Claim No

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

BETWEEN

THE KING
(on the application of the FREE SPEECH UNION LIMITED)

Claimant

-and-

SECRETARY OF STATE FOR EDUCATION

Defendant

-and-

(1) THE OFFICE FOR STUDENTS
(2)THE DIRECTOR FOR FREEDOM OF SPEECH AND ACADEMIC FREEDOM

Interested Parties

STATEMENT OF FACTS AND GROUNDS

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*References below: to the bundle filed with the claim, are in the form **[CB/tab/Page]**; and to witness statements are in the form (witness's initials and paragraph) e.g (BH §**).*

A. INTRODUCTION

1. The claimant ("**FSU**") challenges the decision of the Secretary of State for Education ("**SSE**") not to implement the main provisions of The Higher Education (Freedom of Speech) Act 2023 ("**HEFSA**") and to make The Higher Education (Freedom of Speech) Act 2023 (Commencement No. 2) (Revocation) Regulations 2024 (SI 2024/824) ("**the Revocation Regulations**").

2. The Revocation Regulations were made on 25 July 2024. They purport to revoke the Higher Education (Freedom of Speech) Act 2023 (Commencement No.2) Regulations (SI 2024/566) (the "**Second Commencement Regulations**"). The Second Commencement Regulations provide for the coming into force of the majority of the provisions of HEFSA on 1 August 2024 (the "**Relevant Provisions**"). Broadly, the Relevant Provisions create new rights and duties, and a regulatory system for the

enforcement of those rights and duties, relating to the exercise of free speech in higher education institutions.

3. The Second Commencement Regulations represent the last in a series of stages by which HEFSA came into effect. HEFSA itself brought certain of its provisions into effect on 11 May 2023 and 12 July 2023; and a first set of regulations, The Higher Education (Freedom of Speech) Act 2023 (Commencement No. 1) Regulations 2023 2023/809 ("**First Commencement Regulations**") brought certain other of its provisions into effect on 14 August 2023. It is not in dispute that those provisions are untouched by the Revocation Regulations. They remain in force.

4. SSE has acted unlawfully:

   (i) she has acted *ultra vires*. In deciding that the main provisions of HEFSA should not be implemented, she has acted with an unauthorised purpose (or dominant purpose), that is for a purpose other than that for which the commencement power was conferred, or has failed to promote, or has frustrated, the policy and objects of the legislation. Further, her action strips provisions of HEFSA already in force of effect ("**Ground 1**");

   (ii) she has breached the public sector equality duty ("**PSED**") ("**Ground 2**").

5. Resolution of the claim is urgent. If, as FSU contends, the Revocation Regulations are *ultra vires*, they are a nullity, and the Second Commencement Regulations, which brought the Relevant Provisions into effect on 1 August 2024, stand. Resolution of the claim will thus determine the state of the law. It is imperative for legal certainty that the wide range of persons including higher education providers, the Interested Parties (as regulators), and students, know where they stand. An application for expedition, including a rolled-up hearing, is made with the claim.

B. BACKGROUND

(i) The Claimant

6. FSU is a non-partisan, mass membership public interest body which seeks to vindicate the speech rights and interests of its members and campaigns for free speech more

widely. A detailed explanation of the role and expertise of the FSU is set out in the witness statement of Bryn Harris (BH2 §§ 6-14) **[CB1/11/78-81]**. The FSU aligns with no particular political or other viewpoint: it seeks to advance freedom of speech of all sorts. The FSU has had significant concerns about the curtailment of freedom of speech in higher education as set out in Mr Harris' statement. Such curtailment may manifest in public "cancelling" of academics for lawful free speech, as in the cases of Professor Kathleen Stock, Professor Jo Phoenix or Professor Rosa Freedman, or in the prosecution of disciplinary investigations for stating lawful but unpopular opinions, or in challenging students to think critically (BH2 § 38) **[CB1/11/91-92]**.

7. FSU's legal and legislative affairs teams played a significant role in the development of the HEFSA as explained in the witness statement of Mr Harris (BH2 § 11) **[CB1/11/79-80]**. Since the passing of HEFSA, it has been involved in each of the consultations run by the Office for Students ("**OfS**") on the new duties established by HEFSA, and advised a number of Universities on their obligations under the Act.

8. There is no dispute as to the standing of FSU to bring this claim.

(ii) HEFSA

9. HEFSA received Royal Assent and became law on 11 May 2023. Its Preamble states that it is "*to make provision in relation to freedom of speech and academic freedom in higher education institutions and in students' unions; and for connected purposes*" **[CB2/55/1059]**.

10. HEFSA primarily amends the Higher Education and Research Act 2017 ("**HERA 2017**"), as well as making amendments to the Counter-Terrorism and Security Act 2015, the Higher Education Act 2004, and the Education (No. 2) Act 1986.

11. HERA 2017 established the Office for Students ("**OfS**") as the regulator for higher education providers, including universities, and provides for its functions.

12. HEFSA introduces a range of measures aimed at strengthening freedom of speech "*within the law*" and academic freedom in higher education. In summary it:

    a. provides for new duties on higher education providers (as well as on "constituent institutions" of providers and students' unions at certain providers) including to

take steps to secure freedom of speech (the "**secure duty**") and to maintain freedom of speech codes of practice: sections 1-3. In short the secure duty is to take "reasonably practicable" steps to secure freedom of speech "within the law" for staff, members, students and visiting speakers, and to secure the academic freedom of staff. It embraces an obligation not to enter into non-disclosure agreements (see section 1(11)) **[CB2/55/1060]**;

b. establishes a new complaints scheme to be operated by the OfS, allowing that in certain circumstances compensation may be sought for loss suffered as a result of the breach of the secure duty (section 8) **[CB2/55/1068-72]**;

c. creates a new member of the OfS - a "Director for Freedom of Speech and Academic Freedom" - with responsibility for overseeing the performance of, in certain cases performing, and reporting to other OfS members on the performance of "free speech functions", which include the provision of the above complaint scheme (section 10) **[CB/54/1075]**;

d. creates a new statutory tort, enabling individuals (who have already received a determination on a complaint of breach of the secure duty) to seek redress for loss they have suffered as a result of a breach (section 4) **[CB2/55/1065]**;

e. introduces new transparency measures concerning the risk which overseas funding may present to freedom of speech and academic freedom (section 9) **[CB2/55/1072-74]**.

13. Before it was passed, HEFSA was extensively considered in Parliament: (BH2 §§ 41-113) **[CB1/11/95-114]**. This included consideration of a very wide range of issues, including concerns raised by what was then Her Majesty's Opposition and opponents of the legislation or of the legislation in the form in which it was being proposed at different stages. Among the concerns considered were:

a. whether HEFSA could harm student welfare, or could protect those using hate speech on campuses, or could push higher education providers to overlook the safety and wellbeing of minority groups, including Jewish students (BH2 §§ 51-63) **[CB1/11/97-100]**;

b. whether HEFSA could expose higher education providers to costly legal action that would impact teaching and learning (BH2 §§ 98-111) **[CB1/11/111-13]**;

c. the implications of the new tort, including whether it would place a disproportionate burden including on students' unions (e.g. BH2 §§ 59-66) **[CB1/11/99-101])**;

d. the consequences for delivering English higher education in foreign countries which have restrictions on free speech and the costs of overseas transparency requirements (BH2 § 74) **[CB1/11/104]**;

e. evidence from further education colleges on the provisions in HEFSA (e.g. BH2 §§ 63) **[CB1/11/100])**.

14. The Parliamentary process naturally allowed for consideration of, and involved the consideration of, amendments. The Act as passed by Parliament represents the culmination of that process.

(iii) Commencement of HEFSA

15. Under the heading "*Commencement*", section 13 of HEFSA provides for different stages at which HEFSA was to be, and must be, brought into force **[CB2/55/1076-77]**:

> *"13 Commencement*
>
> *(1) The following provisions of this Act come into force on the day on which this Act is passed –*
> *(a) section 7, so far as is necessary for enabling the exercise on or after the day on which this Act is passed of the powers to make regulations conferred by section 69B(3) and (4) of the [HERA 2017] (inserted by section 7);*
> *(b) section 9, so far as is necessary for enabling the exercise on or after the day on which this Act is passed of the powers to make regulations conferred by section 69D of the [HERA 2017] (inserted by section 9);*
> *(c) section 12;*
> *(d) this section;*
> *(e) section 14;*
> *(f) paragraph 11 of the Schedule.*
>
> *(2) Paragraph 9 of the Schedule comes into force at the end of the period of two months beginning with the day on which this Act is passed.*

(3) The other provisions of this Act come into force on such day as the Secretary of State may by regulations made by statutory instrument appoint.

(4) Different days may be appointed for different purposes.

(5) Regulations under subsection (3) may include transitional provision and savings." (emphasis added).

16. Accordingly, it provides for commencement in three stages:

    (i) First, by section 13(1), certain provisions came into force on the day on which the Act was passed (11 May 2023). In summary, these empowered the Secretary of State to make regulations on the determination of monetary penalties by the OfS (section 7(3)/(4)), and regulations concerning the OfS's duty to monitor overseas funding of higher education providers (section 9(9)/(10)/(11)).

    (ii) Secondly, by section 13(2), paragraph 9 of the Schedule came into force two months later (11 July 2023). That amended section 75 of the HERA 2017, which requires the OfS to prepare and publish a "regulatory framework", so as to: include a requirement that the framework include guidance for students' unions on their duties under HEFSA to take steps to secure freedom of speech and to maintain a free speech code of practice (see section 75(3)(c)/(7A)/(7B)); and to extend the consultation duty in respect of the framework to such guidance (see section 75(8)).

    (iii) Thirdly, the remaining provisions "*come into force on such day as the Secretary of State may by regulations made by statutory instrument appoint*": section 13(3).

17. During the passage of HEFSA through Parliament, the Government published a Memorandum from the Department for Education to the Delegated Powers and Regulatory Reform Committee dated May 2021 (the **"Memorandum**") **[CB1/23]**. The Memorandum identified the provisions in the Bill that conferred powers to make delegated legislation. It explained in each case why the power had been taken and the nature of, and the reason for, the procedure selected.

18. In relation to section 13 (then clause 11 of the Bill), the Memorandum stated as follows **[CB1/23/262-63]**:

> "***Context and Purpose***
>
> *22. Clause 11(1) and (2) brings certain provisions of the Bill into force on the day on which the Act is passed and two months afterwards. Clause 11(3) gives the Secretary of State power to bring the remaining provisions of the Bill into force on such day as the Secretary of State may appoint by regulations. Clause 11(4) provides that different days may be appointed for different purposes. Clause 11(5) provides that the commencement regulations under subsection (3) may include transitional or saving provision.*
>
> ***Justification for taking the power***
>
> *23. This power will enable the Secretary of State to commence the main provisions of the Bill at a suitable time. This will allow time for the OfS to create the complaints scheme and consult on the changes required as appropriate, as well as for the sector to prepare for the changes.*
>
> *24. There are numerous examples of powers to make commencement regulations for the substantive provisions of the Bill, without a parliamentary procedure applying.*
>
> *25. Clause 11(5) ensures that the Secretary of State can provide a smooth commencement of the new legislation and transition between existing legislation and the Bill, without creating any undue difficulty or unfairness in making these changes. This may arise, for example, in relation to making clear how the new complaints scheme created by the Bill should deal with complaints regarding conduct prior to the coming into force of the Bill provisions, alongside conduct occurring afterwards.*
>
> ***Justification for the procedure***
>
> *26. The Department considers that the power to make commencement regulations does not need to be subject to any parliamentary procedure as it only sets the date on which the new provisions will come into force. The substance of those provisions will be considered during the passage of the Bill through Parliament. This also applies to the related power to make transitional provision and savings, which is intended to ensure a smooth transition between existing law and the Bill and will only deal with technical aspects of that which will have a temporary effect*". (emphasis added)

19. Accordingly, rather than the Act itself providing for a date for the commencement of the remaining provisions (i.e. "the other provisions of this Act", as referred to in section 13(3) HEFSA), Parliament empowered the Secretary of State to commence them on a date to be appointed by regulations, in order to "*allow time for the OfS to create the complaints scheme and consult on the changes required as appropriate, as well as for the sector to prepare for the changes*". It was no part of the purpose of the power in section 13(3)-(5), to allow the Secretary of State to stop, or to pause indefinitely, commencement of

the remaining provisions (for instance on the basis of opposition to or concern about the law embodied by the remaining provisions), or to pause their commencement temporarily in order to consider achieving some alternative to that law.

(iv) The Commencement Regulations

20. On 17 July 2023, the Secretary of State made the First Commencement Regulations **[CB2/56]**. Regulation 2 of the First Commencement Regulations provided that various provisions of HEFSA would come into force on 14 August 2023. These included section 10 HEFSA.

21. As explained at § 12(c) above, section 10 of HEFSA established the Director for Freedom of Speech and Academic Freedom ("**the Free Speech Director**") as a member of the OfS, with responsibility in relation to "free speech functions", namely the functions of the OfS in Schedule 6A, Section 8A, and Sections 69A-69E of HERA 2017.

22. Professor Arif Ahmed OBE, a distinguished professional academic with particular experience in free speech issues, was appointed the Free Speech Director, and he remains as such.

23. On 25 April 2024, the Secretary of State made the Second Commencement Regulations **[CB2/57]**. Regulation 2 of the Second Commencement Regulations lists provisions of HEFSA to come into force on 1 August 2024, and Regulation 3 those to come into force on 1 September 2025, as follows:

1 August:

1. section 1 (duties of registered higher education providers);
2. section 2 (duties of constituent institutions);
3. section 3 (duties of students' unions);
4. section 4 (civil claims);
5. section 5 (general functions);
6. section 7 (regulation of duties of students' unions) insofar as it is not already in force;
7. section 8 (complaints scheme);
8. section 11 (minor and consequential amendments) insofar as it relates to the provisions set out in paragraphs (i) and (j);
9. paragraph 1 of the Schedule (minor and consequential amendments) insofar as it relates to the provisions set out in paragraph (j);
10. the remaining paragraphs of the Schedule insofar as they are not already in force, except for paragraph 3.

1 September 2025:

(a) section 6 (regulation of duties of registered higher education providers);
(b) section 9 (overseas funding) insofar as it is not already in force;
(c) section 11 (minor and consequential amendments) insofar as it is not already in force;
(d) the Schedule (minor and consequential amendments) insofar as it is not already in force.

24. Put in simple and summary terms, the Second Commencement Regulations provided for the coming into force on 1 August 2024 of: the new duties, the new complaints scheme, and the new tort; and provides for the coming into force on 1 September 2025 of the new transparency measures.

(v) Purported revocation of the Second Commencement Regulations

25. On 25 July 2024, the Secretary of State made the Revocation Regulations **[CB1/4]**. The Long Title to the Revocation Regulations identify the power under which they were purportedly made as section 13(3) and (4) of HEFSA.

26. By regulation 2 of the Revocation Regulations, the Second Commencement Regulations were purportedly revoked. The Explanatory Note of the Revocation Order states that as a result, those provisions of the HEFSA, as listed in regulations 2 and 3 of the Second Commencement Regulations (see above), will no longer come into force on 1 August 2024 and 1 September 2025 respectively **[CB1/4]**.

(vi) The Secretary of State's Statements

27. On 26 July 2024, the Secretary of State made statements relating to the Revocation Regulations ("**the Statements**"). By the Statements, she identified the nature of what she had decided, and her purpose in acting.

28. First, she made a written statement to Parliament, stating **[CB1/5/53]**:

> *"Lastly, I have written to colleagues separately about my decision to stop further commencement of the Higher Education (Freedom of Speech) Act 2023, in order to consider options, including its repeal. I am aware of concerns that the Act would be burdensome on providers and on the OfS, and I will confirm my long-term plans as soon as possible. To enable students to thrive in higher education, I welcome the OfS's plans to introduce strengthened protections for students facing harassment and sexual misconduct, including relating to the use of non-disclosure agreements in such cases by universities and colleges."* (emphasis added)

29. Secondly, she sent a letter to all Members of Parliament, stating **[CB1/6/54-55]**:

> *"I am writing to inform you that I have today revoked the second commencement regulations made under the Higher Education (Freedom of Speech) Act 2023 (c. 16) (the Act) earlier this year. The previous Secretary of State made these Regulations in exercise of the powers conferred by section 13(3) and (4) of the Higher Education (Freedom of Speech) Act, powers I now use to revoke them.*
>
> *[…]*
>
> *During the passage of the Bill, Peers from all parties raised concerns about elements of this Act: from concern about the implications of the tort, to fears that students' unions were not equipped to fulfil their new duties. Many felt that the burden that the Act would impose was not outweighed by the issues it intended to solve. We also know that many in the higher education sector feel that the Act is disproportionate, burdensome and damaging to the welfare of students. I am concerned that it will expose higher education providers to costly legal action, and I have listened to Jewish groups and unions representing university staff and students who are concerned that fear of sanction will push providers to overlook the safety and well- being of minorities.*
>
> *I have therefore made the decision to stop further commencement of the Act, and I am considering options, including its repeal. I intend to confirm as soon as possible my longer-term plans. I recognise that this decision at short notice could be frustrating for those who have put significant work into preparing for these new duties, but I am confident it is the right approach.*
>
> *I know that many of you supported the provisions in the Act which banned non-disclosure agreements at higher education providers, where there have been instances of sexual misconduct, bullying or harassment. I am therefore very pleased that the Office for Students (the OfS) is planning to introduce strengthened protections for students facing harassment and sexual misconduct, including relating to the use of NDAs in such cases by universities and colleges."* (emphasis added)

30. Thirdly, she made a statement published on the Government website, which stated **[CB1/7/59]**:

> *"For too long, universities have been a political battlefield and treated with contempt, rather than as a public good, distracting people from the core issues they face. The steps announced today will sharpen the focus of the Office for Students, with greater emphasis on ensuring the financial stability of the sector.*
> *We are absolutely committed to freedom of speech and academic freedom, but the Free Speech Act introduced last year is not fit for purpose and risked imposing serious burdens on our world class universities.*
> *This legislation could expose students to harm and appalling hate speech on campuses. That is why I have quickly ordered this legislation to be stopped so that we can take a view on next steps and protect everyone's best interests, working closely with a refocussed [sic] Office for Students."* (emphasis added)

31. The above represent the only public statements made personally by the Secretary of State as to the nature of her decision and reasons.

32. [redacted]

[redacted]

33. [redacted]

34. [redacted]

35. Her reasons, as given in her Statements, relate exclusively to opposition to, objection to, or concern about the law as embodied in the Act. Her letter to MPs identified such and stated that she had "*therefore*" decided to stop further commencement **[CB1/6/55]**. In her website statement she has disclosed her unambiguous view that the Act "*is not fit for purpose*" for reasons she gave, and explained "*that is why I have quickly ordered this legislation to be stopped*" **[CB1/7/59]**.

36. [redacted]

37. It was no part of the Secretary of State's purpose, far less her predominant purpose, to make the Revocation Regulations in order for the OfS or the sector to prepare for the changes provided for by Parliament in HEFSA, or to allow for consideration of *commencement* of the Relevant Provisions. The purpose of the Revocation Regulations was to allow for consideration of how best *not to commence* the Relevant Provisions. The Secretary of State has not acted positively intending to commence them in the

future on some later date. She has said she wishes to consider her "options". [redacted] those "*options*" do not include commencing the Relevant Provisions.

C. GROUNDS FOR JUDICIAL REVIEW

Ground 1: ultra vires

38. As the source of her *vires* to make the Revocation Regulations, the Secretary of State has relied solely on section 13(3)/(4) of HEFSA. The purpose of section 13(3) (to which section 13(4) relates) is explained above. It was recognised that, unlike provisions to be brought into force on dates set by the legislation itself, flexibility was needed as to the date on which the remaining provisions would come into force, in order to allow time for the OfS to create the complaints scheme and consult on the changes required as appropriate, as well as for the sector to prepare for the changes. That was the purpose for which the Secretary of State was given the power in section 13(3)/(4).

39. In this case, the Secretary of State has not made the Revocation Regulations in order to allow time for the matters above. Indeed, for instance, the OfS had conducted the necessary consultations: see (BH2 §§ 122-125) **[CB1/11/117]**. Instead, the Secretary of State has acted for a different purpose. She has acted for the purpose of "*stopping*" the Relevant Provisions from ever coming into force. That is a purpose not authorised by section 13(3). She has thus acted with an unauthorised purpose (or dominant purpose), and/or failed to promote, or frustrated, the policy and objects of the legislation.

40. Even if, alternatively, she has acted with the intention that the Relevant Provisions *may* be commenced at some future date [redacted] she has not done so for a reason consistent with the policy of the legislation, but rather because she wishes to consider alternative "options" *other than* commencement. That was also to act with unauthorised purpose or dominant purpose and/or to fail to promote, or to frustrate, the policy and objects of the legislation. Even on that alternative basis, the Secretary of State has acted *ultra vires*.

41. The circumstances in which a Minister may lawfully decline to exercise, or delay the exercise of, a commencement power, were considered in *R v Secretary of State for the*

Home Department ex parte Fire Brigades Union [1995] 2 AC 513 ("***FBU***"**[CB2/58]**) and further explained in R (Prichard) v Secretary of State for Work and Pensions [2020] EWHC 1495 (Admin); [2020] P.T.S.R. 2255 ("***Prichard***"**[CB2/59]**).

42. *FBU* concerned commencement powers given to the Secretary of State in relation to a statutory criminal injuries compensation scheme, self-contained within sections 108-117 and Schedules 6 and 7 of the Criminal Justice Act 1988 (the "**1988 Act**"). None of the provisions of the compensation scheme came into force immediately on Royal Assent of the 1988 Act or at any pre-determined date [**CB2/58/1132/F**]. Section 171 of the 1988 Act provided for a commencement power similar to that in section 13 of HEFSA.

43. A majority of their Lordships held that the Secretary of State had acted *ultra vires* in deciding not to bring the scheme into force.

44. Lord Lloyd of Berwick construed section 171 as providing that the sections providing for the scheme "*shall come into force when the Home Secretary chooses, and not that they may come into force if he chooses. In other words, section 17 l confers a power to say when, but not whether… The Home Secretary has power to delay the coming into force of the statutory provisions in question; but he has no power to reject them or set them aside, as if they had never been passed."* [**CB2/58/1155-56**].

45. Lord Nicholls of Birkenhead identified the purpose of section 171 as being "*to facilitate bringing legislation into force",* and explained:

> *Parliament enacts legislation in the expectation that it will come into operation. This is so even when Parliament does not itself fix the date on which that shall happen. Conferring power on the executive to fix the date will often be the most convenient way of coping with the practical difficulty that, when the legislation is passing through Parliament, it is not always possible to know for certain what will be a suitable date for the legislation to take effect. Regulations may need drafting, staff and accommodation may have to be arranged, literature may have to be prepared and printed. There may be a host of other practical considerations. A wide measure of flexibility may be needed. So the decision can best be left to the minister whose department will be giving effect to the legislation when it is in operation. He is given a power to select the most suitable date, in the exercise of his discretion* [**CB2/58/1159**].

46. Lord Nicholls clarified that "*the obligation will only cease when the power is exercised, or Parliament repeals the legislation*" **[CB2/58/1160/H]**. The Minister cannot exercise the power in a manner, or for a purpose, inconsistent with the Secretary of State's continuing to perform the duty **[CB2/58/1161/A]**.

47. Lord Browne-Wilkinson explained, at **[CB2/58/1135-36]**, that section 171 did not import an unfettered discretion, since: "*So to hold would lead to the conclusion that both Houses of Parliament had passed the Bill through all its stages and the Act received the Royal Assent merely to confer an enabling power on the executive to decide at will whether or not to make the parliamentary provisions a part of the law*". His Lordship construed section 171 as being a power to be exercised "*so as to bring the relevant provisions into force when it is appropriate and unless there is a subsequent change of circumstances which would render it inappropriate to do so*". The Minister could not "*lawfully surrender or release the power … so as to purport to exclude its future exercise either by himself or by his successors*".

48. The speeches of the majority were examined in depth by Laing J (as she then was) in *Pritchard* (see [75]-[80] **[CB2/59/1178-79]**). Having conducted that exercise, her Ladyship analysed the position as follows:

> *"123. Although the FBU case concerns a refusal to commence legislation, rather than a decision to commence it, the speeches of the majority explain (absent section 149) some of the principles which govern the exercise of a power to commence legislation. I reject the submission (if made) that a minister may decide not to commence legislation if a change in circumstances makes it inappropriate to commence it, if it suggested that a mere minister may, in effect, decide not to commence legislation at all. I do not consider that Lord Browne-Wilkinson intended to go that far; but if he did, there is no support for that approach in the speeches of the two other members of the majority. The commencement power is conferred for the purpose of bringing legislation into force. Commencement may be delayed if, for reasons which are consistent with the policy of the legislation, it is thought better to postpone commencement, for example, while practical or administrative arrangements are made. But the power is not conferred for the purpose of delaying commencement indefinitely, still less for the purpose of enabling a minister to go introduce a policy which is inconsistent with the policy of un-commenced legislation, unless Parliament repeals the un-commence legislation."*

49. Accordingly, in referring in *FBU* to "*a subsequent change of circumstances*" or "*events which subsequently occur*", Lord Browne-Wilkinson was <u>not</u> envisaging that a Minister could lawfully decide that legislation should never be commenced because of such circumstances or events. Further, any delay in commencement must be "*consistent with*

the policy of the legislation". An example of delay inconsistent with the policy of the legislation given in *Prichard* is a delay for the purpose of enabling the Minister to introduce a policy inconsistent with the policy of the un-commenced legislation. So too would be a delay to introduce or consider the introduction of a law alternative to the un-commenced law. Delaying commencement in order to consider some law alternative to that provided for in un-commenced legislation is inconsistent with Parliament's intention in that legislation as to what the law should be.

50. All this reflects Parliamentary sovereignty as described in section 1 of the Bill of Rights 1688: the Executive has no right to suspend, dispense with, override or ignore legislation passed by Parliament, without Parliament's consent.

51. Applying those principles, the Secretary of State has acted beyond her powers, either by acting with the intention that the Relevant Provisions should not come into force, or (if alternatively she intended that they may come into force) by delaying their coming into force in a way inconsistent with the policy of the legislation, namely to considering some law alternative to that provided for in the legislation.

52. The Defendant's letter responding to FSU's letter before claim ("**PAPR**") provides no answer to the above **[CB1/14]**.

53. The Secretary of State relies on section 14 of the Interpretation Act 1978 **[CB2/54/1019]**, which provides that where an Act confers power to make regulations or subordinate legislation to be made by statutory instrument, "*it implies, unless the contrary intention appears, a power, exercisable in the same manner and subject to the same conditions or limitations, to revoke … any instrument made under the power*" (emphasis added). Even if section 14 allows for the repeal of regulations or a statutory instrument commencing provisions of primary legislation, the exercise of the repeal power is accordingly still subject to the principles above. The repeal will be *ultra vires* if the Secretary of State acts in breach of those principles, and she has. Section 14 therefore does not help.

54. [redacted]

[redacted] The purpose or purposes for which a public body has in fact acted (as with the ascertainment of the purpose for which a statutory power was conferred) are matters for the Court: *Sydney Municipal Council v Campbell* [1925] AC 338 at [343]. The Court will not simply defer to the public body's statement as to what its purpose or purposes were: see e.g. *Webb v Minister of Housing and Local Government* [1965] 1 WLR 755 at [777/H]. In light of the Statements, the Court should regard the Secretary of State's true purpose or dominant purpose as being clear, namely as being not to commence the Relevant Provisions rather than to delay their commencement or possible commencement.

55. That is *ultra vires* in its own right. Additionally, the effect is unlawfully to strip provisions of HEFSA already brought into force of their effect: see *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); [2017] 1 All ER 158 at [98]-[101]. For instance, the obligation on the OfS now imposed by section 75 of HERA to amend its regulatory framework to include guidance on the secure duty of students' unions is rendered ineffective absent the secure duty. It is inconsistent with Parliament's intention that there should be such guidance about the duty, that there should be no duty. As Lord Reed (with whom Lord Hope, Lady Hale, Lord Wilson and Lord Carnwath agreed) explained in *M v Scottish Ministers* [2012] UKSC 58; [2012] 1 WLR 3386: "*Parliament is not given to idly passing legislation. As Viscount Simon LC observed in Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014, 1022, Parliament would legislate only for the purpose of bringing about an effective result. Its intention can ordinarily be taken to be that an enactment, when brought into force, will not be futile but will have practical consequences for the life of the community*". Similarly, the Free Speech Director's ability to discharge his responsibilities in relation to the "free speech functions", which include (for instance) providing for the complaints scheme, is rendered ineffective absent the complaints scheme.

56. In any event, simply as a matter of logic, the only possible view of the Secretary of State's consideration of "*options, including repeal*" is that her intention was that the Relevant Provisions *might* never be commenced. Any "pause" must be in order to consider whether a law alternative to that provided for by Parliament should be the law instead. The purpose of such a "pause" is inconsistent with Parliament's intention, embodied by the Relevant Provisions, as to what the law should be, and so *ultra vires.*

57. The consequence is that the Revocation Regulations are a nullity. It is well settled (including in the familiar line of authority from *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 to *Boddington v. British Transport Police* [1999] 2 AC 143) that an act or order which is *ultra vires* is "*a nullity, utterly without existence or effect in law*", at least once so declared by the Court. Delegated legislation will be so declared if it is made for a purpose or has an effect that is outside the scope of the enabling power: *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39; [2016] AC 1531 at [23]. In the present case it follows that the properly passed Second Commencement Order has effect, and the Relevant Provisions are in force. This involves no trespass by the Courts into the domain of the legislature. It simply gives effect to Parliament's intention. Each stage of the commencement of HEFSA took place in accordance with that intention, but the Revocation Regulations were outside it.

Ground 2: breach of public sector equality duty

58. The Secretary of State has failed to comply with her public sector equality duty under section 149 of the Equality Act 2010 ("**EqA**") ("**PSED**").

59. The PSED is contained in section 149(1) of the EqA 2010. Section 149(1) of the EqA 2010 obliges a public authority, "in the exercise of its functions", to have "due regard" to the equality needs listed in section 149(1)(a), (b) and (c). Those are the needs 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'.*

60. Section 149(3) explains that having due regard to the need described:

> *'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;*
>
> *(b) 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;*
>
> *(c) 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.'*

61. The relevant 'protected characteristics' are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation: section 149(7).

62. The PSED applies to the making of regulations and commencement orders: *Pritchard*.

63. In *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058; [2020] 1 WLR 5037 ("***Bridges***") the Court of Appeal distilled the following core principles applicable to the PSED (at [175]) (derived from the well-known principles set out by McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] EqLR 60, [25] – [26]):

> *"(1) The PSED must be fulfilled before and at the time when a particular policy is being considered.*
>
> *(2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.*
>
> *(3) The duty is non-delegable.*
>
> *(4) The duty is a continuing one.*
>
> *(5) If the relevant material is not available, there will be a duty to acquire it […].*
>
> *(6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality goals and the desirability of promoting them, then it is for the decision-maker*

to decide how much weight should be given to the various factors informing the decision."

64. As regards the fifth of the principles identified in *Bridges*, that is the duty of inquiry, the Court of Appeal explained that this *"requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics"*: [181]. The Court explained that *"[t]he whole purpose of the positive [s.149] duty (as opposed to the negative duties in the Equality Act 2010) is to ensure that a public authority does not inadvertently overlook information which it should take into account"*: [182].

65. The Secretary of State's response in her PAPR is cursory. It contains little more than a mere assertion that she had "*due regard*". No evidence or even detail is provided **[CB1/14/152]**.

66. The PAPR asserts that "*equality considerations were a key part of the decision to pause the implementation*" **[CB1/14/152]**. [redacted]. The decision was not to maintain the status quo; it was that the Act should not be implemented. What required to be considered was the equalities implications of not implementing an Act which, it ought to have been obvious, would improve the equalities position of a number of protected groups – such as, simply by way of example, those possessing 'gender critical' views protected by section 10 EqA. No remotely adequate level of analysis was done.

67. The Secretary of State is further wrong to suggest that the onus is on the FSU to identify the considerations to which she should have had regard and that a failure to do so is "*fatal*" **[CB1/14/152]**. Absent a satisfactory equalities impact assessment, the Secretary of State is required to prove that she had the necessary regard. As Swift J explained in *R (oao Drexler) v Leicestershire County Council* [2019] EWHC 1934 (Admin): "*In all*

instances, there must be evidence that demonstrated to the satisfaction of the court that the public authority took its decision with the statutory criteria properly in mind": [65].

D. RELIEF

68. The Claimant seeks:

a. a declaration that in acting as set out in paragraph 1 above, the Secretary of State has acted *ultra vires*;
b. a declaration that the Secretary of State failed to comply with the PSED;
c. a quashing order in relation to the Revocation Regulations;
d. such further or alternative relief as is necessary to give effect to the judgment of the Court;
e. costs.

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