Human Rights and the Public Sector Equality Duty

Version no	**1.0**
Date of last update/review	**August 2019**
Responsibility of	**Subject Lead for Human Rights & PSED**

Key legislation and policy

Legislation	• Human Rights Act 1998 • Equality Act 2010
National policy and guidance	• Development Management Manual
Judgments	• *AZ v SSCLG & Gloucestershire DC* [2012] EWHC 3660 (Admin)
Other guidance	• *Procedural Guidance – Planning appeals and called-in planning applications* – available on Welsh Government website

Other relevant Manual chapters

a. Gypsy and Traveller
b. Hearings
c. Inquiries
d. Local Plan Examinations
e. Role of Inspector
f. Social Inclusion and Diversity

Introduction

1. This guide provides advice on issues relating to the Human Rights Act 1998 and the Equality Act 2010, as they may arise in planning casework. Please note that further information on ethnic groups and equality matters is available in the Social Inclusion and Diversity chapter.

2. Human rights are based on core principles such as dignity, fairness, equality, respect and autonomy.

3. They are relevant to your day-to-day life and protect your freedom to control your own life, effectively take part in decisions made by public authorities that affect your rights and get fair and equal services from public authorities.

4. Human rights and equality issues must be dealt with as an integral part of the reasoning that leads to the final decision and it must be clear that any right has been weighed against all other material considerations before a decision is made.

5. Where human rights and equality issues arise in the same cases, the two should be distinguished and addressed separately.

Human Rights Act

Legislation

6. The Human Rights Act 1998 (the Act) enshrines in UK law most of the fundamental rights and freedoms contained in the European Convention on Human Rights (ECHR).

7. Consequently, in casework you should generally refer to the Act rather than to the ECHR, using a phrase such as, "… *would not breach the requirements of Article 1 of the First Protocol to the Convention, as incorporated by the Human Rights Act 1998*.", or similar.

8. It is unlawful for a public authority to act in a way which is incompatible with a Convention right – section 6(1). As an Inspector you will be working in this capacity[1].

9. Article 1 of the ECHR binds the signatory parties to secure the rights under other Articles. The rights that belong to all individuals, regardless of nationality and citizenship, are set out in Articles 2-12 and 14 of the Convention and Articles 1-3 of the First Protocol[2]. In summary, these are:

Article 2 – right to life
Article 3 – prohibition of torture

[1] See *Jane Stevens v The Secretary of State [2013] EWHC 792 (Admin)* (paragraph 48)
[2] *For example see* Jane Stevens v The Secretary of State *[2013] EWHC 792 (Admin) (paragraph 50 & 53 etc)* & AZ *(paragraph 58)*

Article 4 – prohibition of slavery and forced labour
Article 5 – right to liberty and security
Article 6 – right to a fair trial
Article 7 – no punishment without law
Article 8 – right for respect for private and family life
Article 9 – freedom of thought, conscience and religion
Article 10 – freedom of expression
Article 11 – freedom of assembly and association
Article 12 – right to marry
Article 14 – prohibition of discrimination

Article 1 of the First Protocol – protection of property
Article 2 of the First Protocol - right to education
Article 3 of the First Protocol – right to free elections

10. The rights fall into three broad categories:

Absolute rights – may not be violated in any circumstances.
They include Articles 3, 4 and 7. The right to a fair trial is also an absolute right but certain specific minimum rights set out in Article 6 apply only to criminal and not civil cases such as planning appeal proceedings.

Limited rights – where the right may be limited in certain circumstances – Articles 2, 5 and 12.

Qualified rights – where interference with the right might be permissible if it is done to secure an aim set out in the relevant article – for example, Articles 8, 9, 10 and 11 and First Protocol, Article 1.

11. Qualified rights are the ones most commonly referred to in planning casework, particularly Article 8.

12. Dealing with qualified rights will involve balancing the fundamental rights of the individual against the legitimate interests of other individuals and the wider community/public interest.

Terminology

13. The following terms are commonly cited but are not found or defined in the Act:

Violation – this is where a person's right would be breached or compromised. In respect of a qualified right, this would be where there would be an unjustified interference or infringement.

Interference (applies to qualified rights only) – this is where there would be potential for the right to be violated. Interference with a qualified right is permissible only where there is a clear legal basis for the interference as set out in the relevant Article – and the action is necessary in a democratic society.

The concept of **proportionality** is critical. A disproportionate interference would be where the interference is not justified, and this would amount to a violation.

Infringement – this term is sometimes used as an alternative to 'interference'.

Engaged (as in 'the operation of Article 8 is engaged') – this can generally be taken to refer to circumstances where there would potentially be a contravention of or interference with a right.

Victim – someone who would be personally and directly affected by a violation of a right. Only those who are victims or potential victims of a breach of a Convention right can rely on the ECHR or HRA.

Article 8

14. Article 8 states:

- Everyone has the right to respect for his private and family life, his home and his correspondence.
- There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

15. Consequently, where relevant in casework, you will need to consider:

- Would there be any interference with the right afforded under Article 8(1)?
- If so, would that interference be justified in accordance with Article 8(2)?

The first question involves consideration against the '**Bingham checklist**' and the second question may require a '**proportionality assessment**' (see below for further advice).[3]

16. Article 8 is most commonly cited where a decision to dismiss an appeal might result in the loss of someone's 'home' or adversely affect their 'family life', as defined below.

17. Article 8 is also sometimes referred to by neighbours concerned about the effect on their home or family life of a development proposal.

18. An appeal decision could result in an interference with the rights afforded under Article 8(1), even if the issue and the Human Rights Act have not been raised by any parties.

[3] This is sometimes known as the 'fair balance' test. There is no reference to the term 'proportionality assessment' in the Act but it has been consistently held that this principle is inherent in the application of Convention Rights – see AZ paragraph 98.

The 'Bingham Checklist'

19. The *AZ* case (*AZ v SSCLG & Gloucestershire DC* [2012] EWHC 3660 (Admin)) sets out a five-stage test to determine whether a proportionality assessment is required (paragraph 88). The test or checklist is based on questions advanced by Lord Bingham in respect of an immigration appeal[4]. The questions are set out below with comments in *italics* based on *AZ* (paragraphs 90 to 98); they are based on circumstances where the appellant's home would be at risk but they would apply in all cases where Article 8 rights are engaged.

i. Will the proposed refusal of permission be interference by a public authority with the exercise of the appellant's right to respect for his private or (as the case may be) family life or home?

ii. If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

In AZ *it was held that the decision would lead to removal of the appellant and his son from the appeal site. This would involve the loss of their home, the unlikelihood of finding another suitable site, the possible need to move to an unsuitable site, their possible homelessness and other adverse effects on family life. This amounted to a grave interference with their Article 8 rights.*

iii. If so, is such interference in accordance with the law?

This is likely to be the case if the planning decision is in accordance with the law - ie if the reasoning is adequate and not 'Wednesbury unreasonable', and so is not vulnerable to a successful legal challenge.

iv. If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others?

The interference may be necessary if it relates to the regulation of land use through the use of development control measures that are recognised as an important function of Government.

v. If so, is such interference proportionate to the legitimate public end sought to be achieved?

This requires the carrying out of a 'proportionality assessment'.

[4] Razgar v Secretary of State for the Home Department [2004] UKHL 27

The 'Proportionality Assessment'

20. The proportionality assessment is essentially a structured weighing up or balancing exercise. The AZ judgment explains what is necessary (see paragraphs 99, 121(10) and 133). It involves:

i. The identification of all relevant considerations relating to the appellant and their family's respective rights of enjoyment of family life and a home.

ii. The identification of the best interests of any children.

iii. The identification of the particular public or community interest that had to be balanced against the appellant and their family's interest.

iv. A structured weighing up and balancing of all these interests. This balancing exercise must involve the consideration of the best interests of any children and it should strike a fair balance between the rights of the individuals concerned and the interests of the community (see paragraph 20 below for more advice on dealing with the best interests of children).

21. Carrying out the assessment will often require a two-stage approach:[5]

- Can the relevant planning policy objective be achieved by means which interfere less with the individual's rights?

- If the proposed action is the minimum necessary, does it nevertheless constitute an excessive or disproportionate effect on the interest of the affected person?

22. The Courts have held that Article 8 may arise regularly in casework but a full proportionality assessment will not always be necessary:

> "*given the nature of those rights and the scope of planning decisions, it is likely that Article 8 will be engaged in many planning decision making exercises*." (Stevens v SSCLG and Guildford BC [2013] EWHC 792 (Admin).

> "… a planning case only very infrequently requires a proportionality assessment and even more infrequently a finding that the proposed decision would amount to disproportionate interference with Article 8 rights" (AZ paragraph 79).

23. A decision that could lead to a loss of someone's home because of a conflict with planning policy is almost certainly going to be of such gravity that Article 8 would be engaged – and you would need to undertake a full proportionality assessment. In these circumstances it would be relevant to consider whether the objectives of the planning policy could be met by a less intrusive action[6].

[5] R (on the application of Samaroo) v Secretary of State for the Home Department [2001] EWCA Civ 1139 which was cited in Gosbee v FSS & Sedgemoor [2003] EWHC 770 Admin
[6] R (on the application of McCarthy and 41 others) v Basildon District Council [2008] EWHC 987 (Admin); Lough v FSS [2004] EWCA Civ 905; and Rafferty v SSCLG [2009] EWCA Civ 809

24. In other cases, the explicit two-stage process might not be appropriate. For example, where it is alleged that a neighbour's rights would be directly interfered with by a proposed development, it will not normally be necessary to consider whether the objectives of the development could be achieved in a less intrusive way, unless this has been argued by one of the parties. Instead a simple balancing exercise would usually be sufficient to meet any requirement of proportionality.

Casework Principles where Article 8 is Engaged

25. Legal judgments over recent years have confirmed the following:

'Home'– is anywhere that can reasonably be regarded as a relevant person's home. A person may have more than one home and need not be occupying the property or living on the land for it to be their home. Following from this, an appeal property or site could be the home of the appellant, a tenant or another interested party.

'Family life' is a reference to those matters that are essential in order to enjoy a family relationship. Enforced separation from other family members and the support and assistance they may provide, particularly to children, will be an interference with the right. Family life is not confined to nuclear families and depends on the nature of the relationships, not their legal status. Inspectors may need to investigate what constitutes family life in the circumstances of the case and then consider the impact on the family unit as a whole, as well as the impact on individuals.[7]

Best interests of the child – Article 3(1) of the United Nations Convention on the Rights of the Child provides that the best interests of the child shall be a primary consideration in all actions by public authorities concerning children. Article 3(1) applies to decisions made by Inspectors and the Article 8 rights of a child should be viewed in the context of Article 3(1).

To be a 'primary consideration' means that no other consideration can be inherently more important than the best interests of the child. This means that they must properly be afforded an importance or weight as great as any other material consideration prior to examination of the circumstances of the case. However, their importance or weight may alter on analysis of their specific circumstances and their interests can be outweighed by other factors when considered in the context of the case[8].

---

[7] Stevens v SSCLG and Guildford BC *[2013] EWHC 792 (Admin)*; ZH (Tanzania) v SSHD *[2011] UKSC 4,* AZ v SSCLG & SGDC *[2012] EWHC 3660 (Admin); ,* Stevens v SSCLG and Guildford BC *[2013] EWHC 792 (Admin); and* Collins v SSCLG and Fylde BC *[2013] EWCA Civ 1193*

[8] Stevens v SSCLG and Guildford BC *[2013] EWHC 792 (Admin) and* Collins v SSCLG and Fylde BC *[2013] EWCA Civ 1193 13* Stevens v SSCLG and Guildford BC *[2013] EWHC 792 (Admin) and* Collins v SSCLG and Fylde BC *[2013] EWCA Civ 1193 14* Buckley v UK *[1996] 23 EHRR 101 (see paragraph 54) 15* Chapman v UK *[2001] ECHR 43 (see paragraph 102) 16* South Bucks DC v Porter *[2004] UKHL 33*

In examining all material considerations, the best interests of the child must be kept at the forefront of the Inspector's mind and the Inspector must assess whether any adverse impact of a decision on the interests of the child is proportionate. A helpful discussion of how the best interests of the children should be dealt with, including in terms of attributing weight, can be found in *Jane Stevens v The Secretary of State for CLG [2013] EWHC 792 (Admin)* – see paragraphs 56-69 in particular.

Where children are involved, an appropriate factual enquiry into their personal circumstances and welfare is required to establish their best interests. Unless circumstances indicate otherwise, you are entitled to assume that the best interests of the children will be aligned with those of their primary carers who can provide evidence of potential adverse impacts on their interests. Considering the best interests of children might also involve a factual inquiry into their educational needs. It is best practice to expressly demonstrate in the decision letter that the best interests of any children are a primary consideration, and that those interests are at the forefront of the Inspector's mind. More detail can be found in the Gypsy and Traveller chapter.

Unlawful use – the test for deciding whether Article 8 is engaged is whether the relevant accommodation is the appellant's or another individual's 'home' – not whether the home was established lawfully. Determining if an unlawful occupation constitutes a home could involve an assessment of the nature, length and degree of permanence of occupation. The legality of the use is a relevant factor in determining whether or not a fair balance has been struck and the interference is proportionate.

Unlawful continuation of use – in cases where enforcement action has been taken but occupation as a home continues, this would only undermine a person's reliance on Article 8 if they were seeking to rely on the length of occupation as an argument in their favour **and** if the earlier adverse decisions had correctly taken Article 8 and the proportionality test into account.

Inquisitorial role of the Inspector – at a hearing or inquiry, the Inspector **has to be pro-active, act inquisitorially and make sure that all the main issues are discussed** and that all relevant evidence is brought forward. You must ensure that you have enough information to undertake a full proportionality assessment. This might require raising the issue of human rights, even if the parties have not done so, where interference under Article 8(1) may arise. It may also involve giving the parties an opportunity to introduce evidence, documents or information which had not been previously referred to. If relevant considerations and evidence are not considered the decision is likely to be flawed.

The inquisitorial role was considered in AZ (paragraphs 105-7, 111, 121(11), where it was held that an Inspector should probe sufficiently to ascertain the full effect of the appeal decision on wider family life. It has since been held that, where an appellant is professionally represented, you may assume that relevant evidence regarding the best interests of the children is known to the representative unless

something shows a need for further investigation.[9] However, an agent may not be well-informed in practice and it remains necessary to demonstrate that all family interests have been taken into account and assessed in cases where Article 8 is engaged, regardless of whether they are specifically raised by the parties. This makes it appropriate to proactively consider what investigation is required.

Reasons for the decision – it was held in AZ (paragraph 133) that in carrying out a proportionality assessment, "*the various contributing considerations that had to be taken into account should have been assessed together in a structured and balanced assessment once the necessary circumstances relating to each consideration had been ascertained and it had been decided what relative weight should be given to each circumstance*". Essentially this means that, in your Conclusion, the findings on each main issue, including any identified **planning harm and personal circumstances, should be assessed together**.

Conditions – the onus is on you to consider whether any harm might be overcome by the use of a condition or whether the harm might be reduced to the extent that it is outweighed by other considerations – even if not raised by the parties. This could involve the consideration of personal and/or time limited conditions. Bear in mind that if permission is granted on a temporary, personal or other restricted basis, this could still result in some interference with Article 8 rights. For example, a temporary permission could potentially result in homelessness at a later date. A proportionality assessment may still be required, even if the interference would be less severe and more likely justified.

Green Belt cases – where a proposal would be inappropriate development in the Green Belt, a finding that an interference with the right to respect for private and family life is disproportionate "*will almost inevitably be one that also amounts to a finding that the circumstances are very special*." Your reasoning must include a structured assessment – i.e. whether the personal circumstances (along with any other relevant factors) amount to 'other considerations' which would clearly outweigh the harm to the Green Belt and any other harm. A grant of permission that is justified by personal circumstances will probably need to be the subject to a personal condition.

Alternative accommodation – in casework where the loss of a home is an issue, you will usually need to consider the **availability** and **suitability** of alternative accommodation. The availability, or otherwise, of suitable alternative accommodation could affect the degree of seriousness of any interference with Article 8 rights and should be taken into account as part of the proportionality assessment. This issue has been considered in other legal judgments, usually in the context of Gypsy and Traveller casework.

[9] Collins v SSCLG and Fylde BC *[2013] EWCA Civ 1193;* AZ v SSCLG & Gloucestershire DC *[2012] EWHC 3660 (Admin);* AZ v SSCLG & Gloucestershire DC [2012] EWHC 3660 (Admin) (see paragraphs 60 & 121(4))

In Gypsy and Traveller cases, you must make a finding about the likelihood of the occupants being forced to live a roadside existence. It is not enough to suggest that a roadside existence is a possibility. Please see Gypsy and Traveller Casework for further information.

Other Articles

Article 6: Right to a Fair Trial

26. Article 6(3) relates to fairness in terms of how the planning appeal is conducted. The question of whether the appeal system provides a right to a fair trial is considered in the section on the 'Role of the Inspector'. In summary, everyone is:

- Entitled to a fair and public hearing;
- Within a reasonable time;
- By an impartial tribunal established by law.

27. In effect, Article 6 requires that there is 'equality of arms' and you will need to consider whether the choice of appeal procedure, and the conduct of any hearing or inquiry is fair to all parties, including interested parties and unrepresented appellants.

28. During a Hearing or Inquiry, to ensure that no one is disadvantaged, you may need to explain procedural or planning matters, give opportunity for questions or comments and ensure that matters of interest to all parties are discussed.

29. You may also need to be flexible as to how evidence is presented – for example, by allowing interested parties to read out pre-prepared statements – and to intervene to prevent aggressive questioning. The Franks Principles, the rules of natural justice and the PINS Code of Conduct will all help with this.

30. Matters relating to public funding will not usually be an issue unless the appellant or interested party seeks an adjournment at the start of a hearing or inquiry to seek public funding or assistance/representation (for example, via legal aid, planning aid or the Citizen's Advice Bureau). You will need to consider any such request on its merits. Is there a good reason why public funding or assistance/representation was not sought earlier? What are the views of the other parties? You can note that in your running of the event you will seek to assist those unfamiliar with the procedures and legislation.

31. In exceptional circumstances, an adjournment may be justified but you should be wary of actions which are a deliberate attempt to delay the appeal.

32. In the case of *Moore & Coates*[10] the Court held that the SSCLG's approach to the recovery of two Gypsy and Traveller appeals was in breach of Article 6

[10] *Moore & Coates v SSCLG* [2015] EWHC 44 (Admin); and *Chapman v UK* [2001] ECHR 43

because it prevented the appeals being determined in a reasonable time. Please see the Gypsy and Traveller chapter for further information.

Article 1 of the First Protocol

33. This Article states:

> "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*."

34. This qualified right is often referred to alongside Article 8 where a refusal of permission might lead to the loss of a home. However, an appellant might be concerned that a refusal of permission for **any** development or use could affect their peaceful enjoyment of their land and property. Interested parties might argue the same in relation to the effect of a proposal, particularly in terms of loss of value and lack of compensation.

35. If Article 1 is raised alongside Article 8, you will often find that the same general conclusions will apply. As with Article 8, the lawfulness of the use of the possessions is not relevant for determining whether or not the Article is engaged. The legality of the use may be relevant in determining whether or not a fair balance has been struck but any control over land use could represent an interference with the right and, if so, the question of proportionality or justification would still need to be considered.

36. It is important to distinguish between an engagement with the protection of the protocol and interference with the right – and whether there has been a breach or violation of that protection/right. As suggested above, an interference will depend on whether there is a legitimate aim (ie public interest) and the action is necessary and proportionate. A violation will occur if there is an unjustified interference.

Article 2 of the First Protocol and Article 14

37. Article 2 of the First Protocol (the right to education) and Article 14 (prohibition of discrimination) may sometimes be referred to – usually in relation to community facilities such as places of worship or faith schools, or in connection with Gypsy and Traveller casework. Please see Gypsy and Traveller Casework for further information.

Procedural Issues

38. If relevant Articles of the Human Rights Act are engaged you will need to consider the most appropriate appeal procedure for the evidence to be properly understood and, where necessary, tested. An inquiry or hearing may be necessary if a proportionality assessment is required in connection with Article 8.

39. Further advice about carrying out hearings, inquiries and site visits can be found in the section below relating to the Public Sector Equality Duty. See also the advice on Article 6 above – and in the 'Role of the Inspector', 'Inquiries' and 'Hearings' chapters.

Writing Decisions

40. You will need to specifically address human rights in casework where the parties have alleged that a right would be violated or interfered with – especially if that argument has been made by a 'losing' party. This applies to all the Articles discussed above and, in relation to Article 8, any interference with private and family life – not just the loss of a home.

41. In doing so, Inspectors should be mindful that if information submitted as part of the appeal comprises sensitive personal data or is otherwise sensitive in nature, for example children's names, ages and educational needs, notwithstanding that it may be or address a crucial or determining consideration, you **must not refer in detail** to this information in your decision.

42. **You will also need to specifically address human rights if the parties have not done so, but there is a reasonable prospect that a right could be violated or interfered with**. In such cases it would be reasonable to conclude that the relevant Article would be 'engaged'. You will need to refer back to the parties or raise the relevant Article at the hearing or inquiry, if consideration of the human rights issue in the appeal decision would otherwise come as a surprise.

43. It is not unusual in planning cases for it be argued by an appellant that there are personal circumstances that justify (or could help justify) a grant of permission, perhaps for a house extension, 'granny Annexe' or new dwelling/residential use. You should carefully consider any such representations to ascertain if human rights issues are implicit. The need to address human rights issues applies even when the parties have made only a very brief reference to a human rights matter.

44. In cases where human rights issues are relevant, you need to treat them as an integral part of your reasoning rather than as a footnote (see *Lough v FSS & Bankside Developments* [2004] EWCA Civ 905)[11].

45. In your appeal decision, this means considering the planning merits of the case in the usual way, including any harm, the circumstances of the individuals

[11] (paragraph 48)

and whether imposing conditions would overcome any harm or reduce it to the extent that it is outweighed by other considerations. Explain what the specific consequences would be for the appellant and their family if the appeal is dismissed – or for other parties if the appeal decision would be against their interests. The human rights balancing exercise will then be undertaken as part of your overall conclusion.

46. The Courts will assess the **substance** of any human rights reasoning rather than whether or not you have made specific reference to the Act. However, where human rights are a significant consideration, it is good practice to refer to the Act and relevant Articles.

47. You should always refer to the Act where the issue has been raised by the parties. In other cases, it may be sufficient to simply explain why your decision is 'proportionate'. If you intend to dismiss the appeal where human rights issues are relevant to the appellant, you must make it clear in your reasoning that you have taken their personal circumstances into account and explain why you consider they do not outweigh the harm you have identified. The same principles apply where you intend to allow the appeal but interested parties have argued that their personal circumstances would be affected.

48. If you conclude that dismissing the appeal would **violate** an appellant's human rights, (for example, because it would represent an unjustified interference with their private or family life), this would, in most cases, logically indicate that the appeal should be allowed. This is because, in order to have reached this conclusion, you must have already decided that the personal circumstances of the appellant outweigh any planning harm or that the proposal would not result in any significant harm.

49. It will not usually be necessary for you to undertake a balancing exercise and reach a conclusion on human rights issues if your decision, based on the planning merits, is wholly in favour of the person raising the issue. However, you should briefly explain that this is your approach if a party has made a case in relation to human rights.

50. Human rights are often referred to in Gypsy and Traveller cases because the outcome of a decision might lead to the loss of someone's home. Further advice is provided in the Gypsy and Traveller Casework chapter.

51. Sometimes human rights issues will need to be dealt with as a main issue (or as part of your consideration of a main issue or as an 'other consideration' in Green Belt cases). Examples of main issues include:

- The appellant's personal need for the proposed development *(i.e. where personal circumstances are likely to be determinative)*
- Whether a refusal of permission in the circumstances of the case would be compatible with the provisions of the Human Rights Act 1998

52. Examples of reasoning relating to human rights can be found in Annexe 1.

Public Sector Equality Duty

Legislation

53. The Equality Act 2010 consolidates earlier legislation relating to equality issues. The Planning Inspectorate (including administrative/support staff) and individual Inspectors are subject to the Public Sector Equality Duty (PSED). Section 149(1) of the Act requires that a public authority or person exercising a public function must, in the exercise of its functions, have due regard to the need to:

"(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) *advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*

(c) *foster good relations between persons who share a relevant protected characteristic and persons who do not share it."*

54. Section 149(3) explains that having regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

"(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(d) *take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*

(e) *encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."*

55. Section 149(4) explains that the steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

56. Section 149(5) explains that having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard to the need to:

(a) tackle prejudice; and

(b) promote understanding.

57. Section 149(6) confirms that compliance with the duties may involve treating some persons more favourably than others.

58. Section 149(7) sets out the 'relevant protected characteristics' for the purposes of section 149(1)(b) and (c):

Age – this could relate to a person of a specific age or falling within an age range

Disability – a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities[12]

Gender reassignment – where the person is proposing to undergo, undergoing or has undergone a process for the purpose of reassigning their sex by changing physiological or other attributes of sex

Pregnancy and maternity

Race – includes colour, nationality and ethnic origins

Religion or belief – a person of a particular religion or belief

Sex – a reference to gender

Sexual orientation – a person's sexual orientation towards persons of the same sex, opposite or either sex

59. For the purposes of section 149(1)(a), however, in addition to the list set out in section 149(7) above, **marriage and civil partnership** will also be relevant (as it is included in the list of 'protected characteristics' in section 4 of the Act and in the separate list of 'relevant protected characteristics' pertinent to 'indirect discrimination' set out in section 19 of the Act).

60. In planning and enforcement casework, protected characteristics may be relevant to procedural decisions such as choice of appeal procedure / acceptance of evidence, the handling of the appeal hearing / inquiry itself and appeal decisions. Where there is potential for any decision (including those decisions made by administrative/support staff) to affect a person with a protected characteristic, due regard must be had to the three equality principles set out in Section 14.

61. The duty applies to you as an individual acting in your capacity as an Inspector and cannot be delegated. In recovered cases you must have due regard to the PSED duty when making your recommendation, i.e. you must consider the implications of your recommendation on a protected group[13].

[12] The definition of 'disability' set out in s6(1) of the Equality Act 2010 includes mental impairments, See commentary on LDRA [2016] for guidance on obtaining the necessary information to facilitate compliance with the Act, where a person has a protected characteristic.
[13] The PSED is also relevant to development plan casework, in relation to the conduct of examinations and the soundness of development plan policies, particularly those which could impact upon persons with relevant protected characteristics.

'Due regard'

62. Having 'due regard' involves: "*consciously thinking about the three aims of the Equality Duty as part of the process of decision-making. This means that consideration of equality issues must influence the decisions reached by public bodies*."

63. Due regard is the regard which is appropriate in consideration of the circumstances of the particular case[14]. The level of regard appropriate will depend on the importance of the decision for the lives of persons with the protected characteristic, the extent of the inequality and any countervailing factors.

64. Where negative impacts are identified, potential ways to mitigate these should be considered. The principle of proportionality applies: the more serious the negative impact, the greater the requirement on you to address your mind to the negative impact, justify your decision and consider mitigation.

65. Due regard requires the gathering of information to ensure that an informed decision as regards any negative impact of a decision is made[15]. The duty is on you to obtain the necessary information and the amount of evidence required will depend on the level of regard needed.

66. The case of *LDRA Ltd v SSCLG* [2016] EWHC 950 (Admin) confirms that an Inspector is under an obligation to seek out the relevant information required where it has not been provided by the parties. This duty applies to all appeals, including those proceeding by written representations. To take a decision in accordance with the duty you must, having taken reasonable steps to inquire into the issues, understand the likely impact of the decision on the equality needs which are potentially affected by the decision.[16]

67. *R. (on the application of Brown) v SofS for Work & Pensions* [2008] EWHC 3158 (Admin) established clear principles to be applied in assessing whether 'due regard' had been had in any particular case. The public authority must be aware of the duty under the Act; due regard must be exercised in substance, with 'rigour' and an open mind; it must not be a tick box exercise; it is good practice to make specific reference to the duty; and it is good practice to keep an adequate record showing that the duty was considered. These principles have been recently confirmed in the case of *Moore & Coates*[17].

68. The duty is not a positive duty to eliminate discrimination, advance opportunity or foster good relations, rather it is a duty to ensure that any decision which may have a negative/positive impact on equality is taken from a fully informed position, having given careful consideration to alternative less-harmful ways of making the

[14] R (T) v Sheffield City Council [2013] EWHC 2953 QB
[15] R. (on the application of Williams) v Surrey CC [2012] EWHC 867 (QB)
[16] DAT & Anor, R (on the application of) v West Berkshire Council [2016] EWHC 1876
[17] *Moore v SSCLG* [2015] EWHC 44 (Admin)

decision[18]. It is a duty to consider, rather than a duty to achieve any particular outcome.

69. It is up to the Inspector to decide what weight to give the equality impacts of the decision[19] although any decision that has a negative impact on a protected group must be rationally justified and proportionate.

70. Discrimination against one person by another because of a protected characteristic, either directly or indirectly, is prohibited conduct and unlawful (Part 2, Chapter 2, Equality Act 2010).

Procedural Issues

Names

71. Different ethnic groups have different traditions. The historic British approach, with 'Christian' names followed by a surname, is not repeated in all ethnic minority communities. Make sure you know how to pronounce and spell people's names and how they wish to be addressed. It may be appropriate to ask for 'given name' and 'family name'.

Site Visits

72. When explaining the procedures on a site visit, consider if any of the parties has a limited understanding of English. In most cases this should not prevent the visit from taking place, because the parties will have been informed of the visit and no representations are allowed on site.

73. If the appellant is at a disadvantage because they do not understand what is happening or they are distressed, efforts should be made to contact the agent to request they attend the visit. Similarly, if an interested party is at a disadvantage, investigate whether a relative, friend or neighbour could offer assistance.

74. If these measures fail (or the appellant is unrepresented), it may be possible to conduct the visit from public viewpoints unaccompanied by any party. Alternatively, you may need to spend more time assisting the appellant or interested party by explaining the procedure. As a last resort the visit may have to be re-arranged.

75. During site visits, make sure you take into account any mobility difficulties of those attending. Ascertain whether reasonable adjustments are required and can be facilitated.

---

[18] *R (Baker) v SSCLG* [2008] EWCA Civ 141

[19] *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345

76. If you visit a religious site you may be asked to carry out certain actions out of respect, for example removing your shoes or covering your head. Try to comply with such requests.

Inquiries and Hearings

77. When conducting a hearing or inquiry, consider the following to ensure that no-one is disadvantaged and you can follow the representations:

- Does any participant require wheelchair access or facilities for hearing impairments?[20]
- Is anyone unable to see plans which might need to be explained? Do you need to ensure that documents are read out?
- Is anyone unable to read or write?
- Does anyone not speak English as a first language? (The Welsh Language Act 1993 and Welsh Language (Wales) Measure 2011 require an equal opportunity to conduct business in Welsh. See the Welsh Language Scheme). If so, are family members or friends able to help or act as a spokesperson? Could they write down any verbal representations so these could be submitted to you as a written document?
- Could someone act as an interpreter? In the last resort might a short adjournment be needed to obtain an interpreter? Make sure that the interpreter and party understand each other.
- Can you assist by spending more time explaining the procedures?
- Do you need to explain any jargon or ask the LPA or appellant to do so?

Wearing Veils at Inquiries and Hearings

78. Some Muslim women may wear a veil (niqab) as part of their religious beliefs and you should respect that. The wearing of a niqab is unlikely to interfere with the running of a planning inquiry or hearing but if a person cannot be heard clearly you should ask them to speak up or use a public address system (where available).

References to Ethnic Groups

79. It may be appropriate for a party at a hearing or inquiry to identify the users of a proposed development if it is relevant to the appeal – for example, the regular or intended users of a proposed place of worship who follow a particular faith. Such individuals may have protected characteristics and be directly affected by the outcome of the appeal.

80. However, in most cases, it will not be relevant to identify the users of a development. If unnecessary references are made to particular individuals, you may need to consider whether an attempt is being made to discriminate on racial or other grounds.

81. You may need to point out that the appeal will be considered on its merits, as relating to the use and development of land, as well as with regard to the PSED.

[20] Section 20 of the Equality Act 2010 imposes the duty to make reasonable adjustments for persons with disabilities, including in relation to 'physical features'.

Racist Remarks, Behaviour and Representations

82. Article 10 of the Act states that "*everyone has a right to freedom of expression*". However, this is a qualified right which carries duties and responsibilities and may be subject to restrictions prescribed by law, including the Equalities Act.

83. At events:

- If there is a significant risk that racist comments may be made, make it clear in your opening that this will be unacceptable.
- Do not allow any racist representations (i.e. those where the language used has a clear or malicious intent). Act promptly.
- If potentially racist language is being used unwittingly, explain why it is racist language, and state that it must not be repeated.
- If anyone is wearing something with a racist symbol or message – ask them to remove it or cover it up.
- If racist remarks or behaviour are repeated, you may use your discretion to adjourn the hearing for the offending individual to consider their behaviour or leave the event at your request.

84. Local authority and Inspectorate case officers should screen correspondence for racist representations and return any with an appropriate covering letter. It is therefore unlikely that you will receive such representations on file.

85. However, if you receive racist representations, including at a hearing or inquiry, they should be returned to the party with an explanation that as the representation is unlawful, it cannot be considered.

Gypsy and Traveller

86. Issues related to equality and potential discrimination are often referred to in Gypsy and Traveller cases. Further advice is provided in Gypsy and Traveller Casework chapter.

87. Romany Gypsies and Irish Travellers are recognised as ethnic groups. However, it is also possible for an individual to have 'Gypsy status' but not a protected characteristic. The planning definition of "gypsies and travellers" is irrelevant for the purpose of the PSED.

88. Whether or not any proposed Gypsy site would be for travellers with protected characteristics, who would be explicitly protected by the Act, derogatory comments that are directed against them should not be accepted in written or oral submissions.

Writing Decisions

89. Where you need to refer to the PSED, it is best to refer to the "*Public Sector Equality Duty contained in the Equality Act 2010*". The protected characteristics that may be most relevant to casework include: disability; age; religion; and race, including Gypsies and Travellers.

90. You will need to refer to and address the PSED where this has been specifically raised by the parties. The duty applies even when the parties have made only a very brief reference to a protected characteristic.

91. In doing so, Inspectors should be mindful that if information submitted as part of the appeal comprises sensitive personal data or is otherwise sensitive in nature, for example children's names, ages and educational needs, notwithstanding that it may be or address a crucial or determining consideration, you **must not refer in detail** to this information in your decision.

92. Where no one has raised the PSED, but it is evident that protected characteristics are or could be material, your decision should address the substance of the 'due regard' duty under Section 149 of the Act. It should always be implicit from your conduct and reasoning that you have complied with the duty.

93. In cases where there is a clear negative impact on a protected group it is advisable to make a direct reference to the PSED or section 149 in your decision. Detailed consideration of the equality principles in s149 will be required where equality issues are fundamental to the case.

94. Where relevant, equality issues and any relevant protected characteristics should form an integral part of your reasoning and not be treated as a footnote. The 'due regard' duty may apply not only to the appellant but also interested parties who could be adversely affected by a grant of permission. Consequently:

- If a specific 'protected characteristic' is relevant to your decision, do you have sufficient information to assess its relevance?[21] If not, ask the Case Officer to obtain the evidence from the parties or ask at the inquiry or hearing.
- If such issues are relevant, have you dealt with them appropriately in your reasoning and final balancing?

95. As with human rights, consideration of the PSED should be set out in your conclusions. You should identify any adverse impacts of allowing or is missing the appeal on those with the relevant protected characteristics.

96. It will then be necessary to undertake a balancing exercise with regard to the seriousness of the impacts, planning harm or benefit and mitigating measures that could or would be put in place.

97. The following court cases are of relevance:

[21] In *LDRA Ltd v SSCLG* [2016] EWHC 950 (Admin) it was held that, "If the Inspector was not fully appraised of the relevant information, he was under an obligation to seek the information required." (at paragraph 32).

R. (on the application of Harris) v Barnet LBC [2012] EWHC 3725 (Admin) concerned a grant of permission for a change of use of a garden centre to a free school. The building had been used as an informal community centre by elderly people and people with disabilities and there was no equivalent facility in the area. The Council's decision was challenged on grounds including whether the duty under s149 had been discharged. However, the officer's report had accepted that the loss of the garden centre would have an "*impact*" on the individuals who used it and "*significant weight must be placed on those impacts when considering the merits of the planning application*". The identified impacts on people with protected characteristics were weighed against other considerations and it was recommended that permission should be granted. It was held that "the officers' report displays a coherent approach to the requirements of the due regard duty" and that although the officers did not express their conclusions in the words of s149, "*it is substance – not form – that matters*". The reasons for approval referred to the due regard duty.

In *R. (on the application of Harris) v Haringey LBC and Ors* [2010] EWCA Civ 703, the Court of Appeal quashed a grant of permission for a redevelopment that would adversely affect specific ethnic minorities because there was no reference in the committee report or minutes to the statutory test; no focus on the substance of the duty in the report; and no addressing of the relevant issue by the committee (paragraphs 22, 27 and 39).

98. Examples of reasoning in appeal decisions can be found in Annexe 2.

Public Sector Equality Duty in Local Plan Examinations

99. Please see the Local Plan Examinations chapter for information regarding the PSED in Local Plan Examinations.

Annexe 1: Human Rights - Example Wording from Decisions

Note - in many of the cases cited below, reference was made to the ECHR. As noted above, future decisions should refer to the **Human Rights Act 1998**.

Change of use of land to provide for Gypsy/Travellers – s78 appeal (June 2013)

Inspector's overall conclusions

In locational terms, on balance the site represents a sustainable location for this development and accords with the relevant planning policy. There is an identified need for traveller sites within the Council's area, and there is no five-year supply of land for such sites. Indeed, it is accepted by the Council that there is no alternative site for Mr # and his family to move to. These considerations weigh in favour of granting permission, as do the personal circumstances of the family, and in particular to the need for a settled base to allow Mr and Mrs #'s daughter to go to the local school.

However, the development causes harm to the character and appearance of the surrounding area, and consequently conflicts with relevant policies of the development plan. That harm is limited to the immediate locality but could not be completely overcome by landscape planting. There is also conflict with national policy, because the site is in open countryside away from the existing settlement and is not on a site allocated in the development plan. I attach significant weight to this harm.

Taking all of these considerations into account, I conclude that the identified harm that would arise from the development outweighs the other considerations and indicates that a permanent permission should not be granted for the development at this time.

However, it is also necessary to consider whether the grant of a temporary permission would be justified. There is no identified five-year supply of land for traveller sites in the area. In this particular case I consider that significant weight should be attached to the lack of a five-year supply and to the absence of alternative accommodation for the family.

If planning permission were to be refused, the outcome would be that Mr # and his family would lose their home. This would represent a serious interference with the family's right to respect for private and family life and the home (Article 8 of the European Convention on Human Rights). In addition, Mr and Mrs #'s daughter would be likely to lose the opportunity to attend the local primary school if the family were required to leave the site.

The Council is taking action to address the identified need for traveller sites. Although its own estimated timescale for allocating sites appears somewhat optimistic, the Council is being proactive in this matter. There is no reason to suppose at the moment that an adequate number of sites for travellers could not be identified

and delivered within the next three years. It would accord with national policy for sites to be allocated through the development plan process, rather than on an ad hoc basis.

If a planning permission for a temporary period of three years were to be granted it would avoid Mr # and his family becoming homeless. This would be a proportionate approach to the legitimate aim of protecting the environment and granting a permission for a limited period would have no greater impact on Mr # and his family than would be necessary to address the wider public interest.

For these reasons, and having regard to all matters raised, I conclude that the appeal should be allowed, and planning permission should be granted for a temporary period of three years, subject to appropriate conditions.

Change of use of land to provide one pitch for a gypsy / traveller family etc - s78 appeal recovered by the Secretary of State (September 2013)

Inspector's Report – final balancing

Therefore, I consider that a temporary planning permission for a period of 3 years is appropriate. The protection of the public interest cannot be achieved by means which are less interfering of the appellant's rights. They are proportionate and necessary in the circumstances and hence would not result in a violation of his rights under Article 8 of the European Convention on Human Rights.

Secretary of State's decision

The Secretary of State has considered the Inspector's comments at IR74 and at IR84. He considers that the outcome of this appeal decision engages the site occupants' rights under Article 8 of the European Convention on Human Rights. However, he considers that those rights are qualified and that his role in relation to this appeal is to ensure that any interference with those rights is in accordance with the law and is necessary in a democratic society, applying the principle of proportionality. The Secretary of State's decision to dismiss this appeal could result in the appellant and his family losing their home, but he takes the view that in this case the harm to the Green Belt and other harm is such that dismissal of the appeal is a necessary and proportionate response.

Change of use of the land from paddock to a use for the siting of residential caravans etc - s174 appeals recovered by the Secretary of State (August 2013)

Inspector's Report – overall balancing

The rights of the site residents under the European Convention on Human Rights [Human Rights Act] must also be considered. The appellants contend that Articles 1, 8, 6 and 14 are engaged. These appeals were the subject of a lengthy public inquiry where the appellants' case was fully put. The Secretary of State's decision

to direct that they be recovered for his determination was properly taken under section 79 and paragraph 3 of Schedule 6 of the Town and Country Planning Act, 1990 and he set out his reasons for that decision. The lawfulness and fairness of a decision taken by the Secretary of State on a recovered appeal are subject to review through the courts. I conclude that there has not been an interference with the appellants' rights under Articles 6 and 14.

Article 1 concerns the protection of property and Article 8 deals with the right to respect for family life and the home. Dismissal of these appeals would, in all likelihood, require the site residents to vacate the site, which is their home, without any certainty of alternative accommodation being available. This would represent an interference with their home and family life and with their property. Without an authorised site it would also be difficult for them to pursue a traveller lifestyle. However, the harm which has been and would continue to be caused by the development, in particular its inappropriateness in the Green Belt, harm to Green Belt openness and by encroachment and harm to the character and appearance of the area, is considerable.

Given the current lack of an affordable, available and suitable alternative site and the other matters weighing in the appellants' favour, I have concluded that the granting of temporary planning permission for a period of 3 years is appropriate and reasonable in all the circumstances. I am satisfied that the legitimate aim of the protection of the environment cannot be achieved by any means which are less interfering with the appellants' rights. They are proportionate and necessary in the circumstances and would not result in a violation of their rights under Articles 1 and 8.

Secretary of State's decision

For the reasons given in IR98, the Secretary of State agrees with the Inspector's conclusion that there has not been an interference with the appellants' rights under Articles 6 and 14 of the European Convention on Human Rights... He also agrees with the Inspector that, for the reasons given in IR99, the granting of temporary planning permission is appropriate and reasonable in all the circumstances (IR99). However, he considers that, having regard to the amount of time which has elapsed since the Inspector reported, a further period of 2 years from the date of this permission would be proportionate and reasonable. Like the Inspector, the Secretary of State is satisfied that the legitimate aim of protecting the environment cannot be achieved by any means which are less interfering with the appellants' rights; that these means are therefore proportionate and necessary in the circumstances and would not result in a violation of the appellants' rights under Articles 1 and 8.

The erection of a pitched roof dwelling – s174 appeal (October 2012)

Note – the dwelling was sited in the Green Belt, in a paddock next to the appellants' home. It was constructed for their son and justified on the grounds of medical need.

Conclusion

National policy sets out a presumption in favour of sustainable development – but this does not apply to inappropriate development in the Green Belt which is subject to restrictive policies in the Framework. The appeal building is inappropriate development in the Green Belt. In accordance with the Framework, I attribute substantial weight to the harm so caused to the Green Belt. I attach significant weight to the harm caused by loss of openness in the Green Belt, to the purposes of including land in the Green Belt, and to the character and appearance of the surrounding area.

In favour of the appeal, I attach significant weight to [the son's] need for accommodation that is close to the appellants' house and includes a workshop. However, there is insufficient evidence to justify the scale of the existing building... The attempts to house [the son] elsewhere, the shortage of affordable housing, the public benefit of housing [the son] privately, the appellants' financial constraints and their supporters do not add further weight to the case for this building. I attach a little weight to the benefits that would arise from removing the piggery and caravan, but none to the other matters raised.

The appellants suggest that the development could not set a harmful precedent because the combination of circumstances is unique. This may be true; planning applications should be considered on their merits in any event. When assessed in accordance with the Framework, however, I find that the considerations advanced here do not clearly outweigh the harm caused by the development. Having regard to the case as a whole, I conclude that very special circumstances do not exist which could justify the appeal development.

Article 1 of the First Protocol of the ECHR concerns enjoyment and deprivation of possessions. Article 8… states that everyone has a right to respect for his home and private life, his home and correspondence. These are qualified rights, whereby interference may be justified in the public interest, but the concept of proportionality is crucial.

Dismissing the appeals would interfere with the appellants' and [their son's] rights under Articles 1 and 8. However, it would be unlikely to result in [the son] being homeless, given my conclusion on ground (g) [extension to the period for compliance with the notice], the fallback position [an extant grant of permission for a smaller dwelling] and his likely eligibility for public housing. Having regard to the legitimate and well-established planning policy aims to protect Green Belts and the character of rural areas, a refusal of permission would be proportionate and necessary. It would not unacceptably violate the family's rights under Articles 1 and 8. The protection of the public interest cannot be achieved by means that are less interfering of their rights.

Change of use of land to a private gypsy and traveller site – s78 appeal (October 2012)

Note – recognition that a restricted permission would represent a limited interference.

The Planning Balance and Human Rights

I have considered the rights of the appellants under Article 8 of the European Convention on Human Rights. Article 8 affords the right to respect for private and family life, including the traditions and culture associated with the gypsy way of life. This is a qualified right, and interference may be justified where in the public interest. The concept of proportionality is crucial.

Dismissing the appeal or granting a time-limited permission would interfere with the appellants' rights under Article 8, since the consequence would be that the family or members of it are rendered homeless at some point.[22] However, the interference would be in accordance with the law and in pursuance of a well-established and legitimate aim: the protection of the Green Belt. Given the circumstances overall, I find that a grant of personal planning permission would be proportionate and necessary. It would protect the Green Belt in posterity whilst avoiding a violation of the appellants' rights under the ECHR. The protection of the public interest cannot be achieved by means that are less interfering of their rights.

General: Other Articles

The appellant objects that the place of worship is needed on grounds of religious freedom – and disallowing the appeal would show prejudice to a law-abiding minority. I have had regard to the Human Rights Act 1998 and Articles 9 and 14, which provide for religious freedom and the prohibition of discrimination. However, Article 9 is a qualified right, and Article 14 does not infer any free-standing rights. The appellant's submissions must be weighed against the public interest in this case.

It has not been shown that there is an overriding community need for the place of worship. I am satisfied that the legitimate planning policy aims to protect housing supply and living conditions can only be adequately safeguarded by a refusal of permission. On balance, this course of action would be proportionate in the circumstances. It would not lead to an unacceptable violation of the appellant's rights under Articles 9 and 14.

General: where the outcome of a planning appeal is favourable to the party invoking the Human Rights Act

Representations were made to the effect that Mr # rights under Article # of the Human Rights Act 1998 would be violated if the appeal were to be allowed/dismissed. However, as I have decided to allow/dismiss the appeal [and grant full planning permission], my decision would not lead to any violation.

General: where a full balancing exercise is not required to address the interests of a third party

[22] The Council's committee report recommended enforcement action as well as a refusal of planning permission.

Representations were made to the effect that the rights of the [adjoining] occupier, Mr #, under the Human Rights Act 1998, Article 1 of the First Protocol, would be violated if the appeal were allowed. I do not consider this argument to be well-founded, because I have found that the proposed development would not cause unacceptable harm to the living conditions of Mr #. The degree of interference that would be caused would be insufficient to give rise to a violation of rights under Article 1 of the First Protocol.

Annexe 2: Public Sector Equality Duty - Example Wording

Planning Balance and Conclusion

I have had due regard to the Public Sector Equality Duty (PSED) contained in section 149 of the Equality Act 2010, which sets out the need to eliminate unlawful discrimination, harassment and victimisation, and to advance equality of opportunity and foster good relations between people who share a protected characteristic and people who do not share it. Since the appeal is made for the use of the land as a gypsy site and the current occupiers are Romany Gypsies, they are persons who share a protected characteristic for the purposes of the PSED.

It does not follow from the PSED that the appeal should succeed. However, the shortage of sites and the lack of any development plan policy for travellers may indicate inequality of housing opportunity for Romany Gypsies. The equality implications add weight to my overall conclusion that the appeal on ground (a) should be allowed and the deemed planning application should be approved.

Annexe 3: Court Cases Relating to Equality

***ISKCON v UK* (76ADR90) - decision of the European Commission on Human Rights**

ISKCON (International Society for Krishna Consciousness) had appealed against an enforcement notice in respect of the change of use of a manor in the Green Belt. The frequent attraction of large numbers of worshippers had created problems of traffic and disturbance. The Commission supported the approach taken by the Inspector, who recognised ISKCON's freedom to manifest its religion but considered that this was outweighed by other considerations.

***R. (on the application of Coleman) v Barnet LBC* [2012] EWHC 3725 (Admin)**

Judicial review of Local Planning Authority decision to grant permission for a school on a former garden centre regularly used by the disabled and the elderly – JR application dismissed – Equality Act duty discharged – Officer report had stressed implications of the Act were one of main planning issues – No doubt that officers and members had the statutory considerations in mind.

***R. (on the application of Harris) v Haringey LBC and Ors* [2010] EWCA Civ 703**

Race Relations Act 1976 (RRA 1976) case – Judicial review of Local Planning Authority decision to grant permission for redevelopment of an indoor market predominantly occupied by members of black and ethnic minority communities – JR application granted by Court of Appeal reversing High Court ruling – Local Planning Authority's reliance on existence of development plan policies promoting the welfare of ethnic minority communities was not sufficient to discharge the duty, as the policies did not specifically address the requirements imposed on the LPA by the RRA 1976, which should have formed an integral part of the decision-making process.

***R. (on the application of G & M Isaacs v SSCLG & Anor* [2009] EWHC 557 (Admin)**

Gypsy case – s288 appeal against an Inspector's decision to refuse permission for residential use of a site by gypsies – Although Inspector had not specifically referred to his statutory duty under the Race Relations Act 1976 (RRA 1976) that did not mean he had not taken it into account, and in seeking to apply policies which had the RRA 1976 considerations in mind, he was having regard to the RRA 1976 duty – Appeal allowed on other grounds. In the light of subsequent judgments such as *Coleman*, it is advised to make reference to the 'due regard' duty where appropriate.

***R. (on the application of Brown) v SofS for Work & Pensions* [2008] EWHC 3158 (Admin)**

Disability Discrimination Act 1995 case – Judicial review relating to post office closure programme – JR application dismissed – clear principles to be applied in assessing whether 'due regard' had been had in any particular case. The Council must be aware of the duty under the Act, due regard must be exercised with 'rigour' and not just ticking boxes, it is good practice to make specific reference to the duty, and it is good practice to keep an adequate record showing that the duty was considered. No duty on public authorities to carry out a formal disability equality impact assessment, at most a duty to consider whether such a formal assessment was appropriate with other means of gathering information, when a function or policy would or might impact on disabled persons.

***R. (on the application of Baker & Ors) v SSCLG & Ors* [2008] EWCA Civ 141**

Gypsy case – s288 appeal against an Inspector's decision to refuse permission for residential use of a site by gypsies – Although the Inspector had not specifically referred to her statutory duty under the Race Relations Act 1976, that did not mean she had not taken it into account, though it was good practice to make reference to it in all cases where it was in play as that was more likely to ensure the relevant factors were taken into account and reduce scope for argument as to whether the duty had been carried out. In the light of subsequent judgments such as *Coleman*, it is advised to make reference to the 'due regard' duty where appropriate.

***Moore & Coates v SSCLG* [2015] EWHC 44 (Admin)**

Judicial review of the Secretary of State's decision to recover two Gypsy and Traveller appeals in the green belt for his own determination. Both applications were successful and the two recovery decisions in question were quashed. The Court held that: the Secretary of State's recovery practice pursuant to the Written Ministerial Statements (WMSs) indirectly discriminated against Gypsies and Travellers; the Secretary of State had no regard at all to his Public Sector Equality Duty when issuing the WMSs or when recovering the individual appeals; recovery of Traveller appeals caused unreasonable delay in breach of Article 6 ECHR; as regards WMS1 the Secretary of State was operating contrary to his published policy (by recovering all appeals when he said he would not), and hence unlawfully.

***R (West Berkshire DC & Reading BC) v SSCLG* [2015] EWHC 2222 (Admin)**

Judicial review of SSCLG's decision to: (a) amend policy in respect of planning obligations for affordable housing and social infrastructure contributions so as to provide that such contributions should not be sought in respect of developments comprising 10 or fewer dwellings; and (b) maintain those policy changes following an Equality Impact Assessment after complaint that he had not complied with his PSED in making his original decision.

The challenge was successful in the high court on all grounds. In relation to the PSED the Court considered that whilst it is correct that the court has the discretion to refuse to quash a decision if the PSED was not complied with, the exercise of that discretion needs to be seen in the context of the fundamental and well-established principle

that there must be compliance with the PSED before the decision in question is taken, because that process is meant to inform and influence the decision.

The judge concluded that the PSED had not been complied with because:

(i) The SSCLG did not take adequate steps to obtain relevant information in order to comply with the PSED, in particular to obtain necessary evidence where it was not immediately available;
(ii) The duty was not fulfilled in substance and with rigour;
(iii) The SSCLG did not assess the extent and risk of certain adverse impacts upon persons with protected characteristics; and
(iv) The exercise was not carried out with a sufficiently open mind.

An appeal has been made by SSCLG to the Court of Appeal.

***Hotak v LB of Southwark* [2015] UKSC 30**

Three cases before the Supreme Court were grouped together in the Court's judgment, relating to challenges to Local Authority decisions on whether the claimants were "vulnerable" for the purposes of the Housing Act 1996 s.189(1)(c). The Supreme Court summarises and confirms the relevant principles of the Equality Act in this judgment:

"The equality duty has been the subject of a number of valuable judgments in the Court of Appeal. Explanations of what the duty involves have been given by Dyson LJ (in relation to the equivalent provision in the Race Relations Act 1976) in Baker v Secretary of State for Communities and Local Government [2008] EWCA Civ 141, [2009] PTSR 809, paras 30-31,Wilson LJ (in relation to section 49A of the Disability Discrimination Act 1995, as inserted by section 3 of the Disability Discrimination Act 2005, the predecessor of section 149 of the 2010 Act) in Pieretti v Enfield London Borough Council [2010] EWCA Civ 1104, [2011] PTSR 565, paras 28 and 32, and McCombe LJ in Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345, [2014] Eq LR 40, para 26 which pulls together various dicta, most notably those of Elias LJ in R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin), paras 77-78 and 89…

As Dyson LJ emphasised, the equality duty is "not a duty to achieve a result", but a duty "to have due regard to the need" to achieve the goals identified in paras (a) to (c) of section 149(1) of the 2010 Act. Wilson LJ explained that the Parliamentary intention behind section 149 was that there should "be a culture of greater awareness of the existence and legal consequences of disability". He went on to say in para 33 that the extent of the "regard" which must be had to the six aspects of the duty (now in subsections (1) and (3) of section 149 of the 2010 Act) must be what is "appropriate in all the circumstances". Lord Clarke suggested in argument that this was not a particularly helpful guide and I agree with him. However, in the light of the word "due" in section 149(1), I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment.

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

***R. (oao Patel) v SSCLG & Billy Johal & Wandsworth BC* [2016] EWHC 3354 (Admin)**

It was held that the Inspector was not obliged by s149 of the Equality Act 2010 to find some countervailing public benefit to set against the greater disadvantage of the longer journey or the loss of retail services, before she could reach a lawful decision on the prior approval appeal. The question to decide under the GPDO was still the same.

S149 requires decision makers to be properly informed of the issues but it did not require the Inspector to give any particular weight to the needs of the elderly or disabled in this case or to achieve an outcome which advantaged them or disadvantaged them the least.