



Neutral Citation Number: [2020] EWHC 580 (Admin)

Case No: CO/3231/2019

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12/03/2020

**Before :**

**MR JUSTICE CAVANAGH**

**Between :**

**THE QUEEN (on the application of  
BLOOMSBURY INSTITUTE LIMITED)**

**Claimant**

**- and -**

**THE OFFICE FOR STUDENTS**

**Defendant**

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**Jessica Simor QC, Chris Buttler and Eleanor Mitchell (instructed by Ronald Fletcher  
Baker LLP) for Bloomsbury Institute Limited**  
**Monica Carss-Frisk QC, Tristan Jones and Tom Coates (instructed by Paul Huffer, Head  
of Legal Services, Office for Students) for the Office for Students**

Hearing dates: 11-13 February 2020

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**Approved Judgment**

## **Mr Justice Cavanagh:**

### **Introduction**

1. The Claimant (“Bloomsbury”) was founded in 2002. It is a college which provides higher education to its students. It has approximately 2,000 students. It was known, until 2019, as the London School of Business and Management. The College specialises in Business, Law and Accountancy. The college is a private, rather than a public, college, but it has never declared any dividends to its shareholders. Any profits have been reinvested in the college.
2. Bloomsbury’s mission is to serve disadvantaged students. A very high proportion of Bloomsbury’s students, approximately 85%, are mature students, averaging in their mid-thirties (a student qualifies as a mature student from the age of 21 onwards). 66% of Bloomsbury’s students are BAME. 16% are disabled. 90% of them come from families earning less than £25,000 per annum. Many of them have come to higher education from a non-traditional route. Indeed, in 2018-2019, 88% of Bloomsbury’s students were enrolled on 4-year degree courses which included a first year, a Foundation year, during which students were trained in study techniques etc so as to provide them with the skills necessary to embark upon degree-level study. It was only in the second through to the fourth year of these courses that the studies were at degree-level. These Foundation courses were designed for students who do not have A Levels. 80% of the students on these courses at Bloomsbury do not have A Levels.
3. As well as its four-year courses, Bloomsbury has offered two-year accelerated learning degree courses and traditional three-year undergraduate degree courses.
4. The college is based in Bloomsbury, London, and, through a partnership arrangement, makes use of facilities belonging to Birkbeck College, London University, such as Birkbeck’s library, though Bloomsbury also has buildings of its own.
5. When Bloomsbury began, it offered Higher National Diploma courses. In recent years, however, Bloomsbury has exclusively offered degree courses. Since 2008, Bloomsbury has offered degrees validated, in turn, by Cardiff Metropolitan University, the University of Newport and, most recently, the University of Northampton. However, in 2017, Bloomsbury applied for permission to become a degree-awarding body.
6. As a private college which offers degree-level courses to its students, Bloomsbury comes within a category of higher education institutions which are known as “Alternative Providers” or “APs”. APs are providers which do not receive recurrent direct grant funding from funding councils (as more traditional public universities do). They may be operated on a charitable, not-for-profit, or on a for-profit basis.
7. In order for a higher education provider such as Bloomsbury to survive, it must be able to be designated for the purpose of enabling its students to access student loans from the Student Loans Company (“SLC”). It is not a requirement for higher education providers that they are so designated, but in practice it is impossible for them to attract sufficient students to be viable unless they are designated, because, if they are not, prospective UK students cannot obtain loans to cover tuition fees and

living expenses at the college and will inevitably look elsewhere. In reality, without such designation, a college such as Bloomsbury cannot expect to continue in operation (the University of Northampton has said that it will not validate degrees for new students at Bloomsbury).

8. Student loans are available for the first Foundation year of a four-year degree course in the same way as they are available for the three years of a traditional undergraduate degree course.
9. In 2011, Bloomsbury's courses were designated by the Secretary of State for Education, enabling its students to obtain student loans from the SLC. In the last year or so, as I will explain, responsibility for deciding whether a higher education provider should be designated for student loan purposes was transferred from the Secretary of State to the Defendant ("the OfS"). The OfS was created by the Higher Education and Research Act 2017 ("HERA") to act as a single regulator for higher education providers.
10. By a decision dated 23 May 2019, the OfS refused Bloomsbury's application for registration. These judicial review proceedings are a challenge to this decision. On 25 June 2019, the OfS agreed that Bloomsbury can continue to teach existing courses for existing students (known as "teach-out") and thus should have course designation for a further three-year period, but the effect of the registration decision is that Bloomsbury is no longer able to provide higher education courses to new UK students funded by the SLC.
11. The effect of the registration decision is, therefore, that Bloomsbury cannot take on any new UK students, unless they are wholly self-funded, and so it is likely that its student body will gradually wither away. Staff redundancies will be necessary and, in all probability, Bloomsbury will have to close.
12. I will deal with the reasons why registration was refused in much greater detail later in this judgment. In essence, however, it was primarily because the OfS decided that Bloomsbury had not satisfied one of the conditions for registration, Condition B3, which was concerned with securing "successful outcomes for all of its students". The OfS did not consider that Bloomsbury had performed sufficiently well in relation to two criteria or "indicators" relevant to Condition B3, namely student continuation rates from year one to year two ("continuation rates") and rates of progression to professional employment or post-graduate study ("progression rates"). Bloomsbury was also held to have failed to satisfy one other criterion, E2, which is concerned with the quality of Bloomsbury's "management and quality arrangements", but this was essentially (though not entirely) attributable to Bloomsbury's failure to satisfy Condition B3. The case was presented before me, on both sides, on the basis that the real reason that Bloomsbury had been refused registration was because it had failed to satisfy Condition B3.
13. Bloomsbury challenges the OfS's decision on registration on a large number of grounds. Central to them, however, is Bloomsbury's contention that the Defendant had assessed Bloomsbury's compliance with Condition B3 by reference to pre-determined numerical thresholds for continuation rates and progression rates that were applied universally to all providers.

14. Bloomsbury also submits that the OfS erred in law in relying on confidential Decision-Making Guidance, drawn up by the OfS's Director of Competition and Registration, Ms Susan Lapworth, which contained the pre-determined thresholds. Bloomsbury says that these should have been made public and consulted upon: the OfS erred in law in not publishing the thresholds in advance, in not informing Bloomsbury (or any other higher education providers) that these pre-determined thresholds would be used, and in failing to consult about the thresholds and other matters. Bloomsbury also submits the use of these thresholds was ultra vires, in light of the OfS's scheme of delegation, because Ms Lapworth did not have authority to set them, and that they were implemented in breach of the OfS's Public Sector Equality Duty ("PSED"). Bloomsbury further submits that the use of the thresholds was contrary to the OfS's published Regulatory Framework (on which consultation had taken place), and the guidance provided by the Secretary of State for Education.
15. In addition, Bloomsbury submits that the decision to refuse registration was irrational and disproportionate. Bloomsbury says that the OfS failed sufficiently or at all to take account of the special nature of Bloomsbury's student body and the inevitable struggle that the student body would have to achieve the continuation rates and progression rates. Moreover, Bloomsbury submits that the OfS acted irrationally in refusing to grant registration when registration had been granted on previous occasions on the basis of essentially the same data, as the regulatory changes introduced by HERA were not supposed to have resulted in significant changes to the tests to be applied for designation. Bloomsbury also relies on the fact that an internal recommendation had been made within the OfS in September 2018 that Bloomsbury should be registered. Still further, Bloomsbury complains that the OfS should not have made use of the thresholds without consulting the Quality Assurance Agency for Higher Education ("QAA").
16. The other grounds of challenge relied upon by Bloomsbury are based on the European Convention on Human Rights ("the ECHR"), introduced into UK law, of course, by the Human Rights Act 1998 ("the HRA"). Section 6(1) of the HRA provides that, "It is unlawful for a public authority to act in a way which is incompatible with a Convention Right". Bloomsbury contends that the refusal to register the college was a breach of Bloomsbury's rights under Article 1, Protocol 1, of the ECHR ("A1/P1") and/or the refusal of registration breached Article 14 of the ECHR, when read with A1/P1 and/or Article 2 of Protocol 1 ("A2/P1"). Article 14 is the non-discrimination article.
17. The OfS denies that it has acted unlawfully under domestic law, or that it has breached Bloomsbury's Convention rights. The OfS accepts that it made use of numerical thresholds when assessing continuation rates and progression rates for the purposes of Condition B3, but says that these were not used as a strict cut-off. Rather, the thresholds were a tool that was used in the evaluation process, but the fact that a higher education provider did not meet a threshold did not automatically mean that it had failed to satisfy Condition B3. The wider context would be, and was, taken into account. Moreover, as I will explain, Ms Lapworth's evidence is that numerical thresholds that were adopted for continuation rates and progression rates were deliberately set at a generously low level to make allowances for higher education providers which had non-traditional student bodies and which faced particular challenges.

18. The OfS says that it consulted on the matters that it needed to consult about in relation to registration, and that there was no requirement that there be consultation about these thresholds, which were merely part of the internal evaluation process. The OfS denies that it acted ultra vires, or in breach of the PSED, or that the use of these thresholds conflicted with its regulatory framework. The OfS further denies that it acted unreasonably or disproportionately, and disputes that it was irrational to have departed from an internal recommendation for registration that had been made in September 2018. The OfS says that there was no need to consult with the QAA when setting the thresholds.
19. Finally, the OfS disputes that registration is a “possession” for the purposes of A1/P1. Further and alternatively, even if registration is a “possession”, the OfS submits there was no breach of A1/P1, or of Article 14, when read with A1/P1 and/or A2/P1.
20. In this judgment, I will first set out the statutory and regulatory framework, and I will then deal with the facts in greater detail. I will then deal in turn with the grounds of challenge relied upon by Bloomsbury.
21. Bloomsbury has been represented before me by Jessica Simor QC, Chris Buttler and Eleanor Mitchell. The OfS has been represented by Monica Carss-Frisk QC, Tristan Jones and Tom Coates. Ms Simor QC and Ms Carss-Frisk QC made oral submissions on the domestic law challenges to the decision of 23 May 2019, and Mr Buttler and Mr Jones made oral submissions on the ECHR issues (Mr Buttler also dealt with ground 2(b)). I am grateful to all counsel for their very helpful submissions, both oral and in writing.

### **The statutory and regulatory framework**

22. The relevant statutory and regulatory framework is complicated and needs to be set out in some detail.

### **Regulation of higher education providers before HERA**

23. The effect of the enactment of HERA was to create a single regulatory authority for all higher education providers, namely the OfS. Prior to this, different types of providers were regulated by different regulators. Traditional providers (ie public universities), and private providers with degree awarding powers, and also Further Education Colleges (“FECs”) which received direct funding from local authorities or from the Higher Education Funding Council for England (“HEFCE”), were regulated by the HEFCE.
24. APs wishing to take international students had to apply for Highly Trusted Sponsor Status (Tier 4 visas) and were regulated for that purpose by the Home Office. The Home Office required that the educational provision of these APs was reviewed by the QAA. Those APs which wanted their UK students to have access to student loans from the SLC were regulated by the Department for Business, Innovation and Skills (“BIS”), and, latterly, the Department for Education (“DfE”). These ministries relied on regulatory assessments of the APs by the HEFCE, which in turn relied upon the QAA. In practice, therefore, APs were regulated by the QAA.

### **Designation for student loans purposes prior to HERA**

25. Student loans were introduced by the Teaching and Higher Education Act 1998 (“the 1998 Act”). The maximum annual loan stood initially at £1000. In 2006-7 tuition fees were increased to a maximum of £3000 by the Higher Education Act 2004. In 2012-13 the maximum annual fees were increased again to £9000, although APs were subject to a cap of £6000. The size of the student loans that were available was increased from time to time to keep pace with tuition fees.
26. Section 22(1) of the 1998 Act provides that there should be regulations authorising or requiring the Secretary of State to make grants or loans to eligible students on higher or further education courses, which are “designated” by or under regulations. In other words, loans can only be made to students on designated courses. The first regulations were adopted in 1998 and provided for the “automatic designation” of courses at publicly funded institutions, primarily public universities. It was not until 2009, however, that APs could apply for designation for their courses.
27. The current regulations are set out in the Education (Student Support) Regulations 2011 (SI 2011/1986) (“the 2011 Regulations”). Regulation 4(1) of the 2011 Regulations defines eligible students for student grant purposes as follows:

“4.— Eligible students

(1) An eligible student qualifies for support in connection with a designated course subject to and in accordance with these Regulations.”
28. Accordingly, students are only eligible for grants from the SLC if they are enrolled on a designated course.
29. Prior to HERA, the 2011 Regulations provide that courses wholly provided by publicly funded institutions in the UK are automatically designated: regulation 5(1)(d). In addition, the Secretary of State had discretion to designate courses delivered by APs, under regulation 5(10) (full-time), regulation 139(7) (part-time) and regulation 161(4) (postgraduate).
30. In 2013 BIS adopted guidance for the designation of APs. The process was administered by the HEFCE. The provider had to satisfy three criteria, (1) quality assurance; (2) financial sustainability, management and governance; and (3) course eligibility. Compliance with the criteria was assessed by way of a QAA review. In January 2015, BIS announced that a strengthened and stricter and more robust designation process would be adopted. All APs would have to be re-designated each year. Amongst other things, APs were required to submit information on students’ previous qualifications, demographic characteristics, and achievements, and this information was to be published through the Higher Education Statistics Agency (“HESA”). The DfE, which took over responsibility for designation from BIS, published a guidance document, entitled, “Policy and guidance for alternative providers of higher education: criteria and conditions.”

### **Proposals for reform**

31. In March 2015, the Competition and Markets Authority published a report which recommended that the regulatory framework for higher education be reformed to

provide for a single, transparent, regulatory framework for all providers in the higher education system. The report stated, as regards quality, that the regulatory framework should be reformed in order to:

“[r]egulate for a baseline level of quality. In order for all students to have assurance about the quality of their HE [ie higher education] provider, a gateway for operating in the HE sector should be established across the whole sector. In order to pass through the gateway and be able to operate in the sector all providers should meet a baseline level of quality.

5.25 Apply a strict cost-benefit assessment to ensure the baseline level of quality is kept to a minimum to promote competition. It is not the place of a competition authority to prescribe what aspects of quality should form part of the baseline. However, it is important that:

- the baseline is kept to the minimum level needed to provide assurance to students that governance, student redress, consumer protection and transparency standards have been met, whilst still allowing scope for providers to compete to provide a quality learning experience above the baseline.

....

7.6. In order for the new regulatory system to support an innovative and competitive HE system, it will be important to allow scope for providers to compete on the basis of quality over and above the minimum baseline requirements. The design of the reformed regulatory framework should be based on the principles set out in paragraphs 5.24 to 5.28 of this report in order to achieve such a competitive dynamic.”

32. The Government published a White Paper in May 2016, in which it adopted the recommendation to simplify the regulatory regime and “to create a level playing field with a single route of entry and a risk-based approach to regulation.” At the same time, the Government published an equality impact assessment (“EIA”) under s149 of the Equality Act 2010 into the Higher Education and Research Bill (which became HERA). The EIA said, inter alia:

“[e]nabling more high quality new institutions into the higher education sector builds on the positive equality impact of the decision to end student number controls, by ensuring more places are available for students from all backgrounds and by creating competitive pressure to ensure that all institutions deliver high-quality teaching to students.”

## **HERA**

33. Section 1 of HERA established the OfS as a non-departmental public body with responsibility for regulating all higher education in England, including APs.

34. Section 2 of HERA sets out the general duties of the OfS. Section 2(1) provides, in relevant part:

**“2 General duties**

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

....

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

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

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

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

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

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

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

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

35. Section 3 of HERA provides that the OfS must establish and maintain a register of English higher education providers who meet certain initial registration conditions. Section 3(3) provides that the OfS must register an institution if it satisfies the initial registration conditions applicable to it in respect of the registration sought.

36. Section 4 provides that if the OfS takes a provisional decision to decline to register a provider, it must give the provider an opportunity to make representations before a final decision is made. Section 4 states, in relevant part:

**“4 Registration procedure**

(1) Before refusing an application to register an institution, the OfS must notify the governing body of the institution of its intention to do so.

(2) The notice must—



- (a) specify the OfS's reasons for proposing to refuse to register the institution,
  - (b) specify the period during which the governing body of the institution may make representations about the proposal (“the specified period”), and
  - (c) specify the way in which those representations may be made.
- (3) The specified period must not be less than 28 days beginning with the date on which the notice is received.
- (4) The OfS must have regard to any representations made by the governing body of the institution during the specified period in deciding whether to register it in the register.”
37. Section 5 provides that the OfS must determine and publish the initial and ongoing registration provisions, and must consult before doing so. Section 5 states:
- “5 The initial and general ongoing registration conditions**
- (1) The OfS must determine and publish—
    - (a) the initial registration conditions, and
    - (b) the general ongoing registration conditions.
  - (2) Different conditions may be determined—
    - (a) for different descriptions of provider;
    - (b) for registration in different parts of the register.
  - (3) The OfS may revise the conditions.
  - (4) If the OfS revises the conditions, it must publish them as revised.
  - (5) Before determining or revising the conditions, the OfS must, if it appears to it appropriate to do so, consult bodies representing the interests of English higher education providers which appear to the OfS to be concerned.
  - (6) The OfS may, at the time of an institution's registration or later, decide that a particular general ongoing registration condition is not applicable to it.
  - (7) Where the decision is made after the institution's registration, the OfS must notify the governing body of the institution of its decision.”
38. These conditions may include a condition relating to the quality of, or the standards applied to, the higher education provided by the provider (including requiring the

quality to be of a particular level or particular standards to be applied) (section 13(1)(a)).

39. Section 7 provides that the initial registration conditions must be proportionate to the risk posed by the provider. Section 7 states, in relevant part:

**“7 Proportionate conditions**

(1) The OfS must ensure that the initial registration conditions applicable to an institution and its ongoing registration conditions are proportionate to the OfS's assessment of the regulatory risk posed by the institution.”

40. Section 23 of HERA requires the OfS to assess, or make arrangements for the assessment of, the quality of, and the standards applied to, higher education provided by institutions which have applied for registration.

41. Section 24 provides, in relevant part:

**“24 Quality Assessment Committee**

(1) The OfS must establish a committee called the “Quality Assessment Committee” .

(2) The Committee has—

(a) the function of giving the OfS advice on the exercise of its functions under section 23, and

(b) such other functions that the OfS may confer on it.”

42. Section 27 (set out at paragraph 236, below) provides for a body to be designated to perform the assessment functions contained in section 23. The designated body, designated in accordance with Schedule 4, is the QAA. Section 27(3) makes clear that, notwithstanding this designation, the OfS itself remains responsible for assessing quality.

43. Section 75 of HERA requires the OfS to prepare, consult about and then publish a regulatory framework. The section provides as follows:

**“75 Regulatory framework**

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

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

(3) The regulatory framework is to consist of—

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

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

(4) The statement under subsection (3)(a) must set out how the OfS intends to perform its functions in relation to a registered higher education provider in proportion to the OfS's assessment of the regulatory risk posed by the provider.

(5) “Regulatory risk” means the risk of a breach of the provider's ongoing registration conditions.

(6) Guidance under subsection (3)(b) must include guidance for the purpose of helping to determine whether or not behaviour complies with the general ongoing registration conditions.

(7) The guidance may in particular specify—

(a) descriptions of behaviour which the OfS considers compliant with, or not compliant with, a general ongoing registration condition;

(b) factors which the OfS will take into account in determining whether or not behaviour is compliant with a general ongoing registration condition.

(8) Before publishing a regulatory framework under this section the OfS must consult—

(a) bodies representing the interests of English higher education providers,

(b) bodies representing the interests of students on higher education courses provided by English higher education providers, and

(c) such other persons as it considers appropriate.

(9) Where a regulatory framework is published, the OfS must send a copy of it to the Secretary of State who must lay it before Parliament.”

### **Designation following HERA**

44. As I have said, section 22 of the 1998 Act provides for regulations to make provision authorising or requiring the Secretary of State to make grants or loans to eligible students in connection with their undertaking designated higher education courses. Courses are designated in accordance with the 2011 Regulations. Designation is what is required for students on the courses to access loans from the SLC.

45. Prior to HERA, designation was granted by the Secretary of State under regulation 5(10) of the 2011 Regulations, following assessments by the QAA.

46. Following the enactment of HERA, this has changed. Under regulation 5(1), as amended, a course will be designated if it meets various conditions including, at

regulation 5(1)(d)(i), that the course is wholly provided by a registered provider, that is, a provider which has been registered in the register maintained by the OfS.

47. This means that, since the enactment of HERA, the main way in which a course can be designated for SLC purposes is if the provider of the course is registered by the OfS. It is no longer the role of the Secretary of State to designate courses: nowadays designation of a course follows on from registration of the provider by the OfS.
48. I should add that regulation 5(10) of the 2011 Regulations gives the Secretary of State a residual power to designate courses. The Secretary of State has a power under section 23(4) to delegate this function to the OfS, which he has exercised. It was pursuant to this residual power that the OfS has permitted the “teach out” for Bloomsbury, so that existing students can continue to access loans for their courses, notwithstanding that Bloomsbury is not registered.

### **The Regulatory Framework**

49. Pursuant to its obligation under section 75 of HERA, the OfS consulted upon and then published a Regulatory Framework document. This was published in February 2018. The Regulatory Framework contained the initial registration conditions that higher education providers would have to comply with if they were to be registered.
50. The initial conditions are grouped into a number of separate categories. The “A” conditions concern access and participation for students from all backgrounds. The “B” conditions concern quality, reliable standards and positive outcomes for all students. The “C” conditions concern the protection of students’ interests. The “D” conditions concern financial sustainability. The “E” conditions require providers to have good governance arrangements in place.
51. The key condition for present purposes is Condition B3. This provides:  
  
“The provider must deliver successful outcomes for all of its students, which are recognised by employers and/or enable further study.”
52. Condition E2 provides:  
  
“The provider must have in place adequate and effective management and governance arrangements to:
  - i. Operate in accordance with its governing documents.
  - ii. Deliver, in practice, the public interest governance principles that are applicable to it.
  - iii. Provide and fully deliver the higher education courses advertised.
  - iv. Continue to comply with all conditions of its registration.”
53. The Regulatory Framework states that the OfS’s primary aim is to ensure that English higher education is delivering positive outcomes for students. The four primary regulatory objectives are stated to be that all students, from all backgrounds, and with the ability and desire to undertake higher education:

- (1) Are supported to access, succeed in, and progress from, higher education;
- (2) Receive a high-quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure;
- (3) Are able to progress into employment or further study, and their qualifications hold their value over time; and
- (4) Receive value for money.

### **The approach to regulation by the OfS**

54. Paragraphs 8, 9, 13, 14, 42-43, 95, and 136-140 of the Regulatory Framework state:

“8. The regulatory approach is designed to be principles-based because the higher education sector is complex, and the imposition of a narrow rules-based approach would risk leading to a compliance culture that stifles diversity and innovation and prevents the sector from flourishing. *This regulatory framework does not therefore set out numerical performance targets*, or lists of detailed requirements for providers to meet. Instead it sets out the approach that the OfS will take as it makes judgements about individual providers on the basis of data and contextual evidence.

9. There will be a marked shift from the previous approach to regulation. Once the regulatory framework is established, its implementation will reduce bureaucracy and unnecessary regulatory burden for individual providers and, as a consequence, for the academic and professional staff whose work is essential to successful outcomes for students.

....

13. The OfS is committed to adopting and contributing to best regulatory practice. It will comply with the Regulators’ Code, and in developing this regulatory framework the OfS has consulted widely, drawn on best practice, and sought to learn from the latest in regulatory theory.

14. The OfS’s approach to regulation puts informed student choice and institutional autonomy at its heart. It sees the dynamic of providers responding to informed student choice as the best mechanism for driving quality and improvement, and will regulate at the sector level to enable this. The OfS will regulate at provider level to ensure a baseline of protection for all students and the taxpayer. Beyond that threshold the OfS will encourage and enable autonomy, diversity and innovation.

....

**Ensuring a minimum baseline of quality for all and promoting excellence and innovation beyond that baseline**

42. *The conditions of registration for quality and standards that apply to individual providers are designed to ensure a minimum baseline of protection for all students and the taxpayer.* Beyond this minimum, autonomous providers are free to pursue excellence and innovation as they see fit, and the OfS will use its sector level tools to create the space for this to happen.

43. The OfS has adopted the TEF [the Teaching Excellence Framework] as a sector level intervention to promote excellence in teaching and outcomes beyond the minimum baseline.....

....

95. The initial conditions of registration are designed to mitigate the risk that the OfS is not able to deliver its four primary regulatory objectives. The conditions are ‘baseline requirements’, i.e. the minimum level a provider must achieve to be registered. The conditions are expressed in terms of the outcomes that the OfS wishes to see, rather than the particular approach that a provider might take to achieve such outcomes.

....

### **Lead indicators**

136. *The OfS will identify a small number of lead indicators that will provide signals of change in a provider’s circumstances or performance.* Such change may signal that the OfS needs to consider whether the provider is at increased risk of a breach of one or more of its ongoing conditions of registration. *These indicators will be based on regular flows of reliable data and information from providers* and additional data sources, and will include information about outcomes for students from different backgrounds. Lead indicators are likely to include, but not be limited to, the following:

- overall student numbers and patterns that might suggest unplanned and/or unmanaged growth or contraction
- applications, offers and acceptances for students with different characteristics
- changes in student entry requirements and the qualifications profile of students on entry.
- *continuation and completion rates*
- TEF performance
- degree and other outcomes, including differential outcomes for students with different characteristics, or where there is an unexpected and/or unexplained increase in the number of firsts and 2:1s awarded
- the number, nature or pattern of student complaints to the OIA
- *graduate employment and, in particular, progression to professional jobs and postgraduate study*

- composite financial viability and sustainability indicators based on annual financial statements and forecasts.

137. The lead indicators are likely to show changes that might not, in themselves, reveal areas of weakness or concern for an individual provider, but simply flag possible increased risk, such as a rapid increase or decrease in student numbers. *The OfS will not use crude ‘triggers’ or performance thresholds to monitor risk, preferring a more flexible approach that takes into account the context for an individual provider.*

138. *Absolute performance against an indicator will form part of the overall context for assessing risk.* For example, when monitoring continuation rates, a decrease for an individual provider could mean performance had worsened. However, levels of absolute performance need to be considered in the context of performance across the sector as a whole and might be considered to be of less concern in the wider context.

139. The OfS will seek to ensure that the selection and specification of lead indicators allow the identification of possible increased risk before this crystallises. Indicators that provide strong signals of likely future risk (for example significant shifts during the student recruitment cycle) and data trends over time will be more useful than data that retrospectively reveals where problems have already occurred (unless those problems have not previously been identified).

140. *The OfS will ensure that its lead indicators allow it to monitor a provider’s performance for all students from all backgrounds, for example by splitting student outcome indicators for different student characteristics.* The OfS will also pay particular attention to outcomes achieved for students studying at different levels and in different modes (e.g. undergraduate/postgraduate).

(emphasis added)

### **The way that Condition B3 was dealt with in the Regulatory Framework**

55. Paragraph 340 of the Regulatory Framework states that, in judging whether a provider is delivering successful outcomes for all of its students (ie Condition B3), which are recognised and valued by employers and/or enable further study, material that the OfS may consider includes:

“a. A range of student outcomes indicators, broken down to show outcomes for students with different characteristics that include, but are not limited to:

i. *Student continuation and completion rates.*

ii. Degree and other outcomes, including differential outcomes for students with different characteristics.

iii. *Graduate employment and, in particular, progression to professional and managerial jobs and postgraduate study.*

b. Any other information from employers and others about the extent to which a provider’s qualifications are recognised and valued.”

(emphasis added)

56. It is clear from paragraph 340 of the Regulatory Framework, therefore, that the OfS will take account of continuation rates and progression rates when deciding whether Condition B3 has been satisfied.

57. Paragraph 350 of the Regulatory Framework makes clear that the OfS requires all providers to meet a minimum level of performance with respect to all the B conditions, including B3, rather than meeting “sector-adjusted benchmarks” which vary to take into account a variety of factors such as student demographics and subject areas. In other words, there will be a single minimum level of performance across the whole of the higher education sector. This paragraph also makes clear that, notwithstanding this “one-size fits all” approach to minimum levels of performance, the context in which the provider is operating will be taken into account. Also, paragraph 350 makes clear that the assessment as to whether Condition B3 is satisfied will be made by the OfS. Paragraph 350 states as follows:

“Where the provider has a track record of delivering higher education, the OfS itself will assess whether the provider is able to satisfy condition B3. The evidence used will consist of the actual performance of the provider over time rather than its performance when compared to a sector-adjusted benchmark, although the context in which the provider is operating will be taken into account. This approach is designed to ensure that a minimum level of performance is used to determine whether a provider may be registered (taking into account the context of that provider), rather than a view of the provider’s performance as compared to other providers. The OfS will take into account the impact of a provider’s performance on students with different equality characteristics in assessing whether or not the provider meets the minimum level of performance. Where the OfS has concerns, but nevertheless decides that the provider may be registered, it may require the provider to address any issues in its access and participation plan before it is willing to approve the plan.”

58. The reasoning behind this approach was set out in her evidence by Ms Lapworth. She said that the OfS had decided to avoid sector-adjusted benchmarks, which would have enabled higher education providers to be compared with similar providers, in terms of the student populations, courses provided etc, because this would have the serious disadvantage of allowing poor outcomes to be justified because the provider is compared to other providers whose performance was also poor. Ms Lapworth said that this approach risks accepting that some students, particularly those from disadvantaged backgrounds, will inevitably experience worse outcomes. Put bluntly, though Ms Lapworth did not use these words, the OfS considered that such an approach would have authorised lower standards for higher education providers which had a large proportion of disadvantaged students. The advantage of insisting on a minimum threshold of performance was that it would raise quality for the benefit of disadvantaged students who are currently disproportionately concentrated in providers



with poorer outcomes. The OfS's Board, whose decision it was, therefore considered that the policy would promote both quality and equality.

59. The OfS considered the possibility that an unwanted side effect of this approach might be that providers might shy away from recruiting disadvantaged students. The OfS considered that such concerns could be addressed by the A conditions, which dealt with access and participation.
60. Finally, Ms Lapworth explained that the possible impact of this approach was mitigated by a decision not to set overly ambitious or inflexible thresholds, and to ensure that the assessment of Condition B3 takes account of the provider's context (including demographic characteristics). The idea was that context would be taken into account on a case by case basis, rather than having a lower threshold for certain categories of higher education institutions.
61. Paragraph 352 of the Regulatory Framework states, in the context of reviewing registration conditions after initial registration, that the OfS will not set an explicit numerical target for a provider whose performance has been causing concern. Paragraph 352 states:

“352. Once registered, a provider for which the risk of non-compliance with its conditions of registration for quality and standards is considered to be low will be monitored using lead indicators. These indicators will normally reflect the actual performance of the provider over time rather than its performance when compared to a sector-adjusted benchmark. However, this approach will not involve setting an explicit numerical target for, for example, continuation. An indicator is intended to signal to the OfS that further regulatory investigation may be necessary.”

## **Regulatory Advice 2**

62. At the same time as it published the Regulatory Framework, the OfS published three other regulatory advice documents. The Introduction to the Regulatory Framework states that these do not constitute part of the Regulatory Framework.
63. Regulatory Advice 1 repeats, at paragraph 8, that the OfS does not intend to set out numerical performance targets or lists of detailed requirements for providers to meet. Instead, the Regulatory Framework sets out the approach that the OfS will take as it makes judgments about individual providers on the basis of data and contextual evidence.
64. Regulatory Advice 2 states, at paragraph 3, that the Regulatory Framework “sets out in full the approach that we will take to the registration and regulation of providers.” Paragraph 27 states that if the provider applies by Wednesday 23 May 2018, it would receive a decision by mid-September 2018. This was important, because if there was a question mark hanging over registration during an academic year, this might deter students from applying to the provider. Bloomsbury applied about a month in advance of the May 2018 deadline but did not receive a decision until April 2019. (It is not contended that this delay, of itself, rendered the decision unlawful.)

65. Regulatory Advice 2 sets out the evidence requirements in relation to Condition B3. At paragraphs 128 to 130, Regulatory Advice 2 states as follows:

“128. For Condition B3 all providers will be assessed against the following indicators:

- a. Student continuation and completion indicators
- b. Degree and other higher education outcomes, including differential outcomes for students with different characteristics
- c. Graduate employment and, in particular, progression to professional jobs and postgraduate study.

129...The indicators will be constructed from existing datasets and you will not be required to submit any new data...

130. We will consider your actual performance over time rather than your performance when compared to a sector-adjusted benchmark. This is to ensure that a baseline level of performance is used to determine whether you may be registered, rather than a view of your performance as compared with other providers. We will take account of the context in which you operate, such as the type of provision you offer, when making judgments about your performance.”

66. Annex B to Regulatory Advice 2 states that a number of indicators, including continuation and progression, will be assessed making use of existing data supplied by HESA.

### **The Equality Impact Assessment relating to the Regulatory Framework**

67. The OfS also published an EIA in relation to the Regulatory Framework in February 2018. The focus of the EIA was on the likely impact on protected and underrepresented groups of the proposals set out in the Regulatory Framework. The EIA noted, at paragraph 45, that employment prospects after graduation (relevant to progression) can be affected by students’ social and economic capital, which can influence the experience, connections and attributes that help in many areas of the job market. Paragraph 56 of the EIA said that the B Conditions, relating to quality, reliable standards and positive outcomes for all students, will consider each provider’s baseline with regard to students with different backgrounds and characteristics to secure baseline assurance for all students. Paragraph 69 said that Condition B3 sets out the parameters for how the OfS will assess the impact on student outcomes. The OfS said that it expected to be able to draw on various data and intelligence to reach a nuanced understanding of how each provider ensures successful outcomes for those students from underrepresented groups and with protected characteristics.

### **The confidential internal Decision-Making Guidance**

68. In May 2018, a document (“the Decision-Making Guidance”) was prepared, either by or under the supervision of Ms Lapworth, whose stated purpose was to set out the framework that the OfS will use to make registration decisions. The document was stated to be intended for use by assessors in the OfS’s registration team, those making

decisions about individual providers, and those with responsibility for the oversight and effective operation of the registration process.

69. Paragraphs 2 and 4 of the Decision-Making Guidance stated:

“2. This is a confidential internal document intended only for those listed above [ie its target readership]. It is not intended for wider sharing, or for publication, as this would inhibit the OFS’s ability to undertake its regulatory functions effectively.

....

4. The framework provides guidance and indicators to support assessors to reach these judgements but it is not intended to be a rigid tool that must be followed to produce a “correct” answer.”

70. The Decision-Making Guidance contains a table which sets out a list of thresholds. These are described to be “thresholds which suggest the extent to which an individual metric [continuation, degree outcome and progression] is of concern”. These thresholds were described by the OfS in its evidence as the “initial baselines”. The tables were broken down into types of degree, PhD, first degree etc. The introduction to the table said that:

“The table below sets out the circumstances in which the condition is likely to be satisfied or not satisfied. The thresholds set out in the table are to be treated as a guide rather than a fixed requirement. The performance of an individual provider across the range of indicators will need to be considered and a balanced judgment reached about whether the condition as a whole is satisfied.....

The condition is likely to be satisfied if the split metrics for mode and level that are of significant concern collectively cover less than 75% of the provider’s current students....The condition is not likely to be satisfied if the split metrics for mode and level that are of significant concern collectively cover more than 75% of the provider’s current students.”

71. The thresholds were intended to be assessed by reference to five years’ worth of data.

72. So far as first-degree students were concerned (which encompassed all the students at Bloomsbury), the continuation metric was not of concern if more than 85% of students continued into the second year, the metric might be of concern if the number who continued into the second year were between 85% and 75%, and the metric was of significant concern if 75% or fewer continued into the second year. For progression, the equivalent percentages were 50%, 35-50% and 35%.

73. Ms Lapworth’s evidence was that these percentages were deliberately set at generously low figures. She exercised her judgment, informed by her knowledge and experience and an analysis of the available data. She said that she had particular regard to the performance of different demographic groups. She had data which

indicated a variation in performance of between 5 and 10 percentage points amongst providers. Originally, therefore, she set the “significant concern” baselines 5-10% lower than the “concern” baselines. However, this led to proportionality concerns that the “significant concerns” baselines at this level would have a significant impact upon providers which had large numbers of disadvantaged students. Therefore, she decided to set the “significant concern” baselines at an even lower level.

74. Different threshold percentages were set for part-time students, but no different threshold percentages were set for students on four-year courses which include a Foundation year. The OfS explained that this was because it was felt right to assess four-year courses in the same way as traditional three-year degree courses, especially as there were other ways in which students could undertake training which would bring them to a position at which they could start three years of degree study. Ms Lapworth said that the OfS did not want to adopt a regulatory approach which would tolerate poorer outcomes for Foundation year students.
75. Ms Lapworth’s evidence was to the effect that, after obtaining figures by reference to the initial baselines, there was a second stage to the assessment: the OfS then broke down the indicators by demographic groups to consider how each group was performing. This enabled the OfS to determine whether a provider’s poor performance was driven by a particular group, such as mature students. These indicators are known as “split indicators”.
76. The OfS then applied the 75% baseline, namely that if 75% or more of a provider’s students fall into a demographic group with at least one outcome of “significant concern”, Condition B3 was unlikely to be satisfied. The idea was that this enabled the OfS to check whether the problem existed across different demographic groups.
77. There was then a third stage, in which “context” was taken into account. Context covered a wide range of matters. For example, if there was a particular problem with a certain course and the provider was planning to close the course, Ms Lapworth said that this would be taken into account. The demographic make-up of the student body could be taken into account at this stage, but, Ms Lapworth said, the OfS would treat such a factor with care because the OfS did not want a different level of acceptable performance for providers with high proportions of disadvantaged students and because the different performance of different groups had already been taken into account at the stage of setting the initial thresholds.

### **The rejection by OfS of Bloomsbury’s application for registration**

78. As mentioned above, Bloomsbury had been designated for SLC purposes since 2009.
79. In the QAA’s Higher Education Review Report in 2015, Bloomsbury was one of only two APs that were commended. Bloomsbury was commended for the enhancement of student learning opportunities. This commendation was part of the designation process. The QAA reviews in 2016 and 2017 were complimentary.
80. In February 2016 and then in August 2018, however, Bloomsbury was issued with an “Improvement Notice” in relation to the continuation rates of first-degree students. The 2018 notice related to the rates for 2015-16. On 15 March 2019, the DfE wrote to Bloomsbury to say that the Department had noted that the college has a

significantly worse non-continuation rate for 16/17 entrants of 29.3% against the college's benchmark of 21.7% for first-degree provision, and that this was in addition to the significantly worse rate returned in 2018 with a rate of 26.8% against a benchmark of 18.1% for first-degree provision. The letter informed Bloomsbury that this outcome was considered a breach of the academic performance criteria in the guidance. The letter said that the DfE did not intend to take any action at this time but reserved the right to take further action that might be necessary to address any outstanding concerns.

81. Bloomsbury applied to the OfS for registration under the new system on 30 April 2018. Bloomsbury did not supply any information in relation to Condition B, as part of this process, because that was neither required nor permitted.
82. On 26 September 2018, Mr Fairhurst, Bloomsbury's Managing Director and Academic Principal, asked for an update, as the OfS had indicated that decisions would be announced by mid-September 2018. In response, the OfS informed Mr Fairhurst that the assessment of Bloomsbury's application was complete and was with a reviewer. Mr Fairhurst was told that a decision could be expected within a few weeks.
83. In October 2018, a draft Decision Letter was prepared by OfS assessors in the Assessment Team, in which it was said that the OfS had decided to register Bloomsbury but to impose a specific ongoing condition of registration, requiring an improvement plan, because the OfS's assessment of Bloomsbury's student outcome data suggested that Bloomsbury was at increasing risk of breaching Condition B3. This letter was never finalised and was not sent. In fact, Ms Lapworth's evidence makes clear that the assessment dated September 2018 which preceded the letter was not a completed assessment at this stage. Rather, it was one of a number of draft assessments that were prepared so that the OfS's Provider Risk Committee ("PRC") could consider some generic issues that were cropping up in the assessments. The PRC was informed that that "these assessments are not complete at this stage and will be finalised following discussion at the meeting."
84. Further emails were exchanged between Mr Fairhurst and the OfS, and on 29 October 2018 he was told that the completed assessment was with the final decision-maker, and that a decision would be issued within a matter of days.
85. An internal "Assessment Tool" report was prepared by the OfS in relation to Bloomsbury in November 2018. This flagged up two conditions, B3 and D (financial viability and sustainability) as "red". So far as B3 was concerned, the assessors' summary states that, on the basis of the data available alone, the provider would fail to meet Condition B3, because of poor continuation and progression rates. However, the assessors noted that only two years' worth of data were available, and the provider had made various changes recently. The assessors therefore recommended that the evidence available did not conclusively demonstrate that Bloomsbury was not delivering successful outcomes for all of its current students. The internal assessors recommended that OfS should decide that Bloomsbury satisfied B3, but that an ongoing condition of an improvement plan should be imposed. The assessors recommended that the OfS should decide that Bloomsbury satisfied all of the conditions.

86. On 9 November 2018, the OfS emailed Mr Fairhurst to say that the assessment of Bloomsbury had been passed up the line for review and that a decision was unlikely until late November.
87. On 19 November 2018, Bloomsbury's application was considered by the PRC.
88. During this meeting, as well as considering Bloomsbury's application, the PRC considered a number of other matters. One of these was a general discussion of the Further Education sector. In the course of this discussion, the PRC considered the position of Further Education colleges which did not satisfy Condition B3 and agreed that the OfS should remain mindful that students were unlikely to be receiving a high quality education experience if the provider's outcomes fell below the OfS's baselines. This discussion indicated that the PRC was minded to adopt a strict line towards those providers which did not satisfy the baselines for B3.
89. At this meeting, the PRC considered Bloomsbury's application. At that stage, Bloomsbury had not satisfied three conditions, Conditions B3, D and E2. The PRC decided that Bloomsbury should not be registered. The minute of this meeting records that the PRC did not agree with the recommendation in the assessment made by the OfS Registration Team, which had been to register Bloomsbury. So far as Condition B3 was concerned, the PRC's own assessment was that "a large number of the provider's students are receiving outcomes that are so poor that they are triggering the OfS's flags for "significant concern"". For Condition B3, it was noted that the proportion of the provider's student population covered by split indicators of significant concern was above the baseline of 75% in the two years' data available (in fact it was 100%). Indications for continuation rates for full-time other undergraduates and first-degree students were flagged as of significant concern. Undergraduate completion rates were flagged as of concern (50.2%). The professional employment and further study for full-time first-degree students were also flagged as of significant concern, although there was only one year's data. Differential degree outcomes were also flagged as of concern.
90. The minute of the consideration of Bloomsbury's application concluded as follows:

"The PRC discussed each of the OfS's general duties in turn and concluded, in the current decision-making context, that particular weight should be given to quality and value for money. Proportionality was also considered, both as a component of the general duty for best regulatory practice and due to its particular relevance to human rights law – the conclusion was that a proportionate approach was being taken in light of the evidence relating to Condition B3.

The committee did not consider it to be important to account for the potential market impact of refusing registration for this provider.

In view of the substantial evidence that initial conditions B3, E [sic, I think that this meant D] and E2 had not been satisfied, the committee agreed that the provider should not be registered and it did not satisfy all the initial conditions of registration. It was

agreed that an “intention to refuse registration” letter should be issued.”

91. In December 2018, Mr Fairhurst was informed that there would be a further delay in providing Bloomsbury with notification of the outcome of its decision.
92. The OfS issued its provisional decision to refuse registration by a letter dated 29 January 2019. The letter said that was because initial conditions B3, D and E2 were not satisfied. So far as Condition B3 was concerned, the letter explained that this was because continuation and progression rates and data “shows that the Institute has failed to demonstrate that it delivers successful outcomes for its students, which are recognised and valued by employers and/or enable further study for all of its students.”
93. In an Annex to this letter, the OfS explained its methodology for assessing Condition B3. The OfS said that it relied on three data indicators, continuation and completion rates, degree and other outcomes, and progression rates. The Annex said that the OfS considered a provider’s performance in aggregate over a five year period, as well as across “split metrics”, showing the performance within each data indicator for students from different demographic groups, broken down by mode (full time or part-time) and level of study (eg first degree), as well as by age, participation in local areas (known as “POLAR”), English indices of multiple deprivation, ethnicity, disability, sex and domicile.
94. The Annex also informed Bloomsbury that in assessing whether Condition B3 was satisfied, OfS considered each of the three data indicators by reference to baselines (which were not sector-adjusted) determined by the OfS for that indicator. The aggregate indicator and the student demographic split metrics were all separately assessed against the baseline, in order to determine whether the indicator’s value is not of concern, may be of concern, or is of significant concern. The Annex also said that OfS considered the proportion of the provider’s current students who are at risk of experiencing outcomes that are of serious concern.
95. Accordingly, this Annex set out the methodology used by the OfS in considerable detail, but it did not say what the baselines/thresholds actually were. (I should add that the words “benchmarks”, “baselines” and “thresholds” were used in a range of slightly different senses both in the contemporaneous documentation and in the submissions before me. In particular, “benchmarks” and “baselines” were used to describe the outputs that would be regarded as satisfactory for Condition B3 and also to describe the percentage score that would be regarded as the cut-off for significant concern in relation to a particular indicator. From now on, when I refer in this judgment to the percentage score that gives rise to significant concern, I will use the slightly clumsy phrase, “baselines/thresholds”.)
96. However, the Annex went on to inform Bloomsbury that its analysis of the data indicators for Bloomsbury identified the following areas that were considered to be of significant concern:
  - (1) 64.6% of students studying full-time at “other undergraduate” level continued into a second year of study (though this was not said, the OfS baseline was 70%);

- (2) 73.3% of students studying full-time for a first degree continued into a second year of study, with a downward trend (the OfS baseline was 75%);
  - (3) 30.7% of students in the one year for which data was available (2015-16) progressed into professional/managerial jobs or postgraduate study (the OfS baseline was 35%);
  - (4) When the split metrics were examined, the OfS determined that continuation rates were either of concern or significant concern for all of the demographic groups studying full-time at “other undergraduate” or first-degree level. Detailed figures were given for the various demographic groups. The indicators and split metrics described as a cause of significant concern covered 100% of the students studying at Bloomsbury in 2016-17, and this led the OfS to conclude that significant proportions of Bloomsbury students were likely not to be achieving successful outcomes;
  - (5) The Annex also said as follows: “In assessing the data, the OfS has, in line with Regulatory Advice 2 (paragraph 130), considered whether the Institute’s context or the characteristics of its students may explain the student outcomes achieved. The OfS takes the view that there is no evidence to suggest that this is the case.”
97. In light of the above, it is clear, in my judgment, that the OfS made clear to Bloomsbury that it made use of baselines/thresholds and that, in relation to continuation and progression, Bloomsbury fell into the “significant concern” category. The OfS also explained its methodology and gave Bloomsbury the percentages it was using as Bloomsbury’s “scores” for the purposes of these indicators. There has been no suggestion that the raw data that the OfS was using was incorrect. However, Bloomsbury was not informed where the percentage “cut-offs” were for the purposes of the baselines/thresholds.
98. Bloomsbury was informed that it had an opportunity to make representations before a final decision was taken. Bloomsbury responded in writing, by letter dated 25 February 2019. Amongst other things, Bloomsbury emphasised that its continuation and progression rates should be placed in the context of the college and/or its students’ special characteristics. In particular, the point was made that over 90% of Bloomsbury’s students, the vast majority of whom are mature and therefore financially independent, have a household income of £25,000 or less. Bloomsbury drew attention to the fact that the four-year undergraduate degree includes a Level 0 Foundation year, and that 80% of Bloomsbury students enrol onto a four-year degree. Bloomsbury said that its evidence suggests that the reason for four-year degree students not succeeding is not because they are academically unable to succeed, but because of their own personal circumstances (typically, they are mature students from low-income households, some of whom have additional unrepresented characteristics). For some students, financial pressures and outside responsibilities have impacted upon levels of engagement. Also, Bloomsbury said that it had introduced new measures to improve and had clear and costed plans to introduce additional measures, including travel bursaries and a hardship fund.
99. A further internal assessment conducted by the OfS’s Assessment Team in April 2019 concluded that Condition D had now been met, but that Conditions B3 and E2



remained unmet on the basis of Bloomsbury's non-compliance with numerical and demographic thresholds.

100. On 15 April, Mr Fairhurst had a meeting with the OfS to make oral representations.
101. The PRC took its decision in relation to Bloomsbury at a meeting on 29 April 2019. The PRC took into account a paper that summarised representations that had been made by all providers which were at risk of not being registered in relation to the assessment of Condition B3. This paper is important, in my judgment, because it summarises the thinking behind the OfS's approach.
102. Paragraph 17 of the paper said as follows:

“The OfS's primary aim is to ensure providers are delivering positive outcomes for students – past, present and future, and Condition B3 is a direct assessment of this. Our assessment draws heavily on data indicators which show the historical performance of a provider in relation to student outcomes. However, our assessment of whether the condition is satisfied is still ultimately a matter of regulatory judgment, which is not entirely defined by a provider's statistics.”
103. Paragraphs 27-31 of the paper dealt with the relevance (or lack of relevance) of previous QAA reviews and other processes:

“27. Many of the representations have highlighted positive outcomes from previous QAA reviews, from the HEFCE Annual Provider Review (APR) process or that the provider has a TEF award which would appear to contradict a judgement that the provider is not delivering successful outcomes to its students.

28. Previous QAA review activity is not relevant to the assessment of student outcomes for condition B3 because it was focused on the design and operation of a provider's systems and processes and not on the absolute outcomes achieved by the provider's students on the basis of the indicators that the OfS has constructed to assess initial condition B3.

29. HEFCE APR and TEF also both used benchmarked data to form judgments, rather than considering a provider's absolute performance.

30. This argument has not therefore been given any weight in our assessment of the representations as we believe we have already taken account of these issues.

31. As any judgement from the previous regulatory system did not specifically test a provider against the OfS conditions of registration these arguments have not been given any weight in our assessment of the representations.”

104. The paper also addressed arguments put forward by providers to the effect that a focus on recruiting students from disadvantaged backgrounds is the cause, or has contributed to, high non-continuation rates. At paragraphs 33 and 34, the paper said:
- “33. We believe that if a provider is recruiting students from under-represented groups it should be designing courses to match their needs and ensuring mechanisms are in place to ensure students are supported and are reasonably likely to achieve the same outcomes as other students without protected characteristics.
34. Condition B3 requires that the provider must deliver successful outcomes for all of its students. We therefore do not believe that representations made by providers based on student characteristics provide relevant evidence that the condition is satisfied. Where such representations are made we have, however, considered the extent to which student characteristics might lead to an acceptable variation in performance.”
105. Finally, the paper addressed the arguments that suggest that providers have evidence that student withdrawal is for reasons beyond the provider’s control, such as financial or health issues. The paper accepted that this is relevant for the purposes of Condition B3 but said that this had already been taken into account in the selection of the baselines, ie the baselines were lower than they might have been to take this into account. The paper added, “This argument has therefore not been given weight in the draft assessments.”
106. Bloomsbury made further representations in writing on 7 May 2019 in response to the OfS’s provision of an updated dataset which included one further year’s worth of student data. When these figures were included, the totals were slightly different than the figures in the “provisional decision” letter, but Bloomsbury’s percentages still fell below the baselines/thresholds. So, for example, the continuation rate for all students studying full-time for a first degree was 69.8%. The progression rates for all students studying full-time at first degree level were 32.7%. The split indicators showed that the outcomes were of significant concern for all demographic groups studying full-time first degrees except students declaring a disability. Overall, 98.9% of Bloomsbury’s students fell into demographic groups which experienced outcomes “of significant concern”, as against the 75% baseline.
107. These further representations were reviewed and considered by the PRC. The conclusion reached was that the further information did not make a difference and that the decision not to register Bloomsbury should stand.
108. On 23 May 2019, the OfS wrote to Bloomsbury, notifying Bloomsbury of the final decision to refuse registration for the college. The OfS notified Bloomsbury that Bloomsbury had not satisfied two initial conditions of registration, B3 (quality) and E2 (management and governance). As I have already said, the case was presented before me on the basis that the key reason that Bloomsbury’s registration was refused

was because of the failure to satisfy Condition B3. Detailed reasons for the OfS's conclusion that Condition B3 was not satisfied were set out in an Annex to the letter. The OfS used the most up to date datasets. The OfS noted that 69.8% of students studying full-time for a first degree continued into a second year of study, and that the trend was downward. 32.7% of students studying full-time at first-degree level progressed into professional/managerial jobs or into further study. These were causes of significant concern. The indicators and splits flagged as a cause of significant concern cover 98.9% of all students studying at Bloomsbury in 2017-18, as compared to 100% of those studying in 2016-17.

109. In response to Bloomsbury's representations about the context and characteristics of students, the OfS said:

“The characteristics of a provider's student body are relevant context to the assessment of Condition B3. However, the OfS expects providers to deliver successful outcomes for students regardless of their backgrounds and, as set out in the regulatory framework, the OfS assesses performance in relation to student outcomes in absolute terms, rather than against benchmarked data which compares performance against the performance of similar students on similar courses at other providers.”

110. The Annex also said that if a provider is recruiting students with characteristics which might result in lower continuation rates the OfS would expect courses to be designed to match their needs and mechanisms to be in place to ensure students are supported and are reasonably likely to achieve the same outcomes as other students without those characteristics. The Annex went on:

“Therefore, while the OfS considers that student characteristics might account for slight variations in the expected performance, this is outweighed by the fact that the data indicators used as part of the assessment of Condition B3 demonstrate particularly poor performance across the three year period for which data is available and for all demographic groups, including those without protected characteristics.”

111. The Annex stated that at first degree level, 69.8% of mature students continue, 68.2% of BME students continue and 75.5% of those declaring a disability continue. The continuation rates for those without protected characteristics (students without a disability, white students and those in quintiles 3, 4 and 5 of the POLAR data) were also of significant concern.

112. The Annex explained why QAA review activity was given little if any weight, namely because the QAA monitoring review does not provide an indication of the provider satisfying Condition B3. The Annex also looked at Bloomsbury's proposed Access and Participation Plan (“APP”) and said that it was not credible that the proposed approach taken in the APP was likely to make any material difference to the outcomes for all current and future students.

113. The Annex also addressed the points made by Bloomsbury about the effect of offering a 4-year degree, with a Foundation year, to the great majority of the college's

students. The Annex noted that the four-year courses had lower continuation rates than some of Bloomsbury's other courses, but said there was also evidence that the performance of students in some 2- and 3-year programmes was as weak as students studying courses with Foundation years. The Annex said that the OfS did not compare the performance of a provider with a Foundation year course only against other providers which also offered a Foundation year.

114. Following the notification of the decision not to register the college, Bloomsbury made an application for permission to "teach out" its existing students, which, as I have said, the OfS acceded to.

### **The grounds of challenge**

115. It has been necessary to set out the regulatory framework and the decision-making process in relation to Bloomsbury in considerable detail, because they are central to the grounds of challenge that are relied upon in relation to the registration decision.
116. I will deal with the grounds of challenge in turn. There is, however, a substantial degree of overlap in the grounds, especially in Grounds 1(a) to 1(f) and so, unavoidably, there has been a degree of repetition in my analysis of the grounds.

### **Ground 1: The decision-making framework**

#### **1(a) The requirements in the Decision-Making Guidance were never consulted on**

117. It is common ground between the parties that there were two relevant statutory obligations to consult.
118. Section 75(8) of HERA provides that:

“(8) Before publishing a regulatory framework under this section the OfS must consult—

(a) bodies representing the interests of English higher education providers,

(b) bodies representing the interests of students on higher education courses provided by English higher education providers, and

(c) such other persons as it considers appropriate.”

119. Section 5(5) of HERA provides:

“(5) Before determining or revising the conditions, the OfS must, if it appears to it appropriate to do so, consult bodies representing the interests of English higher education providers which appear to the OfS to be concerned.”

120. Bloomsbury also contends that a further duty to consult arose as a result of the Regulators' Code, with which the OfS had undertaken to comply (even though it only became legally binding on 1 August 2019). The Regulators' Code requires

engagement by a regulator, by means of consultation, with those that they regulate, in order to understand their views so as to be able to develop regulatory policy.

121. The OfS contends that it (or the DfE on its behalf) complied with both of these statutory obligations (and with the Regulators' Code, albeit that the OfS does not accept that it was bound to comply with the Code) by means of a consultation exercise that was conducted between 19 October and 22 December 2017. On 19 October 2017, the DfE published a consultation paper, on behalf of the OfS, on how the OfS would regulate higher education providers. This document was 181 pages long. In addition, the DfE published a Guidance document which set out the conditions, behaviours and evidence for registration with the OfS (95 pages long), and a document entitled "Approach to transition", which contained provider roadmaps.

### **Bloomsbury's challenge**

122. At the heart of Bloomsbury's challenge in relation to consultation is the criticism that, although the OfS consulted about the Regulatory Framework, the OfS failed to consult on the confidential internal Decision-Making Guidance. Bloomsbury contended that, by adopting the Decision-Making Guidance, the OfS adopted a very different intended approach to the assessment of Condition B3 from that which was foreshadowed in the consultation exercise, and, indeed, from that which was set out in the Regulatory Framework.
123. In particular, Bloomsbury submitted that the consultation was misleading in four respects:
- (1) The consultation expressly disavowed "crude absolute numerical baselines applicable to all providers", and yet the Decision-Making Guidance led the OfS to apply absolute thresholds to all providers in determining compliance with Condition B3. The consultation document did not alert providers to this, and did not tell them what the thresholds would be;
  - (2) The approach to Condition B3 consulted on by the OfS rejected comparison with other providers, preferring a provider specific approach based on "outcomes". Bloomsbury submitted that the consultation in relation to Condition B3 proceeded on the basis that an individualised assessment of compliance with quality objectives/outcomes would be carried out so that regard could be had to the question whether the provider was meeting the needs of *its* students, ie an individualised approach. In fact, however, the Decision-Making Guidance adopted by the OfS meant that the OfS made use of the same baselines/thresholds for all providers, regardless of the provider's particular circumstances or the demographic make-up of the student body;
  - (3) The consultation document did not suggest that the OfS would decline to take account of demographic characteristics of the provider's student population. In fact, however, the OfS, applying the Decision-Making Guidance, required that every provider would need to meet the same absolute numerical threshold, irrespective of the demographics of its student population, absent exceptional circumstances; and

(4) The Regulatory Framework made clear that the new Quality Review system was being consulted on and that this “will provide a sound basis for quality and standards conditions..... able to evolve with the increasing diversity of providers.” I think that the point being made by Bloomsbury is that the consultation suggested that registration would not be used to bring up standards and, once again, that account would be taken of the special circumstances of providers.

124. Bloomsbury submitted that these failings in relation to consultation had a real impact upon the consultation process. If accurate information had been given about the OfS’s intended approach, Bloomsbury says, HESA, DfE and the QAA would have had something to say. So would providers, like Bloomsbury, whose mission is to provide for disadvantaged students, who would have warned about the detrimental effect that the OfS’s approach would have on equality. Also, if the actual thresholds had been published, Bloomsbury would have known in advance that it could not achieve them, and it would have been able to enter into a dialogue with the OfS about how it could make a successful application at all.

### **Discussion on Ground 1(a)**

125. The criticisms made by Bloomsbury of the consultation process essentially fall into two broad categories. First, the consultation was positively misleading, because the approach to the assessment of Condition B3 which was adopted by the OfS, in accordance with the confidential Decision-Making Guidance, was very different from the approach that was flagged up in the consultation document. Second, the consultation was defective because the OfS did not inform consultees as to where the cut-off was going to be in the absolute numerical baselines/thresholds.

#### **(1) Was the approach to Condition B3 that was actually followed, in accordance with the internal Decision-Making Guidance, different from the approach that was foreshadowed in the consultation document?**

126. In my judgment, the answer is “no”.

127. The starting point is to identify the approach that the OfS actually followed in its assessment of Condition B3, and in accordance with the internal confidential Decision-Making Guidance.

128. This has been reviewed in detail in the preceding section of this judgment. In my view, it is clear that the OfS used as its jumping-off points numerical (percentage) baselines/thresholds for continuation, progression, etc, which had been worked out on a one-size-fits-all approach as the percentage outcomes below which the OfS would have significant concern. The OfS took a positive decision not to have different benchmarks for different types of providers, and, in particular, the OfS took a decision not to have an assessment process which tolerated lower outcomes for providers with a more disadvantaged student body than some other providers. The baselines/thresholds were to be the same for all providers, though the percentages were lower than they might otherwise have been in order to allow some leeway for providers which had a more disadvantaged student body. The percentage baselines/thresholds were not the end of the story, however. If the percentage analysis gave rise to significant concern, it did not follow automatically that the provider would not be registered. The OfS would also look at the percentage figures

broken down by demographic groups (“split indicators”). Even if there was still significant concern after this exercise was undertaken, the OfS would go on to look at context and would take the special circumstances of the provider into account: however, at this stage demographic factors would have very little impact, because of the OfS’s view that all students, regardless of their particular characteristics, should be entitled to a high level of outcome.

129. This is consistent with the Decision-Making Guidance, and it is also consistent with the Regulatory Framework document (as to which, see below).
130. Ms Simor QC’s skeleton argument highlighted certain passages from the consultation documentation which, she argued, gave a misleading impression as regards the approach that the OfS was going to adopt to Condition B3. In my judgment, these passages do not, in fact, mislead.
131. Ms Simor QC drew attention to paragraphs 150-151 of the consultation on the Regulatory Framework, in which it was stated:

“150. The registration conditions are expressed as outcomes rather than inflexible, absolute values for each condition. The outcomes being judged will not be benchmarked, in the sense that the OfS will not test providers’ performance only against others in the same group. Providers will be held to requirements based on student needs and aspirations, not simply by comparison with their peers. Nor will the OfS rely on crude absolute thresholds. The OfS will use professional judgement, in a structured way, to evaluate whether a provider has demonstrated that they meet these conditions, taking account of the context which may include factors such as performance, size, complexity and student characteristics, and other factors.

151. For example, a provider may have low retention, linked to factors relating to their mode of delivery and student profile (such as distance learning, a large proportion of part-time provision or particular student characteristics). The OfS will take a flexible approach, using data and intelligence, to set appropriate indicators of performance for an individual provider in light of that provider’s relevant context, rather than setting fixed targets on retention for all providers although this is an area where we will remain vigilant to ensure students (and the taxpayer) are deriving value for money.”

132. Similar comments were made in the Guidance on the Conditions, eg at paragraphs 5-6 and 67-68.
133. In my judgment, this passage in the consultation document is consistent with the approach that was actually adopted by the OfS. It is correct that the registration conditions are expressed as outcomes, rather than as inflexible absolute values. It is true that the same baselines/thresholds were used for all providers to flag up significant concern, but a provider was not found to have failed to satisfy Condition B3 just because its percentages for the indicators were below the baselines/thresholds. Rather, further analysis would be carried out. It follows that the OfS did not make

use of inflexible absolute values. Although the OfS has used baselines/thresholds, it has not made use of them in a crude or absolute fashion, and, as the documentation reviewed above makes clear, the OfS carried out a more nuanced and careful evaluation to determine whether a provider has met Condition B3. It is correct, therefore, that the OfS has not relied upon crude absolute thresholds.

134. It is also correct that the OfS has not adopted an approach of accepting different outcomes for different types of providers. There was no benchmarking with similar types of providers.
135. The consultation document said that “in some circumstances, absolute performance against an indicator may form part of the overall context for assessing risk, particularly where a lead indicator suggests that a provider has dropped below baseline ongoing conditions.” The consultation document made clear, therefore, that baselines/thresholds would be used to assess performance against a lead indicator, as part of the overall assessment process. This is what the OfS did, in accordance with the Decision-Making Guidance. However, as I have already said, the OfS did not treat the baselines/thresholds as the absolute determinant of success or failure.
136. Bloomsbury also points out that the consultation on guidance in relation to the registration conditions says that the outcome or objective of Condition B3 is that the provider “must deliver successful outcomes for *its* students and these are recognised and valued by employers and/or enable further study.” Bloomsbury emphasises the word “its”. I think that Bloomsbury has read too much into the word “its” in this sentence. It does not mean that there will be a bespoke and individualised assessment and/or threshold/baseline for each provider, taking account of the special characteristics of each provider. Rather, the message that was being conveyed was that all providers were expected to deliver successful outcomes for their students. Unsuccessful outcomes would not be tolerated for providers, even if they were facing special challenges.
137. The consultation document made clear that one of the main objectives was that “all students, from all backgrounds, receive a high-quality academic experience”. The consultation document set out the four primary objectives which were also set out in the Regulatory Framework (see paragraph 53, above).
138. Bloomsbury also points out that the consultation document said that the “baseline” would be “a minimum absolute level of performance... taking into account the context of that provider.” I do not accept Bloomsbury’s submission that this meant that the benchmark would be an individualised level of performance. Rather, this wording is wholly consistent with the idea that the starting point would be a standard expected minimum outcome, but always subject to further consideration of the context of the provider.
139. In light of the above, I do not regard the four main criticisms of the consultation process by Bloomsbury, set out at paragraph 123, above, as being justified. Taking them in turn:
  - (1) The Decision-Making Guidance did not lead the OfS to apply absolute thresholds to all providers in determining compliance with Condition B3;



- (2) The consultation documentation did not suggest a “provider-specific approach”. Rather, the consultation made clear that the OfS would expect all providers, regardless of circumstances, to provide good outcomes for their students;
- (3) It is not the case that the decision-making process adopted by the OfS paid no attention to the demographic make-up of a provider’s student body. This was taken into account, and the percentages were worked out by reference to students with particular characteristics, as well as overall, and demographics were also taken into account at the “context” stage, albeit against the background of a policy decision that demographic considerations would not be allowed to “excuse” poor outcomes; and
- (4) I do not think that a fair reading of the consultation document would lead to the conclusion that the OfS was not permitted to make use of the registration process to ensure that all registered providers provided satisfactory outcomes for their students.

**(2) Should the OfS have given consultees more information about its approach, and, in particular about where the percentage baselines/thresholds were to be set?**

140. For the reasons given above, I consider that the proposed approach that was consulted upon was the same approach as was actually implemented by the OfS, and was consistent with the approach as described in the Regulatory Framework and the internal Decision-Making Guidance.
141. It is true that the internal Decision-Making Guidance set out the percentage baselines/thresholds which were to be used to identify indicators which were of significant concern and these percentages were not set out in the consultation document. However, I do not consider that this rendered the consultation process defective.
142. As Ms Carss-Frisk QC submitted on behalf of the OfS, the content of a duty to consult will be informed by the statutory context and purposes: **R (Moseley) v Haringey LBC** [2014] 1 WLR 3947 (SC), at paragraph 36, per Lord Reed. The scope of the duty to consult, and the circumstances in which a public authority may have breached its statutory duty to consult, were considered by the Court of Appeal in **R (Help Refugees Ltd) v SSHD** [2018] EWCA Civ 2089; [2018] 4 WLR 168 (CA), and were summarised at paragraph 90 of the judgment, as follows:
  - “90. We were referred to a number of authorities in relation to the scope of that duty, but it is unnecessary to drill deeply down into them. For the purposes of this appeal, the following propositions can be gleaned from them. i) Irrespective of how the duty to consult has been generated, the common law duty of procedural fairness will inform the manner in which the consultation should be conducted (**R (Moseley) v Haringey London Borough Council** [2014] UKSC 56; [2014] 1 WLR 3947 at [23] per Lord Wilson JSC).
  - ii) The public body doing the consulting must put a consultee into a position properly to consider and respond to the consultation

request, without which the consultation process would be defeated. Consultees must be told enough – and in sufficiently clear terms – to enable them to make an intelligent response (**R v North and East Devon Health Authority ex parte Coughlan** [2001] QB 213 at [112] per Lord Woolf MR, and **Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts** [2012] EWCA Civ 472 at [9] per Arden LJ). Therefore, a consultation will be unfair and unlawful if the proposer fails to give sufficient reasons for a proposal (Coughlan at [108]); or where the consultation paper is materially misleading (**R v Secretary of State for Transport ex parte Richmond upon Thames London Borough Council (No 2)** [1995] Env LR 390 at page 405 per Latham J) or so confused that it does not reasonably allow a proper and effective response.

iii) As I have indicated (see paragraph 87 above), the content of the duty – what the duty requires of the consultation – is fact-specific and can vary greatly from one context to another, depending on the particular provision in question, including its context and purpose. Citing the judgment of the Privy Council in **The Mayor and Corporation of Port Louis v The Attorney General of Mauritius** [1965] AC 1111 at page 1124 ("the nature and the object of consultation must be related to the circumstances which call for it"), Lord Reed JSC in *Moseley* said (at [36]):

“[Statutory duties of consultation] vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out.”

Lord Wilson (at [23]) also referred to the requirements being linked particularly to the purpose of the consultation.

iv) A consultation may be unlawful if it fails to achieve the purpose for which the duty to consult was imposed (**Moseley** at [37]-[43] per Lord Reed).

v) The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore, for a consultation to be found to be unlawful, "clear unfairness must be shown" (**Royal Brompton** at [13]); or, as Sullivan LJ said in **R (Baird) v Environment Agency** [2011] EWHC 939 (Admin) at [51], a conclusion by the court that:

“... a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong.”

vi) The product of the consultation must be conscientiously taken into account before finalising any decision (**Coughlan** at [108]).”

143. I accept Ms Carss-Frisk’s submission that the purpose of sections 75(8) and 5(5) of HERA (and of the Regulatory Code) was not to require consultation on every granular detail of the assessment process that was carried out by the OfS. This was a matter for those at the OfS who would be involved in the assessment process. The consultees were not going to be involved in that. Rather, the aim of the consultation was to consult in broad terms about the Regulatory Framework, and to consult, again, in broad terms, about the Conditions that should be adopted. The idea was that consultees should have an opportunity to provide their views about the objectives of the registration process, the Conditions for registration, and the general approach to assessment. The consultation documents did this, in great detail. The consultation documents made clear that the OfS would make use of data about outcomes relating, inter alia, to continuation and progression. In my view, it was not necessary, for the purposes of this broad consultation exercise, for the consultation document to say where the percentage baselines/thresholds for significant concern would be set.
144. It cannot be said, therefore, that something has clearly gone radically wrong, or that there was clear unfairness in the process.
145. I am reinforced in this view by the fact that it is clear that it was not the function of the consultation process to give providers an opportunity to give reasons why they should be registered. This was to be dealt with by the procedure, set out in HERA, section 4, which required providers to be given advance notification of the proposed decision, and an opportunity to make representations, before a decision not to register them was made. At that stage, providers in Bloomsbury’s position were told which indicators were of significant concern and were told the percentage figures that the OfS had calculated, and were then given the opportunity to comment on them before a final decision was taken on registration.

#### **Conclusion on ground 1(a)**

146. In my judgment, the consultation conducted by the DfE on behalf of OfS fully complied with the statutory consultation requirements (and, in so far as the OfS was under any consultation obligations as a result of the Regulatory Code, these too).

#### **Ground (1)(b): the requirements set out in the decision-making framework were never incorporated into the Regulatory Framework and were not published in anyway**

#### **Bloomsbury’s challenge**

147. Ms Simor QC pointed out that section 75 of HERA imposes a statutory obligation on the OfS from time to time to prepare and publish a regulatory framework which must consist of a statement of how it intends to perform its functions and guidance for registered providers on the general ongoing registration provisions (see paragraph 43, above). Section 5(1)(a) also requires the OfS to publish the initial registration conditions (paragraph 37, above), and section 2(1)(g) imposes an obligation to comply with the principles of best regulatory practice, including the principles that

regulatory practice should be transparent, accountable, proportionate and consistent (paragraph 34, above). She also pointed out that the Regulators' Code specifically requires regulators to ensure clear information, guidance and advice is available to help those that they regulate meet their responsibilities to comply (paragraphs 5.1 to 5.6 of the Regulators' Code).

148. Ms Simor QC submitted that the OfS breached these statutory obligations, and its obligations under the Regulators' Code, because the Regulatory Framework did not contain the guidance set out in the Decision-Making Guidance, and that this guidance was essential information for a provider to enable it to know whether and how it could satisfy Condition B3.
149. Ms Simor QC also submitted that there is a common law requirement to publish policies which set out the manner in which a statutory power will be exercised: **R (Lumba) v Secretary of State for the Home Department** [2012] UKSC 12; [2012] 1 AC 245, at paragraphs 35-38.

### **Discussion**

150. To a large extent, Bloomsbury's submissions on ground 1(b) were predicated on the footing that the approach to assessment that was set out in the Decision-Making Guidance was different from the approach that was set out in the consultation documents and in the Regulatory Framework.
151. I have already said that I do not accept that the Decision-Making Guidance was an entirely different approach to the assessment of Condition B3 from that foreshadowed in the consultation documents. Similarly, I do not accept that the Decision-Making Guidance departed from, or was inconsistent with, the Regulatory Framework. Nor do I accept that the Regulatory Framework was defective because it did not go into greater detail about the assessment process.
152. The Regulatory Framework said that the OfS would make judgments about individual providers on the basis of data and contextual evidence. This is what the Decision-Making Guidance provides for. It is true that the Regulatory Framework did not set out numerical performance targets, but in my judgment there was no need for it to do so. Though the assessment process made use of baselines/thresholds for the various indicators, this was only for the first stage of the assessment process. There were no absolute targets. The Regulatory Framework explained that the approach to Condition B3 would be outcome-based, that there would not be different criteria for different types of providers, and that the OfS would make use of data by reference to lead indicators, including continuation and progression (see paragraphs 54-57, above). The Regulatory Advice 2 document gave further information about the approach to be adopted.
153. This was ample information in order to comply with the OfS's obligations in relation to the publication of the Regulatory Framework under sections 75, 5 and 2(1)(g) of HERA (and, to the extent that it adds anything extra, which I doubt, the Regulators' Code). These statutory obligations to provide information to providers and others did not extend to an obligation to providing consultees with all of the information that was going to be provided, in the Decision-Making Guidance, to the officials who were going to carry out the assessments for the OfS.

154. The paper that was presented to the OfS's PRC meeting on 29 April 2019, which summarised the OfS's approach to assessments of Condition B3, and which I have quoted from at paragraphs 102-104, above, demonstrates that the approach that was actually adopted by the OfS was consistent with the approach set out in the Regulatory Framework.
155. In my judgment, **Lumba** does not support Bloomsbury's arguments. In **Lumba**, the unpublished policy that was applied by the Home Secretary departed from the published policy, in material respects (see judgment at paragraph 169). That is not the position here.
156. Moreover, at paragraph 38 of **Lumba**, Lord Dyson said:
- “The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before us. It is not practicable to attempt an exhaustive definition...What must, however, be published is that which a person who is affected by the operation of a policy needs to know in order to make informed and meaningful representations to the decision-maker before the decision is made.”
157. In the present case, the information that was provided to Bloomsbury in order to make representations before the registration decision was finally made consisted not only of the 2018 consultation documents, and the published Regulatory Framework and Regulatory Advice documents, but also the provisional decision that was issued to Bloomsbury on 29 January 2019. The Annex to this document gave Bloomsbury a great deal of information which enabled Bloomsbury to make informed and meaningful representations. The only piece of information that was missing was where the cut-off came for significant concern on the percentage figures for continuation and progression. This information would not have helped Bloomsbury to make its representations. Bloomsbury was told the percentages for the college that OfS was working from for continuation and progression (which were correct), and Bloomsbury were in a position to (and did) make representations to the effect that, given Bloomsbury's particular profile and circumstances, the percentages should not be of significant concern. In any event, the OfS did not use the baselines/thresholds as absolute cut-offs.

#### **Conclusion on ground 1(b)**

158. It follows from all of this, in my judgment, that the OfS was not under any obligation to provide the more detailed information about the assessment process which appears in the Decision-Making Guidance in the Regulatory Framework, or to publish the Decision-Making Guidance.

**Ground 1(c): the Decision-Making Guidance was ultra vires because it was adopted by Ms Lapworth, the Director of Competition and Registration, who did not have delegated power to do so**

159. The evidence before the Court was to the effect that the decision as to where to set the thresholds/baselines for the key indicators for Condition B3 was taken by Ms Lapworth. It was she who decided on the percentages for the various indicators that should be regarded as of significant concern.

### **The Scheme of Delegation**

160. It was common ground that the relevant Scheme of Delegation for the OfS is the one that applies to the period from 1 April 2018. This stated, at paragraph 3, that the matters reserved to the OfS Board included “changes to the regulatory framework”.

161. The Scheme of Delegation also provided, in relevant part:

“4. However, it is not practical for the board to make every decision necessary to fulfil the OfS’s role. It therefore delegates the authority to make certain decisions to the OfS chair, the chief executive, the director for fair access and participation, other directors and board committees, taking into account the advice of the OfS’s senior executive team or others as appropriate.

....

7. Functions, matters, powers, authorisations, delegations, duties and responsibilities within this Scheme shall be construed in a broad and inclusive fashion and shall include the doing of anything which is calculated to facilitate or is conducive or incidental to the discharge of anything specified.

....

13. It is not practical for the chief executive to make every day-to-day operational decision necessary for the smooth running of the OfS. Operational decision-making is therefore cascaded down through directors to senior managers and others as necessary.”

162. The Scheme of Delegation also dealt with the responsibility for assessing applications for registration and for making recommendations in relation to registration. Decisions on initial registration were delegated to the PRC, the Chief Executive, and the Director of Competition and Registration, respectively, in accordance with guidelines set out in the Scheme of Delegation. The Director of Competition and Registration, Ms Lapworth, had delegated authority to grant registration where the provider satisfied the initial conditions of registration and the risk category for each condition (on a traffic-light system) was no higher than yellow (paragraph 20). The Chief Executive could, under delegated authority, decide upon a recommendation if the provider satisfied the initial conditions for registration and there was only one red category (provided it is not category D) (paragraph 22). However, the Chief Executive could decide to refer the application to the PRC (paragraph 23). The PRC would take the decision where the Chief Executive decided to refer the case to the PRC, or where the recommendation was that (a) the provider was not eligible for registration, (b) the provider did not satisfy the initial conditions for registration, or (c) the risk category for two or more conditions was red, or the risk category for

condition D (financial viability and sustainability) or E2 (management and governance) was red (paragraph 24).

163. The effect of this Scheme of Delegation, therefore, is that the decision to refuse registration for a provider will always be taken by the PRC, rather than by the Chief Executive or Ms Lapworth.

### **Bloomsbury's challenge**

164. Ms Simor QC submitted that, under the scheme of delegation that applies to the OfS, Ms Lapworth did not have delegated power to decide on key policy questions that were settled by the Decision-Making Guidance, such as the setting of the main numerical baselines/thresholds and the demographic group baselines/thresholds. In effect, this meant that Ms Lapworth decided on the criteria for registration. Ms Simor QC submitted that only the Board of the OfS had power to do this, and that the Board could only do so after obtaining the advice of the Quality Assessment Committee, set up pursuant to HERA, section 24.
165. Bloomsbury's challenge is not on the basis that the Scheme of Delegation itself is ultra vires. Rather, Bloomsbury contends that the OfS failed to comply with its own Scheme of Delegation.

### **Discussion**

166. In the present case, the decision to refuse registration for Bloomsbury was taken by the PRC. This was in keeping with paragraph 24 of the Scheme of Delegation, because, although the assessors had recommended that Bloomsbury should be granted registration, the risk category for two of the conditions, B3 and E2, had been red. This meant that the decision had to be taken by the PRC. Indeed, in this case the officials of the OfS in the Assessment Team, when the application was first considered, would have granted registration, if the decision had been theirs. The PRC did not follow the recommendation.
167. The ultra vires challenge by Bloomsbury does not relate to the identity of the decision-maker in respect of Bloomsbury's application for registration. Rather, the complaint is that, by having assumed responsibility for the Decision-Making Guidance, and in particular by setting the baselines/thresholds for the key indicators for Condition B3, Ms Lapworth set the ground rules, the criteria, for granting or refusing registration, and this exceeded the authority granted to her by the Scheme of Delegation. It went beyond "operational decision-making" as provided for by paragraph 13 of the Scheme of Delegation, and extended, in effect, to determining the Regulatory Framework on behalf of the OfS. This was a matter that was reserved to the Board, by paragraph 3 of the Scheme of Delegation. Furthermore, Bloomsbury contends that the Decision-Making Guidance departs from, and is in conflict with, the Framework Agreement.
168. There is no dispute that Ms Lapworth was responsible for preparing the Decision-Making Guidance and was responsible for deciding what the baselines/thresholds should be for the indicators relevant to Condition B3. In fact, the proposed use of baselines/thresholds was considered by the PRC at its May 2018 meeting, and again in September 2018, and the approach that Ms Lapworth intended to take, making use

of baselines/threshold, was approved. However, the OfS accepted in its evidence that the decision in relation to where the baselines/thresholds should be set was taken by Ms Lapworth.

169. There is an overlap between this ultra vires submission and grounds 1(a) and 1(b) of Bloomsbury's grounds of challenge, since each of them is based, at least to some extent, upon the proposition that the Decision-Making Guidance departed from the Regulatory Framework and changed the approach to assessments for registration purposes from that which was set out in the Regulatory Framework. For the reasons already given, I do not accept that there is any conflict between the Regulatory Framework and the Decision-Making Guidance. The Decision-Making Guidance did not change the approach to assessment as set out in the Regulatory Framework and so it was not, for this reason, trespassing on a function that was reserved to the OfS Board by paragraph 3 of the Scheme of Delegation.
170. The next question is whether the contents of the Decision-Making Guidance, and, in particular, the baselines/thresholds, were matters that should have been set out in the Regulatory Framework. Again, in my judgment, for the reasons already given, the answer is "no". The OfS's obligation to publish a Regulatory Framework did not extend to an obligation to publish the detailed operational guidance that was subsequently covered by the Decision-Making Guidance. In particular, there was no statutory obligation for the Regulatory Framework to set out the baselines/thresholds that the OfS's assessors would use as part, but only part, of the assessment process. Providers were informed by the Regulatory Framework and by Regulatory Advice 2 that the OfS would take account, inter alia, of continuation and progression rates when assessing compliance with Condition B3, and that for this purpose datasets would be used, but that context would also be taken into account. As I have already said, this, in my judgment was sufficient. There was no legal obligation to provide the baselines/thresholds that would be used as part of the assessment process.
171. In my judgment, Ms Lapworth, as Director for Competition and Regulation, was entitled to take responsibility for the drafting and circulation of the Decision-Making Guidance, because it was part of the "operational decision-making function", which could be delegated to her by paragraph 13 of the Scheme of Delegation. The Decision-Making Guidance was a tool to assist the Assessment Team in conducting assessments, with a view to ensuring that they acted in accordance with the spirit and purpose of the Regulatory Framework, and acted with consistency. The precise baselines/thresholds were matters of detailed implementation of the Regulatory Framework. They were matters of specific and technical detail which were suitable for being worked out by a member of the executive team rather than by a committee such as the PRC.
172. It is important to bear in mind that the final say in respect of assessments and decisions in relation to registration, where registration was refused, rested with the PRC, not with Ms Lapworth. This is exemplified by what happened in Bloomsbury's case. Bloomsbury's application was carefully and thoroughly considered by the PRC, and, as I have pointed out, the PRC departed from the original recommendation from the assessors. This demonstrates that the delegation to Ms Lapworth of responsibility for the Decision-Making Guidance did not have the effect, in theory or in practice, that she determined whether providers' applications would succeed or fail. It was not simply the case of applying a numerical test set out in the Decision-Making



Guidance to the datasets for a particular provider in order to produce the result. This means that Ms Lapworth did not exceed her delegated functions under paragraph 20 of the Scheme of Delegation (see paragraphs 161-2, above).

173. I should add that I do not accept that there was any obligation, either under statute (section 24 of HERA, set out at paragraph 41 above), or under the Scheme of Delegation, for Ms Lapworth to consult with or involve the Quality Assessment Committee when preparing the Decision-Making Guidance. Section 24 of HERA did not mean that every detail of the assessment process had to be run past the Quality Assessment Committee before it could be implemented.

### **Conclusion**

174. For these reasons, ground 1(c) is rejected.

**Ground 1(d): The Decision-Making Guidance and approach to compliance with Condition B3 were adopted without due regard to the statutory equality objectives in breach of section 149 of the Equality Act 2010, and in breach of the OfS's duty to promote equality of opportunity in relation to access and participation in education, set out in sections 2(1)(g)(i) and (ii), 2(1)(e) and 7 of HERA**

175. The OfS is a public authority listed in Schedule 19 of the Equality Act 2010 (“the EA10”). Therefore, the OfS is subject to the public sector equality duty (“PSED”) set out in section 149 of the EA10. This provides, in relevant part:

“(1) A public authority 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.

....

(3) Having due 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;

(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.

(4) 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.

(5) 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, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation”

176. In addition to its PSED duty, the OfS has a specific statutory duty, under section 2(1)(e) of HERA, to have regard to the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers. This largely, if not entirely, overlaps with the PSED.

### **Bloomsbury's challenge**

177. On behalf of Bloomsbury, Ms Simor QC submitted that the OfS failed to discharge its PSED and its statutory duty under section 2(1)(e) of HERA. She makes four main points.

178. First, she submitted that the Equality Impact Assessment (“EIA”), dated February 2018, which was completed by the OfS in purported compliance with its PSED and section 2(1)(e) duties, pre-dated the Decision-Making Guidance. It addressed the proposed Regulatory Framework but not the Decision-Making Guidance. Therefore, the EIA did not consider the equality consequences of applying the numerical thresholds and demographic thresholds to providers with student populations representing a high percentage of protected and underrepresented groups.

179. Second, Ms Simor QC submitted that there is no contemporaneous documentation relating to an equality assessment of the Decision-Making Guidance, either in relation to the general approach set out in the Guidance, or in particular relating to the use of the absolute numerical thresholds.

180. Third, and in any event, Ms Simor QC submitted that the duty to comply with the PSED was a non-delegable duty imposed on the OfS Board, and the potential equality impact of the numerical thresholds methodology was not considered by the OfS Board.
181. Finally, Ms Simor QC submitted that the EIA at the stage of enacting HERA had been based on the proposition that the new regulatory framework would have a positive equality impact because it would open up higher education to new high quality providers. She said that there was no suggestion that the new regulatory system would be used in such a way as to drive up quality by excluding incumbent providers which had met the quality standards under the existing quality review system.

### **Discussion**

182. The scope of the PSED (and by extension, the obligation imposed by section 2(1)(e) of HERA) has been exhaustively considered in the authorities. See, for example, **R (Hurley) v Secretary of State for Business, Innovation and Skills** [2012] HRLR 13, at paragraph 70 (CA), per Elias LJ; see too **R (Elias) v Secretary of State for the Home Department** [2006] 1 WLR 3213 (CA), paragraph 274, per Arden LJ; **R (C) v Secretary of State for the Home Department** [2008] EWCA Civ 882, paragraph 49, per Buxton LJ; **R (BAPIO) v Secretary of State for the Home Department** [2007] EWCA Civ 1139, paragraphs 2-3, per Sedley LJ; and **Bracking and Others v Secretary of State for Work and Pensions** [2013] EWCA Civ 1345, paragraph 26.
183. The PSED, imposes a requirement to “have regard” to equality issues, but does not impose a duty to achieve a result. Rather, it is a duty to have regard to the need to achieve equality goals: **R (Baker) v Secretary of State for Communities and Local Government** [2009] PTSR 809 (CA) at paragraph 31, per Dyson LJ.
184. The scope of the Court’s enquiry into the compliance by a public authority with its PSED was summarised by Flaux J in **R (SG) v Secretary of State for the Home Department** [2016] EWHC 2639 (Admin), at paragraph 329. Flaux J said that:
- “... what is required is a realistic and proportionate approach to evidence of compliance with the PSED, not micro-management or a detailed forensic analysis by the court .... the PSED, despite its importance, is concerned with process not outcome, and the court should only interfere in circumstances where the approach adopted by the relevant public authority is unreasonable or perverse.”
185. There is no obligation to evidence compliance with the PSED by means of an EIA or similar record, or to mention specifically the PSED in carrying out the particular function where it has to have due regard to the needs set out in section 149, though it is good practice to do so: **R (Brown) v Secretary of State for Work and Pensions and others** [2009] PTSR 1506, at paragraphs 93 and 96, per Aikens LJ.
186. In the present case, the OfS published a detailed EIA on 28 February 2018, at the time when it adopted the Regulatory Framework. The EIA referred to Conditions A1 and A2, which were specifically designed to improve access to higher education. At paragraph 56, the EIA said that the targets that would be imposed on providers to improve student access, especially for under-represented groups, would be supported

by the OfS's regulation of the conditions relating to quality, reliable standards and positive outcomes for all students (Conditions B1-B6) and that the OfS would consider each provider's position with regard to students with different backgrounds and characteristics to secure baseline assurance for all students. Paragraph 66 said that the impact of the B Conditions had been assessed as positive, and that the conditions had been carefully framed, taking account of the OfS's objectives, to achieve a positive impact on students with protected characteristics and other underrepresented students. Paragraph 68 said that the B Conditions were designed to ensure that students are provided with the support necessary for a high quality academic experience and successful completion. Paragraph 69 said that Condition B3 sets out the parameters for how the OfS would assess the impact on student outcomes, and that the OfS expected to be able to draw on various data and intelligence to reach a nuanced understanding of how each provider ensures successful outcomes for those students from underrepresented groups and with protected characteristics.

187. The OfS did not publish a second EIA, a few months later, when the Decision-Making Guidance was prepared. The Guidance itself was not intended for publication. However, in her witness statement Ms Lapworth said that she conducted a detailed consideration of equality matters when she worked out the baselines/thresholds to use for the Condition B3 indicators. In particular, she lowered the baselines/thresholds for significant concern to take account of demographic differences between students and providers. This was driven by an awareness that if the baselines/thresholds were not reduced, successful providers which catered for disadvantaged students might struggle to avoid falling into the significant concern category.
188. Ms Lapworth also considered the likely result of the approach in the Decision-Making Guidance in that certain providers whose student bodies contain a high proportion of students from disadvantaged backgrounds would fail to achieve registration. She took the view that this would not have a significant impact, because only a relatively small number of providers would be affected, and that the benefits clearly outweighed the downsides.
189. Taking the four points made by Ms Simor QC in turn, the first is that the EIA only addressed the Regulatory Framework, not the Decision-Making Guidance. In my view, this does not amount to a breach of the PSED or section 2(1)(e) of HERA, for two reasons. First, for reasons I have already explained, the Decision-Making Guidance did not represent a departure from the approach adopted by the Regulatory Framework, but was guidance given to internal assessors for the purposes of implementing that approach. The Decision-Making Guidance does not make use of absolute numerical thresholds. The EIA in relation to the Regulatory Framework therefore covered the equalities considerations arising from the approach set out in the Decision-Making Guidance. Second, and in any event, the evidence of Ms Lapworth makes clear that she had regard, at the relevant time, to the equalities impact of the detailed approach as set out in the Decision-Making Guidance. I have no reason to doubt her evidence on this issue. Taken together, the February 2018 EIA and Ms Lapworth's consideration of equalities issues at the time of preparing the Decision-Making Guidance amounted to a reasonable approach to the OfS's PSED and section 2(1)(e) duties.

190. The second submission of Ms Simor QC was that there is no contemporaneous documentation relating to the Decision-Making Guidance, either in relation to the general approach set out in the Guidance, or in particular relating to the use of the absolute numerical thresholds. I have already addressed this. The EIA in relation to the Regulatory Framework covered the Decision-Making Guidance. There were no “absolute” numerical thresholds. Ms Lapworth had regard to equalities issues when she prepared the Decision-Making Guidance, and, as Aikens LJ made clear in the **Brown** case, it is not necessary that there be contemporaneous documentation evidencing the fact that regard has been had to the PSED.
191. Bloomsbury’s third submission was that the duty to comply with the PSED was a non-delegable duty imposed on the OfS Board, and the potential equality impact of the numerical thresholds methodology was not considered by the OfS Board. I accept the OfS’s submission on this issue: the PSED duty is non-delegable in that it cannot be delegated by the OfS to a third party, but that does not mean that it cannot be complied with by a director of the OfS, such as Ms Lapworth: see **Brown**, at paragraph 94.
192. Finally, Ms Simor QC submitted that there had been no suggestion that the new regulatory system would be used in such a way as to drive up quality by excluding incumbent providers which had met the quality standards under the existing quality review system, and so no regard had been had to this. I do not accept this submission. The EIA said that the OfS would secure baseline assurance for all students. The EIA made clear that the same high standards, including output standards, would broadly be applied to all providers. There was never any suggestion that providers which had been designated for SLC purposes under the old arrangements would be guaranteed registration (and so, designation) by the OfS. Indeed, it was absolutely clear that this was not the position: the OfS was going to carry out its own assessments. It follows necessarily that the OfS was aware that some providers with a high proportion of disadvantaged students, might not obtain registration. Furthermore, Ms Lapworth’s evidence was that she had regard to the fact that some providers would not achieve registration, and that these may specialise in disadvantaged students but took the view that the benefits (of high standards for all) outweighed the disadvantages, especially as only a small number of providers were likely to fail the registration process.

#### **Conclusion on ground 1(d)**

193. For these reasons, ground 1(d) is rejected.

#### **Ground 1(e): The requirements of the Decision-Making Guidance were contrary to the OfS’s published Regulatory Framework and the guidance provided by the Secretary of State for Education**

194. This ground might perhaps have been put as the first of the grounds relied upon by Bloomsbury, because the contention that the requirements of the Decision-Making Guidance were contrary to the Regulatory Framework has been centre-stage in each of Grounds 1(a) to 1(d). I have already addressed this point at length in this judgment, and so I will not repeat my reasoning. Suffice it to say that, for the reasons already given in the earlier parts of this judgment, I reject the argument that the requirements of the Decision-Making Guidance conflict with the Regulatory Framework. They were consistent with the Regulatory Framework. In particular, the

Regulatory Framework and Regulatory Advice 2 made clear that the OfS would use datasets to assess providers against key indicators for Condition B3 purposes, and that such indicators would include continuation and progression. These documents also made clear that there would not be different baselines/thresholds for different types of higher education providers, and so the same baselines/thresholds would be used for providers with a higher proportion of disadvantaged students as other providers. Therefore, it was clear that, when the data was examined, the same broad standards would be applied to all providers. However, the documents also made clear that there would not be an absolute numerical cut-off. Consistently with that, the Decision-Making Guidance did not use an absolute numerical cut-off. Rather, the percentage baselines/thresholds were used to identify indicators of significant concern. The assessment was not just made globally across the student body but was sense-checked by being assessed by reference to different demographic groups. Finally, the assessment process took account of context, including the make-up of the student body, but against the background that the OfS had decided that essentially the same minimum standards of outcome should apply to all students, whether disadvantaged or not.

195. Bloomsbury submitted, correctly, that HERA, section 2(3), obliged the OfS to have regard to guidance promulgated by the Secretary of State, the Access and Participation Guidance. This Guidance said that it was particularly important for the OfS to recognise the needs of students from disadvantaged backgrounds; given they are less likely to access, succeed in, and progress successfully from higher education, even once their entrance characteristics are taken into account. This Guidance also stated that the OfS should consider access and participation holistically, ensuring that it is a fundamental consideration in everything the OfS does and the decisions it takes.
196. In my judgment, the requirements of the Regulatory Framework and the Decision-Making Guidance were consistent with the Secretary of State's Access and Participation Guidance. The A Conditions were directed towards promoting access to higher education, especially from disadvantaged groups. Condition B3 was designed to ensure the same high-quality outcomes for students from disadvantaged groups as for other students. The particular baselines/thresholds selected for continuation and progression were set at a lower level than they otherwise would have been in recognition of the particular difficulties facing students from disadvantaged backgrounds in remaining in their courses and then in obtaining professional jobs or higher study after their first degree was completed – and the challenges that this caused for providers which had a high proportion of students from disadvantaged backgrounds.
197. The way that the OfS chose to tackle the problems of access and progression for disadvantaged students, therefore, was to have a broadly level minimum standard for all providers, with a view to avoiding a situation in which lower standards were expected or tolerated for students at institutions with a high proportion of disadvantaged students. The OfS decided to avoid a two-tier (or multi-tier) system. At the same time, the OfS made use of the A Conditions to widen access. This was consistent with the Access and Participation Guidance.
198. Ms Simor QC also submitted that it was not the intention of the regulatory system adopted under HERA that quality be improved through the refusal of registration; rather the objective was the maintenance of the high quality standards required by the

pre-existing system with an increase in supply to drive up quality through competition. If it is being suggested that the OfS was not permitted to refuse registration to providers that were designated under the old system, this is plainly not the case. Again, if it is being suggested that the OfS was not permitted to set its own minimum standards for outcomes, I disagree. The whole idea was that the OfS was to put in place a new system. There was no guarantee of registration, and there was no promise that registration under the new system would be subject to exactly the same criteria and standards as designation under the old system. In any event, Bloomsbury had been warned in the final year of the old system that there were concerns about its rates of continuation.

### **Conclusion on Ground 1(e)**

199. In my view, the OfS's objectives, implemented through the Decision-Making Guidance, were fully consistent with the Secretary of State's Access and Participation Guidance. The assessment procedure, set out in detail in the Decision-Making Guidance, did not conflict with the slightly less detailed description of the process in the Regulatory Framework. The minutes of the OfS Board meetings do not suggest that the Board rejected or departed from the principles set out in the Regulatory Framework and, as I have said probably too many times already, the Decision-Making Guidance builds upon and is consistent with the Regulatory Framework

### **Ground 1(f): the Condition B3 numerical and demographic thresholds were arbitrary and irrational**

200. The starting point is that the threshold for challenging a regulatory decision in a specialist field such as this is very high: see, eg, **R (Mott) v Environment Agency** [2016] EWCA Civ 564; [2016] 1 WLR 4338, at paragraphs 71-75, per Beatson LJ.
201. Bloomsbury made six specific points about the use of the numerical baselines/thresholds. I will look at each in turn, but before I do so, I must reiterate that I have not accepted Bloomsbury's core submission that the numerical baselines/thresholds were absolute. They were tools to be used to identify indicators of significant concern, but the fact that a baseline/threshold was not met did not mean that the provider would not be registered. The OfS's approach was more complex and more nuanced.
202. The first complaint is about the level at which the numerical thresholds were set. Bloomsbury submitted that this was adjusted to exclude only a certain number of providers rather than by reference to a true determinant of "quality", and this demonstrates that such an absolutist measurement cannot be a true proxy for quality.
203. I do not entirely follow the logic of this argument. I have rejected the premise that the baselines/thresholds are "absolutist" measurements, but in any event, I do not see why numerical thresholds for matters such as continuation and progression cannot play a part in determining quality of outcomes for students. Plainly, if a student drops out, this will be a negative outcome. Equally plainly, if a student succeeds in obtaining a professional job or a place on a postgraduate course after his or her first degree, this will be a positive outcome. If you are going to make use of datasets, and you want to be consistent across the board, you have to have thresholds. The fact

that only a few providers fail to surpass this minimum threshold does not mean that it cannot work as a proxy for quality.

204. The second point relied upon by Bloomsbury is that different (lower) baselines/thresholds were used for continuation and progression in part-time courses and other undergraduate degrees, and the OfS was wrong not to apply a similar lowering in the baseline/thresholds for four year courses with a Foundation year.
205. In my judgment, it was not irrational for the OfS to decide, as a matter of policy, that four-year undergraduate degrees should be treated the same as three-year degrees. I can see that there are policy arguments either way, but that is not the issue before me. The issue is whether the OfS's approach was irrational. Ms Lapworth's evidence explained the thinking behind this approach. There were two main reasons. First, the OfS did not wish to adopt a regulatory approach which would tolerate poorer outcomes for Foundation year students. Second, courses with Foundation years have the same learning outcomes and attract the same fees as courses without Foundation years. There was also a subsidiary reason, namely problems with the reliability of data regarding Foundation year students. In my judgment, these considerations mean that it was entirely rational for the OfS to decide to treat four-year undergraduate degrees the same as standard three-year degrees.
206. The third aspect to Bloomsbury's rationality challenge was the submission that the OfS acted irrationally in relation to the progression indicator, in adopting a six-month period within which a student had to obtain a professional job or to enter post-graduate study in order to qualify as a positive outcome. Bloomsbury did not go into detail as to why this was irrational. In my judgment, this is the sort of expert calibration and judgment that the Court of Appeal had in mind in the **Mott** case. Some type of parameter had to be adopted and there is no reason, in my judgment, why six months, rather than, say nine months, or twelve months, should be regarded as irrational.
207. The next irrationality challenge was to the type of jobs that were treated as being "professional" for this purpose. Mr Fairhurst, at paragraph 12 of his second witness statement, pointed out that this excluded a wide range of jobs, including national and local government administrative occupations, finance officers, various types of clerks, and office managers.
208. In my judgment, the approach adopted by the OfS in this regard was very far from being irrational. It was obviously rational to ask how many students go into professional jobs, in order to test successful outcomes. The OfS did not make up its own eccentric list of professional jobs. Rather, the OfS adopted the classifications used by the Office of National Statistics for professional or managerial jobs (Standard Occupational, SOC, Classifications 1-3). The jobs that Mr Fairhurst says should have been included are jobs in SOC 4, which includes administrative or secretarial occupations. With respect, the jobs listed in paragraph 12 of Mr Fairhurst's second witness statements are not ones that would generally be regarded as professional jobs and are not jobs, on the whole, for which a degree would be necessary.
209. Next, Bloomsbury contends that the demographic group threshold of 75% is arbitrary, and, far from achieving the statutory purpose, potentially undermines it. Once again, I do not accept that this was irrational, or contrary to the statutory purpose. The



demographic baselines/thresholds operate as a sense-check. If a high proportion of a provider's students fall into demographic group which achieve outcomes of significant concern, this is a sign that there is a problem across the board at the provider. Anyway, failing the 75% demographic test does not automatically mean that the provider has failed to comply with Condition 3B.

210. Finally, Bloomsbury submits that it was irrational to make use of four indicators for the purpose of Condition B3, continuation, completion, degree outcome, and progression, and then to ignore the indicators for which the threshold had been met. In Bloomsbury's case, it passed the baselines/thresholds for completion of degrees and degree outcome, but failed for continuation and progression. In my judgment, there is nothing irrational in the OfS seeking successful outcomes in relation to all of these indicators, rather than in just half of them. Also, as Ms Lapworth explained, the "completion" indicator was a new indicator and the OfS had greater confidence in the continuation indicator as a guide to successful outcomes.

### **Conclusion on Ground 1(f)**

211. The approach adopted to the assessment of Bloomsbury in relation to Condition B3 was not arbitrary nor irrational.

### **Ground 2: The decision refusing registration to Bloomsbury was unreasonable and/or disproportionate in all the circumstances**

#### **Groud 2(a): the OfS failed to act on its September 2018 assessment which recommended that Bloomsbury should be registered**

212. I refer to the September 2018 assessment document at paragraph 83, above. This document recommended that Bloomsbury should be registered and identified only one possible "red" category, Category B3. Ms Simor QC submits that, in accordance with the Scheme of Delegation, paragraph 22, this meant that the Chief Executive should have taken the decision on registration in September 2018, unless she determined to refer the application to the PRC. She did neither. Bloomsbury contends that if the Chief Executive had determined the application based on the September 2018 recommendation, there is, at least, a real prospect that the application would have been granted.
213. In my judgment, this argument is misconceived. As Ms Lapworth's evidence made clear, there was no finalised recommendation by the Assessment Team in September 2018. Rather, the draft decision letter was prepared for the purposes of a meeting of the PRC at which some sample assessments were to be looked at in order to address some generic issues. The process of assessing Bloomsbury's application continued into November 2018, by which time two red conditions were identified. It follows that Bloomsbury's application was correctly referred upwards to the PRC, which took the decision not to register.
214. It is true that a draft positive Decision Letter was drafted in October 2018, but this was simply because, when the Assessment Team recommended registration, as was the case for Bloomsbury, the staff prepared a draft Decision Letter in accordance with the recommendation, to save time. In the event, as the PRC disagreed with the recommendation, the Letter was not sent.

**Ground 2(b): the OfS misdirected itself as to its statutory powers**

215. In relation to this ground, Bloomsbury relies on the combined effect of section 3(3) and section 7 of HERA. Section 3(3) provides that the OfS must register a provider if the provider satisfies the initial registration conditions “applicable to it”. Section 7 requires the OfS to ensure that the initial registration conditions applicable to an institution are proportionate to the regulatory risk posed by the institution.
216. Bloomsbury submits that the cumulative effect of sections 3(3) and 7 is that the OfS has a discretion to disapply a particular Condition in relation to a particular provider. Indeed, Regulatory Advice 2, at paragraph 131, notes that this can be done where there was insufficient data to assess compliance in relation to the relevant condition. The OfS’s Scheme of Delegation, in place at the time when the proposed decision was taken by the PRC in November 2018 (a different one from the Scheme under consideration in Ground 1(c)) stated, at paragraph 21, that the Director for Competition and the Register may decide upon recommendations to disapply the initial condition of Registration B3 for a provider that otherwise satisfies the initial conditions of registration. Bloomsbury contends that the OfS did not appreciate that it had the power to disapply Condition B3, and there was no reference to this option in the assessment in November 2018 or in the final decision in May 2019. Bloomsbury says that, if the OfS had realised that it had this power, there is a real possibility that it would have exercised it.
217. In my judgment, there was no such misdirection. I accept that the statutory framework permitted the OfS, at its discretion, to disapply an initial condition. The OfS was not mistaken about this: the OfS was aware that it could, in appropriate circumstances, disapply Condition B3, because Regulatory Advice 2 left open the possibility that the OfS would do so if there was insufficient data to assess compliance (because a provider was a new entrant to the higher education market). However, the OfS had taken a policy decision that, outside those special circumstances, the OfS would apply all of the initial conditions of quality and standards to all providers seeking registration (see, Regulatory Framework, paragraph 348). I do not think that there would be any basis for contending that it was an unlawful exercise of the OfS’s discretion to take this line. There was no scope for bringing Bloomsbury within the narrow exception of providers for whom no data was available for B3: Bloomsbury had been operating since 2002 and sufficient data was available.
218. In any event, the PRC carefully considered Bloomsbury’s application in November 2019 and decided, having addressed all relevant matters, that Bloomsbury’s registration should be refused. It follows that the PRC did not think it appropriate to disapply Condition B3.

**Ground 2(c): The OfS acted unreasonably in refusing registration in circumstances where designation had previously been granted on the basis of the same data, where the tests were not intended to be significantly different, and improving quality beyond that required under the prior system was not the aim of the Regulatory Framework**

219. Bloomsbury makes five points under this Ground, which I will take in turn.

220. First, Bloomsbury points out that it had been refused registration notwithstanding that it had been assessed as having successfully met the high standards required by the DfE in respect of quality, academic performance, financial sustainability and governance under the old system. Indeed, it was one of only two APs to have been commended. Bloomsbury says that the DfE decisions were taken on the basis of precisely the same continuation/progression rate data as were used by the OfS.
221. In my judgment, this does not render the OfS's decision irrational (which is the test). The fact that a provider was designated under the old regime does not guarantee recognition under the new regime, or render a decision under a new and different regulatory regime irrational. As Ms Carss-Frisk QC's skeleton argument points out, the registration regime operated by the OfS was a new regulatory regime. In particular, the old regime operated sector-adjusted benchmarks which the new regime has disavowed. If Parliament had intended that everyone who was designated under the old regime should qualify for initial registration under the new regime, the legislation would have said so.
222. The second point made on behalf of Bloomsbury is that there is nothing in the policy papers or impact assessments that signalled a change of regulatory approach, or that the quality requirements would be more onerous than heretofore. On the contrary, Bloomsbury submitted that the documentation stated that there would be no significant change in the approach to quality from that under the previous regulatory regime.
223. As for this, I think that the starting point is, as Ms Carss-Frisk QC submitted, that HERA expressly permitted the OfS to set the initial registration conditions. Nothing in the policy papers or impact assessments could have undermined this wide statutory discretion (and Bloomsbury has not advanced a "legitimate expectation" argument on this issue).
224. Moreover, the extracts from documents that are relied upon by Bloomsbury do not support Bloomsbury's argument. Bloomsbury pointed to paragraph 95 of the DfE EIA on HERA, which said, that "importantly, none of the changes listed above introduce any new tests that are significantly different from those that currently exist". The July 2018 EIA in respect of the Regulatory Framework said that the initial and on-going registration conditions are not new.
225. In my judgment, these passages did not connote that there were to be no changes whatsoever in the new regulatory regime. Rather, the sentence in the EIA on HERA was indicating that the matters that would be taken into account, quality, standards, governance etc, were broadly the same. It is also important to note that this sentence appeared in a part of the EIA that was considering whether the new regulatory regime would impose a higher costs burden on providers than the old regime. It was not intended to say that there would be no alterations at all. The assertion in the sentence in the Regulatory Framework EIA was accurate, in that the conditions broadly are the same: the fact that the assessment of the conditions is different does not undermine this.
226. Bloomsbury's third point is that it was not legitimate to use the registration process to drive up quality by excluding providers which met the previous quality guidelines, and there was nothing in the Regulatory Framework or other relevant guidance

documents to suggest that the new regime would be used as a basis for excluding existing providers in order to drive up quality.

227. I do not accept this submission. The HERA EIA, the Regulatory Framework, and the consultation document published prior to the adoption of the Regulatory Framework each stated expressly that the aim of the registration process was to secure that students receive a high-quality education (see paragraphs 32, 53 and 137, above). It was never suggested that the assessment process under the new regime would be exactly the same as the assessment process under the old regime, or that providers that were designated under the old regime would achieve registration under the new regime. It was not irrational, or otherwise unlawful, for the OfS to make fresh assessments.
228. Bloomsbury also said that there was nothing in the Regulatory Framework or other published guidance to suggest that continuation and progression rates could be used as a presumptive measure of quality. But it was made abundantly clear in the guidance documents that continuation and progression rates would be taken into account as a means of evaluating outcomes for students, albeit not as absolute cut-offs.
229. The fourth point relied upon by Bloomsbury in Ground 2(c) is that Bloomsbury had in fact met all of the OfS's quality requirements, including the baselines/thresholds for degree outcomes and completion rates, apart from the continuation and progression thresholds. In my judgment, this cannot possibly form the basis for an irrationality or unlawfulness challenge. The fact remains that continuation and progression gave rise to significant concern and, when these matters were considered against the background of demographic and other contextual issues, the OfS came to the view that the "outcomes" condition, Condition B3, was not satisfied. The fact that degree outcomes and completion rates did not give rise to significant concern cannot possibly render the conclusion in relation to Condition B3 irrational.
230. Finally, in respect of this ground, Bloomsbury says that the OfS failed to have regard to the Secretary of State's Access and Participation Guidance. Bloomsbury submits that the OfS acted unreasonably and so unlawfully by using the regulatory condition of "quality" to exclude providers, such as Bloomsbury, who ensured wide access and participation and who, as a result, had higher non-continuation and progression rates. I have already dealt with this argument. The OfS had regard to the importance of facilitating access and participation in higher education for disadvantaged groups and for those with protected characteristics. The A Conditions were specifically directed to these aims. There is nothing irrational or inherently contradictory between these aims and the OfS's decision to maintain minimum standards and outcomes for all higher education providers which take account of context but which are broadly the same for all providers.

**Ground 2(d): The OfS acted unfairly and unreasonably in applying the numerical and demographic thresholds to Bloomsbury without consulting the QAA**

231. Bloomsbury had been commended by the QAA on its enhancement of student learning opportunities in 2015. Also, in February 2018, the QAA Advisory Committee on Degree Awarding Powers had agreed that Bloomsbury's application for degree-awarding powers should go forward to full scrutiny. Thereafter, the QAA

commenced detailed scrutiny of Bloomsbury in March 2018, with QAA representatives making some 48 visits to the college between then and April 2019. The OfS did not seek evidence from the QAA in relation to Condition B3, and said in its registration decision that it was appropriate to place little, if any, weight on the representations regarding the QAA annual monitoring review. The OfS also confirmed, in these proceedings, that the OfS did not have regard to the detailed scrutiny by the QAA as part of the degree-awarding process.

232. Bloomsbury submitted that this was unfair, unreasonable and unlawful. The QAA had significant knowledge and experience of Bloomsbury's educational provision. Moreover, the QAA had been designated as the quality review body for OfS by the Secretary of State with effect from 1 April 2018, pursuant to HERA, section 27. Still further, paragraph 18(c) of the Regulatory Framework states that the OfS will work with the QAA "to assess the quality of, and standards applied to, the higher education providers seeking to register." The consultation document relating to the Regulatory Framework said that the OfS would exceptionally "assess against the Quality and Standards conditions set using the outcomes of the current Quality Assessment arrangements", and would for this purpose use the latest available quality judgment made under existing arrangements, supplemented with requested data/metrics.
233. I do not accept these submissions.
234. The QAA had no history or track record of assessing an outcome-based quality criterion like Condition B3. Rather, the QAA had, historically, through the Higher Education Review process, assessed conditions which were similar to Conditions B1, B2, B4 and B5. There was no reason, therefore, why the OfS should consult with or involve the QAA in the assessment of the new Condition B3.
235. The Regulatory Framework made clear that the OfS itself would be responsible for assessing Condition B3. At paragraphs 335-350, the Regulatory Framework made clear that the OfS would work with the QAA in relation to Conditions B1, B2, B4 and B5, but not in relation to Condition B3. There was a good reason for this, namely that the QAA had never assessed providers by reference to a Condition equivalent to B3, whereas the QAA had a track record of assessing providers by reference to criteria equivalent to B1, B2, B4 and B5. At paragraphs 349-350, the Regulatory Framework said:
- "The OfS will consider the assessment made by the DQB [the Designated Quality Body for assessing the standards of providers under HERA, s23, namely the QAA] when determining whether initial conditions B1, B2, B4 and B5 are met. Where the provider has a track record of delivering higher education, the OfS itself will assess whether the provider is able to satisfy Condition B3."
236. There was nothing in the statutory framework that would suggest that the QAA would be involved in assessing Condition B3. The QAA is the Designated Quality Body ("DQB") for assessing the standards of providers under HERA, s23, designated under Schedule 4 to HERA. Section 27 provides:

**"27 Performance of assessment functions by a designated body**

(1) In Schedule 4—

(a) Part 1 makes provision about the designation of a body to perform the assessment functions, and

(b) Part 2 makes provision about oversight of the designated body by the OfS.

(2) “The assessment functions” are—

(a) the functions of the OfS under section 23 (assessing the quality of, and the standards applied to, higher education), and

(b) the functions of the relevant body under section 46 (advice on quality etc to the OfS when granting degree awarding powers etc).

(3) Where a body has been designated under Schedule 4 to perform the assessment functions, the functions under section 23—

(a) so far as they relate to the assessment of the standards applied to higher education provided by a provider, cease to be exercisable by the OfS, and

(b) otherwise do not cease to be exercisable by the OfS.”

237. The effect of section 27 is that when a body is designated as the DQB, only that body can be responsible for assessment of standards. The OfS is, therefore, not responsible for standards. However, section 27(3)(b) makes clear that the OfS is still responsible for the exercise of assessment functions which do not relate to standards. Condition B3 is concerned with quality of education, not with standards, and so the effect of section 27 is not that only the QAA can assess compliance with Condition B3. There was no requirement in section 27, or anywhere else in HERA, for the QAA to play a part in the OfS’s assessment of quality criteria.
238. In light of the fact that the QAA had a track record of assessing quality criteria for higher education providers, and had a continuing responsibility for doing so, it made sense for the OfS to take account of the assessment made by the QAA when determining whether Conditions B1, B2, B4 and B5 were met. As the QAA had never assessed the outcome-based factors that were relevant to Condition B3, the same did not apply to B3. Moreover, this means that it was reasonable and sensible for the OfS to decline to take the QAA’s Higher Education Reviews of Bloomsbury into account for the purposes of Condition B3, when Bloomsbury made representations that this should be done.
239. As regards the consultation document, the position is that the proposal floated in the consultation document about using QAA assessments as part of the process of considering outcomes was dropped and was not proceeded with.
240. It is not clear if Bloomsbury is persisting with a pleaded legitimate expectation argument in support of the contention that the OfS should have taken account of

assessments by the QAA for Condition B3 purposes. If such an argument is being relied upon, I reject it. The Regulatory Framework made clear that QAA assessments would not be taken into account for B3 purposes, and that the OfS would decide on Condition B3 itself.

**Ground 2(e): The decision to refuse registration was disproportionate and/or unreasonable**

241. Under this heading, Bloomsbury relies upon a large number of points which, singly or cumulatively, the college submits show that the decision to refuse registration was unreasonable or disproportionate.
242. The contention that the decision was unreasonable is, of course, a submission that the decision was **Wednesbury** unreasonable, or irrational, in that the decision took account of irrelevant considerations, failed to take account of relevant considerations, or was so unreasonable that no reasonable regulator could have reached it.
243. The submission that the decision was disproportionate has two limbs to it. The first is that sections 2(1)(g) and 7 of HERA imposed a statutory duty upon the OfS to act proportionately in deciding whether to register. The second is that Bloomsbury's rights under A1/P1 and/or Article 14 of the ECHR were engaged and so the OfS had breached its duty to act proportionately, in the sense the decision not to register was not a proportionate means of achieving a legitimate aim.
244. The OfS accepted that it is obliged to act rationally in making its registration decisions. As for the first limb of the proportionality argument, the OfS submitted that, properly understood, HERA did not impose a domestic law duty to act proportionately. As for the second limb, the OfS submitted that the registration decision does not engage Bloomsbury's rights under A1/P1, and the matter does not come within the scope of Article 14.
245. I will first deal with the first limb of the proportionality argument, the domestic law point. I will postpone consideration of the ECHR proportionality issues until I come to deal with Grounds 3 and 4, which deal head-on with Bloomsbury's claims under the ECHR.

**Has a statutory duty been imposed upon the OfS to act proportionately in relation to its registration decisions?**

**Section 2(1)(g)**

246. Section 2(1)(g) of HERA provides that:

“2 General duties

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

...,

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

- (i) transparent, accountable, proportionate and consistent, and
- (ii) targeted only at cases in which action is needed.”

247. The OfS points out that this is not an out-and-out statutory obligation to act proportionately. Rather, it is a duty to have regard, inter alia, to the principle of proportionality. The OfS submits that this means that it is a “process” obligation, rather than an “outcome” obligation: it is not a substantive duty to act proportionally, but an obligation to have regard to proportionality.
248. In my judgment, the OfS is right. As the OfS pointed out, in **R (on the application of Baker and others) v Secretary of State for Communities and Local Government** [2008] EWCA Civ 161; [2009] PTSR 809, a case concerned with the statutory obligation in section 71 of the Race Relations Act 1976 (one of the precursors to section 149 of the EA 10) to have regard to the need to promote equality of opportunity amongst different racial groups, Dyson LJ said at paragraph 31 that this did not amount to a duty to promote equality of opportunity. Rather it was a duty to have regard to the need to promote such equality of opportunity. By parity of reasoning, in my view, the duty imposed by section 2(1)(g) is a duty to have regard to proportionality, not a duty to act proportionally. As the OfS submitted, the weight to be attached to this consideration is a matter for the OfS, subject to review only on irrationality grounds.
249. It follows that, in my view, section 2(1)(g) of HERA does not impose a duty to act proportionally when taking registration decisions.
250. In so far as the “process” obligation is concerned, it is clear on the evidence that the OfS did have regard to proportionality. This was recorded in the minutes of the PRC meeting at which the decision was taken.

## **Section 7**

251. Section 7 of HERA provides, in relevant part:

### **“7 Proportionate conditions**

- (1) The OfS must ensure that the initial registration conditions applicable to an institution and its ongoing registration conditions are proportionate to the OfS's assessment of the regulatory risk posed by the institution.”
252. Read literally, this section does not go so far as to impose a statutory obligation upon the OfS to act proportionately in the registration decision it takes in relation to each individual provider. Rather, the obligation is that the initial and ongoing registration conditions for the institution must be proportionate to the OfS's assessment of the regulatory risk posed by the institution.
253. This statutory obligation could be read in one of two ways. The first way is that all it means is that the particular conditions which are applied to a provider, A1, A2 etc, must be proportionate to the OfS's assessment of the regulatory risk posed by the



institution. In other words, the OfS should consider whether it is really necessary to apply all of the standard conditions to this provider. The second way of reading this obligation is that it goes considerably further. The reference to “initial registration conditions” in section 7 does not just mean the headline conditions themselves, eg A1, A2 etc, but the exact way in which compliance with the conditions is tested for the particular provider. If this latter interpretation is correct, then it would mean that the OfS had a domestic statutory duty to comply with the principles of proportionality when it assessed Condition B3 in relation to Bloomsbury, to ensure that the way in which the Condition operated for Bloomsbury was proportionate to the OfS’s assessment of the regulatory risk provided by Bloomsbury.

254. I did not hear any detailed submissions on which of these two alternative interpretations is the right one. However, I will proceed, for the purposes of determining this application for judicial review, on the basis that the latter is the correct one. Section 7(1) is not directed to the conditions in general, but to the conditions for a particular provider, to be assessed in light of the regulatory risk posed by that specific provider. In my judgment, it is likely that this means that section 7(1) was intended to ensure that the OfS’s decision as to whether a particular provider met the conditions for registration was proportionate, bearing in mind the regulatory risk posed by the provider.
255. Accordingly, I will proceed to deal with this ground on the basis that the OfS had a domestic law statutory duty to act proportionately in relation to the decision whether to register Bloomsbury. I stress again, however, that I did not hear full legal argument on this point of interpretation and so I should not be understood to be expressing a fully-reasoned conclusion on the point.

#### **What does the domestic law duty to act proportionately entail?**

256. Again, I did not hear full argument on this point. The word “proportionate” is not defined in HERA. It is, of course, very familiar to public lawyers in the UK nowadays, because it is a concept that is used widely in Human Rights law and in EU law. I will assume, for present purposes, that the word “proportionately” in a domestic statute has the same meaning as it does for the purposes of the ECHR (subject, as explained below to some minor necessary adjustments).
257. Authoritative guidance on the meaning of “proportionately” has been set out by Lord Reed in a well-known passage in **Bank Mellat v HM Treasury (No 2)** [2013] UKSC 39; [2014] AC 700, at paragraphs 69-76, as follows:

“69. ... In **R v Ministry of Agriculture, Fisheries and Food, ex p Fedesa and others** (Case C-331/88) [1990] ECR I-4023, the European Court of Justice stated (para 13):

"The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse

must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

The intensity with which the test is applied – that is to say, the degree of weight or respect given to the assessment of the primary decision-maker - depends upon the context.”[emphasis added]

70. As I have mentioned, proportionality is also a concept applied by the European Court of Human Rights. As the court has often stated, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see eg **Sporrong and Lönnroth v Sweden** (1983) 5 EHRR 35 , para 69). The court has described its approach to striking such a balance in different ways in different contexts, and in practice often approaches the matter in a relatively broad-brush way. In cases concerned with A1P1, for example, the court has often asked whether the person concerned had to bear an individual and excessive burden (see eg **James v United Kingdom** (1986) 8 EHRR 123 , para 50). The intensity of review varies considerably according to the right in issue and the context in which the question arises. Unsurprisingly, given that it is an international court, its approach to proportionality does not correspond precisely to the various approaches adopted in contracting states.

71. An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle does not however entitle the courts simply to substitute their own assessment for that of the decision-maker. As I have noted, the intensity of review under EU law and the Convention varies according to the nature of the right at stake and the context in which the interference occurs. ...in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation. That concept does not apply in the same way at the national level, where the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend upon the context, and will in part reflect national traditions and institutional culture. For these reasons, the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court.

72. The approach to proportionality adopted in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights,

including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982. The three-limb test set out by Lord Clyde in **De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing** [1999] 1 AC 69 , 80 has been influential:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

...

73. The **De Freitas** formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in **Huang v Secretary of State for the Home Department** [2007] UKHL 11; [2007] 2 AC 167 , para 19 that the formulation was derived from the judgment of Dickson CJ in **R v Oakes** [1986] 1 SCR 103 , and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups. That, it was said, was an aspect which should never be overlooked or discounted. That this aspect constituted a fourth criterion was noted by Lord Wilson, with whom Lord Phillips and Lord Clarke agreed, in **R (Aguilar Quila) v Secretary of State for the Home Department** [2011] UKSC 45; [2012] 1 AC 621 , para 45.

74. The judgment of Dickson CJ in **Oakes** provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in **Oakes** can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in **De Freitas**, and the fourth reflects the additional observation made in

**Huang.** I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

...

76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in **Alberta v Hutterian Brethren of Wilson Colony** [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four)."

258. Very helpful guidance on the approach to proportionality in relation to regulatory decision has recently been given by Freedman J in **Npower Direct Limited and others v The Gas and Electricity Markets Authority** [2018] EWHC 3576 (Admin), at paragraphs 131-2, as follows:

131. Ms Love on behalf of the CMA submitted that the above decisions were consistent with the four criteria cited in **Bank Mellat**. In respect of the competition cases which she cited, Ms Love distilled the following principles from them:

(1) The proportionality of a measure taken by a regulator must be evaluated in its full context. [Hence the emphasis being added in the citations from **Bank Mellat** about context]. ....

(2) The regulator (in this case, Ofgem) has " a wide margin of appreciation " and a court should be slow to interfere with the regulator's expert views in relation to the measure under challenge in a judicial review.

(3) The regulator's margin of appreciation extends not only to the decision whether to take the measure in question but also to the assessment of its proportionality, as this involves a degree of judgment. The margin of appreciation encompasses both the methodology used to assess the necessity of the measure (as Dr Harris rightly puts it in the present case (paragraph 14 of his second statement), " [T]his is not a PhD thesis, it is a consumer trial, under SLC 32A, to inform potential future policy ") and the balancing of its aims and any adverse effects.

(4) Even if a Convention right is engaged, the nature of the assessment of proportionality and the discretion to be accorded to the regulator in undertaking it are not transformed. The intrusiveness of the measure is simply one factor to be taken into account; indeed in certain contexts, the standard of review may be essentially the ordinary domestic rationality test.

(5) In assessing the adequacy of the regulator's analysis, a court should read that analysis generously and not every perceived deficiency in that analysis requires or permits that the measure be quashed: there is a question of materiality.

132. I respectfully adopt this summary of the relevant principles relating to proportionality as are relevant in this case.”

259. In **Npower Direct** case, it was made clear, and I agree, that the specialist regulator must be afforded a margin of appreciation (or, perhaps, a “margin of discretion” so as to avoid confusion with the technical use of the term “margin of appreciation” which is used for the margin that is afforded by the European Court of Human Rights (“ECtHR”), but not by domestic courts, to decision makers). On the other hand, however, this does not mean that the Court can only intervene if the decision was “manifestly without reasonable foundation”. In **Gilham v Ministry of Justice** [2019] UKSC 44; [2019] 1 WLR 5905, at paragraph 34, Baroness Hale said that the “manifestly without reasonable justification” test was only applicable to cases relating to the welfare benefit system. More recently, in **J.D and A v United Kingdom** (ECtHR) 32949/17 and 34614/17, the Strasbourg court went further and said that the “manifestly without reasonable foundation” test applies only to transitional measures designed to correct historic inequalities. It is not yet known whether the **J.D and A** case will be followed in domestic courts but, either way, the “manifestly without reasonable foundation” test does not apply to regulatory decisions about registration of a higher education provider.
260. When coming on to consider the statutory proportionality requirement, I will apply the test for proportionality as set out in **Bank Mellat** and in **Npower**, save for the necessary adjustments to parts (1) and (4) of the **Bank Mellat** test to take account of the fact that, in applying a domestic law test of proportionality, there are no ECHR “rights” in issue. Rather, section 7 of HERA makes clear that a provider should not be denied registration unless that is justified by the regulatory risk posed by the provider. In other words, a provider has the “right” to carry on operating unless the regulatory risk justifies the conclusion that it should not do so. These are minor adjustments which make no difference in practice.
261. I will also proceed on the basis that the legal burden for showing proportionality rests with the OfS.

**What are the aim or objectives of the regulatory regime?**

262. In conducting any proportionality review, the first step must be to identify the aims and objectives of the measure under consideration. The aims or objectives of the regulatory regime set out by HERA are to assist the OfS to meet the statutory objectives set out in section 2 of HERA (see paragraph 34, above), and, also, to

ensure that registration is declined if the provider represents what is considered to be an unacceptable regulatory risk, and fails to meet minimum standards. Put another way, the aim encompasses the objective of providing a minimum level of high-quality higher education to all students. Greater detail was provided in the Competition and Markets Authority Report, Government White Paper and EIA, referred to at paragraphs 31 and 32, above, the four primary regulatory objectives set out in the Regulatory Framework, at paragraph 53, above, and the further detail in the parts of the Regulatory Framework summarised at paragraph 54, above. In addition, the aims and objectives were summarised in the paper presented to the PRC meeting on 29 April 2019 (paragraphs 102-104, above).

263. It is worth repeating the four primary regulatory objectives, which are that all students, from all backgrounds, and with the ability and desire to undertake higher education:

- (1) Are supported to access, succeed in, and progress from, higher education;
- (2) Receive a high-quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure;
- (3) Are able to progress into employment or further study, and their qualifications hold their value over time; and
- (4) Receive value for money.

**The points taken by Bloomsbury in relation to irrationality/disproportionality**

264. I will deal with them in turn, whilst bearing in mind that Bloomsbury also relies upon the cumulative effect of these points.

265. Bloomsbury makes eleven points.

**(1) The OfS's Assessment Teams twice recommended that Bloomsbury be granted registration**

266. This is a reference to the fact that there were two recommendations by the OfS's internal Assessment Team, in September and November 2018, that Condition B3 should be treated as satisfied and that (in September 2018) Bloomsbury should have enhanced monitoring arrangements and (in November 2018) that Bloomsbury should be served with an "improvement notice". Bloomsbury submits that no adequate explanation was provided for the decision to reject these recommendations.

267. In my view, the decision by the PRC to decline to register Bloomsbury, notwithstanding these recommendations, was neither irrational nor disproportionate. As I have already explained, the decision rested with the PRC, and the PRC was not under any obligation to accept the recommendations of the Assessment Team. The PRC carefully considered those recommendations and came to a rational and reasoned decision to depart from them. The reasons for the decision not to recommend registration were set out in detail in the decision letter that was sent to Bloomsbury in May 2019, and cannot, in my view, be regarded as irrational or disproportionate, even though the internal Assessment Team took another view.

**(2) Bloomsbury satisfied two of the four key indicators for Condition B3, namely completion rates and degree and other outcomes rates**

268. Bloomsbury pointed out that these key indicators were satisfied, and submitted that the completion rates indicator was of particular importance, because it showed that, despite problems with students continuing between year 1 and year 2, a satisfactory number of students made it to the end of their degree course. Bloomsbury said that the OfS should have balanced the satisfactory completion rate indicator against the continuation rates indicator.
269. In my judgment, this does not come close to rendering the overall conclusion on Condition B3 either irrational or disproportionate. The OfS looked at all of the indicators and was entitled to come to the balanced conclusion that it came to. It cannot be said that this conclusion was irrational or disproportionate, when the continuation and progression rates were plainly important, and it is not the role of the Court to substitute its own view of whether, looking at the matter overall, Bloomsbury should have been registered. It was for the OfS, using its expertise, to balance the various considerations relevant to Condition B3.

**(3) There was no need to decline to register: a less intrusive measure would have been to serve an improvement notice or to provide special monitoring of Bloomsbury**

270. This was considered by the OfS. Indeed, as already mentioned, the internal Assessment Team proposed that a less intrusive measure than non-registration should have been adopted. But it does not follow that it was either irrational or disproportionate for the PRC to decide not to register Bloomsbury. In light of the PRC's assessment of the regulatory risk, the OfS decided that the only option was to decline to register. Detailed reasons for this were given in the Decision Letter and its Annex. See, especially, paragraphs 40-42 of the Decision Letter. The OfS took the view that it could not be confident that the proposed alternative measures would work, and that the risk of registration was too high. This conclusion was neither irrational nor disproportionate. The less intrusive measure would not have achieved the objectives that the OfS was seeking to achieve.

**(4) The refusal to register Bloomsbury had disproportionately significant consequences, because the outright refusal to register, rather than a decision to de-register, does not trigger a right of appeal to the First-Tier Tribunal (HERA, s20)**

271. I do not accept this submission. There cannot possibly be any domestic law challenge based on irrationality or proportionality on this ground, as HERA itself, which is primary legislation, provides for no right of appeal. In any event, Bloomsbury were able to make representations to the OfS before the final decision was taken, and have also been able to bring a claim for judicial review. There is no rule of law, whether under domestic law or the ECHR, to the effect that a public law decision is disproportionate if there is no right of appeal against it. Moreover, as the OfS pointed out, Bloomsbury have not brought a challenge on the basis that its rights under Article 6 of the ECHR (the right to a hearing) have been infringed and it is too late to do so now.

**(5) The OfS did not identify any causative relationship between Bloomsbury’s non-continuation/progression rates and the quality of its educational provision, as expressed in the “outcomes” or “objectives” as set out in Condition B3**

272. Bloomsbury contended that the fact that the OfS did not accept that Bloomsbury’s Access and Participation Plan would remedy the problems with outcomes shows that the OfS saw the problems as being irremediably connected with the demographic make-up of Bloomsbury’s student body, which no improvement plan could solve. Bloomsbury submitted that this means that the OfS’s position is contrary to its duty under HERA, section 2, and its PSED.
273. Once again, I do not accept this submission. In my judgment, the OfS was plainly entitled to regard continuation and progression rates as being relevant to the quality of education being provided, and was entitled to treat them as relevant to the “outcomes” Condition, B3. The fact that the OfS decided that Bloomsbury should not be registered does not mean that the OfS was not concerned about its duty under HERA section 2, to have regard to the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers. The OfS was entitled to take the view that all students, regardless of whether they were from disadvantaged groups, are entitled to a minimum quality and standard of educational outcomes.

**(6) The OfS’s approach to multiple characteristics of disadvantage and to Foundation year students**

274. Bloomsbury contended that that the OfS failed to take account of multiple characteristics of disadvantage, ie that many Bloomsbury students would have several overlapping characteristics, for example, financial disadvantage and disability, which would potentially have a negative impact on continuation and progression. Moreover, the OfS’s approach to Foundation years was unreasonable. Special allowance should have been made for this, as it was more likely that Foundation year students would drop out. Special allowance was made for part-time students and students on other undergraduate courses, but not for this feature of Bloomsbury’s courses.
275. Ms Lapworth’s evidence explained the reason why the OfS did not consider the intersection of protected characteristics at the split indicator stage: this would have generated a very large amount of data which would be subject to significant statistical uncertainty, especially as many of the groups of students with two or more characteristics would be very small indeed. The OfS did look at the statistics for students at Bloomsbury with a particular characteristic. In all cases but two groups, the outcome fell into the statistical category of “significant concern”.
276. In my judgment, this is the paradigm type of issue in which respect must be afforded to the choice of the specialist regulator. I do not think that the approach adopted by the OfS in this regard was either irrational or disproportionate.
277. As for the treatment of Foundation years, the OfS has explained why four-year degrees were treated the same as standard three-year degrees. In my judgment, it was a rational and proportionate regulatory choice to proceed in this manner (see paragraph 74, above). Once again, this was the type of judgment for which a regulator



is entitled to a broad margin of discretion. Moreover, the continuation rates for students at Bloomsbury who were not on a four-year course were no better than for those on four-year courses.

**(7) The OfS failed to have regard to the serious work that was being undertaken by Bloomsbury in relation to graduate employment opportunities**

278. This is not the case. It is clear from the Decision Letter, at paragraphs 40-42, that the OfS did have regard to this work but took the view that it did not outweigh the OfS's concerns about the weak outcomes that were being delivered to Bloomsbury's students.

**(8) The OfS proceeded on the basis of an error of law, and there were other steps that the OfS could have taken, which would be less drastic than non-registration**

279. It is not clear to me what error of law this is a reference to. I have not found the OfS to have erred in law in its approach to registration of Bloomsbury. As for the argument that there were less intrusive measures that the OfS could have adopted, I have already dealt with, under point (3), above.

**(9) The refusal of registration was likely to have a significant impact upon students from disadvantaged backgrounds as the closure of Bloomsbury would narrow their options, and OfS's approach to Condition B would incentivise other providers to avoid recruiting disadvantaged students, with statistically lower completion and progression rates**

280. Bloomsbury submitted that these considerations were not taken into account by the OfS, but this is not borne out by Ms Lapworth's evidence. The OfS took into account both of these two considerations. As for the impact on disadvantaged students from the closure of Bloomsbury, the OfS took the view that there is a significant number of other providers that are available for disadvantaged students. As for the question whether providers will be incentivised to avoid recruiting disadvantaged students, the OfS took the view that the A Conditions, which are concerned with participation and access, will avoid this risk. This was neither irrational nor disproportionate.

**(10) The OfS failed to have regard to the negative impact that non-recognition would have on Bloomsbury's directors, managers and senior employees**

281. In particular, Bloomsbury submitted that there is a danger that association in a senior position with a provider that was not registered would mean that, in future, a person would not satisfy the "fit and proper" person test and this would mean that a future employer would run the risk of failing to comply with Conditions E2 and E3 if the future employer were to employ him or her.

282. I do not accept that this rendered the decision irrational or disproportionate. It is very unfortunate for the individuals concerned, to be associated with a provider that has not been registered, but it cannot outweigh the other considerations that the OfS must take into account. Put bluntly, if a provider is not providing adequate outcomes for students, the fact that closure will adversely affect senior staff cannot be the

determining factor. In any event, it is clear that the OfS was aware of this consideration.

**(11) If the approach to Condition B3 was flawed, then this will taint the conclusion on Condition E2, because the conclusion that Condition E2 was flawed is based, in substantial part, on its analysis of Condition B3**

283. The OfS accepts that its conclusion that Bloomsbury did not comply with Condition E2 was premised in part on its conclusion on Condition B3. If I had accepted Bloomsbury's submissions that the OfS's approach to Condition B3 was unlawful, I would not have refrained from granting judicial review on the basis that Bloomsbury also failed Condition E2. I accept Bloomsbury's submission that if the approach to Condition B3 was flawed, this would have tainted the conclusion on Condition E2 also.

### **The cumulative effect of the rationality and proportionality challenges**

284. As will be seen, I have rejected each of the rationality and proportionality challenges advanced by Bloomsbury. Just for the avoidance of doubt, I also reject the submission that these alleged errors, taken cumulatively, mean that the registration decision was either irrational or disproportionate. To mirror the fourth question in paragraph 74 of **Bank Mellat**, I conclude that balancing the severity of the measure's effects upon the interests of Bloomsbury, its students and prospective students, and its senior staff, against the importance of the objectives of the registration regime, the latter outweighs the former, to the extent that the registration decision will contribute to achieving those objectives. I should add that Bloomsbury relied before me upon a witness statement from Professor Sir David Melville CBE, who is an extremely distinguished figure in the higher education field and is, amongst other things, a Member of the Higher Education Commission, the Chair of Pearson Education Limited and Chair of the All Souls Group. Sir David's statement supported the criticisms made by Bloomsbury to the approach taken by the OfS to Condition B3, both in general and in relation to Bloomsbury specifically. I mean no disrespect to Sir David when I say that the fact that he disagrees with the approach that was taken by the OfS does not render the steps taken by the OfS either irrational or disproportionate.

### **Ground 3: A1/P1**

285. In Ground 3, Bloomsbury submitted that the registration decision was a disproportionate interference with Bloomsbury's rights under A1/P1.

286. A1/P1 provides that:

“Every natural or legal person is entitled to the peaceful employment 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.”

287. The question whether there has been a breach of Bloomsbury's A1/P1 rights can be sub-divided into the following questions:

- (1) Did the decision not to register Bloomsbury give rise to an interference with the peaceful enjoyment of a “possession” belonging to Bloomsbury? Bloomsbury contended that the “possession” at issue was the marketable goodwill in its business; and
- (2) If so, was the interference lawful because the interference was a proportionate means of achieving a legitimate aim, the burden being on the OfS to prove that the interference was lawful? The Court must judge for itself whether the interference was proportionate, making a value judgment based on all of the evidence: **R (SB) v Governors of Denbigh High School** [2006] UKHL 15; [2007] 1 AC 100, at paragraph 30, per Lord Bingham.
288. As for the second issue, I have already addressed this, in detail, in the preceding section of the judgment. I have found that the aims and objectives of the registration decision were lawful and that, in all the circumstances, the decision reached by the OfS to decline to register Bloomsbury was proportionate. In so doing, I applied the same test for proportionality, based on **Bank Mellat**, as applies to claims under A1/P1. I made some minor adjustments to the test, but these make no difference to the outcome of a proportionality analysis under A1/P1. Moreover, the submissions made on behalf of Bloomsbury as to why the interference with its possession was not a proportionate means of achieving a legitimate aim were essentially the same as they made in relation to the domestic law proportionality challenge.
289. In these circumstances, regardless of the answer to the “possession” question, the A1/P1 challenge must fail, because even if A1/P1 is engaged, the treatment of Bloomsbury was lawful as being a proportionate means of achieving a legitimate aim.
290. Nevertheless, as I have heard detailed submissions on the A1/P1 issue, I will deal with it in this judgment.

### The “possession” issue

#### **Bloomsbury’s argument**

291. On behalf of Bloomsbury, Mr Buttler accepted that registration, in and of itself, is not a “possession” for A1/P1 purposes. Furthermore, he accepted that expected future income is not a possession. However, he submitted that there is a consistent line in the authorities to the effect that marketable goodwill is a possession, and that a decision which causes a loss of marketable goodwill is an “interference” for the purposes of A1/P1. Marketable goodwill, which is a possession, is to be distinguished from the present day value of future income, which is not a possession. The refusal to register Bloomsbury effectively eradicated the college’s marketable goodwill, at a stroke.
292. Bloomsbury provided two expert witness statements from Mr Michael Weaver, a Chartered Accountant and a Managing Director of Messrs Duff & Phelps, dated 7 August 2019 and 17 December 2019, setting out his opinion of the value of the loss of the marketable goodwill of the college following the decision taken by the OfS not to register Bloomsbury. The second witness statement was provided in response to comments made in relation to the first witness statement by the OfS.

293. Bloomsbury submitted that these reports made clear that Bloomsbury had suffered a loss of marketable goodwill as a result of the refusal to register the college. In his first report (“Weaver 1”), Mr Weaver quantified the marketable goodwill of Bloomsbury by estimating the enterprise value of the business as a whole (ie estimating the net present value of the cash flows that the business is expected to generate in the future) and then deducting from it the fair value of net assets (ie tangible fixed assets and net working capital) so as to arrive at the marketable goodwill value. He concluded that the marketable goodwill of the business in light of the refusal to register was nil. This was compared to a marketable goodwill value if Bloomsbury was registered and degree-awarding powers were granted of £5,128,000 and a marketable goodwill value if Bloomsbury was registered but degree-awarding powers were not granted of £4,560,000. Therefore, in Weaver 1, he concluded that the loss of marketable goodwill as a result of the decision not to register Bloomsbury was either £5,128,000 or £4,460,000, depending on whether Bloomsbury would have been granted degree-awarding powers. (I do not have to decide whether the figures are accurate, for present purposes. The quantification of loss is a matter for a later stage in the proceedings, if it arises.)
294. In conducting this analysis in Weaver 1 and in his second report (“Weaver 2”), Mr Weaver said that he was adopting and applying the definition of “marketable goodwill”, for A1/P1 purposes, that was set out by Lord Dyson MR in **Breyer Group plc v Department of Energy and Climate Change** [2015] EWCA Civ 408; [2015] 1 WLR 4559, paragraphs 43 and 44:

“The consistent line taken by the European court is that the goodwill of a business, at any rate if it has a marketable value, may count as a possession within the meaning of A1P1, but the right to a future income stream does not. I agree with Rix LJ that the distinction is not always easy to apply and it seems that the European court has not addressed the difficulties. As Moses LJ put it in the **Malik** case [2007] 1 WLR 2092, at para 83, marketable goodwill is a possession “notwithstanding that its present day value reflects a capacity to earn profits in the future” (emphasis added). The important distinction is between the present day value of future income (which is not treated by the European court as part of goodwill and a possession) and the present day value of a business which reflects the capacity to earn profits in the future (which may be part of goodwill and a possession). The capacity to earn profits in the future is derived from the reputation that the business enjoys as a result of its past efforts. That is why the applicant succeeded in a case such as the **Tre Traktörer** case 13 EHRR 309 (a decision on which Mr Grodzinski relies).

44. Goodwill is not susceptible to precise definition. Like the judge, I have derived assistance from what Lord Macnaghten said (admittedly in a wholly different context) in **Inland Revenue Comrs v Muller & Co's Margarine Ltd** [1901] AC 217, 223-224:

“It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in

custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade ... The goodwill of a business is one whole, and in a case like this it must be dealt with as such.”

295. As Mr Buttler acknowledged in his oral submissions, in Weaver 1, Mr Weaver quantified goodwill by reference to future income. He said that this was a valid approach, in accordance with the authorities. The value of goodwill is the ability to attract future income, and this comes down to the same thing as the capitalised value of future income (less the fair value of net assets).
296. In Weaver 2, Mr Weaver said that marketable goodwill constitutes Bloomsbury’s reputation and attractive force established through its past efforts. It is not simply its future income. He said that whilst the value of the marketable goodwill can appropriately be assessed by reference to Bloomsbury’s ability to generate future revenues, this does not mean that the future revenue by itself constitutes the marketable goodwill of Bloomsbury. He said that there had been an almost complete loss of the marketable goodwill that Bloomsbury possessed prior to the refusal of registration, because the result of the refusal to register is that the general perception of Bloomsbury’s quality standards among the student community, Bloomsbury’s existing staff, and the market in which Bloomsbury operates, and by extension its attractiveness and reputation, has been almost completely eroded. In addition to the impact on students’ perception of Bloomsbury’s quality and competence, the negative publicity caused by the refusal to register (which the OfS made public) has significantly reduced the ability of Bloomsbury to retain staff. Given that the reputation of Bloomsbury’s staff itself contributes to Bloomsbury’s attractive force, this too has significantly damaged Bloomsbury’s marketable goodwill.
297. Bloomsbury submitted that there was no inconsistency between Weaver 1 and Weaver 2. In both Reports, Mr Weaver applied the correct test for marketable goodwill, and he did not fall into the trap of equating marketable goodwill with the present value of future income. Rather, in Weaver 1, he used future income projections to place a value on marketable goodwill. This was entirely appropriate because, self-evidently, the reason that marketable goodwill has an economic value is because of its capacity to generate future income.
298. In his reply, Mr Buttler submitted on behalf of Bloomsbury that, whilst it was accepted that the ability to generate income on the back of registration is not a possession, because it looks into the future, the marketable goodwill based on the history of good educational provision is a possession, which has been interfered with by the registration decision. It was accepted that the extent to which reputation could have been enhanced by registration could not amount to marketable goodwill, but

damage to Bloomsbury's pre-existing reputation is an interference with marketable goodwill and so is an interference with Bloomsbury's possessions.

### Discussion

299. The starting point is that a key dividing line between what is a possession and what is not is that marketable goodwill is a possession but expected future revenues are not.
300. I say at the outset that, as has been recognised in the authorities, there is a real practical difficulty in applying the test for a "possession" in this context. In **Breyer**, Lord Dyson MR said, at paragraph 43, that the important distinction is between the present day value of future income (which is not treated by the European court as part of goodwill and a possession) and the present day value of a business which reflects the capacity to earn profits in the future (which may be part of goodwill and a possession). This is, to put it mildly, a narrow distinction. If there is a capacity to earn profits in the future, this means that there is a present day value of future income, and that means in turn, one might think, that this will affect the present day value of the business (goodwill). If this logic is correct, then, at first sight, it would mean that if there is an interference with the present day value of future income, this inevitably means that there is interference with goodwill, and so that there is interference with a "possession" for the purposes of A1/P1. To be frank, I struggle to see where the dividing line is, on the basis of test laid down by the ECHR in the authorities.
301. This problem was noted by Lord Dyson MR in **Breyer** itself, at paragraph 45, in which he said that:
- "A possession comprising the goodwill of a business is the product of past work: "by dint of their own work, the applicants had built up a clientele." Goodwill is the present value of what has been built up. It is to be distinguished from the value of a future income stream. From an accountants' point of view, this distinction may make little practical sense. But it is the distinction that has been clearly drawn by the European court for the purposes of A1P1."
302. Mr Jones, in his submissions on behalf of the OfS, recognised that it is extremely difficult to identify a bright line between marketable goodwill, on the one hand, and the present day value of a future income stream in the future, on the other. However, he submitted, this was not a problem that the Court has to grapple with in the present case, in all its complexity. He said that the solution to the question whether there is a possession for A1/P1 purposes in the present case is to be found in three analogous Court of Appeal authorities, which, he said, made clear that registration is not itself a possession, and it follows that the economic benefits of registration are not a possession either.
303. Before looking at those authorities, it is appropriate to start with the ECtHR authorities. The first case is **Van Marle and others v The Netherlands** (1986) 8 EHRR 483. This case was concerned with a decision to refuse registration to a firm of accountants under a new regulatory regime. The appellants maintained that A1/P1 was engaged because their income and the value of the goodwill of their accountancy practices had been diminished. The ECtHR agreed that A1/P1 was engaged. The Court said, at paragraph 41, that by dint of their own work, the applicants had built up

a clientele, which had in many respects the nature of a private right and constituted an asset, and the effect of the refusal to register was that their income fell, as did the value of their clientele and, more generally, their business.

304. The next case is the decision in the **Tre Traktörer** case. In that case, the ECtHR held that the withdrawal of a liquor licence from a company which ran a restaurant was within the scope of A1/P1, because the withdrawal had adverse effects on the goodwill and value of the restaurant. It is worth noting that the licence belonged to the company, not the restaurant, and was non-transferable.
305. A contrasting case is **Denmark Limited v United Kingdom (Admissibility)** (2000) 30 EHRR CD 144. In this case, **Denmark** ran shooting ranges and a gun shop. Its business was adversely affected by a government announcement that it was going to introduce legislation to ban handguns. The ECtHR held that, to the extent that the complaint was about a loss of future income, A1/P1 was not engaged. Nonetheless, for reasons that are not entirely clear from the judgment, the Court did go on to consider A1/P1 in the **Denmark** case, on the basis that there was an interference in the form of a “control of use”.
306. Pausing there, in my judgment, these authorities tend to lend support to Bloomsbury’s submissions. There is a clear parallel with the **Van Marle** and **Tre Traktörer** in that the goodwill and value of an existing business was diminished by a decision to refuse registration or a licence which, whilst strictly not absolutely necessary in order for the business to continue, was nonetheless of great importance. The **Denmark** case is different, in that it is a challenge to an across-the-board legislative choice to prevent a particular product from being sold in future. Even in the **Denmark** case, however, the ECtHR treated A1/P1 as being in play, because there was a “control of use”.
307. In the English Courts, the first important authority is **R (Nicholds) v Security Industry Authority** [2007] 1 WLR 2067, in which Kenneth Parker QC (sitting as a deputy high court judge) held that A1/P1 did not apply to a permission to act as a nightclub door supervisor under the self-regulatory arrangements that applied prior to the licensing system introduced by the Private Security Industry Act 2001. At paragraph 73, the judge said that A1/P1 protects only goodwill as a form of asset with monetary value and does not protect an expected stream of future income which, for mainly organisational reasons, cannot be or is not capitalised. In other words the Convention protects assets which have a monetary value, not economic interests as such.
308. Kenneth Parker J in **Nicholds** held that A1/P1 was not engaged, because the permissions at issue were not marketable. He said, at paragraphs 72-77 of his judgment:

“72. It seems to me that ‘goodwill’ in this context is not being used in the technical accounting sense of the difference between the cost of an acquired entity and the aggregate of the fair values of that entity’s identifiable assets and liabilities ..... It appears that ‘goodwill’ is being used rather in the economic sense of the capitalised value of a business or part of a business as a going concern which, according to modern theory of corporate finance, is best understood as the expected free future cash flows of the

business discounted to a present value at an appropriate after tax weighted average cost of funds ....

73. The business has a capital value or goodwill only if the entity can be, and is, organised in a way that allows future cash flows to be capitalised .... [It] is clear on Strasbourg jurisprudence, now confirmed by high domestic authority, that article 1 of the First Protocol protects only 'goodwill', as a form of asset with monetary value, and does not protect an expected stream of future income which, for mainly organisational reasons, cannot be or is not capitalised. In other words, the Convention ... protects assets which have a monetary value, not economic interests as such.

74. How should a licence or permission be treated under article 1? It seems to me that certain licences or permissions are 'assets', that is, they have a monetary value and can be marketed for consideration, either through outright sale, 'leasing', or sub-licensing. ... A more difficult case is a licence which has been acquired at a 'market' price but which may not be assigned or sub-licensed ....

75. However, there are other licences or permissions that are neither marketable nor have been obtained at a 'market' price, that is, a price representing what is thought to be the value of net discounted future cash flows that the licence might generate. Such a licence in one sense has a value to the holder because, without it, he cannot carry on the licensable activities. However, such licences do not seem to me to be 'assets' having monetary value in the sense required for article 1. Such licences do not as such represent a distinct asset having a monetary value.

76. Furthermore, to treat such licences as 'possessions' would, in my view, risk introducing unjustified distinctions into what is already a fairly complex area of law ....

77. In the present application it is common ground that the permissions which the claimants enjoyed under the arrangements prevailing in their cases before the 2001 Act were not marketable and were not obtained at a 'market price', although the claimants may have paid fees, intended to cover the administrative costs of the grantor, to obtain them. They did not, therefore, represent any form of asset having a monetary value, although they were 'valuable' to the claimants because, without them, they could not work as door supervisors in the areas covered by the relevant arrangements. As I analyse the position, these permissions would not constitute possessions under article 1 of the Protocol."

309. **Nicholds** was followed by the Court of Appeal in **R (Malik) v Waltham Forest NHS Primary Care Trust** [2007] EWCA Civ 265; [2007] 1 WLR 2092. This case was



concerned with a doctor's right to practise in the NHS resulting from his inclusion in a specified list. The Court of Appeal held that this was not a possession because he was precluded by regulation from selling the goodwill of his practice and so his goodwill had no economic value. However, in a concurring judgment in **Malik**, Rix LJ expressed doubts (at paragraphs 58-66) that marketability of the asset was the sole benchmark, and said that the distinction might be that A1/P1 did not apply where the only negative effect on goodwill arose from loss of future income (although he recognised that this test would very hard to apply in practice).

310. In **R (Countryside Alliance) v Attorney General** [2007] UKHL 52; [2008] 1 AC 719, Lord Bingham made clear that, whilst he did not find the jurisprudence very clear, he regarded both **Nicholds** and **Malik** as being rightly decided.
311. If the **Nicholds** and **Malik** approach is applied to the present case, this would suggest that the registration decision is not an interference with a possession, because Bloomsbury cannot sell its registration. Registration is not itself an asset with a monetary value.
312. This brings me to the first of the three Court of Appeal authorities relied upon by the OfS in the present case. This is **New London College v Secretary of State for the Home Department** [2012] EWCA Civ 51; [2012] Imm AR 3. In this case, the College claimed that the Secretary of State's suspension and withdrawal of the College's Tier 4 sponsorship licence was an interference with a possession. The Tier 4 licence was necessary in order for the college to attract international students, as possession of a Tier 4 licence meant that foreign students could qualify for a UK visa whilst undertaking a course at a college with such a licence.
313. At first instance, Wyn Williams J held that the suspension and withdrawal of the college's Tier 4 licence had the same effect as the suspension of the liquor licence in **Tre Traktörer**, and so came within the scope of A1/P1. The sponsor licence was not itself a possession, but the impact on the college's goodwill of its withdrawal meant that A1/P1 was engaged. Wyn Williams J found it difficult to reconcile **Nicholds** with **Tre Traktörer**.
314. The Court of Appeal allowed the Secretary of State's appeal. At paragraphs 95-98, giving the judgment of the Court, Richards LJ said:

“95. The principal factor leading Wyn Williams J to find that the suspension and withdrawal of a sponsor licence nevertheless engaged A1/P1 was the apparent parallel with the withdrawal of the liquor licence in **Tre Traktörer**. There is obvious attraction in that line of reasoning, given the undoubted effect on the business in each case. The judge did not grapple, however, with the question whether the adverse effect in the present case amounts to an effect on goodwill, in the sense used in the authorities, or only to a loss of future income (albeit a loss with serious economic consequences for the business). I agree with Mr Palmer that he needed to do so. The distinction is far from clear but one has to decide which side of the line the case falls, since the relevant possession is the goodwill of the business, and the suspension or withdrawal of a licence will not amount to an interference with the right to peaceful enjoyment

of possessions within A1P1 unless it has an adverse effect on that goodwill.

96. Kenneth Parker J in **Nicholds** was of the view that “goodwill” in this context means the capitalised value of the business as a going concern. Mr Gill did not seek to challenge the correctness of that view. Whilst there is evidence in this case of the economic disruption caused by the suspension of the college's licence, and liable to be caused by the withdrawal of the licence, the evidence does not deal with the goodwill of the business in the sense identified in **Nicholds** . Thus there is no concrete evidential basis on which to found a conclusion that the goodwill of the business has been or would be adversely affected by suspension or withdrawal of the licence. Nor, as it seems to me, can such an effect be inferred from the information available to us.

97. It is important to bear in mind that the sponsor licence does not touch on the freedom of the college to provide courses of education to students. What it does is to confer the right to issue a CAS which will be recognised by UKBA and will contribute to a student's ability to meet the substantive criteria for leave to enter or remain under the Immigration Rules. That certainly enables the sponsor to attract non-EEA nationals wishing to apply for leave to enter or remain as students, and the loss of that ability through suspension or withdrawal of the licence, with a consequential loss of income from that source, is clearly a serious matter. But it is far from clear that the expected income stream from such students can be capitalised as part of the value of the business, in particular because it depends on a licence that is non-transferable and has no market value in itself: in order to maintain the income stream, a purchaser of the business would have to obtain a licence of its own. (I accept that if the business is run in such a way that the current owner qualifies for a licence, it will facilitate the obtaining of a licence by the new owner; but on that basis it is the underlying state of the business that matters and the existing licence of itself has no substantive significance.)

98. The conclusion I reach is that the college has failed to establish that the suspension or withdrawal of its sponsor licence amounts to an interference with its right to the peaceful enjoyment of its possessions within A1P1 so as to require justification under that article. On this one issue, therefore, I respectfully differ from the view taken by Wyn Williams J.”

315. Pausing here once again, I think that Mr Jones was right to submit that the **New London College** supports his argument on whether A1/P1 is engaged in the present case. A key feature in the Court of Appeal's reasoning in **New London College** was that the expected income stream from future students could not be capitalised as part of the college's business, because it depended on a licence which is non-transferable

and which has no market value in itself. The same applies to registration. This was confirmed at paragraph 129 of Ms Lapworth's first statement. A provider cannot sell or otherwise transfer its registration to another provider. If Bloomsbury were to sell its business to another provider, that provider would have to obtain registration of its own. It could not simply inherit Bloomsbury's registration. It is true that, if Bloomsbury were to be registered, this would make it much easier for the new provider to obtain registration, but, as Richards LJ explained, this would be because of the underlying state of the business and not because of the mere existence of registration.

316. It follows, in light of this reasoning, in my judgment, that registration does not have an impact upon marketable goodwill. Mr Buttler, for Bloomsbury, submitted that **New London College** can be distinguished from the present case because, in that case, as Richards LJ pointed out at paragraph 96, the college did not put forward any concrete evidential basis on which to found a conclusion that the goodwill of the business has been or would be adversely affected by suspension or withdrawal of the licence. However, I do not think that **New London College** can be explained away on the basis that the appellant in that case failed to put forward expert evidence of the type that Mr Weaver has provided in the present case. The Court of Appeal went on to say that it was not possible to infer any adverse effect on the goodwill. This was because the Tier 4 sponsorship status was not an asset that could be transferred to a future purchaser so as to guarantee the future income stream. The same applies to registration. There can have been no doubt in **New London College**, even without concrete evidence, that the withdrawal of Tier 4 Sponsorship would lead to a diminution in expected future income.
317. In my judgment, if the reasoning in **New London College** is applied to the present case, the refusal to grant a licence does not adversely affect the marketable goodwill. This is not because Mr Weaver's analysis is internally inconsistent, but is because it proceeds on a mistaken premise. As the benefits of registration cannot be passed on from Bloomsbury to any purchaser of the business, any future business that would have been expected as a result of registration cannot count towards marketable goodwill. It follows that, counter-intuitive as it may feel, the refusal to register did not have any effect on Bloomsbury's marketable goodwill, for A1/P1 purposes.
318. I think that this conclusion is consistent with **Nicholds**, because in that case, Kenneth Parker QC said that A1/P1 would not apply where there was an expected stream of future income which, for mainly organisational reasons, cannot be capitalised. Because registration is not transferable, the expected stream of future income arising from registration cannot be capitalised.
319. The next Court of Appeal judgment which is relied upon by Mr Jones for the OfS is **R (Guildhall College, in liquidation) v Secretary of State for BIS** [2014] EWCA Civ 986. This is the case which is closest on its facts to the present case. The Appellant college sought judicial review of decisions of the Secretary of State to suspend all payment of students loans to the college and its students, and to withdraw the designation of two courses offered at the college. One of the issues in the appeal was whether the designation of the courses for the purpose of SLC funding was a possession within the meaning of A1/P1. The Court of Appeal, having referred to **Nicholds**, **Malik** and **New London College**, held that it was not.

320. At paragraphs 71-73, giving the judgment of the Court, Christopher Clarke LJ said:

“71. Mr Biggs [counsel for the college] submits that, unlike the Tier 4 sponsor licence in the **New College** case, the designation of the two courses was an interest entitling the College to payment of fee loans in respect of students. There was produced to Cranston J a letter from the College's accountant to the effect that the designation contributed some £ 2 million to its capitalised value.

72. Like the judge, I do not regard the designation of the two courses as any form of possession within A1FP. Any right that the College may have to receive the payment of fee loans derives from the fact that students have enrolled on and begun a designated course. The entitlement to a loan is an entitlement of the student derived from his falling within the scheme of student support and signing up for a designated course. The designation itself gives no right to funds; nor does its absence preclude the College from providing educational services. It is something without which the College cannot expect to attract students who are not privately funded and with which it could expect to do so — as was the case with the Tier 4 licence which would enable or assist overseas students to acquire a visa.

73. The case is to be distinguished from **R (Infinis Plc) v Gas and Electricity Markets Authority** [2013] EWCA Civ 70 where the accreditation under the Renewables Obligation Order 2009 that was refused would give the electricity provider who possessed it an absolute right not to pay a charge. In the present case the designation cannot be purchased; nor can it be sold. If the business was sold the designation would have to be renewed. The judge regarded the letter from the College's accountants (which was not claimed to constitute expert evidence), stating that in their view course designation added a value of over £ 2 million to the goodwill of the company, as wholly inadequate to support the point about goodwill, i.e. the suggestion that the designation was itself a marketable asset with a monetary value. So do I. It seems to me wholly implausible that the designation alone could properly be regarded as valued at £ 2 million. I note that no accounts were produced that showed that to have been so.”

321. In my view, there is a direct parallel between the **Guildhall College** case and the present case. Removal of designation had a similar impact to refusal to register in that it meant that students at the college would not qualify for loans from the SLC. It is true, as Mr Buttler pointed out, that counsel for the college was arguing that the designation of a course is a possession for the purposes of A1/P1, rather than that the marketable goodwill was the possession (see judgment, paragraph 65). Nonetheless, it is clear from the analysis carried out by the Court of Appeal in **Guildhall College** that the Court treated the central issue as being whether the removal of designation had an adverse effect on the relevant marketable goodwill of the college. The Court of Appeal applied **Nicholds, Malik** and **New London College**, and concluded that A1/P1 was not engaged because the goodwill arising from designation was not

marketable. The key point was that designation, like registration, cannot be bought and sold. As in the present case, there was evidence that the goodwill in the business had a significant monetary value, but the Court rejected the suggestion that there was any marketable goodwill attached to the status of designation itself.

322. The third authority relied upon by the OfS is **Breyer** itself. This case was concerned with a higher tariff which the Department of Energy and Climate Change set for small-scale producers and installers of electricity which made use of low-carbon technologies for the generation of electricity, such as solar photovoltaic technology (“Solar PV”). The installation and equipment costs of Solar PV were high and so at first the Government guaranteed the rates for each new installation for two years. The Government then changed its mind and proposed shortening the guarantee period. In the event, after a judicial review challenge, this proposal was not implemented. A number of producers brought a claim for damages on the basis that the proposal had led to many installations being abandoned, causing them financial loss. One of the main issues in the case was whether A1/P1 was engaged.
323. A central issue in **Breyer** was what counted as marketable goodwill. At paragraph 45, Lord Dyson MR said that “Goodwill is the present value of what has been built up. It is to be distinguished from the value of a future income stream.” At paragraph 49, Lord Dyson MR (with whom Richards and Ryder LJ agreed) said that:
- “49..... In my view, the distinction between goodwill and loss of future income is not always easy to apply. But, in my view, the judge was right to see a clear line separating (i) possible future contracts and (ii) existing enforceable contracts. Contracts which have been secured may be said to be part of the goodwill of a business because they are the product of its past work. Contracts which a business hopes to secure in the future are no more than that.”
324. In my judgment, **Breyer** provides a further reason why the present case does not come within the scope of A1/P1. The loss of marketable goodwill that Bloomsbury relies upon is the loss of future students who would have been attracted in the future by the college’s reputation and attractive force, if registration had been granted. Bloomsbury has been permitted to “teach out” ie its current students continue to qualify for loans from the SLC, and so the adverse effect of non-registration is the impact upon future students. The retention of current students is equivalent to the contracts which have already been secured in **Breyer**. The adverse impact upon the recruitment of future students is akin to the adverse effect on possible future solar energy installation contracts in the **Breyer** case. It follows that the loss of future students who have not yet contracted with the College is not the loss of marketable goodwill for the purposes of A1/P1.

#### **Conclusion on the “possession” issue**

325. I have dealt with this at some length. However, in my view it is clear that the decision not to register Bloomsbury was not an interference with Bloomsbury’s possession for the purposes of A1/P1 because:

- (1) Registration cannot be sold or transferred to a new provider, if a new provider were to buy or take over Bloomsbury's business. This means that any loss of future earnings resulting from the decision not to register did not result in a diminution of marketable goodwill, for A1/P1 purposes: the future earnings that are dependent on registration are not part of the marketable goodwill; and
  - (2) There is a second and free-standing reason why future earnings from future students do not count as a possession for A1/P1 purposes. This is because the Court of Appeal in **Breyer** made clear that existing enforceable contracts with current students are part of the goodwill for this purpose, but potential future contracts with prospective students are not. The decision not to register Bloomsbury only affected prospective students, not current students.
326. It is not entirely easy to reconcile the domestic authorities with the ECtHR authorities, but in my judgment it is clear that I should follow the binding authorities of the Court of Appeal, and the guidance of Lord Bingham in the **Countryside Alliance** case.

**Proportionate means of achieving a legitimate aim**

327. In light of my finding on the "possession" issue, the OfS does not have to show, for A1/P1 purposes, that the decision to withhold registration from Bloomsbury was a proportionate means of achieving a legitimate aim. However, as I have already made clear, if this were a live issue I would find that the OfS has proved that its decision not to register Bloomsbury was indeed a proportionate means of achieving a legitimate aim, applying the test as laid down in **Bank Mellat**. As for that:
- (a) The decision to refuse registration pursued the legitimate aim of ensuring that there was an acceptable minimum level of quality and outcomes for all students in higher education;
  - (b) There was a clear and rational connection between the decision not to register Bloomsbury and that legitimate aim;
  - (c) Less intrusive measures would not have achieved this aim. The OfS considered less intrusive measures and rejected them because of concerns that the outcomes that were being delivered to students were too weak to make such a course of action consistent with the regulatory risk; and
  - (d) The importance of maintaining quality and protecting students outweighed the impact upon Bloomsbury itself, its students and staff that this decision would inevitably have.

**Ground 4: Article 14, read with A1/P1 and/or A2/P1**

328. The final ground relied upon by Bloomsbury is that the registration decision was a breach of Article 14 of the ECHR, when read with A1/P1 and or Article 2 of Protocol 1 of the ECHR (“A2/P1”).

329. Article 14 of the European Convention on Human Rights provides as follows:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

330. The questions which a court has to ask itself in relation to an Article 14 challenge were set out by Baroness Hale in **Gilham v Ministry of Justice**, at paragraph 28:

“(i) do the facts fall within the ambit of one of the Convention rights; (ii) has the claimant been treated less favourably than others in an analogous situation; (iii) is the reason for that less favourable treatment one of the listed grounds or some “other status”; and (iv) is that difference without reasonable justification—put the other way round, is it a proportionate means of achieving a legitimate aim?”

331. It is convenient to deal with these questions in a slightly different order.

**Do the facts fall within the ambit of one of the Convention rights?**

332. The main substantive convention rights that are relied upon by Bloomsbury are those in A1/P1. For the reasons set out above, I do not accept that the facts of this case fall within the ambit of A1/P1. Mr Buttler pointed out that there are authorities which suggest that a claimant may be able to rely upon Article 14, read with A1/P1, even if they do not have a “possession” for A1/P1 purposes, but these are cases in which the argument is that, but for the discrimination, the claimant would have qualified for something which amounts to a “possession” for A1/P1 purposes: see, for example, **JT v First-tier Tribunal (Social Entitlement Chamber) and another** [2018] EWCA Civ 1735; [2019] 1 WLR 1313, at paragraph 52. That is not the issue in this case.

333. Bloomsbury also relies upon A2/P1. This provides that:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

334. In my judgment, the circumstances of this case do not come within the ambit of A2/P1. As the OfS has pointed out, A2/P1 concerns the right of individuals to receive education, not any right of Bloomsbury to provide education. In any event, no person has a right to education at a particular establishment: **Ali v UK** (2011) 53 EHRR 12, at paragraph 60.

335. Bloomsbury relies on the case of **R (Tigere) v Secretary of State for BIS** [2015] UKSC 57; [2015] 1 WLR 3820. This was a case about access to student loans. The Supreme Court held that A2/P1 did not impose an obligation on states to provide funding for higher education but that, if they did so, then the states must act in a way that is Article 14 compliant. Bloomsbury submitted that this shows that the present case falls within the ambit of A2/P1, because the decision under challenge reduced access to the college because it removes the availability of student loans for new students. I agree with the OfS that the **Tigere** case does not show that the present case is within the ambit of A2/P1. Once again, the claimant in the present case is the provider, not a student. The effect of the registration decision that was taken by the OfS was not to deprive any student of their funding, as the “teach out” means that students who are already at Bloomsbury will maintain their funding. Nor does it deprive future students of SLC funding, because there are other registered providers that can accommodate such students.
336. This means that Bloomsbury’s challenge under Article 14 cannot get off the ground. I will, however, very briefly address some of the other issues.

**Is the reason for the treatment complained of one of the listed grounds in Article 14, or some “other status”?**

337. The question of what amounts to “other status” for Article 14 purposes is a complicated and often very difficult one. It has been considered in recent years by the Supreme Court in a number of cases, including **Mathieson v Secretary of State for Work and Pensions** [2015] UKSC 47; [2015] 1 WLR 3250, **R (Stott) v Secretary of State for Justice** [2018] UKSC 59; [2018] 3 WLR 1831, and in **Gilham** itself, by the Court of Appeal in **R(SC) v Secretary of State for Work and Pensions** [2019] EWCA Civ 615, paragraphs 60-77, and by Pepperall J in **Carter v Chief Constable of Essex Police and another** [2020] EWHC 77 (QB), at paragraphs 50-57.
338. I do not intend to prolong what is already a very long judgment with a detailed examination of whether Bloomsbury enjoys an “other status” for Article 14 purposes. Rather, I will proceed on the assumption, without deciding, that the college does have “other status”.

**Should Bloomsbury have been treated differently to than others in an analogous situation, and, if so, is the treatment meted out to Bloomsbury a proportionate means of achieving a legitimate aim?**

339. It is clear that compliance with Article 14 does not just involve treating everyone the same. There can be circumstances in which the requirements of Article 14 mean that a person should be treated differently from other persons because of that person’s special status: (**Thlimmenos v Greece** (ECtHR) 23369/96, at paragraph 44). In such a case, the obligation upon the defendant is to show that the decision to treat the person in the same way as others was a proportionate means of achieving a legitimate aim. Bloomsbury submitted that this is such a case, and that the college should have been treated differently, in the registration process, because it specialises in students from disadvantaged groups.
340. Bloomsbury submitted that the OfS cannot demonstrate that the refusal to disapply Condition B3 and/or to make adjustments to the application of the numerical



thresholds or demographic group threshold is objectively proportionate. In my judgment, this submission must be rejected. I bear in mind that the question under Article 14 is different from the question under A1/P1 in an important respect. This is that what must be justified under Article 14 is the refusal to treat Bloomsbury differently on account of its significantly different student body. Nevertheless, in my judgment all of the reasons set out in detail above as to why the OfS has proved that the treatment complained of was proportionate for the purposes of the domestic law proportionality requirement and for the purposes of A1/P1 are equally reasons why the decision not to treat Bloomsbury differently by granting it registration is justified for the purposes of Article 14. As I have explained, the OfS carefully considered the demographic make-up of Bloomsbury's student body and took it into account when deciding whether or not Condition B3 had been satisfied. The OfS was entitled to strike the balance in the way that it did and to conclude that, notwithstanding the demographic make-up, registration should be withheld.

341. I should add that, to an extent, Bloomsbury was treated differently as a result of the make-up of its student body because this was a matter which was considered and taken into account by the OfS when the decision in relation to registration was made.
342. Accordingly, even if Article 14, when read with A1/P1 or A1/P2, was engaged, my conclusion would be that there was no breach of Article 14.

### **Conclusion**

343. For these reasons, the application for judicial review is dismissed. Despite the impressive and commendable work that Bloomsbury has done over the years, particularly with disadvantaged students, and the college's understandable disappointment at the decision, the decision by the OfS to refuse registration was lawful.