, if indeed there are no reasonably practicable steps to secure it."*

76. RA24 then goes on to give detailed guidance (65 pages), including a number of examples, showing when speech can or cannot be restricted.

SECTION D: THE UNIVERSITY POLICY DOCUMENTS

77. The OfS decision under challenge found the University's Trans and Non-Binary Equality Policy Statement (abbreviated as *"TNBEPS"* and referred to below as "*the Policy Statement"*) did not uphold the academic freedom and freedom of speech PIGPs (and so breached condition E1). Parts of the University's Freedom of Speech Code of Practice (*"FOSCOP"*) and External Speakers Procedure (*"ESP"*) are also relevant to the issues in the case.

The Trans and Non-Binary Equality and Policy Statement (*"the Policy Statement"* or *"TNBEPS"*)

78. The Policy Statement is at the heart of the OfS decision. It has gone through four versions, 2018, 2022, 2023 and 2024. Each version has similar or identical opening words, and the same intent not to discriminate against people on the grounds of their gender identity. The issues in this case turn on some of the very precise wording, and the variations between the different versions.

79. The Policy Statement emanated from a template policy produced by an organisation called Advance HE, a charity that promotes higher education for the public benefit. Professor Roseneil explains that some 10 other universities adopted the same or very similar policies during the same period.

80. Various passages in the Policy Statement were given titles or nomenclature by the OfS. I have inserted those in square brackets for the purpose of clarity.

The Policy Statement 2018

81. This is the only version that contained the *"Positive Representation Statement"*.

"The University of Sussex recognises that there can be differences between physical sex and gender identity/expression. We will at no time discriminate against people on the grounds of their gender identity or gender expression. Where this policy refers to 'trans people', it has in mind a broad range of people whose gender identity is not expressed in ways that are typically associated with their assigned sex at birth. This includes those who have non-binary, non-gender or genderfluid identities.

…

The curriculum shall not rely on or reinforce stereotypical assumptions about trans people, [Stereotyping Statement] *and any materials within relevant courses and modules will positively represent trans people and trans lives.* [Positive Representation Statement]
…
Transphobic abuse, harassment or bullying (name-calling/ derogatory jokes, unacceptable or unwanted behaviour, intrusive questions) are serious disciplinary offences for staff and students and will be dealt with under the appropriate University procedures. [Disciplinary Statement]

Transphobic propaganda, in the form of written materials, graffiti, music or speeches, will not be tolerated. We undertake to remove any such propaganda whenever it appears on the premises. [Propaganda Statement]
…
Footnote 1 This policy statement wording is based on the Joint agreement on guidelines for transgender equality in employment in further education colleges (Association of Colleges et al, 2005).”

82. The University removed the Positive Representation Statement from the Policy Statement on 16 August 2022, shortly after Professor Roseneil was appointed as Vice-Chancellor on 1 August 2022. Professor Roseneil says in her witness statement dated 9 May 2025, *“these words should not have been included in the TNBEPS and that it was right to remove them.”*

83. The University accepted that the Positive Representation Statement did not uphold the principles of freedom of speech and academic freedom on (at the very latest) 29 May 2024 in the Representations submitted in response to the PD.

84. Both the National Union of Students (“*NUS*”) and Vivienne Stern MBE (chief executive of Universities UK) have said in witness statements supporting the University that the Positive Representation Statement should not have been made and the University was correct to remove it.

The Policy Statement 2022

85. The 2022 version, which was introduced very shortly after Professor Roseneil was appointed, removed the Positive Representation Statement and amended the Stereotyping Statement through the addition of the words “seek to”, so that the relevant passage simply read “*the curriculum shall not rely on or seek to reinforce stereotypical assumptions about trans people.”* The rest of the Policy Statement stayed the same.

The Policy Statement 2023

86. In this version the Disciplinary and Propaganda Statements were changed into the following paragraph;

“Transphobic abuse, harassment or bullying (e.g. name-calling/ derogatory jokes, unacceptable or unwanted behaviour, intrusive questions) are serious disciplinary offences for staff and students and will be dealt with under the appropriate University procedures. Any abusive, bullying, or harassing material (e.g. written materials, graffiti or recordings) will be removed from University premises.”

87. The following footnote was added;

“We use the term “transphobic abuse, harassment or bullying” to mean unwanted behaviours and communications that could reasonably be expected to cause distress or fear among trans people.”

88. The *“Safeguarding Statement”* was added at the end of the document:

“This Policy Statement is intended to promote the fair and equal treatment of trans people. That is compatible with the University’s obligation to ensure, so far as reasonably practicable, that freedom of speech within the law is secured for members, students and employees of the establishment and for

visiting speakers (as required by section 43 of the Education (No.2) Act 1986), and the requirement to have regard to the need to ensure that academic staff have freedom within the law to (a) question and test received wisdom and (b) put forward new ideas including controversial or unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges at the University (as required by section 202 of the Education Reform Act 1988). For the avoidance of doubt, nothing in this Policy Statement should be taken to justify sanctioning academic staff for questioning or testing received wisdom or putting forward new ideas including controversial or unpopular opinions within the law, nor should this Policy Statement be taken to justify disproportionate restrictions on freedom of speech. Any person concerned that their rights of academic freedom or freedom of speech have been unjustifiably restricted may lodge a complaint."

The Policy Statement 2024

89. This is the version that the OfS did not take into account in the FD, but the University argues in Ground 5A that it should have done so. This version has the benefit of paragraph numbers. The changes are underlined as follows:

"2(c) The curriculum shall not rely on or seek to reinforce stereotypical assumptions about trans people unless such reliance or seeking to reinforce is in accordance with paragraph 3 of this policy statement…

2(f) Transphobic abuse, harassment or bullying[2] (e.g. name-calling/ derogatory jokes, unacceptable or unwanted behaviour, intrusive questions) are serious disciplinary offences for staff and students and will be dealt with under the appropriate University procedures.[3] After consideration of its form and contents, ~~harassing~~ material (e.g. written materials, graffiti or recordings) that is found objectively to be abusive, bullying, or harassing will be removed from University premises…

Footnote 1 This policy statement wording is based on the Joint agreement on guidelines for transgender equality in employment in further education colleges (Association of Colleges et al, 2005).

Footnote 2 We use the term "transphobic abuse, harassment or bullying" to mean unwanted behaviours and communications that could reasonably be expected to cause distress or fear among trans people. This definition is objective and replicates the definition in the Protection from Harassment Act 1997, as set out in the Code for Crown Prosecutors.

Footnote 3 Including the University Statutes and Regulations."

90. The Safeguarding Statement remained the same in the 2024 version.

The Freedom of Speech Code of Practice (*"FOSCOP"*)

91. FOSCOP was created pursuant to the University's obligations under s.43(3) of the Education Act (No 2) 1986, which provides that universities must keep a code of practice setting out how they will discharge their duty to take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members.

92. As stated above at paragraph 16, FOSCOP was amended in 2021, 2023 and 2024. The changes to the text have no impact on this case.

93. The 2021 version of FOSCOP included the following passages;

"1. The University of Sussex is proud to offer all our staff, students, and visitors, the opportunity to engage with a democratic teaching and learning environment that encourages rational debate and challenges received wisdom. Our success and distinctiveness is defined through our institutional values of kindness, integrity, inclusion, collaboration and courage, which underpin our education, research

and engagement activities. The University values diversity and is committed to the principles of academic freedom and freedom of speech and expression. In support of these values, an atmosphere of tolerance, where personal and academic growth take place is fundamental to enable open discussion and to debate a wide variety of ideas, some of which may be controversial. This Code of Practice exists to promote balance, respectful debate.

2. As a truly international institution we encourage all members and visitors to our campus and community to express opinions, freely, within the law, and to enjoy open access to information. Sussex continues to build on its long tradition of offering scholarships and bursaries, employment and conference places to those who would not otherwise be in a position to enjoy the freedom to learn and to research, without fear of restriction or reprisal.

3. Article 10 of the European Convention on Human Rights (ECHR[1]) provides that everyone has the right to freedom of expression whilst The Education Act (no.2) 1986[2] and the Education Reform Act (1988)[3] place duties on universities to secure freedom of speech "within the law" and to protect academic freedom[4].

4. There is also a requirement, in the 1986 Act[5] for universities to maintain and update a code of practice that covers procedures for organising meetings and events which include external speakers, whether these are internally or externally organised. These include Sussex-branded events held off campus, as well as those held on-line, whether hosted off or on campus. Ensuring freedom of speech and expression at these events is also a matter necessitating consideration of the health and safety of attendees.

5. Freedom of speech is not an absolute right and is to be exercised within the law. As such, there is a legal framework within which the University must operate, whilst securing both freedom of speech and academic freedom. This includes having regard to laws that govern public order as well as provisions in the Equality Act 2010.

6. The University recognises that, on occasion, the views of some who exercise the right to freedom of expression may cause offence, shock or disturb others who do not hold those views. This, in itself, is not a matter for constraint and is not breaking the law. Allowing opposing views to be heard will continue to be encouraged by the university, with appropriate and timely risk assessments undertaken as required. We will be anticipatory, as far as possible, and proportionate in our assessments of risk, and in how we might manage identified risks…

Footnote 1 ECHR 1950 Article 10 details the rights to freedom of expression, along with restrictions and penalties as prescribed by law, in certain circumstances

Footnote 2 The Education Act (no.2) 1986 places a direct obligation on universities in England and Wales to 'take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.'"

94. The January 2023 version of FOSCOP added the following paragraphs;

"2. This Code of Practice and the accompanying External Speakers' Procedure are issued pursuant to section 43(3) of the Education (No.2) Act 1986. The Code of Practice has been approved by the University's Council and will be reviewed annually by the Office of the General Counsel and Governance Services. The Code applies to all staff, students and visitors to the University. It applies to teaching, meetings and events on campus (whether internally or externally organised), Sussex-branded events held off campus, and events held on-line.

…

*4. All staff, students and visitors have the right to hold opinions and to receive and impart information and ideas so long as they do not break the law ("**the right to freedom of speech**"). The right may be*

*restricted to protect the rights of other people if the restriction is proportionately justified. In accordance with section 43 of the Education (No.2) Act 1986, the University will take such steps as are reasonably practicable to ensure the right. In particular, the University will ensure, so far as is reasonably practicable, that no individual or body of persons is denied the use of any of its premises for reasons relating to their beliefs, views, policies or objectives. The University will only restrict the right (for example, by refusing to permit an event to take place on campus) if it is legal and proportionate to do so (for example, if risks of the kind identified at paragraph 7 below outweigh the strong interest in promoting free speech). In addition, academic staff at the University have the right to (a) question and test received wisdom and (b) put forward new ideas including controversial or unpopular opinions, without fear of being sanctioned for doing as long as they do not break the law ("**the right to academic freedom**"). The right applies to all activities that relate to academic life, whether those activities take place on or off the campus, including designing the curriculum and teaching. It is enshrined in Article VII of the University Statutes, pursuant to section 202 of the Education Reform Act 1988. Every member of the University is expected to uphold the right to freedom of speech and the right to academic freedom and nothing in this Code of Practice should be taken to limit the right to academic freedom or justify a disproportionate interference with the right to freedom of speech."*

SECTION E: THE FINAL DECISION ("*FD*")

Structure of the Final Decision

95. The Final Decision is structured as follows:

Section	**Page reference in Core/8:**
Summary of decisions	184-186
Annex A – background to the investigation	187-188
Annex B – relevant regulatory landscape	189-191
Annex C – analysis in relation to the breach of condition E1 in respect of the Policy Statement	192-212
Annex D – analysis in relation to the breach of condition E2(i)	213-217
Annex E – consideration of the intervention factors in respect of alleged breaches of conditions E1 and E2(i) and imposition of monetary penalties	218-238
Annex F – consideration of the factors set out in regulation 4 of the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019	239-242
Annex G – calculation of the levels of monetary penalties that should be imposed	243-261
Annex H – wider regulatory concerns	262-266
Annex I – consideration of the OfS's general duties and other relevant duties when reaching the Final Decision, both in respect of the decision	267-273

to find breaches and the decision to impose a monetary penalty (and the level of any monetary penalty)	
Annex J – information about rights of appeal and payment	274-275

96. The summary of the FD set out below has been agreed by the parties, to whom I am extremely grateful. Where specific passages of the FD are relevant to the Grounds, particularly under Issues Three and Four, I set them out in further detail under those Issues.

97. Annexes that are most relevant to the Judicial Review proceedings are Annexes C, D, E and I. Annexes C and D set out the OfS's substantive reasoning on the alleged breaches, and Annexes E and I set out the OfS's reasoning on (*inter alia*) the decision to make findings of breach and the imposition of monetary penalties.

Annex C: Breach of condition E1 in relation to the Policy Statement

98. The OfS set out some background to the adoption of the Policy Statement by the University at Annex C, paragraphs 1-21. The OfS then sets out its proposed approach to assessing compliance with condition E1 and the freedom of speech and academic freedom PIGPs (paragraphs 22-28). The OfS considered whether the Policy Statement was a *"governing document"* for the purposes of condition E1 and concluded that it was (paragraphs 29-31).

99. The OfS considered whether the Policy Statement had contractual effect and could potentially trigger disciplinary action at Annex C, paragraphs 32-57. The OfS concluded that the Policy Statement had contractual effect for staff and students (paragraph 34). The OfS then considered the safeguarding effect of Statute VII of the University's Statutes. It concluded that this did not have a safeguarding effect on students' freedom of speech as it only applied to staff (paragraph 36). It concluded that the protection of freedom of speech and academic freedom was only built into the determination, interpretation and application of the University's Disciplinary, Grievance and Probationary Procedures (paragraph 43). As regards staff, it concluded that Regulation 31 (the Disciplinary Procedure) enabled the bringing of disciplinary proceedings for a breach of the Policy Statement by a staff member (paragraph 51). The OfS concluded that the effect of Statute VII did not rule out the possibility of disciplinary proceedings being brought in the first place, but that, assuming proper application, Statute VII would safeguard against any such disciplinary proceedings progressing to an adverse outcome (paragraph 53).

100. The OfS concluded that staff and students could not reasonably be expected to understand what the University describes as the hierarchy of norms within its governance structure where (in the OfS's view) that hierarchy was not clearly set out on the face of the University's governing documents or elsewhere (paragraph 50). The OfS concluded that the safeguarding effect of Statute VII was therefore limited, and even in that circumstance, staff would technically still be in breach of the Policy Statement (paragraph 53). The OfS concluded that, as a result, a staff member could potentially be subjected to the adverse consequences flowing from any potential disciplinary proceedings, which could potentially include stress, anxiety and/or reputational damage (paragraphs 52-55).

101. The OfS analysed the Positive Representation Statement in the 2018 version of the Policy Statement at Annex C, paragraphs 58-64. The OfS concluded that the Positive Representation Statement was capable of capturing lawful speech and, when combined with the absence of adequate and effective safeguards for freedom of speech, created a chilling effect (which the OfS defined as the *"potential"* for staff and students to self-censor and not speak about/express certain views) (paragraph 59, footnote 14). The OfS concluded that the University had failed to provide for reasonably practicable steps to secure freedom of speech within the law, and failed to expressly provide for adequate and effective safeguards to prevent academic staff from being disciplined or treated less favourably because of their lawful academic ideas and opinions, for the reasons set out at paragraphs 59-64.

102. The OfS analysed the Stereotyping Statement in the 2018, 2022 and 2023 versions of the Policy Statement at Annex C, paragraphs 65-81. The OfS concluded that: (i) the Stereotyping Statement was a restriction capable of capturing lawful speech and, when combined with the absence of adequate and effective safeguards for freedom of speech, created a chilling effect (paragraphs 67, 70, 74-75); (ii) the University failed to provide for reasonably practicable steps to secure freedom of speech within the law and provide for adequate and effective safeguards to prevent academic staff from being disciplined or treated less favourably because of their lawful academic ideas and opinions (paragraphs 68, 71-73, 76); (iii) although the 2022 Policy Statement introduced an intention requirement, in the absence of adequate safeguards, this did not remedy the issues that arose from the Stereotyping Statement (paragraph 69); (iv) the introduction of the Safeguarding Statement in the 2023 Policy Statement was sufficient to safeguard the academic freedom PIGP, but remained an inadequate safeguard in respect of the freedom of speech PIGP (paragraphs 77-81).

103. The OfS analysed the Disciplinary and Transphobic Propaganda Statements in the 2018, 2022 and 2023 versions of the Policy Statement at Annex C, paragraphs 82-97. The OfS concluded that: (i) the scope of the restrictions in the Disciplinary and Transphobic Propaganda Statements was unclear and they were capable of capturing lawful speech (paragraphs 83, 85-86, 89-94); (ii) the University failed to provide for reasonably practicable steps to secure freedom of speech within the law and provide for adequate and effective safeguards to prevent academic staff from being disciplined or treated less favourably because of their lawful academic ideas and opinions (paragraphs 84, 87-88, 95); (iii) the changes in the 2023 Policy Statement, including the Safeguarding Statement, were sufficient to safeguard the academic freedom PIGP, but remained an inadequate safeguard in respect of the freedom of speech PIGP (paragraphs 96-97).

104. In light of its conclusions and the *"significant degree of overlap"* between the analyses of the alleged failure to uphold the academic freedom and freedom of speech PIGPs in the various versions of the Policy Statement, the OfS found a single historic holistic breach of condition E1 in relation to the Policy Statement from 1 August 2019 until at least 20 March 2024 (Annex C, paragraphs 98-102). The OfS reserved its position on whether the breach of condition E1 continued past 20 March 2024 (paragraph 102).

Annex D: Breach of condition E2(i)

105. In assessing whether the provider had in place adequate and effective management and governance arrangements to operate in accordance with its governing documents, the OfS analysed the University's decisions relating to the adoption of the FOSCOP (2021 version) (Annex D, paragraphs 4-7), the ESP (2023 version) (Annex D, paragraphs 10-11), and the Policy Statement (2022 and 2023 versions) (Annex D, paragraphs 12-15) and whether those decisions were taken in accordance with the provider's delegation arrangements, and any processes stipulated in the provider's governing documents relating to decision-making in respect of matters concerning freedom of speech and academic freedom (Annex D, paragraphs 1 and 3).

106. In light of its analysis of the University's decision-making regarding the four documents above, the OfS concluded that there was a pattern of decisions being taken to adopt and/or revise policies without proper delegated authority. The OfS concluded that the University had not operated in accordance with its governing documents that deal with delegation arrangements and was in breach of condition E2(i) from 9 August 2021 until at least 20 March 2024 (Annex D, paragraphs 19-23).

107. The OfS concluded that it was empowered to do so notwithstanding the visitorial jurisdiction (Annex D, paragraphs 16-18).

108. The OfS reserved its position on whether the breach of condition E2(i) was ongoing, noting that the University had subsequently adopted further versions of the FOSCOP, Policy Statement and ESP in 2024 (Annex D, paragraph 23).

Annex E: Analysis of intervention factors in respect of breaches of conditions E1 and E2(i) and imposition of monetary penalties

109. Annex E records the OfS's consideration of the factors set out in paragraph 167 of the Regulatory Framework (whether the OfS properly considered those factors is a matter in dispute). The OfS set out the intervention factors in relation to the decisions to (i) make findings of breach and (ii) impose monetary penalties, separately. The OfS concluded that the intervention factors supported finding a breach of ongoing condition E1 in respect of the 2018, 2022 and 2023 versions of the Policy Statement from 1 August 2019 until at least 20 March 2024, for the reasons summarised at paragraph 3 (and detailed at paragraphs 6-81). The OfS also concluded that the intervention factors supported a finding of breach of condition E2(i) for the reasons summarised at paragraph 4 (and detailed at paragraphs 6-81). Consideration of the decision to impose a monetary penalty (and how the intervention factors related to that) was summarised at paragraph 5 but is outside the scope of the Judicial Review.

Annex I: Matters to which the OfS has regard – OfS's consideration of its general duties and other relevant duties when reaching final decisions

110. Annex I records the OfS's general duties and other relevant duties that it is required to have regard to before taking the final decisions, including (i) the need to protect institutional autonomy (paragraphs 2-6); (ii) the need to promote quality, and greater choice of opportunities for students, in the provision of higher education (paragraphs 7-11); (iii) the need to encourage competition between English HE providers (paragraphs 12-13); (iv) the need to promote value for money in the provision of higher education (paragraphs 14-17); (iv) the need to use the OfS's resources in an efficient, effective and economic way (paragraphs 18-21); and (v) principles of best regulatory practice (paragraphs 22-24).

SECTION F: OVERVIEW OF THE GROUNDS

111. Mr Buttler grouped the Grounds into five headings or topics. The FD contained two separate findings of breach, in respect of condition E1 and condition E2. Some of the Grounds only go to one or other of these findings, and some of the Grounds only go to certain versions of the Policy Statement. I set out here an overview of how the Grounds fit into the five headings, and which findings and Policy Statement version they apply to.

1 Issue One/Ground 1 (the meaning of governing documents). This Ground relates to condition E1. It applies to all versions of the Policy Statement (2018, 2022, 2023).

2 Issue Two/Ground 2 (the visitorial jurisdiction). This Ground relates to condition E2(i).

The following Grounds proceed on the basis that the Court has rejected Ground 1 of the claim:

3 Issue Three concerns findings of breach in relation to condition E1 and includes the following Grounds:

a. Ground 3D (the meaning of "*freedom of speech within the law*" and whether the OfS failed to properly address justification for the purposes of the freedom of speech PIGP). This Ground applies to all versions of the Policy Statement (2018, 2022, 2023).

b. Ground 3C and Ground 4 (did the OfS misapply the academic freedom PIGP?). This Ground applies only to the 2018 and 2022 versions of the Policy Statement.

c. Ground 5C (did the OfS misinterpret the Safeguarding Statement?). This Ground applies only to the 2023 version of the Policy Statement.

d. Ground 3A (did the OfS consider the protective effect of FOSCOP?). This Ground applies to all versions of the Policy Statement (2018, 2022, 2023).

4 Issue Four concerns the decision to make a formal finding of breach and impose sanctions.

The Grounds under Issue Four proceed on the basis that the Court rejects all the Grounds set out above.

a. Ground 5A (did the OfS err in not addressing whether the breaches had been remedied?). This Ground concerns breaches of both condition E1 and E2.

b. Ground 6A (was it unfair not to disclose Dr Stock's second witness statement?).

c. Ground 5E (was it reasonable to conclude that the harm was *"significant and severe"*?). This Ground concerns the breach of condition E1.

d. Ground 5B (anti-competitive effect). This Ground concerns breaches of both condition E1 and E2.

5 Issue Five/Ground 6C (apparent bias and predetermination). This Ground goes to the entire FD.

SECTION G: ISSUE ONE/GROUND ONE – THE MEANING OF "GOVERNING DOCUMENTS"

112. The Claimant submits that the OfS had no jurisdiction to make the finding of breach of condition E1 because the Policy Statement was not a "*governing document*" within the meaning of s.14(1) of HERA. Condition E1 provides: "*the provider's governing documents must uphold the public interest governance conditions that are applicable to the provider".* Section 14(1) is set out above at paragraph 63 and expressly refers to governing documents.

113. The Defendant's primary submission is that the Claimant's interpretation of governing documents is wrong, but alternatively that even if the Policy Statement was not a governing document within the meaning of s.14(1) of HERA, the OfS still has the vires to make condition E1 in respect of a wider class of document by exercising the power in s.5 of HERA.

114. Mr Buttler submits that "*governing documents*" means the documents setting out the University's legal form and governance arrangements, including the Charter, Statutes and Regulations.

115. The OfS takes the definition from paragraph 424 of the RF, when giving guidance on condition E1;

"424. 'governing documents' means the documents adopted, or that should have been adopted by the provider, that describe any of the provider's objectives or values, its powers, who has a role in decision making within the provider, how the provider takes decisions about how to exercise its functions, or how it monitors their exercise. This test will be broadly rather than narrowly applied. Where a document in part deals with any such matters, and in part with other matters, the whole of the document is a 'governing document'.

425. Depending on the legal form of the provider its 'governing documents' may include a Royal Charter, Statutes and Ordinances, articles of association, or Instruments of Government and/or a trust deed or deeds. They are also likely to include documents such as schemes of delegation, terms of reference of committees to which significant functions have been delegated, the provider's policies on matters such as management of conflicts of interest, support for freedom of speech or academic freedom, and/or member/shareholder agreements where these may influence the operation of the provider."

116. It is worth noting that, at paragraph 430, the RF states;

"430. During the initial registration process the OfS will carry out an assessment of the extent to which a provider's governing documents uphold the public interest governance principles. A provider is required to submit its governing documents and a self-assessment of how those documents uphold the public interest governance principles."

117. This Ground turns on principles of statutory construction. Mr Buttler submits that the historical context of the provision points strongly against governing documents having the very broad definition which the OfS has adopted. Further, he submits that the background material to the Bill, including the Green and White Papers, similarly support a narrow meaning of governing documents, and the Parliamentary material points inexorably to the same narrow interpretation.

118. Ms Carss-Frisk relies heavily on the statutory purpose and submits that a narrow interpretation would undermine Parliament's intention in creating the OfS and giving it the relevant powers.

119. The starting point is that there is no definition of governing documents in HERA, and the statutory context in terms of the other provisions of the Act are not determinative on whether to give the words a wide or narrow construction.

120. The correct approach to statutory interpretation was most recently explained by the Supreme Court in *For Women Scotland v Scottish Ministers* [2026] AC 315 [2025] UKSC 16 at [10]-[12];

"10 In R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687, Lord Bingham of Cornhill warned against giving a literal interpretation to a particular statutory provision without regard to the context of the provision in the statute and the purpose of the statute. He stated (para 8):

> *"The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."*

11 The general approach of focusing on the words which Parliament has used in a provision is justified by the principle that those are the words which Parliament has chosen to express the purpose of the legislation and by the expertise which the drafters of legislation bring to their task. But where there is sufficient doubt about the specific meaning of the words used which the court must resolve, the indicators of the legislature's purpose outside the provision in question, including the external aids described in para 30 of R (O) quoted above, must be given significant weight. As Lord Sales JSC has stated in an extra-judicial writing, "sometimes the purpose for which legislative intervention was required may be the very prominent focus for the legislative activity which follows from it, and thus may frame in a particularly strong way the context in which that activity takes place" (see "The role of purpose in legislative interpretation: inescapable but problematic necessity", Presentation at the Oxford University and University of Notre Dame Seminar on Public Law Theory: Topics in Legal Interpretation, 19 September 2024). Such aids can explain the meaning of a statutory provision which is open to doubt and can themselves alert the court to ambiguity in the provision, but they cannot displace the meanings conveyed by the clear and unambiguous words of a provision construed in the context of the statute as a whole.

12 Lord Nicholls of Birkenhead's important constitutional insight in Spath Holme, that citizens with the help of their advisers should be able to understand statutes, points towards an interpretation that is clear and predictable. As Lord Hope of Craighead DPSC stated in Imperial Tobacco Ltd v Lord Advocate 2013 SC (UKSC) 153, at para 14:

> *"The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used.""*

121. In terms of the historical context of the provision in question (s.14(1) of HERA), Mr Buttler points to the predecessor provision in s.129 Education Reform Act 1988. Sections 129A and 129B of that Act set out how universities could only change what might naturally be described as their governing documents with approval of the Privy Council.

122. For providers formed as a company, s.129B(2) of the 1988 Act provided that *"the articles of association of the company shall incorporate (a) provision with respect to the constitution of a governing body of the institution (to be known as the instrument of government of the institution) and (b) provision with respect to the conduct of the institution (to be known as the articles of government of the institution)"*. The articles of association could not be changed without Privy Council approval: s.129B(4).

123. For providers not formed as a company nor established by Charter, s.129A(1) required the institution to have an instrument of government *("an instrument providing for the constitution of a governing body of the institution"*) and articles of government (*"an instrument in accordance with which the institution is to be conducted"*). Neither governing document could be modified without the approval of the Privy Council: s.129A(7).

124. For providers established by Royal Charter, the terms of the Charter itself prevented a university from unilaterally amending it: Charters require the consent of the Privy Council to amend the Charter (the instrument of government) or the byelaws (i.e. the Statutes) made thereunder (the articles of government).

125. These statutory provisions themselves did not use the term *"governing documents"* and therefore gave no definition of it. However, the Secretary of State for Business and Innovation provided Guidance in 2015 to all higher education institutions;

> *"All amendments, however minor, to the governing documents of an HE provider that has been designated for HEFCE funding must be submitted to the Privy Council for approval and must be approved by the Council before they can take effect."*

126. It is not in dispute that the Privy Council had the equivalent role to the OfS in reviewing the providers' instruments of government. Mr Buttler submits that the intention of Parliament in enacting HERA was to transfer the powers of the Privy Council in this respect to the OfS, without expanding the scope of the oversight body to a very wide range of policies and practices that had never previously fallen within the purview of the Privy Council. Therefore, just as the Privy Council had oversight of the limited documents outlined in s.129 Education Reform Act 1988, the OfS only has oversight of governing documents in the narrow sense under s.14(1) of HERA.

127. Mr Buttler also relies on the, he submits, well-established approach to the meaning of governing documents in Charities Law. The *"governing documents"* of an exempt charity such as the University are those set out in ss.197-198 of the Charities Act 2011, i.e. its instrument and articles of government.

128. He accepts that the Charities Act 2011 does not use the words *"governing documents"*, but he refers to the settled position in relation to charities: see, for example, Tolley's Charities Manual at 34.8; *"the governing document is a legal document setting out the charity's purposes and how it is to be administered. It may take the form of a trust deed, constitution, memorandum, and articles of association, will, conveyance, Royal Charter, Scheme of the Charter Commission or other formal document."* The OfS's Regulatory Advice 5 addressed to exempt charities also uses the well-established definition of *"governing documents"* – it advises universities that the *"governing documents"* of an exempt charity such as the University are those set out in ss.197-198 of the Charities Act 2011: Regulatory Advice 5 at p.12. It would be surprising if governing documents had a completely different meaning in different parts of the OfS's advice.

129. Mr Buttler points to four documents which were preparatory to the Bill which are aids to construction:

a. The Green Paper, "*Fulfilling our potential Teaching Excellence, Social Mobility and Student Choice"* (November 2015).

b. The White Paper, "*Success as a knowledge economy"* (May 2016).

c. The Detailed Impact Assessment for the Higher Education and Research Bill (June 2016).

d. The Explanatory Notes to the Bill.

130. Ms Carss-Frisk does not dispute that these are all capable of being aids to construction.

131. There are three passages in the Green Paper which are relevant as to the intention of Government at that stage in respect of the meaning of governing documents;

"11. At present all HEFCE-funded providers must seek Privy Council approval to all changes to their governing documents no matter how minor. Requiring Privy Council approval is recognition that there is some public interest in the governing documents of institutions. The Privy Council, in discharging this function, normally takes advice from BIS and the Charity Commission as appropriate.

12. This can, however, be burdensome and time-consuming to institutions, the Privy Council and Government officials who advise the Privy Council on behalf of the Secretary of State. It can also create inefficiencies and financial costs and put these institutions at a disadvantage compared to newer providers in the sector with more flexible frameworks."

…

16. In the longer term, the Government is seeking views on removing the requirement for changes to the governing documents of HEFCE-funded providers to be approved by the Privy Council. Responsibility for protecting the public interest in their governing documents would transfer to the OfS, with the principles of public interest incorporated into the terms and conditions of grant funding. Providers would not be required to seek approval to individual changes to their governing documents and would be free to make changes as and when best suited them to meet their business needs. The governing documents would, however, be periodically reviewed for compliance with the public interest principles, as part of ongoing monitoring to determine whether the conditions for continuing grant funding were being met."

132. A similar intention to simplify the process in respect of the scope of governing documents, and achieve deregulation, is shown in the White Paper;

"30. We will simplify the approval process for the governing documents of most publicly funded higher education providers, removing the requirement to submit any changes to their governing documents to the Privy Council for approval. This will reduce both cost and complexity. Responsibility for protection of the public interest in governing documents will transfer from the Privy Council to the OfS, which will be responsible for monitoring the governance of all publicly funded HEPs."

133. The position in the Impact Assessment is, if anything, even clearer;

"2) All publicly funded HEPs are subject to a lengthy process of Privy Council approval when seeking to amend their governing documents, which is unnecessarily burdensome and restrictive. This process can be significantly streamlined to give publicly funded HEPs greater flexibility and control over their governance."

134. The Explanatory Notes to clause 14 expressly refer to the role of the Privy Council moving to the OfS and "*this would mirror the current arrangements".*

135. Mr Buttler also relies on one passage of the Parliamentary consideration of the Bill. He refers to *Medical Costs for Asbestos Diseases* [2015] AC 1016 [2015] UKSC 3 at [55] as authority for this being an aid to construction, where Lord Mance said;

"To put a legislative measure in context, domestic courts may (under a rule quite distinct from that in Pepper v Hart [1993] AC 593) examine background material…including ministerial statements and statements by members of parliament in debate."

136. At the House of Commons Committee Stage on 15 September 2016, Mr Wes Streeting MP (the Opposition spokesperson) proposed Amendment 25: in clause 14 (now s.14 of HERA), he wanted to insert, after *"governing documents"*, the words *"and practices"*.

137. Mr Jo Johnson MP (the Minister for Universities) opposed the Amendment and said;

"Let me first explain how we envisage the public interest governance condition working. Clause 14 explains what the condition allowed for by clause 13 is. It will be a condition requiring certain providers' governing documents to be consistent with a set of principles relating to governance. The principles will be those that the OFS thinks will help ensure that the relevant higher education provider has suitable governance arrangements in place. That is not new. Legislation currently requires the governing documents of certain providers – broadly, those that have been in receipt of HEFCE funding – to be subject to Privy Council oversight. That is the backdrop …

The introduction of the word 'practices' through the amendment would risk changing the scope of the public interest governance condition to give it a much wider and more subjective application and imposing significant and ambiguous regulatory burden on the OFS. That would stray outside our stated policy objective and beyond the OFS' regulatory remit." [emphasis added]

138. Ms Carss-Frisk does not dispute the admissibility or relevance of this Parliamentary material. She submits that, on the ordinary meaning of the word *"practices"*, the Amendment was intended to cover decisions and practices which were not written down in a document, which I have to say does not appear to accord with what was said in Parliament.

139. Mr Buttler submits that Parliament should be taken as having known that the existing system limited the oversight of the Privy Council to the Articles and Statutes of a university. The reform in HERA was intended to transfer that oversight from the Privy Council to the OfS, and the material above shows very clearly that there was no intention to broaden that oversight. Parliament used the term *"governing documents"* in HERA to reflect the existing scope of the oversight. Therefore, the meaning of governing documents in HERA is the same as that in the 1988 Act and in charities law, as was the case with the Privy Council.

140. Both parties argue that the other's interpretation of *"governing documents"* would be contrary to the statutory purpose. Ms Carss-Frisk submits that in HERA Parliament created a new, single regulatory regime that was to cover a broad range of higher education providers, with many different forms of governing documents. Therefore, the term *"governing documents"* must be applied to them all, and be given a broad meaning. Further, for the OfS to be effective, the meaning of governing documents needs to be sufficiently wide and flexible to ensure that documents necessary for assessing compliance with condition E1 fall within the scope of the OfS's regulatory remit. Parliament adopted broad words without providing any limitation on the documents that would be included.

141. She submits that it is clear that Parliament intended that the OfS could impose public interest governance conditions to ensure regulatory compliance of governing documents with the PIGPs. Giving governing documents a narrow interpretation restricts the OfS's ability to ensure compliance and to uphold the principles which HERA seeks to strengthen.

142. The OfS rely on the fact that the University's definition of *"governing documents"* has shifted through the course of the litigation. The University is seeking to put a *"gloss on the statute"*, whereas the OfS is simply relying on a broad and purposeful definition.

143. The OfS rejects the submission that the meaning of *"governing documents"* can be taken from earlier statutes or from the materials relied upon by the University. None of the statutes themselves give a definition, and the various provisions referred to are in the context of different bodies and different statutory regimes. The OfS relies on the fact that the RF takes a broad approach to governing documents, although their core submission is that the definition of governing documents is broad within the statute as a matter of unaided construction.

144. Ms Carss-Frisk further submits that the University's challenge is essentially a challenge to the RF, and this is out of time, because the RF was first adopted on 28 February 2018 and has remained unchanged since then. She submits that the time for challenge ran from when the University were first affected by the RF, per *R (Badmus) v SSHD* [2020] 1 WLR 4609. In my view this argument is misconceived. The University is not seeking to challenge the RF, per se. It is arguing that the OfS's interpretation of governing documents in the FD is legally wrong, and therefore the FD is wrong in law. If they are correct then the RF will have to be amended, but there is no freestanding challenge to the RF. In my view there is no issue as to limitation here.

145. Ms Carss-Frisk's alternative argument is that, even if the power under ss.13 and 14 to make the public interest governance conditions was limited to governing documents within the University's construction of the term, the OfS still had the power under s.5 of HERA to make a condition that required the provider's governing documents (in a broader sense of the term) to uphold the PIGPs.

146. Mr Buttler submits that, firstly, this is not what the OfS purported to do. They said when they promulgated condition E1 that they were exercising the power under s.14, see RF PART V – "*Guidance on the general ongoing conditions of registration*", which says under *"Condition E1": "Legal basis: sections 13 and 14 of HERA"*.

147. Secondly, Ms Carss-Frisk's submission is wrong in principle. Parliament had made clear, for the reasons set out above, that it did not intend to broaden the scope of oversight to include documents which had not previously fallen within the powers of the Privy Council.

148. Thirdly, as a matter of statutory construction, where Parliament has spelt out a specific provision, here s.14, a body cannot rely on a general provision to go beyond the specific powers. In *R (on the application of W, X, Y, and Z) v Secretary of State for Health (British Medical Association intervening)* [2016] 1 WLR 698 [2015] EWCA Civ 1034, the Court of Appeal said at [57];

> *"We accept the correctness of the statement of Lord Bingham CJ in R v Liverpool CC, ex p Baby Products Association [2000] LGR 171 at p 178 that: "[a] power conferred in very general terms plainly cannot be relied on to defeat the intention of clear and particular statutory provisions". The reason is that, if Parliament has enacted specific provisions to govern a particular subject-matter, then it is to be taken to have intended that the same subject-matter will not be governed by other more general provisions."*

Conclusion on Ground One

149. In my view the OfS has misdirected itself as to the meaning of governing documents in s.14 of HERA. The Policy Statement is not a governing document, and thus falls outside the scope of s.14. The consequence is that the FD was *ultra vires* in relation to the findings of breach of condition E1.

150. The starting point is the words of the statute, read in their statutory context, see *For Women Scotland*. There is nothing in the words of s.14(1) of HERA which would give *"governing documents"* a broad or narrow definition. The ordinary and natural reading of governing documents tends towards a narrow

meaning, because they would need to be documents that had some governing effect, rather than simply setting out a policy.

151. The meaning of *"governing documents"* which appears to have previously been assumed is relevant to what Parliament intended in s.14 of HERA. The 2015 Guidance provided by the Secretary of State for Business and Innovation, referred to at paragraph 125 above, is by no means determinative. However, it does provide an indication that it had been understood in the field of higher education that governing documents referred to the documents that set out the constitution and governance of the institution, rather than a much broader range of documents encompassing all policy documents.

152. I accept Mr Buttler's submissions on the Guidance and the provisions of s.129A and s.129B of the Education Reform Act 1988. Although the 1988 Act does not use the term *"governing documents"*, firstly, it is apparent that that is what the provisions are aimed at, and secondly the Guidance takes that view. I note that the OfS can point to no material that suggests that either *"governing documents"* had the broad meaning they assert before HERA, or that, when the Privy Council exercised its powers, it had ever taken such a broad view.

153. The legislative history of HERA points very strongly to governing documents having the meaning that the University asserts. The Green Paper, which was a consultation document, sets out considerable detail about proposals to move the Privy Council's responsibilities to the new body. Those references all assume that the scope of the powers in respect of *"governing documents"* will remain, but be transferred to the OfS. If the intention was to broaden that scope to a much wider class of document, then it would be reasonable to expect that that would be referred to, so that consultees could respond.

154. Similarly in the White Paper and the Impact Assessment, part of the intention appears to have been to lessen the regulatory burden on HE providers, not to very significantly increase it, as would be the case on the OfS's interpretation. The Impact Assessment expressly refers to transferring the Privy Council's powers in respect of governing documents, but again makes no suggestion that the class of document will be widened.

155. The Explanatory Notes to the Bill make the same point.

156. Perhaps most tellingly, the Minister (Mr Johnson) made the position very clear in rejecting Amendment 25 to include *"practices"* at the Committee Stage. I reject Ms Carss-Frisk's submission that practices only meant individual decisions or non-formal practices, and/or matters and decisions that were not written down. The words of the Minister could almost be used as a shorthand for much that has gone wrong in this case; "*... [the amendment would] ... give it a much wider and more subjective application and imposing significant and ambiguous regulatory burden on the OfS. That would stray outside our stated policy objective and beyond the OfS' regulatory remit".*

157. In terms of the argument about statutory purpose put forward by the OfS, there is in my view an element of circularity. The public interest governance condition ("*PIGC*") in s.13(1)(b) is only intended to apply to governing documents. It was not intended to apply to every decision or document of the HE provider. One part of the OfS's overarching duties is to ensure University autonomy (s.2(8) of HERA). There is therefore nothing inherently unlikely or contrary to the purpose of the statute that the OfS's remit in this regard is limited to the high-level governance documents, and does not afford them direct regulatory oversight of the lower-level documents.

158. I also do not accept Ms Carss-Frisk's submission that the broader definition is required because the OfS regulates a wide range of HE providers, with a range of different governance arrangements and documentation, and there needs to be a "*level playing field*". Firstly, it is apparent that HE providers (including many different universities) have always had a range of different governance structures, but that did not prevent the Privy Council from operating effectively in its oversight role. There may be some differences between different providers, but that is inevitable. Every provider has governing documents of some sort (or they could not exist), and therefore the narrower interpretation does provide

a level playing field. Secondly, if governing documents is given the narrower interpretation, it will be no more difficult to identify the documents caught, than if the broad definition of any document which describes the providers' values is adopted. The breadth of the OfS's interpretation would allow a huge range of documents to be caught.

159. The OfS's interpretation itself leads to if not absurdity then something very close to unworkability. The OfS is required to approve governing documents before registering the provider, under s.3(3) of HERA, and be satisfied that the initial registration conditions are met. Condition E1 was one of those initial conditions. However, it is effectively unworkable for the OfS to review all the documents which it now says are governing documents before it registers the provider. I note that the OfS made no attempt to undertake this task before it registered the University on 17 September 2018. Ms Lapworth herself in her second witness statement says that it would be *"wholly unworkable"* to scrutinise governing documents to that extent; "*... it would require us to conduct detailed analysis and assessment of all governing documents…."*. The OfS therefore relied on *"self-assessment"* of conditions E1 and E2 on initial registration. However, the duty on the OfS under s.3(3) of HERA is to register an institution if it satisfies the initial registration conditions. An interpretation which makes it *"unworkable"* for the OfS to actually check whether this requirement is met would be a surprising outcome.

160. Taking this narrower approach to governing documents does not rob or even undermine the purposes of HERA. The OfS still has to apply the PIGC to the governing documents, within the University's definition. Therefore, if the Charter and Statutes fail to uphold academic freedom and freedom of speech then this would be a breach of condition E1. Although I do not intend to speculate about hypothetical or counterfactual scenarios, it follows that if the OfS had been concerned that the University were not upholding freedom of speech in breach of the PIGC and s.43 of the Education Act (No 2) 1986, this was an issue they could have lawfully raised with the University, without pursuing an investigation and finding of breach of condition E1 specifically in relation to the Policy Statement.

161. Ms Carss-Frisk's alternative submission is that even if governing documents in s.14 of HERA has the narrower definition, the OfS can still create condition E1 under the broad power in s.5 of HERA, which is not limited to *"governing documents"* and can therefore apply to a broader class of documents. In my view that argument falls foul of the principle that the general is ousted by the specific provision, see *ex p Baby Products* above at paragraph 148. There is an entirely specific provision here in ss.13 and 14 of HERA. The OfS cannot therefore rely on the general provision in s.5 of HERA for the creation of condition E1.

SECTION H: GROUND TWO/ISSUE TWO – THE VISITORIAL JURISDICTION

162. The OfS found that the University had breached condition E2(i) because it had breached its internal laws on four occasions, see Annex D of the FD. Condition E2(i) states, "*the provider must have in place adequate and effective management and governance arrangements to: (i) operate in accordance with its governing documents."*

163. At Annex D, paragraphs 20-21, the OfS says;

"20. This demonstrates that the provider has on at least four occasions taken decisions to adopt and/or revise policies without proper delegated authority and therefore the provider has not operated in accordance with governing documents that deal with delegation arrangements.

21. For these reasons, the OfS's analysis is that the provider did not comply with condition E2(i). It did not have in place adequate and effective management and governance arrangements to operate in accordance with its governing documents that deal with delegation arrangements as it has a pattern of failing to take decisions without proper delegated authority."

164. The University contends that these findings are *ultra vires* because they concern matters which fall within the exclusive jurisdiction of the Visitor and nothing in HERA abrogates that exclusive jurisdiction.

165. The position of the University appeared to change during the hearing (or certainly the litigation). In its Skeleton Argument the University said that *"the Visitor of a university has exclusive jurisdiction on matters concerning the interpretation and application of university's internal laws, save where the jurisdiction has been expressly or by necessary implication limited by Parliament"*, see paragraph 39. However, in his oral submissions, Mr Buttler accepted that s.14 of HERA probably did encroach upon the visitorial jurisdiction, but argued that there was no encroachment in respect of the powers given by s.5 of HERA, under which condition E2 is made.

166. The OfS accepts that there is no express provision in HERA to remove or intrude upon the visitorial jurisdiction but contends that the OfS's concurrent jurisdiction in this regard is a necessary and therefore implied power within the Act.

167. The background to the visitorial jurisdiction is that if a university has a Visitor and a member of the university's academic staff is aggrieved by an act or omission of the university, he or she may petition the Visitor for redress. The President of the Council exercises the Visitor's jurisdiction on behalf of His Majesty the King concerning 14 universities and colleges. The Visitor's jurisdiction is limited to adjudicating on petitions from members of the university's academic staff on the interpretation and application of the institution's Charter, Statutes, Ordinances etc, provided the point at issue is not an employment dispute. This summary is taken from a Guidance Note produced by the Privy Council Office. The University's Charter establishes the King as visitor, see paragraph 7 above.

168. The nature of the visitorial jurisdiction was considered by the House of Lords in *Thomas v University of Bradford* [1987] AC 795 and *R v Lord President of the Privy Council ex p Page* [1993] AC 682. Those decisions (and decisions cited therein) establish:

(1) The origin of the visitorial jurisdiction is ecclesiastical: *Philips v Bury* (1692) 1 Ld Raym at 7-8. During the course of the sixteenth and seventeenth century, it became well-established in common law that eleemosynary (charitable) corporations (such as colleges) were liable to visitation by their founder, heirs, or other persons appointed by the founder.

(2) The nature of the jurisdiction *"stems from the power recognised by common law in the founder of an eleemosynary corporation to provide the laws under which the objects of his charity was to be governed and to be the sole judge of the interpretation and application of those laws either by himself or by such person as he should appoint as visitor" (Thomas,* 814H per Lord Griffiths). In other words, "*the founder of such a body is entitled to reserve to himself or to a visitor whom he appoints the exclusive right to adjudicate upon the domestic laws which the founder has established"* (*Page*, 695H per Lord Browne-Wilkinson). [emphasis added]

(3) The internal laws established by the founder are "*a peculiar or domestic law*" that is not part of the general law of England and over which the Visitor is the sole judge (*Page*, 700D per Lord Browne-Wilkinson). Although the decisions of Visitors are amenable to judicial review, their decisions cannot be impugned for being *ultra vires* the internal law of the institution because the courts have no jurisdiction to interpret that peculiar law and therefore cannot say whether or not the Visitor acted *ultra vires* (*Page*, 702H per Lord Browne-Wilkinson).

(4) Unless stated otherwise in the Charter, the Crown exercises visitorial powers: *Bradford* at 811B-C per Lord Griffiths. Visitors can be special or general, a general visitor being one *"who may visit a corporation in respect of all matters relating to its internal affairs"*. In the absence of any express qualification, the powers of a Visitor are presumed to be general and include powers incidental to the office of the Visitor. A general Visitor may exercise its powers on petition or of its own motion.

(5) Any matter which involves the interpretation or application of a university's internal laws is within the jurisdiction of the Visitor: *In re Wisland's Application* [1984] NI 63, approved by the House of Lords in *Bradford* at 688-690. This includes the application of internal matters that are *"perfectly clear"* and require no interpretation: *Bradford* at 819H per Lord Griffiths.

(6) Where the jurisdiction exists, it is exclusive: *"the exclusivity of the jurisdiction of the visitor is in English law beyond doubt and established by an unbroken line of authority spanning the last three centuries"* (*Bradford* at 811E per Lord Griffiths) and *"for over 300 years the law has been clearly established that the visitor of an eleemosynary charity has an exclusive jurisdiction to determine what are the internal laws of the charity and the proper application of those laws to those within this jurisdiction"* (*Page,* 700C-E per Lord Browne-Wilkinson).

169. These propositions are not disputed by the OfS. Therefore, it is accepted that the Visitors, until HERA came into force, had sole jurisdiction over the interpretation and application of the University's internal laws. There seems to be no doubt that condition E2(i) intrudes into that jurisdiction, because it concerns the operation and therefore the application of the internal laws, as set out in the governing documents.

170. The issue is whether a power for the OfS to intrude into this jurisdiction can be implied into HERA. It is clear that Parliament can always "*invade the jurisdiction of the visitor if it chooses to do so"*, see *Thomas* per Lord Griffiths at 824C. The Higher Education Act 2004 (HEA 2004) expressly abrogated the Visitors' jurisdiction in two respects: s.20 provides that *"the visitor of a qualifying institution has no jurisdiction in respect of"* complaints made by students and former students. Instead, oversight was transferred to the Office of the Independent Adjudicator. Section 46 of HEA 2004 provides that *"the visitor of a qualifying institution has no jurisdiction in respect of"* disputes between members of staff and the qualifying institution where any such dispute could be brought before any court or tribunal, including over the application of internal laws for the purposes of determining such a dispute. Mr Buttler relies on the fact that where Parliament intends to encroach or remove the visitorial jurisdiction it says so expressly in HEA 2004.

171. Mr Buttler submits that a statutory provision is not to be interpreted as abrogating a rule of the common law unless there is an express or clear implication.

172. In *National Assistance Board v Wilkinson* [1952] KB 648, the Divisional Court was considering whether the National Assistance Act 1948 had impliedly altered the law that a husband's obligation to maintain his wife ended with a *"matrimonial offence"*. At 659A Lord Goddard CJ said;

"In Minet v. Leman,21 Sir John Romilly M.R. stated as a principle of construction which could not be disputed that the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched."

173. In *R v Home Secretary ex p Pierson* [1998] AC 539 at 573G Lord Browne-Wilkinson said;

"It is well established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions: see Cross on Statutory Interpretation, 3rd ed. (1995), pp. 165-166; Bennion, Statutory Interpretation, 2nd ed. (1992), p. 727 and Maxwell on Interpretation of Statutes, 12th ed. (1969), p. 116. As a result, Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication: Cross on Statutory Interpretation, p.166; Bennion, Statutory Interpretation, p.718 and Maxwell on Interpretation of Statutes, p.116. This presumption has been applied in many different fields including the construction of statutory provisions conferring wide powers on the executive…

From these authorities I think the following proposition is established. A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which

adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

174. The rule was reiterated by Lord Hutton in *R (Rottman) v Metropolitan Police Commissioner* [2002] 2 AC 692 at [75].

175. Mr Buttler submits that for HERA to have abrogated, or invaded, the visitorial jurisdiction it would have to be shown that this was a *"necessary"* implication of the statute. He relies upon *R (Morgan Grenfell & Co Ltd) v Special Comr. of Income Tax* [2003] 1 AC 563, 616 at [45], cited in *R (XH) v Secretary of State for the Home Department* [2018] QB 355 at [89];

"A necessary implication is not the same as a reasonable implication… A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation." [emphasis added]

176. Finally, Mr Buttler relies on *R (Fylde Coast) v Fylde BC* [2021] 1 WLR 2794 [2021] UKSC 18, where the Supreme Court considered whether s.61N of the Town and Country Planning Act 1990 removed existing public law rights to challenge. At [47] Lord Briggs and Lord Sales said;

"It would be a strong thing to conclude that Parliament had, by s 61N, which is silent about anything prior to stage 5, abrogated all those rights arising under the general law. If an existing right is to be taken away by statute, then this requires clear language: see Islington London BC v Uckac [2006] EWCA Civ 340, [2006] 1 WLR 1303, [2006] 2 FCR 668 (para [28]) per Dyson LJ, relying on Coke's Institutes; and (in relation to common law rules rather than rights) R (on the application of Rottman) v Metropolitan Police Comr [2002] UKHL 20, [2002] 2 All ER 865, [2002] 2 AC 692 (para [75]) per Lord Hutton:

'It is a well-established principle that a rule of the common law is not extinguished by a statute unless the statute makes this clear by express provision or by clear implication.'"

177. Mr Buttler submits that there is no clear or necessary implication here, indeed the material strongly points to Parliament having no such intention. Parliament must be taken to have been aware of the visitorial jurisdiction, see *inter alia Pierson*. In the HEA 2004 when the Visitors' jurisdiction was to be ousted, Parliament made express provision in s.20 of that Act. There is nothing in HERA that gives any such suggestion.

178. The background material to the Bill, referred to above under Ground One, makes no mention of intruding upon the visitorial jurisdiction. The Green Paper considers in some detail the impact on other bodies, including the Privy Council, of the proposals that became the Bill, but there is no mention of any impact on Visitors.

179. Ms Carss-Frisk relies upon *R (Child Poverty Action Group) v SSWP* [2011] 2 AC 15 for the argument that the test to be applied is not one of strict necessity. The issue in that case was whether the SSWP had a right to recover certain benefit overpayments. The SSWP was arguing, *inter alia*, that it had a common law right to recover overpayments under restitutionary principles, see paragraph 26. Mr Eadie, for the SSWP, argued that the common law right was not withdrawn, either expressly or by *"necessary implication"*, see paragraph 26. Lord Dyson considered whether the test for the overriding of a common law right was as high as *"necessary implication"* and said that it was not, see paragraphs 31 and 34;

"The context in the present case, however, is quite different. The question whether the Secretary of State can recover overpayments of benefit does not involve any fundamental human rights of the Secretary of

State nor does it engage the principle of legality. I do not accept the submission that the Child Poverty Action Group have to surmount the high hurdle erected by Lord Hutton in the B (A Minor) case or Lord Hobhouse in the Morgan Grenfell case. Rather the question is whether, as a matter of statutory interpretation, section 71 is an exclusive code for recovery of overpayments. That question is to be answered not by applying any presumptions or by saying that the common law remedy in restitution is not displaced unless, in Lord Hobhouse's words, as a matter of logic, it cannot coexist with the statutory regime for recovery…

The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended by coexist with it."

180. She submits that there is a critical distinction between situations where a fundamental right or a basic tenet of the common law is being removed, such as in *Wilkinson,* and a case such as *CPAG* where there is only an interference with the common law and not with an established *"right"*. The Visitors did not have a *"right"* in that sense, and therefore the test to be applied is simply one of clear implication from the statute.

181. In her submission there is a clear implication from HERA that it was intended that the OfS would have a concurrent jurisdiction over internal laws with the Visitors. She points to the fact that, if this were not the case, there would be inconsistency between the OfS's role with universities with or without Visitors, and it would be necessary to consider the detail of the role of the Visitors in each individual Charter. That would then lead to obvious scope for universities to manipulate the position to minimise the role of the OfS.

Conclusions on Ground Two

182. In my view there are problems with both parties' submissions on this Ground. Although there is an interesting debate as to the height of the test for whether it can be implied that a statute has changed the pre-existing common law, in whatever form, it is not necessary to determine that issue here. Mr Buttler accepts that some invasion of the Visitors' jurisdiction can be implied into HERA. Therefore, the in principle line of implication has been crossed, and the issue becomes how far that intrusion goes.

183. I agree with Mr Buttler's concession, because s.14 of HERA clearly intends to give the OfS jurisdiction over the governing documents, and this necessarily involves straying into the Visitors' jurisdiction. That is despite the fact that there is no express reference, either in the statute or any of the background documentation, to the impact of HERA on the Visitors. Therefore, whether one applies the lower test in *CPAG* or the higher test in *Fylde Coast* and *Pierson* of necessary implication, the test is met.

184. Mr Buttler submits that the concession only applies to s.14 of HERA, because of the reference therein to governing documents, which necessarily overlaps with the role of the Visitors, but does not apply to the powers under s.5 of HERA. Therefore, the OfS can publish in its list of PIGPs under s.14 matters that would overlap with the Visitors' jurisdiction, but what it cannot do is use the broad powers in s.5 to make registration conditions which seek to give the OfS oversight over the internal laws of the University, which are within the sole jurisdiction of the Visitors.

185. The distinction becomes very complicated, because Mr Buttler concedes that the OfS could have said that there was a breach of condition E2(ii) to *"deliver in practice, the public interest governance principles that are applicable to it"*; but what it could not do was find a failure to act in accordance with the governing documents, because that concerned the working of the internal laws, which did not fall within the power in s.14, but rather under s.5.

186. The difficulty with this submission is that it leaves a very unclear line between what the OfS has oversight on, and what is left to the Visitors alone. It also leaves the problem Ms Carss-Frisk highlighted,

which is that there become very stark differences between HE providers with and without Visitors, and complexity around what the Visitors do under different charters.

187. It is surprising that none of the background documents, including the Green and White Papers, appear to have raised the issue of what role the Visitors had in the light of the creation of the OfS. However, I accept that point carries less strength once it is accepted that there is undoubtedly some intrusion into the Visitors' jurisdiction.

188. In my view Mr Buttler's analysis is illogical and probably unworkable. It means that there would be stark differences in what conditions the OfS could make under s.5 for HE providers with and without Visitors. It would also mean that some conditions could cover the internal laws, those made under s.14 of HERA, but those made under s.5 of HERA could not. It is clear from the submissions that that distinction itself would be very difficult to establish, and probably unworkable.

189. The necessary implication is therefore that Parliament intended the OfS to have power to scrutinise issues that would previously have fallen within the exclusive jurisdiction of the Visitors.

190. For these reasons I conclude that the OfS did have the vires to make conditions that intruded into the jurisdiction of the Visitors and therefore Ground Two fails.

SECTION I: ISSUE THREE – BREACH OF CONDITION E1 – FREEDOM OF SPEECH AND ACADEMIC FREEDOM (GROUNDS 3D, 3C and 4, 5C and 3A)

191. These Grounds all relate to the OfS's finding in respect of breach of condition E1, in respect of the public interest governance principles (*"PIGPs"*) of either freedom of speech or academic freedom. The OfS's reasoning is contained in Annex C of the FD. Mr Buttler dealt with these Grounds together and in the order set out in the heading above. These Grounds are all in the alternative to Ground One.

192. There is quite a complicated interaction between the five Grounds that fall within Issue Three:

a. Ground 3D applies to the *"freedom of speech"* PIGP and to all the versions of the Policy Statement. It concerns the meaning of *"freedom of speech within the law"*. The Claimant's argument is that the OfS failed to ask the essential question of whether the restrictions on freedom of speech within the Policy Statement were justified. It is this Ground that the Intervener is concerned with.

b. Ground 3C applies to the *"academic freedom"* PIGP and only to the 2018 and 2022 versions of the Policy Statement. The Claimant's argument is that the OfS misconstrued the academic freedom PIGP because no academic was "*in jeopardy of losing their jobs or privileges…*".

c. Ground 4 is very closely related to Ground 3C, and I will deal with the two together below.

d. Ground 5C applies to both the academic freedom and freedom of speech PIGPs. The Claimant's argument is that the OfS acted unreasonably in having accepted that the 2023 version of the Policy Statement protected academic freedom, by reason of the *"Safeguarding Statement"*, but reaching the opposite conclusion in respect of freedom of speech.

e. Ground 5A applies to all versions of the Policy Statement and is that the OfS failed to take into account the protection offered by the FOSCOP.

Ground 3D

193. This Ground concerns the meaning of "*freedom of speech within the law".* It is made more complicated by the fact that both parties appear to have nuanced their positions during the course of the

litigation, and the Intervener takes a position different from either party. This Ground may have wider ramifications, and it is therefore particularly important to set out as clearly as possible the issues and the parties' respective positions.

194. The parties disagreed on two issues: first, the extent to which *"freedom of speech within the law"* and *"reasonably practicable steps"* encompasses a proportionality assessment. Ultimately the University and the OfS agreed on a three-stage approach that did encompass a proportionality assessment. Second, whether the 2018, 2022 and 2023 versions of the Policy Statement, and the different "*Statements*" that they contained, complied with the three-stage approach that will be outlined below. One difficulty here is that the 2023 version included the Safeguarding Statement, whereas the 2018 and 2022 versions did not.

195. The FD sets out a series of breaches of the freedom of speech PIGP in all the versions of the Policy Statement. It analyses the 2018 Policy Statement (which included the *"Positive Representation Statement"* and *"Transphobic Propaganda and Disciplinary Statements"*), the 2022 version of the Policy Statement (which included the *"Stereotyping Statement"* and *"Transphobic Propaganda and Disciplinary Statements"*), and the 2023 version of the Policy Statement (which included the *"Safeguarding Statement"*). The conclusion on breach is worded in the same way in each case:

"60. The provider failed to provide for reasonably practicable steps to secure freedom of speech within the law because the provider failed, in the [2018/2022/2023] version of the TNBEPS to: a. set out clearly the remit or limits of the restriction on freedom of speech that the [relevant Statement] permitted, in particular by making clear that it did not capture lawful views; and b. ensure adequate effective safeguards for freedom of speech were built into [the 2018/2022/2023] version of the TNBEPS or one of the provider's other governing documents."

196. Ms Carss-Frisk said it was for the University to explain why it was not *"reasonably practicable"* not to impose the restrictions contained within the TNBEPS, and to provide evidence to support that position. In other words, it was for the University to provide compelling justification where it decided not to take steps to secure lawful speech. The failure to do so had a chilling effect.

197. The University contends that the OfS erred in the FD as to its interpretation of the words "*reasonably practicable"* and "*freedom of speech within the law"*. In the FD, the OfS treated the Policy Statement as contravening condition E1 on the ground that (without more) it was capable of restricting lawful speech. This was described during the hearing as the OfS taking an "*absolutist*" approach.

198. Condition E1 states, "*The provider's governing documents must uphold the public interest governance principles that are applicable to the provider*." The PIGP in respect of freedom of speech is, "*VII Freedom of speech: the governing body makes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured with the provider."* [emphasis added]

199. This directly reflects the duty on HE providers in s.43 of the Education (No2) Act 1986, which states;

"(1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers."

200. There is an immediate question as to what "*freedom of speech within the law*" means and how it relates to the need to undertake a proportionality balance within Article 10 of the ECHR, in order to comply with s.6 of the Human Rights Act 1998 ("*HRA*").

201. Article 10 ECHR states;

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

202. The importance of freedom of speech in a democratic society is hard to overstate. In *R (Carlile) v SSHD* 2015 AC 945 Lord Sumption at [13] explained that it was one of the core rights protected by the ECHR, and the more important the right the more difficult it would be to justify any interference. At [73] Lord Neuberger said, "*the importance of freedom of expression is fundamental in a modern democratic society and that political free speech is particularly precious."* However, Lord Neuberger went on to point out that Article 10 is not an unqualified freedom.

203. There did at one point appear to be an in principle dispute between the parties as to whether securing freedom of speech *"within the law"* incorporated undertaking a proportionality balance, and the degree to which, if at all, the University could restrict speech that was not contrary to criminal or civil law restrictions (save for the HRA), i.e. what I will call below *"lawful speech"*. Although each party says that the other has changed its position, in practice they appear to have reached a common position. The position of the Intervener was different, and I will deal with that below at paragraph 212.

204. The degree to which freedom of speech can lawfully be interfered with where there is no statutory right to do so was considered in *R (Miller) v College of Policing* [2022] 1 WLR 4987 at [56], where Dame Victoria Sharp said;

"…, there are a great many areas of common law, which lawfully interfere with free speech rights, and are unsupported by primary legislation - common law contempt of court and common law breach of confidence being two such examples. It is not the case, therefore that as a matter of principle, any interference with free speech can only be lawful if there is a statutory basis for it. Indeed if there were such a principle, this would be a much more stringent restriction upon executive action than articles 8 and 10 of the Convention, and large swathes of the common law would become inoperable."

205. The OfS accepts that the University would not be in breach of condition E1 or s.43 Education (No2) Act 1986 if in appropriate circumstances it restricted lawful speech, where it would not be *"reasonably practicable"* not to impose such restrictions. The double negative makes this proposition complex, but an example would be where the speech gave rise to real difficulties teaching at the University, and there was no reasonably practicable way to overcome the difficulties other than by limiting or preventing lawful free speech. This was close to the facts considered in *R (Ben-Dor) v University of Southampton* [2016] EWHC 953, where the Court held that cancelling a conference where there was risk to public order was a proportionate decision under Articles 10 and 11.

206. The OfS also stated in oral submissions that the three-stage test outlined in RA24 (published on 19 June 2025), which includes a proportionality assessment, is correct and applicable. Although RA24 was promulgated after the FD, the parties agree that it sets out the steps that have to be undertaken in order for the *"freedom of speech duty"* to be met. Paragraph 5 of the summary in RA24 is set out above at paragraph 75 and outlines the three stages:

"*Step 1:* ***Is the speech 'within the law'?*** *…*

Step 2: ***Are there any 'reasonably practicable steps' to secure the speech?*** *If yes, take those steps. Do not restrict the speech …*

Step 3: ***Are any restrictions 'prescribed by law' and proportionate under the European Convention on Human Rights?****"*

207. Therefore, in effect, an HE provider will have complied with the duty under condition E1 and the PIGP if it has taken reasonably practicable steps to secure the speech, and has acted proportionately in any restrictions it imposes on freedom of speech.

208. The guidance on Step Two (reasonably practicable steps) is set out in RA24 at paragraphs 55-123. The complexity of the issues under this topic and the need to balance different interests is manifest, not least by the length of the guidance. Paragraph 99 is relevant, even though it is referring to condition E6, which was only introduced after the FD. It shows that the OfS accept the need to consider the potential impacts of free speech on others;

"99. Providers and constituent institutions will wish to have robust anti-bullying and anti-harassment policies. The legal duty to take reasonably practicable steps to secure freedom of speech does not prevent them from doing so. Rather, institutions must ensure that these policies are carefully worded and implemented in a way that respects and upholds their free speech obligations. In doing so, particular regard and significant weight must be given to the importance of free speech. Wherever possible, any restrictions should be framed in terms of the time, place and manner of speech, rather than the viewpoint expressed. (See paragraph 109 below)." [emphasis added]

209. RA24, paragraphs 106 and 107, set out the relevant factors in respect of the essential functions of the HE provider, and when a provider may be justified in interfering with lawful speech in order to secure those functions;

"106. Whether steps or speech interfere with the essential functions of higher education is likely to be relevant to whether the steps are reasonably practicable. 'Essential functions' means, learning, research and the administrative functions and resources that those three things require.

107. If taking a step to secure speech (including permitting the speech) prevents the continuation of these functions, this would make it less likely that the step is reasonably practicable. We recognise that providers and constituent institutions may have to regulate lawful expression, where this is required for their essential functions. This might mean, for instance, that it may in certain circumstances not be reasonably practicable to enable protests that prevent learning, teaching or research." [emphasis added]

210. The University accepts the in principle approach set out in the three steps above. The OfS in its Skeleton Argument appeared not to accept that a proportionality balance under Article 10(2) should be undertaken. At paragraph 75(b) it stated; *"the language of Article 10(2)/lawful justification finds no basis in the statutory language of s.43 […] Parliament did, however, make provision for balancing relevant considerations that may justify restrictions on lawful speech within s.43 (and as reflected in the language of the Freedom of Speech PIGP) by means of the "reasonably practicable" standard."*

211. However, Ms Carss-Frisk submitted orally that it is necessary to *"balance relevant considerations"* under the *"reasonably practicable"* test. It seems to me that reasonable practicability thus encompasses the same issues that would go into a proportionality assessment. Therefore, as I understand it, in practice both parties reach the same end result in terms of the approach that has to be taken. The parties' disagreement is over whether the OfS applied this approach when finding a breach of condition E1.

212. However, the FSU disagrees with the Claimant that the term *"freedom of speech within the law"* incorporates a proportionality analysis as provided for in Article 10(2) ECHR. It broadly joins with the

OfS in the interpretation of *"reasonably practicable"*, but it does not agree with what is described as *"step 3"* in the OfS's RA24 (paragraph 37, FSU Submissions).

213. The FSU relies on HE(FS)A 2023, which amended HERA to include a definition of *"freedom of speech"* at s.A1(13): *"(13) In this Part— references to freedom of speech are to the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the Convention as it has effect for the purposes of the Human Rights Act 1998) by means of speech, writing or images (including in electronic form)."*

214. Mr Cross argues that s.A1 of HERA can be relied upon as an aid to interpreting the s.43 Education (No2) Act 1986 obligations. He relies on two authorities (paragraph 36(c), footnote 27, FSU Submissions). First, *Attorney-General v Clarkson* [1900] 1 QB 156, where Sir F. H. Jeune said at [165];

"Our duty is to interpret the meaning of the Legislature, and if the Legislature in one Act have used language which is admittedly ambiguous, and in a subsequent Act have used language which proceeds upon the hypothesis that a particular interpretation is to be placed upon the earlier Act, I think the judges have no choice but to read the two Acts together, and to say that the Legislature have acted as their own interpreters of the earlier Act."

215. Second, *Retail Ltd v Dixons Retail Group Ltd* [2020] EWCA Civ 671, where Sir Geoffrey Vos said;

"57. In the course of argument, a lengthy debate took place as to whether or not it was appropriate to use later primary and delegated legislation to interpret earlier legislation. Many authorities were cited, most of which were referred to in customarily erudite passages from Bennion on Statutory Interpretation at sections 24-19 and 26-10 under the respective headings: "Inferences from later Acts" and "Law should be coherent and self-consistent". The principle stated under section 24-19 is that "[w]here the legal meaning of an enactment is doubtful, subsequent legislation on the same subject may be relied on as persuasive authority as to its meaning". It is perhaps sufficient to record that Lord Sterndale MR in Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 2 KB 403 at page 414 emphasised the point that the legislation being construed had first to be shown to be ambiguous when he said:

> *"I think it is clearly established in Attorney-General v Clarkson [1900] 1 QB 156 that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier".*

58. The problem here is that the earlier legislation in rule 31(4) is not, I think, ambiguous. It is only if you reason backwards from the later legislation in rule 119 that it appears that it might be."

216. Mr Cross also relies on external aids, such as the Explanatory Notes to the Bill and one passage of the Parliamentary consideration of HE(FS)A 2023. Earl Howe, the Promoter of the Bill in the Lords, said, *"Freedom of speech is a term that has been used in domestic legislation in a higher education context since the Education (No. 2) Act 1986. It is well understood in that context and there is no intention to change its meaning in this Bill."*

217. If it is accepted that s.A1 of HERA (as amended by HE(FS)A 2023) informs the interpretation of s.43 Education (No2) Act 1986, then Mr Cross notes that what is referred to in s.A1 of HERA is *"Article 10(1)"* specifically. What is not referred to is the requirements under Article 10(2), which would include a proportionality assessment (paragraph 27(e), FSU Submissions). Therefore, *"freedom of speech"* in s.A1 of HERA and s.43 Education (No2) Act 1986 means all speech falling within the definition of Article 10(1), rather than all speech *except that which can be restricted under Article 10(2)*. The only speech that falls outside of Article 10(1) is a limited class of speech aimed at the destruction of any ECHR right or freedom, pursuant to Article 17 ECHR (paragraph 25, FSU Submissions); and, as stated

by Choudhury P in *Forstater v CGD Europe* [2022] ICR 1 at [59], *"The level at which Article 17 becomes relevant is clearly (and necessarily) a high one."*

218. Once it is established that *"freedom of speech"* has this broad meaning, it is necessary only to consider whether the speech is prohibited by a *"law"* in the ordinary sense of that word. As Mr Cross says, *""[t]he law" here must mean the body of domestic law as made by Parliament or the courts […] As to what is "within" the law, the context dictates that something is "within the law" if it is not prohibited by a law: whether in statute or which forms part of the common law"* (paragraph 28, FSU Submissions).

219. Therefore, the FSU submit that *"freedom of speech within the law"* protects all speech that is not prohibited by domestic law, or Article 17 ECHR, so long as it is reasonably practicable for the speech to be protected. It necessarily follows that the FSU believes that the three steps outlined in RA24 are incorrect. Only a two-step approach is necessary.

220. I record the Intervener's position for completeness. Given that the submission that no proportionality balance under Article 10 is required is not raised by the parties, it is not strictly necessary to determine the issue. However, it does impact on the arguments under this Ground and in what way the OfS may have erred in law in its approach to freedom of speech within the law.

221. For the avoidance of any doubt, I agree with the position of the University and the OfS, that in order to determine whether the E1 condition is met, it is necessary to consider the three steps, including the proportionality balance. This is for two reasons. First, if the asserted speech interfered with a person's other rights under the ECHR, most obviously Article 8, then an HE provider would have to consider proportionality in order to meet its duty under s.6 of the HRA, otherwise it would potentially be acting unlawfully. The HRA is domestic law, and the duty to comply with s.6 HRA applies to the University, as it would to any other public authority. Second, and in any event, as I explain at paragraphs 249-250 below, in my view whether it is reasonably practicable to protect free speech (a matter which the FSU and the OfS accept to be relevant), and the proportionality test, are likely to turn on the same factual matters, so in practice the two steps largely if not wholly elide.

222. Returning to the University's submissions, the question is whether the OfS in the FD misdirected itself as to whether there was a breach of condition E1. The starting point is that pursuant to condition E1 the governing documents have to be read as a whole. The OfS accepts this point, which is largely the focus of Ground 3A. It also accepts that it is necessary to consider the Policy Statement itself as a whole.

223. The University accepts and has done since (at the very latest) 29 May 2024 that the Positive Representation Statement in the 2018 version of the Policy Statement would have been in breach of condition E1 if it was a governing document. The Positive Statement was removed in August 2022, within days of Professor Roseneil being appointed, as stated at paragraph 82 above. Although that does not mean that there was a lawful finding of breach of condition E1 in relation to the 2018 version, because of the issues under other Grounds, it does mean that this Ground focuses on the versions without the Positive Representation statement, i.e. 2022 and 2023 (and 2024, see Ground 5A).

224. In relation to those versions of the Policy Statement, the University argues that, although the approach set out in RA24 is accepted by the OfS, the OfS failed in the FD to properly apply the three steps and have in practice applied an "*absolutist*" approach, in other words that if there is any interference (or any potential for interference) with lawful speech then the Policy Statement breaches condition E1.

225. Mr Buttler submits that in order to find a breach of condition E1 the OfS needed to do an analysis analogous to that set out by the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at [20];

"…the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

226. Mr Buttler submits that if that exercise is undertaken in respect of the Stereotyping Statement and the Disciplinary Statement, then it is plain that the tests in the three steps are met, and the OfS misdirected itself in the FD in respect of the meaning and approach of *"freedom of speech within the law"*, despite accepting what is set out in RA24.

227. First, the Stereotyping Statement only applies to the curriculum, the setting of which is an essential function of the University. Therefore, this is an area where the University has to make discretionary judgements, but will necessarily do so subject to the full suite of other policies. What is prohibited are *"stereotypical assumptions"*, which means in effect over-simplified ideas about trans people. Such assumptions would not uphold high academic standards. The University is not seeking to restrict discussion of stereotypes, but rather the reliance on them, or attempts to reinforce such simplified ideas about trans people in the curriculum. A policy restricting teaching based on the intentional promotion of stereotypes is a proportionate means of advancing the University's core function of promoting excellence in teaching and learning (Skeleton paragraph 67(2)).

228. The FD in Annex C, paragraphs 65-69, and in particular paragraph 69, does not undertake the proportionality exercise required by RA24 and accepted by the parties to be the correct approach. Rather it focuses on whether the Stereotyping Statement might catch lawful speech;

"69. The amended Stereotyping Statement in the 2022 version of the TNBEPS introduced a requirement linking the prohibition on the curriculum from reinforcing stereotypical assumptions to where there was an intention to do so. Although this narrowed the restriction by way of a new requirement to demonstrate intent to reinforce stereotypical assumptions, in the absence of adequate safeguards, the Stereotyping Statement still restricted lawful speech. Therefore, this change did not remedy the issues arising from the Stereotyping Statement that gave rise to a breach of condition E1." [emphasis added]

229. Second, in respect of the Disciplinary Statement, Mr Buttler submits that this largely covers unlawful speech (harassment or bullying). However, there may be a small category of cases where, as an example, harassment may not cross the line into being contrary to the Public Order Act 1986 or Harassment Act 1997, and therefore the speech may remain lawful. However, the aim of preventing harassment or bullying on the basis of transphobia, even it if it does not step over the line into unlawful action, is plainly a legitimate one and would meet step three of RA24.

230. The FD in Annex C, paragraphs 82-4 and paragraphs 90-96, does not undertake the proportionality exercise in relation to the Disciplinary Statement. Rather, it again focuses on whether the Disciplinary Statement might catch lawful speech, particularly at paragraph 93;

"The 2023 version of the TNBEPS also removed the wording of 'transphobic propaganda'. However, it included the statement that '[a]ny abusive, bullying, or harassing material (e.g. written materials, graffiti or recordings) will be removed from University premises.' It is not clear whether the new definition which applied to the Disciplinary Statement is also intended to apply to 'abusive, bullying or harassing material'. However, even on the assumption that it does, as explained above, the definition that has been included in the 2023 version of the TNBEPS is capable of capturing lawful speech. Further, by stating that '[a]ny abusive, bullying, or harassing material (e.g. written materials, graffiti or recordings) will be removed from University premises' the provider indicated that staff and students need not only to regulate their speech but also to regulate any materials they may wish to read, discuss, share, or otherwise utilise." [emphasis added]

231. Third, the Safeguarding Statement introduced in the 2023 version ensured that staff could test *"received wisdom"* and put forward new ideas, including controversial ones. Further, the Safeguarding Statement expressly says, "*nor should this Policy Statement be taken to justify disproportionate restrictions on freedom of speech."*

232. In the FD this is dealt with at Annex C at paragraphs 77-79 and paragraphs 89-94. The FD finds that, while the Safeguarding Statement has some safeguarding effect, it is *"undermined by"* the continued inclusion of the Stereotyping, Disciplinary and Transphobic Propaganda Statements. It concludes at paragraph 96;

"96. The TNBEPS Safeguard Statement purports to safeguard freedom of speech via the inclusion of 'nor should this Policy Statement be taken to justify disproportionate restrictions on freedom of speech'. Whilst this must have some safeguarding effect because it confirms that the provider will not permit disproportionate restrictions of lawful speech, it is inadequate because it is undermined by the continued inclusion of the Disciplinary Statement, and the restriction on 'abusive, bullying or harassing material' which replaced the Transphobic Propaganda Statement. Together, these imply that the provider considers these restrictions (which for reasons explained above capture lawful speech) to be a proportionate restriction on freedom of speech. Therefore, students and staff, are likely to continue to be directly restricted, and chilled, for reasons explained above."

233. Ms Carss-Frisk starts by submitting that the FD was a decision taken by a regulator, not a court, and should be approached as such. She relies on *Corkish v Wright* [2014] EWHC 237 at [12] per Popplewell J;

"12. Decisions of lay administrative tribunals should be interpreted with a degree of benevolence (see e.g. R (Siborurema) v Office for the Independent Adjudicator [2007] EWCA Civ 1365 [2008] ELR 209 at [79]). Such decisions should not be construed as if they were statutes or court judgments, nor subjected to pedantic exegesis (see Osmani v Camden LBC [2005] HLR 325 at [38(9)] per Auld LJ)."

234. She submits that in the FD the OfS did undertake an appropriate legal analysis by considering whether the Policy Statement provided for reasonably practicable steps to be taken in order to protect freedom of speech. She relies upon paragraphs 25 and 27 of Annex C, in the section covering the OfS's approach;

"25. The OfS has interpreted the duty to take reasonably practicable steps in order to ensure freedom of speech within the law to include deciding not to take a step which would have an adverse impact on freedom of speech without compelling lawful justification.
…

27. For the purposes of assessing whether the TNBEPS (2018, 2022 and 2023 versions) upheld the freedom of speech public interest governance principle, we have considered the extent to which: a. the contents of the policy expressly provide for steps to be taken that are likely to directly or indirectly undermine freedom of speech within the law…b. this policy fails to provide for reasonably practicable steps that would facilitate securing freedom of speech within the law, e.g. because of inadequate content or a lack of content."

235. In relation to the assessment under Article 10, Ms Carss-Frisk referred to the FD at Annex, H, paragraph 10;

"10. The OfS has seen no credible evidence, including in reviewing as part of the investigation the decision-making documents underpinning the TNBEPS, that demonstrates that the provider assessed the proportionality of these potential interferences with Article 10 rights, or that the potential interferences were themselves proportionate. The OfS has wider regulatory concerns that there is a risk that the provider did not in fact carry out a proportionality assessment, and that these potential interferences with Article 10 rights could be disproportionate and therefore unlawful."

236. In respect of each of the offending statements she refers to parts of Annex C, where the FD considered whether or not there continued to be a risk of impact on freedom of speech, without proportionate protection. I set these out in detail because there is no other way to encapsulate the points being made:

a. She submits that the Positive Representation Statement (2018 version) captured lawful speech, had a chilling effect and failed to provide adequate safeguards. However, subject to the other Grounds, the University accepts that the Positive Representation Statement should never have been included and do not seek to defend it. In principle therefore it could have given rise to a breach of condition E1, subject to those other Grounds.

b. Ms Carss-Frisk submits that the Stereotyping Statement (2018 and 2022 versions) imposed a *"blanket ban on the curriculum"*, such that *"academics may have excluded content from the curriculum that contained lawful speech which was, could be, or may be perceived to be 'stereotypical assumptions about trans people'",* and that ban, combined with the risk of a disciplinary process for breach of the Policy Statement, created a chilling effect, and *"staff and students may have self-censored and avoided discussing anything that was, could be, or may be perceived to be, 'stereotypical assumptions about trans people'"* (FD paragraph 67). As a result, the OfS concluded that the University had failed to *"a. set out clearly the remit or limits of the restriction on freedom of speech that the Stereotyping Statement permitted, in particular by making clear that it did not capture lawful views; and b. ensure adequate effective safeguards for freedom of speech were built into either the 2018 or 2022 versions of the TNBEPS or one of the provider's other governing documents"* (FD paragraph 68). The University subsequently amended the Stereotyping Statement in the 2022 version. The OfS considered whether the amended Stereotyping Statement was sufficient to alter its analysis, but rejected that argument. Whilst accepting that the additional intention requirement "*narrowed the restriction by way of a new requirement to demonstrate intent to reinforce stereotypical assumptions, in the absence of adequate safeguards, the Stereotyping Statement still restricted lawful speech*" (FD paragraph 69).

c. The OfS also considered whether the Safeguarding Statement, added to the 2023 version, was sufficient to alter its analysis in relation to the amended Stereotyping Statement. It reasoned that the additional wording (*"nor should this Policy Statement be taken to justify disproportionate restrictions on freedom of speech"*) *"must have some safeguarding effect because it confirms that the provider will not permit disproportionate restrictions of lawful speech"*, but concluded that *"it is inadequate because it is undermined by the continued inclusion of the Stereotyping Statement in the TNBEPS"* and this *"impl[ied] that the provider considers the Stereotyping Statement (which for reasons explained above captures lawful speech) itself to be a proportionate restriction on freedom of speech"* (FD paragraph 78).

d. The Transphobic Propaganda and Disciplinary Statements (2018 and 2022 versions) imposed restrictions which were unclear in scope, and included the terms *"transphobic propaganda"* and *"transphobic abuse"* which were capable of capturing lawful speech (FD paragraph 83). In addition, the examples of *"transphobic abuse, harassment or bullying"* set out in the Disciplinary Statement (which included *"name-calling/derogatory jokes, unacceptable or unwanted behaviour, intrusive questions"*) were capable of capturing lawful speech (FD paragraph 83). The OfS concluded that these statements created/create a chilling effect because *"staff and students were likely to have self-censored…in order to avoid contravening the policy and potentially facing disciplinary proceedings"* (FD paragraph 83). As a result, the OfS concluded that the University had failed to *"a. set out clearly the remit or limits of the restriction on freedom of speech that the Disciplinary and Transphobic Propaganda Statements permitted, in particular by making clear that it did not capture lawful speech/views; and b. ensure adequate effective safeguards for freedom of speech were built into either the 2018 or 2022 versions of the TNBEPS or one of the provider's other governing documents"* (FD paragraph 84).

e. The OfS considered the amendments to the 2023 version, which inserted a definition of *"transphobic abuse, harassment or bullying"* and replaced the Transphobic Propaganda Statement.

Whilst the OfS acknowledged that the definition *"narrows the restrictive effect"*, it reasoned that *"even applying the objective definition, the terms 'transphobic abuse, harassment or bullying' and 'abusive, bullying or harassing material' are still capable of capturing lawful speech because as above explained the definition is not limited to existing prohibitions in law"* (FD paragraph 90). The OfS considered the University's Representations on the definition adopted, which focused on specific legal sources, and did not change its analysis (FD paragraphs 91-92). The OfS also considered whether the Safeguarding Statement altered its analysis. It did not: given the issues with the wording which remained, *"Together, these imply the provider considers these restrictions (which for the reasons explained above capture lawful speech) to be a proportionate restriction on freedom of speech"* (FD paragraph 96).

Conclusions on Ground 3D

237. In order to determine whether the Policy Statement breaches condition E1 and the freedom of speech PIGP it is necessary to read the document as a whole. That is how the document was intended to be read and applied, and it is also a basic principle of construction of any document such as this.

238. It is also necessary to read it as an objective reader, and in a legally correct manner. It is a policy and not a statute, and should be considered in that light. However, the Court should interpret policy statements objectively in accordance with the language used, read in their proper context (*Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; [2012] P.T.S.R. 983, at [17]). Ms Carss-Frisk urged the Court to take a *"real world"* approach, by which I believe she meant that the Court should consider the Policy Statement as it might be read by a fairly legally unsophisticated reader who was concerned about their free speech, and consider whether they would feel *"chilled"* in respect of their freedom of speech. However, for the purposes of deciding whether the Policy Statement breaches condition E1, it is necessary to consider the Policy Statement's meaning in an objective manner. Although the Policy Statement, in all its versions, is a complicated document to read and understand, it does need to be remembered that it is trying to cover and give guidance in a highly contentious area, where the University was seeking to guide staff and students through a legal and ethical minefield. The very complexity of the OfS's own regulatory documents and of the three-step approach relied upon by the OfS illustrates the difficulty of drawing up a simple document, which will meet the various competing legal and good governance requirements. It is also relevant that the Policy Statement is trying to deal with a range of potential factual scenarios whilst remaining nuanced and legally watertight.

239. I note that the OfS itself promotes a highly structured and objective approach in the RF and RA24. Therefore, on its own case, taking a subjective approach of what someone in the *"real world"* would think seems contrary to the OfS's own requirements.

240. Applying that objective approach, both the Disciplinary and Transphobic Propaganda Statements and the Stereotyping Statement are, in the 2023 and 2024 versions, subject to the Safeguarding Statement. The Safeguarding Statement complies with the three-step approach, which the OfS itself advocates and supports, because it expressly requires the University to take reasonably practicable steps to secure free speech and provide proportionate justification for any restrictions on free speech.

241. The difficulty with paragraph 96 of Annex C is that, having acknowledged the role of the Safeguarding Statement, it is said by the OfS that it is undermined by the continued inclusion of the Disciplinary, Transphobic Propaganda and Stereotyping Statements. However, once it is understood that any disproportionate interference with freedom of speech which might occur under those parts of the Policy Statement is itself prevented by the Safeguarding Statement, the interference with freedom of speech in breach of condition E1 necessarily falls away. That is the critical consequence of reading the Policy Statement as a whole and why the correct approach must involve a reasonably well-informed and objective reader, who considers the whole document. Such a reader would also have read FOSCOP, which further protects freedom of speech (see Ground 5C below).

242. It is in my view clear, reading Annex C fairly and as a whole, and in particular by reference to a number of the paragraphs relied upon by Ms Carss-Frisk above, that the OfS was focusing on the fact that the Policy Statement might capture *"lawful speech"*, see paragraphs 67, 68, 69, 74, 78, 79, 83, 84, 89, 90, 93, 95. All these paragraphs rely on the fact that the Policy Statement might still capture *"lawful speech"* as grounds for finding a breach of condition E1. However, the OfS now accept that it may be legitimate to prevent *"lawful speech"*, whether because it is not reasonably practicable to protect it, or because such a restriction would be justified under Article 10(2).

243. Ms Carss-Frisk submits that it was for the University to provide *"compelling justification"* to show why it was not reasonably practicable to secure the free speech. However, that is part of the proportionality balance that the University were accepting and had effectively incorporated into the Policy Statement by 2023. In referring to proportionality under Article 10, the University (on a proper legal analysis) is necessarily encompassing the need for a high level of justification in the light of the importance of Article 10 rights, as set out by Lord Neuberger in *Carlile*.

244. In my view the difficulty with Ms Carss-Frisk's submission as to the height of the justification required is that the FD concerns a Policy Statement, not a fact-specific scenario, such as in *Ben-Dor*. In a fact-specific decision, it is possible to determine on the facts whether a proportionate approach has been taken to the interference with Article 10. It is undoubtedly correct on the caselaw, such as *Miller*, that a high level of justification would be required to interfere with free speech, but whether that test is met is extremely difficult to answer in the abstract, without concrete facts. That is why the courts are so cautious about considering hypothetical or *ab ante* challenges in this field. The Safeguarding Statement does not refer to a *"compelling justification"*, but it does say that any person concerned that their freedom of speech has been *"unjustifiably restricted"* may lodge a complaint and, per FOSCOP, that complaint would need to "*outweigh the strong interest in promoting free speech"*. That encompasses the correct test under Article 10 and therefore meets step three of the OfS's approach.

245. In determining whether the OfS erred in its decision I have to read both Annex C of the FD and the Policy Statement as a whole, and I have to consider an objective interpretation of the Policy Statement. The interpretation of the Policy Statement is a matter for the Court and there is no deference owed to the OfS (or indeed the University), see *Tesco v Dundee* at [20].

246. On that basis I find that the OfS erred in Annex C of the FD, in its interpretation of the 2023 Policy Statement. Firstly, it relied on the restriction of *"lawful speech"*, when such a restriction could itself accord with condition E1. Secondly, it failed to read the Policy Statement as a whole, and was wrong to conclude that the Safeguarding Statement did not ensure that the three-stage approach was to be undertaken before the Policy Statement would support the infringement of the right to freedom of speech. Thirdly, and this is the subject of Ground 5C, it failed to read the Policy Statement alongside FOSCOP and appreciate that the Policy Statement was merely one of a suite of documents, which protected freedom of speech.

247. The 2022 version removed the Positive Representation Statement. It still included the Stereotyping, Transphobic Propaganda and Disciplinary Statements, but did not include the Safeguarding Statement, as this was not introduced until 2023. Therefore, the second point above does not apply. However, in my view, the conclusion remains the same. The first and third points remain. In determining whether the 2022 version breaches condition E1 the OfS relied on its ability to encompass *"lawful speech"*, where the OfS accepted in the RA24 that lawful speech could, in appropriate circumstances, be restricted. This is made clear in FOSCOP. Therefore, the FD's reliance on the restriction on "*lawful speech*" was a misdirection in respect of the 2022 version of the Policy Statement.

248. Ms Carss-Frisk submits that the failure to make clear that restrictions could only be made so far as "*reasonably practicable*" in the 2022 version is a critical point in the OfS's conclusions. In my view, and this also goes to the substance of the FSU's arguments, once it is accepted that lawful speech can be restricted when reasonably practicable steps to preserve it cannot be taken, then the OfS and the FSU's arguments about the 2022 version collapse. I agree with Mr Buttler at paragraph 227 above that

the Stereotyping Statement is necessarily a question of judgement, where a proportionality balance is inherent and is subject to the other policies, including those related to academic freedom. The Disciplinary Statement is subject to the University procedures, which necessarily encompasses FOSCOP and the protections for academic freedom set out under Grounds 3C and 4. Therefore it is only the Transphobic Propaganda Statement where the issue of whether there is breach of condition E1 truly arises. However, assuming that the Propaganda Statement could restrict lawful speech, it is subject to the proportionality balance in FOSCOP. Therefore, Annex E paragraph 84 misdirects itself when it says that the other governing documents do not set out the limits on the restrictions on freedom of speech in the Transphobic Propaganda Statement.

249. For completeness, I do not consider that the FSU's argument that there is no scope for a proportionality balance changes or adds anything to the conclusions. The FSU submit that *"freedom of speech within the law"* is only subject to a test of whether it is reasonably practicable to protect the free speech and therefore step three should not be applied. However, in my view, step three necessarily encompasses the question of whether the University could have taken "*reasonably practicable steps*" to protect free speech. Therefore, the omission of those words in the 2022 version does not lead to a change in the analysis. Whether an interference with free speech is lawful because there are no reasonably practicable steps to protect it, or because the interference is proportionate, elide into the same factual analysis.

250. Under limb (iii) of the *Bank Mellat* analysis of justification under Article 10(2), the decision-maker (or court) must consider whether there are *"less intrusive means"* by which free speech can be protected. It is quite hard to do the analysis without real facts, but if there is an interference with free speech by the University then the factual issues as to whether there are "*reasonably practicable steps*" to allow the free speech to go ahead, or alternatively whether there are *"less intrusive means"* to prevent the interference, will turn on the same factual issues. One example might be a situation where a lawful speech which might fall within the Disciplinary Statement (perhaps a gender critical feminist lecture which somebody objects to) is allowed to go ahead on the condition that it is read in advance by the University. That would be less intrusive than preventing the lecture, and would also be a reasonably practicable step which would largely protect free speech but balance any Article 8 rights. I am not speculating as to whether this is a realistic scenario or not, but rather seeking to show that the two issues are likely to elide. The point is also made by the analysis of Whipple J in *Ben-Dor,* where at [71] onwards she undertakes an analysis of the *"less intrusive means"* test, which in effect is asking the question of whether there are reasonably practicable steps that could have been taken to protect the free speech.

251. For these reasons I conclude that the OfS misdirected itself in Annex C on whether the 2022 and 2023 versions of the Policy Statement failed to protect *"freedom of speech within the law"*.

Grounds 3C and 4

252. The OfS found at FD Annex C that condition E1 had been breached in respect of the academic freedom PIGP, that "*Academic staff at an English higher education provider have the freedom within the law;*

a. To question and test received wisdom; and

b. To put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges they may have at the provider." [emphasis added]

This wording precisely replicates s.2(8)(c) of HERA.

253. The OfS found that the 2018 and 2022 versions of the Policy Statement had not upheld the academic freedom PIGP because, if an academic member of staff had breached either the Positive Representation Statement, the Stereotyping Statement, or the Disciplinary and Transphobic Propaganda Statements,

"An academic member of staff would have been in breach of this policy and could have faced disciplinary proceedings" and *"Statute VII did not adequately safeguard staff from disciplinary action."*

254. Mr Buttler submits that to breach the principle of academic freedom in the PIGP it is necessary that the academic is "*in jeopardy*" of losing "*their job or privileges*", and "*in jeopardy*" means at risk of losing the job or privilege. That is a very specific requirement and does not encompass other lesser risks, such as the risk of disciplinary proceedings. The totality of the University's documents makes it entirely clear that an academic is not at risk of either losing their job or privileges if they rely upon their right to academic freedom.

255. In the University Statutes at VII.6 it states;

"6. In determining the procedures to be adopted under Statutes VII.3 and 4, the Council shall apply the following guiding principles:

(1) to uphold the right of any member of staff to express political, religious, social and professional views, both privately and in public, provided that this is within the law and is done explicitly in his or her own name and not in that of the University;

(2) to ensure that academic staff have freedom, within the law, to carry out teaching and research, including the publication of the outcomes of research, in a way which questions and tests established ideas and received wisdom, and presents controversial or unpopular points of view, without placing themselves in jeopardy of losing their jobs or privileges;

(3) to enable the University to provide education, promote learning and engage in research efficiently and economically, while seeking, so far as practicable and consistent with that aim, to maintain staff in employment;

(4) to have due regard to the need to avoid unlawful discrimination and to advance equality of opportunity for staff;

(5) to apply the principles of justice and fairness;

(6) to ensure that complaints are resolved at as early a stage as possible and within a reasonable timescale." [emphasis added]

256. The Condition of Service for all academics refers them under Clause 1 to the provisions of the University Charter and Statutes. Therefore, no member of staff could be disciplined in any way that impacts upon their academic freedom.

257. It is clear from the FD that the OfS was not suggesting that a member of staff might lose their job, but rather that they were at risk of disciplinary proceedings being brought.

258. The OfS accepted in paragraphs 52, 53 and 55 of Annex C that the academic would not be at risk of losing their job;

"52. Therefore, it is evident that disciplinary proceedings could be proposed or brought against a staff member for a breach of the TNBEPS. As a result, that staff member could potentially be subjected to the adverse consequences flowing from any potential disciplinary proceedings which could potentially include stress, anxiety and/or reputational damage.

53. The effect of Statute VII is not to rule out the possibility of disciplinary proceedings being brought in the first place. Assuming proper application, Statutes VII.6 and VII.7 would safeguard against disciplinary procedures progressing to an adverse outcome for any staff member being sanctioned for

a breach of the TNBEPS, because the Disciplinary Procedure must be construed to give effect to the guiding principles. However, even in that circumstance, the staff would technically still be in breach of the TNBEPS. The safeguarding effect of Statute VII is therefore limited only to protecting against disciplinary procedures progressing to an adverse outcome, and does not extend to protecting a member of staff from being subjected to disciplinary proceedings.

....

55. Statute VII does not therefore rule out the possibility of disciplinary proceedings being brought against staff, specifically where the complaint pertained to matters of freedom of speech and/or academic freedom. This is because, in order for the provider to determine that disciplinary proceedings should not be brought and/or pursued, a provider would be required to undertake the exercise described at the paragraph preceding this paragraph (i.e. paragraph 52). Were such an exercise to be carried out, given the complexity of these matters, it would take time for that exercise to be completed. Indeed, a full investigation or detailed inquiry may be needed to determine some of these matters. In that time, the affected staff member could potentially suffer the detrimental effects of being subject to disciplinary proceedings themselves, including anxiety, stress and uncertainty." [emphasis added]

259. However, in the FD at paragraph 72 it states;

"Statute VII did not adequately safeguard staff from disciplinary action for the reasons set out at paragraphs 34-56 above."

260. Therefore, the OfS found a breach on the basis of the risk of disciplinary action. While the proceedings would not lead to *"an adverse outcome"* (paragraph 53), it still created the risk that staff might be *"treated less favourably"* (paragraph 64) and the risk of broader *"detrimental effects"* (paragraph 55).

261. The FD at paragraph 52 sets out that the consequence of such disciplinary action could include *"stress, anxiety and/or reputational damage"* for the academic, which goes directly to freedom of speech and could have a chilling effect.

262. Mr Buttler submits that the OfS have either misdirected themselves as to the test in the PIGP, or alternatively have wrongly considered that the risk of disciplinary action is sufficient to amount to a breach of the PIGP. Ground 4 effectively repeats the substance of Ground 3C, slightly rephrasing it as the OfS having misunderstood how the University's disciplinary procedures operate.

263. The disciplinary procedure is set out at Regulation 31 of the University's Regulations. At paragraph 17.3 in respect of any investigation it states;

"17.3 The investigation process will depend on the nature of the alleged misconduct, the initial evidence against the member of staff, and whether the individual has admitted to the misconduct. In cases where the facts are very clear and not in dispute, the investigation will be very short, and it may be appropriate for it to be undertaken by the hearing manager."

264. Ms Carss-Frisk accepts, as she must do from the FD, that if the Statute and Regulations are read properly there is no risk of an academic losing their job. However, she submits that the OfS were entitled to understand the academic freedom PIGP as encompassing the risk of disciplinary proceedings being taken against an academic pursuant to the Policy Statement. The Disciplinary Statement (in the Policy Statement) clearly indicated that a breach of the Policy Statement would be considered a disciplinary offence and action would be taken. She submits that *"in jeopardy"* in the PIGP includes a situation where the academic may be subject to disciplinary action and could result in the loss of the individual's job. She submits that *"things might go wrong"* and in the *"real world"* there is a risk that a breach of the Policy Statement could lead to the person losing their job. Therefore, there was a *"risk"* or *"jeopardy"* of that situation arising.

265. Ms Carss-Frisk makes the same submissions on Ground 4.

Conclusions on Ground 3C and 4

266. The error of law under these Grounds is manifest. The requirement in condition E1 and s.2 of HERA to protect academic freedom by not allowing an academic to be in jeopardy of losing their job is absolutely clear. It does not encompass jeopardy of disciplinary proceedings or of other detrimental effects, such as psychological impacts; nor does it include a *"chilling effect"*, however harmful that might be to freedom of speech, or indeed academic freedom.

267. In order to determine whether such jeopardy exists it is necessary to read the relevant University documents as a whole, and to read them fairly and in accordance with a proper, lawful interpretation (see *Tesco v Dundee*, *supra*).

268. The OfS accepts that if this is done the academic is not at risk of losing their job or privileges by reason of anything in the Policy Statement. That in my view is the end of the matter.

269. Ms Carss-Frisk cannot be correct that the risk that the University might, entirely wrongly, take disciplinary action and then wrongfully dismiss the academic contrary to the Statutes is a material consideration which justifies a finding of breach of condition E1. In determining whether there is a risk of a breach, it is not only the case that the documents must be read objectively and lawfully, but also any public body (such as the University) must be assumed to be intending to act lawfully unless there is very clear evidence to the contrary. Otherwise, it could always be said that there was a risk or jeopardy, because the University in any of its functions might choose to (or inadvertently) act unlawfully. The presumption of legality as applied to public authorities is well known, see *Calder Gravel Ltd. v Kirklees Metropolitan Borough Council* (1990) 60 P. & C.R. 322 where Sir Nicholas Browne-Wilkinson VC said;

"The … presumption of regularity can arise where the validity of an act done by a public authority depends on the existence of a state of facts which cannot, with the passage of time, be proved. The presumption is that the statutory authority has acted lawfully and in accordance with its duty."

270. It therefore follows that, assuming that the University acts lawfully, an academic is not placed in jeopardy of losing their job or privileges and therefore there is no breach of the academic freedom PIGP.

271. Further the reliance on the chilling effect and potential for stress and anxiety are irrelevant considerations in respect of this purported breach.

272. There is a clear error of law and this Ground must succeed.

Ground 5C

273. Ground 5C relates to freedom of speech and to the finding of breach in relation to the 2023 version of the Policy Statement, which was the first version to include the *"Safeguarding Statement"*. The University argues that the OfS misinterpreted the Safeguarding Statement because it fully protected freedom of speech. The FD at Annex C paragraphs 80-81 accepted that the Safeguarding Statement did protect academic freedom in the 2023 version of the Policy Statement, but did not accept that it had the same effect in relation to freedom of speech.

274. In my view it is not necessary to consider this Ground separately because it is wholly encompassed by Ground 3D above. I have found an error of law under Ground 3D, which concerns the role of the Safeguarding Statement, and whether it sufficiently protects freedom of speech. Ground 5C adds nothing to that issue.

Ground 3A

275. This Ground has been somewhat refined by the University. In the Skeleton Argument it is put as the OfS failing to properly consider the University documents as a whole. It was alleged that the USCEC did not properly take into account all the relevant suite of policies that protected freedom of speech (assuming that Ground One was rejected and all these policies fell within the definition of governing documents).

276. In oral argument Mr Buttler focused on the failure by the investigation team to give the USCEC the University's Freedom of Speech Code of Practice FOSCOP, and to expressly refer them to the protective provisions in that document relating to freedom of speech. Therefore, FOSCOP was not properly taken into account.

277. The relevant part of FOSCOP is set out above at paragraphs 91-94. The most important part for these purposes is "*Every member of the University is expected to uphold the right to freedom of speech and the right to academic freedom...".*

278. Mr Buttler submits that it was essential for the FD to consider this part of FOSCOP, because the FD at Annex C, paragraph 51 refers to a breach of the Policy Statement being misconduct which may lead to disciplinary action. However, by failing to refer to FOSCOP, the OfS failed to take into account the fact that it would be a disciplinary breach under FOSCOP not to uphold freedom of speech.

279. Ms Carss-Frisk points to the terms of the FD at Annex C, paragraphs 46 and 50, where reference is made to the *"other governing documents"* and *"governing documents as a whole"*, and further references in the FD to consideration of these other documents. Dr Ahmed says at paragraph 75(a) of his witness statement that the OfS had reserved its position on FOSCOP, by which he appears to mean reserved their position as to whether FOSCOP preserved freedom of speech.

280. Mr Coleman confirms that the USCEC was provided with the University's full Representations, witness statements and supporting documents, and that it was his practice to read and give full consideration to all the papers including the underlying supporting documents, see Coleman paragraphs 27-29.

281. Mr Buttler does not seek to challenge Mr Coleman's statement, but points out that there were 3,000 pages of background documents, and nowhere in the papers sent to the USCEC did the OfS suggest that FOSCOP and the protection within it had any particular relevance to a finding of breach of condition E1. Further, Mr Coleman in his witness statement does not actually suggest that he gave any consideration to the protection of freedom of speech in FOSCOP.

Conclusions on Ground 3A

282. Condition E1 states that *"the providers' governing documents must uphold…."* [emphasis added]. It therefore follows that in finding a breach the OfS had to consider all the documents that were relevant. It is possible that the different documents might pull in slightly different directions, but the legal question for the OfS under condition E1 was whether the governing documents (as understood) as a whole upheld freedom of speech. Otherwise, every document would have to repeat the contents of every other document.

283. In addressing that question FOSCOP was obviously a material consideration. It was the document which specifically addressed and set out the University's policy on freedom of speech. To put it colloquially, the clue is in the name. The University's position was that FOSCOP met condition E1, and that if FOSCOP, the Policy Statement and the other relevant documents were read together, then there was no breach of condition E1.

284. The OfS's own guidance in RA24 ("*Guidance related to freedom of speech*") contains a section called *"freedom of speech code of practice"*;

> *"167. Providers and constituent institutions must bring their free speech code of practice (as well as the provisions of section A1 of the Act) to the attention of students at least once a year. Beyond this, in connection with the publication and format of the free speech code of practice, the following steps are likely to be good practice. […]*
>
> *169. […] It would be good practice for the statement to be: […]*
>
> > *d. prominently included, or prominently linked to, in any other document stating or explaining any policy that may affect free speech or academic freedom (for instance a bullying and harassment policy, research ethics policy or fitness to practise procedure), along with a statement that in cases of uncertainty, the definitive and up-to-date statement of the institution's approach to freedom of speech is set out in the code."* [emphasis added]

285. Therefore the OfS is itself accepting in its Guidance that the University's *"definitive statement"* on freedom of speech is in FOSCOP. Despite this public position of the OfS, the FD makes no reference to FOSCOP and does not explain whether, and if so why, the OfS did not accept the University's submission on this point. A reference by Mr Coleman to having had all the documents and the Representations and having read them all is inadequate in these circumstances. FOSCOP was so plainly relevant that in my view a failure to refer to it falls into the third category of consideration considered by the Supreme Court in *R (Friends of the Earth) v Heathrow Limited* [2021] 2 All ER 967 [2020] UKSC 52 at [116]-[122], as being *Wednesbury* irrational not to expressly have regard to it. In the language of planning law, the role of FOSCOP was a principal important controversial issue (see *South Bucks v Porter (no 2)* [2004] 1 WLR 1953 at [36]) that needed to be expressly referred to. The OfS had to explain why, despite FOSCOP's terms, there was still a breach of condition E1. Whether one characterises this as a failure to take into account a material consideration, or a failure to provide adequate reasons, matters not on the facts of this case.

286. For these reasons I conclude that the OfS misdirected itself because of its failure in the FD to have proper regard to the FOSCOP.

SECTION J: ISSUE FOUR – SHOULD THE OFS HAVE MADE FINDINGS OF BREACH AND SANCTION (GROUNDS 5A, 6A, 5E AND 5B)

287. This issue covers Grounds 5A, 6A, 5E and 5B. Each of these Grounds assumes that the findings of breach were in themselves lawful, but concern whether formal findings should have been made and sanctions imposed.

288. The relevant parts of the FD are in Annex E.

Ground 5A

289. Ground 5A concerns whether it was wrong in law for the OfS not to address whether the breaches had been remedied by the time of the FD, and in particular the failure to consider the 2024 version of the Policy Statement, which the University says remedied the breach of condition E1, and the correct approvals of the Policy Statement, ESP, and FOSCOP, which the University says remedied the breach of condition E2.

290. For the purposes of this Ground, it is important to go back to the OfS's general duties in s.2 of HERA, see paragraph 59 above. In particular, the general duty in s.2(1)(f) that when performing its functions the OfS must have regard to *"the need to use the OfS's resources in an efficient, effective and economic way"*; and in s.2(1)(g) to undertake regulatory activities in a proportionate manner, *"(ii) targeted only at cases in which action is needed".*

291. These statutory duties are expanded upon and refined in the OfS's RF, including in the *"intervention factors"* set out at paragraph 167 of that document. This states as relevant;

*"**Intervention factors***

167. The OfS will consider a range of factors before deciding whether to intervene, and if so, which form that intervention should take. Not all factors will be relevant in every circumstance, and the OfS will consider the relevant factors in the round when making its decision. The factors include:

a. How significant the risk of a breach is, on the basis of its likelihood and the severity of the impact of the breach should it occur. An intervention is more likely where the OfS considers the risk of breach to be significant, or when a breach has already occurred.

b. The actual or likely severity of the impact of a breach (either from a single instance or a number of instances). An intervention is more likely where: the impact on students is significant (e.g. student study is disrupted, there are breaches to the student contract, a large number or students are affected); the taxpayer's interests have been severely affected (costs have increased affecting value for money); or there is reputational damage to the sector as a whole (and considering fairness to providers that did comply).

c. …

d. The nature of the increased risk or breach and whether a particular intervention would be effective in mitigating the risk or remedying the breach.

e. How the OfS became aware of the increased risk or breach. An intervention is more likely where the provider has not notified the OfS and the OfS has become aware from other sources, such as through its own regulatory activity, whistleblowing, or media reporting.

f. How long the underlying causes of the increased risk or the breach have existed and the extent to which these occurred deliberately or recklessly, or whether there is dishonestly involved. An intervention is more likely where the issues are longstanding, the provider has been deliberate or reckless or where issues have been concealed.

g. Steps taken by the provider to mitigate the increased risk or remedy the breach. An intervention is more likely to be used where a provider has not provided sufficient evidence that it has taken reasonable steps to mitigate an increased risk or prevent or remedy a breach.

h. The likelihood that a breach could happen again, including the provider's history of regulatory compliance. An intervention is more likely to be used where a provider has a history of non-compliance or the OfS has concerns that a breach could happen again.

i. The extent to which the provider cooperates with the OfS's investigations and enquiries. An intervention is more likely where a provider does not fully cooperate with the OfS.

…

n. The extent to which any increased risk or breach has created a lack of confidence in the higher education sector. An intervention is more likely where action taken by a provider or a group of providers has undermined confidence in the higher education sector and therefore affected providers that have complied."
[emphasis added]

292. The importance of considering whether a breach has been remedied in determining enforcement action is further emphasised in Regulatory Advice 15 (originally published in 2020 and then updated) (*"RA15"*) at paragraph 73;

"73. The primary purpose of using our enforcement powers is to ensure that a provider takes necessary actions to comply with its conditions of registration. This is particularly important because a breach of one or more conditions means that there is likely to be a material impact on a provider's students and our view is that a breach must be remedied as quickly as possible. Where a breach is not remedied in a reasonable timescale, the OfS would expect to escalate its interventions in a way that is proportionate to the provider's circumstances and the risks to students."

293. In the FD at Annex E the OfS dealt with the intervention factors in respect of the breaches of conditions E1 and E2(i) and the imposition of monetary penalties. At paragraph 3 the OfS says that the intervention factors support a finding of breach of condition E1; at paragraph 4 they make the same finding in respect of condition E2(i); and at paragraph 5 they say;

*"**Imposition of monetary penalties***

5. Overall, the OfS considers that the intervention factors support a final decision to impose monetary penalties in relation to breaches of conditions E1 and E2(i) because:

a. the concerns that amount to breaches of conditions E1 and E2(i) have already occurred;

b. the impact of the breaches of conditions E1 and E2(i), as above, is considered to be significant and severe, which supports the imposition of monetary penalties to sanction those breaches;

c. the nature of the breaches of conditions E1 and E2(i) is considered to be serious for the reasons set out above, and although a monetary penalty alone would not remedy those breaches, it is an effective sanction to incentivise compliance at this provider (and the sector as a whole if regulatory action taken is publicised). Failure to impose a monetary penalty may suggest to the provider (and the wider sector) that the breach is not significant, which may encourage future non-compliance;

d. the provider did not alert the OfS to the potential breaches;

e. whilst the provider has taken some steps to seek to remedy the breaches of condition E1 and to address the underlying causes/issues, these steps have not been sufficient to remedy the breaches. The OfS has identified no steps that the provider has taken to seek to remedy the breach of condition E2(i) and to ensure that it has adequate and effective management and governance arrangements in place to operate in accordance with its governing documents (and the delegation arrangements set out therein); and

f. responsibility for taking regulatory action in respect of compliance with conditions E1 and E2(i) lies with the OfS." [emphasis added]

294. Under Ground 5A the University argues that the OfS failed to take into account a mandatory material consideration, namely that the University had remedied the alleged breaches. The University submits that *"[FOSCOP 2021] should have been formally approved by the University Council but the omission to do so was immaterial"* (Skeleton paragraph 46(2)), and that, regardless, the 2023 and 2024 versions were approved correctly. In response to the Provisional Decision (*"PD"*) dated 20 March 2024 the University took immediate action by further amending the Policy Statement, FOSCOP and the ESP. Ms Potts, the University's interim chief operating officer, explains that in light of the PD the University convened an extraordinary meeting on 20 May 2024 in which the University Council made the amendments to the 2024 documents, as set out above at paragraph 48. The University responded to the PD on 30 May 2024 and included the revised 2024 documents.

295. In the FD Annex E at paragraph 53 the OfS acknowledges the relevance of steps taken to mitigate or remedy the breach, under intervention factor (g). At paragraph 54 the FD acknowledges that *"In August 2022 and January 2023, the provider did take some steps to seek to remedy the breaches of E1 and address some of the issues with its TNBEPS. However, some issues persisted."* However, in the following paragraphs, it fails to take into account the 2024 revisions, and finds at paragraph 58 that *"this factor supports intervention"* in the form of both the finding of breach and the monetary penalty.

296. At paragraph 61, under intervention factor (h), the PD said, *"some of the issues with the TNBEPS which gave rise to the breach of condition E1 continued to exist as at 20 March 2024 and therefore it is possible that the breach continued beyond that date and could occur again"*. This was then taken into account in supporting a finding of breach and a monetary penalty at paragraph 63.

297. Mr Buttler submits that it is beyond doubt that the breach of condition E2(i) had been remedied some 10 months before the FD (dated 27 March 2025) because, as explained by Ms Potts, the necessary internal laws had been scrupulously followed since 20 May 2024. In respect of condition E1, the University's case was and remains that if there were any breaches in the 2022 and 2023 Policy Statements, this had been remedied in the 2024 version, but there is no reference to this in Annex E.

298. Mr Coleman provides no explanation for this omission. The explanation comes in the witness statement of Dr Ahmed. Dr Ahmed explains that the FD pertained to the period from 1 August 2019 to the point the PD was made on 20 March 2024. He asserts that it would not be appropriate for a regulator to be delayed in finalising a decision purely on the basis that a subsequent change may affect compliance. He asserts that, if it were that way, a regulated entity could circumvent findings by continually updating the relevant position.

299. The OfS also say that it would have taken *"a considerable time"* to assess whether the 2024 Policy Statement was compliant, and the *"process could have gone on indefinitely"*, see Ms Lapworth's second witness statement at paragraphs 23-25. It was therefore reasonable and procedurally fair not to consider the 2024 Policy Statement.

300. Mr Buttler submits that although this might be a fair observation in some circumstances, here the updated position was simple and involved limited further investigation, particularly given that the changes were limited to a few sentences. Further, and in any event, the OfS had had 10 months to consider the position, i.e. from 30 May 2024 until the issuing of the FD in March 2025.

301. He points to the fact that, under intervention factor (h) *("the likelihood of the breach occurring again"*), the OfS at Annex E paragraph 61 had expressly relied on the possibility that the breach could have continued beyond 20 March 2024 and *"could occur again"*. Therefore, they had expressly taken into account the possibility of continued breach, whilst refusing to consider the evidence that pointed in the opposite direction.

302. Ms Carss-Frisk submits that the OfS did expressly consider whether a finding of breach was necessary to achieve compliance with the conditions of registration at Annex E, paragraphs 41-2. Therefore, this factor was considered. At paragraph 82 of the OfS Skeleton it says;

"82. The University alleges that the OfS failed "to consider whether a finding of breach was necessary to achieve compliance with the conditions of registration" (CSkel §77) and thereby failed to consider a relevant factor/acted irrationally. That is incorrect. The FD did, in fact, consider this and concluded: "Findings on breaches and imposition of monetary penalties will act as strong incentives for the provider to address breaches of conditions E1 and E2(i) and ensure compliance in the future in addition to incentivising compliance from other providers" (Annex E, §41). Plainly, the FD cannot be vitiated by reference to a failure to consider a factor which the OfS did consider."

303. The importance to the OfS of finding a breach, regardless of whether it had been remedied, is made very clear in the following passages. In the FD Annex E, paragraph 3(c), the OfS writes;

"finding breaches will incentivise this provider (and others if regulatory action taken is publicised) to ensure they are complying with their regulatory obligations relating to freedom of speech and academic freedom…" [emphasis added]

304. And at FD Annex E, paragraph 5(c) (on "*Imposition of monetary penalties*"), the OfS writes;

"the nature of the breaches of conditions E1 and E2(i) is considered to be serious for the reasons set out above, and although a monetary penalty alone would not remedy those breaches, it is an effective sanction to incentivise compliance at this provider (and the sector as a whole if regulatory action taken is publicised). Failure to impose a monetary penalty may suggest to the provider (and the wider sector) that the breach is not significant, which may encourage future non-compliance." [emphasis added]

Conclusions on Ground 5A

305. Under s.2(1)(g)(ii) of HERA the OfS was under a duty to have regard to the need to target regulatory activities *"only at cases where action was needed"* [emphasis added]. Whether a breach had been remedied must be material to that question, even if it was not necessarily determinative. Further, under the RF intervention factors, particularly (g) and (h), the question of whether a breach has been remedied is plainly a relevant consideration in deciding whether it is necessary to make a finding and impose a sanction.

306. Therefore, under the statute and the RF, the issue of whether the breach had been remedied was a mandatory material consideration which the OfS needed to have regard to, applying the analysis of the Supreme Court in *Heathrow Limited*.

307. The importance of considering whether the breach has been remedied was further emphasised in RA15, see above at paragraph 292. The OfS appears to have ignored, or misinterpreted, its own guidance in failing to take the matter of remedy into account as one of the relevant factors in deciding whether there needed to be a finding of breach and an imposition of a sanction. I return to this issue under Issue Five and predetermination.

308. I find the reliance on incentivisation in paragraph 5(c) of Annex E (in the OfS's Skeleton, paragraph 82) as a way to respond to this Ground extremely odd. The passage set out above at paragraph 302 does not say that the OfS has taken into account whether the University had remedied the breach, but rather that, whether they had done so or not, a finding of breach would provide a strong incentive to other providers. This may be true in terms of providing an incentive, but it cannot form a lawful basis for proceeding to a decision if the breach had already been remedied.

309. The OfS raises two arguments. Firstly, they say that there was a need for finality in the process. This argument might have carried some weight if there were evidence that the University had been deliberately prolonging the process. There is no such evidence and the OfS did not suggest otherwise. There might also have been some argument if the OfS had proceeded to a rapid conclusion after a very long inquiry. However, in reality there were 10 months between the 2024 Policy Statement (20 May 2024) and the promulgating of the FD documents (27 March 2025). That was more than sufficient time for the OfS to read the limited changes in the 2024 documents and decide whether there was a continuing breach.

310. Secondly, […]. To the degree that there was any judgement to be made, or discretionary area, for the OfS in deciding whether to consider the 2024 Policy Statement, the fact that they proceeded to impose a £585,000 fine on the University, without considering whether the breach had been remedied, is in my view relevant. The OfS might (perhaps) have made a finding of breach but then, in determining sanction,

have considered whether the breach had been remedied. In my view that would have still been the wrong approach in law, given the terms of HERA, the RF and the RA15. However, the error is made more egregious by the fact that the OfS imposed a significant fine whilst refusing to consider the up-to-date factual situation. I return to this point under predetermination below from paragraph 352 onwards, particularly paragraph 438.

Ground 6A

311. Ground 6A is a complaint that the OfS failed to disclose Professor Stock's second witness statement (*"Stock 2"*) before making the FD.

312. Before making the PD (dated 20 March 2024) the OfS took a first witness statement from Professor Stock dated 3 November 2023, which was disclosed to the University and upon which they commented in their Representations on the PD, dated 30 May 2024. Professor Stock's evidence is the only direct evidence of harm upon which the OfS relies. The University points to the fact that there was no other evidence from academic staff or students about any harm they had suffered, and the OfS did not seek any evidence from students at the University.

313. The OfS told the University that it was only relying on five paragraphs of Professor Stock's first witness statement, paragraphs 23, 24, 26, 37 and 41.

314. In respect of those five paragraphs the University in its Representations raised a number of factual inaccuracies in respect of what Professor Stock had said. The most relevant of these points was that where Professor Stock had said she had omitted certain work from her teaching because of the Policy Statement, in fact that work had been included in her reading lists for students. This has some relevance because (a) it showed that there were issues of fact which the University appropriately needed to respond to; and (b) those errors undermined the only evidence of *"harm"* that the OfS had relied upon in the PD.

315. However, in respect of the second witness statement, dated 16 December 2024, the University was given no opportunity to respond. When the OfS came to deal with Professor Stock's evidence in the FD, it continued to rely on the *"chilling effect"* on her teaching, at Annex E, paragraph 16. Further, at paragraphs 20-21, the FD stated;

"20. In particular, in her second witness statement, Professor Stock has explained:

a. that despite the fact that the two articles that Professor Stock referenced in her first witness statement as being implicitly excluded did in fact appear on her reading list, she nonetheless felt unable to discuss them;

b. that where the provider has sought to rely on public statements to demonstrate that she did not feel chilled, that this is incorrect, and she maintains her evidence that she felt chilled; and

c. in response to the provider's representations about Professor Stock being reassured, she did not in fact feel reassured by the provider.

21. Key elements from Professor Stock's second witness statement make the following points in response to the provider's representations:

a. In relation to the two gender critical texts which the provider notes were included in Professor Stock's reading lists for the Feminist Philosophy module which she taught at the provider, Professor Stock responds in her second witness statement that:

'[w]hilst it is true that my Sexual Orientation Article and my Economist Article were included in the reading list for Feminist Philosophy, to my best recollection they were not

ever taught by me to students in the classroom, partly due to my nervousness about introducing sex and gender identity as a discussion topic, again for reasons I have explained in my First Statement.'

b. *Professor Stock also makes clear in her second witness statement that 'the Clause [which required the curriculum not to rely on or reinforce "stereotypical assumptions about trans people" and that "any materials within relevant course and materials will positively represent trans people and trans lives"] had a chilling effect on me. Between 2019 and 2021 I was writing, or had forthcoming, 3 pieces that were relevant to Feminist Philosophy that I could have included for teaching…but did not because of general nervousness about this topic, itself generated partly by the Clause…In addition, as above, I skipped over topics in my own teaching about sex and gender, shaped by my knowledge of the oppressive climate at the UoS and the Clause.'"*

…

f. *"Finally, with regard to the provider's representations that Professor Stock was given assurances that the principles of academic freedom were enshrined in the provider's overarching statutes and therefore sat above any other university policies, Professor Stock notes in her second witness statement that:*

i. *The university did not give me assurances that the principles of academic freedom were enshrined in the overarching statutes of the University "and therefore sat above any other university policies"…*

ii. *It was never said to me that a university's duty towards academic freedom sits above other of its duties (if this is now what is being implied)…*

iii. *Merely quoting a university statute at me…was not reassuring to me, since I had seen no evidence of the university taking any adequate action in practice to make sure the principles of academic freedom were fulfilled … As I say at paragraph 26 of my First Statement, I was never assured that I would not face disciplinary action as a result of contravening the Statement.'*

iv. *Professor Stock also disputes the provider's argument that she was explicitly reassured by the Complaints team and her line manager that nothing in the TNBEPS was intended to limit her lawful speech, and that in informal meetings she was verbally reassured that she had the freedom to teach what she wanted and that she would not be subjected to disciplinary measures. In this regard, Professor Stock concludes her second witness statement by noting 'I do not recall any such meetings. I feel it likely that I would remember.'"*

316. Mr Buttler relies on *R (Ramda) v SSHD* [2002] EWHC 1278 at [25];

"25. As to the fairness of the process, two principles come into potential conflict. One is that there has to be finality in decision-making as much as in litigation: the Home Secretary is not required to be drawn into a never-ending dialogue whenever his decision proves unacceptable to a wanted person. The other is that he must not rely on potentially influential material which is withheld from the individual affected. This is a simple corollary of Lord Loreburn's axiom that the duty to listen fairly to both sides lies upon everyone who decides anything (Board of Education v Rice [1911] AC 179) and of Lord Denning's dictum that if the right to be heard is to be worth anything it must carry a right in the accused man to know the case against him (Kanda v Government of Malaya [1962] AC 322). An individual facing a sentence of thirty years if he is extradited and convicted can be entitled to no less consideration. Once it is accepted, as very fairly it is, that the decision letter threw up genuine issues requiring reconsideration, the principle of finality is not breached; but once it is seen that the Home

Secretary made use, in reconsidering the case, of materials which were and in at least one critical respect still are unknown to the claimant, in our judgment the principle of fairness is breached."

317. He also relies on Schedule 3(2) of HERA, which states that before imposing a monetary penalty on a provider the OfS must give notice specifying its reasons for proposing to impose the penalty and give the provider at least 28 days to make representations. The OfS must then have regard to those representations.

318. Further, the RF sets out extremely detailed processes that the OfS will follow during *"information gathering, assessment of evidence and enforcement"*, see p.96 and in particular paragraph 332R;

"332R. Having gathered further relevant information as necessary, the OfS will reach a view about a provider's previous and ongoing compliance with the condition. Where the OfS takes the view that there is or has been a breach of the condition, it will write to the provider to set out the reasons for its provisional decision and set out the evidence it has used to reach this view. The provider is able to submit any further information it considers relevant in a representations process and the OfS will consider this before reaching a final decision."

319. Mr Buttler submits that in light of the significant reliance placed by the OfS on Stock 2 and in particular on the fact that her evidence was the only evidence of actual harm, fairness demanded that the University be given an opportunity to reply to the second witness statement.

320. Ms Carss-Frisk submits that Stock 2 was only sought as a rebuttal of the University's Representations, and not with the intent that it would provide new evidence, see Ms Lapworth's first witness statement at paragraph 174, and the summary at paragraph 89 of the Defendant's Skeleton;

"Stock 2 runs to just over seven pages… It provides a response to: (i) the University's allegation that certain gender critical texts were included on Professor Stock's reading lists, such that the evidence Stock 1 gave about the chilling effect of the TNBEPS was incorrect (§§4-13). Professor Stock maintained "that the Clause had a chilling effect on me" (§13); (ii) the University's allegation that it did in fact champion Professor Stock and her work (§§14-15); (iii) the University's reference and conclusions from certain public statements Professor Stock had made (§§16-20); and (iv) the University's statement that it gave Professor Stock assurances that academic freedom principles were enshrined in its Statutes after she raised concerns about the TNBEPS, and that the Complaints team and line manager also reassured her (§§21-2)."

321. All these points are a response to the University, and a reiteration by Professor Stock that she felt chilled as a result of the Policy Statement. The OfS complied with its obligations in relation to the PD, and the University does not suggest otherwise. As *Ramda* makes clear, there is no obligation to have a *"never ending dialogue"*. Procedural fairness requires that the University should be able to respond to the allegations made against it, not every piece of evidence that is gathered, *R (Miller v Health Service Commissioner for England* [2018] PTSR 801 at [49].

Conclusion on Ground 6A

322. I do not think that the OfS was under a legal obligation to allow the University an opportunity to respond to Stock 2. Although there were points that the University wished to respond to, there were no issues raised in it that were new, and sufficiently different from the issues that had already been raised and responded to, for fairness to require it to be shared.

323. I accept Ms Carss-Frisk's submission that there has to be some point of finality. In any investigation or administrative decision-making process there must come a point where the decision-maker is entitled to stop and reach a decision. Ultimately there is a judgement to be made as to whether the new material raises points that are important to the decision and whether the University has not had a fair chance to respond. In my view those tests are not met here.

Ground 5E

324. This ground concerns whether it was reasonable for the OfS to conclude that the harm was *"significant and severe*". It is important to be clear that this Ground now only arises if I am wrong on Ground One, Ground 3D (freedom of speech within the law), Ground 5C (the Safeguarding Statement) and Ground 3A (failure to take into account FOSCOP).

325. Pursuant to the intervention factors set out in the RF (see paragraph 291 above), particularly intervention factor (b), the OfS treated the severity and significance of the breach as a significant factor in deciding to make a formal finding of breach, see FD Annex E paragraphs 9-22. The summary at paragraph 3(b) states;

"b. the impact of these breaches is considered to be significant and severe. The four contested statements in the TNBEPS with which the OfS takes issue in this investigation are each capable of capturing lawful speech. They therefore have the effect of restricting lawful speech. The problematic content in the TNBEPS also created a chilling effect. An example of this chilling effect materialising in practice is set out in Professor Stock's evidence;"

326. The conclusion at FD Annex E, paragraph 28 states;

"In conclusion, the specific and likely impact of the breach of condition E1 in respect of the TNBEPS is significant and severe, including on students, and potentially all of the students at this provider were affected. The impact of the breach of condition E2(i) is also considered significant."

327. The OfS concluded such harm on the basis of: (a) the contested statements in the Policy Statement, which were *"each capable of capturing lawful speech"* (Annex E paragraph 11); (b) the problematic content, which had the potential to cause a chilling effect (Annex E paragraph 12); and (c) Professor Stock's evidence, which was an example of the chilling effect (Annex E paragraphs 13-22).

328. In respect of Professor Stock's evidence, although the OfS accepted that the gender critical specific materials that she had referred to in her first witness statement had in fact been included in the curriculum, they were still thought to be *"implicitly*" excluded, see Annex E, paragraph 18.

329. Mr Buttler submits that the OfS treated Professor Stock's feelings as being dispositive of the question of harm, rather than considering whether those feelings were a reasonable response to the Policy Statement. This material could not reasonably justify the conclusion of *"significant and severe harm"* to academic freedom and freedom of speech.

330. He further submits that the OfS now accepts that it is permissible for policies to capture some lawful speech, see paragraph 205 above. The OfS therefore failed to consider whether the restrictions on lawful speech in the Policy Statements were permissible (see Ground 3D), but further it was unreasonable for the OfS to consider that the mere fact that the Policy Statement might capture some lawful speech amounted to harm.

331. It was also unreasonable for the OfS to consider that the mere alleged potential for students or staff to self-censor was evidence of a chilling effect. There was no actual evidence of a chilling effect. The OfS chose not to speak to any students or student representatives, and the University provided evidence (via the National Student Survey) of how students perceived freedom of speech at the University, which was in line with the national average. There was therefore no evidence of a chilling effect after November 2021 when Professor Stock left the University.

332. The OfS placed unreasonable weight on Professor Stock's evidence given that her evidence did not relate to the 2022 or 2023 versions of the Policy Statement, as she had left the University in 2021. She only took issue with the Positive Representation Statement, and not with the other elements of the Policy Statement, such as the Stereotyping Statement and the Disciplinary Statement. Therefore, there was no

evidence of harm in respect of those elements. Professor Stock's own evidence of any chilling effect on her from the Positive Representation Statement was minimal, as summarised at paragraph 88 of the Claimant's Skeleton;

"Dr Stock's evidence, read fairly, was that any chilling effect on her from the Positive Representation Clause was minimal. She says, notably, that (i) it was only by "implication" that gender critical materials were excluded (Stock 1 §24); (ii) this was partly because of the Positive Representation Clause and partly because of the allegedly "oppressive climate" at the University (in respect of which the OfS has no functions) Stock 2 §§4-5, 8; and (iii) it is not in issue that Dr Stock did draw her students' attention to her extensive gender-critical writings at the start of each reading list (and that there were gender-critical texts from others on the reading list). The height of her evidence was that she could not recall teaching some gender-critical texts in lectures. Her evidence was also that she cannot recall being reassured by her line manager in respect of her ability to express lawful views, not that this did not happen (Stock 2 §10…)."

333. Ms Carss-Frisk submits that the OfS was entitled to reach its conclusion as to significant and severe harm. It was entitled to place weight on the wording of the Policy Statement (in its various versions) and to reach a view on the potential chilling effect. The OfS did not have to point to specific evidence of such effect, and that is supported by intervention factor (b) (in the RF, as well as RA15 Annex A), which does not require any actual harm to have arisen; rather, the risk of harm is sufficient.

334. Ms Carss-Frisk also points to the FD at p.36, where the OfS included a footnote definition of *"chilling effect"*: *"By chilling effect, the OfS means the potential for staff and students to self-censor and not speak about/express certain lawful views."* [emphasis in original]

335. The OfS is a specialist regulator, with a very specific remit around the protection of freedom of speech and academic freedom. It must therefore be capable of reaching its own view on the effect that the Policy Statement could have. That accords with Strasbourg and domestic caselaw: in *R (Miller) v College of Policing* [2022] 1 WLR 4987, Dame Victoria Sharp found that there was a chilling effect because, at [70], an action *"had the capacity to"* impede Mr Miller expressing himself on transgender issues; and *Karsai v Hungary* (App. No. 5380/07) at [33] describes actions which would be *"capable of producing a chilling effect"*.

Conclusions on Ground 5E

336. This Ground is different from those above where I have found against the OfS, because this Ground is a pure irrationality ground. The other grounds all turn on legal misdirection, failure to take into account material considerations, or the decision being vitiated by bias. On Ground 5E the University argue that the OfS's conclusions on significant and severe impact on freedom of speech were irrational in light of the evidence.

337. The starting point is that the OfS is the statutory regulator created by Parliament with a specific remit to, *inter alia*, protect freedom of speech and academic freedom in HE providers. It has a specialist expertise on this issue which the Court should respect so long as it acts within the law.

338. Further, the words *"significant and severe"* harm necessarily import a considerable level of subjective judgement. This is an area where reasonable people can disagree. The test for whether this Ground is made out is agreed to be whether the OfS's judgement was *Wednesbury* unreasonable, and this is a high test, made higher by the fact of the OfS's remit under HERA and its specialist expertise.

339. I also have close regard to the particular importance of protecting free speech under Article 10 ECHR, as explained in *Carlile*.

340. In terms of the harm to free speech, and the nature of an interference under Article 10, this is not necessarily a matter which is amenable to very specific evidence but may rather be a matter of

judgement. The very nature of a *"chilling effect"* is that people may be unwilling to come forward and give specific evidence of the effect upon them, and indeed may not themselves necessarily perceive that the Policy Statement is having that effect upon them. A chilling effect does not manifest itself simply by creating a specific bar on referring to a document or saying something, but rather by creating a sense that it might be better not to do so. One effect may be self-censoring which may not even be done consciously. Therefore, the absence of specific evidence, other than from Professor Stock, does not on its own indicate that there was no chilling effect.

341. I accept that the OfS did not properly consider the scope of the right of the University to limit free speech, by reason of the meaning of *"within the law"*, see Ground 3D above. I have also accepted that the OfS in its finding of breach should have considered FOSCOP, see Ground 3A above. Further, I set out below why I have concluded that the OfS had a closed mind through the investigation and in the ultimate decision. However, focusing on the Policy Statement alone, given the breadth of the judgement that needed to be made, and the nature of harm to free speech, I do not conclude that the OfS were *Wednesbury* unreasonable in the conclusion that they reached that the harm that flowed from the Policy Statement (read alone) was capable of being significant and severe.

342. I appreciate that the exercise is somewhat unreal because no real person is going to consider the Policy Statement in a vacuum. However, to the degree that this is a separate Ground and the finding of the OfS focuses on the Policy Statement alone, I do not think that the finding that it could have a chilling effect on free speech is *Wednesbury* irrational.

343. This analysis does not undermine or indeed impact upon my conclusion that the OfS has misdirected itself in a number of key ways.

Ground 5B

344. This Ground concerns whether the OfS failed to take into account the *"anti-competitive"* effect of its decision.

345. Ms Sheridan submits that the OfS has a statutory duty to have regard to the need for competition between HE providers under s.2(1)(c) of HERA. This is a mandatory material consideration, and the University had made clear in its Representations that the decision would have a highly adverse impact upon it. In the FD there is only fleeting mention of the impact of the FD on the University's ability to compete in the HE sectors if the findings were made.

346. The University was one of many universities that had adopted the Advance HE template policy, and the University explained in its Representations that the Policy Statement was based on the template and that a number of other universities had adopted the same or very similar policies. However, the University was the only one that was singled out for investigation and ultimately punishment.

347. Ms Carss-Frisk submits that the OfS did consider the impact on the University of the findings, at Annex I paragraphs 12-13. She also submits that the OfS had good reason to single out the University, and points to Ms Lapworth's first witness statement, which explains that the OfS's investigation was prompted in part by the protests over Professor Stock in October 2021.

348. Finally, it is obvious that if one university is being investigated then the impact of any negative findings will fall upon that institution. That is not anti-competitive.

Conclusions on Ground 5B

349. In my view as a freestanding Ground this argument has no merit. As Ms Carss-Frisk says, if the University is the one being investigated and the OfS lawfully finds a breach, then it is necessarily going to be the case that a negative impact, and therefore in some sense an impact on its competitive position, will fall on that institution.

350. That effect is sufficiently obvious that there was no need to make an express reference to s.2(1)(c) of HERA. It can reasonably be inferred that such a negative effect would follow.

351. The degree to which the OfS acted fairly in its investigation, and findings against the University through the process as a whole, including its approach to the other HE providers using the Advance HE template, is better considered under the heading of predetermination, rather than not taking into account a competitive effect.

SECTION K: ISSUE FIVE/GROUND 6C – APPARENT BIAS AND/OR PREDETERMINATION

352. The University alleges that the FD was vitiated by apparent bias, including by predetermination. The oral advocacy was done by Ms Sheridan. There are five stages to the analysis;

a. The OfS investigation team deliberately chose not to put the question of current compliance (i.e. the 2024 documents) to the decision-makers;

b. The investigation team singled the University out for sanction;

c. The investigation team did not explain to the decision-maker how Professor Stock's evidence had been produced;

d. Dr Ahmed, who was the effective head of the investigation team from October 2024, was personally connected to the only witness relied upon by the OfS in the FD, Professor Stock;

e. The investigation team did not put the evidence fairly or fully to the decision-makers.

353. The approach to the modern law on bias was explained by Leggatt LJ in *Bubbles and Wine v Lusha* [2018] EWCA Civ 468 at [17];

"….These establish that the test for apparent bias involves a two stage process. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased: see Porter v Magill [2001] UKHL 67; [2002] 2 AC 357, paras 102-103. Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case: see Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117, para 28; Secretary of State for the Home Department v AF (No2) [2008] EWCA Civ 117; [2008] 1 WLR 2528, para 53."

354. A significant aspect of this case is that the allegation of apparent bias is aimed not at the decision-maker (the Committee or *"USCEC"*) but rather at the effective head of the investigation team (Dr Ahmed). In *R (Compton) v Wiltshire Primary Care Trust* [2009] EWHC 1824 it was argued that the decision to close an NHS unit was vitiated by bias because one member of the decision-making body (the Strategic Health Authority) was married to one of the directors of the company that had written the consultation report which led to the closure. Cranston J dealt with the approach at [91];

"91. In my view the principle is clear: the bias of advisers is capable of vitiating a decision when there is a real possibility that it has adversely infected the views of the decision-maker. That seems to me to turn on at least three considerations. First, there is the nature of the advice itself. Advice to my mind falls along a spectrum from the provision of information, which may or may not have a bearing on the ultimate decision, to a strong recommendation that a particular course be taken. Secondly, there is the matter to which the advice pertains. That may be tangential to the decision to be taken, or it may be an essential component without which no decision is possible. Thirdly, there is the relationship between the adviser and the decision-maker and whether it is so close that there is a real possibility that the bias of one will infect the other."

355. Amongst other factors the nature of the report in *Compton* was relevant, see [96];

"96. Moreover, the doctrine of apparent bias could not apply, in my judgment, to the circumstances of this case because of the character of the Red Bridge report. As I have already said, although it was relevant to the decision which the PCT board took on 30 January 2007, the fair minded and informed observer would know that the report did not contain recommendations, explicit or implicit, as to the decision to be taken. The report was more in the character of information for use in the decision process. The report summarised responses to the consultation and, while that involved judgment, it was not part of the decision to be made. In a sense it was a tool which facilitated the taking of the decision, providing information for use in the decision-making, rather than being a clear pointer in the direction of what decision ought to be taken. The chairman and chief executive of the PCT had read all the consultation responses, and Board numbers had certified they were fully informed of what consultees had said. In all there was no apparent bias inflecting the PCT's decision-making process."

356. In *R (Royal Brompton NHS Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 the Court of Appeal considered an allegation that one member of the steering group which recommended the decision had a conflict of interest, see [76]. The Court of Appeal set out the relevant approach at [125]-[126];

"125. The question which the hypothetical observer will be thinking about in such a situation has, in our judgment, to be adapted (rather than simply adopted) from the now conventional question relating to perceived bias in a decision-maker. If, as was said by this court in In re Medicaments [2001] 1 WLR 700, bias in a judicial decision-maker is "an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve"; and if, as Lord Hope put it in Porter v McGill [2001] UKHL 67, the issue for the court is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"; it seems to us that, where the issue relates to the effect on a decision of potentially biased advice, the question has to be whether the observer, knowing the composition and remit of both the advisory body and the deciding body, would perceive a real possibility both of bias in the advice and of its infecting the decision.

126. We think it necessary to pose the question in this way, first because it is not possible to exclude a priori the possibility that legally bad advice will affect a decision based in part on it, and secondly because it is not possible to draw a principled line between advice which is bad because of misinformation and advice which is bad because of bias. What matters here, as elsewhere, is the matrix of fact in which the risk is said to have taken shape. That includes, but is not confined to, the composition and method of working of each of the bodies concerned. But the answer cannot depend on what the decision was: as we have said, that goes only to the entitlement to relief. It depends on the evidence; and, as with all evidence, it is for the party which asserts a fact to prove it."

357. The present case concerns an allegation of predetermination by the decision-maker and not simply bias by reason of conflict of interest. Predetermination was considered by Richards J in *Georgiou v London Borough of Enfield* [2004] EWHC 779 at [29]-[31];

"[29] I accept Mr Dinkin's submission that bias, in the sense of a pecuniary or personal interest in the outcome of a decision, is conceptually distinct from predetermination or a closed mind, and I see the force of the analysis in Ex p Kirkstall Valley which was picked up and applied in Cummins' case. If the Cummins approach were applied narrowly here, then it seems to me that the rules on bias could not be said to be engaged, since under the council's constitution the CAG is a committee of the council (albeit one with co-opted external members) rather than an external body, and a councillor's membership of that committee could not be said to amount to an external or extraneous personal interest. The situation is in that respect factually closer to Cummins' case than to the Bovis case, where the problem arose out of participation in what was truly an external body by the chairman of the relevant committee of the council.

[30] It seems to me, however, that a different approach is required in the light of Porter v Magill [2002] LGR 51. The relevant question in that case was whether what had been said and done by the district auditor in relation to the publication of his provisional conclusions suggested that he had a closed mind and would not act impartially in reaching his final decision: see eg the background set out by Lord Hope (at [96]–[98]). Thus it was a case of alleged predetermination rather than one in which the district auditor was alleged to have a disqualifying interest. Yet it was considered within the context of apparent bias, and the decision was based on the application of the test as to apparent bias which I have already set out. There is nothing particularly surprising about this. I have mentioned Sedley J's observation in Ex p Kirkstall Valley, as quoted in Cummins' case, that predetermination can legitimately be regarded as a form of bias. Cases in which judicial remarks or interventions in the course of the evidence or submissions have been alleged to evidence a closed mind on the part of the court or tribunal have also been considered in terms of bias: see eg Southwark London BC v Jiminez [2003] EWCA Civ 502 at [25], [2003] IRLR 477 at [25], where the test in Porter v Magill was accepted as common ground and was then applied.

[31] I therefore take the view that in considering the question of apparent bias in accordance with the test in Porter v Magill, it is necessary to look beyond pecuniary or personal interests and to consider in addition whether, from the point of view of the fair-minded and informed observer, there was a real possibility that the planning committee or some of its members were biased in the sense of approaching the decision with a closed mind and without impartial consideration of all relevant planning issues. That is a question to be approached with appropriate caution, since it is important not to apply the test in a way that will render local authority decision-making impossible or unduly difficult. I do not consider, however, that the circumstances of local authority decision-making are such as to exclude the broader application of the test altogether."

358. The principle of predetermination was considered in the regulatory context in <u>*R (Nobel Oil) v Oil and Gas Authority*</u> [2025] EWHC 2139. The Divisional Court made an important point about the correct approach to such an allegation in respect of a regulator;

"70. Prior to addressing the claimant's submissions here and elsewhere in relation to apparent bias and predetermination it is important to set out the wider context in which these allegations are made. As will already be readily obvious, the defendant was a regulator with important responsibilities for supervising the delivery of MER and the central obligation in the operations undertaken in the UKCS. As a regulator it is clear that it had, and it needed to have, a strategy in mind for the petroleum resources it was supervising, addressing the lifetime of the oilfield, which would also find its articulation in the day to day regulatory activities which the defendant undertook. This strategy would also be relevant to the prioritisation of the resources which the defendant allocated to particular regulatory issues bearing in mind their resources were not infinite. It was clear throughout the length of the narrative of events that the defendant's strategy placed a high priority on the Q9GP project, and that in that context this strategically important gas project should not be "detrimentally impacted by the potential oil opportunity".

71. This is important background to the allegations which the claimant makes. As a regulator it was necessary for the defendant to have an open mind but it was not necessary for them to have an empty mind. They were entitled to have a clear strategic view of the kind set out above and to use it to inform their approach to their day to day regulatory activity as well as the prioritisation of the resources at their disposal. They were also required to be open to evaluate and carefully consider matters properly raised with them in relation to both their strategic endeavours and their day to day regulation and keep these activities under review. However, the need to retain an open mind and act fairly did not include a requirement to forget or ignore the strategic context of their regulatory supervision and resource allocation."

359. There is also a useful passage in <u>*R (Bovis Homes) v New Forest DC*</u> [2002] EWHC 483 (Admin) at [112] where Ouseley J considered the vice of predetermination;

"…The further vice of predetermination is that the very process of democratic decision making, weighing and balancing relevant factors and taking account of any other viewpoints, which may justify a different balance, is evaded. Even if all the considerations have passed through the predetermined mind, the weighing and balancing of them will not have been undertaken in the manner required. Additionally, where a view has been predetermined, the reasons given may support that view without actually being the true reasons. The decision-making process will not then have proceeded from reasoning to decision, but in the reverse order. In those circumstances, the reasons given would not be true reasons but a sham."

360. I draw from this caselaw the following propositions:

a. The test for bias/predetermination is whether all the circumstances would lead a fair-minded and informed observer to conclude that that there was a real possibility that the judge or decision-maker was biased, see *Porter v Magill* and *Bubbles & Wine* at [17];

b. Bias of advisors can vitiate a decision (*Compton* at [91]), but it is necessary to consider:

i. the nature of the advice, i.e. whether it is a strong recommendation or simply background information;

ii. the relationship between the advice given and the decision;

iii. the relationship between the adviser and the decision-maker, including the degree to which the decision-maker undertakes a separate consideration (*Compton* at [96]).

c. The bias of the advice and the infecting of the decision have to be considered separately (*Royal Brompton* at [125]);

d. Predetermination involves the decision-maker approaching the decision with a closed mind and without considering all the relevant matters (*Georgiou* at [31]);

e. A regulator is entitled to have a strategy and priorities, and such will not amount to predetermination (*Nobel* at [70]);

f. A regulator therefore must have an open mind but not an *"empty mind"* (*Nobel* at [71]). This is in effect the same as a local government or other political decision-maker being entitled to have a predisposition to a decision, but still having to have an open mind and fairly consider relevant matters.

361. Ms Sheridan submits that the caselaw shows that it is necessary to consider: the attitudes of the investigation team; the extent of the influence on the information presented; how the investigation team put recommendations to the USCEC; and the degree to which the investigation team influenced the FD.

362. As is clear from the caselaw, it is particularly important for this Ground to fully consider the precise decision-making process and the various roles and responsibilities. Ms Lapworth, the OfS's then chief executive, explains the process in some detail in her witness statement. She explains that she became aware of an incident at the University involving Professor Stock on 7 October 2021. She sent an email that day to the then Vice Chancellor of the University, Professor Tickell, about the incident and asking what action the University had taken or planned to take to ensure freedom of speech and academic freedom.

363. Ms Lapworth prepared two documents, one describing the incident at the University and the second titled *"prioritisation of a free speech case"*.

364. A committee of the OfS Board was set up specially to consider the matter. This committee met on 21 October 2021. It was decided that the University case should be prioritised. The following day, Hilary Jones, at that time the Companion and Registration Manager at the OfS, was tasked with preparing a recommendation paper as to whether to open an investigation into the University. On 22 October 2021, Ms Jones recommended that Ms Lapworth open an investigation into the University for potential breaches of conditions E1, E2 and E3. On the same day, Ms Lapworth took the decision to open the investigation and sent a letter to the University informing them.

365. Ms Lapworth's reasoning for initiating the investigation as set out in her first witness statement is of some interest. She first outlines the landscape of the HE sector in the months leading up to her decision of October 2021. The two key landscape changes were: (1) the *"Reindorf Report"* by Akua Reindorf KC, published in May 2021, on infringements of freedom of speech at the University of Essex, which demonstrated, in her view, that *"there were issues that needed to be addressed"* (paragraph 33); and (2) forthcoming legislative changes, as the Higher Education (Freedom of Speech) Bill was being debated in Parliament.

366. An OfS board meeting was held on 23 September 2021 to discuss what approach the OfS should take before any new legislation was implemented, including whether to *"Proactively seek cases to pursue using our investigatory powers"*. Ms Lapworth explains at paragraph 34 of her first witness statement that at that board meeting;

"the Board expressed its strong support during this meeting for using the OfS's existing powers to take enforcement action in relation to freedom of speech and academic freedom issues in a targeted way. By "targeted way" I mean that, as is recorded in the minutes of the meeting, the Board took the view that the criteria for identifying any cases for the OfS to pursue would need careful consideration, to focus on cases that would be likely to incentivise compliance both now and in the future."

367. That is the backdrop against which she came to consider the events of October 2021. She then explains;

"62. In light of the sector landscape I have described above, I considered that initiating investigatory work on a case relating to free speech would benefit the sector, by sending a strong signal about the importance of freedom of speech and academic freedom (and I note that the Board had also confirmed by this point that it was supportive of the OfS pursuing cases relating to free speech in a targeted way). I took the view that if we subsequently took enforcement action, this would address both the particular issues arising in that case and would also create clear compliance incentives and expectations for that and other higher education providers to ensure that they were complying with their legal and regulatory obligations in these areas.

63. In terms of identifying the right case, through risk-based prioritisation, I would be looking for a case with a number of features. A strong candidate case would be one in which the issues of concern appeared to fall within the OfS's remit with a clear and direct link to the requirements set out in one or more condition of registration, the issues appeared relatively bounded with some established case law to draw on, and the potential harm arising from potential non-compliance appeared significant and reasonably clear."

368. In February 2022 Ms Lapworth became the interim chief executive of the OfS and stepped back from managing the day-to-day conduct of the investigation. However, she retained a close oversight function, including attending fortnightly meetings. In her own words, she *"maintained close supervisory oversight of the analysis and investigation more broadly"* (paragraph 78, first witness statement).

369. One of the University's complaints about the way the OfS conducted the investigation, and which they say illustrates the OfS's mindset and particularly their closed mind, was the approach to settlement. Settlement discussions started around October 2022, and the parties considered holding a settlement meeting. A series of letters were exchanged, but on 6 February 2023, the OfS wrote, *"Having considered*

your letters we have concluded that there does not appear to be a credible route to a settlement agreement with the University on these matters. We do not consider that the meeting scheduled for 10 February 2023 would progress matters in a productive and timely way and we are therefore cancelling that meeting. We consider that settlement discussions have now concluded on these matters."

370. There is considerable disagreement between the parties as to whose fault it was that a meeting was not held. However, the OfS's approach to *"settlement"* is illustrated by the following passage in Ms Lapworth's first witness statement;

"86. Provided the University agreed to accept the potential breaches the investigation team had identified in Annex A, we were willing to be flexible on the levels of monetary penalties associated with those potential breaches, and how those potential breaches may be packaged (as I explain further below)."

371. It therefore does not appear to be disputed that the OfS was only prepared to discuss settlement if the breaches outlined were accepted. Ms Lapworth relies on the OfS's guidance in Regulatory Advice 19 (*"RA19"*), paragraphs 27 and 29, which state;

"27. Where we consider it appropriate, we may offer a settlement discount to a provider that agrees that it has breached a condition of registration and agrees to a monetary penalty at an early stage…

29. A settlement discount is conditional on a provider:

a. Admitting to the breach of condition(s), accepting that a breach has occurred and not publicly suggesting that it disagrees with the details of the breach set out in the settlement agreement (and this includes not making comments in a way that the OfS considers reasonably likely to become public)."

372. In July 2023 the OfS established the USCEC to take the decisions in relation to the investigation of the University. The members of the USCEC were Martin Coleman as chair, Elizabeth Fagan as deputy chair and Nisha Arora as third member. Mr Coleman is deputy chair of the OfS Board. Ms Lapworth outlines his qualifications for the role, and I note he holds a number of board level appointments.

373. The USCEC had a large number of meetings and worked closely with the investigation team. It is quite apparent from Ms Lapworth's witness statements that this single investigation was absorbing a very large proportion of the OfS's time and staff resources.

374. Mr Coleman has made a witness statement in which he sets out the care with which he and the USCEC considered the reports submitted to them. Although I have no doubt as to Mr Coleman's good faith, it is important to have regard to the principle in R (Inclusion Housing) v Regulator of Social Housing [2020] EWHC 346, where Chamberlain J considered the need to treat *ex post facto* evidence as to decision-making with considerable caution;

"78. So far as ex post facto reasons are concerned, the authorities draw a distinction between evidence elucidating those originally given and evidence contradicting the reasons originally given or providing wholly new reasons … Evidence of the former kind may be admissible; evidence of the latter kind is generally not. Furthermore, reasons proffered after the commencement of proceedings must be treated especially carefully, because there is a natural tendency to seek to defend and bolster a decision that is under challenge …"

The evidence in relation to Dr Ahmed

375. One part of this Ground is that the FD was vitiated by apparent bias because of the role of Dr Ahmed in the investigation and his relationship with Professor Stock. I therefore set out in some detail the evidence that is relevant to that allegation.

376. Dr Ahmed and Professor Stock first exchanged emails in 2020. At that time, Dr Ahmed was campaigning to change the free speech policy at the University of Cambridge, where he was a professor of philosophy, and was reaching out to academics for comment.

377. On 23 October 2020, Professor Stock responded to Dr Ahmed's email about the campaign;

"Dear Arif Thanks for this, and I admire you for chasing this. Good luck with it. I agree "tolerance" is much better than "respect", I agree. ... Here is Sussex's policy, if it makes you feel any better. https://www.sussex.ac.uk/webteam/gateway/file.php?name=dignity-and-respect-policy-(links).pdf&site=608…"

378. On 26 October 2020, Dr Ahmed responded;

"Thank you very much, and for the links … Pleased to see that Sussex has 'zero tolerance' for all forms of harassment and bullying, unless of course it is of people like you."

379. On 30 November 2020, Dr Ahmed wrote;

*"I'm writing to ask for your advice - as I think I mentioned, I'm canvassing for support here in Cambridge for my attempt to liberalize our free speech policy. … do you know anyone here in Cambridge who would be good to contact? - I mean well-connected and supportive *real* feminists."*

380. On 1 December 2020, Professor Stock responded, *"Sussex meanwhile is just about to appoint a Pro-Vice Chancellor for "Culture, Diversity, and Inclusion."*

381. Dr Ahmed replied on 2 December 2020, *"I can't imagine how Sussex stumbled along for 60 years *without* a PVC for culture, diversity and inclusion."*

382. On 3 January 2021, Professor Stock wrote to Dr Ahmed saying, *"I published this recently which might be of interest - https://kathleenstock.com/highlights-of-trans-policies-in-ukuniversities".*

383. On 9 January 2021, Dr Ahmed wrote to Professor Stock to congratulate her on her OBE;

"Your critics are going to argue that anyway, and everyone in the profession with any sense knows that they are wrong on all counts - you are an excellent philosopher and thoroughly deserve the positive attention you have been getting for your courage - and you would be welcome to talk to the MSC about your views on trans issues, on which you know far more than any of them. I know a lot of people here think the same, and anyway if we can invite that lunatic Kukla we can certainly invite you!

*Seeing your name on our list, and hearing you speak and meeting you, would be an inspiration to many of the philosophy students here in Cambridge. It is the undergrads here who are especially subject to, and on account of youth and immaturity especially ill-equipped to resist, peer pressure to have the right thoughts on these matters. After three years of this pressure, although at first they only conform outwardly, unless there is some counter-weight they will end up in the Khmer Rouge themselves. And so many of the staff here are either spineless or complicit, when what students especially really need is articulate, intelligent *resistance* to Groupthink."*

384. On the same day, Professor Stock responded, *"You have a point about Kukla, lol."* Professor Quill Kukla is a non-binary academic at Georgetown University.

385. On 7 September 2021, Dr Ahmed and Professor Stock appeared in Parliament together before the Higher Education (Freedom of Speech) Public Bill Committee. In advance of the event, they exchanged phone numbers on 6 September 2021.

386. On 7 September 2021, Professor Stock forwarded Dr Ahmed an *"Active Bystander Workshop"* happening at the University of Sussex and wrote, *"And back to business as usual at Sussex…"* On the same day, Dr Ahmed responded, *"Ffs"*.

387. On 19 October 2022, Professor Stock wrote to Dr Ahmed to inform him that she would be speaking at the Cambridge Union. He responded on the same day, *"All this makes me think I should keep inviting GC* [gender critical] *speakers until they get the message. For instance, you would be most welcome to come and talk this academic year - let me know if you're interested."*

388. On 17 November 2022, Dr Ahmed and Professor Stock appeared on the same side of a debate at the Cambridge Union, also exchanging emails around the event.

389. In March 2023, Professor Stock sent Dr Ahmed an academic article, and they had a brief email exchange about it. This was their final communication. Dr Ahmed has had no contact with Professor Stock since joining the OfS.

390. The University also rely on a series of publications and communications by Dr Ahmed published between 2021 and 2023.

391. In 2021, Dr Ahmed published an article in *Index on Censorship*, a magazine on free speech, titled "We academics must fight the mob – now". The sub headline read: *"The appalling hounding of Kathleen Stock at the University of Sussex is a serious threat to freedom of speech on campus, argues ARIF AHMED";* and the article continued;

"The Sussex philosopher Kathleen Stock began writing about the GRA [Gender Recognition Act] *in 2018, in academic journals but also on blogs, in comment pieces for the press and so on. She argued (among other things) that there were costs, to people born women, of expanding the category of "woman" to include anyone who calls themselves one. Because of her intervention, Professor Stock has been subject to a sustained campaign of vilification and harassment.*

Stock's case is unusual by historical standards. In the past, perhaps even today, the principal threat to academic freedom came from the authorities (state or university). In 1687 James II tried to expel the Fellows of Magdalen College, Oxford, who had resisted his favoured choice for president of that institution; the attempt failed and was one of several disasters that together fatally undermined him.
…

In Stock's case though, it was not the state that attacked her; and the university authorities supported her – or, at least, they supported her in the latest, most serious round of protests, having failed to do so previously. But she was subject to abuse and harassment by individuals. Sussex admitted as much in October 2021, though by then police had advised her to avoid her place of work, to employ a bodyguard if she ventured on to campus and to install CCTV outside her home, so it was hardly being controversial. In any case, the upshot was that Stock left her job and in November became a Founding Fellow of the new University of Austin in Texas. The UK regulator of Higher Education, the Office for Students, has now launched an investigation into whether the University of Sussex has "met its obligations for academic freedom and freedom of speech within the law for all students and staff, whatever their views".

Without anticipating what that inquiry finds, it is possible to make two points about this deeply concerning case. The first is that in principle there may be academic freedom issues on both sides: one side points, rightly, to Stock's right to lecture, write and speak without fear of harassment; the other side points, again rightly, to the right of students (or anyone else) to protest against her. But we must distinguish peaceful protest in favour of a principle like rights for trans people – which, incidentally, Stock has publicly defended – and harassment and victimisation of an individual aimed at blocking their speech (or worse). It seems that both things were happening at Sussex; but while the former is defensible on free speech grounds, the latter certainly is not.

Second, Stock's case is extreme but far from unique. In one recent case more than 500 students petitioned Oxford University to force two professors to include trans women in their research into women's equality, so as not to create a "hostile and exclusionary atmosphere". ...

And these are just the highlights, if that is the word, of a pervasive phenomenon. Hundreds of academics across the UK have written, anonymously, about having to walk on eggshells when it comes to issues around gender, sex and transsexuality.

All this points to something much worse than Stock's harassment, appalling though that is: the wholesale censorship, by a mob, of a legitimate and important point of view on a matter of public interest. We – I mean we academics – must fight back now; unless we do so, I fear people will look back at 2021 as the time that we let free speech die." [emphasis added]

392. I have underlined the passage where Dr Ahmed appears to be criticising the University.

393. In 2022, Dr Ahmed published an article titled "Freedom to Think, Freedom to Speak: Why UK Universities must Change Course". He discussed *"direct intimidation and cancellation of speakers and academics; universities taking a corporate position on contentious issues; and micro-management of speech, typically via harassment and discrimination policies".* Then;

"Many readers will have heard about the Philosophy professor Kathleen Stock, who was subject to violent intimidation and harassment for years following her interventions on the Gender Recognition Act. In 2021 police advised her to avoid her own place of work, to employ a bodyguard if she did venture onto campus and to install CCTV outside her home. Shortly before she left Sussex, protestors had distributed posters and stickers across her workplace demanding that she be fired. Several of them, their faces concealed with balaclavas, also let off flares on the Sussex campus.
...

If a lecturer or student had suffered such treatment for their race, it would have been a matter of national outrage, and any employer, particularly a public body, would (you'd expect) have stamped it out in about twenty minutes. Kathleen Stock suffered victimization for holding and legally stating the beliefs of a gender-critical feminist. Although these beliefs, like race, constitute a legally protected characteristic, her employer seems to have permitted the harassment to continue, and to escalate, for three years.

First there are the activists, typically but not always a minority of students. The activists attempt to shut down the legal and legitimate intellectual activities of academics. Sometimes they do this by directly intimidating the academic. This seems to have happened in Stock's case. Other times they do it by petitioning the university authorities to do the same. That is what seems to have happened to Greer.
...

A second form of institutional non-neutrality is through the highly selective use of official 'statements'. Many universities routinely describe themselves as anti-racist institutions, where this means: actively campaigning for political end. For instance, Sussex says: '[a]s an institution we must actively play our part in dismantling the systems and structures that lead to racial inequality, disadvantage and under-representation.' Bristol expects all its members to 'stand up' to racism 'wherever it occurs'...." [emphasis added]

394. Again, I have highlighted these two passages because they contain comment on the actions or inactions of the University, as opposed to general support for Professor Stock and her efforts to secure academic freedom and freedom of speech.

395. Finally, the University rely on communications surrounding Dr Ahmed's appointment as OfS Director of freedom of speech and academic freedom, where the OfS was concerned about a conflict of interest. Dr Ahmed was formally appointed on 18 May 2023, and it was announced on 1 June 2023.

396. The day after the announcement, on 2 June 2023, Ms Lapworth messaged David Smy, Head of regulation at the OfS, asking, *"Can we agree whether we think Arif is conflicted in relation to Sussex. I know that he knows KS and expect he will have discussed relevant issues with her. So, I think he is conflicted."* Ms Lapworth attached a tweet showing a photograph of Professor Stock and Dr Ahmed together at an event.

397. On the same day, Mr Smy responded, *"I think decisions that's fine: in other circumstances we'd often exclude from policy discussions etc but difficult for the Director to be excluded from discussions about wider principles in Sussex, about interaction with prevent/IHRA etc."*

398. On 18 September 2023, Dr Ahmed filled in an excel file outlining potential conflicts of interest relevant to his new position. He inputted *"Gender"* and *"K Stock"* as two relevant *"subjects"* (i.e. topics on which he may have a conflict of interest). Under *"Gender"* he wrote, *"I don't recall making public comments on the subject but have supported speech rights of Helen Joyce and Kathleen Stock; and I was on the EHRC Board in early 2023 when it made public comments on 'sex' in the EA2010."*

399. Under *"K Stock"*, he wrote;

> *"Connection: Have publicly defended Kathleen Stock's right to speak and have described her treatment as appalling. We gave evidence together at the HE(FOS)A Committee stage in 2021 and were on the same side at a Cambridge Union debate in 2022. Possible conflict: Any OfS involvement in KS case. Stock was formerly a Prof. of philosophy at Sussex. Comment: I don't expect to be involved in decisions or discussions around KS."*

400. On 21 June 2024, Katherine Jacob (OfS corporate governance senior officer) emailed Ms Lapworth's office checking whether she should restrict access to a paper containing an update on the University investigation, *"including perhaps from Arif as he is conflicted".* On the same day, Mike Spooner (OfS senior adviser and assistant to the chair and chief executive) responded, *"Susan [Lapworth] has been clear that the paper is a factual update there's no reason for AA to be restricted from the paper."*

401. On 15 October 2024, Ms Lapworth emailed Farhana Patel (OfS Principal Legal Adviser) and communicated her decision to add Dr Ahmed to the investigation team. She wrote;

> *"I've been reflecting on the challenges of providing policy input and oversight of the case, in a context where David and I are trying to juggle too many things to give this the focus it needs. I've talked to Arif about this and we've agreed that he'll step in for me and shepherd the case to its conclusion. I'll still be involved – for example, prepping for and attending the meeting on 30th– but I won't need to try to hold the whole case in my head. I've thought about Arif's potential conflicts of interest and have taken the view that, at this stage of the case when we've already crystallised our view on substantive matters, that's not a material concern, particularly as we expect decision-making to happen via the committee we've set up. I'm hoping this helps us to move forward, with you getting the policy input that's needed to do that as efficiently as possible."*

402. In her first witness statement, Ms Lapworth explains the change of position on Dr Ahmed's conflict of interest from paragraph 147 onwards. She had been impressed by Dr Ahmed taking a *"determinedly viewpoint neutral approach to championing freedom of speech within the law".* She established that he had a limited professional acquaintance with Professor Stock. She was aware that the investigation process was well advanced and that Dr Ahmed would not be the decision-maker. In those circumstances she thought it appropriate for Dr Ahmed to manage the day-to-day conduct of the investigation.

Submissions

403. Ms Sheridan submits that the course of the investigation clearly indicates that the OfS had a closed mind. They commenced the investigation of the University alone and only made findings against the

University, rather than considering the other universities that had adopted the same policy on transgender issues. This was despite the fact that, at the PD stage, both Vivienne Stern MBE (chief executive of Universities UK) and Mary Curnock Cook (former chief executive of UCAS) had said to the OfS that it would be more proportionate to issue sector-wide guidance, rather than single out one university.

404. The OfS had also refused to engage in settlement discussions unless the University accepted the breaches in totality.

405. The OfS did not explain to the USCEC how Professor Stock's evidence had been produced, and when asked to provide this information to the University, it relied on litigation privilege. The OfS says that it relied on litigation privilege because the University had taken a highly adversarial approach. The University rely on *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48, where Lord Carswell said at [102] that in order for a communication to attract litigation privilege, *"(c) The litigation must be adversarial, not investigative or inquisitional".* This principle has been considered in *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 6 and *SFO v ENRC* [2018] EWCA Civ 2006, where both Tesco and the ENRC, respectively, were permitted to rely on litigation privilege even in the context of ongoing investigations, because the investigations into them had become sufficiently adversarial that litigation was in reasonable contemplation by that point. Although I accept that it may be possible for a regulator to rely on litigation privilege because litigation was in contemplation, it indicates that the OfS was viewing the University as an adversary rather than taking a more traditional quasi-judicial approach to its role.

406. Ms Sheridan points out that Professor Stock's evidence was the only actual evidence in support of the findings of harm and therefore the overall evidence of harm, whether to academics or students, was extremely limited.

407. Further the OfS did not provide the University with Professor Stock's second witness statement before making the FD, which was unfair (see Ground 6A) and is indicative of a closed mind.

408. The investigation team prepared both the PD and the FD, together with recommendations, and presented that material to the USCEC. The FD entirely followed the report that was presented by the investigation team.

409. The work of the investigation team after 15 October 2024 (the date that Dr Ahmed joined the investigation team) was undermined by the bias and predetermination of Dr Ahmed. He had expressed his unequivocal support for Professor Stock and, critically, had made it clear that he thought the University had failed to support Professor Stock and failed to uphold academic freedom (see the passages underlined above). That Dr Ahmed was conflicted and should not be involved in the investigation had been accepted by the OfS, including by Ms Lapworth, until October 2024. Indeed Dr Ahmed himself had taken that view when first appointed. Despite this, Dr Ahmed was the person who prepared the FD documents, which only contained one option, and which were then accepted by the USCEC.

410. The evidence shows that, far from the USCEC being hermetically sealed from Ms Lapworth and the investigation team, including Dr Ahmed, both of them were in the room when the decision was made by the USCEC and they had a very high degree of influence over the decision.

411. The OfS's closed mind is further demonstrated by their refusal to consider whether there was compliance at the date of the FD, by refusing to have regard to the 2024 Policy Statement or FOSCOP (Ground 3A and Ground 5A).

412. Ms Carss-Frisk went through the history of the investigation and decision-making to show that there had been no bias or predetermination. Prior to the events of October 2021 at the University, the board of the OfS had given a steer that the OfS should use its powers to take enforcement action in relation to freedom of speech and academic freedom in a targeted way, as stated above at paragraph 366. Following

those events, it was decided that the University investigation should be prioritised on 22 October 2021, and then the USCEC was set up on 6 July 2023.

413. From the earliest stages of the investigation, it was clear that there were grounds for concern in relation to the Policy Statement. That was subsequently confirmed by the fact that the University conceded that the Positive Representation Statement should never have been made, and that it breached freedom of speech and academic freedom. Therefore, the OfS's approach was entirely fair and justified.

414. In relation to the OfS's stance on settlement negotiations, the University's position in correspondence was, as Ms Lapworth puts it, *"in very strong terms"*. She later describes it as being *"aggressive"*. That justified the OfS considering the process as a highly contested and indeed adversarial one, and therefore cancelling the settlement meeting on 6 February 2023.

415. Ms Carss-Frisk emphasised the fact that the FD was made by the USCEC, with highly skilled and experienced individuals. The USCEC met the investigation team nine times during the course of the investigation and Mr Coleman describes how he thoroughly prepared for meetings.

416. In respect of the submission that the University had been singled out for punishment when other HE providers had the same policy, Ms Carss-Frisk relies on the context of the investigation and the steer from the OfS board in September 2021. Ms Lapworth said that the fact that other providers might be adopting similar practices meant that *"it was important that the OfS should prioritise this case, and if appropriate, set out clearly its view of these issues to assist all registered providers in complying with the relevant law and the OfS's regulatory requirements"*, see Ms Lapworth's first witness statement at paragraph 52(a).

417. On the role of Dr Ahmed, she submits that a fair-minded observer would not be unduly suspicious. Dr Ahmed was appointed as Director of freedom of speech and academic freedom and, as such, he was known to be committed to free speech. Further, she relies on the advanced stage that the investigation had reached by the time Dr Ahmed became involved. In any event, but very importantly, he was not the decision-maker.

Conclusions on Bias/Predetermination

418. There are two largely separate issues under this Ground: (i) whether Dr Ahmed's involvement in the process vitiates the FD on the basis of apparent bias, and (ii) whether the OfS had a closed mind as to the outcome of the investigation, such that the FD is vitiated by predetermination.

419. I will deal with the issue of Dr Ahmed's role first. It is important to start with the legal principles set out above, in particular that the fair-minded observer would not be unduly suspicious and would be aware of the limitations of Dr Ahmed's role in making the FD.

420. Dr Ahmed had expressed clear support for Professor Stock and for the position that she had taken, and he had been very critical of her opponents. Importantly, he had in the emails of 26 October 2020, 2 December 2020 and 7 September 2021, and in the articles of 2021 (to some degree) and 2022 (more clearly), made strong criticism of the University and what he perceived to be their lack of support for Professor Stock. He had certainly expressed a clear view that the University had failed to properly support Professor Stock.

421. I also note that the OfS had, when Dr Ahmed was first appointed, taken a decision that he should not be involved in the University investigation because he could have a conflict of interest, and he had agreed with this. It was in those circumstances somewhat surprising that he was later appointed to effectively head the investigation team.

422. However, given his role as Director of Freedom of Speech and Academic Freedom at the OfS, it was almost inevitable that he would have expressed strong views on the issue of free speech and the need to

protect it in universities. Given the level of media attention in October 2021 around Professor Stock and the University, it again seems almost inevitable that anyone deemed suitable to be the Director of Freedom of Speech and Academic Freedom would have expressed views on the subject.

423. Dr Ahmed's relationship with Professor Stock was a professional one. The evidence does not suggest that they were personal friends, despite exchanging friendly emails and having spoken together at some professional events, such as the Parliamentary briefing session. There is in my view nothing in their personal relationship that would give rise to any finding of apparent bias.

424. The most troubling aspect are the emails which suggest a clear view that the University had failed in its obligations to uphold free speech. If Dr Ahmed had been the decision-maker I would in all probability have found that he had predetermined the decision by reason of having a closed mind. However, that would involve engaging in a counterfactual exercise which is not necessary.

425. It is critical to bear in mind that Dr Ahmed was not the decision-maker and that he came into the process after the PD had been issued. To a significant degree, as I set out in detail below, the die had already been well cast by then. In my view his role in the FD was not sufficiently central for any apparent personal bias of his to vitiate the decision.

426. For those reasons I find no vitiating apparent bias in respect of Dr Ahmed's personal role in the decision-making.

427. I find the evidence in respect of predetermination more compelling. It is necessary to go through each stage of the process to decide whether the OfS reached its decision with an open mind to the degree required by the law.

428. First, there is the overarching approach of the OfS and its strategy from the opening of the investigation into the University. Ms Lapworth is very clear that right from the start of the investigation in October 2021, and indeed before, the OfS was looking for a test case that would send *"a strong signal about the importance of freedom of speech…"* (first witness statement, paragraph 62), set out above at paragraph 366. She then goes on to say that if the OfS took enforcement action (i.e. found a breach and imposed a sanction), that would *"create clear compliance incentives and expectations"* for other HE providers.

429. Although the principle of using a test case is not in itself wrong, Ms Lapworth's mindset from the outset appears to have been that she wished to use the University as a tool to incentivise the rest of the sector. I note at this point that although Ms Lapworth was the chief executive, she was not the decision-maker. However, her involvement in the investigation was both intense and overarching, and the entire process was shaped by her.

430. It follows from Ms Lapworth's statement that that stated intent could only be met by a finding of breach, sanction, and presumably a high level of publicity, at least in the HE sectors, for the strategy to be successful. I note various comments in her witness statements which seek to suggest that she was open to not finding a breach, for example; *"my expectation was that the regulatory action taken in this case (if any) would create compliance incentives and a deterrent effect, not only for the University, but also across the sector"* (first witness statement, paragraph 67a) [emphasis added]. However, it is necessary to apply suitable caution to such *ex post facto* justifications, see *Inclusion Housing*. The evidence at the time points to a fixed intent to find the University in breach of the conditions, in order for the case to have its requisite incentivising effect on the sector.

431. The benefits, and indeed effectiveness of, such a strategy from the OfS's viewpoint is perhaps understandable, but as the basis for a fair investigative process it is plainly the wrong starting point. It was entirely open to the OfS to have free speech as its highest priority and to highlight concerns in one or more particular cases. That would fall within the principle set out in *Nobel Oil* that a regulator can have a strategy. However, the strategy at issue in that case was about the approach to the

decommissioning of oil storage facilities, and the decision related to that matter. The decision here was of an entirely different nature. It was a decision to make findings of breach in a highly sensitive area, sanction the University a large amount of money, and do so in a way that had significant reputational consequences. The analogy with *Nobel Oil* would be the OfS having a policy relating to the importance of freedom of speech, and then applying it in a fair manner, which would be entirely unproblematic.

432. The next key stage in the analysis is the OfS's approach to settlement negotiations. As is set out above at paragraph 369, the OfS refused to meet the University to discuss settlement unless the University accepted the alleged breaches in their entirety. This took place well before the PD was issued.

433. Although in principle placing conditions on a meeting is not determinative of a closed mind, on the facts of this case it strongly ties into the OfS's determination to find significant breaches by the University in order to further the objective of the investigation, as set out in the preceding paragraphs. It appears that the OfS was not prepared to even consider a compromise without that objective being met. The OfS rely on RA19 and say that supports their approach. But that document is of their own creation. An approach of assuming the breach before even a provisional decision is reached, and refusing to discuss any other option, certainly on the facts of this case is indicative (although not determinative) of a fixed view.

434. The third indicator of the OfS's closed mind was its approach to other HE providers that were using the same policy. If the OfS's principal concern had been to change the Policy Statement itself, and secure freedom of speech and academic freedom in other HE providers, then the quickest and most effective measure would have been to find out which HE providers were using the offending policy and communicate with them.

435. It is clear, and effectively admitted by the OfS, that they did not take that course because they wanted to use the University as an example to incentivise others. This is again strongly indicative of a determination to pursue a strategy which rested upon finding significant breaches by the University. The fact that Dr Ahmed wrote to the other universities using the same policy template only after the FD was published, highlighting the breach and the fine, points again to the OfS's strategy, and the centrality of making findings and penalising the University.

436. The fourth indicator is the OfS's failure to refer to FOSCOP. This was the document that the OfS's own policy document in RA24 says is the institution's (here the University's) *"definitive and up to date statement"* on the correct approach to freedom of speech. The failure to refer to it is highly indicative of a closed mind.

437. The fifth and final indicator is the OfS's refusal to consider whether the University had complied with the conditions in its 2024 revisions to the Policy Statement, and the correct formal authorisations of the relevant documents. I have already found that this was wrong in law under Ground 5A. As I have said above, this failure cannot be justified by the need to produce a speedy decision given that it took 10 months to produce the FD. Further, there was no evidence that the University was seeking to obfuscate or delay the process by producing multiple changes. However, the point goes further than that.

438. In my view the refusal to take into account the 2024 revisions strongly suggests that the OfS was determined to find significant breaches and therefore had no wish to consider whether the University had now complied. To reach a conclusion that the breaches had been remedied would have undermined the strategy that Ms Lapworth and the OfS had adopted in October 2021, pursued for three and a half years, and invested very significant resources into. The evidence supports a finding that the OfS had closed its mind to anything that would lead to not finding breaches and being unable to therefore sanction the University.

439. The question that then arises is the degree to which the fact that the decision was made by the USCEC, which was an independent committee, rather than Ms Lapworth or the officers of the OfS, protects the FD against predetermination.

440. The evidence of predetermination here is very strong. In this case, unlike the *Compton* or the *Royal Brompton* cases, the USCEC was almost entirely led by the material put before them by the officers, including Dr Ahmed and Ms Lapworth. The draft FD was adopted in its entirety and there is no evidence of sufficient independent consideration for the closed mind approach of the OfS to have been sufficiently, if at all, removed.

441. Far from the USCEC being "*hermetically sealed*" from the OfS itself, the evidence shows it adopting the material that was put in front of it. Both Ms Lapworth and Dr Ahmed were in the room when relevant decisions were made, and there is no contemporaneous material which points to independent decision-making by the USCEC.

442. I fully take into account Mr Coleman's witness statement, but as Chamberlain J said in *Inclusion Housing*, such evidence has to be treated with some caution given the dangers of *ex post facto* justifications. Apart from broad generality, the evidence does not support an analysis that the USCEC questioned the OfS's approach to findings of breach and sanction in any material way. As but an example, there is nothing to suggest that they raised any concerns about the matters that I have set out above, or questioned the officers on why those decisions had been made during the investigation.

443. The fair-minded, informed and not unduly suspicious observer would in my view conclude that there was a real possibility that the decision-maker here was biased in the sense of having a closed mind to the legal and factual merits of the University's position.

SECTION L: FINAL CONCLUSIONS

444. Conclusions on each of the Grounds are set out below. It is important to make clear that I am not determining any of the issues or facts surrounding what happened to Professor Stock. That was not the subject of the OfS investigation and it is not the subject of this Judicial Review.

445. This is a Judicial Review of the OfS's decision to find breaches and to fine the University. The judgment is concerned with whether the OfS erred in law, either in respect of its jurisdiction, its interpretation of the law, or the lawfulness of its process.

446. I have found for the University on Ground One. The OfS misinterpreted the meaning of *"governing documents"* and wrongly determined that the Trans and Non-Binary Equality Policy Statement (*"TNBEPS"* or *"the Policy Statement"*) fell within the meaning of governing documents in s.14(1) of HERA.

447. I have found against the University on Ground Two. The OfS did have jurisdiction to find a breach of condition E2, because the powers given to the OfS in HERA do encroach into, or overlap with, the Visitors' jurisdiction.

448. I have found for the University on Ground 3D. The OfS erred in law in the Final Decision by misdirecting itself as to *"freedom of speech within the law"*, and relying on the restriction of *"lawful speech"* as being sufficient to find a breach of condition E1.

449. I have found for the University on Ground 3C and 4 because the OfS misdirected itself on the question of what amounted to a breach of academic freedom, placing academics *"in jeopardy"* of *"losing their job or privileges"*.

450. I have found for the University on Ground 3A because of the failure by the OfS to have proper regard to the Freedom of Speech Code of Practice (*"FOSCOP"*).

451. I have found for the University on Ground 5A. The OfS was wrong not to have considered whether the alleged breaches had been remedied by the time of the Final Decision.

452. I have found against the University on Ground 6A. The OfS did not err in law in not providing the University with Professor Stock's second witness statement before the Final Decision.

453. I have found against the University on Ground 5E. In principle, subject to the other Grounds, it was not irrational to conclude that the TNBEPS/Policy Statement read in isolation could have a significant and severe effect on freedom of speech because of its chilling effect.

454. I have found against the University on Ground 5B. The OfS did not err in law by failing to take into account the anti-competitive effect of the Final Decision.

455. I have found for the University on Ground 6C. The Final Decision was vitiated by bias because the OfS approached the decision with a closed mind and had therefore unlawfully predetermined the decision.

Glossary

ESP
External Speakers Procedure
FD
Final Decision
FOSCOP
Freedom of Speech Code of Practice
HEA
Higher Education Act 2004
HE
Higher Education
HERA
Higher Education and Research Act 2017
OfS
Office for Students
PD
Provisional Decision
PIGC
Public Interest Governance Condition
PIGP
Public Interest Governance Principle
RA
Regulatory Advice
RF
Regulatory Framework
TNBEPS
Trans and Non-Binary Equality Policy
University
University of Sussex
USCEC
University of Sussex Compliance and Enforcement Committee