Neutral Citation Number: [2017] EWCA Civ 1850

Case No: C1/2014/2651 and C1/2016/0374

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE LEWIS
[2014] EWHC 2358 (Admin)
MR JUSTICE CRANSTON
[2015] EWHC 3494 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 November 2017

Before:

Lord Justice McFarlane
Lord Justice Treacy
and
Lord Justice Lindblom

- -

Between: **C1/2014/2651**

(1) Edward Connors
(2) Miley Connors
(3) Bridget Doran
(4) Fred Sines **Appellants**

- and -

(1) Secretary of State for Communities and Local Government
(2) Reigate and Banstead Borough Council
(3) Tonbridge and Malling Borough Council
(4) Royal Borough of Windsor and Maidenhead Council

Respondents

- -
- -

Mr Alan Masters (instructed by **Minton Morrill Solicitors**) for the **Appellants**
Mr Rupert Warren Q.C. and Mr Stephen Whale (instructed by **the Government Legal Department**) for the **First Respondent**
The second, third and fourth respondents did not appear and were not represented

And between: **C1/2016/0374**

(1) Bernadette Mulvenna
(2) Elias Smith **Appellants**

- and -

(1) Secretary of State for Communities and Local Government
(2) Hyndburn Borough Council **Respondents**

- and -

The Equality and Human Rights Commission **Intervener**

- -
- -

Mr Marc Willers Q.C. and Ms Tessa Buchanan (instructed by **Minton Morrill Solicitors**) for the **Appellants**
Mr Rupert Warren Q.C. and Mr Stephen Whale (instructed by **the Government Legal Department**) for the **First Respondent**
Mr Christopher Buttler (instructed by **the Equality and Human Rights Commission**) for the **Intervener**
The second respondent did not appear and was not represented

Hearing dates: 17 and 18 May 2017

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Each of the appellants in these two appeals is either a Gypsy or a Traveller. The underlying grievance is the same: that a statutory appeal against the decision of a local planning authority to refuse, or for its failure to determine, an application for planning permission for a material change of use of land in the Green Belt to enable a caravan or mobile home to be stationed upon it, or against enforcement action taken by the authority, was unlawfully recovered for his own determination by the Secretary of State for Communities and Local Government under a discriminatory policy or practice for recovery, and that his decision to dismiss the appeal was therefore itself invalid. The judges in the court below upheld the Secretary of State's decisions as lawful. Were they right to do so?

2. The Secretary of State is the first respondent in both appeals. The appellants in the first appeal are Mr Edward Connors, Mr Miley Connors, Mrs Bridget Doran and Mr Fred Sines. Mr Edward Connors and Mr Miley Connors – who are not related to each other – are both Irish Travellers, as is Mrs Doran. Mr Sines is a Romany Gypsy. They appeal against the order of Lewis J., dated 11 July 2014, dismissing their applications and appeals under sections 288 and 289 of the Town and Country Planning Act 1990. By those proceedings they had challenged decisions of the Secretary of State to dismiss appeals against refusals of planning permission – and also, in Mrs Doran's case and Mr Sines', enforcement notices issued – by three local planning authorities. In the case of Mr Edward Connors and in that of Mr Miley Connors, the local planning authority was Reigate and Banstead Borough Council, the second respondent in the appeal; in the case of Mrs Doran, Tonbridge and Malling Borough Council, the third respondent; and in the case of Mr Sines, the Royal Borough of Windsor and Maidenhead Council, the fourth respondent. The Secretary of State's decision letters are dated, respectively, 30 October 2013, 30 October 2013, 5 March 2014 and 19 December 2013. Another appeal against Lewis J.'s order was made by a fifth claimant in the same proceedings, Mrs Jane Lee. That appeal has already been heard and dismissed by this court (*Lee v Secretary of State for Communities and Local Government* [2016] EWCA Civ 558).

3. The appellants in the second appeal are Ms Bernadette Mulvenna, an Irish Traveller, and Mr Elias Smith, a Romany Gypsy. They appeal against the order of Cranston J., dated 4 December 2015. The judge dismissed Mr Smith's application under section 288 of the 1990 Act, by which he had challenged the decision of the Secretary of State, in a decision letter dated 15 July 2014, dismissing his appeals against a refusal of planning permission by the second respondent, Hyndburn Borough Council. Ms Mulvenna had in the meantime abandoned her own application under section 288 challenging the Secretary of State's decision, in a decision letter dated 5 August 2014, dismissing her appeals against the refusal of planning permission by West Lancashire Borough Council and an enforcement notice. The judge also refused applications for permission to apply for judicial review of the Secretary of State's decisions to recover the appeals, on 4 July 2013 in Ms Mulvenna's case, on 23 January 2014 in Mr Smith's. The Equality and Human Rights Commission, as intervener, supported those applications to the court, and has done so again before us.

4. A complete account of the facts in each appeal is to be found in the judgments below – in paragraphs 29 to 107 of Lewis J.'s, and in paragraphs 16 to 38 of Cranston J.'s. I gratefully adopt their narrative, none of which is in dispute, and I shall refer only to the salient events.

The issues in the appeals

5. As I have said, the main issues in the two appeals are, in large part, concerned with a shared grievance – essentially that the Secretary of State's decisions were made outside his powers because, it is said, he recovered the appellants' statutory appeals unlawfully.

6. In the first appeal the grounds of appeal present us with five issues to decide:
   (1) whether, in determining the appeals before him, the Secretary of State acted contrary to the provisions on indirect discrimination in section 19 of the Equality Act 2010, and in breach of the public sector equality duty in section 149 (ground 1);
   (2) whether the Secretary of State's decisions breached the appellants' human rights under the European Convention on Human Rights, including, in particular, article 6 and article 8, and whether Lewis J. failed properly to undertake his own human rights assessment (ground 2);
   (3) whether the judge failed to have regard to article 14 of the Human Rights Convention (ground 3);
   (4) whether the judge failed to recognize the adverse differential treatment of Gypsies and Travellers by comparison with the settled population, which the appellants say was inherent in the Government's "Planning policy for traveller sites" issued in 2012 and its successor policy issued in 2015 (ground 4); and
   (5) whether the Secretary of State's decisions are otherwise flawed by public law error – including perversity, a failure to have regard to material considerations, and a failure to provide clear and adequate reasons (grounds 5 and 6).

7. In the second appeal there are four issues:
   (1) whether the judge was wrong to refuse to extend time for the proceedings to be brought before the court (ground 1);
   (2) whether the judge was wrong to hold that the Secretary of State, having recovered and determined the appeals, was now "functus officio", and therefore unable to revisit and revoke his decisions (ground 2);
   (3) whether, in each case, the Secretary of State's decision is in any event a nullity and of no legal effect, because, in the absence of a lawful recovery direction, he lacked the power to make them (ground 3); and
   (4) whether the judge was wrong to refuse Mr Smith's application to amend his application under section 288 of the 1990 Act (grounds 4 and 5).

The statutory scheme for the determination of planning appeals

8. The statutory regime for the determination by the Secretary of State of appeals against a decision of a local planning authority to refuse planning permission or for its failure to determine such an application is contained in sections 78 and 79, in Part III of the 1990 Act. Section 79(1)(b) provides that, on an appeal under section 78, the Secretary of State "… may deal with the application as if it had been made to him in the first instance"; section 79(2), that "[before] determining an appeal under section 78 the Secretary of State

shall, if either the appellant or the local planning authority so wish, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose"; section 79(5), that the decision of the Secretary of State on the appeal "shall be final"; and section 79(7), that Schedule 6 to the 1990 Act applies to such appeals. The regime for the determination of appeals against enforcement notices is in sections 174, 175, 176 and 177, in Part VII of the 1990 Act. The specific grounds on which such an appeal may be brought are in section 174(2).

9. Schedule 6 to the 1990 Act, under the heading "Determination of Certain Appeals by Person Appointed by Secretary of State", provides, in paragraph 1, for the determination of appeals by appointed persons:

> "1. – (1) The Secretary of State may by regulations prescribe classes of appeals under sections 78, … [and] 174 … of this Act … which are to be determined by a person appointed by the Secretary of State for the purpose instead of by the Secretary of State.
>
> (2) Those classes of appeals shall be so determined except in such classes of case –
>
> (a) as may for the time being be prescribed, or
>
> (b) as may be specified in directions given by the Secretary of State.
>
> … ."

The relevant regulations under paragraph 1(1) are the Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1997. Regulation 3 provides that appeals under sections 78 and 174 are "prescribed … as appeals to be determined by a person appointed". Paragraph 2 of Schedule 6 contains provisions for the powers and duties of appointed persons:

> "2. – (1) An appointed person shall have the same powers and duties –
>
> (a) in relation to an appeal under section 78, as the Secretary of State has under subsections (1), (4) and (6A) of section 79;
>
> …
>
> (b) in relation to an appeal under section 174, as he has under sections 176(1), (2) to (2A) and (5) and 177(1) to (4);
>
> … .
>
> …
>
> (6) Where an appeal has been determined by an appointed person, his decision shall be treated as that of the Secretary of State.
>
> (7) Except as provided by Part XII, the validity of that decision shall not be questioned in any proceedings whatsoever.
>
> (8) It shall not be a ground of application to the High Court under section 288, or of appeal to the High Court under section 289, that an appeal ought to have been determined by the Secretary of State and not by an appointed person, unless the appellant or the local planning authority challenge the appointed person's power to determine the appeal before his decision on the appeal is given.
>
> (9) Where in any enactment (including this Act) there is a reference to the Secretary of State in a context relating or capable of relating to an appeal to which this Schedule applies or to anything done or authorised or required to be done by, to or before the Secretary of State on or in connection with any

such appeal, then so far as the context permits it shall be construed, in relation to an appeal determined or falling to be determined by an appointed person, as a reference to him.

… . ”

Paragraphs 3 and 4 provide for the determination of appeals by the Secretary of State himself:

“3. – (1) The Secretary of State may, if he thinks fit, direct that an appeal which would otherwise fall to be determined by an appointed person shall instead be determined by the Secretary of State.

(2) Such a direction shall state the reasons for which it is given … .

(3) Where in consequence of such a direction an appeal falls to be determined by the Secretary of State, the provisions of this Act which are relevant to the appeal shall, subject to the following provisions of this paragraph, apply to the appeal as if this Schedule had never applied to it.

… .

4. – (1) The Secretary of State may by a further direction revoke a direction under paragraph 3 at any time before the determination of the appeal.

… .”

10. In Part XII of the 1990 Act, which contains its provisions relating to “Validity”, the effect of section 284(1)(f) and (3)(b) is that, except as that Part expressly provides, any “decision on an appeal under section 78”, as well as any of the other “orders and actions” of the Secretary of State specified in section 284(2) and (3), “shall not be questioned in any legal proceedings whatsoever”. Section 288 permits an application to be made to the High Court to question such a decision on the grounds that it “is not within the powers of [the 1990 Act]” or “that any of the relevant requirements have not been complied with …” (sub-sections (1)(b) and (4), and section 284(3)(b)). Any such application must be made within six weeks of the decision (section 288(4B)). The High Court, “… if satisfied that the order or action … is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action” (sub-section (5)(b)). Section 285(1) provides that the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings on any of the grounds on which such an appeal may be brought. Under section 289(1) “[where] the Secretary of State gives a decision in proceedings on an appeal under Part VII against an enforcement notice the appellant or the local planning authority or any other person having an interest in the land to which the notice relates may … either appeal to the High Court against the decision on a point of law or require the Secretary of State to state and sign a case for the opinion of the High Court”. Permission is required to bring such an appeal before the court (section 289(6)). Subsection (7) provides that “[in] this section “decision” includes a direction or order, and references to the giving of a decision shall be construed accordingly”.

The Secretary of State's policy for the recovery of appeals in Gypsy and Traveller cases

11. The "Planning policy for traveller sites" published by the Government in March 2012 provided policy and guidance on the determination of applications for planning permission for such development, including proposals for sites in the Green Belt. It stated, in paragraph 3, that the Government's "overarching aim is to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community"; in paragraph 9, that local planning authorities should "identify and update annually, a supply of specific deliverable sites sufficient to provide five years' worth of sites against their locally set targets"; in paragraph 14, that "inappropriate development is harmful to the Green Belt and should not be approved, except in very special circumstances", and that "[traveller] sites (temporary or permanent) in the Green Belt are inappropriate development"; and in paragraph 21, that "[applications] should be assessed and determined in accordance with the presumption in favour of sustainable development and the application of specific policies in the National Planning Policy Framework ["the NPPF" – also published in March 2012] and this planning policy for traveller sites". In Policy H, "Determining planning applications for traveller sites", paragraph 25 stated:

> "25. … [If] a local planning authority cannot demonstrate an up-to-date five-year supply of deliverable sites, this should be a significant material consideration in any subsequent planning decision when considering applications for the grant of temporary planning permission."

Paragraph 28 said that the policy in paragraph 25 was to apply only to applications for temporary planning permission for traveller sites "made 12 months after this policy comes into force".

12. Before July 2013, it was the Secretary of State's policy to direct that appeals for planning permission for Gypsy and Traveller sites were to be determined by him where the proposal was for "significant development" in the Green Belt. On 1 July 2013 the Parliamentary Under Secretary of State for Communities and Local Government issued a written ministerial statement, entitled "Protecting the Green Belt", which said:

> "Our policy document, "Planning Policy for Traveller Sites", was issued in March 2012. It makes it clear that both temporary and permanent Traveller sites are inappropriate development in the green belt and that planning decisions should protect green belt land from such inappropriate development.
>
> As set out in that document and in [the NPPF], inappropriate development in the green belt should not be approved except in very special circumstances. Having considered recent planning decisions by councils and the planning inspectorate, it has become apparent that, in some cases, the green belt is not always being given the sufficient protection that was the explicit policy intent of Ministers.
>
> The Secretary of State wishes to make clear that, in considering planning applications, although each case will depend on its facts, he considers that the single issue of unmet demand, whether for Traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the "very special circumstances" justifying inappropriate development in the green belt.

> The Secretary of State wishes to give particular scrutiny to Traveller site appeals in the green belt, so that he can consider the extent to which "Planning Policy for Traveller Sites" is meeting this Government's clear policy intentions. To this end he is hereby revising the appeals recovery criteria issued on 30 June 2008 and will consider for recovery appeals involving traveller sites in the green belt.
>
> For the avoidance of doubt, this does not mean that all such appeals will be recovered, but that the Secretary of State will likely recover a number of appeals in order to test the relevant polices at national level. The Secretary of State will apply this criteria [sic] for a period of six months, after which it will be reviewed."

13. On 17 January 2014 the Parliamentary Under Secretary of State issued a further written ministerial statement, entitled "Green Belt", which said:

> "The Government's planning policy is clear that both temporary and permanent traveller sites are inappropriate development in the green belt and that planning decisions should protect green-belt land from such inappropriate development. I also noted the Secretary of State's policy position that unmet need, whether for traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the "very special circumstances" justifying inappropriate development in the green belt.
>
> The Secretary of State wishes to re-emphasise this policy point to both local planning authorities and planning inspectors as a material consideration in their planning decisions.
>
> That statement revised the appeals recovery criteria by stating that, for a period of six months, the Secretary of State would consider for recovery appeals involving traveller sites in the green belt, after which the position would be reviewed.
>
> The Secretary of State remains concerned about the extent to which planning appeal decisions are meeting the Government's clear policy intentions, particularly as to whether sufficient weight is being given to the importance of green-belt protection. Therefore, he intends to continue to consider for recovery appeals involving traveller sites in the green belt.
>
> Moreover, Ministers are considering the case for further improvements of both planning policy and practice guidance to strengthen green belt protection in this regard. We also want to consider the case for changes to the planning definition of "travellers" to reflect whether it should only refer to those who actually travel and have a mobile or transitory lifestyle. We are open to representations on these matters and will be launching a consultation in due course."

14. In *Moore and Coates v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin) the court considered the lawfulness of the two written ministerial statements. The claimants in that case were Romany Gypsies who had challenged, by way of claims for judicial review, the decisions of the Secretary of State to recover their appeals. The claims were issued in June 2014. When judgment was given, on 21 January 2015, the Secretary of State had not made decisions on the appeals themselves. However, in the light

of the evidence of Mr Richard Watson, the Head of Planning Casework in the Department for Communities and Local Government, in a witness statement dated 9 September 2014, it had become clear that – notwithstanding the policy in the written ministerial statement of 1 July 2013 – the Secretary of State had since September 2013 recovered all appeals for the development of sites for Gypsies and Travellers in the Green Belt. In paragraphs 179, 180 and 182 of his judgment Gilbart J. said:

> "179. I think it important to identify what was unlawful. I have determined that what was unlawful was the practice of recovering all appeals, and the unreasonable delay caused to Mrs Moore's and Ms Coates' appeals. I have not determined that [the written ministerial statement of 1 July 2013] as drafted and published was unlawful, but I have found that its application was. In the case of [the written ministerial statement of 17 January 2014], its terms do not reflect the reasons for its being made nor its application.
>
> 180. What was unlawful was the application of the policies in [the two written ministerial statements] in such a way as to recover all traveller's pitch appeals, which, due to the way the practice was approached, amounts to a breach of [sections]19 and 149 [of the Equality Act 2010]. I have also found that the practice of recovering all appeals, or an arbitrary percentage thereof, was and is unlawful. The effect of the approach of the Secretary of State was also to breach Article 6 [of the Human Rights Convention] so far as Mrs Moore and Ms Coates are concerned.
>
> …
>
> 182. But it must also be said that the issues raised by Mrs Moore and Ms Coates are not limited to their appeals. There are, as the figures set above demonstrate, many others whose appeals have been recovered and who must be experiencing delays, as are those who oppose their appeals. If, as appears to be the case, the appeals were recovered not because of their merits but because they were cases of travellers' pitches in the Green Belt, then the effect of the judgment will be to call into question the legality of many other recoveries. But it may be that when addressed properly, some of those appeals would have merited recovery anyway. No doubt sorting out which should or should not be recovered will involve some time and resources being expended, although it will no doubt be less than the time and cost spent in dealing with judicial review claims by many others should a review not be conducted."

15. In *Connors v Secretary of State for Communities and Local Government* [2015] EWHC 334 (Admin), in a judgment given on 28 January 2015, Mr C.M.G. Ockelton, sitting as a deputy judge of the High Court, adhered to those conclusions of Gilbart J., and suggested (in paragraphs 18 to 22) that the Secretary of State might now review every recovery decision he had made in cases involving proposals for Gypsy and Traveller accommodation between 1 July 2013 and 21 January 2015 to ascertain whether they were unlawful in the same way as the recovery directions in *Moore and Coates*.

16. On 26 March 2015, in an answer to a written Parliamentary question, Lord Ahmad of Wimbledon said on behalf of the Government that the Secretary of State would introduce a new policy for the recovery of appeals relating to sites in the Green Belt early in the new Parliament, and that, in the meantime, the Secretary of State would de-recover appeals

made by Gypsies and Travellers on which a substantive decision had not yet been reached. In a letter dated 30 March 2015 to parties in recovered appeals in which a substantive decision had already been made, Mr Watson confirmed that the Secretary of State had no power to take any further action on the appeal.

17. On 31 August 2015 the Secretary of State published an amended "Planning policy for traveller sites", which reflected the language of the written ministerial statements. It stated (in paragraph 16):

> "16. Inappropriate development is harmful to the Green Belt and should not be approved, except in very special circumstances. Traveller sites (temporary or permanent) in the Green Belt are inappropriate development. Subject to the best interests of the child, personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances."

The Secretary of State's decisions in the first appeal

18. All four appellants in the first appeal applied for planning permission to make a material change in the use of land for the stationing of a caravan or mobile home. In each case the local planning authority either refused the application or failed to determine it. In the cases of Mrs Doran and Mr Sines, as I have said, the authority served an enforcement notice alleging a breach of planning control. Appeals were made. In each case the inspector's report and the Secretary of State's decision letter conform to the familiar pattern. The main issues were identified and dealt with, including, as a common feature in all the appeals, whether a decision to approve the development proposed, as "inappropriate development" in the Green Belt, could be justified by "very special circumstances": in particular, whether any unmet need for sites for Gypsies and Travellers in the local area and the personal circumstances of the appellants and their families, taken together with any other considerations weighing in favour of the proposal, amounted to a sufficiently strong case for planning permission to be granted.

19. In the case of Mr Edward Connors the application for planning permission was made on 1 December 2011, for development at Treetops, Peeks Brook Lane, Horley. The local planning authority refused planning permission on 11 July 2012. On 13 March 2013, more than three months before the written ministerial statement of 1 July 2013 was issued, the Secretary of State directed that the appeal would be determined by himself. The inspector's report is dated 2 July 2013. Having placed considerable weight on unmet need for Gypsy and Traveller accommodation in the local area and on the personal circumstances of Mr Connors and his family, the inspector concluded that "very special circumstances" existed to justify the proposed development being approved, and he recommended that planning permission be granted. In his decision letter of 30 October 2013 the Secretary of State disagreed with that recommendation and dismissed the appeal. In the light of the July 2013 written ministerial statement, he said that "unmet demand" on its own was unlikely to constitute very special circumstances justifying inappropriate development in the Green Belt, that although the unmet need for sites carried "significant weight in favour of the proposal", he did not consider this sufficient to outweigh harm to the Green Belt and other harm – which he considered "very significant" – even when combined with "the personal circumstances" of Mr Connors and his family and "the needs of the children" (paragraph 21

of the decision letter). He concluded that "the very special circumstances necessary to justify the development [did] not arise" (paragraph 26).

20. Mr Miley Connors' application for planning permission, for development at Highlands, Brighton Road, Lower Kingswood, Tadworth, was submitted to the local planning authority on 17 July 2012. Planning permission was refused on 28 September 2012. By a direction dated 14 March 2013 – again more than three months before the July 2013 written ministerial statement was issued – the Secretary of State recovered the appeal for his own determination. In his report, dated 2 July 2013, the inspector concluded that the potential harm of the proposed development, including the harm arising from its being "inappropriate development" in the Green Belt, was clearly outweighed by other considerations, and that "very special circumstances" therefore existed to justify the grant of planning permission. In his decision letter of 30 October 2013 the Secretary of State disagreed with the inspector. He said he did "not consider that the factors which weigh in favour of the proposal, either individually or cumulatively, clearly outweigh the harm that would arise from a permanent permission", and that, in considering whether he should grant a temporary permission, he was "also satisfied that those factors which weigh in favour of the proposal would not clearly outweigh the harm that would arise from the proposal despite its limited duration" (paragraph 32 of his decision letter). He therefore dismissed the appeal.

21. Mrs Doran applied for planning permission for development on land to the north-east of Askew Bridge, Maidstone Road, Platt, Sevenoaks, on 23 January 2012. The local planning authority failed to determine the application, and, on 8 November 2012, served an enforcement notice alleging a breach of planning control. Mrs Doran appealed both for the non-determination of her application for planning permission, under section 78 of the 1990 Act, and against the enforcement notice under section 174. Those appeals were recovered by the Secretary of State for his own determination on 16 August 2013, some six weeks after the July 2013 written ministerial statement had been published. The inspector's report is dated 16 September 2013. In view of the unmet need for Gypsy and Traveller accommodation, he concluded that "very special circumstances" existed to justify the development. In his decision letter of 5 March 2014 the Secretary of State disagreed. He accepted, as the inspector had concluded, that the council could not "demonstrate a five year supply of sites", and he gave "significant weight to this matter" (paragraph 18 of the decision letter). He agreed that "the unmet need for sites and the personal circumstances of the appellant and her family, including the best interests of the children, [carried] substantial weight in favour of the proposal". But, unlike the inspector, he did "not consider this, in itself, [was] sufficient to outweigh the harm to the Green Belt and other harms to comprise the very special circumstances necessary to justify the appeal proposal" (paragraph 19). He therefore dismissed the appeals.

22. Mr Sines applied for planning permission for development on land adjoining Newtonside Orchard, Burfield Road, Old Windsor, on 11 June 2012. That application was refused on 7 August 2012. On 13 July 2012 the local planning authority issued an enforcement notice. Mr Sines appealed both against the refusal of planning permission and against the enforcement notice. On 13 March 2013, more than three months before the July 2013 written ministerial statement was issued, the Secretary of State recovered both appeals. The inspector's report is dated 11 July 2013. He concluded that "very special circumstances" existed to justify the development. In his decision letter of 19 December 2013 the Secretary of State rejected the inspector's recommendation, observing, in the light of the July 2013

written ministerial statement, that unmet demand on its own was unlikely to outweigh harm to the Green Belt. Though he accepted that unmet need carried "significant weight", Mr Sines' personal circumstances did not constitute the "very special circumstances" necessary to justify the development (paragraph 38 of the decision letter). Accordingly, he dismissed the appeals.

23. Those decisions of the Secretary of State were challenged by the appellants in applications under section 288 of the 1990 Act. Mrs Doran also sought permission to appeal against the dismissal of her appeal against the enforcement notice under section 289.

Issues (1), (2), (3) and (4) in the first appeal – the Equality Act 2010 and the appellants' human rights

24. These four issues are, I think, best considered together. The submissions made on them by Mr Alan Masters, for the appellants, were discursive, ranging wider than the arguments put forward in the court below and beyond the grounds of appeal for which permission to appeal to this court was granted. In particular, they introduced the concept that an unlawful "policy within a policy" for the recovery of appeals existed before the written ministerial statement was published on 1 July 2013.

25. Section 19 of the Equality Act 2010, "Indirect discrimination", provides that "[a] person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's" (sub-section (1)). The "relevant protected characteristics" include "race" (sub-section (3)). Section 149(1), under the heading "Public sector equality duty", provides that "[a] public authority must, in the exercise of its functions, have due regard to the need to" do three things: first, "(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act"; second, "(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it"; and third, "(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it …".

26. Article 6 of the Human Rights Convention enshrines the "Right to a fair trial". Article 6(1) states that "[in] the determination of his civil rights and obligations … , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …". The right in article 8 is the "Right to respect for private and family life". Article 8(1) states that "[everyone] has the right to respect for his private and family life, his home and his correspondence". Article 14 asserts the "Prohibition of discrimination". It states that "[the] enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as … race …".

27. Mr Masters argued that the Secretary of State's decision to recover the appellants' appeals for his own determination was, in each case, made on the basis of an unlawful – or at least an unlawfully applied – policy for recovery, which had existed for some time before the first ministerial written statement was issued. Mr Masters submitted that that policy and its application in the determination of appeals represented an "abuse of power" by the Secretary of State. Even before it emerged formally for the first time on 1 July 2013, the policy was, Mr Masters submitted, discriminatory under section 19 of the Equality Act 2010 and irreconcilable with the duty in section 149, and in breach of the appellants'

human rights. The Secretary of State's use of it in recovering the appeals in each of these cases deprived him of the lawful power to decide them, and rendered invalid the decisions he made. In each case, irrespective of the date of the recovery direction, the provisions for challenging the validity of decisions of the Secretary of State in sections 288 and 289 of the 1990 Act founded the court's jurisdiction to grant a remedy. In *Moore and Coates* Gilbart J. had found that although the policy for recovery in the first ministerial statement was "not itself discriminatory", the "application" of that policy was "discriminatory within the meaning of [section] 19 [of the Equality Act 2010]" (paragraph 126 of Gilbart J.'s judgment), and amounted to "a breach of [sections] 19 and 149 …" (paragraph 180). Mrs Doran's case, Mr Masters submitted, was analogous to those in *Moore and Coates*, as her appeal had been recovered after the first ministerial statement was issued. The appeals of Mr Edward Connors, Mr Miley Connors and Mr Sines had been recovered before the publication of the first written ministerial statement, but the recovery of their appeals was also discriminatory because it had taken place under the "policy within a policy" already in existence at the time. That policy had caused disruption and delay in the handling of their appeals, as in many others, and, in the end, illegality in the decisions themselves. The Secretary of State was recovering appeals made by Gypsies and Travellers with a view to applying to those appeals, when he determined them, a more restrictive policy for development in the Green Belt, in which "unmet demand", by itself, was "unlikely" to be enough to constitute the "very special circumstances" justifying inappropriate development.

28. The "policy within a policy" was said to have been in existence at least since late 2012. The parties disagreed as to the proportion of appeals made by Gypsies and Travellers recovered in the relevant period. The appellants said it was as high as 78%. Relying on evidence apparently accepted by Gilbart J. in *Moore and Coates*, the Secretary of State maintained, that in the two years between 1 July 2011 and 1 July 2013, it was only about 21%. Evidence produced on behalf of the claimants in a witness statement of Ms Parminder Sanghera of the Community Law Partnership, dated 7 October 2014, suggested that it was about 27%. In paragraph 65 of his judgment Gilbart J. said there had been "a considerable disparity between recovery in non-traveller residential Green Belt cases and recovery of traveller residential Green Belt cases". Before 1 July 2013, he said, "an appeal relating to a traveller residential site in the Green Belt was about 50 times more likely to be recovered than a non traveller scheme". After that date this "had risen to 125 [times] more likely".

29. I cannot accept the argument Mr Masters presented to us on these four issues.

30. In the first place, as Mr Rupert Warren Q.C. submitted on behalf of the Secretary of State, none of the challenges made by these four appellants corresponds to the proceedings in *Moore and Coates*. The target in those proceedings was, in each case, a recovery direction, and no decision had yet been made on the appeal itself. The proceedings were brought in claims for judicial review, not in an application under section 288 or an appeal under section 289. Here, by contrast, the proceedings impugn both the Secretary of State's policy for the recovery of appeals and his substantive decisions on the appeals made to him in these four cases. Neither in Mrs Doran's case nor in any of the other three was there a direct attack on the recovery directions themselves. I should also make it clear at this stage – as I shall explain when I come to the nullity argument in the second appeal before us – that, in my view, even if those directions were unlawful because they were taken in accordance with an unlawful practice in the recovery of appeals, it does not follow that the Secretary of State's decisions on the appeals themselves were, for that reason, invalid. And I cannot accept that they were.

31. Secondly, whatever the percentage of recovered appeals actually was in the relevant period before 1 July 2013, I cannot accept that there was before Lewis J., or that there is before this court, evidence to demonstrate the existence in that period of an unlawful "policy within a policy" for the recovery of appeals, undisclosed and secretly applied.

32. Thirdly, in any event, Lewis J. made no error in disposing of the argument that the Secretary of State, when he promulgated the policy for the recovery of appeals in the written ministerial statements, neglected the provisions of section 19 of the Equality Act 2010, failed to perform his duty under section 149, or acted in breach of the appellants' human rights. The essence of the argument, as the judge recorded it in paragraph 128 of his judgment, was that the policy announced in the written ministerial statement of 1 July 2013 "involved unjustified differential treatment of Travellers and Gypsies as compared with those seeking planning permission for conventional housing in the Green Belt whose appeals may be determined by inspectors not the Secretary of State". This, it was suggested, "was to treat people differently by reason of their race or ethnicity", and "would involve … applying different procedures to Travellers and Gypsies as compared with persons who were not Travellers or Gypsies". Lewis J. dealt comprehensively with this argument in paragraphs 132 to 142 of his judgment. I cannot fault his analysis, or the conclusions to which it led.

33. To hold that either of the two written ministerial statements constituted, in itself, a conflict with section 19 of the Equality Act 2010, or a failure to discharge the public sector equality duty in section 149, or a breach of any of these appellants' human rights under articles 6, 8 and 14 of the Human Rights Convention, would be to go further than did Gilbart J. in *Moore and Coates* (see paragraphs 179 and 180 of his judgment, quoted in paragraph 14 above). And I would not do that. As Mr Warren submitted, the intention expressed in the written ministerial statement of 1 July 2013, to give "particular scrutiny" to appeals relating to development for Gypsies and Travellers in the Green Belt, and to make this the basis for a revision of the criteria for the recovery of appeals, was not irrational or unfair. Nor was it inherently discriminatory against Gypsies and Travellers in comparison with people who are not Gypsies or Travellers. Nor again was it inimical to the duty to "have due regard" to the aims stated in section 149(1) of the Equality Act 2010; neither in its terms nor in its substance was it inconsistent with the public sector equality duty. Adjusting the criteria for recovery in this way was not, in my view, unlawful in any of those respects. Nor was the stated justification for doing so unreasonable or unclear, or otherwise unlawful. The same may also be said of the proposition in the written ministerial statements that "unmet demand [or, as it was put in the second, "unmet need"], whether for Traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the "very special circumstances" justifying inappropriate development in the [Green Belt]" (my emphasis). Indeed, that statement of policy is explicitly and deliberately non-discriminatory.

34. Fourthly, and again in any event, I do not accept that the Secretary of State's decisions to recover the appellants' appeals, either in the exercise of the policy in the written ministerial statements or in the exercise of some unpublished previous policy to similar effect – even if the existence of such a policy had been demonstrated – can be said to have automatically generated, in his decisions on the appeals themselves, a conflict with section 19 of the Equality Act 2010, a failure to perform the public sector equality duty in section 149, or any breach of the appellants' human rights. The Secretary of State's decisions on the

appeals fall to be reviewed by the court in accordance with familiar public law principles. Even if the recovery decisions were taken in breach of the public sector equality duty or in breach of article 14 of the Human Rights Convention – not a conclusion reached by Lewis J. – the appellants would still have to show that that unlawfulness infected the decision-making process itself. They did not succeed in persuading Lewis J. that this was so. Nor do I accept that it was.

35. As Lewis J. recognized, the inescapable difficulty for the appellants here, a difficulty that in my view they cannot overcome, is that in none of these cases was a timely challenge made to the Secretary of State's recovery directions, or to the policy in the written ministerial statements, or, in the cases of Mr Edward Connors, Mr Miley Connors and Mr Sines, to the allegedly pre-existing and hidden "policy within a policy" on which the Secretary of State is said to have acted in recovering their appeals. None of the four appellants availed himself, or herself, of any remedy, either by way of a claim for judicial review, or, if available, an application for permission to appeal under section 289 of the 1990 Act, before the Secretary of State had actually made his decision on the appeal in question. In seeking to avoid the consequences of this failure to move the court, the appellants resorted to inviting Lewis J. to regard their proceedings under sections 288 and 289 of the 1990 Act as including an assault on the Secretary of State's recovery directions and to the policy underlying those directions, or to exercise his discretion to deal with those applications as if they had been claims for judicial review, issued without delay. Now, before this court, they have sought to persuade us that the judge exercised his discretion wrongly in refusing to do so.

36. That is a bold submission, and in my view it is wrong. As Lewis J. said in paragraph 133 of his judgment, in the cases of Mr Edward Connors, Mr Miley Connors and Mr Sines, "the [recovery] decisions were taken on the basis of the pre-existing policy that appeals involving significant development in the Green Belt would be determined by the Secretary of State", and there was "no challenge to the lawfulness of that earlier policy". In those three cases, therefore, as the judge said, "the [decisions] that [the] appeals be determined by the Secretary of State were not influenced by [the] 1 July 2013 announcement", and "[the] lawfulness of the directions … cannot have been affected by any alleged flaw in the later ministerial announcement". In the judge's view, this conclusion, on its own, would have been enough to justify the dismissal of the proceedings in those three cases. I agree.

37. Lewis J. also concluded, in paragraph 134 of his judgment, that in Mrs Doran's case, the proceedings she had pursued under sections 288 and 289 of the 1990 Act were not an appropriate means of challenging either the policy in the written ministerial statement of 1 July 2013 or the Secretary of State's direction that her appeals were to be determined by him rather than by an inspector. He rejected Mr Masters' argument to the contrary. In my view he was right to do so, for the reasons he gave. As to section 288, he said, in paragraph 135 of his judgment, that "the orders and action set out in section 284(2) and (3) … do not include decisions under section 79 of, and paragraph 3 of Schedule 6 to, the 1990 Act, to direct that an appeal is to be determined by the Secretary of State rather than an inspector", nor "policies governing the criteria by which such directions are to be made". That is correct. Thus, as the judge said, "[an] application under section 288 of the 1990 Act is not, therefore, an available means of challenging such directions or policies". As to section 289, he said in paragraph 139 that "[any] application for permission to appeal would have had to be made within 28 days after notice is given of that decision: see CPR Practice 52D [paragraph] 26.1", and that "[if] Mrs Doran had wished to use an appeal under section 289

to challenge the direction, and to raise the procedural issue of who was to determine her substantive appeal, she should have sought permission to appeal within 28 days of the direction being given on 16 August 2013".

38. Mr Masters submitted to us that if sections 288 and 289 could not be used to bring unlawful recovery directions before the court, then, in the absence of any other provisions affording such an opportunity to someone in the predicament of these four appellants, the 1990 Act would not be compatible with articles 6, 8 and 14 of the Human Rights Convention – and in a situation where the Secretary of State was not only decision-maker but also author of the policy for recovery. Once it was established that the policy being applied was unlawful, any subsequent decision was "tainted with illegality". The court could not in these circumstances deny a "person aggrieved" an appropriate remedy, and such a remedy was available through an application made under section 288, or an appeal under section 289. The approach taken by Lewis J., said Mr Masters, ran counter to the jurisprudence in the House of Lords' decision in *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295 (in particular, in the speech of Lord Slynn of Hadley, at paragraphs 41 to 52, and in the speech of Lord Clyde, at paragraph 169), and, in the context of article 8, observations made by Hickinbottom J., as he then was, in *Stevens v Secretary of State for Communities and Local Government and Guildford Borough Council* [2013] EWHC 792 (Admin) (in particular, in paragraph 45 of his judgment). As to timing, Mr Masters submitted that the challenge to the recovery directions had, in all four cases, been made as soon as they realistically could be. The existence of the Secretary of State's "policy within a policy" had not been discernible even when he made his recovery direction in Mrs Doran's case on 16 August 2013. It had only become plain when Mr Watson's evidence was put before the court in *Moore and Coates*.

39. In my view that argument is unsustainable. As Lewis J. said in paragraph 135 of his judgment, an application under section 288 is not a means of challenging recovery directions or the policy under which they are made. His understanding of the provisions of sections 284 and 288 was correct. If Parliament had wanted to include, within the ambit of section 288, challenges to directions for the recovery of appeals, or to policies that inform the making of such directions by setting out relevant criteria, it could have done so. It did not.

40. The judge acknowledged in paragraph 136 of his judgment, that "[it] would, in theory, be open to the court to direct that the claim form in the section 288 proceedings stand as a claim form in judicial review proceedings (where the court could, in principle, consider the lawfulness of the ministerial announcement or the direction that the appeal be determined by the Secretary of State himself)". But he rejected that course in this case. In his view any challenge to the Secretary of State's policy for recovery, or to the recovery direction itself, "should have been made promptly and in any event within [three] months of the policy or direction under challenge". The Secretary of State's recovery direction in Mrs Doran's case was made some six weeks after the publication of the written ministerial statement on 1 July 2013. That direction was not challenged by a claim for judicial review, and it was only after the Secretary of State's decisions on her appeals had been made that Mrs Doran launched proceedings under sections 288 and 289 of the 1990 Act. In those circumstances, as the judge said, it was "not appropriate, given the stage at which the challenge to the decision of 5 March 2014 dismissing the planning appeal has now reached, to seek to distort that claim and turn it into a challenge to a policy announced on 1 July 2013 or a

direction given on 16 August 2013 that Mrs Doran's appeal be determined by the Secretary of State" (ibid.). That conclusion is, in my view, sound, and I do not think the judge's exercise of his discretion on the basis of it can be faulted.

41. Lewis J. also rejected the submission that it was open to Mrs Doran to pursue a challenge to the written ministerial statement of 1 July 2013 under section 289 – an appeal against "a decision in proceedings on an appeal under Part VII". As he said in paragraph 137 of his judgment, "the ministerial announcement was not such a decision". It was "a statement as to how the Secretary of State would approach the exercise of his discretion under paragraph 3 of [Schedule] 6 …". Once again, I agree.

42. The judge did not accept the submission made on behalf of the Secretary of State that the court lacked jurisdiction under section 289 to entertain a challenge to a recovery direction itself. The range of "decisions" for the purposes of appeals under section 289 is widely drawn in sub-section (7) to include not merely decisions on appeals against an enforcement notice, but also "a direction or order". It would seem, therefore, as Lewis J. said in paragraph 138 of his judgment, that "the court would have had jurisdiction to hear an appeal under section 289 … against a direction that the appeal be determined by the Secretary of State not a person appointed by him". Aided by the helpful discussion in paragraphs P289.07 and P289.08 of the Encyclopaedia of Planning Law and Practice, I too would accept that a challenge to a direction recovering an appeal against an enforcement notice for the Secretary of State's own determination is possible under section 289, and does not have to be made by a claim for judicial review.

43. No appeal against the Secretary of State's recovery direction in Mrs Doran's case was made under section 289. The fatal difficulty here, however, was not merely one of form, but in the timing of the proceedings Mrs Doran chose, on advice, to bring before the court. In her case the claim form was not issued until more than seven months after the direction was given, by which time the Secretary of State had already made his decision on the appeal. As the judge said in paragraph 139 of his judgment, "[it] would not be appropriate now to permit a late challenge to the direction that the Secretary of State determine the appeal given that the challenge is brought very late and, indeed, after the substantive appeal has been heard and determined".

44. Lewis J. was satisfied that exercising his discretion as he did in Mrs Doran's case would not result in injustice. That exercise of discretion by the judge is also, in my view, beyond criticism, and it would be wrong for us to interfere with it. Had he decided differently – so as to admit an extremely late challenge to the recovery direction, brought only after the decisions on the appeals had been made, whether by way of a claim for judicial review or by an application for leave to appeal under section 289 – the Secretary of State could properly have complained that his exercise of discretion was unreasonable and should be overturned. In principle, similar considerations applied in the case of all four of these appellants, including Mrs Doran. In spite of the differences between the history in her case and that in Mr Edward Connors', Mr Miley Connors' and Mr Sines', her position before the court is not materially better than theirs. Neither in their cases nor in hers was there any competent and timeous challenge to the Secretary of State's recovery directions or to the policy for recovery that he was operating when he made them.

45. I do not accept that any of these appellants could have attacked either the policy in the written ministerial statements or the so-called "policy within a policy" by proceedings

under sections 288 and 289. Lewis J. described this argument, in paragraph 141 of his judgment, as "misconceived". It is. The court cannot stretch the statutory language in those provisions beyond the words Parliament has used. As the judge said (ibid.), "[there] were other available mechanisms by which the High Court could have considered whether the ministerial announcement or the direction in Mrs Doran's case involved any breach of her Convention rights", and "[she] chose not to bring such proceedings". The proceedings she did bring, under sections 288 and 289, to challenge appeal decisions issued on 5 March 2014 were "not appropriate mechanisms for seeking to challenge a policy announced on 1 July 2013 or a direction given on 16 August 2013 that her appeal be determined by the Secretary of State".

46. Like the judge, I see no force in the argument that there was, in the case of any of these four appellants, a breach of article 6 of the Human Rights Convention in that the Secretary of State, having formed the policy declared in the written ministerial statements, and, it is alleged, the pre-existing "policy within a policy", was not, and could not be, a fair and independent tribunal when determining the appellants' statutory appeals. No support for this argument is to be found in the House of Lords' decision in *Alconbury*. Lewis J. was right to deal as he did with the argument on article 6 that was presented to him by Mr Masters. Nor do I accept that, in the particular circumstances of each or any of these individual cases, whose history was fully described by the judge and which I have set out in short summary (in paragraphs 19 to 22 above), there was such delay in the Secretary of State's determination of the appeal or appeals before him as to constitute a breach of article 6 vitiating the decisions themselves. I should add that the same can also be said for the Secretary of State's decisions on the statutory appeals in the second appeal before us (whose history is set out in paragraphs 71 to 73 below). As Lewis J. said in paragraph 142 of his judgment, to assess whether there had been a breach of article 6, it was necessary to consider "the system as a whole". The Secretary of State's decisions are "subject to review by the courts". The public inquiries held into the appellants' appeals enabled them "to produce all the factual material that they wished". In none of these cases was it suggested that the relevant facts had been inaccurately stated. The issues were "whether the decisions on the overall planning balance, given those facts, are correct as a matter of law" and "whether the decisions are compatible with the [appellants'] Convention rights". The court was "able to deal fully with those issues". The complaint of a breach of article 6 was "not therefore made out". Those conclusions are, in my view, impeccable. Review by the court of decisions made by the Secretary of State on planning appeals, case by case, is sufficient safeguard to achieve compliance with article 6. That principle is well established. It is not displaced by the existence and operation of a national policy for the recovery of appeals such as is contained in the written ministerial statements, or any "policy within a policy" supposedly applied by the Secretary of State without being announced.

47. The submission that in determining the appeals the Secretary of State breached the appellants' rights under article 8 and article 14 of the Human Rights Convention is also, in my view, mistaken. In each of his decision letters the Secretary of State set out his assessment of the potential impact of a refusal of planning permission on the appellants' human rights and the human rights of affected members of their families, specifically having regard to the best interests of the children involved, as a primary consideration, and also dealing explicitly with the considerations that arose in discharging the public sector equality duty in the particular circumstances of the case in hand. None of the relevant conclusions reached by the Secretary of State in each appeal is vulnerable to criticism. They were complete, coherent, and lawful.

48. Lewis J.'s self-direction, in paragraph 144 of his judgment, leaves no room for doubt that he was fully conscious of the court's task here. He acknowledged that the court has "jurisdiction to determine whether the decisions dismissing the appeals in individual cases do or do not involve any element of discrimination contrary to article 14". He then emphasized that "[equality] of treatment is, a fundamental value underlying both the law of England and Wales and the [Human Rights Convention]". Allegations of "discriminatory treatment", he said, "need careful scrutiny". This was, he observed, "perhaps … particularly important where, as here, the court is dealing with ethnic groups with a particular traditional life style which is not always understood or appreciated by the wider community". It was, however, "[equally] important that courts proceed on the evidence before them and reach decisions based on the law and that evidence". He went on "to consider carefully the evidence and submissions" relevant in this context (paragraph 145). Having referred to the evidence before the court on the rate of recovery of appeals at the relevant time and also on the outcome of the appeals themselves (in paragraphs 145 to 149), he concluded that "the evidence produced in these cases does not establish any differential treatment in terms of the decisions on appeals by Travellers and Gypsies in relation to sites in the Green Belt as compared with non-Gypsy and Traveller appeals in such cases" (paragraph 150). That conclusion seems quite secure. Mr Masters was not able to point to anything in the Secretary of State's consideration of the appellants' appeals that undermines it.

49. Essentially the same may be said of Mr Masters' argument on the policy in the "Planning policy for traveller sites" of March 2012, including the statement in paragraph 25 confirming that a local planning authority's failure to demonstrate an up-to-date five-year supply of deliverable sites "should be a significant material consideration … when considering applications for the grant of temporary planning permission".

50. Rightly, in my view, Lewis J. found no discrimination there, and no breach of article 14. He saw two problems facing Mr Masters' submissions.

51. First, even if there were anything in the complaint about the policy itself – which in my view there is not – it carries no sting as a criticism of the Secretary of State's decisions under challenge in these proceedings. Mr Warren aptly described it as "entirely academic". In the case of each of these four appellants, when considering the application for permanent planning permission, the Secretary of State gave significant weight to the need for additional accommodation for Gypsies and Travellers, and, specifically, to the shortfall in provision against the requisite five-year supply, as material considerations in the positive side of the balance (in paragraph 14 of his decision letter in Mr Edward Connors' case, paragraph 18 of his decision letter in Mr Miley Connors', paragraph 27 of his decision letter in Mr Sines', and paragraph 18 of his decision letter in Mrs Doran's). As Lewis J. said in paragraph 152 of his judgment, the Secretary of State "did treat the fact that there was an unmet need and the absence of a five year supply of deliverable sites as a significant material consideration in favour of each of the … appeals both so far as permanent and temporary planning permission was concerned". And when the balance between "unmet need" and "the absence of a five year supply of sites" was struck, "[there] was no discriminatory failure to have regard to the absence of a five year supply of Gypsies and Traveller sites". This, on its own, would have been enough to defeat Mr Masters' argument.

52. Secondly, as the judge said in paragraph 153 of his judgment, the policy in paragraph 25 of the "Planning policy for traveller sites" of March 2012 did not represent "unjustified differential treatment against Gypsies and Travellers". The contention that this was a discriminatory policy is untenable. It is also impermissible in proceedings seeking relief for allegedly unlawful decision-making by the Secretary of State on appeals against refusals of planning permission and enforcement notices issued by local planning authorities.

53. If the absence of an "up-to-date five year supply of deliverable sites" was "a significant material consideration" in decisions on applications for "temporary" planning permission, it might also be "a significant material consideration" in decisions on applications for permanent planning permission. The "Planning policy for traveller sites" did not deny that. And the approach taken by the Secretary of State in determining the appellants' appeals shows that he accepted it was so. The absence of an equivalent policy for market and affordable housing in the NPPF is not symptomatic of any discrimination against Gypsies and Travellers. There is, in fact, no policy in the NPPF stating that a local planning authority's inability to demonstrate a five-year supply of deliverable housing sites is a "significant material consideration" for any application – whether for permanent or for temporary planning permission. If anything, therefore, it could be said that the policy in paragraph 25 of the "Planning policy for traveller sites" favoured applications made by Gypsies and Travellers. Certainly, it did not disadvantage such proposals. And, as Mr Warren pointed out, the policy in paragraph 25 must be read together with the policy in paragraph 21: that applications – plainly meaning all proposals for Gypsy or Traveller accommodation, no matter whether the planning permission sought was permanent or merely temporary – must be dealt with in accordance with the "presumption in favour of sustainable development" in paragraph 14 of the NPPF (see the recent decisions of this court in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, and *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314).

54. As Lewis J. said in paragraph 153 of his judgment, "[the] position in relation to both Traveller and Gypsy sites and conventional housing in the Green Belt will, strictly, be the same". Both would be "inappropriate development" in the Green Belt. The requirement for a five-year supply of sites applied to both – through the policy in paragraph 9 of the "Planning policy for traveller sites" and the policy in paragraph 47 of the NPPF. Since the absence of a five-year supply of sites will, in principle, be a material consideration weighing in favour of a grant of planning permission, the question in a Green Belt case will be whether that factor, when taken with others weighing in favour of approval, is enough to be regarded as "very special circumstances" to justify inappropriate development in the Green Belt. Under the policy in the written ministerial statement of 1 July 2013, "unmet demand, whether for Traveller sites or for conventional housing" (my emphasis), was unlikely to be sufficient on its own to warrant a grant of planning permission. And, as the judge said (ibid.), "[in] any event, in the present cases, there was no differential treatment as the [Secretary of State] did consider the absence of a five year supply of sites as a material consideration". That is clearly right.

55. In my view therefore, as Mr Warren submitted, Mr Masters' argument on article 14 gains nothing from his submissions on paragraph 25 of the "Planning policy for traveller sites". Lewis J.'s conclusions in paragraphs 144 to 153 of his judgment are solid.

56. The judge went on to consider the challenges to the Secretary of State's decisions in the individual cases. He directed himself appropriately in the light of the relevant case law on article 8, including (at paragraph 158) the judgment of Hickinbottom J. in *Stevens*. For each case before him he carried out his own article 8 proportionality assessment, which included explicit consideration of the best interests of the children (paragraphs 159 to 191). As he accepted, the Secretary of State was himself well aware that he must have regard to the best interests of the children as a primary consideration in the determination of the appeals, and demonstrably did that in each of these four cases – in paragraph 16 of his decision letter in Mr Edward Connors' case, in paragraph 21 of his decision letter in Mr Miley Connors', in paragraph 21 of his decision letter in Mrs Doran's and in paragraph 21 of his decision letter in Mr Sines'.

57. The Secretary of State went about this task, in each case, in accordance with the approach indicated in paragraph 69 of Hickinbottom J.'s judgment in *Stevens*. In each case his findings and conclusions were, in my view, realistic and thorough, expressed in clear terms, and correct. As Lewis J. said in paragraph 179 of his judgment, "[at] the first stage of the exercise, the [Secretary of State] did identify the best interests of the children as a primary consideration" and "he identified what the best interests of the relevant children required". Then, "at the second stage, [he] considered the balance of the competing considerations in the way described above [in paragraphs 159 to 176] in relation to Mrs Lee and in accordance with the approach in *Stevens*". No "errors in fact" had occurred. The judge went on to say in paragraph 183 that in his view the decision in the case of each of the appellants was "compatible with [article 8]". Any interference with the rights of each appellant and his or her family would need to pursue a "legitimate aim". And in the judge's view the Secretary of State's decisions to dismiss their appeals did so – by "protecting the environment in the form of the Green Belt and thereby protecting the rights of the wider community in terms of environmental protection (see [the judgment in *Chapman v United Kingdom* (2001) 33 E.H.R.R. 18,] at paragraph 103)".

58. In considering "proportionality", Lewis J. concluded that that aim had a "very high value in the present case involving, as it does, development in the Green Belt". None of the sites had planning permission and the stationing of caravans on the land was unlawful. This factor was "also relevant in assessing the proportionality of interference: see *Chapman*, at paragraph 102". The judge went on to say, in paragraph 184, that the Secretary of State's decisions correctly identified the impact on each of the appellants and his or her family. The circumstances of each family were, he acknowledged, different. Where children were involved, the Secretary of State's decision letter in each case had identified, from the evidence before him, what was "in their best interests". The "best interests of a child", said the judge, "are a primary consideration in conducting the exercise of deciding if any interference with the rights recognised by [article 8] is proportionate". Bringing these conclusions together in paragraph 189 of his judgment, he said that "[given] the importance of the legitimate aim and the need to strike a fair balance between the rights of the individual [appellant] and his or her family members (including those [appellants] where the best interests of children are involved and which are a primary consideration) and the wider community, I am satisfied that in all these cases the dismissal of the appeals and the refusal of planning permission was a proportionate means of pursing a legitimate aim". He concluded that the decisions of the Secretary of State "are compatible with the [article] 8 rights of Mr Edward Connors, Mr Miley Connors, Mrs Doran, Mr Sines and their families". Once again, I agree with the judge, and need not add to what he said.

59. Finally, again contrary to Mr Masters' submission, and again in my view correctly, the judge rejected the submission that the Secretary of State's decisions on the appellants' appeals involved breaches of the public sector equality duty, and that this manifested the disproportionate and discriminatory treatment Gypsies and Travellers were receiving not only after the policy in the written ministerial statement of 1 July 2013 was issued, but also before then, once the "policy within a policy" was in place. As the judge said in paragraph 190 of his judgment, it was clear from his decision letters that the Secretary of State "did have due regard to the [matters] referred to in [the] duty [in section 149 of the Equality Act 2010], including in particular … the need to eliminate discrimination, advance equality and foster good relations", and "concluded that any impact on the appellants by reason of their protected characteristics was justified and proportionate". There was, therefore, "no breach of the public sector equality duty".

60. All these conclusions of the judge, both in respect of the appellants' and their family members' human rights, including the best interests of the children, and in respect of the public sector equality duty, are in my view well founded. There is no reason for us to upset them.

61. It follows that the first appeal cannot succeed on any of grounds 1, 2, 3 and 4 – either in their original form or as developed by Mr Masters in the submissions he made to us.

Issue (5) in the first appeal – other public law error

62. Mr Masters did not present in oral submissions his full argument on the public law errors he said were apparent in the Secretary of State's decisions. Which parts of this argument he maintained, and which, if any, he abandoned was not entirely clear – though it did seem at times that this was an attempt to draw the court into a consideration of the planning merits of the appellants' section 78 and section 174 appeals. That is not the court's task.

63. Mr Masters submitted that the written ministerial statements were expressed, at least mainly, as a policy for the recovery of appeals for determination by the Secretary of State, not as an alteration of existing government policy for development in the Green Belt. The Secretary of State had erred in treating the first written ministerial statement as a material consideration in the determination of the appellants' appeals, or, even if it were properly to be regarded as a material consideration, in giving it the weight he did. Influenced as they clearly were by the policy in the written ministerial statement, his decisions on the appeals were therefore unreasonable in the *Wednesbury* sense, and also in breach of natural justice and unfair. But Mr Masters went further. In stating that "the single issue of unmet demand, whether for traveller sites or for conventional housing, [was] unlikely to outweigh harm to the green belt and other harm to constitute very special circumstances justifying inappropriate development in the green belt", the first written ministerial statement was merely stating a justification for the Secretary of State's recovery of appeals, not recasting the policy for the making of development control decisions. Otherwise, it would have been contradicting extant policy in the version of the "Planning policy for traveller sites" applicable at the time.

64. Those submissions are, in my view, incorrect. Three things can be said about them.

65. First, the errors said to have been made by the Secretary of State were, for the most part, in his consideration of matters calling for an exercise of planning judgment, and in which, in the exercise of his own planning judgment, he differed from his inspectors – the weight to be given to the harm the development would cause to the Green Belt, the countryside or an Area of Outstanding Natural Beauty, the significance of conflict with relevant policy, and the striking of the planning balance. He was entitled to differ from his inspectors on these matters, so long as there was evidence on which he properly could do it – which clearly there was (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780E-H). And he could lawfully do that without having to visit the site himself (see the judgment of Sullivan L.J. in *Ecotricity (Next Generation) Ltd. v Secretary of State for Communities and Local Government* [2015] EWCA Civ 657, at paragraphs 32 to 36). In none of these cases did he act unlawfully – whether unfairly or in breach of natural justice, or in bad faith, or unreasonably in the *Wednesbury* sense, or by omitting material considerations or taking into account considerations that were not material, or by going astray in his findings of fact (see my judgment in *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, at paragraphs 6 and 7). Nor did he fail to provide clear and adequate reasons on the "principal important controversial issues" (see the speech of Lord Brown of Eaton-under-Heywood in *South Buckinghamshire District Council v* Porter *(No.2)* [2004] 1 W.L.R. 1953, at paragraph 36).

66. Secondly, it is not a defect of the Secretary of State's decisions on the appellants' appeals that he applied the policy in the written ministerial statements in assessing the weight to be given to need, or "unmet demand", for additional sites for Gypsies and Travellers. Regardless of whether it marked a significant shift from previous policy in the "Planning policy for traveller sites" of March 2012, the policy itself was lawful. It was undoubtedly a material consideration in the appellants' appeals. For the Secretary of State to have left it out of account, as a statement of national planning policy relevant to the appeals, would have been to fail to have regard to a material consideration. That would have rendered his decisions unlawful. And he was not under any duty to invite the appellants' submissions on the implications of this new policy for his decisions. Rule 17(5) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 did not require him to give parties to an appeal an opportunity to make representations on government policy published after the close of an inquiry. The weight he gave to need in striking the planning balance was "significant" – but not enough, either on its own or with other material considerations, to constitute "very special circumstances" justifying approval of the proposals as "inappropriate development" in the Green Belt. This was a matter of planning judgment for him. His conclusion here – though the appellants may disagree with it – was consistent with government policy in the written ministerial statements and in the "Planning policy for traveller sites". It was also legally unexceptionable.

67. Thirdly, there is nothing in the submission that the Secretary of State failed to confront the appellants' assertions about what might happen if their appeals failed, their personal circumstances, and whether it was inevitable, or at least highly likely, that they and their families would have to resort to living on the roadside or to sites without planning permission in the Green Belt – with similar harm to the Green Belt or worse (see the judgment of Richards L.J. in *Moore v Secretary of State for Communities and Local Government* [2014] J.P.L. 362, in particular at paragraphs 23 to 27). This submission is wrong as a matter of fact. Lewis J. rejected it. He referred to the relevant passages in each of the Secretary of State's decision letters (in paragraphs 45, 67, 86 and 102 of his

judgment). As he said (in paragraph 180), the Secretary of State was aware of the extent of the Green Belt in the relevant areas. And in any event, in the light of national policy for the Green Belt, there was "nothing irrational" in refusing planning permission for development in the Green Belt when it was possible or likely that other sites suitable for the development would themselves be in the Green Belt. This court reached a similar conclusion in Mrs Lee's appeal (see the judgment of Simon L.J. in *Lee*, at paragraphs 17 to 25).

68. That argument was put forward on behalf of Mr Edward Connors, Mr Miley Connors and Mr Sines in their appeals to the Secretary of State – though not, it seems, on behalf of Mrs Doran in hers. The Secretary of State dealt with it explicitly in each of those three cases, as well as giving significant weight in all four cases to the local need for sites for Gypsies and Travellers. In Mrs Doran's case he disagreed with the inspector's conclusion (in paragraph 43 of her report) that Mrs Doran's need for accommodation could not be met at a particular alternative site – at Coldharbour Lane – and that significant weight should be given to this consideration in the planning balance. In his view, as he said in paragraph 14 of his decision letter, less weight should be given to it. These were all purely questions of planning judgment for the Secretary of State.

69. Grounds 5 and 6 of the first appeal must also, therefore, fail.

70. The ultimate conclusion on this appeal, therefore, is that in all four of these cases the Secretary of State's decisions on the appellants' statutory appeals were lawful, irrespective of the alleged unlawfulness in his preceding recovery directions. In these circumstances, even if the recovery directions were legally flawed in themselves, as contended by Mr Masters in his submissions to us, it would not have been necessary or appropriate for the court to grant any relief against them.

The Secretary of State's decisions in the second appeal

71. Ms Mulvenna's application for planning permission, for development at Shannon Moor Stables, to the west of Mosslands, Aveling Drive, Banks, Southport, was submitted on 22 August 2010. It was refused by the local planning authority on 17 April 2012. Ms Mulvenna appealed under section 78 of the 1990 Act. The authority issued an enforcement notice on 9 July 2012, and Ms Mulvenna appealed under section 174. The appeals were recovered by the Secretary of State on 4 July 2013, three days after the publication of the first written ministerial statement. In his report dated 16 September 2013 the inspector concluded that "very special circumstances" existed, and recommended that planning permission be granted. In his decision letter of 5 August 2014 the Secretary of State disagreed with the inspector's recommendation and dismissed the appeal, having concluded that the circumstances of Ms Mulvenna and her family did not outweigh the harm to the Green Belt (paragraph 23 of the decision letter).

72. In Mr Smith's case the application for planning permission, for development on land at Moss Lane, Knuzden, Blackburn, was made on 5 April 2013. It was refused by the local planning authority on 23 July 2013, and Mr Smith appealed under section 78. On 23 January 2014 the appeal was recovered by the Secretary of State. In his report dated 16 April 2014 the inspector concluded that "very special circumstances" existed, sufficient to justify a grant of temporary planning permission. In his decision letter of 15 July 2014 the Secretary of State disagreed and dismissed Mr Smith's appeal, having concluded that the

unmet need and Mr Smith's personal circumstances did not constitute "very special circumstances" (paragraph 24 of the decision letter).

73. On 28 August 2014 Ms Mulvenna made an application under section 288 and an appeal under section 289 of the 1990 Act, seeking an order to quash the Secretary of State's decision of 5 August 2014. On 10 March 2015, following the court's decision in *Moore and Coates*, she issued a claim for judicial review, challenging both the Secretary of State's decision to recover her appeals and his failure to revoke his decisions on the appeals themselves. On 29 January 2015, apparently on the advice of counsel, she withdrew her application under section 288 and appeal under section 289. On 21 August 2014 Mr Smith challenged the Secretary of State's decision of 15 July 2014 under section 288. He also issued a claim for judicial review, on 13 April 2015, challenging the Secretary of State's recovery direction and also the refusal to revoke his decision on the appeal.

Issue (1) in the second appeal – extending time

74. Article 13 of the Human Rights Convention states that "[everyone] whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". Article 19 of the Treaty on European Union states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law". In its judgment in *Levez v T.H. Jennings (Harlow Pools) Ltd.* Case C-326/96 [1999] 2 C.M.L.R. 363 the European Court of Justice emphasized (in paragraph 82) "… that the principle of effectiveness limits the scope of the principle that the Member States should enjoy independence in procedural matters, in so far as it requires that the rules governing domestic actions should not make it virtually impossible or excessively difficult to exercise rights conferred by Community Law". This principle has consistently been acknowledged by the domestic courts. As Brooke L.J. said in *Alabaster v Barclays Bank Plc* [2005] EWCA Civ 508 (in paragraph 18 of his judgment), "[it] is well known that the ECJ has prescribed that national law must ensure that rights conferred on individuals by EC law must be made fully effective in each member state", and "the EC principle of effectiveness dictates that the national rules must not render virtually impossible or excessively difficult the exercise of rights conferred by EC law".

75. Before Cranston J., as he recorded in paragraph 46 of his judgment, it was accepted by the Secretary of State, "subject to the delay issue", that "his recovery of [Ms Mulvenna's and Mr Smith's] appeals was unlawful". But, said the judge (ibid.), "the difficulty Ms Mulvenna and Mr Smith face is that their challenges are well out of time". In paragraph 49 of his judgment, having observed, correctly, that claims for judicial review must be made without delay and that in planning cases the time limits are "especially tight", the judge said that "for reasons of good administration our system of public law cannot work on the basis of persons holding back from legal challenges until another claimant in a similar position has a success in court", and that "[those] unhappy with a public authority's decision must take the initiative and promptly challenge it".

76. For Ms Mulvenna and Mr Smith, Mr Marc Willers Q.C. submitted that Cranston J.'s decision to refuse their applications for an extension of time to bring claims for judicial review challenging the Secretary of State's recovery directions was disproportionate and an unlawful exercise of the court's discretion. Even at the time of the decisions on the appeals,

there was not enough evidence in the public domain to show that the Secretary of State had been acting in a discriminatory way. In the circumstances, Mr Willers submitted, the judge should have accepted that time had only started to run from the date of Gilbart J.'s judgment in *Moore and Coates* – 21 January 2015 – because it was only then that one could say the appellants knew, or ought to have known, that the Secretary of State had been acting unlawfully. Only then had the pattern of unlawful recovery been firmly established – though it was candidly described in Mr Watson's witness statement of 9 September 2014. Here, Mr Willers argued, the effect of rigidly imposing the six-week time limit in CPR rule 54.5(5) from the date of the Secretary of State's recovery directions had been to deny the appellants any remedy for the unlawful discrimination to which they had been subjected. They would have been denied a remedy for the violation of a right recognized in EU law, the right not to be subject to discrimination under the Race Directive (Directive 2000/43/EC), and in domestic law, under section 19 of the Equality Act 2010. There was here a clear breach of the "principle of effectiveness" under article 13 of the Human Rights Convention and article 19 of the Treaty on European Union.

77. That argument was firmly rejected by Cranston J.. In his view, as he said in paragraph 55 of his judgment, "the EU principle of effectiveness does not have any purchase in this case"; *Levez, Alabaster* and *Johnston v Chief Constable of the Royal Ulster Constabulary* Case C-222/84 [1987] Q.B. 129 "involved situations when claimants would have been shut out from a remedy altogether"; and, he said, "[the] principle of effectiveness does not mandate that domestic remedies cannot be subject to appropriate time and other procedural limits ..." – a proposition supported, for example, by the decision of the Divisional Court in *R. (on the application of Unison) v Lord Chancellor* [2014] EWHC 218 (Admin) (in particular, the judgment of Moses L.J. at paragraph 40). As Cranston J. said in paragraph 56 of his judgment, the success of the challenges in *Moore and Coates* showed that although the time limit for issuing claims for judicial review in planning matters was "tight", it was, nevertheless, "not impossible to meet". He concluded in paragraph 57 that in neither of these two cases should time be extended. The delay in issuing proceedings was sufficient to prevent the challenges to the Secretary of State's recovery directions being entertained by the court.

78. I agree. In my view the judge's approach to the appellants' delay in launching their claims for judicial review was correct. And his decision not to extend time for them to do so is, I think, unassailable. Indeed, I do not think he could realistically have exercised his discretion in any other way. The consequence of our upholding that exercise of discretion, if we do, is that the remaining grounds of appeal fall away.

79. The history behind the application for an extension of time in each of these two cases is stark.

80. Had Ms Mulvenna wanted to challenge the Secretary of State's recovery direction of 4 July 2013 in her case, she would have had to issue proceedings by 15 August 2013. But her claim for judicial review was not made until 4 March 2015, almost 18 months out of time. In the meantime, her appeal had been dismissed by the Secretary of State, on 5 August 2014, and her section 288 application and section 289 appeal, issued within time on 28 August 2014, had been withdrawn – on 11 December 2014. Even at that stage, almost three months more went by before the claim for judicial review was issued, on 21 January 2015. In Mr Smith's case, he would have had to file his claim for judicial review challenging the Secretary of State's recovery direction of 23 January 2014 by 6 March 2014. But it was not

until 13 April 2015, more than 13 months later, that his claim was issued. That was almost eight months after the Secretary of State had dismissed his appeal – on 15 July 2014, and some six and a half months after he had challenged that decision by an application under section 288, issued within time on 21 August 2014. In both cases, therefore, the delay was more than 12 months.

81. That delay was, on any view, excessive, and, I think, easily enough on its own to justify the judge's refusal of permission to apply for judicial review in both of these cases. But it is compounded here by the fact that, in both cases, the Secretary of State had made his decisions on the appellants' appeals before any challenge was brought to his recovery directions, indeed long before – more than six months in either case. Even if – contrary to my view – one were to accept that time should not have run until judgment had been handed down in *Moore and Coates*, Mr Smith failed also at that stage to launch his claim within six weeks. It is also significant that the Secretary of State's decisions on the appeals are not, in themselves, the subject of any criticism, or certainly any cogent criticism, in the proceedings before the court. To permit either of these claims to proceed in such circumstances would be seriously detrimental to good administration.

82. There is no good reason to extend time. In truth, both of these appellants have failed to take advantage of the remedy available to them by making a timely challenge to the Secretary of State's recovery directions. There is no offence here to the "principle of effectiveness", no breach of article 13 of the Human Rights Convention, and no breach of article 19 of the Treaty on European Union. As the judge rightly held, the appellants were not without an effective remedy. They simply failed, until far too late, to use the effective remedy they had. Each of them could have brought a timely challenge to the Secretary of State's recovery directions, either on the grounds of unlawfulness in the policy contained in the relevant written ministerial statement, or on the grounds of unlawfulness in the recovery decision itself, or both. Each of them had the benefit of professional planning advice: Ms Mulvenna from Ms Alison Heine, Mr Smith from Philip Brown Associates. And both could also have availed themselves of legal advice.

83. But leaving all else aside, it can fairly be said that at least by June 2014, when the claims in *Moore and Coates* were issued, Ms Mulvenna and Mr Smith were no less able to launch a challenge to the Secretary of State's recovery directions in their cases than were the claimants in those proceedings. They did not do so at that stage, nor until long after the Secretary of State had issued his decisions on their appeals, nor in the light of the evidence filed in *Moore and Coates*, including Mr Watson's witness statement of 9 September 2014, nor before the claims in those proceedings were heard in December 2014, nor, indeed, until some time after judgment had been handed down in January 2015.

84. With that sequence of events in mind, I think it is significant – as Cranston J. said in paragraph 21 of his judgment – that as early as 10 July 2013, within two weeks of the publication of the first written ministerial statement, and within a week of the recovery direction in Ms Mulvenna's case, her planning consultant, Ms Heine, was writing to the Secretary of State on her behalf, in these terms:

> "No explanation has been given as to why this appeal has been recovered. No explanation has been given for this unprecedented interference in the role of Planning Inspectors. No explanation has ever been provided why the Inspector's

> decision for a hearing heard last November has not been issued. It is not the fair play we were promised in [the "Planning policy for traveller sites"].
> …
> In the interests of fair play I am most surprised that appeals such as this are being recovered so that the Secretary of State can scrutinise the recommendation of Inspectors without any evidence even being provided of cases where it is considered that Planning Inspectors are failing to give sufficient protection to the Green Belt. This would suggest Ministers have no confidence in their Planning Inspectors[']ability to understand, interpret and apply policy. This is most troubling. …
> …
> … No justification has been provided for the interference of the Secretary of State in the decision making process and there is no evidence to support the claims of [the Secretary of State] that insufficient protection is being afforded [to] the Green Belt by experienced Planning Inspectors."

85. Despite those concerns, no challenge was made at that stage to the Secretary of State's recovery direction. The process of decision-making was allowed to run its full course, and still further delay occurred after that. Mr Smith's challenge to the recovery direction came even later. By contrast, as Cranston J. said in paragraph 50 of his judgment, "the claimants in *Moore and Coates* did not hold back". They launched their claims for judicial review in June 2014, without material delay, and, crucially, before the Secretary of State made his decisions on their appeals (see paragraphs 46, 49, 51 and 55 of Gilbart J.'s judgment). Those advising them, as Cranston J. remarked (ibid.), "no doubt saw the pattern of recovery decisions with Gypsy and Traveller appeals and decided to advance an Equality Act 2010 claim". It is also clear when one looks at the grounds on which the claims for judicial review were made in *Moore and Coates*, as summarized by Gilbart J. in paragraphs 79 to 81 of his judgment, that the alleged unlawfulness in those proceedings was of the same nature as the complaints that arise in these. There is no particular feature in Ms Mulvenna's and Mr Smith's cases that could be said to justify their delay in seeking an appropriate remedy for the grievances they eventually brought before the court.

86. In the circumstances, even on the most generous view one could possibly take, I do not think the court could properly have extended time for issuing claims for judicial review to challenge the Secretary of State's recovery directions in the appellants' cases beyond the date on which proceedings were launched in *Moore and Coates*, and certainly not beyond the dates on which the Secretary of State's decisions on the appeals were issued.

87. In the context of planning decision-making, this court has made it very clear that the exercise of judicial discretion to permit very late challenges to proceed by way of claims for judicial review will rarely be appropriate – regardless of whether the claimant has had available to him and acted upon legal advice (see the judgment of Sales L.J., with whom Lord Dyson M.R. and Tomlinson L.J. agreed, in *R. (on the application of Gerber) v Wiltshire Council* [2016] 1 W.L.R. 2593, at paragraphs 45 to 58). Although the facts in every case will be different, the relevant principles are well established, and, on the facts here, those principles clearly support the judge's approach, the conclusions he reached on delay, and the exercise of his discretion against extending time.

88. As I have said, that conclusion would seem to leave the remainder of the grounds in the second appeal academic, but I shall deal with them nevertheless.

Issue (2) in the second appeal – "functus officio"

89. Mr Willers submitted that the Secretary of State was wrong to consider himself "functus officio" once he had determined Ms Mulvenna's and Mr Smith's appeals and therefore unable to undo those decisions. That would only be so, he said, if the decisions had been made lawfully within the Secretary of State's statutory power to make them, which they were not. In the light of the court's decision in *Moore and Coates*, the Secretary of State should have reviewed and revoked his decisions on the appeals. Mr Willers said his submission was strengthened by the observation made by the deputy judge in *Connors* to the effect that the Secretary of State should review all the recovery decisions he had made between 1 July 2014 and 21 January 2015 on appeals concerning Gypsy and Traveller sites in the Green Belt. In rejecting this argument, Cranston J. had failed to deal with the basic principle that in circumstances such as these a decision-maker is not "functus officio" (see, for example, *Davies v Howe Bridge Spinning Co. Ltd.* [1934] 27 B.W.C.C. 207, where the Court of Appeal held that a medical referee who had reached a decision without complying with the relevant regulations under the Workmen's Compensation Act 1925, because he had not given the employer the opportunity of making representations to him, was not "functus officio").

90. This argument is based on a fallacy. Cranston J. clearly thought so. As he said, in paragraph 59 of his judgment, it is "not arguable that the Secretary of State has power to revoke his decision letters on these appeals". He based this conclusion, correctly, on the concept of the planning legislation as a complete statutory code – recognized as such by the House of Lords in its decision in *Pioneer Aggregates (UK) Ltd. v Secretary of State for the Environment* [1985] A.C. 132 (see, in particular, the speech of Lord Scarman at p.140H to p.141C). The statutory scheme contains no power for the Secretary of State to review or revoke a decision dismissing an appeal under section 78, or an appeal under section 174, and no power to revisit a recovery direction once he has made his decision on the substantive appeal. Parliament did not provide, in any circumstances, for the revocation of such a decision or a recovery direction made prior to it. To have done so would have been contrary to the fundamental objective of providing, through planning decisions made under the statutory regime, certainty and finality for those affected by them. As the judge said (ibid.), "[this] conclusion follows whether the Secretary of State's prior recovery direction is lawful or not", and "[under] the legislation, his determination on these appeals remains lawful and valid unless set aside by the court". I agree.

91. That is enough to dispose of this issue. But there are two things I should briefly add.

92. First, I do not think we get any assistance here from case law relating to other legislative schemes with no connection to the statutory code for land use planning. Not only will the facts of such cases be remote from those of the present appeals, but the relevant structure for decision-making will itself necessarily be shaped by the particular statutory regime with which the case is concerned. False comparisons do not help the court. In *Davies v Howe Bridge Spinning*, for example, the proceedings before the court were not concerned with the arrangements in the statutory scheme under which the medical referee had been appointed by the registrar, but only with the medical referee's conduct of the disciplinary process itself. Neither the statutory context there nor the issue the court had to decide has any relevance to the appeals before us.

93. Secondly, I do not accept that the observations made by the deputy judge in paragraph 22 of his judgment in *Connors* were intended to suggest a wholesale review by the Secretary of State of relevant recovery directions irrespective of whether he had subsequently determined the appeal itself, or a review of the appeal decisions themselves once made. That is not what the deputy judge said, and not what he can sensibly have meant.

94. In my view, therefore, ground 2 of the second appeal must be rejected.

Issue (3) in the second appeal – nullity

95. Mr Willers submitted that since recovery directions made by the Secretary of State between 1 July 2013 and 17 January 2014 were unlawful – as Gilbart J. held in *Moore and Coates* – his subsequent decisions on the appeals themselves, are inevitably, in each case, a nullity. Those decisions depended upon the Secretary of State's previous unlawful conduct, and were rendered unlawful by it. Under sections 78 and 174 of the 1990 Act the power to decide appeals can be transferred to an inspector, and the Secretary of State is then, Mr Willers submitted, divested of his own role as decision-maker. Although the Secretary of State can recover jurisdiction under paragraph 3(1), he may only do so by means of a lawful direction. Otherwise, any decision he purports to make on the appeal itself is a nullity for want of jurisdiction. In those circumstances the power to make the decision remains with the inspector; the transfer of jurisdiction from the inspector back to the Secretary of State is never achieved. And the appropriate route for a challenge is a claim for judicial review. The Secretary of State's "decisions", he contended, fell outside the reach of the statutory regime in Part XII of the 1990 Act. Nor in these cases did section 288 afford the appellants an "effective remedy", because they did not know within the statutory deadline of six weeks, and could not have known, that the Secretary of State's "decisions", preceded by unlawful recovery directions, were in each case a nullity.

96. On behalf of the Equality and Human Rights Commission, Mr Christopher Buttler submitted that, where a public body takes upon itself the making of an administrative decision by means of an unlawful act, the decision it purports to make may be a nullity, and in the case of these two appellants it was. And in principle, he contended, a challenge may be brought against a decision on a statutory appeal where a prior procedural act is shown to have been unlawful. For the principles on which he relied – not in themselves controversial – he pointed to the decisions of the House of Lords, in criminal proceedings, in *Boddington v British Transport Police* [1999] 2 A.C. 143 (in particular, the speech of Lord Irvine of Lairg at p.160C, and at p.161C-H), *R. v Wicks* [1998] A.C. 92 (in particular, the speech of Lord Hoffmann at p.117A-D, p.119A-E and G-H, p.120D-H, and p.121E-F) and, in civil proceedings, in *Wandsworth London Borough Council v Winder* [1985] A.C. 461 (in particular, the speech of Lord Fraser of Tullybelton at p.508G to p.510C), and also observations made by Lord Dyson in *R. (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 (in particular, in paragraphs 68 to 70). It will always be for the court to deduce, by a process of statutory construction, whether the decision-maker is empowered to act. In *R. v Wicks*, where a central issue was whether the commission of a criminal offence depended on the mere issuing of an enforcement notice or on the legal validity of the notice, Lord Hoffmann said (at p.117B-D), that such a question "must depend entirely upon the construction of the statute under which the prosecution is brought".

97. Here, submitted Mr Buttler, the question was not whether the Secretary of State should have determined Ms Mulvenna's and Mr Smith's appeals, or how he had determined them, but rather whether he lawfully could. And he could not. It was therefore unnecessary to consider whether the actual determination of Ms Mulvenna's and Mr Smith's appeals was intrinsically lawful.

98. In the context of planning law, Mr Buttler relied on the decision of this court in *R. (on the application of The Friends of Hethel Ltd.) v South Norfolk District Council* [2011] 1 W.L.R. 1216. In that case the local authority's constitution provided that any decision of an area planning committee taken contrary to the recommendation of the Head of Planning Services required a two-thirds majority, failing which the decision was to be taken by the Planning Committee. Sullivan L.J., with whom Sedley and Lloyd L.JJ. agreed, said (at p.1222F-H), that the council's delegation arrangements under section 101 of the Local Government Act 1972 "could not lawfully … override paragraph 39(1) [of Schedule 12 to the 1972 Act] and provide, in effect, that a decision to grant or refuse planning permission contrary to the recommendations of the [Head of Planning Services] would be taken by a two-thirds majority". He went on to conclude (at p.1223E-F) that "[if] the two-thirds requirement was unlawful", as in his view it was, "there was no valid reference to the planning committee and it did not have power to determine the application". Mr Buttler submitted that a similar analysis applied here. Having recovered the appellants' appeals unlawfully, the Secretary of State had had no power to determine them. The legal validity of the appeal decision itself depended on the legal validity of the recovery direction.

99. In the light of Lord Hoffmann's approach in *R. v Wicks*, Mr Buttler submitted, since Parliament had provided no statutory restriction on challenging the validity of a decision by the Secretary of State to recover an appeal under section 78 or under section 174, there was no statutory obstacle to the validity of a recovery direction being challenged by means of an application under section 288 or an appeal under section 289. Nor was there any policy reason to compel such a restriction. Mr Buttler emphasized the limited terms of the restrictive provision in paragraph 2(8) of Schedule 6, which precludes a challenge under section 288 or section 289 being made on the ground that an appeal ought to have been determined by the Secretary of State rather than by an appointed person, unless the appointed person's power to determine the appeal is challenged before his decision on the appeal is given. Founding his submission on the maxim "expressio unius est exclusio alterius", he argued that, as Parliament had not specifically prohibited challenges on the ground that an appeal ought to have been decided by an inspector rather than the Secretary of State, it must be taken to have deliberately permitted such challenges to be made.

100. Mr Buttler also submitted that it would be contrary to the intent of the statutory scheme for a person aggrieved by a recovery direction to have to launch a challenge to that decision by way of a claim for judicial review if his complaint can properly be brought under sections 288 and 289. Such a challenge would be premature. Until a decision has been made on the appeal itself, the recovery direction may be revoked under paragraph 4(1) of Schedule 6. And the recovery direction will not affect an appellant's legal rights at all or result in any prejudice to him, unless the Secretary of State makes a decision to dismiss his appeal, contrary to an inspector's recommendation. Only then will he suffer any real prejudice (see Lord Steyn's observations in his speech in *R. (on the application of Burkett) v Hammersmith and Fulham London Borough Council and another* [2002] UKHL 23, at paragraph 32).

101. Cranston J. crisply defined the primary question here in paragraph 60 of his judgment. It concerned, as he said, "the doctrine of nullity", and it was, simply, whether "the Secretary of State only has jurisdiction to decide a planning appeal if he has lawfully recovered it". If the Secretary of State's decisions on Ms Mulvenna's and Mr Smith's appeals were preceded by unlawful recovery directions, were those decisions "themselves a nullity or, putting it another way, ultra vires"? Logically, however, as the judge said in paragraph 61 of his judgment, there is a prior question here, which is whether the court itself has jurisdiction to address that primary question as to the Secretary of State's jurisdiction when it is posed in a claim for judicial review, rather than in an application or appeal made under the provisions in Part XII of the 1990 Act. That question must be tackled first.

102. The essential submission made on behalf of Ms Mulvenna is that sections 284 and 288 of the 1990 Act do not preclude a claim for judicial review being made to challenge a decision of the Secretary of State on a planning appeal within the scope of those provisions, when that decision is alleged to be "ultra vires" because the recovery direction preceding it was unlawful. That submission is, in my view, untenable. The main thrust of the challenge in both Ms Mulvenna's case and Mr Smith's is that the Secretary of State's decisions on the appeals were beyond his power to make them – literally, therefore, "ultra vires". In other words, the appeal decisions were, it is said, "not within the powers of [the 1990 Act]" (section 288(1)(b)(i)). Such a challenge is squarely inside the scope of section 288, and thus subject to the ouster provision in section 284(1) – that "[except] in so far as may be provided by [Part XII of the 1990 Act]", which includes the provisions for challenge in section 288 – the "validity" of such decisions "shall not be questioned in any legal proceedings whatsoever". The provisions for challenge in section 288 include, in subsection (4B), the immutable six-week time limit (as to which, see the decision of this court in *R. v Secretary of State for the Environment, ex parte Kent* [1990] 1 P.L.R. 128).

103. This is not to say, of course, that an unlawful recovery direction cannot itself be challenged before the court. As I have said, it can be – by a timely claim for judicial review before the appeal itself is determined. Such a challenge may not be futile. In *Moore and Coates* it succeeded. If it does succeed, the recovery decision will be revisited, and the result may be that the appeal is determined by an inspector.

104. That, however, is not the only possible recourse for an appellant. I do not accept the argument Mr Buttler sought to base on the principle "expressio unius est exclusio alterius" if it is to be understood as justifying a direct challenge to the validity of a recovery direction by means of an application under section 288. But I do accept that, in principle, it would be possible, in an application properly made within time under section 288 or in an appeal under section 289, to challenge a substantive decision of the Secretary of State on an appeal to him on the grounds that that decision is vitiated by some prior unlawfulness in his recovery of the appeal – for example, because the recovery direction betrays bad faith or predetermination or bias that has demonstrably contaminated the decision on the appeal itself. On the facts, no such argument is available in any of the cases now before the court. And I do not think it likely that such a challenge would often, if ever, succeed – given that, as Gilbart J. stressed in *Moore and Coates* (in paragraph 148(ii) of his judgment), "the recovery *decision* is not a consideration of the substantive merits of a planning appeal, but a procedural step – see [*R. (on the application of Hadfield) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1266 (Admin)]". The important point, however, is that an appellant with a genuine grievance of this kind is not without an "effective remedy".

105. The judge's analysis to the same effect, in paragraph 63 of his judgment, was therefore correct. As he said, the Secretary of State's decisions on the appellants' appeals, "including the issue of nullity", could only be challenged by an application made under section 288 of the 1990 Act, and not by a claim for judicial review. That this is so is clear, as he said, in section 284. The submissions made by Mr Buttler were predicated on that understanding of the statutory scheme. To this extent they were right. Under the statutory scheme, an application under section 288 was the "exclusive procedure" for challenging a decision of the Secretary of State on an appeal under section 78. As the judge said (ibid.), "[exceptional] circumstances, if they be such, take the legal argument nowhere, and … the EU doctrine of effective remedy has no purchase". It followed that "only Mr Smith can raise the issue of nullity, and then only if his current section 288 application is amended to accommodate it".

106. The question of amendment in Mr Smith's case is the subject of the following issue – issue (4) – and I shall deal with that separately.

107. On the question of whether the Secretary of State's decisions on the section 78 and section 174 appeals were, in each instance, a nullity, the judge reminded himself, in paragraphs 64 to 71 of his judgment, of the relevant principles in the authorities, including *Anisminic Ltd. v Foreign Compensation Commission* [1969] 2 A.C. 147, *McLaughlin v Governor of the Cayman Islands* [2007] 1 W.L.R. 2839, *Secretary of State for the Home Department v JJ* [2008] 1 A.C. 385, *Ahmed v H.M. Treasury (Justice Intervening) (Nos. 1 and 2)* [2010] 2 A.C. 534 – all of which were mentioned by Mr John Howell Q.C., sitting as deputy High Court judge, when granting permission to appeal under section 289 of the 1990 Act in *Smith v Secretary of State for Communities and Local Government* [2015] EWHC 784 (Admin). Cranston J. also recalled what Lord Dyson said in paragraph 66 of his judgment of *Lumba*, including his observation to the effect that if a decision, albeit authorized by statute, is "made in breach of a rule of public law", it will be "unlawful and a nullity". He referred, in paragraphs 65 to 70, to the jurisprudence in the House of Lords' decisions in *Boddington* and *R. v Wicks*. And he acknowledged (in paragraph 70) "Professor Forsyth's conceptual approach [in his essay "The Metaphysic of Nullity, Invalidity, Conceptual Reasoning and the Rule of Law", published in "The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade" (1998)], the theory of the second actor, approved by Lord Steyn in *Boddington*" – including Professor Forsyth's observation (on p.159) that "[the] crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act".

108. Mr Warren pointed to what Lord Hoffmann said in his speech in *R. v Wicks* (at p.115C-G) when discussing the rebuttable presumption that the administrative act of a public body is valid until quashed by the court – a concept recognized by the House of Lords in *Smith v East Elloe Rural District Council* [1956] A.C. 736 (see, in particular, the speech of Lord Radcliffe, at pp.769 and 770). Founding his submissions, however, on the concept of the "second actor" endorsed by Lord Steyn in *Boddington*, he submitted that the unlawfulness of a recovery direction does not necessarily and inevitably render the subsequent appeal decision a nullity. The Secretary of State is not in those circumstances disabled from making a lawful decision on the appeal. Here, Mr Warren submitted, the Secretary of State's decisions were lawful.

109. Cranston J. acknowledged, in paragraph 74 of his judgment, that Mr Buttler's submissions were "arguable". But he found it impossible to reconcile them with the statutory arrangements for decision-making by the Secretary of State on appeals made to him under sections 78 and 174 of the 1990 Act. In his view it did not follow, assuming that the Secretary of State's recovery directions in Ms Mulvenna's and Mr Smith's appeals were unlawful, that his subsequent decisions to dismiss their section 78 appeals under section 79(1)(a) were ultra vires and a nullity. This question turned largely on "the design of the statutory scheme".

110. Contrary to Mr Buttler's submission that the statutory scheme vests the power to decide section 78 and section 174 appeals in planning inspectors, subject to any recovery decision, the legislation makes it clear, said the judge, that "section 78 and section 174 appeals are appeals to the Secretary of State", and "determinations by him following a recovery direction are thus a return to [the] primary statutory locus for the determination of such appeals" (paragraph 74 of his judgment). This was, he said, underlined by paragraph 4(1) of Schedule 6, which enables the Secretary of State, by a further direction, to revoke a recovery direction under paragraph 3 at any time before the determination of the appeal. Paragraph 2(8), on which Mr Buttler relied, must be seen in this context. The "primary statutory locus for appeals", as the judge put it, "is with the Secretary of State". But when they are determined by inspectors under the 1997 regulations and Schedule 6, "paragraph 2(8) is there to ensure that it is not possible to challenge that course with the argument they should have been determined by the Secretary of State". Paragraph 2(8) was "limited to precluding a challenge to a determination by a planning inspector per se, if there is no timeous challenge to his or her power to determine the appeal prior to its determination" (paragraph 75). Cranston J. concluded therefore, in paragraph 76, that "[even] if the Secretary of State's recovery directions were a nullity because of *Moore and Coates*, it does not follow that his determination of the appeals are also a nullity". That was "because the statutory framework conferred jurisdiction on him to determine the appeals, whatever the lawfulness of his decisions … to recover them for his own determination".

111. I would endorse those conclusions of the judge, for these five reasons.

112. First, as the authorities show and as Cranston J. recognized, if one is to identify the potential consequences of a prior unlawful act for the legal integrity of a later, substantive decision, it is necessary to understand the particular circumstances in which the decision was made, and, in particular, the structure and precise content of the statutory code in question. That seems elementary. And in resolving this issue I do not think we need to embark on any elaborate discussion of the cases on "void" and "voidable" acts, "jurisdictional error", or the legal power of a "second actor" to act notwithstanding the invalidity of the "first act". The relevant legal principles are, for our purposes, sufficiently well established at the highest level.

113. Secondly, we are concerned here, and only concerned, with the self-contained statutory code for land use planning, and specifically the statutory arrangements for decision-making on planning appeals under the relevant provisions in Part III and Part VII of the 1990 Act. The statutory scheme confers the power, or jurisdiction, to determine appeals made under sections 78 and 174 on the Secretary of State. It also makes separate and distinct provision, under section 77, for the "call-in" of an application for planning permission before a local planning authority, by which the Secretary of State "may give directions requiring applications … to be referred to him instead of being dealt with by local planning

authorities". We are not considering that power. We are considering the Secretary of State's jurisdiction to deal with appeals made to him. That jurisdiction, as one might expect, begins and ends in the hands of the Secretary of State. The Secretary of State is statutorily responsible for the making of the decision in every case, and statutorily answerable for that decision, once made, if it is challenged under the provisions as to "Validity" in Part XII of the 1990 Act. This understanding of the statutory arrangements is confirmed both by the provisions for appeals in sections 78, 79 and 174, and the provisions connected to them, all of which speak of appeals being made to "the Secretary of State", and to the powers of "the Secretary of State" in disposing of them. It is confirmed by the provision in paragraph 2(6) of Schedule 6 that, where an appeal has been determined by an inspector, "his decision shall be treated as that of the Secretary of State". And it is also confirmed by the Secretary of State's power to take back to himself the exercise of his jurisdiction to make the decision by recovering the appeal for his own determination by a direction under paragraph 3, and his power under paragraph 4 to revoke such a direction. It is reflected too in the provisions of Part XII: for example, in section 288(1)(b), which refers to a person being "aggrieved by any action on the part of the Secretary of State … to which this section applies". Throughout the relevant provisions, the statutory language itself conforms to the basic concept that the power to determine planning appeals belongs to the Secretary of State.

114. Thirdly, if the making of a decision on a planning appeal is, for reasons of administrative convenience, delegated to an inspector, the inspector will determine the appeal, but this is always done for the Secretary of State, in his name, and at his behest. When, in accordance with the provisions of Schedule 6 to the 1990 Act, under regulations made for certain "classes of appeals" to be "determined by a person appointed by the Secretary of State … instead of by the Secretary of State", an inspector is authorized to decide an appeal, the Secretary of State does not irrevocably part with his statutory jurisdiction. He retains that jurisdiction, but authorizes the inspector, as the "appointed person", to exercise it on his behalf. Hence the need for the provision in paragraph 2(1) that the "appointed person shall have the same powers and duties" as the Secretary of State "in relation to" appeals under sections 78, 79 and 174, and the provision in paragraph 2(9) that references to "the Secretary of State" in the 1990 Act and other legislation are to be "construed" as references to the "appointed person". The inspector is, as Mr Warren I think aptly described him, an "avatar" of the Secretary of State. Paragraphs 3 and 4 of Schedule 6 permit the Secretary of State to resume, and – if he chooses – to hand back to an inspector, the exercise of his jurisdiction at any time before the appeal is determined. Overall responsibility for the decision-making process, and autonomous control of it, rests with the Secretary of State throughout.

115. Fourthly, as the judge concluded, the Secretary of State's recovery directions here did not render his subsequent decisions on the appellants' appeals in each case a nullity. That was not the automatic or inevitable consequence of the alleged unlawfulness in those directions. In recovering the appeals for his own determination, the Secretary of State used the power given to him by Parliament to resume the exercise of the jurisdiction conferred upon him to determine such appeals. At no stage did he act inconsistently with the procedural arrangements governing the recovery of appeals for his own determination. He acted within the four corners of his statutory powers, not outside them. The unlawfulness, if any, in his recovery directions did not go to any want of jurisdiction to determine the appeals. It went to his practice of recovering appeals under an allegedly unlawful policy, or in accordance with an allegedly unlawful practice. The result of those unlawful recovery decisions, if they were unlawful, was only that, by this procedural step, the Secretary of State resumed the

exercise of his lawful jurisdiction to determine the appeals himself, as he was entitled to do under paragraph 3 of Schedule 6. He then proceeded to determine the appeals, and did so lawfully. No provision in sections 78 and 174, or in Schedule 6, or in the 1997 regulations, prevented him from acting as he did. He was using the procedural power he had, under the statute, to reverse the delegation of the exercise of his jurisdiction to an "appointed person", so that he would now decide the appeal himself. Nor has it been shown that in Ms Mulvenna's case or Mr Smith's, or in any of the cases before us, the unlawfulness in the recovery decisions, if any, influenced or infected the making of the decision itself. The fact that, in each case, the Secretary of State disagreed with the inspector's recommendation does not signal any error of law. And in my view the Secretary of State's decision-making in each case, as an assessment of the proposals on their planning merits in accordance with the statutory scheme, was intrinsically lawful.

116. Fifthly, the circumstances here are not comparable to those contemplated in *Boddington* and *R. v Wicks*, where the lawfulness of the second act depended on the lawfulness of the first. The appellants' section 78 and section 174 appeals could be validly determined by the Secretary of State on their merits, regardless of the lawfulness of the preceding recovery directions. As Mr Warren submitted, the making of a decision on recovery – to recover or not to recover – is a discrete exercise, separate and distinct from the determination of the appeal itself, no matter whether that determination is made by the Secretary of State or by his inspector. Here, the appeal decisions were duly made by the Secretary of State within the bounds of his own jurisdiction under the statutory scheme, and they were lawfully made. There is nothing in the statutory scheme to disturb that analysis. It is also clear, therefore, that there is no parallel here with *Friends of Hethel*. The statutory regime under consideration in that case was a different statutory scheme, and the circumstances were materially different. There, as Mr Warren submitted, the authority had put in place arrangements for the determination by its committees of applications for planning permission that were in conflict with the scheme of the 1972 Act. It had built those arrangements into its constitution. Here, by contrast, there was no infraction of the statutory scheme itself. No alternative system for the recovery of appeals was created or operated by the Secretary of State, alien to that embodied in the relevant legislation, or incompatible with it. No arrangements had been put in place by him, purporting to override or displace the statutory regime for the determination of appeals in the 1990 Act and the 1997 regulations, or to modify it – or, albeit, unintentionally, with such an effect. He had not prevented himself from acting lawfully, within the jurisdiction conferred upon him by the statutory scheme, in determining the appellants' appeals. And that, in my view, is what he did.

117. For those reasons, which apply equally in the first appeal, ground 3 of the second appeal must, in my view, fail. As in the first appeal, the Secretary of State's decisions on the appellants' statutory appeals were lawful. And in these circumstances, as in the first appeal, it would in any event have been both unnecessary and inappropriate for the court to grant a remedy for unlawful recovery directions.

Issue (4) in the second appeal – the amendment of Mr Smith's section 288 application

118. This issue arises only in Mr Smith's case. It does not arise, and cannot, in Ms Mulvenna's – because, although she originally pursued an application under section 288, that application was later, in January 2015, abandoned and cannot now be resurrected.

119. Mr Smith's section 288 application does not include any of the arguments on nullity now embraced in issue (3). The sole ground advanced in that application as lodged with the court was that the reasons given by the Secretary of State for disagreeing with the inspector's conclusion on the weight to be given to the need for Mr Smith and his family to live on the appeal site, and to their personal circumstances, fell short of the standard of reasons required. That ground was rightly rejected by Cranston J., in paragraphs 78 and 79 of his judgment. It has not been argued again before us.

120. Cranston J. also, in paragraph 77 of his judgment, refused Mr Willers' application for leave to amend by adding a ground containing a nullity argument. He was, in my view, right to do so. To have acceded to that application would have been to permit a belated reshaping of Mr Smith's challenge to advance an entirely new argument, unrelated to that originally put forward, and so, in effect, to avoid the strict statutory time limit for a section 288 application. This on its own would have been justification enough for excluding the new ground. But as I have explained in discussing issue (3), I am in no doubt, having heard full submissions on either side, that the argument itself is mistaken. Both in Ms Mulvenna's case and in Mr Smith's, the Secretary of State's substantive decisions were lawful.

121. I would not, therefore, reverse the judge's exercise of his discretion to refuse the application to amend.

Conclusion

122. What then is the paramount conclusion on these two appeals? It is, I believe, clear. All six appellants had their statutory appeals determined by the Secretary of State, on the planning merits, in decisions properly and lawfully made by him, within the powers given to him under the statutory scheme. That conclusion, which aligns with those reached in the court below, must in my view prevail. Therefore, for the reasons I have given, I would dismiss both appeals.

Lord Justice Treacy

123. I agree.

Lord Justice McFarlane

124. I also agree.