IN THE HIGH COURT OF JUSTICE **AC-2025-LON-001462**
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
BETWEEN:

THE KING
(ON THE APPLICATION OF THE UNIVERSITY OF SUSSEX)

Claimant

-and-

THE OFFICE FOR STUDENTS

Defendant

CLAIMANT'S SKELETON ARGUMENT FOR TRIAL: 3rd – 6th FEBRUARY 2026[1]

SUMMARY

1. The OfS' investigation was prompted by concerns about the protests concerning Dr Kathleen Stock by certain sections of the University's student body in October 2021. The OfS recognised that it had no jurisdiction to investigate the treatment of Dr Stock. It instead embarked on an investigation primarily focused on the wording of a two-page document, called the Trans and Non-binary Equality Policy Statement ("**the Policy Statement**"). The Policy Statement was introduced by the University based on a template promulgated by Advance HE that was adopted by many other universities. It sought to promote the fair treatment on campus of trans and nonbinary members of staff and students.

2. The OfS' investigation lasted more than three years. On 27 March 2025, the OfS made its final decision (the **"FD"**). The FD did not reach any conclusions about the lawfulness of the Policy Statement as then in force. But it found that the University had previously breached ongoing conditions of registration in that:

   (1) Condition E1. The Policy Statement constituted a governing document of the University and was incompatible with the public interest governance principles (the **"PIGP"**) of freedom of speech and academic freedom. The OfS concluded that universities were not permitted to impose any proportionate restrictions on free speech unless the speech was prohibited by civil or criminal law. The OfS concluded that the Policy Statement was impermissible because it sought to prevent bullying, harassment and abuse that was not necessarily unlawful.

   (2) Condition E2(i). The University had not acted in accordance with its internal scheme of delegation when adopting policy documents.

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[1] References to the hearing bundles are in format **CB/Tab/Page** or **SBVolume/Tab/Page**. References to paragraphs of witness statements are in format **Surname §***.

3. Those past breaches led the OfS to impose a fine of £585,000 on the University. The fine and the impact of the OfS' conclusions on the University's reputation threaten to have a significant financial impact on the University: **Roseneil 1 §§33-65 [CB/24/593-604]**.

4. The University submits that the FD is unlawful:

   (1) Condition E1 only applies to "*governing documents*" within the meaning of the Higher Education and Research Act 2017 ("**HERA 2017**"). The Policy Statement is not a governing document of the University and the OfS was therefore not empowered to impugn the Policy Statement under Condition E1 (**Ground 1 §§6-38**).

   (2) The University's internal scheme of delegation forms part of its internal laws, which fall within the exclusive jurisdiction of the University's Visitor. The 400 years of common law relating to the visitorial jurisdiction was not abrogated by HERA 2017 (**Ground 2 §§39-50**). The OfS' conclusion on Condition E2(i) was therefore *ultra vires*.

   (3) The OfS was wrong in law to direct itself (in relation to Condition E1) that the University was not permitted to impose proportionate restrictions on speech unless the restrictions related to speech that was already prohibited by civil or criminal law (**Ground 3D §§62-65**). The OfS also erred in its interpretation of Condition E1 (**Ground 3A §§53-56**); failed to apply the correct definition of Academic Freedom (**Ground 3C §§57-61**); and misinterpreted the Policy Statement (**Ground 4 §§69-72**).

   (4) The OfS' approach was in certain respects unreasonable. In particular: (i) despite the "*primary purpose*" of the power exercised being to "*secure compliance*" by the University, the OfS refused to consider whether the Policy Statement put in place a year before the FD had remedied the OfS' concerns about previous versions of the Policy Statement (**Ground 5A §§76-82**); (ii) the OfS came to an unreasonable conclusion about the Safeguarding Statement, and a reference to "*stereotyping*" in the Policy Statement (**Ground 5C §§83-85**); and (iii) the OfS concluded that the Policy Statement had a "*significant and severe*" impact from 2019 to 2024, despite having no evidence on impact from November 2021 onwards and scant evidence before then (**Ground 5E §§86-88**).

   (5) The FD was procedurally unfair. In particular: (i) the primary evidence used against the University was drafted by the OfS itself and not disclosed to the University for rebuttal or comment (**Ground 6A §§90-97**); (ii) the FD was made on a substantially different (and undisclosed) basis from the Provisional Decision **(**the **"PD")**, but the University was given no opportunity to make representations on that basis (**Ground 6B §§98-99**); and (iii) the actions of the OfS gave rise to apparent bias and/or pre-determination, including by appointing Dr Arif Ahmed to lead the investigation team and make recommendations, when he had already expressed strong opinions relating to the matters he was charged with investigating and had a pre-existing collegial friendship with the OfS' only witness (**Ground 6C §100-110**).

5. This case is of public importance. It concerns the scope of the OfS' powers, the institutional autonomy of universities to foster civility and tolerance on campus, and the reputation of one of this country's leading universities.

GROUND 1: ULTRA VIRES AND/OR MISDIRECTED DEFINITION OF GOVERNING DOCUMENTS

Overview

6. The University submits:

   (1) Before the enactment of HERA 2017, the "*governing documents*" of a university were the documents constituting its legal form and governance arrangements and the Privy Council had oversight of such documents.

   (2) Sections 13-14 of HERA 2017 transferred the oversight of "*governing documents*" from the Privy Council to the OfS. It did not change the meaning of "*governing documents*".

   (3) HERA 2017 tasked the OfS with devising and publishing initial and ongoing conditions of registration (s.5) which could include a "*public interest governance condition*" relating to provider's "*governing documents*" (the **"PIGC"**) (s.13-14). The OfS exercised that power by promulgating Condition E1, which provides that "*Condition E1: the provider's governing documents must uphold the public interest governance principles that are applicable to the provider*" **[CB/9/344] [CB/9/348]** and identifies its legal source as ss.13-14 of HERA 2017 **[CB/9/331]**.

   (4) Accordingly, Condition E1 can only apply to "*governing documents*" within the meaning of HERA 2017, *i.e.* documents which constitute the legal form and governance arrangements of a university.

   (5) When applying Condition E1 in the FD, the OFS interpreted "*governing documents*" to include any document which "*describe[s] any of the provider's objectives or values*" **[CB/9/331] [CB/8/198]**. This is much broader than the meaning of "*governing documents*" in HERA 2017 and was therefore *ultra vires*. The Policy Statement is not a "*governing document*" within the meaning of HERA 2017, and the OfS' findings under E1 were therefore unlawful.

Legal principles

7. A court should ascertain the meaning of the words of a statute in light of their context and the purpose. In doing so it should apply the following principles.

8. First, the "*modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that*

purpose." [2] The purpose of Parliament is an objective concept, to be ascertained from the words used in their context. It is not "*the subjective intention of the minister or other persons who promoted the legislation*".[3]

9. Second, "*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.*"[4]

10. Third, external aids to construction "*may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision*"[5], albeit that such aids will not displace the meaning of clear words and play a "*secondary role*". Where there is "*sufficient doubt*" about the meaning of the words to be interpreted, external aids "*must be given significant weight*".[6]

11. Fourth, while presumptions do not override plain words, they are useful tools of construction. These include: (i) the rule against absurdity – courts should avoid giving an interpretation that produces an absurd result, since this is "*unlikely to have been intended by the legislature. In that respect absurdity is given a very wide meaning, covering, amongst other things, unworkability, impracticability, inconvenience, anomaly or illogicality*" (*JR222's Application for Judicial Review* [2024] 1 WLR 4877 at §76); (ii) the presumption that the general gives way to the specific: "*where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision*";[7] accordingly, where an enactment sets out particular ways in which a power can be used and they are subject to express or implied limitations, the general power cannot be used in a way that would undermine the specific limitations;[8] (iii) the *expressio unius est exclusion alterious* principle; accordingly, when "*a legislative provision sets out who or what is within the meaning of an expression, it ordinarily means that no-one else or nothing else is*".[9]

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[2] *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 at §28 *per* Lord Nicholls.
[3] *R (Spath Holme) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 349, 396.
[4] *R (Quintavalle v Secretary of State for Health* [2003] 2 AC 687 §8 *per* Lord Bingham
[5] *R (Project for the Registration of Children as British Citizens v Secretary of State for the Home Department* [2023] AC 255 at §30 *per* Lord Hodge
[6] *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 at §11.
[7] *Bennion on Statutory Interpretation* §21.4. See also *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 at §27 ("*A principle of construction is that general words do not derogate from specific words. Where there is an unqualified specific provision, a general provision is not to be taken to override that specific provision*.")
[8] *Bennion on Statutory Interpretation* §3.10, see *R (JM (Zimbabwe)) v Secretary of State for the Home Department* [2017] EWCA Civ 1669 at §74.
[9] *Salisbury v Independent Living Ltd v Wirral Metropolitan Borough Council* [2012] EWCA Civ 84 at [23] *per* Hughes LJ.

12. Fifth, the Court may have regard to Parliamentary materials for limited purposes that are relevant to interpretation. These include: (i) to ascertain background material and context;[10] (ii) to identify the mischief which the legislation seeks to rectify;[11] and (iii) where the *Pepper v Hart* conditions are satisfied, to determine the meaning of the words in question.[12]

Statutory history

13. The legislative history to HERA 2017 is set out at **RASFG §§31-40 [CB/2/35-39]**. The salient points are as follows. The OfS' pleaded case does not dispute these points.

14. First, prior to 2017, the words "*governing documents*" referred to documents instituting a university (*i.e.* the instrument of government) and providing for its formal governance (*i.e.* the articles of government). Guidance issued to higher education institutions (**"HEIs"**) (the **"2015 Guidance"**) by the then Secretary of State for Business and Innovation provided in relation to all HEIs, including universities, that: "*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*" [**SB3/2/20**].

15. The route by which universities could change their governing documents depended on the legal form of provider.

    (1) For providers formed as a company, s.129B(2) of the Education Reform Act 1988 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).

    (2) 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).

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[10] "*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*" (*Medical Costs for Asbestos Diseases* [2015] UKSC 3 at §55 *per* Lord Mance).

[11] *McDonnell v Congregation of Christian Brothers Trustees* [2003] UKHL 63 [2004] 1 AC 1101 at §29 *per* Lord Steyn: "*It is permissible to use Hansard to identify the mischief at which a statute is aimed.*"

[12] The conditions are that the (i) legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) the material must consist of or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering: *Pepper v Hart* [1993] AC 593.

(3) 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).[13]

16. Thus, the reference to "*governing documents*" in the 2015 Guidance was to a provider's instrument and articles of government.

17. The position was consistent with charity 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.[14]

18. Second, the legislative history of HERA 2017 shows that Parliament intended these functions to be transferred to the OfS, not expanded. In particular:

(1) The Government Green Paper provided that the government's intention in creating the OfS was to streamline into one body functions performed by nine government and sector bodies **[SB3/3/31]**. When addressing the role of the Privy Council, the Green Paper provided *"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…"* **[SB3/3/40]**. The 2015 Green Paper went on to note that the Government was considering removing the requirement for the Privy Council to approve governing documents, to be replaced with a power conferred on the OfS to "*periodically review*" the governing documents for compliance with the public interest principles.[15] **[SB3/3/41]**.

(2) The Bill was introduced in Parliament in May 2016. The Government published a Detailed Impact Assessment of the Bill **[SB3/6/102-125]**. As regards governing documents and the Privy Council, it provided that *"all publicly funded HEPs are currently subject to a lengthy process of Privy Council approval when seeking to amend their*

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[13] https://privycouncil.independent.gov.uk/wp-content/uploads/2025/03/2025-03-04-Amending-a-Royal-Charter-or-Byelaws.pdf

[14] For 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' Regulatory Advice 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, *i.e.* its instrument and articles of association: Regulatory Advice 5**[SB3/8/146]**.

[15] The then applicable list of public interest principles was set out in an Annex to a letter to Vice-Chancellors dated 6 February 2006. The letter again reflected the well understood position as to what type of documents were included within the phrase "*governing documents*": "*Higher education institutions do, of course, own their own governance arrangements. They therefore are responsible for the content of their Charter and Statutes, or Instrument and Articles of Government, and for proposing changes to them. However, the current legal position is that all changes to these documents have to be agreed by the Privy Council*". **[SB3/1/3-5]**.

governing documents, which is unnecessarily burdensome and restrictive" **[SB3/6/110]**. Accordingly, "*responsibility for the public interest in the governing documents of publicly funded HEPs will transfer from the Privy Council to the OfS. The OfS will consult on, publish and maintain a list of 'public interest principles' against which it will in future monitor the governing documents of publicly funded HEPs."* **[SB3/6/111-112]**.

(3) The Government's Explanatory Notes to the Bill explained of clause 14 (later section 14 of HERA 2017) that "*This clause defines a 'public interest governance condition' for the purposes of clause 13 and is intended to ensure that certain higher education providers will continue to adhere to a set of public interest principles. This is currently being monitored by the Privy Council, but in the new system this role would move to the OfS, to be monitored and enforced as a condition of registration...The OfS may impose, as an initial and/or ongoing condition of registration, a requirement for the governing documents of a provider to be consistent with the principles in the list applicable to that provider...This would mirror current arrangements."* (emphasis added).

(4) The Government told Parliament that the mischief being addressed was the regulatory burden on providers of having to apply to the Privy Council to amend their governing documents. The sponsoring Minister spoke against an amendment which sought to give the OfS a remit to assess whether a university's *"practices"* complied with the PIGPs (as opposed to assessing whether its "*governing documents*" complied with the PIGPs). The sponsoring Minister 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."* **[SB3/5/77-78]**.

19. The University respectfully submits that the Government was right about that. To require the regulator to assess whether a provider's practices, values and objectives are consistent with the PIPG on a broader basis would be unworkable for both providers and the regulator (see further §36 below).

20. The resulting statutory framework was therefore intended to transfer oversight of a university's *"governing documents"* (as regards their consistency with principles of public interest) to the OfS. It was not intended to expand the definition of "*governing documents*".

21. In relation to Wales and Scotland, higher education is a devolved function. The equivalents of HERA 2017 in Wales and Scotland adopt the same approach to "*governing documents*". In Wales, a "*governing document*" means "*in the case of an institution established by Royal Charter – (i) the institution's charter, and (ii) any instrument relating to the conduct of the institution the making or amendment of which requires the approval of the Privy Council*" (s.47 Higher Education (Wales) Act 2015). In Scotland, a "*governing document*" "*in the case of an institution established by Royal Charter, means its charters together with the statutes (if any) made under them*" (s.19 Higher Education Governance (Scotland) Act 2016).

Statutory wording

22. The OfS has a general duty to determine and publish the initial registration conditions and the general ongoing registration conditions (s.5(1) HERA 2017).

23. Sections 13(1) provides a list of the conditions that the initial or ongoing registration conditions may, in particular, include. These include under s.13(1)(b) "*a public interest governance condition (see section 14)*".

24. Section 14 provides:

> "*(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.*
>
> *(4) The list may include different principles for different descriptions of English higher education providers.*
>
> *(5) The OfS may revise the list.*
>
> *(6) If the OfS revises the list, it must publish it as revised.*
>
> *[(7) The list (as originally determined and as revised) must include the principle that academic staff at an English higher education provider have 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 and privileges they may have at the provider.[16]]*
>
> *(8) Before determining or revising the list, the OfS must consult –*
>
> > *(a) bodies representing the interests of English higher education providers which appear to the OfS to be concerned,*

[16] Section 14(7) was in force when the FD was taken. It was repealed on 1 August 2025 by Sch 1(1) para 3 of the Higher Education (Freedom of Speech) Act 2023, which inserted (*inter alia*) a direct duty on providers to take such steps as are reasonably practicable to secure freedom of speech within the law for (*inter alia*) staff and members of the provider, which includes the academic freedom of academic staff. Academic Freedom is defined in s.1A and s.85(6) albeit there is no suggestion that the substance of the definition has changed.

(b) the Secretary of State, and

(c) such other persons as the OfS considers appropriate.

25. Thus, if the regulator chooses to enact a public interest governance condition under s.13(1)(b), it is subject to the limitations set out in s.14. One such limitation is that the condition must relate to *"governing documents"* and specifically their *"consistency"* with the PIGP.

Condition E1

26. Relying on ss.13-14 of HERA 2017, the OfS devised and published a public interest governance condition – Condition E1. Condition E1 is published in the following terms: *"The provider's governing documents must uphold the public interest governance principles that are applicable to the provider"*. **[CB/9/344]**

27. The Regulatory Framework ("**RF**"), which gives guidance on the governance conditions, specifically identifies ss.13-14 of HERA 2017 as the legal basis for Condition E1 **[CB/9/331]**.

The OfS' Guidance on Condition E1

28. The OfS is also obliged to prepare and publish from time to time a RF (s.71(1)) to which it must have regard when exercising its functions (s.75(2)). The RF is to consist of, inter alia, (a) a statement of how it intends to perform its functions; and (b) guidance for registered higher education providers on the general ongoing registration conditions.

29. The RF provides the following guidance to providers on how the OfS will interpret *"governing documents"*:

> *"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'.*
>
> *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."* **RF §§424-425 [CB/9/331]**

30. The RF is not a source of the OfS' powers – it is guidance to which the OfS must have regard: s.75(2) HERA 2017. It cannot change the meaning of the statute, enlarge the OfS' statutory powers or change the meaning of the conditions promulgated under the statute.

Submissions

31. If the University is right about the statutory meaning of "*governing document*", then: (i) the words "*governing document*" in *Condition* E1 (which seeks to give effect to ss.13-14 of HERA 2017) have the same meaning and (ii) the OfS was not empowered to treat the Policy Statement as a governing document for the purposes of the FD.

32. It also follows that the guidance as to the meaning of "*governing documents*" in the RF (§§424-427 **[CB/9/331]**) is *ultra vires*, although it is unnecessary to decide this point in order to quash the FD.

33. By contrast, there is nothing inconsistent between the terms of Condition E1 itself and the statute.

34. The OfS' defence to Ground 1 makes no reference to the legislative history or context at all, save to seek to rely on the (inadmissible) opinions of its current Chief Executive Susan Lapworth **Lapworth 1 §§11-12 [CB/25/610-611]** (who had no involvement in the passing of HERA 2017) as to the intentions of unspecified government officers.

35. The points advanced by the OfS do not undermine the University's submissions:

    (1) First, the OfS contends that the University's interpretation "*cuts across the purpose of s.14(1)*" because it would risk excluding policy statements which directly bear on the PIGP: **SGR §37.3 [CB/5/120]**. However, once it is recognised that the statutory purpose of s.14(1) was to transfer oversight of "*governing documents*" to the OfS, it does not undermine the statutory purpose to limit the OfS' oversight to "*governing documents*" as they were then understood.

    (2) Second, the OfS contends that there would be a "*real difficulty*" if different legal forms of provider had different forms of governing documents (**DGD §78 and 81 [CB/7/161]**). But the legislative history shows that there is no such difficulty. The existing meaning of "*governing documents*" has always been apt to cover all forms of provider. It may be noted that, during the course of this litigation, the OfS has amended the initial conditions of registration for providers registered from 1 August 2025 to make it clear that they only have to produce a defined set of "*governing documents*" **[SB3/15/527-550]**.[17] This further undercuts the OfS' submission that "*governing documents*" have to be interpreted as any document that "*describes any of the provider's values*" in order to cover different legal forms of provider.

[17] New Condition E7 provides that "*The provider must have a set of documents which will enable the effective governance of the provider in practice*". The accompanying guidance refers to "*governing documents*" which must include: "a. documents which establish the provider as an institution, including (where applicable to the provider's legal form) its Royal Charter, memorandum and articles of association or trust deed", "b. governing body documents"; "c. risk and audit documents"; "d. decision making documents"; "e. a conflicts of interest policy"; and "f. any other documents (including shareholder agreements) which contain rules which govern the operation of the provider's governing body".

(3) Third, the OfS contends that it would be free not to impose a "*public interest governance condition*" relating to a provider's "*governing documents*" as specified by s.13(1)(b) and s.14(1) and instead to produce a different, broader form of public interest governance condition (**DGD §§81-82 [CB/7/162-163]**). That is both wrong and irrelevant. It is wrong because it would be contrary to the statutory purpose to formulate a "*public governance condition*" that sidesteps the limits of s.14(1).[18] It is, in any event, irrelevant because the OfS in fact purported to promulgate a "*public interest governance condition*" in accordance with s.14(1) HERA 2017 (as recorded in the RF **[CB/9/331]** and there is no evidence to the contrary).

36. The OfS' definition of "*governing documents*" also leads to absurdity. It would have (up until August 2025 when the OfS changed the initial conditions of registration (see ftn 17 above)) required the OfS to satisfy itself prior to the registration of a University that **every single** document setting out any of the provider's values or objectives (including lower order policy documents, emails to students, news announcements, posters on campus etc) complied with the PIGP (see s.3(3) HERA 2017 by which the OfS must be satisfied that the provider satisfies the initial registration conditions at the time of registration). The OfS has never taken such an approach, and to do so would be unworkable for universities and would undermine the objective of institutional autonomy enshrined in HERA 2017: **Roseneil 2 §14 [CB/29/743] Lapworth 2 §7 [CB/31/776]**.

37. No issue arises in relation to limitation. The FD was unlawful because the OfS misdirected itself as to the meaning of Condition E1 and was accordingly not empowered to treat the Policy Statement as a governing document. The challenge to the FD was issued promptly and within three months.

38. The Court could, alternatively, start from the proposition that the guidance in the RF is wrong in law and that the OfS erred in the FD in applying that unlawful guidance. The target of the judicial review would still be the FD and the grounds to challenge the FD first arose when the FD was made. However, if the Court considers it necessary to do so, the University applies for an extension of time to challenge the RF for the reasons set out in its separate submissions **[SB2/5-6/17-26]** and **Roseneil 3 [CB/30/761-773]**.

GROUND 2: THE VISITORIAL JURISDICTION

Overview

39. In Annex D of the FD, the OfS found that the University had breached condition E2(i) ("*the provider must have in place adequate and effective management and governance arrangements to (i) operate in accordance with its governing documents*") **[CB/9/344]** because it found that the

[18] See *Bennion on Statutory Interpretation* §21.4 and *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 at §27 (quoted at fnt 7 above).

University had breached its internal laws on four occasions. The University contends that these findings are *ultra vires*. For almost four centuries, the common law has recognised that the Visitor of a university has exclusive jurisdiction on matters concerning the interpretation and application of a university's internal laws, save where the jurisdiction has been expressly or by necessary implication limited by Parliament. Nothing in s.5 HERA 2017 (the statutory basis for condition E2(i)) abrogated the exclusive jurisdiction of the University's Visitor.

Legal principles

40. The legal framework concerning the visitorial jurisdiction (which the OfS does not engage with at all and therefore is taken to accept (**DGDs, §§84-90) [CB/7/163-165]**) is summarised in the House of Lords decisions in *Thomas v University of Bradford* [1987] AC 795 and *R v Lord President of the Privy Council ex p Page* [1993] AC 682 at 700. 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 corporations (such as colleges) were liable to visitation by their founder, heirs, or other persons appointed by the founder.[19]

    (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*" (*Bradford,* 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). 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).

    (3) The position of the visitor is therefore "*anomalous, indeed unique*" (*Page*, 704B *per* Lord Browne-Wilkinson) – universities with visitors operate under a different legal framework from those without visitors. That alone does not justify sweeping away the long-established recognition of the visitor's special jurisdiction (*ibid*).

[19] Holdsworth, *History of English Law* Vol. III pp.417 and Vol IX, 58.

(4) Unless stated otherwise in the Charter, the Crown exercises visitorial powers: *Bradford* at 811B-C *per* Lord Griffiths.[20] 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*".[21] 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.[22] A general visitor may exercise its powers on petition or of its own motion.[23]

(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.[24]

(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).

(7) Parliament can always "*invade the jurisdiction of the visitor if it chooses to do so*" (*Bradford* at 824C *per* Lord Griffiths). The test for assessing whether Parliament is to be taken to have done so is addressed below.

(8) Universities established by Royal Charter, such as the University, are eleemosynary corporations subject to the visitorial jurisdiction.[25] The grant of a Royal Charter (and appointment of a visitorial jurisdiction therein) is an exercise of the Royal Prerogative.[26]

41. Parliament has abrogated the visitorial jurisdiction in relation to qualifying disputes between staff and students and the university:

(1) Section 20 of the Higher Education Act 2004 ("**HEA 2004**") provides that "*the visitor of a qualifying institution has no jurisdiction in respect of*" complaints made by students and

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[20] See further "*wherever the Crown founds a charity [the] Court treats the Crown as the permanent authority and visitor of the charity, unless where the Crown has thought fit to appoint a special visitor" Att.Gen v The Dedham School* 1857) 23 Beauv at 356, *per* Sir John Rommily MR.
[21] *Keeping the Peace in Universities* at III, see further *Eden v Foster* (1725) 2 P Wms at 326 and *R v Bishop of Ely* (1788) 2 TR at 328.
[22] *St John's College, Cambridge v Todington* (1757) 1 Burr, *per* Lord Mansfield at 200-202.
[23] *R v Bishop of Ely* (1788) 2 T.R *per* Buller J at 388.
[24] "*Whatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the domus, of the institution, is properly within the jurisdiction of the Visitor*" (*Thomson v University of London* (1864) 33 LJ Ch, *per* Sir Richard Kindersley *V-C* at 634.
[25] 13 *Halsbury's Laws of England (3rd ed) pp.707-708.*
[26] *R (on the application of BMA) v Royal College of General Practitioners* [2024] EWHC 2211 (Admin) at §83.

former students. Instead, oversight was transferred to the Office for the Independent Adjudicator.

(2) 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.[27]

42. By contrast, HERA 2017 contains no mention of visitors.

Submissions

43. It is not in dispute in these proceedings that, prior to the enactment of HERA 2017, the Visitor of the University had exclusive jurisdiction to determine and apply the University's internal laws save where that jurisdiction had been abrogated by HEA 2004. For example, save as carved out by ss.20 and 46 of HEA 2004, nobody could have brought a claim for judicial review on the ground that a decision of the University contravened its internal laws – the Administrative Court would have lacked jurisdiction to adjudicate on those internal laws.

44. The relevant issues are therefore:

(1) First, did the OfS purport to interpret and apply the University's internal laws?

(2) Second, did HERA 2017 invade the Visitor's jurisdiction so as to empower the OfS to interpret and apply the University's internal laws for the purposes of Condition E2(i)?

45. The answer to the **first** question is plainly "yes".

46. The University submitted to the OfS that:

(1) The OfS had no jurisdiction to interpret or apply the University's internal laws in relation to Condition E2(i) **PD Representations §§145, 221 [SB1/3/345, 370]**.

(2) Under the University's internal laws, the University's Freedom of Speech Code of Practice ("**FOSCOP**") should have been formally approved by the University Council but the omission to do so was immaterial **PD Representations §151 [SB1/3/347]**.

(3) The University's External Speakers Procedure ("**ESP**") was approved by the Prevent Steering Group (in 2021) and by the Vice-Chancellor (in 2023, on the advice of the

[27] Parliament has also expressly abrogated the Visitorial jurisdiction over other matters, for example see s.24(1) Crime and Courts Act 2013, and in Northern Ireland see Public Services Ombudsman Act (Northern Ireland) s.18(2)-(5).

University Executive Group) in accordance with the University's internal laws **PD Representations §154 [SB1/3/348]**.

(4) The Policy Statement was approved by the Vice-Chancellor, on the advice of the University Executive Group, in accordance with the University's internal laws **PD Representations §§224-225 [SB1/3/371-372]**.

47. In response, the OfS concluded:

(1) "*HERA confers on the OfS the power to impose (and therefore enforce) conditions E1 and E2(i) and in doing so Parliament implicitly intrudes into the visitor's jurisdiction*" **FD Annex D §18(b) [CB/8/216-217]**.

(2) The University's omission to obtain the Council's approval of the FOSCOP was a material breach of Regulation 10 of its internal laws **FD Annex D §§5-7 [CB/8/213-214]**.

(3) The ESP was approved in breach of the University's internal laws **FD Annex D §11 [CB/8/214]**.

(4) The Policy Statement was approved in breach of the University's internal laws **FD Annex D §§13-15 [CB/8/215-6]**.

48. As to the **second** question, the approach to construing the power conferred by HERA 2017 is as follows:

(1) As noted above, (i) through the exercise of prerogative powers (by Royal Charter) the Crown retains the power to grant exclusive jurisdiction to visitors of eleemosynary charities; (ii) the scope and nature of that jurisdiction have been established by common law for nearly four centuries.

(2) Parliament is presumed not to legislate to abrogate or limit prerogative powers and/or the common law unless this is enacted expressly or by necessary implication.[28]

(3) A necessary implication must be derived from the words of the Act, and the threshold is high: "*a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion*".[29]

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[28] *R (XH) v Secretary of State for the Home Department* [2018] QB 355 at §89, *National Assistance Board v Wilkinson* [1952] 2 QB 648, 661

[29] *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, 616 §45 "*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.*" cited in *R (XH) v Secretary of State for the Home Department* [2018] QB at 355 at §89

(4) The OfS' pleaded case (which contradicts its stance in the FD) is that a *"concurrent regulatory jurisdiction does not 'abrogate' the prerogative power to grant charters creating a visitorial jurisdiction"* **DGDs §85 [CB/7/163]**. This misunderstands the nature of the Visitor's jurisdiction. By its very nature, the Visitor's jurisdiction is exclusive. If Parliament enacted a concurrent jurisdiction for the OfS, then (i) that would invade the Crown's prerogative power to confer an exclusive jurisdiction on visitors to adjudicate on an institution's internal laws, and (ii) it would abrogate the centuries old common law principle that a Visitor's jurisdiction is exclusive.

49. As noted above, the Parliamentary drafter is alert to the visitorial jurisdiction and, when Parliament has sought to invade the visitorial jurisdiction, it has done so expressly: HEA 2004, ss.20(1)-(3) and s.46 (see also Crime and Courts Act 2013 s.24(1), Public Services Ombudsman Act (Northern Ireland) 2016 s.18(2)-(5)). However, there is no such express provision for invading the visitorial jurisdiction in HERA 2017.

50. Nor is the strict test for necessary implication satisfied:

(1) First, as in *XH,* it would be *"fanciful to suppose"* that Parliament overlooked the role of visitors. Had Parliament intended to limit the visitorial jurisdiction under HERA 2017, one would have expected to see express provision.

(2) Second, HERA 2017 imposes a duty on the OfS to make certain registration conditions (ss.8-12) and otherwise gives the OfS a power to make such conditions as it sees fit (s.5). If the mandatory conditions required the OfS to adjudicate on the internal laws of universities, then this would by necessary implication invade the visitorial jurisdiction to that extent. But this does not apply to the discretionary conditions because any such conditions are not *necessary* under the terms of the Act.

(3) Third, in its pleaded case, the OfS has not attempted to identify any words in HERA 2017 which necessarily imply the ousting of the exclusive jurisdiction of visitors.

(4) Fourth, the OfS' pleaded case is that it would be "*absurd*" for Parliament to have retained the visitorial jurisdiction **DGD §87 [CB/7/163]**. As noted above, the test is whether the words used by Parliament unmistakably show that it abrogated the visitorial jurisdiction, not whether it would have been sensible for Parliament to have abrogated the visitorial jurisdiction so as to put all universities in the same position. But, in any event, there is no absurdity:

(a) Institutions established by Royal Charter are not free from supervision – it is just that the supervision comes from the Visitor, not the OfS. It is not surprising that Parliament should choose to leave this jurisdiction intact, just as the House of Lords considered that the advantages of the visitorial system (speed, cost and finality) justified the anomalous exclusion of the visitorial jurisdiction from

judicial review on the grounds of error of law (*Page*, 704B-F *per* Lord Browne-Wilkinson).

(b) Parliament provided that different types of higher education providers could be subject to different types of conditions as appropriate: s.5(1). Even on the OfS' interpretation, the regulatory framework recognises that there are differences in the regulatory burden between Charter institutions and others: **Lapworth 1 §14 [CB/25/14]**.[30]

(c) Preserving the visitorial system is consistent with the statutory objective of protecting the institutional autonomy of higher education providers (HERA 2017, s.2(1)(a)).

(5) Fifth, the OfS contends that condition E2(i) does not require consideration of internal laws (**DGDs §86 [CB/7/163]**). Whilst it may well be possible in some cases to conclude that there has been a breach of condition E2(i) without needing to form a view on whether a university has complied with its internal laws, in this case the OfS' conclusion on condition E2(i) was plainly based on its findings that the University breached its internal laws (see §47 above).

GROUND 3: FREEDOM OF SPEECH WITHIN THE LAW AND THE MEANING OF CONDITION E1

51. The meaning of Condition E1 is an objective question for the Court. The OfS misinterpreted Condition E1 and/or failed to take into account matters that were relevant to the proper application of Condition E1. In particular:

(1) **Governing documents:** if (contrary to ground 1) *"governing documents"* mean all documents which express any of the provider's values, then the OfS necessarily had to analyse the full suite of documents which expressed the University's values to determine whether, taken as a whole, they were consistent with the PIGPs. The OfS failed to do this: §§53-56 below.

(2) **Academic Freedom:** the question was whether the Policy Statement placed academics in jeopardy *"of losing their jobs or privileges"*, contrary to the Academic Freedom PIGP. The OfS rightly concluded that the Policy Statement would not put academics at risk of losing their jobs and privileges (**FD Annex C §53 [CB/8/202]**). The question was not, as the OfS asked, whether the Policy Statement could cause any academic *any detriment*: see §§57-61 below.

(3) **Freedom of Speech:** the OfS misinterpreted *"freedom of speech within the law"*. The principle of freedom of speech within the law permits proportionate restrictions of

[30] See Lapworth 1 *"a number of chartered universities still need to seek approval from the Privy Council to amend their Charter and Statutes"*. This is in fact incorrect: all chartered universities must do so.

lawful free speech. The OfS misdirected itself that only unlawful speech (*i.e.* speech in breach of criminal or civil law) can be restricted: see §§62-68. The OfS concedes that if that is what the FD did, then that was an error of law (but denies that is what the FD does): (**DGD §§104-105 [CB/7/170-171]**). This strand of the argument therefore depends on the proper interpretation of the FD.

52. The University does not pursue Ground 3B (flawed approach to assessing the consistency of governing documents with public interest governance principles) save insofar as the point arises in in relation to the Academic Freedom and Freedom of Speech of staff, to the extent set out in Ground 4 below.

Ground 3A: governing documents as a whole

53. The OfS does not dispute that it was (i) obliged to take into account every document expressing any of the University's values, rationally grapple with those documents, and come to a rational view on whether those documents, taken together, were consistent with the PIGPs; and (ii) if that was not done, then the OfS committed a material error of law. The only question is whether the FD shows that that was in fact done.

54. In approaching that question, the Court should apply the following principles:

    (1) The Court can properly draw inferences as to what was or was not taken into account (and rationally grappled with) from the written evidence before it.[31]

    (2) The FD should stand as a record of the decision, particularly given that the decision was taken by a committee.[32] The OfS accepts this: **DGD §53 [CB/7/151]**.[33]

55. As to the facts in this case:

    (1) When responding to the PD, the University drew the OfS' attention to the extensive efforts and the suite of policies and work done to protect freedom of speech and academic freedom at the University. This work was extensive **[SB1/4/481-483]**[34] and contained many documents stating the university's objectives and values. If Ground 1 of the claim is rejected, then all these documents constitute "*governing documents*". For example, the 2023 FOSCOP (which is incorporated into student and staff contracts) provides that "*every member of the University is expected to uphold the right to*

[31] See, for example, *R (Kerswell) v London Borough of Lewisham* [2019] EWHC 754 (Admin) in which the Court rejected a witness statement asserting a matter was taken into account that was missing from the decision-record. The Court noted that "*by the time he came to write this witness statement he knew perfectly well what the highly specific area of [complaint…] was which it was said that the [decision-maker] had not taken into account. He had every opportunity to address it, but instead he put it in entirely general terms.*"

[32] See *R (Young) v Oxford City Council* [2002] EWCA Civ 990 at §20 *per* Pill LJ, noting the dangers of an individual producing witness evidence relating to a collective decision.

[33] See further *Venuscare Ltd v Cumbria County Council* [2019] EWHC 3268 (Admin) at §15 "*the court should normally when considering criticism of a decision limit itself to the material which was actually placed before the decision maker and to the reasons that were actually given.*"

[34] See also correspondence in June 2023 **[SB2/61/628-711].**

freedom of speech and the right to academic freedom" and *"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"* **[SB1/142/1855]**.

(2) On 10 February 2025, the OfS' investigation team presented the USCEC with a decision recommendation with two annexes **[CB/38/943-949]** and various documents. These documents did not include the University's Representations albeit the USCEC had *"access to"* those representations from a previous meeting: **Ahmed 1 §§90-91 [CB/26/705-706].**

(3) One of the documents was the Draft Notice of the Final Decision **Ahmed 1 §90(a) [CB/26/705] [CB/40/1042-1134]**, in which the investigation team wrote that *"the decision-makers in this investigation were provided with copies of, and had due regard to, the full suite of the provider's representations"* **Draft FD Summary §3 [CB/40/953]**[35] and that none of the "*other*" governing documents of the provider (other than the Policy Statement, Charter and Statutes) had any protective effect on freedom of speech or academic freedom **Draft FD Annex C §58, §63, §67, §72, §83, §87, §94 [CB/40/1062-1069]**. Those "*other*" governing documents were not identified in the draft decision notice, nor in any other document given to the USCEC by the investigation team. No analysis of such other *"governing documents"* was conducted by the investigation team or considered by the USCEC.[36]

(4) The minutes of the decision-making meeting on 14 February 2025 **[CB/41/1135-1138]** do not record any deliberation. In relation to Condition E1, they merely note that the USCEC adopted the draft notice *"on the basis of the reasons set out in the draft notice"* **Minutes §3 and §6 [CB/41/1135-1136]**. The USCEC therefore conducted no analysis of other "*governing documents*".

(5) In the RASFG, the University particularised examples of other *"governing documents"* (on the OfS' interpretation of "*governing documents*") that it says were not sufficiently grappled with, including the FOSCOP: **RASFG §§137.3 [CB/2/71]**. In his witness statement in response, Mr Coleman does not identify whether and to what extent any other governing documents were identified and considered by the decision-making committee.[37] His evidence on this issue is simply that he read the University's representations: **Coleman 1 §29 [CB/27/720]**. Despite stating that there was *"vigorous discussion"* **Coleman 1 §§36-39 [CB/27/727-729]**, Mr Coleman does not suggest that

[35] This was of course written before the USCEC had in fact had any regard to such representations. The final version says *"the OfS has had due regard to the full suite of the provider's representations"* **FD Summary §3 [CB/8/185]**.
[36] Had it been done, the duty of candour would have required it to be disclosed. No such document has been disclosed.
[37] Nor is this matter addressed in Dr Ahmed's evidence.

other "*governing documents*" were taken into account by the USCEC, still less does he identify the USCEC's assessment of other "*governing documents*".

56. The Court is accordingly invited to conclude from the record of the decision (and the absence of contrary evidence) that the OfS (i) failed to have regard to *all* of the relevant "*governing documents*" on its broad interpretation of the term and/or (ii) failed to rationally grapple with the "*governing documents*" as a whole.

Ground 3C: Academic Freedom

57. The Academic Freedom PIGP is that "*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 or losing their jobs or privileges they may have at the provider*" **RF Annex B [CB/9/348]**. Academic Freedom therefore protects academics from a specific form of harm: "*jeopardy of losing their jobs and privileges that they may have at the provider*". It is distinct from Freedom of Speech **RF Annex B [CB/9/348]**, which provides a more general form of protection.

58. The OfS correctly recognised that none of the versions of the Policy Statement could have led to the imposition of any disciplinary action (including dismissal) of any academic for lawful speech or a lawful expression of academic freedom. This was because of the protection afforded by Statute VII of the University's Statutes: **FD Annex C §53 [CB/8/202]**. Accordingly, the OfS positively concluded that an academic in breach of the Policy Statement but speaking lawfully would not be in jeopardy of "*losing their jobs or privileges*" **FD Annex C §53 [CB/8/202]**. That should have been the end of this issue.

59. However, the OfS went on to assess the possibility that the Policy Statement might lead to academics being subject to disciplinary proceedings and that, even though the proceedings would be resolved in the academic's favour (by virtue of Statute VII), the process might cause stress and anxiety **FD Annex C §55 [CB/8/203]**. The OfS concluded that this was enough to establish a breach of the Academic Freedom PIGP in respect of the 2018 and 2022 versions of the Policy Statement **FD Annex C §62, §72 [CB/8/205-206]**.

60. The OfS thereby asked itself the wrong question. It asked whether the Policy Statement contained "*anything that could potentially be relied on by the higher education provider … to treat [the academic] less favourably than other academic staff, because of their lawful academic ideas and opinions*" (a question which relates to the broad concept of 'detriment' found in anti-discrimination law in relation to 'protected beliefs') rather than whether it put academics "*in jeopardy of losing their jobs and privileges*" at the University.

61. The OfS' pleadings offer no answer to this – they merely contend that the submission is "*unreal*" **DGD §96 [CB/7/167]** without reference to the wording of the Academic Freedom PIGP or the questions the OfS asked itself.

Ground 3D: *"reasonably practicable"* steps to ensure *"freedom of speech within the law"*

62. The Freedom of Speech PIGP requires that the University's governing body, in promulgating *"governing documents"*, *"takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider"* **[CB/9/348]**. The University contends that the OfS erred in the FD as to its interpretation of the meaning of the words *"reasonably practicable"* and *"freedom of speech within the law"* (**RASFG §§147-153.2 [CB/7/74-79]**).

63. The Freedom of Speech PIGP imposes a qualified positive duty to promote freedom of speech. It is not straightforward to identify how and to what extent this imposes a negative duty not to restrict freedom of speech. However, the University and the OfS now agree that the University is entitled to restrict lawful speech where such restrictions pursue a legitimate aim of the University and are proportionate (having regard to the importance of free speech). The OfS now accepts in its DGDs:

    (1) The University's governing documents are permitted to restrict lawful speech, where it is not reasonably practicable for the University to secure such speech **DGD §104 [CB/7/170]**.

    (2) Reasonable practicability relates not only to practical matters, but also to the University's ability to further its essential functions and protect students (and staff) from bullying (even though the bullying speech is not itself unlawful) **DGD §104 [CB/7/170]**.

    (3) The OfS' position in its DGDs as to the meaning of reasonable practicability mirrors that set out in that set out in Regulatory Advice 24 (**"RA24"**) (which is the OfS' guidance on the meaning of the words *"reasonably practicable"* and *"freedom of speech within the law"* as regards the Higher Education (Freedom of Speech) Act 2023) (**"HEFSA 2023"**). The OFS does not contend that its position on the meaning of *"reasonably practicable"* in RA24 is any different from that under Condition E1 (and that is the only logical position, given the operative wording of section 1 of HEFSA 2023). **DGD §103.2.2 [CB/7/170]**

    (4) In considering what is *"reasonably practicable"*, RA24 now directs providers to consider whether taking or not taking the relevant step would affect the essential functions of learning, teaching, research or the administrative functions or resources necessary for those functions: **RA24 §61 [SB3/14/475]**. Where speech is neither prohibited by law (for example, the EqA 2010) nor required by law (for example, safeguarding referrals), the OfS' position is now that there is a *"balance to be struck"* in considering what *"reasonably practicable"* steps are: **RA24 §§66-67 [SB3/14/476]**. It encourages providers to frame any restrictions in terms of *"time, place and manner of speech"* rather than the *"viewpoint"* expressed: **RA24 §99 [SB3/14/484]**.

(5) The OfS accepts that, in relation to both condition E1 and RA24, it is not reasonably practicable for the University to permit any of the examples given of lawful speech at **RASFG §§147.3 [CB/2/75]**.[38] Thus, the OfS' position is now that (i) it is not reasonably practicable for the University to permit the use of lawful but abusive or demeaning language beyond that which is protected by the EqA 2010; (ii) it is not reasonably practicable for the University to permit such abusive and discriminatory language where it falls outside a relationship covered by the EqA 2010 (for example, inter-student abuse) (**RASFG §147.3.3-4; DGD §104**); (iii) it is not reasonably practicable to require a university's documents to ensure lawful speech that serves to undermine academic standards **(RASFG §§147.3 [CB/2/75] DGD §104 [CB/7/104]).**

64. The OfS thereby now considers that the qualified positive duty to promote freedom of speech gives rise to a qualified negative duty. It reaches that conclusion by applying a double negative: it may not be reasonably practicable not to impose restrictions depending on the facts and the balance of competing interests. That is, in substance, a proportionality test.[39]

65. The key point is that the decision-maker did not take that approach in the FD. The decision-maker took an absolutist position, that any restriction of speech that is not contrary to criminal or civil law was incompatible with the requirement for the Policy Statement to *"uphold"* the Freedom of Speech PIGP. In other words, in the FD the decision-maker took the position that the qualified positive duty imposes an absolute negative duty. It was on this basis that the OfS concluded that the Policy Statement was in breach of Condition E1.

The findings in the FD

66. 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 (*i.e.* any speech that is not prohibited by civil or criminal law). That is because the OfS interpreted (i) *"freedom of speech within the law"* to mean all speech that is not prohibited by civil or criminal law; and (ii) *"reasonably practicable step"* to include making clear in any policy document that there are no restrictions on speech other than that prohibited by civil or criminal law. That is shown by the reasoning in FD, Annex C **[CB/8/192-212]**.[40]

67. For example (emphasis added):

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[38] See DGD §104 *"it is not reasonably practicable to permit plagiarism, poor academic standards (or any of the University's other examples)"* **[CB/7/170]**.

[39] The University had pleaded that the qualification to the negative duty lay within the concept of *"freedom of speech within the law"* rather than *"reasonably practicable"* RASFG §§147). However, the University is content to take the approach set out in RA24. What matters is that the negative duty is a qualified duty (which permits proportionate restrictions to lawful free speech) rather than an absolute duty (**RASFG §§151A-152 [CB/2/76-77]**.

[40] It is also entirely consistent with the OfS' approach in the PD, see e.g. **[SB1/1/80-84] [SB1/1/90-91]**

(1) As regards the Stereotyping Statement and Amended Stereotyping Statement (read with and without the Safeguarding Statement), the OfS found that those statements (i) "*expressly provided for steps to be taken that were likely to undermine freedom of speech within the law*" because the restriction was "*capable of capturing lawful speech*" **(FD, Annex C §67 [CB/8/205])**; and that (ii) because it failed to "*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*" reasonably practicable steps had not been taken (**FD, Annex C §68 [CB/8/206]**. The OfS concluded that the Amended Stereotyping Statement "*still restricted lawful speech*" and "*therefore*" this change did not "*remedy the issues arising from the Stereotyping Statement that gave rise to a breach of Condition E1*" (**FD, Annex C §69 [CB/8/206]**).

(2) On the interpretation of "*reasonably practicable*" now accepted by the OfS, the decision-maker at least *might* have concluded that it was not reasonably practicable for the University to limit the Stereotyping Statement to unlawful speech because a curriculum that sets out to stereotype a group (as opposed to exploring the construction, or empirical validity and impact of stereotypes, for example) will not uphold academic standards **Roseneil 1 §16 [CB/24/585]**. The FD contains no analysis at all of the Stereotyping Statement against the understanding of "*reasonably practicable*" that is correctly set out in RA24 and the DGDs. For example, the decision-maker failed to give any consideration at all to the University's case that 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 (which, the OfS now accepts in RA24, §106, is a legitimate aim): **RA24 §106 [SB3/14/106], DGDs §104 [CB/7/104]**). As noted above, the analysis in the FD was limited to asking whether the Stereotyping Statement went beyond the exclusion of unlawful speech.

(3) As regards the Disciplinary and Transphobic Propaganda Statement, the OfS found that: (i) the Statement impacted on freedom of speech within the law ("*[90] …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";* **[CB/8/210]** ""*[93] …the definition that has been included in the 2023 version is capable of capturing lawful speech*");" **[CB/8/211]**); and (ii) " *[95] failed to provide for reasonably practicable steps to secure freedom of speech within the law because the provider failed, in the TNBEPS 2023 to: (a) set out clearly the remit or limits of the restriction on freedom of speech that the Transphobic Abuse Statement, and the restriction on 'abusive, bullying or harassing material' which replaced the Transphobic Propaganda Statement, permitted, in particular by making clear that these restrictions did not capture lawful speech/views and only restricted conduct which is already prohibited in existing law;…*". **[CB/8/211]**.

(4) On the interpretation of "*reasonably practicable*" now accepted by the OfS, it is not reasonably practicable for the University to permit transphobic abuse, harassment or bullying speech, even if it is not necessarily unlawful **(DGDs §104 [CB/7/104])**.[41] However, again, the FD contains no analysis of the Abuse Statement against that understanding of "*reasonably practicable*" – the analysis in the FD is limited to asking whether the Abuse Statement goes beyond the exclusion of unlawful speech.

68. The OfS' pleaded case accepts that – if that is the correct reading of the FD – then the decision-maker misunderstood the scope of the Freedom of Speech PIGP (and accordingly, Condition E1): **DGDs §105 [CB/7/171]**. It follows that the decision on condition E1 should be quashed.

GROUND 4: THE MEANING OF THE POLICY STATEMENT AND DISCIPLINARY PROCEDURES

69. The University submits that the OfS misinterpreted the Policy Statement by concluding that, construed in light of Statute VII.7 and the Disciplinary Policy, it would not prevent disciplinary proceedings being brought against staff for lawful speech: **FD Annex C §§35-57 [CB/8/199-203]**. This turns on the proper interpretation of the Policy Statement, Statute VII and the Disciplinary Policy, which is an objective question for the Court.

70. The OfS' key conclusion was that, although Statute VII ruled out the possibility of an adverse outcome in respect of any disciplinary proceedings for lawful speech (**FD, Annex C §53 [CB/8/202]**), this would not protect a member of staff from being subject to disciplinary proceedings.

71. This was a misinterpretation of the Disciplinary Procedure:

(1) The OfS rightly accepts that, read in light of Statute VII, the Disciplinary Procedure must be interpreted and applied compatibly with the principles of Academic Freedom and Freedom of Speech **FD Annex C, §43 [CB/8/200]**. That applies to all stages of the Disciplinary Procedure.

(2) The unchallenged evidence of the University at the PD stage was that (i) disciplinary proceedings are preceded by a process of triage and investigation (ii) such an investigation must be carried out without unreasonable delay and, if there is no factual dispute, can be very short; and (iii) if there is no case to answer the appropriate outcome is to resolve the issue without the need to take further action, such that "*a letter confirming that there is no case to answer, and that all reference to the investigation will be removed from the record, will be sent to the individual who has been the*

[41] Indeed, the OfS now requires providers to go beyond existing legal obligations in the EqA 2010, for example as regards inter-student harassment, through condition E6: **[SB3/13/437-459]**.

subject of the investigation" (**Cox 1 §6-25 [SB1/5/500-505]** and **Disciplinary Procedure §§17.3, 17.9 [CB/17/475]**).

(3) Pursuant to Statute VII, the obligation to determine whether there is a case to answer before initiating any disciplinary proceedings against a staff member must, the OfS accepts, be interpreted and applied consistently with the principles of academic freedom and freedom of speech: **Statute VII §6-7 [CB/16/465-466]; FD Annex C, §43 [CB/8/200]**.

(4) It was therefore wrong for the OfS to conclude that the effect of Statute VII is *"not to rule out the possibility of disciplinary proceedings being brought in the first place"* (which was the primary basis upon which it identified the potential for a chilling effect **FD Annex C §57 [CB/8/203])**. That is precisely what Statute VII does.

72. The OfS' pleaded response to ground 4 is flawed:

(1) First, the OfS pleads that it did not conclude that there was any objective risk of disciplinary action (**DGD §§111-113 [CB/7/172]**). Rather, it appears to submit that it concluded that a member of staff might misconstrue the Policy Statement (read in context) and perceive it to create a risk of disciplinary action, which would give rise to a chilling effect. The OfS argues that it was free to form this view, regardless of the real, objective meaning of the Policy Statement. The University submits that this is wrong in law. Condition E1 does not authorise the OfS to penalise universities for something which their governing documents – properly interpreted – do not say: **RASFG §§138-140 [CB/2/72-73]**.

(2) Second, in any event, the OfS' pleadings do not confront what the FD actually decided. The primary basis in the FD for concluding that Statute VII did not have sufficient protective effect was that it did not prevent disciplinary proceedings from being brought (*"When assessing the extent to which Statute VII has a safeguarding effect on academic freedom and staff's freedom of speech, the OfS has considered whether or not staff could face disciplinary proceedings as a result of non-compliance with the TNBEPS… [and] whether the application and interpretation of the Disciplinary Procedure, by reference to Statute VII, adequately safeguards a staff member's freedom of speech or academic freedom"* **FD Annex C §47 [CB/8/201]**) (*"it is the OfS' view, that Statute VII does not adequately safeguard against the potential for disciplinary proceedings to be brought against a staff member in respect of a breach of the TNBEPS … the safeguarding effect of Statute VII is therefore insufficient to counteract the potential harm to staff"* **FD Annex C §57 [CB/8/203]**. That was based on a misinterpretation of the Disciplinary Procedure, and it materially undermined the OfS' analysis of potential harm arising to staff under it.

GROUND 5: FAILURE TO CONSIDER RELEVANT FACTORS AND/OR UNREASONABLE CONCLUSIONS[42]

73. The OfS failed to take into account certain mandatory relevant considerations and/or acted unreasonably in its treatment of those considerations. In response to this ground, the OfS does not dispute the relevancy of the considerations (**DGD §§115-125 [CB/7/172-175]**) but instead contends that each factor was considered and treated reasonably.

74. It is therefore not in issue that the USCEC was obliged to take such factors into account and come to rational conclusions in respect of them. The simple question is whether it did so. If it failed to do so, it fell into error.

75. In assessing whether that is the case, the Court should apply the following principles:

    (1) The FD should stand alone as a record of decision-making in this case, particularly in light of the decision-making by committee (ftn 32 above).

    (2) It should assess whether the process of reasoning recorded in the decision addresses all mandatorily relevant considerations and contains no unexplained evidential gap or leap in reasoning.[43]

GROUND 5A: FAILURE TO CONSIDER THE REMEDY OF THE ALLEGED BREACH

76. The University relies on the following points.

77. First, the OfS was obliged to consider whether a finding of breach was necessary to achieve compliance with the conditions of registration. This is not disputed by the OfS (**DGD §§116 [CB/7/172]**). That concession is rightly made:

    (1) HERA 2017 requires the OfS to have regard to the principles of best regulatory practice, including that regulatory activity will be proportionate and "*targeted only at cases in which it is needed*" (s.(2)(1)(g)(ii)).

    (2) The RF states: "*the OfS will consider … whether a particular intervention would be effective in mitigating the risk or remedying the breach*" (**RF, §167 [CB/9/321-322]**).

    (3) Regulatory Advice 15 (**"RA15"**) states: "*the primary purpose of using our enforcement powers is to ensure that a provider takes necessary actions to comply with its conditions of registration* (**RA15 §73 [SB3/9/169]**). RA15 also states that a provider will ordinarily be given an opportunity to improve its performance before any

[42] Ground 5B (failure to consider/irrational treatment of anti-competitive approach) is addressed below at §106. Ground 5D (irrational conclusion concerning the significance of an investigation) follows from the submissions under Ground 4 above – on a proper interpretation of the Policy Statement and Disciplinary Procedures, it was not reasonable to conclude that the mere possibility of investigation breached the academic freedom or freedom of speech PIGPs.

[43] *R (KP) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] EWHC 370 (Admin), para 56, *per* Chamberlain J.

enforcement action is taken (**RA15 §75 [SB3/9/170]**, and that, in all cases, the OfS would ordinarily impose a specific condition of registration (to rectify non-compliance) before pursuing other methods of enforcement (**RA15 §78, [SB3/9/170]**). No reason for departing from that normal approach was given by the decision-maker in this case.

78. Second, to determine whether a finding of breach was necessary to achieve compliance, the OfS needed to know whether the University was already compliant at the time of the decision.

79. However, the OfS investigation team refused to consider that question and presented it to the decision-maker as irrelevant (notwithstanding that the OfS does not now contest its relevance). In particular:

(1) At the PD stage, the OfS stated that (i) the Policy Statement, FOSCOP, and the ESP should have been approved by Council (**PD Annex E, §§4-6 [SB1/1/104]** and that (ii) the sole problem with the 2023 version of the Policy Statement was that it did not sufficiently define the concepts of transphobic abuse, bullying, harassing and stereotyping as objective concepts (**PD Annex D [SB1/1/80-84; 90-91]**)

(2) On receipt of the PD, the University rectified this immediately by amending the Policy Statement to expressly provide that the definitions were objective and obtained Council's approval of the three documents **Potts 1 §44 [SB1/83/1413-1426]**. The Court is invited to read the 2024 version of the Policy Statement **[CB/14/455-458]**. Even on the OfS' approach to Condition E1, it is unimpeachable.

(3) In submitting the representations in May 2024, the University specifically drew the OfS' attention to these new policy documents and asked for an assurance that they would be considered **PD Representations §§8-12 [SB1/3/297-298]**.[44] In response, the OfS represented that they were indeed being considered **[SB1/78/835] [SB1/81/840]**.

(4) In **Lapworth 2**, Ms Lapworth alleges that, on receipt of the representations and new policy documents, she remained *"concerned"* that the policy *"potentially capture lawful free speech"* and that *"based on past experience and given the complexity of the issues involved … anticipated that it would take considerable time for the investigation team to assess how the revisions to the 2024 version of the TNBEPS affected the University's ongoing compliance with Condition E1"* and that, therefore, to save time, she decided that the documents would not be considered (**Lapworth 2 §23 [CB/31/781]**). However, (i) Ms Lapworth was not part of the decision-making committee, and (ii) her supposed views were never recorded in writing or

[44] See further correspondence at [**SB1/77/833-834**].

communicated to the decision-making committee (as the OfS has confirmed in a Part 18 response) **[SB2/31/148-149]**. In fact, as late as 21 November 2024, the OfS investigation team represented to the University that it was considering the amended policy documents, some six months after receiving them: **[SB1/81/840]**.

(5) Ms Lapworth now states that "*Given that the 2024 version of the TNBEPS was relevant only to whether the breach of Condition E1 was ongoing, and not to findings in respect of historic non-compliance, I did not think it made sense to delay the crystallisation of final decisions on serious historic non-compliance any further*" (**Lapworth 2 §25 [CB/31/781-782]**). Thus, even on Ms Lapworth's evidence, the investigation team was wrong to treat the issue as irrelevant and to present the case on that basis to the decision-making committee. The OfS' rightly made concession is that ongoing compliance is relevant to the question of whether a finding of breach should be made (see §73 above).

(6) When the investigation team presented the case to the decision-making committee, it presented the current version of the Policy Statement (and the approval process of the ESP and FOSCOP) as irrelevant. The decision-makers were presented with two annexes of "*relevant*" documents, which neither (i) included the 2024 Policy Statement, nor (ii) the fact that the Policy Statement, the ESP, and the FOSCOP had been approved by Council **[CB/38/943-950]**.

80. Third, decision-makers therefore did not consider whether the University was currently complying with Conditions E1 and E2(i) or, on that basis, whether it was necessary to use its enforcement powers to achieve regulatory compliance.

81. Worse still, without examining the University's remedial action, the decision-making committee concluded that there was a risk that the University remained in breach of Conditions E1 and E2(i):

(1) The USCEC decided that "*some issues [with the TNBEPS] persisted …until at least 20 March 2024*" (**FD Annex E §3(f) [CB/8/218]**), "*finding breaches of Condition E1 … is in the student interest because it could incentivise this provider to ensure future compliance with that condition*" (**FD Annex E §32**, **[CB/8/231]**), and "*findings on breaches and imposition of monetary penalties will act as strong incentives for the provider to address breaches of Condition E1 and E2(i) and ensure compliance in the future…*" (**FD Annex E §41 [CB/8/233]**).

(2) At intervention factor (g) the USCEC purported to consider "*steps taken by the provider to mitigate the increased risk or remedy the breach*" yet failed to consider the steps taken in 2024, which were directly responsive to (and remedial of) the problems identified in the 2023 Policy Statement in the PD **FD Annex E §§53-58 [CB/8/234-236]**.

(3) Under intervention factor (h), the USCEC concluded that *"for the reasons explained above … some of the issues with the TNBEPS which gave rise to 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"* and that, because of the approval process of the Policy Statement and the ESP in 2023 *"it is possible that the breach of E2(i) could occur again"* **FD Annex E §§59-63 [CB/8/236]**.

82. The USCEC concluded that there was a risk of breach whilst shutting its eyes to the material that would enable it to determine whether there was in fact a breach, in circumstances where the University had cogently explained how the alleged breach had been fully remedied.

GROUND 5C: UNREASONABLE CONCLUSION RELATING TO THE AMENDED SAFEGUARDING STATEMENT

83. The 2023 Policy Statement provided:

> *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 areas including controversial and 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 Safeguarding Statement*]*. **[CB/13/453-454]**

84. The USCEC found that the Amended Stereotyping Statement and the Disciplinary and Transphobic Propaganda Statements in the 2023 Policy Statement read with the Safeguarding Statement was compatible with Academic Freedom PIGP but incompatible with the Freedom of Speech PIGP. Its reasoning was that the words following *"nothing"* were sufficient to protect academic freedom, but the words following *"nor"* were insufficient to protect freedom of speech, because the latter *"impl[ies] that the provider considers the Stereotyping Statement … itself to be a proportionate restriction"* (in relation to the Stereotyping Statement) and *"impl[ies] that the provider considers these restrictions [the Disciplinary Statement and Transphobic Propaganda Statements] to be a proportionate restriction"* and that this would potentially cause a chilling effect **(FD Annex C, §§78-81, 96 [CB/8/208] [CB/8/211])**.

85. This reasoning was not logical:

(1) First, as a matter of grammar, the negative conjunction "*nor*" indicates that the second matter (the relationship between the policy and freedom of speech) is to be treated in the same way as the first matter (the relationship between the policy and academic freedom). In respect of the second matter, the plain meaning of the sentence is that "*nothing in this Policy Statement should be … taken to justify disproportionate restrictions on freedom of speech*". Objectively interpreted, this does not mean that any restrictions on free speech in the Policy Statement should be taken to be proportionate. The OfS misread the Policy Statement. It was irrational for the OfS to conclude that a reasonable reader would have been potentially chilled by the 2023 Policy Statement.

(2) Second, the Amended Stereotyping Statement relates to the design of the curriculum. Given that (i) the OfS was satisfied that there would be no chilling effect on academics, and (ii) curricula are designed by academics, then (iii) why did the OfS consider that there was a chilling effect on the design of the curriculum? There was an inconsistency in the OfS' approach, or an unexplained gap in its reasoning.

GROUND 5E: UNREASONABLE CONCLUSION CONCERNING THE IMPACT OF THE ALLEGED BREACH

86. Pursuant to the intervention factors set out in the **RF §167 [CB/9/321-323]** and **RA15 Annex A [SB3/9/175],** the OfS treated the "*severity and significance*" of the breach (*i.e.* the incompatibility of previous versions of the Policy Statement with the Academic Freedom and Freedom of Speech PIGPs) as a significant factor in deciding whether it was necessary to make a formal finding of breach (**FD Annex E, §§9-22 [CB/8/220-227]**).

87. The OfS concluded that there was "*significant and severe*" harm to the academic freedom of academics, and "*significant and severe*" harm to the freedom of speech of students and academics because:

(1) First, "*the four contested statements in the TNBEPS with which the OfS takes issue"* were "*each capable of capturing lawful speech"* (**FD Annex E, §11**) **[CB/8/220]**. The OfS treated that "*capability*" as establishing harm.

(2) Second, "*the problematic content in the TNBEPS created a chilling effect, by which the OfS means the potential for staff and students to self-censor and not speak about/express certain views*". Thus, the OfS concluded that there may have been self-censoring, not that there actually was (**FD Annex E, §12**) **[CB/8/221]**.

(3) Third, Dr Stock's evidence provided an example of this chilling effect (**FD Annex E, §13**) **[CB/8/221]**. At paragraphs 14-22, the OfS investigation team summarised parts of the University's representations and explained why it considered that Dr Stock's evidence (that it drafted) remained good. Those paragraphs **(FD Annex E, §§14-22 [CB/8/221-227]** record that:

(a) Although the gender critical texts specified in Dr Stock's first statement were in fact included in the curriculum (as the University had pointed out, contrary to Dr Stock's statement that they were excluded), they were somehow thought to have been "*implicitly*" excluded as a result of the Policy Statement (**FD Annex E, §18 [CB/8/225]**).

(b) The OfS treated Dr Stock's feelings as dispositive of the question of harm, rather than whether those feelings were a reasonable response to the Policy Statement. The OfS did so despite an absence of evidence of actual impact on the curriculum (**FD Annex E, §§19-20 [CB/8/225]**).

88. This material did not reasonably justify the conclusion of "*significant and severe harm*" to academic freedom and to the freedom of speech of both academics and students. In particular:

(1) The OfS now accepts that it is permissible in principle for policies to capture lawful speech. Not only did the OfS fail to consider whether the restrictions of lawful speech in the Policy Statement were permissible on that basis (see §§62-65 above) but it was also unreasonable for the OfS to consider that the mere fact that the Policy Statement potentially captured some lawful speech[45] to be evidence of harm.

(2) It was unreasonable for the USCEC to consider that the mere (alleged) potential for students or staff to self-censor was evidence of a chilling effect, particularly when that "*potential*" was only said to arise from the fact that the Policy Statement potentially captured some lawful speech (which the OfS now accepts is permissible). The potential for an effect is not evidence of an actual effect.

(3) There was no evidence at all of a chilling effect on students. The OfS chose not to speak to any students or student representatives. The University provided the OfS with comprehensive and reliable evidence (via the National Student Survey, which is undertaken by the OfS) of how students felt about freedom of speech at the University, which showed that student experience of freedom of speech at the University was in line with the national average: **PD Representations §313.2-3 [SB1/3/403-404], Aldridge 1 §14.2 [SB1/12/567]** and **[SB1/4/493]**. That was the best evidence of freedom of speech of students at the University, collected by the OfS itself. The FD does not grapple with that evidence nor give any reasons for discounting it.

[45] The lawful speech *potentially* captured by the Policy Statement (absent the protection of the Statutes and the Safeguarding Statement: RASFG §152) is abusive statements made by academics to transgender students in private residences where (i) the transgender student does not fall within the protected characteristic of "gender re-assignment" and (ii) where it is not a course of conduct such as amount to statutory harassment or other criminal offence. On any view, the lawful speech potentially captured by the Policy Statement (which would in any event be resolved in favour of the University Statutes) is very narrow.

(4) There is no evidence at all of a chilling effect from November 2021 onwards (when Dr Stock left the University in October 2021). The OfS repeatedly refers to Dr Stock's evidence as a "*example*" (**FD Annex C §13 [CB/8/221]**, **DGDs §124.3 [CB/7/175]**) but no other evidence was referred to or relied on.

(5) The OfS also placed unreasonable weight on Dr Stock's[46] evidence when:

(a) Dr Stock's evidence says nothing about the 2022 and 2023 versions of the Policy Statement, yet was the only evidence relied on by the decision-maker for evidence of harm arising from the 2022 and 2023 versions of the Policy Statement.

(b) Dr Stock's evidence about being chilled only related to the Positive Representation Clause and only to the period 2019-2021. She took no issue with the other elements of the Policy Statement: **Stock 1 §§23-24, 26, 37, 41** (the only paragraphs relied on by the decision maker) **[SB1/2/274-276] [SB2/74/828-830] Stock 2 §§4-5, 8 [SB2/101/1516-1517]**. There was, accordingly, no evidence of harm arising from those aspects of the Policy Statement. Had the decision-maker appreciated that the evidence of harm was limited in this way, it might have reached a different view on whether it was necessary to make a formal finding of breach, given that the University itself recognised that the Positive Representation Clause was inappropriate and removed it in August 2022, before the OfS had expressed any concerns about the Policy Statement: **Potts 1 §55 [SB1/37/1033-1034]**, **Roseneil 1 §16 [CB/24/585]**.

(c) 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 [SB1/2/273-274]**); (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 [SB2/101/1516-1517]**; 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) **[SB1/20/658-659] [SB1/20/681-683] [SB1/20/685]**[47]. 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

[46] The evidence of Dr Stock is five paragraphs of her First Witness Statement **§§23, 24, 26, 37** and **41** see **Stock 1 [SB1/2/268-291]** see correspondence 21 May 2024 **[SB2/74/828-830]**, and her Second Witness Statement **[SB2/101/1515-1522]**.

[47] Dr Stock specifically chose to draw her student's attention to her public writings about *"feminism, sex, gender, lesbians and the law"* and offered to discuss her writings with students: **[SB1/20/658-659]**

in respect of her ability to express lawful views, not that this did not happen **(Stock 2 §10, 22 [SB1/101/1522**]).

GROUND 6 – PROCEDURAL UNFAIRNESS AND APPARENT BIAS

89. The OfS' investigation was procedurally unfair in three respects:

(1) First, the OfS relied solely on witness statements from Dr Stock to reject the University's evidence. The investigation team drafted Dr Stock's statements for her and relied on them to reject the University's evidence, but (i) failed to disclose the second witness statement, thereby denying the University an opportunity to adduce evidence in response or make representations on it in advance of the FD and (ii) failed to explain the process by which it had written that evidence, either to the decision-maker or to the University. (Ground 6A §§90-97 below).

(2) Second, the FD is significantly different from the PD, but the OfS did not afford the University an opportunity to make representations on the new aspects of the decision (Ground 6B §§98-99 below).

(3) Third, the investigative process was unfair by reason of apparent bias/predetermination. In particular, the OfS (i) declined to consider the remedial action taken by the University in response to the PD, despite this being the "*primary purpose*" of the OfS' enforcement powers; (ii) repeatedly refused to meet the University (despite nine requests), contrary to the investigative approach set out in its published regulatory advice; (iii) drafted the only evidence in support of its conclusions itself, but then hid that part of the investigation behind an untenable assertion of litigation privilege; (iv) on its own account, treated the investigation as an adversarial exercise; and (v) the investigation team (which decided what material and recommendations to put to decision-makers) was led by Dr Ahmed, who was personally connected to and proactively supported Dr Stock (Ground 6C §§100-110).

GROUND 6A: FAILURE TO DISCLOSE THE KEY EVIDENCE

90. The requirements of procedural fairness are an objective matter for the Court and owe nothing to the OfS' views of what is fair.[48] What fairness requires is context specific, having regard to the effect on the person condemned (here the University), the function of the decision-maker, and the policy context.[49]

91. Fairness generally requires a right to be heard, the corollary of which is the right to be informed. As part of that right, the "*[decision-maker] must not rely on potentially influential material which is withheld from the individual affected*"[50] and "*Decision making bodies whether*

[48] *R (Osborn) v Parole Board* [2014] AC 1115 at §65
[49] *Howard League for Penal Reform v Lord Chancellor* [2017] 4 WLR 92 at §39.
[50] *R (Ramda) v Secretary of State for the Home Department* [2002] EWHC 1278 (Admin) §25.

administrative or adjudicative in character should not consider relevant material (supportive or adverse to their case) without giving the affected person the right to comment upon it…"[51]

92. That obligation is heightened in adversarial proceedings[52] and it is the OfS' case that the investigation into the University was an adversarial proceeding (**DGD §§133A [CB/7/177]**).

93. The University submits:

    (1) First, in this statutory, regulatory, and investigative context, the required standards of procedural fairness are high.

    (2) Second, the evidence withheld from the University – drafted by the OfS itself – was material to the outcome and should therefore have been disclosed to the University.

    (3) Third, the omission was material because the University would have submitted evidence and representations in response to the evidence that the OfS withheld.

94. As to the **first** point (context):

    (1) The regulatory and statutory framework. Section 6(3) and Schedule 3(2) of HERA 2017 require the OfS (i) to issue a provisional decision in respect of any proposed decision to impose a monetary penalty, or decision to impose or vary any specific conditions of registration and (ii) to give the provider the opportunity to make representations in response. The OfS has also committed to a provisional decision process where there is an intention to make a finding of breach: **RA19 §17**.[53] In the RF, all references to a provisional decision commit the OfS to disclosing the evidence on which its provisional view is based and to affording the provider an opportunity to make representations on such evidence. There is no support for the proposition that the OfS may collect evidence to bolster its provisional decision and withhold that evidence from the provider: **RF §§332R, 333O, 335A, 325X, 336O, [SB3/10/276, 285, 296, 305, 310]**.

    (2) The impact on the University (students and staff). The OfS accepts that the FD *"seriously and prejudicially affect the interests"* of the University and past students at the University (s.67A HERA 2017), including: (i) *"very likely"* reputational and financial damage (**Final Decision on Publication ("FDP")** §11(a)-(b) **[SB1/102/1526]**; (ii) a risk to the quality of courses and credibility of students' qualifications (FDP

[51] *Miller v Health Service Commissioner for England* [2018] PTSR 801 at §§43-49, see further §51 on the importance of disclosing material evidence collected after a provisional decision. See further *R v London Borough of Hackney ex p Decordova* (1995) 27 HLR 108, 113 Laws J *"If the authority is minded to make an adverse decision because it does not believe the account given by the [claimant], it has to give the [claimant] an opportunity to deal with it."*

[52] *Primary Health Investment Properties Ltd v Secretary of State for Health* [2009] EWHC 519 (Admin) [2009] PTSR 1563 at §120 *per* McCombe J

[53] *"Furthermore, when we intend to make a finding of breach, we will notify the provider and it will have an opportunity to make representations about our provisional decision. We will consider those representations and other relevant factors in reaching a final decision about a breach."*

§11(b) **[SB1/102/1526]**; and (iii) likely negative impact on students and academics at the University. That prediction is borne out by the University's evidence **Roseneil 1 §§21-22, 29-65 [CB/24/604]**, **Roseneil 2 §19 [CB/29/745-746]**. The FD has been seriously detrimental to the University.

(3) The purpose of the evidence. The evidence was not incidental contextual material – it was collected for the purpose of making findings of fact on a central issue in the OfS' investigation. It was the only evidence against the University that the Policy Statement had in fact impacted the speech of any academic at the University.

95. As to the **second point** (materiality to the FD):

(1) When the OfS issued the PD, it disclosed the first witness statement of Dr Stock (**"KS1"**). The OfS stated that it only relied on five paragraphs of KS1 (§§23, 24, 26, 37 and 41).[54] The OfS has disclosed that it drafted Dr Stock's first witness statement but has refused to disclose the circumstances in which this was done.

(2) Paragraph 41 of KS1 related to the FOSCOP, which is no longer relied on by the OfS. Paragraph 23 quoted the Positive Representation Clause. Paragraphs 24, 26, and 37 alleged that (i) the Positive Representation Clause meant that some of Dr Stock's work were "*implicitly*" excluded from permissible materials at the University (**Stock 1 §24 [SB1/2/273-274]**; and (ii) although Dr Stock did not stop expressing some gender-critical views in her teaching she was *"never assured that [she] would not face disciplinary action as a result of contravening the policy"*; and (iii) the Positive Representation Clause had a chilling effect on her because although she taught gender-critical topics, she did so *"extremely nervously"* (**Stock 1 §26 [SB1/2/274]**).

(3) The University adduced evidence and submissions in response KS1 **(Cox 1 §35 [SB1/5/507], exhibit SC/9 [SB1/11/553-555**], **James 1 §6, 14-19 [SB1/19/620-622] exhibit LJ1 [SB1/20/623-686], PD Representations §§252-261 [SB1/3/380-385]**).[55] Its evidence was that Dr Stock was expressly assured that academic freedom and freedom of speech were protected in the overriding statutes of the University, and that she was expressly assured of her rights to freedom of expression and academic freedom. The University also adduced evidence that Dr Stock's gender-critical work was actively supported and recognised by the University, including through her promotion to Professor, the public celebration of her OBE, and the prominent inclusion of her work in the University's 2021 Research Excellence Framework

[54] As confirmed by the OfS in correspondence dated 21 May 2024 **[SB2/74/828-830]**.

[55] See **PD Representations §69 [SB1/3/318]**: *"The OfS has only sought evidence from one person – Professor Stock. Professor Stock is unable to comment on most of the issues that the OfS has to decide. The OfS relied on only five paragraphs of Professor Stock's statement…and admits that those five paragraphs are the only evidence it has to justify a £1million fine…obtaining incomplete evidence from one person, whose view is inevitably coloured by her specific experience, is on any view an inadequate evidence base and does not discharge the duty of inquiry. Strikingly, the OfS has repeatedly refused to meet and speak with the Vice-Chancellor or any other representative of the University…"*

submission: **James 1 §§7-12 [SB1/19/618-619]**. The University submitted Professor Stock's reading lists to the OfS, in which she had specifically referred her students to her gender-critical writing and invited discussion of those writings, and in which she informed students that conventional ideas would be tested and discussed on her course. The reading lists showed that some of the materials claimed in KS1 to have been "*excluded*" by the Positive Representation Clause were in fact included and drawn to the attention of her students **[SB1/20/658-659] [SB1/20/681-683] [SB1/20/685].**[56]

(4) The OfS was accordingly faced with factual disputes. It put those disputes to Dr Stock **[SB1/182/3307-3312]** and drafted a further witness statement for her (**"KS2"**) which it then relied on in the FD. The OfS told Dr Stock when contacting her that it was likely to disclose that evidence to the University, presumably because it considered that fairness required this **[SB1/180/3305]**.

(5) KS2 states that (i) to Dr Stock's recollection she did not teach certain articles because she was nervous (notwithstanding their actual inclusion on the reading lists), and that this nervousness was *"partly"* generated by the Positive Representation Clause (and partly by matters outside the Policy Statement) **Stock 2 §§4-5, 8 [SB2/101/1516-1517]**; (ii) that her contemporaneous public statements were not settled evidence of what she believed to be the case at the time, but that a *"variety of things happened over several things at UoS to convey the impression to me that the university would much rather I stopped talking about sex and gender"* **Stock 2 §18 [SB2/101/1520]**; and (iii) she did not feel reassured by her correspondence with Ms Cox (Head of Employee Policy and Relations), and she did not recall receiving any assurances from Professor James (Dr Stock's then line manager and Dean of the School of Media, Arts and Humanities) **Stock 2 §§21-22 [SB2/101/1521-1522].**

(6) The OfS relied on KS2 in the final decision as the basis for preferring Dr Stock's evidence to the University's evidence **FD Annex E, §§11-22 [CB/8/220-227]**. In analysing that evidence, (i) the investigation team sought to defend the credibility of the evidence it had drafted, rather than approaching questions of credibility and weight with an open mind **FD Annex E, §§16-22 [CB/8/220-227]**; and (ii) the OfS decided that the ultimate question was merely whether Dr Stock felt chilled and not whether, in light of all the relevant facts, a reasonable person in Dr Stock's position would have been chilled as a consequence of the Policy Statement: **(FD Annex E, §§17-20 [CB/8/220-227])**.

96. As to the **third point** (significance of the omission), it will rarely be the case that denying someone the chance to present their case was not unfair, since it is inherently difficult to

[56] Dr Stock specifically chose to draw her student's attention to her public writings about *"feminism, sex, gender, lesbians and the law"* and offered to discuss her writings with students: **[SB1/20/658-659]**

know what that person would have said or how the other side would have responded.[57] Here, the evidence is that the University would have made representations on KS2 and conducted enquiries with other sources to address the factual disputes in issue: see **Roseneil 2 §§23-34 [CB/29/746-750]**. It is at least possible that such representations and evidence might have had a material influence on the FD – as did many of the University's representations at the PD stage (and the OfS does not contend otherwise).

97. The OfS' only pleaded response is that:

(1) First, it contended that the University had not identified anything it would have wished to say in response to the evidence: **SGR §76 [CB/5/129]**. That is wrong in fact (see **Roseneil 2 §§23-34 [CB/29/746-750]**) and appears to no longer be pursued.

(2) Second, it contended that the witness statement merely "*reiterated*" Dr Stock's personal experience: **DGD §129 [CB/7/175]**. That is also wrong – it gave evidence seeking to rebut the University's evidence, as set out above. Had it contained nothing new, the OfS would not have relied on it so extensively.

(3) Third, the OfS alleges that the statement was "*limited to setting out how Dr Stock felt*": **DGD §129 [CB/7/175].** That is incorrect – KS2 gave factual evidence about Dr Stock's recollection of her teaching. But, even if KS2 had been limited to evidence of feelings, the University would have made representations about, *inter alia* (i) the weight to be given to Dr Stock's subjective feelings as against the objective evidence (that she was re-assured about her right to express lawful views and did teach gender-critical texts) when assessing harm; and (ii) the relevance of one individual "feeling" chilled (which the OfS treated as dispositive) rather than the reasonableness of that position **Roseneil 2 §§23-34 [CB/29/746-750].**

GROUND 6B: UNFAIR CHANGE OF BASIS FOR THE DECISION

98. It is not in dispute that (i) procedural fairness required that the University was given an effective opportunity to make representations on a provisional decision to make a finding of breach (RA19 §17); and (ii) if the OfS proposed making a final decision on a substantially different basis to the provisional decision, fairness would require it to afford the University an opportunity to comment on those new matters.

99. The University's case (**RASFG §182 [CB/2/182]**) is that the FD was materially different from the PD but it was not afforded an opportunity to comment. In particular:

(1) In the PD, the OfS found that the 2023 Policy Statement was flawed because, and only because, it allegedly failed to define with sufficient precision the meaning of "*stereotypical assumptions about trans people*" "*transphobic abuse*" and "*abusive, bullying and harassing material*" **[SB1/1/80-84; 90-91]** The alleged lack of precise definition of

[57] *R v Chief Constable of Thames Valley Police ex p Cotton* [1990] IRLR 344, para 60, *per* Bingham LJ.

those terms led the OfS to conclude that the 2023 Safeguarding Statement afforded insufficient protection. The OfS did not take issue with the wording of the Safeguarding Statement itself.

(2) In response to the PD, the University immediately amended the policy documents to address the alleged defects (see §§76-82 above), including by stating "*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.*" **[CB/14/455-458]**.

(3) In the FD, the OfS ignored the remedial action taken by the University. Instead, the OfS pivoted to a new, unheralded criticism. It now concluded that the 2023 Safeguarding Statement was deficient because it considered that the words *"nor should this policy Statement be taken"* made it insufficiently clear that the Safeguarding Statement qualified the whole of the Policy Statement (**FD Annex C, §§78-81 [CB/8/208]**).

(4) The OfS had not given the University any notice of that criticism. That was unfair. Had the OfS given notice, the University would have made representations of the kind set out at §§69-72 above. Even if the submissions at §§69-72 are insufficient to persuade the Court that the FD was irrational, they might have persuaded the OfS to reach a different conclusion (as many of the University's other representations did at the PD stage).

GROUND 6C: APPARENT BIAS INCLUDING BY PREDETERMINATION

100. The modern application of the test has two stages. First, the Court must ascertain *"all the circumstances which have a bearing on the suggestion that the [Defendant] was biased."* Second, the Court must then *"ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the [Defendant] was biased" (Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468, *per* Leggatt LJ at §17).[58]

101. The observer:

(1) Is fair minded: she is *"not unduly sensitive or suspicious, but neither is he or she complacent"* (*Bubbles & Wine,* at §18(1)).

(2) Is informed: she knows *all* the relevant facts in their context – not only those in the public domain at the time of the decision.[59]

[58] Where apparent bias by apparent predetermination is in issue, the test is materially identical – whether the fair-minded and reasonable observer would *"think that the evidence gives rise to a real possibility or risk that the decision-maker had pre-determined the matter, in the sense of closing his mind to the merits of the issue to be decided" R (Electronic Collar Manufacturers Association) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin) [2020] ACD 4 at § 140

[59] *Virdi v Law Society* [2010] 1 WLR 2840 at §§38-44 *per* Stanley Burnton LJ

(3) Is realistic about human weaknesses: she "*knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially*".[60]

102. Where a real possibility of bias arises on the part of investigators rather than decision-makers, the Court will need to consider the connection between the steps taken by investigators and the decision. It is well-established that the actions of investigators can infect the fairness of decisions. For example:

(1) Material presented to a decision-maker must be fair and objective, particularly where decision-makers are reliant on summaries or steers: *R v Camden LBC ex p Cran* [1995] RTR 346.[61]

(2) An investigation may constrain the decision-maker's options, for example through the selection of relevant considerations. Thus, as noted in *R (Ninhawi) v Secretary of State for Justice* [2011] EWHC 830 (QB) at §80, "*The Secretary of State plainly had an open mind. The officials who had a key role in making the submission to him did not ... when the Secretary of State came to make that decision personally, as he did in this case, the materials had to be presented to him fairly; it was difficult for those who did not have an open mind to do so.*"

103. In deciding this issue, the Court should not pay any "*attention to any statement by the [OfS] concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value*".[62] By contrast, the Court may draw adverse inferences from a lack of candour in explaining how important decisions have been made: *R (Das) v Secretary of State for the Home Department* [2014] 1 WLR 3538 at §80.

The factual context

104. The informed observer would know the following facts about this case.

105. First, the OfS investigation team deliberately chose not to put the question of current compliance to the decision-makers. This was significant because:

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[60] *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 *per* Lord Hope at §§1-3.

[61] "*Council members are busy; meetings are held in the evening and last, so far as the evidence goes, two or three hours. There are large agenda to get through. Reports are many (20 or more in most of the meetings with which this case is concerned), often accompanied by even longer appendices. Members rely on officers to produce fair, accurate and objective summaries. It is not sufficient to leave members to ferret out some point of significance or to discover some imbalance in the report from studying an appendix. One cannot expect perfection in the field of local government administration – or in any other – but affected citizens and representative organisations are entitled to expect objectivity in those whose duty it is to convey to decision-makers what they have suggested.*"

[62] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at §19, see further *R (Georgious) v London Borough of Enfield* [2004] EWHC 779 (Admin) at §36.

(1) The regulatory context makes clear that the primary purpose of the OfS' enforcement powers (including the power to make a finding of breach and publish that fact) is to incentivise the provider in question to comply: **RA15 §§53, 73, 75 [SB3/9/165,169-170]**. The ordinary position – set out in RA15 – is that (i) a provider will be given an opportunity to improve its performance before any enforcement action was taken; and (ii) in all cases, the OfS would ordinarily impose a specific condition of registration (to rectify the non-compliance) before choosing other methods of enforcement.

(2) In this investigation, the PD identified that (i) the Policy Statement, FOSCOP and ESP should have been approved by Council (**PD Annex E, §§4-6 [SB1/1/104])**; and (ii) the sole problem with the 2023 Policy Statement was that it did not sufficiently define transphobic abuse, bullying, harassing, and stereotyping as objective concepts. It was said that this lack of objective definition undermined the effectiveness of the Safeguarding Statement. (**PD Annex D [SB1/1/80-84; 90-91]**)

(3) On receipt of the PD, the University immediately addressed the OfS' concerns by (i) obtaining Council's approval of the Policy Statement, FOSCOP and ESP; and (ii) amending the Policy Statement expressly to define transphobic abuse, bullying, harassing, and stereotyping as objective concepts **Potts 1/44 [SB1/83/1413-1426]**.

(4) In its representations, the University specifically drew the OfS' attention to these new policy documents and asked for assurance that they would be considered **PD Representations §§8-12 [SB1/3/297-298]**.[63] The OfS represented multiple times that they were indeed considering the updated policy documents **[SB1/78/835] [SB1/81/840].**

(5) Inexplicably, the investigation team – then led by Dr Ahmed – chose not to put the question of current compliance to the decision-maker (the USCEC) and did not draw the decision-maker's attention to the University's remedial action or to the fact that the University had repeatedly asked the OfS to indicate whether the remedial action was adequate. The investigation team presented summaries of "*relevant*" University decision-making to the USCEC which made no mention of the University's remedial action [**CB/38/946-950**] and the investigation team presented draft decision notices (which the USCEC then approved) which read as though the question of continuing breach could not be determined (see §§55(2) and 105(1) above). It was in this context that the USCEC concluded that its adverse findings and penalties were necessary to *"incentivise… compliance"* and that *"it was possible that the breach continued"* past March 2024 (see §81(1) above).

[63] See further correspondence at [**SB1/77/833-834**].

(6) There has been a striking lack of candour from the OfS about how the question of current compliance came to be omitted from the decision-making process. It features nowhere in any contemporaneous decision-making documents. It is not addressed in the evidence of Dr Ahmed (other than by way of a theoretical observation) or by the Chair of the USCEC. In her second witness statement, Ms Lapworth – in response to the apparent bias allegation – purports to explain what her opinion had been at the time but which, the OfS admits, was not recorded in any contemporaneous document and was never communicated to the USCEC **[SB2/31/148-149]**.

(7) The investigation team's unexplained decision not to put to the decision-maker one of the central factors in the University's favour was unfair and indicates a lack of balance.

106. Second, the investigation team singled out the University for punishment. The informed observer would know that:

(1) The OfS' guidance emphasises the importance of maintaining open dialogue between providers and the OfS: **RA15 §§13-14, 52** [**SB3/9/157, 165**].

(2) The Policy Statement was based on a template from Advance HE **[SB1/104/1550-1553]**, a respected national charitable organisation whose purpose is to promote higher education for the public benefit, and that template was used by many other providers in the higher education sector. A similar version of the 2018 Policy Statement was in force at several universities during the OfS' investigation (**Ruebain 1 §§19-21 [SB1/24/738-40] Exhibits DR27 [SB1/27/779-894]** and remained in place even after the OfS published the FD **[SB1/192/3351]**.

(3) Many other universities have also faced high profile controversies concerning gender-critical speech (as the University pointed out to the OfS: **[SB1/4/484]**).

(4) During the PD Representations process, the OfS received evidence from sector-wide bodies (for example Vivienne Stern MBE, Chief Executive of Universities UK (**Stern 1 [SB1/86/1463-1471]**), and Mary Curnock Cook CBE, former Chief Executive of UCAS (**Cook 1 [SB1/18/606-615]**) saying that it would be more proportionate to issue sector-wide guidance than to investigate and punish one university (**Stern 1 §23, 30**).

(5) The OfS took a fundamentally different approach to the other universities with equivalent policy statements, some of whom had also faced controversies about free speech.[64] In line with its ordinary regulatory approach, the OfS offered to meet with them and discuss how to remedy any problems with those policies **[SB1/192/3351].**

[64] For example, the University of Oxford **Ruebain 1 §20.3 [SB1/24/738] [SB1/26/751] [SB1/27/794-797]**.

(6) By contrast, the OfS (i) refused any substantive meeting about the investigation with any University officer for the entirety of the investigative period, despite nine requests to do so[65]; (ii) cancelled the only meeting planned (which related to the OfS's offer of settlement prior to the PD) because the University would not submit to the OfS' findings (most of which have now been withdrawn) and (iii) did not draw to the attention of decision-makers (the USCEC) the fact that many other universities had substantially the same document in place. Indeed, the draft decision notice merely noted (without reasons) that the impact on competition between higher education providers was considered to be *"less relevant"* in the investigation, without explaining to the USCEC that (i) the University was following sector level guidance in promulgating the Policy Statement and (ii) many other universities in England had in place the same or substantially the same policy statement at the material time **FD Draft Annex I §§12-13 [CB/40/1128]**. Again, the OfS' evidence in this litigation provides no explanation for that omission.[66]

107. Third, the investigation team did not explain to the decision-maker how Dr Stock's evidence (the only evidence against the University) had been produced, so as to enable the decision-maker to assess its credibility and weight. The OfS has also refused to provide this information to the University:

(1) In response to the University's Part 18 requests, the OfS has refused to disclose who drafted Dr Stock's witness statements, what questions were put to Dr Stock, and whether the witness statement gave a full account of her answers.

(2) The OfS has refused to do so because (i) it contends that the information is subject to litigation privilege **[SB2/24/83]** and (ii) despite its selective disclosure of some of its communications with Dr Stock – including those where the questions which she answers in the Witness Statement are put to her **[SB1/182/3307-3312]**– it contends that it has not waived that alleged privilege **[SB2/28/141] [SB2/30/147] [SB2/31/149-151]**.

(3) It follows from the OfS' claim of litigation privilege that it drafted Dr Stock's witness statements with the primary purpose of defending its position in this litigation and undermining the University's evidence, rather than collecting evidence as part of an objective investigation.

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[65] 3 February 2023 **[SB2/48/243]**; 7 February 2023 **[SB2/50/247]**; 13 February 2023 **[SB2/52/249]**; 24 February 2023 **[SB2/53/250];** 29 March 2023 **[SB2/56/259]**; 2 June 2023 **[SB2/61/628]**; 26 September 2023 **[SB2/66/804-805]**; 31 July 2024 **[SB2/79/836-837]**; 16 January 2025 **[SB2/86/859-860].**

[66] The totality of Ms Lapworth's evidence on this point is that the OfS did not have capacity to investigate all other universities with the same or substantially the same policy **Lapworth 1 §67 [CB/25/629-630]**. But that is not the point. It was centrally relevant to the proportionate exercise of the OfS' discretion to find a breach that many other universities had the same or substantially the same policy, yet the investigation team (inexplicably) did not draw this to the attention of decision-makers.

(4) The OfS has also made clear that none of the information concerning how Dr Stock's evidence was drafted was put to the decision-maker **[SB2/31/149-151]**, despite that information being relevant to credibility and weight. It bears emphasis that the investigation team that drafted the witness statement also produced the analysis of the credibility and weight to be attached to the product of their own work.

108. Fourth, the OfS' only witness was personally connected to the head of the investigation team. The informed observer would know that:

(1) In the years 2020-2022, Dr Ahmed (the head of the investigation team) and Dr Stock (the sole witness relied on by the investigation team) shared warm and friendly email exchanges, including congratulations and encouragement to one another on matters relating to free speech and trans issues **Roseneil 2 §§35-46 [CB/29/750-757]**. These exchanges included: (i) Dr Ahmed expressing the view that the University had a "*zero tolerance*" approach to harassment and bullying, except in relation to Dr Stock **[SB2/27/122]**; (ii) that Dr Ahmed viewed gender-critical feminists as the only "*real feminists*" **[SB2/27/127-128]**; (iii) the exchange of sarcastic jokes about the importance of diversity and inclusion at universities **[SB2/27/127] [SB2/27/133]**; (iv) discussion of trans policies in universities in the UK **[SB2/27/126]**; (v) encouragement and compliments from Dr Ahmed to Dr Stock to "*keep going*" in spreading her views **[SB2/24/95]**; (vi) the exchange of personal mobile phone numbers **[SB2/24/99]**; (v) Dr Ahmed saying "*for fuck's sake*" in response to Dr Stock forwarding an invitation to an Active Bystander workshop at the University **[SB2/27/133]**; (vi) Dr Ahmed trying to persuade Dr Stock to speak at Cambridge **[SB2/27/125**] and (vii) the organisation of a drink or lunch before or after speaking at the Cambridge Union together **[SB2/27/136]**.

(2) In the years 2021-2023, Dr Ahmed wrote publicly of his support for Dr Stock (including the expression of the view that the University had "*permitted the harassment [of Dr Stock] to continue and to escalate for three years*") and gender-critical feminists more generally: **Roseneil 2 §§35-46 [CB/29/750-757]**.

(3) On 1 June 2023, the OfS announced that Dr Ahmed would join the OfS as the Director of Freedom of Speech and Academic Freedom. When joining the OfS, Dr Ahmed declared a possible conflict of interests in "*cases involving gender*" and cases related to Dr Stock, because he had "*publicly defended Kathleen Stock's right to speak and have described her treatment as appalling. We gave evidence together at the HE(FOSA) Committee stage in 2021 and were on the same side at a Cambridge Union debate in 2022*" **[SB1/158/1986]**.

(4) On 2 June 2023, Ms Lapworth messaged David Smy, Head of Regulation at the OfS: "*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.*"

[SB1/154/1941] Ms Lapworth noted a tweet showing a photograph of Dr Stock and Dr Ahmed together at an event. David Smy agreed that Dr Ahmed "*was conflicted*" **[SB1/154/1941]**, as did Katherine Jacob, Corporate Governance Senior Officer **[SB1/176/3293-3294]**. The OfS therefore took steps to ensure that Dr Ahmed was not involved in decision-making in relation to the investigation, until it reversed that decision in October 2024, as set out below.

(5) On 15 October 2024, Ms Lapworth changed her mind and decided that Dr Ahmed would head up the investigation team from October 2024 onwards. She wrote that despite Dr Ahmed's "*potential conflicts of interest*" it was not a "*material concern*" because (i) the investigation team's view on substantive matters (which she did not identify) had already "*crystallised*" and because Dr Ahmed was not a decision-maker **[SB1/178/3300]**. Yet, once appointed to lead the investigation team, it was Dr Ahmed who provided the final recommendation papers to the USCEC, decided what questions to ask (including the decision not to put the issue of ongoing compliance to the USCEC), decided not to explain to the decision-maker any of the circumstances in which Dr Stock's evidence had been collected, and presented the slide deck on relevant decision-making to the USCEC **[CB/34/814]**.[67]

(6) The investigation team (led by Dr Ahmed) also saw it as relevant that Dr Stock would feel "*vindicated*" by the FD, and that it may improve her employment opportunities, even though the OfS had no jurisdiction to investigate Dr Stock's departure from the University **FDP §10(j) [SB2/90/960]**.

109. Fifth, the investigation team (led by Dr Ahmed) did not put the evidence fairly or fully to decision-makers. In particular:

(1) The decision-makers were reliant on the investigation team's summaries of the University's case, rather than the University's actual representations.[68]

(2) Those summaries did not identify the updated policy documents as being relevant to the decision on breach, notwithstanding the question of current compliance being the "*primary purpose*" of the powers that the USCEC were proposing to exercise (see §§77(3) above).

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[67] Dr Ahmed was also named as the lead contact for the USCEC in the investigation team's recommendation paper **[CB/38/950]**.

[68] Mr Coleman states (in response to the apparent bias allegation) that he independently decided to read all the underlying documents **Coleman 1 §29 [CB/27/720]**. However, he does not purport to give evidence as to what the Committee did as a collective (and his evidence cannot be taken to represent the Committee's collective approach: *R (Young) v Oxford City Council* [2002] 3 PLR 86, para 20, *per* Pill LJ). Given the breadth of materials presented to the USCEC and the summaries provided to them, the Court is invited to infer that the USCEC was reliant on the investigation team's presentation of the evidence, including but not limited to (i) the draft decision notice (which was approved with only stylistic changes and changes to the monetary penalty); (ii) the summaries of "relevant" decision-making, which failed to include the 2024 revisions to the policy documents.

(3) The draft decision documents held it against the University that the breaches identified could have continued beyond the date of the FD, without attempting to determine whether that was in fact the case in light of the amendments the University had made to the Policy Statement nearly a year before the FD was taken (see §81(1) above).

(4) The investigation team's summary of the evidence to the decision-makers was incomplete and argumentative: it sought to defend the credibility of the evidence that the investigation team had drafted rather than providing a balanced picture of the disputes of fact and disputes as to the appropriate approach **[SB1/184/3323-3334]**, For example, it failed to draw to the USCEC's attention that (i) there was no evidence at all that the freedom of speech of any students had been impacted by the Policy Statement and (ii) there was positive evidence, submitted by the University, that students' freedom of speech at the material time was in line with the national average: **PD Representations §313.2-3 [SB1/3/403-404], Aldrige 1 §14.2 [SB1/12/567]** and **SB1/4/493**

110. Taking all those factors into account, the apparent bias test – which is one of possibility and risk (not likelihood or probability) is satisfied. The OfS' defence to this ground (**DGD §139 [CB/7/179]**) does not address apparent bias. Rather, it asserts in various ways that the USCEC in fact addressed the decision with an open mind.

CONCLUSION

111. For the reasons set out above, the Claim should be allowed, and the FD should be quashed.

CHRIS BUTTLER KC

KATY SHERIDAN

JACK BOSWELL

MATRIX

12 JANUARY 2026