Neutral Citation Number: [2020] EWHC 336 (Admin)

Case No: CO/1864/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2020

Before :

MR JUSTICE CAVANAGH

- -

Between :

THE QUEEN (ON THE APPLICATION OF ESTHER LOUISE LEIGHTON)	**Claimant**
- and -	
THE LORD CHANCELLOR	**Defendant**
-and-	
INCLUSION LONDON	**Intervener**

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- -

Karon Monaghan QC (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Jonathan Auburn and Rupert Paines (instructed by **Government Legal Department**) for the **Defendant**
Catherine Casserley (instructed by **Fry Law**) for the **Intervener** (written submissions only)

Hearing date: 28 January 2020

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Approved Judgment

Mr Justice Cavanagh :

Introduction

1. This application for judicial review is brought by Ms Leighton, the Claimant, to challenge an asserted decision of the Defendant not to extend Qualified One-Way Costs-Shifting ("QOCS") to discrimination claims in the County Court and/or the Defendant's failure to extend QOCS to such claims. Permission to apply for judicial review was granted by Edis J on 8 August 2019.

2. The Claimant contends that the decision or failure at issue is contained in or reflected by the contents of a document entitled "Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), Civil Litigation Funding and Costs." ("the Part 2 PIR"). The Part 2 PIR was published by the Ministry of Justice ("MOJ") on 7 February 2019, following a review of the operation of certain aspects of LASPO. The review involved a consultation exercise. The Defendant contends that no decision has yet been taken as to whether to extend QOCS, or some other form of costs protection, to discrimination claims in the County Court.

3. The Claimant is a disabled person within the meaning of the Equality Act 2010 ("EA 2010"), section 6. She is a full-time wheelchair user. Over the last few years, she has frequently issued proceedings in the County Court, mainly as a litigant in person, against service providers. These claims have mostly taken the form of complaints that shops, cafes, etc have discriminated against her by not providing ramps for wheelchair users, meaning that wheelchair users cannot gain access to the premises. This is potentially in breach of the statutory duty to make reasonable adjustments in relation to service provision, which is to be found in the EA 2010, section 29, read with section 21 and Schedule 2 of the Act.

4. I will summarise the issue that is at the heart of these proceedings in greater detail a little later in this judgment. In essence, however, the claim is concerned with the costs regime that applies to discrimination claims relating to the provision of services, when such claims are allocated to the fast-track and multi-track in the County Court (the County Court is the forum for discrimination claims outside the employment and non-disability education fields). As a result of reforms that were introduced by LASPO, it is no longer possible for a Court to order an unsuccessful defendant in such proceedings to pay the "success fee" to which a successful claimant's lawyers may be entitled if the claim succeeds and the lawyers are instructed under a Conditional Fee Agreement ("CFA"), or to pay the cost of After the Event ("ATE") insurance premiums. For reasons that I will explain, this means, the Claimant says, that disabled persons like her who wish to take legal proceedings to enforce their rights against service providers face two very serious impediments. The first is that if their claims end up in the fast-track or the multi-track (rather than the small claims track, in which costs are not usually recoverable), and they do not qualify for legal aid, they are at risk of an adverse costs order. Given that the damages recoverable for claims such as these tend to be small, but the costs incurred by defendants may be significant, this operates as a real deterrent. Claimants cannot realistically protect themselves by using ATE insurance, because the cost of the premium will be prohibitive, especially if it cannot be recovered by means of a costs award against the defendant. The second impediment is that it is very difficult, and may be impossible,

for a claimant in a disability discrimination claim in the County Court to find solicitors and counsel who are prepared to represent them. Ordinarily, solicitors and counsel in such cases will seek to be paid by means of a CFA, but, as the success fees which are a central feature of CFAs can no longer be passed on to defendants, and damages are generally low, this means that the lawyers cannot be confident that their clients will be able to pay the success fee, even if they win. The Claimant says that she is now effectively deterred from seeking to enforce her rights as a disabled person in relation to the provision of services in the County Court.

5. These problems are not unique to discrimination cases. In the personal injury field, their effects have been mitigated by QOCS. In short, the effect of QOCS is that the claimant knows, when the litigation begins, that, unless s/he behaves wholly unreasonably or fraudulently, s/he will not be required to pay the defendant's costs if the claim is unsuccessful (unless the claimant recovers some damages, in which case the costs will not exceed the amount of the damages), but the defendant will be required to pay the claimant's costs if the claimant is successful. QOCS was introduced for personal injury claims by changes to the Civil Procedure Rules ("CPR"), in CPR r44 13-17. Outside the personal injury field, the changes in LASPO, which generally worked to the disadvantage of claimants, were not mitigated by the introduction of QOCS.

6. The operation and impact of LASPO was reviewed by the Ministry of Justice in the Part 2 PIR in 2019, some six years after the changes came into effect. The Part 2 PIR dealt briefly with the question whether costs protection, which might include QOCS, should be extended to discrimination claims. The Claimant says that the effect of the Part 2 PIR was that the Defendant took a decision not to extend QOCS to discrimination claims. The Claimant submits that this decision was unlawful on public law and/or Human Rights grounds. Alternatively, the Claimant says that, in any event, even if no positive decision was taken at the time of the Part 2 PIR, it is clear that the Defendant has failed to extend QOCS to discrimination cases and this, too, is unlawful.

7. The Claimant relies on five grounds. These are that the decision not to extend QOCS to discrimination claims and/or in failing to extend QOCS to discrimination cases was unlawful because:

    (1) The Defendant failed to comply with the Public Sector Equality Duty;

    (2) The Defendant (a) acted irrationally, (b) failed to take account of relevant considerations, and (c) failed in his duty of inquiry;

    (3) The Defendant is in breach of Article 6 of the European Convention on Human Rights ("ECHR"), introduced into UK law by Schedule 1 to the Human Rights Act 1998;

    (4) The Defendant is in breach of Article 14 of the ECHR, read with Article 6; and/or

    (5) The Defendant is in breach of the common law right of access to a court.

8. The Defendant's main argument in opposition to the Claimant's claim is that he has not yet taken a decision as to whether or not to extend some type of costs protection, of which QOCS is only one form, to discrimination claims. The Defendant says that this is under active consideration, though it is likely to be some time before a decision is taken. Therefore, the Defendant submits, the argument based on the proposition that a decision on this issue has already been taken is misconceived. In addition, the Defendant submits that the challenge on the basis that he has acted unlawfully by failing to extend QOCS to discrimination cases is premised on the existence of a mandatory obligation to provide for QOCS in discrimination cases. The Defendant submits that none of the five arguments set out in the preceding paragraph comes anywhere near to providing for such an obligation. The Claimant contends that the Defendant is not entitled to advance this latter argument, because it is not pleaded in the Defendant's Detailed Grounds. The sole defence relied upon in the Detailed Grounds, the Claimant says, is that no decision on this matter has yet been taken.

9. The Claimant has been represented before me by Karon Monaghan QC, and the Defendant has been represented by Jonathan Auburn and Rupert Paines. I am grateful to all counsel for their very helpful submissions, both written and oral.

10. In addition, I have received and taken into account written submissions by Catherine Casserley of counsel on behalf of an Intervener, Inclusion London. The Intervener is a charity which is run by and for deaf and disabled people, which promotes equality and inclusion by supporting Deaf and Disabled People's Organisations, and by campaigning for rights for deaf and disabled people in the UK. Whilst it is based in London, the Intervener campaigns across the UK. Neither the Claimant nor the Defendant objected to the participation in these proceedings by the Intervener, which was limited to written submissions, though the Defendant submits that the points made by the Intervener do not materially assist the Court in resolving the issues before it. I have therefore granted permission to intervene. In general, the submissions made on behalf of the Intervener cover similar ground to the submissions on behalf of the Claimant, but the Intervener also makes additional submissions in reliance upon the UN Convention on the Rights of Persons with Disabilities ("UNCRPD"). I will deal with these submissions later in my judgment.

11. I should add that the Defendant named on the Claim Form is the Secretary of State for Justice. Of course, the same person holds the offices of Secretary of State for Justice and Lord Chancellor. Strictly, the Lord Chancellor is the office holder with responsibility for the present issue and so I have referred to the Defendant as the Lord Chancellor in the title to this judgment. Needless to say, I hope, this makes no practical difference whatsoever.

The structure of this judgment

12. In order to address and evaluate each of the grounds relied upon by the Claimant, it is necessary first to consider the central point relied upon by the Defendant, namely that no decision has yet been taken on the question whether to extend some form of costs protection to discrimination claims in the County Court, and the matter is under active consideration. The answer to this question will inform and potentially determine the grounds relied upon by the Claimant.

13. I will first summarise the legal and factual background, and I will then go on to deal with the question whether the Defendant has yet taken a decision whether to extend QOCS to discrimination cases. I will then deal in turn with each of the grounds relied upon by the Claimant and the Intervener.

The factual and legal background

The Jackson Review

14. In December 2012, Sir Rupert Jackson published his Review of Civil Litigation Costs. The Review was triggered, at least in part, by concerns about the level of costs in civil litigation. At the time, the costs awarded in favour of a successful claimant, and against an unsuccessful defendant, could include the success fees payable to the claimant's lawyers, under "no win, no fee" or Conditional Fee Agreements ("CFAs"), and also the cost of ATE insurance premiums. Success fees could be, and routinely were, as high as 100% of costs, and ATE premiums were often substantial, and so there was a concern that the then-current arrangements had led to excessive litigation costs overall, and were unfair to defendants.

15. In his Review, Sir Rupert Jackson recommended that, whilst it should still be open to clients to enter into "no win, no fee" agreements with their lawyers, any success fees should be borne by the client, not the opponent. Success fees should be capped at 25% of the claimant's damages. Sir Rupert also recommended that the rule permitting recovery by claimants of ATE premiums from the unsuccessful defendant should be abolished.

16. Sir Rupert Jackson recognised that there would need to be further consultation on which categories of litigation should include one-way costs shifting, and said that he could see the benefit of QOCS in personal injuries litigation (Report, para 2.6). Otherwise, the risk of being liable to pay the defendant's costs might deter persons who have a meritorious claim for personal injury damages. In addition, the expectation was that, if QOCS was introduced, the need for ATE insurance would fall away. Sir Rupert added that there may be other categories of civil litigation where QOCS would be beneficial (Report, para 2.7). He did not stipulate what those categories might be, but said that further consultation would be required on this issue. Sir Rupert recommended that the protection should be targeted at those who merit such protection on grounds of social policy, and expressed the view that this would apply where the parties were in an asymmetric relationship. He gave examples of persons in housing disrepair cases, claimants in actions against the police, claimants seeking judicial review and individuals making claims for defamation or breach of privacy against the media. Such protection should be lost if the claimant has acted unreasonably (Jackson Review, Chapter 9, paras 5.10 and 5.11). Sir Rupert did not mention discrimination cases in this context.

The relevant changes introduced by LASPO

17. The Government accepted many, though not all, of the recommendations in Sir Rupert Jackson's Review, and changes to the civil costs regime were enacted in LASPO, mainly by making amendments to the Courts and Legal Services Act 1990 ("the 1990 Act"). These changes came into force on 1 April 2013.

18. In particular, the changes introduced by LASPO provided that a success fee under a CFA would no longer be recoverable from a defendant in any proceedings, and an ATE insurance premium would not be recoverable against an unsuccessful defendant (save in very limited circumstances which are not relevant for present purposes).

19. Section 44(4) of LASPO deals with success fees. Section 44(4) amends section 58A(6) of the 1990 Act, so that it provides as follows:

> "(6) A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement."

20. Sections 44-47 of LASPO deal with ATE insurance premiums, by inserting section 58C(1) of the 1990 Act, as follows:

> "(1) A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy..."

The introduction of QOCS

21. The introduction of QOCS was dealt with by means of amendments to the CPR, by the Civil Procedure Amendment Rules 2013 (SI 2013/262). These changes also came into force on 1 April 2013. The CPR, and changes to the CPR, are made by the Civil Procedure Rules Committee in accordance with its power to do so under the Civil Procedure Act 1997. Section 3 of that Act provides that the Civil Procedure Rules Committee must make amendments to the CPR if the Lord Chancellor gives them written notice that he thinks it is expedient for Civil Procedure Rules to include provision that would achieve a purpose specified in the notice. For the purposes of this litigation, the Defendant accepts that responsibility for decision making in relation to QOCS rests with him, rather than the Civil Procedure Rules Committee, and so that he is the appropriate Defendant to these proceedings.

22. Under the CPR, as amended, QOCS is limited to personal injury claims and claims under the Fatal Accidents Act 1976 (or those arising out of death or personal injury for the benefit of the estate). Rules 44.13- 44.16 of the CPR provide, in relevant part:

> "**Qualified one-way costs shifting: scope and interpretation**
>
> **44.13**
>
> (1) This Section applies to proceedings which include a claim for damages –
>
> (a) for personal injuries;
>
> (b) under the Fatal Accidents Act 1976; or
>
> (c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934.....
>
> **Effect of qualified one-way costs shifting**

44.14

(1) ....orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.

(2) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.

(3) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record."

Exception to qualified one-way costs shifting where permission is not required

44.15

Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that -

(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;

(b) the proceedings are an abuse of the court's process;

(c)the conduct of -

The claimant; or

A person acting on the claimant's behalf and with the claimant's knowledge of such conduct

Is likely to affect the judge's disposal of the proceedings."

Exceptions to qualified one-way costs shifting where permission is required

44.16

(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest;

(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court and to the extent that it considers just, where.....

(b) a claim is made for the benefit of the claimant other than a claim to whom this Section applies."

23. The effect of these changes to the CPR is that, in the type of cases covered by rule 44.13, a claimant is protected to the extent that s/he can be sure that no order for costs in favour of a defendant will be enforced if it exceeds any order for damages and interest made in favour of the claimant, unless the claim has been struck out, or there is fundamental dishonesty. In theory, such an order may be enforced with the permission of the Court, but in reality this is very unlikely to happen. If the claimant recovers nothing at all, the claimant will be insulated from having to pay any costs to the defendant. In other words, a claimant in a personal injury case can be sure that, unless they behave wholly unreasonably or fraudulently, they will not have to pay the defendant's costs if they lose (unless they recover some damages, in which case they will not have to pay more by way of costs, than they have been awarded). This substantially reduces the need for ATE insurance in this class of case.

24. There are limited exceptions, or different rules, in respect of insolvency cases, publication and privacy (defamation) cases and mesothelioma cases, which it is not necessary for me to set out.

25. QOCS does not apply to claims outside the personal injury field, and QOCS does not apply to "mixed" claims, that is, claims that include a personal injury claim but which also include another type of claim (CPR 44.16(2)(b)).

Other changes, and other differences between personal injury claims and discrimination claims

26. In addition to the changes referred to above, other changes were made to the costs regime in 2013. LASPO, s44 gives the Lord Chancellor the power to specify a maximum level for success fees in particular types of claim. The success fee for personal injury cases has been capped at 100% of lawyers' fees, subject to an overall maximum of the 25% of the damages. Success fees for other types of claim are capped at 100% of lawyers' fees, but without any limitations by way of a percentage of damages. These limits are set out in the Conditional Fee Agreements Order 2013, articles 3-5.

27. Section 45 of LASPO permits solicitors and clients to enter into damages-based agreements (DBAs). A DBA is a variant on a CFA, pursuant to which part or sometimes all of the solicitors' fees will only be payable by the client in the event of success. Under a CFA, if any of the defined success criteria agreed when the CFA is entered into is achieved (i.e., normally, the case is won) a success fee will be payable by the client in addition to the normal fees. A DBA is an agreement pursuant to which payment of solicitors' fees, counsel fees and VAT by a client is dependent on achieving defined success criteria agreed when the DBA is entered into, and is based on a percentage of the sum recovered from the losing party/opponent. In other words, and in essence, under a CFA, the solicitors will be entitled to a specified level of costs if the claim is successful, whereas, under a DBA, the solicitors are entitled to a proportion of the damages. The DBA fee that is normally payable is 25% of general damages and pecuniary loss (other than future pecuniary loss) for a personal injury claim, and up to 50% of the sum recovered for all other matters (excluding employment claims). In appeal proceedings, there is no limit on the DBA percentage fee payable.

28. The DBA percentage fee for solicitor fees, counsel fees, and VAT is paid by way of deduction from the sum recovered by the winning party from the losing party. A successful claimant cannot recover the DBA percentage fee by way of costs from the unsuccessful defendant: CPR 44.18. The DBA is paid by the successful party out of its winnings. In practice, little use has been made of DBAs since 2013.

29. Changes were also made to Part 36 (offers to settle) with a view to incentivising and encouraging the making and acceptance of reasonable settlement offers. (Also, though not relevant for present purposes, referral fees were banned in personal injury cases.)

30. Sir Rupert Jackson also recommended that general damages for pain, suffering, loss of amenity etc should increase by 10%, and this was put into effect by the judgment of the Court of Appeal in **Simmons v Castle** [2012] EWCA Civ 1288.

31. Finally, there is one other important difference between personal injury cases and other types of claim that should be mentioned. This is that, since 2000, legal aid has not been available for personal injury cases, but it continues to be available for other types of claim, including discrimination claims in the County Court.

The Claimant's experience, and the problems that the current costs regime gives rise to for discrimination cases

32. As I have said, the Claimant is a full-time wheelchair user, and she routinely experiences treatment which may amount to a failure to comply with the duty to make reasonable adjustments in the area of service provision. She has successfully brought a number of claims in the County Court as a litigant in person against service providers, mainly relating to physical access to premises (lack of ramps). The defendants have ranged from small businesses, such as cafes, to large national businesses and franchises. Many of these claims are brought, and remain, in the small claims track. This is a no-costs forum, and so she is not at risk of having to pay the defendant's costs. However, some of the claims are complex. For example, there may be difficult questions about what would amount to a reasonable adjustment, or there may be an issue as to whether a particular claimant is disabled, or as regards which amongst a range of potential defendants owes the relevant duties to the claimant under the Equality Act 2010. As a result, some claims will only be suited for the fast-track or the multi-track. A claimant cannot ensure or guarantee that such claims stay in the small claims track. If a claim is transferred to the fast-track or the multi-track, then the Claimant, and others in her position, is at risk of being liable to pay the defendant's costs if she loses. These may be substantial, as the cost to a defendant of making reasonable adjustments, perhaps at multiple sites, could be high, and the reputational risks of an adverse findings may be significant, and so a defendant may allocate substantial resources to defending the claim.

33. Moreover, if a case is complex, the Claimant may be at a disadvantage if she cannot make use of the assistance of expert lawyers. It will be difficult if not impossible for the Claimant to persuade a law firm to take her claim, because the damages that are likely to be recoverable in discrimination cases are relatively low, and any success fee cannot be recovered by way of a costs award against an unsuccessful defendant. A law firm may well be unwilling to act under a CFA because, if the Claimant loses, the law firm will not recover any costs and, if she wins, her damages will be unlikely to

be sufficient to pay the success fee. ATE insurance will not provide a solution, because an unsuccessful defendant will not be liable for the premium and the damages award may well not cover the premium. In any event, given the low damages that are generally available, an ATE insurance company may not be prepared to offer cover.

34. The Claimant states in her skeleton argument that the risk that a claim will be transferred to the fast-track or the multi-track means that she no longer brings claims directed at ensuring that she and other disabled people have equal access to service provision. She believes that other disabled persons are similarly deterred. The Claimant's witness statement makes clear that, notwithstanding these difficulties, she has begun court proceedings in the County Court for disability discrimination "on numerous occasions in the last two or three years." Nevertheless, I accept that the current costs regime for discrimination claims in the County Court has acted as a real deterrent for the Claimant in bringing claims, and she is now unwilling to take the risk of bringing claims to enforce her rights. This is despite the fact that the Claimant would like to bring complex disability discrimination claims, including against franchised organisations such as petrol stations and fast food establishments relating to lack of ramp access; against online holiday booking companies which do not provide sufficient, or sufficiently accurate, information about accessibility in hotel rooms; and against transport companies in relation to the space requirements for wheelchairs, and supplementary fares for disabled people.

35. There are other potential ways of affording or funding a discrimination claim in the County Court. If a claim is in the small claims track, there is no risk, unless a claimant behaves unreasonably, that the claimant will have to pay the defendant's costs (although the claimant will have to pay their own legal costs, regardless of outcome). The main problem arises in relation to more complex claims which are allocated to the fast-track or the multi-track. As I have said, legal aid is available for such claims. However, the threshold for legal aid is low, and the evidence before me suggests that in practice there are only a handful of legally-aided disability discrimination claims in the County Court each year. It may be that legal expenses insurance might cover such a claim, depending on the terms of the policy. A trade union may support a claim, but there can be no confidence that this will be the case, as a claim about discrimination in relation to service provision is unlikely to be employment-related and so a trade union may not regard it as being within its sphere of responsibility. Similarly, if a case is of general importance, it is possible that a charity may support a claim, but charities are subject to financial constraints and the resources to support legal action tend to be very limited indeed. Again, the Equality and Human Rights Commission ("EHRC") has the power to provide financial support for litigation. However, once again, the EHRC is subject to very tight financial constraints and has many other demands on its resources, and in practice it is unlikely that the EHRC will be in a position to provide financial support save in a very small number of particularly important cases. Finally, it is possible that lawyers will act pro bono in deserving cases, but it is not proper or practicable to assume that such claims can be funded on the back of the goodwill of lawyers.

36. Ms Monaghan QC makes the point that it is particularly important that there is access to the Courts for potential claimants in disability discrimination cases relating to service provision, because the reasonable adjustment duties are "anticipatory" in nature, i.e. they are directed towards achieving equal access to service provision for

all disabled persons. In other words, unlike discrimination claims in other fields, the main objective is not usually to obtain damages or some other remedy for an individual in relation to an incident that happened in the past, but, rather, the main objective is to make things better in the future for the whole cohort of persons who share the claimant's protected characteristic, and who are disadvantaged by the impediment in issue. She submits that there is, therefore, a public interest in enabling such claims to be brought.

37. I have also been provided with witness statements from Ms Samantha Fothergill from the Royal National Institute for Blind People ("RNIB"), and Ms Louise Whitfield, the Claimant's solicitor, an experienced lawyer who acts for claimants in discrimination cases. Ms Fothergill says that the RNIB brings some claims for individuals on a pro bono basis, but is frequently forced to discontinue if the claims are not speedily settled, because of fears about the costs risks. Ms Whitfield says that she has sometimes been able to obtain legal aid for claimants, especially where the defendant is a public authority, but it is far harder logistically to obtain legal aid for a private law discrimination claim against a private organisation, and in any event a significant number of her potential clients do not qualify for legal aid. She says that even if ATE insurance were available, it would be unaffordable as the premiums run to several thousand pounds, which would exceed any likely damages. Ms Whitfield says that she is contacted by about two or three people each year who appear to have a strong case which they decide not to pursue as they cannot secure costs protection. For example, one case, outside the disability field, concerned an Irish Traveller who was refused service in a pub.

38. In terms of numbers of claims, Ms Whitfield says that the best estimate of the number of discrimination claims in the County Court is in the region of one hundred per year. This contrasts with approximately 547,000 whiplash claims and 35,000 claims for holiday sickness per annum. In 2013-14 only four legal aid certificates were granted for claims in the County Court relating to a breach of the Equality Act 2010.

39. In summary, so far as the problems perceived by potential claimants in relation to costs for discrimination claims relating to goods and services in the County Court are concerned, there are a number of interrelated issues. The problems are essentially avoided if there is certainty that a case can be dealt with in the small claims track, but this will often not be the case. The problems arise if the degree of complexity means that it is possible or likely that a case will be allocated to the fast-track or the multi-track. The first major problem is that a potential claimant may be deterred by the fear of having to pay the defendant's costs, which may be substantial. This problem would be solved by QOCS. The second problem is ATE insurance will not be affordable and may well not be available. Once again, QOCS goes some way towards solving this problem because, if QOCS is available, there is no longer the same need for ATE. The third problem is the difficulty in finding solicitors willing to take on the case. This problem will not be solved by QOCS. This is because QOCS does not change the position that success fees cannot be passed on to the unsuccessful defendant, and so solicitors will be deterred by the recognition that damages are low and so a success fee will not be recouped from a successful claimant's damages. A further "problem", arguably, is that damages for discrimination claims in this field are low. This means that a claimant takes the risk of putting himself or herself to the risk

and stress of litigation in the knowledge that the financial returns will be low. Again, this is not something that will be affected by QOCS.

40. In light of the above, the availability of QOCS will improve matters for potential claimants in County Court discrimination cases, but there will still be features that operate as a deterrent.

Has the Defendant taken a decision that QOCS should not be extended to discrimination claims in the County Court?

41. As I have said, this is an important preliminary question.

42. In one sense, a decision was taken in 2012-13 that QOCS should not be extended to discrimination claims in the County Court, because at that stage QOCS was only introduced for personal injury claims, by means of the amendments to the CPR. However, the Claimant has not mounted a challenge to any decision in that regard that was taken over seven years ago (and she would plainly face potential limitation problems if she were to seek to do so). Rather, the Claim Form challenges the decision taken on 7 February 2019 not to extend QOCS to discrimination claims and/or the failure to extend QOCS to discrimination claims. The date of 7 February 2019 refers to the date of publication of the Part 2 PIR. This is the act or omission to which this claim relates.

The evidence

43. Before LASPO was enacted, the MOJ promised that the operation of the changes to the costs regime that would result from LASPO, and the associated changes to the CPR, would be subject to a review. This was on the basis that it is clearly good practice to examine whether the legislation has met its objectives, and whether there have been unintended consequences that need addressing. This was the purpose of the PIR.

44. On 24 March 2016, the House of Lords Select Committee on the Equality Act 2010 and Disability published a report, "The Equality Act 2010: the impact on disabled people". This report recommended the extension of QOCS to discrimination claims. The Government published a response in July 2016 saying that the Government would need to consider carefully the arguments in favour and against the extension of QOCS in different categories of law, including whether QOCS was the right way forward to address any access to justice issues. The response said that this issue would be addressed as part of the Part 2 PIR.

45. On 28 June 2018, the MOJ published a consultative document on the Gov.uk website which provided the MOJ's initial assessment of the reforms in Part 2 of LASPO (relating to costs of litigation). The initial assessment document said that the overall aims of the costs and litigation funding reforms in LASPO, Part 2, were to reduce the costs of civil litigation and to rebalance the costs liabilities between claimants and defendants whilst ensuring that parties with a valid case can still bring or defend a claim. The initial assessment said that the MOJ had access to reasonable data on the effect of the LASPO, Part 2, reforms on PI claims, but less so in other areas. The document said that the MOJ was interested in receiving further data and evidence that would help to indicate impacts for the final review. The initial assessment document

invited consultees to complete an online survey and to state, in particular, whether they were aware of categories of cases where the number of meritorious cases has increased or decreased as a result of the non-recoverability of the success fee. The initial assessment also asked a specific question about the impact of non-recovery of ATEs in non-personal injury cases, given that QOCS are not available there, and, in particular, whether the number of meritorious cases have increased or decreased.

46. The Defendant's evidence before me in relation to the Part 2 PIR was provided by a witness statement from Mr Robert Wright, a civil servant in the MOJ. He said that evidence was received in response to the requests in the initial assessment, but that relatively little evidence was provided in relation to the impact of the LASPO changes on discrimination claims. There were 155 full non-duplicate responses to the Part 2 PIR, of which only four (2.5%) were primarily focused on discrimination claims. Mr Wright said that the MOJ did not feel that this provided it with sufficient information to form a view. He said, "Little quantitative data was received generally. This meant it was not possible to get a reliable evidence-led assessment of the current situation with discrimination claims." The information that was provided took the form of case studies, rather than statistical data relating to volumes etc. Mr Wright said,

> "..... this lack of data is a significant factor limiting our ability to make careful, informed and appropriate decisions on possible changes to the comprehensive statutory reforms enacted by Parliament."

47. More generally, and perhaps predictably, Mr Wright said that claimants' representatives were generally in favour of the extension of QOCS, whereas defendants' representatives were opposed.

48. As I have said, the Part 2 PIR Report was published on 7 February 2019. Paragraph 10 of the Executive Summary referred to the fact that stakeholders in the PI field generally stated that QOCS was working well, and that there were calls to extend QOCS to a wider range of cases including professional negligence, actions against the police, housing disrepair, discrimination, private nuisance and judicial reviews to improve access to justice. Defendants had argued that an extension of QOCS was not necessary or desirable and risked an increase in unmeritorious claims.

49. This was addressed in paragraph 20 of the Executive Summary, as follows:

> "20. The second area of concern is that QOCS (or some other form of costs protection) should be extended beyond PI. There are clear attractions for claimants and their lawyers in being able to litigate at no or reduced costs risk. However, there is also a clear risk that by extending costs protection that some of the benefits of the Part 2 reforms would be undermined: the shifting of costs back to defendants, an overall increase in costs and the potential for prolonging rather than settling litigation. The Government would wish to be satisfied that these risks have been addressed before considering the case for extending costs protection further.
>
> 21. Other suggestions for change were proposed to the rules and regulations, as set out in this report. The Government will keep them under review, as it will all aspects of the reforms more generally. While it is not proposing to make

immediate changes, it may be that some of these issues are revisited at a later stage."

50. In the main body of the Report, under the heading, "Extension of QOCS beyond PI", the following was said, at para 107:

> "107. It has been argued that QOCS should be extended to discrimination claims under the Equality Act 2010 due to concerns about access to justice and ensuring discrimination and human rights could be enforced. Claimant lawyers provided case studies to highlight the difficulties in bringing such claims post-LASPO. They stated that the ATE insurance premium could often exceed the level of damages awarded in these cases, which would act as deterrent in claimants' willingness to bring claims. They also stated that claimants' compensation was not a driving factor in bringing discrimination claims, rather it was primarily about asserting and enforcing their rights."

51. The Conclusion section of the Part 2 PIR Report measured Part 2 of LASPO against its five objectives, which were:

(1) Reducing the costs of civil litigation;

(2) Rebalancing the costs liabilities between claimants and defendants;

(3) Promoting access to justice at proportionate cost;

(4) Encouraging early settlement; and

(5) Reducing unmeritorious claims.

52. The Conclusion stated that, on balance, the evidence suggests that the LASPO Part 2 reforms have been successful against their objectives. In relation to the question of extending QOCS to other areas, the Part 2 PIR said, at paragraph 160:

> "160. In relation to costs protection, stakeholders generally stated that QOCS was currently working well. Some highlighted issues with the use of 'fundamental dishonesty' allegations or insinuations by defendants, and others highlighted issues with the late withdrawal of claims by claimants. In terms of any potential extension of costs protection there are clear attractions for claimants and their lawyers in being able to litigate at no or reduced costs risk. However, there is also a clear risk that by extending costs protection some of the benefits of the Part 2 reforms would be undermined: the shifting of costs back to defendants, an overall increase in costs and the potential for prolonging rather than settling litigation. The Government would wish to be satisfied that these risks have been addressed before considering the case for extending costs protection further.
>
> "161.As has been stated, the control of civil litigation costs (and funding) is an ongoing process so the issues raised in this process have been noted and will be kept under review."

53. Mr Wright's evidence was that, since the publication of the Part 2 PIR, the MOJ has been actively considering the question whether to extend QOCS to discrimination claims.

54. On 20 February 2019, which was before the judicial review claim was issued, an advisory note was prepared by MOJ civil servants which was entitled "Piloting a Cost Protection Regime for Disability Claims." This dealt with the possibility of a pilot scheme for non-damages disability claims, though it is fair to say that the note was somewhat dubious about its value, because of a lack of data currently available to inform the pilot, and the difficulty in collecting such data.

55. On 13 May 2019, a formal submission was sent to Ministers, which shows that the issue of costs protection for discrimination claims was under consideration, with a potential pilot amongst other forms of action being considered. This submission said that the Part 2 PIR had considered the case for an extension of costs protection, and it had been drafted in such a way as not to preclude such an extension, as there was ongoing interest in extending costs protection to disability discrimination claims. The submission said that there could be a consultation exercise and then a pilot. The submission said, "A pilot could be a useful way of testing the advantages and disadvantages of extending cost protection in this way. It could particularly be used to examine whether there are any significant increases in cost to Government/defendants or in unmeritorious claims." The submission said that a pilot would have to run for at least two years and warned that there are limitations in the data that could be collected by a pilot, and so its feasibility would have to be considered carefully.

56. Mr Wright says in his witness statement that the issue is still under active consideration. He said that his team has worked with MOJ analysts since publication of the Part 2 PIR, to continue to investigate potential sources of data, and explore how any potential pilot might work. I have seen an evaluation model document that was produced by MOJ analysts on 29 June 2019, setting out a "logic model" for a pilot. Mr Wright also said that his team has met extensively with MOJ lawyers to discuss the legal aspect of possible policy options on cost protection. He said that the pace has slowed recently because of this judicial review claim and because resources are limited.

57. The current position, according to the Defendant's evidence, therefore, is that no decision has yet been taken on whether there should be a pilot. However, Mr Wright said that the MOJ is actively considering consulting on a 2-year pilot to extend costs protection, with costs capping, for non-financial remedies. He said that, in light of the lack of available evidence, it may be decided to hold a call for evidence, to investigate further if damages claims are problematic. No decision has yet been made as to whether the pilot should cover only disability cases, or all County Court discrimination cases. Whether this happens or not, there is likely to be consultation and/or consideration of whether more evidence/data is required, before ministers take a decision whether to extend costs protection to discrimination claims. At paragraph 84 of his witness statement, Mr Wright said:

> "The current position is that the government is considering costs protection for discrimination claims and has not made a decision as to whether to extend costs protection to some or all discrimination claims, with QOCS or any other model of costs protection, or indeed any other alternative. Our thorough consideration of the matter of costs protection for discrimination claims is an important part of our discharging of the PSED."

58. Mr Wright said that the timing of this is uncertain. If ministers decide to consult, the MOJ hopes that this would be in early 2020 (the witness statement was written in October 2019, so this may well have slipped). It would take 6-9 months before a pilot can begin, because the rules would first have to be agreed with the Civil Procedure Rules Committee.

In light of the evidence, was a decision taken in the Part 2 PIR not to extend QOCS to discrimination claims and/or was there a failure to extend QOCS to discrimination claims?

59. On behalf of the Claimant, Ms Monaghan QC points out that, at paragraph 20 of the Part 2 PIR Report, the MOJ said that "The Government would wish to be satisfied that these risks have been addressed before considering the case for extending costs protection further." The same form of words was used at paragraph 160. Ms Monaghan QC says that this language shows that a decision has been taken to reject the suggestion that QOCS should be extended to cover discrimination claims in the County Court. The Part 2 PIR was shutting the door to the possibility, as things stand, and unless something changes. She says that nothing that has happened since 7 February 2019 to alter this: nothing has actually happened, and there are no concrete proposals for extending QOCS to discrimination claims. There is not even much in the way of a timetable for the decision-making process. All that we can be clear about is that a decision has been made for the time being that QOCS should be available only for personal injury cases.

60. I agree with Ms Monaghan QC that the form of words that is used in the sentence that she relies upon in Part 2 PIR report is capable of being read to mean that a definite decision has been taken to the effect that QOCS will not be extended to discrimination cases, unless and until something changes. However, in light of the evidence that I have set out in the preceding section of this judgment, I do not think that this is the true position. It is also capable of being read to mean that more research and information is required before a decision can be taken as to whether to extend QOCS to discrimination cases. The evidence on behalf of the Defendant makes clear, in my judgment, that this is what was meant. The real position is that, at the time of the Part 2 PIR Report, the MOJ did not consider that it had sufficient information to take a decision about the extension of cost protection, possibly involving QOCS, to other types of cases, including discrimination cases. The MOJ took the view, in particular, that the responses to the consultation process had not provided adequate evidence about the impact of the 2013 reforms to the cost regime on non-personal injury cases. The evidence before me shows that, from a date very shortly after the publication of the Part 2 PIR, the MOJ has been taking active steps to consider the question whether costs protection, potentially including QOCS, should be extended to discrimination cases. This process is continuing. It is fair to say that it has not got very far yet, but that is explicable on the ground that this issue gives rise to very difficult questions of social policy, and hard information is difficult to come by. The MOJ and the Defendant need to explore their way carefully.

61. The conclusion that the decision-making process is still ongoing is consistent with other parts of the text of the Part 2 PIR. Immediately after the sentence that is relied upon by Ms Monaghan QC, at paragraph 20 of the Part 2 PIR Report, the text goes on to say that the MOJ will keep the suggestions for change under review, and that some may be revisited at a later stage. The same point is made at paragraph 161.

62. It would be different if the Part 2 PIR Report had, in reality, been the end of the process of considering whether to extend costs protection to discrimination cases. If a decision not to do something is taken by a public authority, the authority cannot avoid scrutiny of that decision merely by saying that there is a theoretical possibility of the matter being reconsidered at some point in the future. However, I am satisfied that this is not the position here. The Defendant has put forward evidence, supported by documentation, to show that (1) the MOJ did not consider that it had sufficient information to take a decision about the extension of QOCS to discrimination cases at the time when the Part 2 PIR Report was published, and (2) the MOJ is currently actively considering this issue, with a view to taking a decision on it when more evidence has been gathered and the MOJ feels that it has enough information to form an informed view.

63. Accordingly, I do not accept the Claimant's submission that the Part 2 PIR Report contained a decision not to extend QOCS to discrimination claims. No such decision has yet been taken.

64. The alternative way that the Claimant puts her case is that the absence of a decision to extend QOCS to discrimination cases in the Part 2 PIR Report means that there has been a failure to extend QOCS to discrimination claims. At one level, this is plainly correct. QOCS has not been extended to discrimination cases, and so the Defendant has "failed" to provide such an extension. However, I think that it is important to bear in mind what this really means. It means that the Defendant has not done anything to alter the status quo as it has existed since 2013 in relation to costs protection for discrimination claims in the County Courts. For the time being, QOCS are not to be extended to discrimination cases. But on the other hand, the Defendant is currently actively considering whether this should happen. A decision-making process is underway, but it is only part-way through. There is, as yet, no final decision not to extend QOCS to discrimination cases.

65. Having said this, I do not exclude the possibility that the time may come, at some point in the future, when inaction on the part of the Defendant might amount to a de facto decision that QOCS should not be extended to discrimination cases. No final decision has been taken by the Defendant and the MOJ as to whether there should be a pilot scheme or a consultation exercise. If there is such a scheme and/or such an exercise it will, probably, result in a decision. But if the MOJ decides instead to do nothing and, to use the old cliché, to kick the issue into the long grass, a point may be reached, in my judgment, when the practical reality would be that the Defendant had taken a definite decision not to extend QOCS to discrimination cases. However, that point has not been reached yet.

The Grounds

66. I will first deal with the pleading point relied on by the Claimant. I will then deal in turn with each of the Grounds of challenge which are relied upon by the Claimant.

The pleading point

67. In the Defendant's Detailed Grounds, the Defendant asserts that he has not yet decided whether to extend QOCS to discrimination claims, that he intends to make a decision on this in the future, and that he is presently actively considering how to

proceed with this decision-making. As I have made clear in the preceding section of this judgment, I accept that this reflects the reality of the position.

68. At paragraph 15 of the Detailed Grounds, the Defendant says as follows:

> "The Defendant does not address each of the five separate grounds of challenge, as the answer is the same to all of them, namely that the Defendant has not acted unlawfully in the manner claimed as it is still in the process of making its decision in the matter."

69. In fact, as the Defendant's skeleton argument makes clear, the Defendant's position is not quite as simple as that paragraph suggests. So far as Grounds (1) and (2) are concerned (breach of PSED and irrationality), the Defendant's position, consistently with paragraph 15 of the Detailed Grounds, is that the answer to the Claimant's case is, simply and straightforwardly, that the Defendant is still part-way through the decision-making process. However, in relation to Grounds (3), (4) and (5) (breach of Article 6, breach of Article 14, and breach of the common law right of access to the courts, respectively), though a key plank of the Defendant's defence is that no decision has yet been taken, the Defendant's skeleton argument goes further. The Defendant advances arguments as to why the current status quo is justified and proportionate.

70. In her skeleton argument and oral submissions on behalf of the Claimant, Ms Monaghan QC's primary argument is that the Claimant's grounds go unchallenged, and the Defendant is not entitled to rely on any grounds in response, save the bare assertion that no decision has yet been taken. So far as Grounds (3), (4) and (5) are concerned, Ms Monaghan QC submitted that since the Defendant has chosen in these proceedings not to seek to justify the absence of QOCS protection in discrimination claims, it follows that the Claimant must succeed on these grounds. Ms Monaghan points out that the burden of satisfying the Court that treatment is justified in Article 6 and Article 14 cases rests with the defendant.

71. I do not accept Ms Monaghan QC's submission on the pleading point.

72. I fully accept that it is important that the parties in judicial review proceedings each plead their cases carefully and fully so that the other side knows the case that it has to meet. In **R (Talpada) v Secretary of State for the Home Department** [2018] EWCA Civ 841, Singh LJ stressed the importance of rigour in the pleading of judicial review cases. At paragraphs 67-69 of the judgment in **Talpada**, Singh LJ said as follows:

> "67. I turn finally to the question of procedural rigour in public law litigation. In my view, it cannot be emphasised enough that public law litigation must be conducted with an appropriate degree of procedural rigour. I recognise that public law litigation cannot necessarily be regarded in the same way as ordinary civil litigation between private parties. This is because it is not only the private interests of the parties which are involved. There is clearly an important public interest which must not be overlooked or undermined. In particular procedure must not become the master of substance where, for example, an abuse of power needs to be corrected by the court. However, both fairness and the orderly management of litigation require that there must be an appropriate degree

of formality and predictability in the conduct of public law litigation as in other forms of civil litigation.

68. In the context of an appeal such as this it is important that the grounds of appeal should be clearly and succinctly set out. It is also important that only those grounds of appeal for which permission has been granted by this Court are then pursued at an appeal. The Courts frequently observe, as did appear to happen in the present case, that grounds of challenge have a habit of "evolving" during the course of proceedings, for example when a final skeleton argument comes to be drafted. This will in practice be many months after the formal close of pleadings and after evidence has been filed.

69. These unfortunate trends must be resisted and should be discouraged by the courts, using whatever powers they have to impose procedural rigour in public law proceedings. Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."

73. Though the observations made by Singh LJ in **Talpada** were in the context of addressing the position where a claimant relied at the hearing on a point that was not pleaded in the Claim Form, the obligation of rigour in pleading must also apply to defendants (although the public interest considerations may not be exactly the same).

74. It is true that, in the present case, the Detailed Grounds in effect put all the Defendant's eggs in the basket of the assertion that no decision has yet been taken on the extension of QOCS to discrimination claims, and that the Detailed Grounds do not themselves set out the detailed submissions, later set out in the skeleton argument, about justification, proportionality etc. However, in my judgment it is in the interests of justice to permit the Defendant to advance the entirety of his case, as set out in his skeleton argument, and as developed orally by Mr Auburn, for the following reasons:

(1) This is a case of general public importance;

(2) The outcome of this case, if the Claimant succeeds, will not just (and, indeed, will not primarily) adversely affect the Defendant. The effect of a rebalancing of the costs regime applying to claimants and defendants in discrimination cases in the County Court will potentially have an impact upon defendants to such cases. Litigation will be more costly for them. It would be wrong, in my view, in those circumstances, to shut out potential defences because of a pleading objection. The issues need to be ventilated as fully as possible. As Singh LJ said in **Talpada,** "There is clearly an important public interest [in judicial review cases] which must not be overlooked or undermined.";

(3) No injustice will be caused by permitting the Defendant to advance the full range of its arguments in defence of the Claimant's claim, because:

(a) As I have already said, I have accepted the factual premise upon which the Detailed Grounds are based.

The Defendant's skeleton argument builds upon that factual premise and is not inconsistent with it. In my judgment it is fair to say that the Defendant's more detailed arguments grow organically out of the case as summarised in the Detailed Grounds. They are not entirely new points;

(b) The witness statement of Mr Wright, which was filed at the same time as the Detailed Grounds, sets out the factual background upon which the Defendant's more wide-ranging arguments is based, and sets out reasons why the Defendant says that the current costs regime is justified and proportionate. The Claimants were provided with this witness statement on or about 17 November 2019, more than three months before the hearing in this case; and

(c) The Claimant was not taken by surprise by the Defendant's wider arguments and she was able to deal with them. The Claimant filed a second witness statement of Ms Whitfield, dated 22 November 2019, to address sections of Mr Wright's statement which went to the issue of justification. Ms Monaghan QC's skeleton argument anticipated and dealt with the justification arguments that were put forward by the Defendant, and she was able to deal with these issues fully in her oral submissions (without resiling from the position that the Defendant was de-barred from relying on them). Very properly, she did not suggest that she was unable to deal with the points. The Defendant served its skeleton argument on the Claimant 14 days before the hearing date.

75. For these reasons, I take the view that the Defendant is not de-barred from advancing the defences that he puts forward to the Grounds, by reason of the way in which he has pleaded his Detailed Grounds. The essence of the Defendant's defence is that he has not yet taken a decision as to whether to extend QOCS to discrimination cases, and is still actively considering the issue. This is how his case was put in his Detailed Grounds. It is in the interests of justice to permit the Defendant to rely upon the full scope of his defence as it was argued before me.

Ground 1: Has the Defendant failed to comply with the Public Sector Equality Duty ("PSED")?

76. There is no significant dispute between the parties as regards the nature and scope of the PSED. The PSED is imposed by the Equality Act 2010, s149, which 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—disability…….”

77. The importance of full compliance with the PSED as an essential preliminary to public decision making has been emphasised time and again by the courts. 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 Departmen**t [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.

78. It is also trite, and common ground, that the PSED is concerned with procedure, not with outcome. In **R (Baker) v Secretary of State for Communities and Local Government** [2009] PTSR 809 (CA) at paragraph 31, Dyson LJ said:

> "In my judgment, it is important to emphasise that [the PSED] is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to achieve these goals"

79. 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."

80. The Claimant points out that there is no evidence that the Defendant had regard to the PSED in relation to the possible extension of QOCS to discrimination cases at the time when the Part 2 PIR was published in February 2019. This is not a case in which a claimant is contending that the public sector defendant has failed sufficiently to have regard to its PSED; rather, this is a case in which it is alleged that the Defendant was obliged to have regard to its PSED but failed completely to do so. The Defendant does not claim that it had completed a PSED evaluation at the time of the Part 2 PIR. There is no Equality Impact Assessment ("EIA"), which, whilst not a necessary part of the discharge of the PSED, is commonly used by public authorities both to ensure that they comply with the PSED and to demonstrate that they have done so.

81. The Defendant accepts that there is a need to discharge the PSED as part of the process of reaching a decision on the extension of costs protection. However, the Defendant submits that he has not failed to do so, because he is still at the stage of gathering information and conducting analysis before he comes to a decision about the extension of costs protection to discrimination cases. Indeed, he submits that the process of gathering as much evidence as possible is an integral part of complying with his PSED duty. He submits, therefore, that he has not breached his PSED by failing to have completed a PSED evaluation by 7 February 2019.

82. In my judgment, the Defendant's submission is correct. It is clear, as both sides agree, that the Defendant must have regard to the PSED as an integral part of the process of reaching a decision whether to extend some form of costs protection to discrimination cases. However, it does not follow that the Defendant breached his PSED obligations by failing to have completed the PSED evaluation by the date of publication of the Part 2 PIR. As I have explained in the previous section of this judgment, the Defendant has not yet reached the stage of taking a decision on whether to extend QOCS, or some other form of costs protection, to discrimination cases in the County Court. In those circumstances, it would have been premature for the

Defendant to reach a conclusion in relation to the PSED evaluation at the stage of publishing the Part 2 PIR. Moreover, I accept the Defendant's submission that the process of gathering further evidence and undertaking further analysis is an important part of the discharge of the PSED. At paragraphs 89-90 of **Hurley,** Elias LJ said that the PSED, in conjunction with the principles set out in **Secretary of State for Employment v Tameside Metropolitan Borough Council** [1977] AC 1014 (HL), requires:

> "public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required."

83. A public authority such as the Defendant must give advance consideration to issues of discrimination before making any policy decision that may be affected by them (see **Hurley**, at paragraph 70). There is still time for the Defendant to do so, and, indeed, it would have been premature for the Defendant to form a concluded view on the PSED issues in February 2019.

84. As I have said, as well as submitting that the Defendant made a decision not to extend QOCS to discrimination cases at the time of the Part 2 PIR in February 2019, the Claimant submits, in the alternative, that the Part 2 PIR shows that there was a failure to extend QOCS to such cases at that point. In my judgment, this alternative way of putting the Claimant's case does not alter the position in relation to the PSED. The Claimant does not advance a case on the basis of a failure in relation to the PSED when the changes to costs protection were introduced in 2013. The MOJ prepared and published a detailed EIA in advance of those changes. Though Ms Monaghan QC was critical of this EIA in her oral submissions, the Claimant does not mount a judicial review challenge to the 2013 reforms, whether on the basis of a failure to comply with the PSED or on any other grounds. The continuing failure to extend QOCS to discrimination cases stems from the decisions that were taken that led to the 2013 reforms. No new decision was made in February 2019. Whilst it is true that the PSED duty is a continuing one, this does not mean that a failure in February 2019 to carry out and complete a full-blown PSED evaluation gave rise to a breach of the Defendant's obligations under s149 of the Equality Act 2010. The Defendant has recognised the need to discharge the PSED as part of the process of reaching a decision on the extension of costs protection, but that process did not come to an end in February 2019. At that stage, the Defendant did not consider that he had sufficient information to take a decision. It follows that it would have been inappropriate, and premature, to conduct a full-blown PSED evaluation.

85. For these reasons, I do not accept that the Defendant is in breach of the PSED in relation to the potential extension of QOCS to discrimination cases.

Ground 2: Did the Defendant act irrationally in deciding not to extend QOCS to discrimination claims in the County Court, or in failing to do so?

86. The Claimant submits that it is absolutely clear that QOCS should be extended to discrimination cases, and that was irrational for the Defendant to have failed to accept this at the time of the Part 2 PIR Report. I have already referred to the evidence that the current costs regime for discrimination cases in the County Court has a significant

deterrent effect. The whole idea of the post-Jackson reforms was to extend access to justice, but, for discrimination claims, the Claimant says that the opposite has happened. So far as personal injury cases are concerned, the evidence from both claimant and respondent representatives was that QOCS has worked well. The Claimant points out that there is no evidence that the extension of QOCS to discrimination case will encourage unmeritorious cases or would lead to weak cases being dragged out. There is no evidence that the use of QOCS in the personal injury field has led to an increase in unmeritorious claims and so there is no reason to think that this would happen in the discrimination field. As compensation is generally low, it is not in anyone's financial interests to bring speculative or unmeritorious cases. In any event, the QOCS regime provides for it to be possible for defendants to recover their costs from claimants whose claims are struck out or who have acted dishonestly. Moreover, the Claimant points out that, compared to personal injury cases, the number of discrimination cases relating to goods and services is tiny.

87. In my judgment, notwithstanding these points, the irrationality argument must be rejected.

88. The starting point is that the burden upon a Claimant of establishing that a public authority has acted irrationally in taking a decision, or in failing to take a decision, is a high one. The decision must be one which no responsible decision-maker could have made: **R v IRC ex parte Unilever Plc** [1996] STC 681, at 692 (HL).

89. There are two cumulative reasons why, in my judgment, the irrationality argument cannot succeed.

90. The first is that one aspect of rational decision-making on the part of a public decision-maker should obtain sufficient information to be able to make a properly reasoned decision. It is for the decision-maker to decide when and if s/he has sufficient information to be in a position to take a decision: see **Tameside** and (in the PSED context) **R (Simone) v Chancellor of the Exchequer** [2019] EWHC 2609 (Admin), at paragraph 74, per Lewis J. In my judgment, it is plain that it was within the scope of rational decision-making for the Defendant to decide that he needed more research and analysis before taking a decision on extending QOCS to discrimination claims in the County Court.

91. Second, and in any event, notwithstanding the cogent points that the Claimant has advanced in favour of extending QOCS to discrimination claims, I am not in a position to conclude at this stage that it would be irrational for the Defendant to take a different view. There are, at least potentially, a number of arguments in favour of refraining from extending QOCS to discrimination cases. These include:

    (1) Issues of costs protection are complicated by the fact that they involve a balancing of the interests and aspirations of claimants and defendants, respectively. Something that works to the benefit of claimants may work to the disadvantage of defendants;

    (2) Three stated aims of the 2013 reforms were (1) to reduce the costs of civil litigation, (2) to rebalance the costs liabilities between claimants and defendants, (3) whilst ensuring that parties with a valid case can still bring or defend a claim. The extension of QOCS to discrimination cases would help to achieve the third of

those objectives but it is not a "given" that they would achieve the first two. It is for the Defendant to achieve a balance between these three potentially conflicting objectives;

(3) At present at least, the possibility cannot be entirely excluded that the extension of QOCS to discrimination claims might increase unmeritorious claims, unduly increase the costs to defendants, or reduce early settlement of cases. This would run counter to other stated aims of the 2013 reforms. In particular, a claimant could conduct the litigation in such a way that s/he could be sure that the costs of the defendant would mount up, without being subject to any significant risk that the claimant would end up paying those costs;

(4) Not all defendants to discrimination claims, by any means, have deep pockets. For example, the Claimant referred in her evidence to bringing a disability discrimination claim against a local café;

(5) The issue arises as to whether the interests of claimants in discrimination claims in the County Court are adequately protected by the combination of the no-costs jurisdiction in the small-claims track, the availability of CFAs, which permit success fees of up to 100%, and the availability of legal aid for those whose incomes are low;

(6) Even if QOCS was extended to discrimination claims, this would not solve, at a stroke, all of the problems facing potential claimants. As explained above, the extension of QOCS to discrimination cases would be unlikely to solve the problem that such cases are unremunerative for solicitors and so that it is difficult to find solicitors willing to take such cases; and

(7) The Defendant is not faced with the stark, binary, choice, between extending QOCS to discrimination claims or leaving things exactly as they are. There may be other forms of additional costs protection which may be regarded as preferable to QOCS. If QOCS is extended to discrimination claims, the question will arise as to whether this should be accompanied by a reduction in the cap on success fees, and, if so, what the new cap should be.

92. In my judgment, all of these considerations mean that it cannot be said that the only rational decision that the Defendant could have taken in February 2019 was that QOCS should be extended to discrimination claims in the County Courts. I am reinforced in my view by the fact that these are considerations of financial and social policy, and involve the exercise of political judgment and assessments of various competing factors, which the Defendant is better and more appropriately placed to evaluate than a judge would be.

Grounds (3) and (5): Is the Defendant in breach of Article 6 and/or of the common law right of access to a court, by reason of the decision not to extend QOCS to discrimination claims and/or in failing to extend QOCS to discrimination claims?

93. The Claimant's submissions on these two grounds were made together, on the basis that these grounds are overlapping. I agree that they overlap. However, I will look first at the argument based on Article 6 of the European Convention on Human Rights ("ECHR"), and then at the argument based on the common law right of access to a

court, as considered by the Supreme Court in **R (Unison) v Lord Chancellor** [2017] 3 WLR 409 ("**Unison**").

Article 6 of the ECHR and the right of access to a court

94. Article 6(1) of the ECHR provides, in relevant part:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

95. The right provided for by Art 6(1) is, of course, one of the Convention rights set out in Schedule 1 to the Human Rights Act 1998. Section 6(1) of that Act provides that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right".

96. Ms Monaghan QC submits, and it is not in dispute, that Article 6 protects the right of access to a court. See, for example, **Golder v United Kingdom** (1975) 1 EHRR 524, and **Airey v Ireland** (1979) 2 EHRR 305. However, at paragraph 38 of **Golder,** the European Court of Human Rights said that "the right of access to a court is not absolute". This was explained further in **Ashingdane v UK** (1985) 7 EHRR, at paragraphs 56 and 57, where the European Court of Human Rights said:

> "56. The applicant did have access to the High Court and then to the Court of Appeal, only to be told that his actions were barred by operation of law (see paragraphs 17 and 18 above). To this extent, he thus had access to the remedies that existed within the domestic system.
>
> 57. This of itself does not necessarily exhaust the requirements of Article 6(1). It must be still be established that the degree of access afforded under the national legislation was sufficient to secure the individual's 'right to a court' , having regard to the rule of law in a democratic society.
>
> Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access, 'by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals' . [taken from **Golder,** at paragraph 38] In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field.
>
> Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

97. Accordingly, as Ms Monaghan QC submitted, any interference with the right of access to the courts must not impair the very essence of the right: but that is not the issue here. There is no absolute bar to bringing discrimination claims in the County Court. The issue for present purposes is whether the extent of the restriction of access to the courts that results from the costs regime for discrimination cases in the County Court is a proportionate means of achieving a legitimate aim.

98. In **Handölsdalen Sami Village v Sweden** (appl no. 39013/04, 4 October 2010), a case about legal aid, the Strasbourg court made clear, at paragraph 51, that it is not a precondition, in order for a costs regime to be Article 6-compliant, that there is total equality of arms between litigants. The Court said:

> "The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate. It may therefore be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigants or the prospects of success in the proceedings. Moreover, it is not incumbent on the State to seek, through the use of public funds, to ensure total equality of arms between the parties to the proceedings, as long as each side is afforded a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis the adversary (see **Steel and Morris v. the United Kingdom**, … §§ 59-62, with further references)."

The Claimant's argument based on Article 6

99. Ms Monaghan QC submits that there will be a large cohort of potential claimants in County Court discrimination cases for whom access to a court is impeded and often effectively barred. This is a state of affairs which must be justified as being a proportionate means of achieving a legitimate aim. Restrictions which are of a purely financial nature, unrelated to the merits of the claim or its prospects of success, should be subject to particularly rigorous scrutiny from the point of view of the interests of justice. The costs regime falls into this category.

100. Ms Monaghan QC further submits that even if the current costs regime for discrimination cases in the County Court is regarded as pursuing a legitimate aim, there is no evidence, even more than six years after the introduction of the 2013 reforms, to suggest that the extension of QOCS to discrimination claims would undermine any of the legitimate objectives for costs regimes. Indeed, she submits, the failure to extend QOCS to discrimination cases fundamentally and adversely affects three of the five stated aims of the reforms (set out at paragraph 51, above). The three aims that are adversely affected, she says, are (a) reducing the costs of civil litigation; (b) rebalancing costs liabilities between claimants and defendants, and (c) promoting access to justice at proportionate cost.

101. I should add that the Intervener makes submissions in support of the Claimant's Article 6 argument, and the Article 14 argument, specifically by reference to the UN Convention on the Rights of Persons with Disabilities ("UNCRPD"). I will deal separately with the submissions based on the UNCRPD at the end of this judgment.

Lawrence v Fen Tigers and others (No 3)

102. In my judgment, very helpful guidance can be obtained as regards the proper approach of a court to an argument such as this by reference to the judgment of the Supreme Court in **Lawrence v Fen Tigers and others (No 3) (also known as Coventry v Lawrence)** [2015] 1 WLR 3845 (SC) ("**Lawrence**") . This case involved an Article 6 challenge to the costs regime that applied to civil claims before the 2013 reforms. Prior to 2013, the costs which a successful claimant was entitled to recover from the unsuccessful defendant included not only the base costs actually incurred by the claimant, but also the success fee payable to the claimant's solicitors who were acting under a CFA (usually, and in this case, 100% of base costs) plus the ATE insurance premium (if any). In **Lawrence,** the successful claimants were awarded 60% of their costs and they claimed several hundred thousand pounds worth of costs from the defendants, after the success fee and ATE premium were included. The case had already gone to the Court of Appeal and the Supreme Court and so the figures were particularly high. The case was concerned with noise pollution of the claimants in their home by a local speedway track. The damages awarded by the judge to the claimants was just over £20,000. The unsuccessful defendants contended that the then-prevailing costs regime was disproportionate and in breach of Article 6, because defendants faced being liable to pay costs which were far out of proportion to the sums in issue.

103. It will be seen, therefore, that **Lawrence** was a case in which it was defendants, not claimants, who were contending that the costs regime that applied at the time was unfair to them and was in breach of Article 6.

104. The Supreme Court, by a 5-2 majority, dismissed the defendants' appeal in relation to the costs order. The leading judgment was given by Lords Neuberger and Dyson (with whom Lords Sumption and Carnwath agreed).

105. There was no real issue about the legitimacy of the aim of the costs regime in question. It had three statutory aims. These were (1) to contain the rising cost of legal aid to public funds and enable existing expenditure to be refocused on cases with the greatest need to be funded at public expense; (2) to improve access to the courts for members of the public with meritorious claims; and (3) to discourage weak claims and enable successful defendants to recover their costs in actions brought against them by indigent claimants (judgment, paragraph 26). These are broadly equivalent to the first, third and fifth stated aim of the post-2013 reforms (see paragraph 51, above).

106. The main focus of the **Lawrence** judgment was on proportionality, and the Supreme Court gave helpful guidance about the correct approach to proportionality in cases which are concerned with the balance of costs and of costs risks between parties to litigation.

107. First, the Court considered the intensity of review by the reviewing Court. At paragraph 30, the Court cited the judgment of the Supreme Court in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700, at paragraph 30, in which Lord Reed said that the principle of proportionality does not entitle the courts simply to substitute their own assessment for that of the decision maker. On the other hand, Lord Reed noted that the practice of allowing the decision-maker a margin of appreciation did not apply where the matter was before a domestic Court, rather than the Strasbourg Court. Lord Reed went on:

> "That concept [margin of appreciation] 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 on 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."

108. At paragraph 74 of **Bank Mellat,** Lord Reed set out the proportionality test in the following terms (adopted in **Lawrence** at paragraph 31):

> "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."

109. At paragraph 32 of **Lawrence,** the majority of the Supreme Court said that, in applying these four stages, "appropriate weight must be given to informed legislative choices."

110. The Supreme Court in **Lawrence** recognised that there were four flaws in the costs regime at the time in question. Three of them (the regime was unfocussed, costs were assessed only at the end of the case, and the opportunity existed for lawyers to cherry pick winning cases to conduct on CFAs), were not flaws that could have adversely affected the Article 6 rights of opposing parties. The key flaw, for Article 6 purposes, was that the scheme enabled claimants to impose a cost burden on opposing parties which was excessive and in some cases amounted to a denial of justice. This was described as the "blackmail" or "chilling" effect. This was the issue that lay at the heart of the **Lawrence** case (paragraph 53).

111. The majority of the Supreme Court emphasised that the test of proportionality was not determined by whether the system was unfair or had "flaws". At paragraph 56, Lords Neuberger and Dyson said:

> "In **Swift v Secretary of State for Justice** [2014] QB 373, para 35 Lord Dyson MR said:
>
> "the question is not whether the existing law is unfair and could be made fairer. Nor is it whether the existing law is the fairest means of pursuing the legitimate aim referred to at para 23 above. Rather, the question is whether the existing law pursues that aim in a proportionate manner. The Strasbourg jurisprudence does not insist that a state pursues a legitimate aim in the fairest or most proportionate way. It requires no more than that it does so in a way which is proportionate. There may be a number of ways in which a legitimate aim can be pursued. Provided that the state has chosen one which is proportionate, Strasbourg demands no more."

112. At paragraph 58, the majority said that whilst the question whether a fair balance has been struck between litigants was one for the courts to determine, "even in a field such as access to justice and legal costs, the court, while being vigilant to protect fundamental rights, must give considerable weight to informed legislative choices, at least where state authorities are seeking to reconcile the competing interests of different groups of society." The majority continued:

> "58…..In such cases, they are bound to have to draw a line somewhere in order to mark where a particular interest prevails and another one yields. Making a reasonable assessment of where to draw the line, especially if that assessment involves balancing conflicting interests falls within the state's wide discretionary area of judgment. As Lord Bingham said in **Brown v Stott** [2003] 1 AC 681, 703:
>
> "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies …"
>
> "59. The choices made by Parliament in enacting the 1999 Act followed a wide consultation to enable it to evaluate the various interests at stake. Similarly, in formulating the CPR and the CPD, the relevant rule-makers were (following consultation) in the best position to determine how to effect the reforms and how to strike the appropriate balance between the different types of litigant."

113. The majority of the Supreme Court also made clear that the proportionality of a scheme for litigation costs must be judged by reference to how it works overall, and a legislative or regulatory scheme may in some circumstances be compatible with the Convention even it operates harshly in individual cases (paragraphs 58-63 and 83).

114. Applying those principles to the **Lawrence** case, the majority of the Supreme Court observed that there is no perfect solution to the problem of how best to enhance access to justice following the withdrawal of legal aid for most civil cases (paragraph 69). In the period immediately prior to 2013, the balance was such that an unsuccessful defendant was worse off than s/he would have been previously, and also was worse off than s/he would have been once the LASPO reforms had taken effect in 2013. The majority observed that the existence of different various schemes over the years shows that, at least in the absence of a widely accessible civil legal aid system, it is impossible to devise a fair scheme which promotes access to justice for all litigants (paragraph 72).

115. At paragraphs 83 and 84, the majority of the Supreme Court concluded that the scheme in question was not incompatible with Article 6. This was even though, in a number of cases, the scheme might be said to have interfered with a defendant's right of access to justice. Nevertheless, the scheme was a rational and coherent scheme for providing access to justice to those whom it would probably otherwise have been denied, and it was subject to certain safeguards. The government was entitled to a considerable area of discretionary judgment in choosing the scheme that it considered

would strike the right balance between the interests of appellants and respondents whilst at the same time securing access to justice to those who would previously have qualified for legal aid. It had to find a solution to the problem created by the withdrawal of legal aid. It had produced three schemes by the time of the hearing before the Supreme Court. Each was produced after wide consultation. Each had generated considerable criticism. It was impossible to come up with a solution which would meet with universal approval.

Discussion on the Article 6 argument

116. In my view, it is clear that the stated aims of the post-2013 costs regime, were legitimate aims. To recap, they were:

(1) Reducing the costs of civil litigation;

(2) Rebalancing the costs liabilities between claimants and defendants;

(3) Promoting access to justice at proportionate cost;

(4) Encouraging early settlement; and

(5) Reducing unmeritorious claims.

117. Ms Monaghan QC submitted that the fifth aim, reducing unmeritorious claims, cannot be legitimate if what is meant is reducing claims that prove unsuccessful. But I do not think that this is what is meant by "reducing unmeritorious claims". This is plainly a reference to reducing hopeless claims, and/or claims that are advanced with an ulterior motive, rather than to reducing claims which have a realistic chance of success but which are not bound to succeed.

118. As with the **Lawrence** case, therefore, the real issue in the present case is whether the means adopted, and, in particular the decision that QOCS should apply only to personal injury cases, so that it does not apply to County Court discrimination cases, was a proportionate means of achieving these legitimate aims.

119. The Defendant submits that there is a simple answer to this question: namely that the Defendant and the MOJ are currently actively considering this very issue and intend to conduct research and analysis with a view to taking a decision, at some point in the future, as to whether QOCS should be extended to discrimination cases. Moreover, the Defendant submits that the evidence, such as it is at present, suggests that the current costs regime for discrimination cases is a proportionate means of achieving a legitimate aim. In those circumstances, the Defendant submits, it would be wrong for a court to second-guess the outcome and to impose a requirement that QOCS be extended to discrimination cases in the County Court.

120. I have some sympathy with the Defendant's submission. Where the matter is actively under consideration, and the decision-maker's explanation for not yet taking a decision to do what the Claimant seeks is that the evidential basis for such a decision is not present, I think that a judge should be particularly cautious about ruling that the current regime is in breach of Article 6. Moreover, the paucity of evidence of an adverse effect of the current costs regime upon litigants in discrimination cases may

be a strong ground in support of the conclusion that the current status quo is a proportionate means for achieving a legitimate aim (even bearing in mind that the burden rests with the public authority to show that something is proportionate in Human Rights terms). However, I do not think that the fact that a public authority is currently actively considering making changes to the status quo means that a Court is barred from considering whether the current costs regime is a proportionate means of achieving a legitimate aim. I will, therefore, go on to consider this issue (and I will also go on to consider the related question of whether the current regime is unlawful because it impedes access to justice, contrary to common law).

121. In my judgment, the key guidance that can be derived from **Lawrence** is as follows:

(1) The question whether the means is proportionate is to be decided by the court. In the domestic court, in contrast to the Strasbourg court, there is no margin of appreciation;

(2) However, the principle of proportionality does not entitle the courts simply to substitute their own assessment for that of the decision maker. The extent to which the domestic court will respect the judgment of the primary decision maker will depend on the context;

(3) 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;

(4) The Strasbourg jurisprudence does not insist that a state pursues a legitimate aim in the fairest or most proportionate way. It requires no more than that it does so in a way which is proportionate. There may be a number of ways in which a legitimate aim can be pursued. Provided that the state has chosen one which is proportionate, Strasbourg demands no more. Something may be proportionate even if it is not fair for everyone. Put bluntly (and to use words that do not appear in **Lawrence)** there is no requirement, in order for something to be proportionate, that everything is for the best in the best of all possible worlds;

(5) The court, while being vigilant to protect fundamental rights, must give considerable weight to informed legislative choices, at least where state authorities are seeking to reconcile the competing interests of different groups of society. This observation has particular resonance in the present case, as the issue is how to reconcile the competing interests of claimants and defendants;

(6) Where the balancing of costs in litigation is concerned, Parliament and the relevant rule-makers of the CPR were (following consultation) in

the best position to determine how to effect the reforms and how to strike the appropriate balance between the different types of litigant;

(7) A legislative or regulatory scheme may in some circumstances be compatible with the Convention even it operates harshly in individual cases; and

(8) There is no perfect solution to the problem of how best to enhance access to justice following the withdrawal of legal aid for most civil cases. Indeed, it is impossible to come up with a solution which would meet with universal approval.

122. Applying those principles, and that guidance, to the issue in the present case, I conclude that the current costs regime as it applies to discrimination cases in the County Court passes the test of proportionality. It is not perfect, and there can be little doubt that it has a deterrent effect for some claimants in some cases. However, as the Supreme Court observed in **Lawrence,** there is no perfect solution to the problem of balancing interests and enhancing access to justice. It is a rational and coherent scheme which has been carefully thought out, and it was introduced after the commissioning of a report by a distinguished judge, and after extensive consultation. The legislature and those who make the CPR are better placed than an individual judge to decide how to effect the reforms and to strike the appropriate balance.

123. Looking at the first part of the four-stage test set out in **Bank Mellat** and adopted in **Lawrence,** the five stated aims are sufficiently important to justify the limitation of a protected right. It is common ground that the right of access to a court is not absolute, even for rights relating to discrimination, and some sort of costs regime is necessary. Objectives such as reducing costs and promoting access to justice are important ones. It is an unfortunate but unavoidable feature of the aims that they conflict to some extent. Measures that promote access to justice for a claimant, by reducing the risk factor and insulating the claimant from a costs risk, may deny justice to a defendant, who may be driven by fear of an expensive costs award to concede or settle. It cannot be assumed that all claimants are poor and meritorious and that all defendants are rich and in the wrong.

124. The second question is whether the measure is rationally connected to the objective. Again, I think that the answer is "yes". The removal of the rule that success fees and ATE premiums could be passed on to unsuccessful defendants, without the safety net of QOCS, may help to reduce costs, and rebalance costs between claimants and defendants, promote early settlements and reduce unmeritorious claims. It may not be as successful in promoting access to justice at proportionate cost, but there are other measures, part of the total package making up the cost regime, which may help to do so, such as the availability of the non-costs small-claims track, the availability of legal aid, and the existence of a cap of 100% on success fees in discrimination cases. Also, if a claimant succeeds, s/he will not be liable to pay the costs of the defendant. It would be wrong to look at the absence of QOCS in isolation, without taking account of other parts of the package of measures relating to the balancing of costs and costs risks.

125. The third question is whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. I am not satisfied that

a less intrusive measure would have been available, bearing in mind that the 2013 reforms were introduced after thorough consultation and the Jackson Report, and bearing in mind also that Parliament and the rule-makers were in a better position that I am to weigh up the pros and cons. This is an area in which, in my judgment, weight has to be given to informed legislative choices. Moreover, the fact that the current costs regime may cause hardship in individual cases does not, of itself, mean that a less intrusive means would have been available. A less obtrusive means would not have achieved the same balance as has currently been applied.

126. It is also worth pointing out that the Claimant's case is predicated on the proposition that the only proportionate thing to do would be to extend QOCS to discrimination cases in the County Court. As the Defendant has submitted, however, that is not the only option. The current costs regime consists of a large number of moving parts, including legal aid, a no-cost jurisdiction for small claims, caps on success fees etc. There is no simple binary choice between the status quo and the extension of QOCS to discrimination cases. It should be borne in mind that there is no QOCS in the employment and educational tribunal systems, where the majority of discrimination claims are heard, and the interests of claimants in those jurisdictions, so far as costs are concerned, are protected in another way, namely in that, in the vast majority of cases, a claimant will not be liable to pay the respondent's costs, even if the claim is unsuccessful.

127. The final question is 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. In my judgment, for the reasons I have already given, the former does not outweigh the latter. The scheme is not incompatible with Article 6.

128. In this regard, it is important to bear in mind that the issue in question concerns the balancing of costs, and of costs risks, between claimants and defendants, two groups each of whom have Article 6 rights. It is not about court fees, where a main aim is to reduce costs for government, and it is not about the availability of legal aid for those who cannot afford to go to court. In imposing a costs regime, the Defendant is trying to strike a balance, or to draw a line, between competing legitimate interests.

129. In coming to this conclusion on the Article 6 issue, I bear in mind that there is no clear evidence of the damaging effect of the non-extension of QOCS to discrimination cases in the County Court. As the Defendant's evidence has shown, there is no clear and compelling evidence of the impact of the 2013 reforms on discrimination cases. The evidence is primarily anecdotal, although it is also supported by arguments based on logic and common-sense (if you are at risk of being allocated to the fast-track or multi-track and may face a substantial award of costs if you lose, it perhaps goes without saying that you may think twice about bringing a claim).

130. For these reasons, I do not accept the Claimant's submission that the current costs regime for discrimination claims in the County Court is in breach of Article 6. On the basis of the limited evidence available, and applying the appropriate legal test, the costs regime is a proportionate means of achieving a legitimate aim.

131. I add that, even if the matter were not currently under active consideration by the Defendant and the MOJ, my conclusion would still be that the current regime for costs in discrimination cases is not in breach of Article 6.

The common law right of access to the courts

132. This part of Ms Monaghan QC's argument is based on the reasoning of the Supreme Court in the **Unison** case. That case was decided primarily on the basis of the common law right of access to the courts, though the Supreme Court also said that the fees regime in issue was in breach of EU law. No argument based in EU law is being advanced in the present case.

133. The **Unison** case was concerned with the vires of The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 ("the Fees Order"). The Fees Order was made pursuant to the Lord Chancellor's power, under section 42(1) of the Tribunals, Courts and Enforcement Act 2007, to prescribe, by order, fees payable in respect of anything dealt with by the ET and the EAT.

134. Prior to the Fees Order, no fees were payable by litigants in the ET and the EAT. Claims in those tribunals were often concerned with issues of modest financial value. The rationale behind the decision to introduce fees was to transfer some of the costs burden of these tribunals from the general taxpayers to those who made use of them, to incentivise early settlements, and to disincentivise weak or vexatious claims. The expectation was that successful claimants would recover the fees from unsuccessful respondents. A fees remission system was introduced for those with limited means. As Lord Reed pointed out in his judgment, paragraphs 13 and 66-67, the impact assessment used by the MOJ proceeded on the wholly misconceived basis that consumption of ET and EAT services without full cost recovery resulted in a "deadweight" loss to society, ie that claims in ETs and EATs were only of value for the litigants, and had no wider benefit for society.

135. The level of fees depended upon whether the nature of the claim fell within one of two categories, Type A or Type B. Fees were payable in two stages, at the point of presenting the claim and then a hearing fee. The level of fees bore no direct relation to the amount sought. The fees for Type B claims were very much higher than the fees for Type A claims, even though Type B claims did not necessarily involve higher value issues than Type A claims. The effect of the fees regime was that the fees might well exceed the sum in issue, or at least may represent a high proportion of the sum at issue. Fee remission was not available, save for the very poor. At paragraph 29, Lord Reed said that the opportunity to recover fees if a claimant succeeds does not solve the problem that fees gave rise to: the right of access to justice is not restricted to the ability to bring claims which are successful.

136. By the time of the hearing before the Supreme Court, there was a great deal of evidence about the impact of the Fees Order on ET and EAT claims. An earlier claim had been dismissed by the Divisional Court on the basis the proceedings were premature and the evidence was insufficiently robust to sustain the grounds of challenge (see [2014] ICR 498, and Supreme Court, paragraph 60). At the time of the Supreme Court hearing, the evidence showed, beyond doubt, that since the Fees Order came into effect, there had been a dramatic and persistent fall in the number of claims brought in ETs. There had been a long-term reduction in the order of 66-70%

(paragraph 39). The impact upon low-value claims was particularly significant (paragraph 42). There had been no deterrent effect on unmeritorious claims (paragraph 57) and no impact on early settlement (paragraphs 58-59).

137. The main issue before the Supreme Court was whether the Fees Order was ultra vires the enabling power in section 42(1) of the Tribunals, Courts and Enforcement Act 2007, because the Lord Chancellor's power to make fees orders was constrained by the constitutional right of access to the courts and tribunal. In other words, the Lord Chancellor was not permitted to make a fees order if it infringed that constitutional right.

138. The Supreme Court held that the constitutional right of access to the courts is inherent in the rule of law (paragraph 66). Lord Reed emphasised that access to the courts is not of value only to the particular individuals involved, and this does not apply only to landmark or test cases (paragraphs 67-70).

139. At paragraph 78, Lord Reed observed that impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible. Moreover, any hindrance or impediment by the executive requires clear authorisation by Parliament, in the form of primary legislation (paragraphs 78 and 79). Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objectives of the provision in question (paragraph 80).

140. The Fees Order was, of course, secondary legislation. At paragraph 87, Lord Reed said that "the Fees Order will be ultra vires if there is a real risk that persons will effectively be prevented from having access to justice." At paragraph 88, Lord Reed said that even where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation: the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve. If, however, the primary legislation expressly authorises the particular degree of intrusion, it will be lawful (see paragraph 82).

141. Applying the legal test to the Fees Order, the Supreme Court decided that the Fees Order effectively prevented access to justice, and so was ultra vires. Fees have to be set at a level that everyone can afford, taking into account the availability of full or partial remission, and the evidence before the Supreme Court, considered realistically and as a whole, led to the conclusion that this requirement was not met (paragraph 91). There had been a sharp and sustained fall in claims. The Government had proceeded on the basis that the fees were affordable, but this was wrong, because the current situation was that households on low to middle incomes could only afford the fees if they sacrificed the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living (paragraph 93). Moreover, the fees would, in many cases, render it futile or irrational to bring a claim (paragraph 96).

142. As I have said, the Supreme Court based its decision in **Unison** on the common law right to access to the Courts and upon principles of EU law. The decision was not based on Article 6. However, there was some consideration of Article 6 at paragraphs 108-117 of the judgment. Lord Reed pointed out that the requirement to pay fees in

civil cases is not in itself incompatible with the Convention, but that there must be a reasonable relationship of proportionality between any limitation of access to a court (such as a fee) and the legitimate aim to be achieved. At paragraph 110, Lord Reed said:

> "That is consistent with the principle of domestic law that such rights may be curtailed only to the extent reasonably necessary to meet the ends which justify the curtailment."

143. Lord Reed also said that, under the Convention, the ability to pay fees is not determinative of their proportionality: it is merely one among a number of relevant factors. The Strasbourg court has emphasised that financial restrictions on access to a court which are unrelated to the merits of a claim or its prospects of success should be subject to particularly rigorous scrutiny, and that it is significant if non-payment of a fee may result in a claim's never being examined on its merits: **Teltronic-CATV v Poland** CE;ECHR: 2006:0110JUD00481409, para 61 (**Unison,** paragraph 113). So, for example, the Strasbourg court had held that a fee that was equivalent to 90% of compensation was disproportionate: **Stankov v Bulgaria** (2007) 49 EHRR 7.

144. Ms Monaghan QC submits that there is no doubt that the absence of QOCS protection interferes with the right of access to the court. She submits that, in light of **Unison,** this is a state of affairs which the Defendant must justify, but the Defendant is unable to do so.

145. In response, Mr Auburn on behalf of the Defendant advances two main arguments. First, he submits that **Unison** was concerned with an issue of statutory interpretation, namely how far a statutory power is subject to an implied limitation. That is not the issue here. Rather, the Claimant is relying upon the common law right of access to the courts as a free-standing ground of review. Mr Auburn says that this is not permissible. Second, and in any event, he submits that the subject-matter of the **Unison** case was very different from the subject-matter of this case and that even if the common law right of access to the courts gives rise to a free-standing ground of review, **Unison** does not lend any support to the argument that the failure to extend QOCS to discrimination cases is in breach of the common law right.

Is it a complete answer to this part of the Claimant's case to say that the common law right of access to the courts does not give rise to a free-standing ground of review?

146. In considering this question, it is important, first, to have regard to what the **Unison** case was about. The central issue in that case was whether the Fees Order was ultra vires, because the enabling power, set out in section 42(1) of the Tribunals, Courts and Enforcement Act 2007, properly interpreted, did not permit the Defendant to make the order. This was because the power to make fees orders, set out in section 42(1), was subject to the implied limitation that no fees order could effectively prevent access to justice.

147. In other words, the common law right of access to the courts was employed in **Unison** as an aid to statutory interpretation. Given the constitutional importance of the common law right, an apparently untrammelled right to make fees orders was subject to an implied limitation. However, the Supreme Court also recognised that

Parliament was entitled, by primary legislation, to enact a measure which intruded upon the right of access to the courts if that intrusion was expressly authorised in terms which did not admit of an implied limitation (see judgment at paragraphs 82 and 84).

148. In light of this, I accept Mr Auburn's submission that the Supreme Court in **Unison** did not make use of the common law right of access to the courts as a free-standing ground of review, but, rather, used it as an aid to statutory interpretation.

149. I also accept that there are authorities that have stressed the difference between cases where a court is asked to construe legislation in a way which may be contrary to human rights embedded in the common law (sometimes known as the "principle of legality"), on the one hand, and when the Court is being invited to treat the human rights embodied in the common law as an additional ground of challenge in cases purely involving questions of common law, on the other. The former is permissible, whilst the latter is not. This was made clear by **R(Youssef) v Foreign Secretary** [2013] QB 906 (DC), in which Toulson LJ said, at paragraphs 53-55:

> "53. In making a decision whether to support or oppose the designation of an individual by the sanctions committee, the Foreign Secretary is not exercising a power derived from an Act of Parliament. He is acting on behalf of the Government in its capacity as a member of an international body, the Security Council.
>
> 54. Consequently, we are not in an area where the "principle of legality" explained in such cases as **R v Secretary of State for the Home Department, Ex p Pierson** [1998] AC 539 , 573–575 (per Lord Browne-Wilkinson) and 587–590 (per Lord Steyn) **and R v Secretary of State for the Home Department, Ex p Simms** [2000] 2 AC 115 , 131, per Lord Hoffmann, is apposite. That principle applies in cases where a court is asked to construe legislation in a way which may be contrary to human rights embedded in the common law. Lord Hoffmann stated the principle in this way, at p 131:
>
> "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words are intended to be subject to the basic rights of the individual."
>
> 55. As the common law has developed, certain rights have come to be regarded as embedded in our largely unwritten constitution, so as to attract the application of that principle. The process of development of the common law is never complete, because it develops as society changes. But there is sometimes a tendency on the part of lawyers (as there has been in this case) to seek to use the "principle of legality" as a developmental tool providing an additional ground of challenge in a case purely involving questions of common law, ie not a case where the defendant is seeking to justify his action by reference to a statutory

> power. That is to misunderstand it. The "principle of legality" is a principle of statutory interpretation, derived from the common law."

150. See, also, **AJK v Commissioner of Police for the Metropolis** [2014] 1 WLR 285, at paragraphs 23-28.

151. It is also fair to say that, in the present case, as Mr Auburn pointed out, there is no issue about the vires of delegated legislation, or about the interpretation of primary legislation. Ms Monaghan QC does not put her case on the basis that ss 44-47 of LASPO must be read in light of implied limitations imposed by the common law right to access to a court. Nor does she contend that the power granted to the Defendant by section 3 of the Civil Procedure Act 1997 in effect to require that changes be made to the CPR by the Civil Procedure Rules Committee is subject to an implied limitation resulting from the common law right of access to a court. Rather, the Claimant relies on the common law right of access to a court as a free-standing ground of review (though, to be fair to Ms Monaghan QC, she relies upon it primarily to supplement and bolster her Article 6 argument).

152. On the basis of the case as pleaded, therefore, the Defendant is right that there is a complete answer to the point based on the common law right of access to the court: this does not give rise to a free-standing ground of challenge. However, just as I am unwilling to decide the case on the basis of a narrow pleading objection to the way that the Defendant has advanced his case, so I am unwilling to reject this argument by the Claimant solely on a pleading point. There is another way of looking at the Claimant's submission on this point. It might be understood to be a submission that the apparently wide power granted to the Lord Chancellor by section 3 of the Civil Procedure Act 1997 effectively to direct the Civil Procedure Rules Committee to make changes to the CPR, is subject to the principle of legality. In other words, such a power is subject to an implied limitation in that it cannot be exercised in such a way that it breaches the common law right of access to a court.

153. Put this way, the Claimant could argue that by using his section 3 power to arrange for the introduction of QOCS for personal injury cases, but not for discrimination cases, the Defendant has acted ultra vires the implied limitations on his power.

154. Having recast the Claimant's case in this way, I am somewhat dubious as regards whether the principle of legality would operate in this way. There is no challenge on common law grounds to the extension of QOCS to personal injury cases by way of changes to the CPR. There can be no challenge to the abolition of the power to recover success fees and ATE insurance premiums from a defendant in discrimination cases, because it is set out expressly and unequivocally in primary legislation: ss 44 and 47 of LASPO, set out at paragraphs 18 and 19 above. There is no scope to alter the meaning of those provisions by recourse to implied limitation based on the common law right of access to the courts, and the Claimant does not invite me to do so. It follows that the argument would have to be that the Defendant acted in breach of his powers under section 3 of the 1997 Act by failing to do something, namely by failing to introduce further changes to the CPR which would have extended QOCS to discrimination cases. The complaint is about a sin of omission: a failure to exercise the Defendant's power to cause changes to be made to the CPR. I am doubtful as to whether the rule of statutory interpretation relied upon in **Unison** goes this far. I do not think that it would extend to imposing a positive obligation to deal with something

in delegated legislation. However, for the purposes of this judgment, there is no need to reach a final decision on this issue.

155. For present purposes, I will assume without deciding that it is not a complete answer to this part of the Claimant's case to say that the common law right of access to the courts does not give rise to a free-standing ground of review. Accordingly, I will go on to consider whether, if there is a free-standing ground of review based on the common law right of access to a court, the failure to extend QOCS to discrimination cases has infringed that right.

If there is a free-standing ground of review based on the common law right of access to a court, has the failure to extend QOCS to discrimination cases infringed that right?

156. In her submissions, Ms Monaghan QC submitted that the common law right of access to the courts afforded the same protection as Article 6(1) of the European Convention on Human Rights. In other words, if something breached Article 6, it would breach the common law right, and vice versa. The scope of the protections at common law and under the Convention are the same.

157. The Supreme Court did not say this in terms in the **Unison** judgment. At paragraph 108 of the judgment, Lord Reed referred to Article 47 of the Charter of Fundamental Rights of the European Union which provides that there must be the guarantee of an effective remedy before a tribunal for everyone whose rights and freedoms governed by the law of the European Union are violated. Lord Reed referred to the "corresponding guarantee in article 6.1 of the Convention". It is, in my judgment, clear from this paragraph and the paragraphs that follow that the Supreme Court took the view that the scope of the protections under Article 47 of the Charter and Article 6.1 of the Convention, respectively, are the same (save that the Charter only applies to rights under EU law). So far as I can tell, there is no similar statement in the **Unison** judgment to the effect that the scope of the protection granted by the common law right of access to the courts and the protection granted by Article 6.1 are exactly the same. This may be because, as the Defendant submits, the common law protection is a rule of statutory interpretation rather than a free-standing ground of challenge, and so the comparison did not arise in the **Unison** case.

158. However, in my view, and assuming that the common law right of access to a court gives rise to a free standing right of challenge at all, Ms Monaghan QC was right to submit that the common law right of access to the courts affords the same protection as Article 6(1) of the European Convention on Human Rights. At paragraph 88 of the **Unison** case, Lord Reed said that if there is an intrusion on the right of access to justice, the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve. This is, in my view, indistinguishable from the test that applies to Article 6.1 challenges, namely, is the measure complained about a proportionate means of achieving a legitimate aim? I do not see any valid basis for concluding that the standard of scrutiny is either more rigorous or less rigorous in a common law right case than it would be in an Article 6.1 case. It would, as Mr Auburn submitted, be very surprising if the common law right of access to a court functions to provide a claimant with a remedy, in circumstances in which there is no breach of Article 6 for similar reasons to those set out by the Supreme Court in **Coventry v Lawrence**.

159. Accordingly, if there is scope for a free-standing challenge based on the common law right of access to the courts, it does not add anything to the Article 6 challenge. If the Article 6 challenge succeeds, the common law challenge will succeed, and vice versa.

160. I have already set out my conclusions, in the preceding section of this judgment, as to why the Article 6 challenge to the failure to extend QOCS to discrimination claims in the County Court is rejected. For those same reasons, which I will not repeat here, I reject the challenge on the basis of the common law right of access to a court.

161. It is worth, however, emphasising the key differences between the **Unison** case and the present case. First, **Unison** was concerned with tribunal fees, rather than the balancing of costs and costs risks between litigants. Plainly, different considerations apply where the issue concerns a financial charge imposed by government to go to court, on the one hand, and the decision as regards how costs and costs risks should be allocated as between litigants, on the other. Second, in **Unison** the Supreme Court was provided with detailed evidence and statistics about the "before and after" effect of the introduction of fees. No such evidence is available, at present, relation to the unavailability of QOCS in discrimination cases. As I have mentioned, at an earlier stage in the fees litigation, the Divisional Court had dismissed a claim by Unison for judicial review on the basis that the evidence was insufficiently robust to sustain the ground of challenge. The Supreme Court did not suggest that the Divisional Court had been wrong to do so (see judgment, paragraph 60).

Ground (5) Does the current costs regime infringe Article 14?

162. The fifth and final ground relied upon by the Claimant is based upon Article 14 of the Convention, read with Article 6.

163. 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."

164. 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** [2019] 1 WLR 5905 (SC), 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?"

165. In the present case, there is no doubt that the first question is answered in the affirmative. The facts fall within the ambit of Article 6, since they relate to access to the courts. It is not necessary, for this purpose, that there has been a breach of Article 6.

166. Ms Monaghan QC puts her case on Article 14 in two alternative ways. She says that the QOCS regime:

(a) Treats those pursuing discrimination claims less favourably than those bringing personal injury/Fatal Accidents Act claims (I will call this group "class (a)"); and/or

(b) Disadvantages those with particular protected characteristics, including disability, who are self evidently more likely to bring discrimination claims ("class (b)").

167. Ms Monaghan QC said that those who are pursuing or who may wish to pursue a discrimination claim are discriminated against because they are treated less favourably than those who are pursuing or who may wish to pursue a personal injury claim. It does not matter that QOCS is also not available to many other types of potential litigants, beyond those who want to bring discrimination claims, because there can be a breach of Article 14 if a public authority has failed to give special treatment to protected classes whose circumstances warrant different treatment to that ordinarily meted out. There can also be a breach of Article 14 if those in a particular group were not deliberately singled out for special treatment.

168. Ms Monaghan QC accepts that an Article 14 claim can only succeed if the protected group, ie classes (a) or (b) above, has a protected "status" for the purposes of Article 14. She submits that "other status" for the purposes of Article 14 is very wide, and can be defined by reference to a legal or social status. Disability is a protected status. A claimant as a potential litigant in a claim not protected by QOCS will have a protected "status".

169. Ms Monaghan QC submits that discrimination against class (a) is akin to direct discrimination, whereas discrimination against class (b) is, in effect, indirect discrimination. She accepts that both direct and indirect discrimination can be justified for the purposes of Article 14, and she says that since both classes are treated less favourably than personal injury claimants, there is a requirement to justify the discriminatory effect of the treatment.

170. Finally, Ms Monaghan submits that the discriminatory effect of the treatment cannot be justified. She submits that the test for justification is that set out by the Supreme Court in **R (Tigere) v Secretary of State for Business, Innovation and Skills (Just for Kids Law intervening)**]2015] 1 WLR 3820, at paragraph 33. This is:

> "(i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?"

171. As for the standard of scrutiny, Ms Monaghan QC submits that the court must make its own assessment. It is not the case that the decision-maker's decision should be

respected unless it was "manifestly without reasonable foundation", as this formulation only applies to welfare claims where the measure under challenge was one introduced to correct past discrimination. Again, the threshold for justification is not low because the case is in the territory of socio-economic policy: we are in the territory of "ordinary" proportionality. Indeed, where direct discrimination (class (a)) is concerned, the standard is particularly rigorous. Weighty reasons are required to justify the difference in treatment.

172. Ms Monaghan QC further submits that the difference in treatment cannot be justified on the basis that the Defendant is currently actively considering whether to extend QOCS to discrimination cases. The discrimination in issue falls to be justified now.

173. On behalf of the Defendant, Mr Auburn submits that the Article 14 challenge is misconceived.

174. He submits that Article 14 is not engaged, because there is no relevant "status". The complaint is really that "non QOCS claimants" are being treated less favourably than "QOCS claimants" and being a non QOCS claimant is not a status for the purpose of Article 14. A "status" is a personal characteristic and there is no personal characteristic which means that a person may wish to bring a civil claim. Being someone with a protected characteristic is not a status either, because everyone has a protected characteristic.

175. Second, he submits that there is no "discrimination", no less favourable treatment, because the Claimant is not comparing like with like. There was substantial data to inform and justify the introduction of QOCS in personal injury claims, but there was no, or no sufficient, evidence and data in relation to other types of claims, such as discrimination claims. Their position is materially different. There are a number of different ways in which personal injury claims are treated differently from other types of claim, apart from QOCS. So, for example, legal aid is not available for personal injury claims.

176. Third, if it is necessary to justify the difference in treatment, it can be justified. The court should not interfere unless the decision in question was manifestly without reasonable justification. The executive should be given a broad margin of discretion where, as here, the question whether to introduce QOCS for discrimination claims is a question of predictive judgment.

Discussion on Article 14

Status

177. The first question to be considered is whether there is a relevant protected status, as without such a status, a claim for discrimination in breach of Article 14 must necessarily fail.

178. The question as to the scope of the words "other status" in Article 14 is a vexed and difficult one. The case law shows that it extends to matters such as sexual orientation, marital status, transsexual status, trade union membership and illegitimacy. In **Gilham v Ministry of Justice,** the Supreme Court held that being a judge was a "status" for this purpose (see judgment at paragraph 32). All of these

examples are relatively straightforward, however. It is much more difficult to discern a rule or set of principles which enable one to work out whether a more transient or inchoate "status" counts for this purpose. The issue was considered, thoroughly and in great detail, by Lady Black in **R (Stott) v Secretary of State for Justice** [2018] 3 WLR 1831 (SC) at paragraphs 13-81. This case was not cited by either party in the present case. I will not attempt to summarise the review of the case law that is set out in Lady Black's judgment, but she noted that, whilst the grounds within Article 14 are to be given a generous meaning, not everything is a "status" for these purposes. A "status" could include a personal characteristic, but was not limited to personal characteristics. It is not necessary that the treatment of which the applicant complains must exist independently of the other status. The fact that a person is affected by new legislation which would not previously have applied to others in the same position does not give them a "status" for these purposes. When, as in the present case, a court is considering an as yet unconsidered characteristic, the court will have in mind the nature of the grounds it was thought right to list specifically in Article 14, but a strict ejusdem generis interpretation would be unduly restrictive. In **Clift v United Kingdom** CE:ECHR:2010:0713JUD000720507; The Times, 21 July 2010, the Strasbourg Court held that the length of a prisoner's sentence was a status for Article 14 purposes. In **R (RJM) v Secretary of State for Work and Pensions** [2009] AC 311, homelessness was held to be a "status". In **Mathieson v Secretary of State for Work and Pensions** [2015] 1 WLR 3250, the Supreme Court held that the claimant had a "status" for Article 14 which consisted of being a severely disabled child in need of lengthy in-patient hospital treatment, or by virtue of being a child hospitalised free of charge in a NHS hospital for a period longer than 84 days. In the **Stott** case itself, the Supreme Court held that being a prisoner serving an extended determinate sentence, as compared to be a prisoner serving indeterminate or other determinate sentences, was a "status".

179. In **Stott,** at paragraph 209, Lady Hale said that "status" for the purposes of Article 14 is not limited to personal qualities, whether innate (such as sex, race, colour, birth or sexual orientation) or acquired (religion, political opinion, marital/non-marital status or habitual residence), but extends to non-personal qualities such as property rights

180. The issue of "status" has also recently been considered by the Court of Appeal in **R(SC) v Secretary of State for Work and Pensions** [2019] EWCA Civ 615, paragraphs 60-77, and in **R (SHU) v Secretary of State for Health and Social Care** [2019] EWHC 3569 (Admin), per Foster J, at paragraphs 78-89. In **SC,** at paragraph 62, Leggatt LJ said that no clear or coherent test of what constitutes a "status" for the purpose of article 14 has emerged in the case law of the European Court of Human Rights. In **SHU**, at paragraph 85, Foster J said that "It is beyond contention …. that, according to the case law, the concept of "other status" must be given a broad interpretation. The claimed status does not have to be innate or acquired, it may be imposed or (as described in paragraph 71 of **SC**) it may be "the upshot of circumstance, as with homelessness."" Even more recently, the issue of "other status" was considered in **Carter and another v Chief Constable of Essex Police and another** [2020] EWHC 77 QB, at paragraphs 50-57. In **Carter,** Pepperall J held that being a post-retirement widow of a police officer with pre-1978 service (who did not have the same survivors' pension rights as a pre-retirement spouse) was an "other status" for the purposes of Article 14.

181. Also in **Carter,** at paragraph 56, Pepperall J referred to **Stevenson v. Secretary of State for Work & Pensions** [2017] EWCA Civ 2123, in which Henderson LJ, commenting on the clear direction of travel in the Strasbourg jurisprudence, observed at paragraph 41:

> "In the majority of cases, it is probably now safe to say that the need to establish status as a separate requirement has diminished almost to vanishing point."

182. I hope that it is not an oversimplification to express the view that, in practice, it will be rare that the "status" issue will be the decisive issue in an Article 14 case. If a court regards treatment as amounting to unjustified discrimination for the purposes of Article 14, the court will be likely to regard the class of persons which has suffered from this treatment as having the necessary "other status". In **SHU** [2019] EWHC 3569 (Admin), at paragraph 84, Foster J observed that "there may be an element of circularity in seeking to identify status separately from the notion of discrimination, although the courts have accepted certain self-defining cases."

183. Coming to the first way in which Ms Monaghan QC's Article 14 argument is put, I think that class (a), the category of persons who have brought a claim for discrimination in the County Court, have the requisite "other status". This is a self-contained category of persons which is identifiably treated differently from the comparator group, the personal injury claimants. It is true that class (a) is really just a sub-group of a wider class, namely all County Court litigants apart from personal injury litigants, all of whom face the same disadvantage, but this does not mean, in my view, that membership of class (a) cannot amount to a "status" in its own right. The basis of Ms Monaghan QC's case is that there are special considerations which apply to discrimination claimants, but not to the generality of County Court non-personal injury claimants. Her case is that they should be singled out for special treatment.

184. On the other hand, I do not think that class (b) satisfies the "other status" requirement. As Mr Auburn points out this class, consisting of everyone who has a protected characteristic and so who might in theory one day want to bring a discrimination claim, actually covers everyone in the country. We all have protected characteristics for the purposes of the law of discrimination. I do not think that it is possible to subdivide this wide and open-ended class into a group of people who, because of their particular protected characteristics, are more likely to want to avail themselves of a discrimination claim. You cannot tell in advance who might want to do so. Even amongst disabled persons, the vast majority will never think of bringing a claim.

185. Accordingly, in my judgment, the "status" requirement is satisfied, but only in relation to class (a). However, in case I am wrong about this, I will go on to consider the issues of discrimination and of justification in relation to both classes.

Discrimination: has the Claimant been treated less favourably than others in an analogous situation?

186. Discrimination takes place where those with the Claimant's status are treated differently, without an objective and reasonable justification, from persons in relevantly similar situations: **Willis v United Kingdom,** 36042/97 (ECtHR),

paragraph 48. It also takes place where, without justification, the state fails to treat differently persons whose situations are significantly different (**Thlimmenos v Greece** (ECtHR) 23369/96, at paragraph 44), but that is not the issue here. In the present case, the Claimant is contending that the Defendant should treat discrimination claimants in the County Court the same as personal injury claimants.

187. As is so often the case, the question whether the Claimant has been treated less favourably than others in an analogous situation is difficult to separate from the question whether the treatment is justified. As Pepperall J noted in **Carter**, at paragraph 60, Lady Hale noted in **Re McLaughlin** [2018] 1 W.L.R. 4250 (SC), that few Strasbourg cases have been decided on the basis that the situations are not analogous rather than on the basis that the difference in treatment was justifiable

188. The differences in the situations between discrimination claimants and personal injury claimants form the central plank of the grounds of justification relied upon by the Defendant. In particular, the Defendant points to the relatively abundant evidence about the impact of the costs regime in personal injury cases as compared to the real shortage of evidence in relation to discrimination claims in the County Courts. The Defendant also points to other differences in the costs regimes, apart from QOCS, such as the availability of legal aid for discrimination claims but not for personal injury claims, and the different caps for success fees *(*as the overall maximum of 25% of damages recovered does not apply outside personal injury cases*)*. These differences give rise to the question whether claimants in discrimination cases are in a relevantly similar situation to claimants in personal injury cases.

189. In my judgment, these matters are best taken into account at the justification stage. On a broad analysis, discrimination claimants, or potential claimants, are treated less favourably than personal injury claimants, or potential claimants, because the latter have the comfort of QOCS, and the former do not.

190. Accordingly, in my judgment the Claimant has been treated less favourably than others in an analogous situation.

Justification: is the difference in treatment a proportionate means of achieving a legitimate aim?

The standard of scrutiny

191. I received detailed submissions on the standard of scrutiny that should be applied to the justification issue in this context. Before I go on to express my views, I wish to emphasise that my conclusion on the justification issue would be the same whichever standard of scrutiny I applied to the question whether the difference in treatment is a proportionate means of achieving a legitimate aim. In those circumstances, and given the length of this judgment, I will deal with the issue of legal principle fairly briefly.

192. The focus of enquiry should be on the question whether the difference in treatment between personal injury claimants and discrimination claimants, rather than between personal injury claimants and litigants in all other County Court claims, can be justified. A general policy that has disproportionately prejudicial effects on a particular group could be considered to be discriminatory notwithstanding that it was

not specifically aimed at that group: **Opuz v Turkey** (2010) 50 EHRR 695, at paragraph 183.

193. The question of justification arises in the area of social policy. It is concerned with social policy considerations such as balancing the rights and interests of claimants and defendants, ensuring reasonable access to courts, whilst at the same time deterring unmeritorious claims and encouraging settlements. The Defendant submitted that, in areas of social policy such as this, the courts should respect the decisions of the democratically elected legislature unless they are "manifestly without reasonable foundation".

194. In my judgment, however, Ms Monaghan QC is right to submit that the "manifestly without reasonable foundation" test does not apply in these circumstances. In the **Gilham** case, Lady Hale, giving the judgment of the Supreme Court, said, at paragraph 34:

> "34….while it is well-established that the courts will not hold a difference in treatment in the field of socio-economic policy unjustifiable unless it is "manifestly without reasonable foundation", the cases in which that test - or something like it - has been applied are all cases relating to the welfare benefits system…. This case is not in that category, but rather in the category of social or employment policy, where the courts have not always adopted that test: see, for example, **In re G (A Child) (Adoption: Unmarried Couple)** [2008] UKHL 38; [2009] 1 AC 173."

195. More recently, in **J.D and A v United Kingdom** (ECtHR) 32949/17 and 34614/17, the Strasbourg court said that the "manifestly without reasonable foundation" test applies only to transitional measures designed to correct historic inequalities.

196. The **J.D and A** case has not yet been considered in detail by the domestic appellate courts, and this court is bound by the higher domestic courts on this issue: **SHU**, at 120. However, for present purposes I do not think that there is any conflict between the **J.D and A** judgment and the **Gilham** judgment: both suggest that the "manifestly without reasonable justification" test will not necessarily apply to a case such as the present. Accordingly, I will give the Claimant the benefit of the doubt on this issue, and I will not address justification on the basis that the justification is made out unless it is manifestly without reasonable justification. I will assume that the standard of scrutiny required is somewhat greater.

197. On the other hand, it is plainly not the position that a judge can simply substitute his or her view on the social policy issues for that adopted by government or the legislature. In **Gilham,** at paragraph 35, the Supreme Court said that:

> "35. The courts will always, of course, recognise that sometimes difficult choices have to be made between the rights of the individual and the needs of society and that they may have to defer to the considered opinion of the elected decision maker: see **R v Director of Public Prosecutions, Ex p Kebilene** [2000] 2 AC 326 , 381."

198. The degree of latitude to be afforded in cases such as this was also emphasised by Lord Kerr in **R (Steinfeld) v Secretary of State for Education** [2018] 3 WLR 415, at paragraph 29:

> "29. It follows that a national court must confront the interference with a Convention right and decide whether the justification claimed for it has been made out. It cannot avoid that obligation by reference to a margin of appreciation to be allowed the Government or Parliament, (at least not in the sense that the expression has been used by ECtHR). The court may, of course, decide that a measure of latitude should be permitted in appropriate cases. Before Andrews J the respondent had relied on the well known statement of Lord Hope of Craighead in **R v Director of Public Prosecutions, Ex p Kebilene** [2000] 2 AC 326 , 381A–B, where he said:
>
> > "difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.""

199. **Steinfeld** was an Article 14 case. In the **Tigere** case, Baroness Hale made clear, at paragraphs 26 and 33 of the judgment, that the standard of scrutiny is the same for Article 14 cases as for cases in which the question as to whether there has been a breach of the substantive Convention Article depends upon whether the treatment was a proportionate means of achieving a legitimate aim.

200. Ms Monaghan QC made one other point about the appropriate standard of scrutiny. She submitted that since "disability" covers a particularly vulnerable group in society, "very weighty" reasons are required to justify a distinction in treatment: see, eg, **Kiss v Hungary** (ECtHR) 3883/06. I do not accept that is the correct approach in the present case. The disadvantaged group for present purposes consists of claimants in discrimination cases, not disabled claimants, specifically, nor disabled persons as a class. Since everyone has some protected characteristics (at least relating to gender, race and age), protection for discrimination claimants would at least potentially benefit the whole of society, not just a particularly vulnerable section of it. It is true, as the Claimant submits, that there may be a particular public benefit in enabling discrimination claims to be brought, but this is a matter which needs to be taken into account when weighing up if the treatment is a proportionate means of achieving a legitimate aim. It is not a reason for applying a stricter standard of scrutiny.

201. Accordingly, in my judgment, the appropriate standard of scrutiny, and the correct approach to the justification issue for the Article 14 challenge is the same as I have described and applied above, when dealing with the Article 6 challenge: see paragraphs 108 and 121, above. This is consistent with **Tigere** and **Steinfeld.**

Applying that standard of scrutiny to the Article 14 issue in the present case

202. The difference between the justification analysis for the Article 6 challenge, on the one hand, and the Article 14, on the other, is that the former is directed towards

considering whether the costs regime for discrimination claims in the County Court is a proportionate means of achieving a legitimate aim, whereas the latter is directed towards considering whether the difference in costs regimes between personal injury claims and discrimination claims can be justified as being a proportionate means of achieving a legitimate aim.

203. In reality, however, there is a very great degree of overlap. The reasons why, in my judgment, the costs regime for discrimination claims is a proportionate means of achieving a legitimate aim all go to support the proposition that the difference in treatment is a proportionate means of achieving a legitimate aim.

204. The aims for the treatment of discrimination cases are the same in both cases. For the reasons I have already given, I regard them as legitimate. For Article 14 purposes, one might add the aim of making a properly informed decision. Such a decision can be taken in relation to personal injury cases, but not in relation to discrimination cases.

205. As for proportionality, as I have explained earlier in this judgment, there are key differences between personal injury cases and discrimination cases. There is ample evidence that QOCS is beneficial for personal injury cases. On the other hand, there is a shortage of evidence, currently available, about whether QOCS would help to achieve the legitimate aims in discrimination (and other) County Court claims. The Defendant was, in my judgment, entitled to take the view that more research and investigation is needed before a decision is taken in relation to QOCS in relation to discrimination claims. The same does not apply to personal injury claims. Put another way, the Defendant acted proportionately in deciding that he should make use of QOCS in personal injury cases but was not in a position to form a clear view as to whether he should introduce QOCS for discrimination cases. This, together with the reasoning I have set out earlier in relation to the proportionality issue when dealing with Article 6, means that the Defendant has satisfied me that the differences in costs regimes between discrimination claims and personal injury claims in the County Court are a proportionate means of achieving a legitimate aim.

206. My conclusion would be the same if, contrary to the view I have expressed, class (b), namely those with particular protected characteristics, including disability, who are self-evidently more likely to bring discrimination claims is an "other status" for the purposes of Article 14. If so, the difference in treatment is still a proportionate means of achieving a legitimate aim.

207. For these reasons, I reject the Claimant's ground of challenge based on Article 14, read with Article 6.

The Intervener's submissions

208. The Intervener is a charity run by and for deaf and disabled people promoting equality and inclusion by supporting Deaf and Disabled People's Organisations. During the last three years, the Intervener has run the Disability Justice Project which supported disabled people to protect and enforce their rights under the goods and services provisions of the Equality Act 2010.

209. The written submissions of the Intervener supported the arguments advanced on behalf of the Claimant, especially in relation to the PSED Ground. I have taken the Intervener's submissions into account, when dealing with the Claimant's arguments.

210. The witness statement of Svetlana Kotova, Director of Campaigns and Justice at the Intervener, provided evidence in support of the contention that the current costs regime for discrimination claims relating to good and services in the County Courts was not satisfactory. She said that the fear of adverse costs awards operated as a real deterrent to bringing or continuing with claims, especially in complex cases.

211. It was helpful for the Intervener to place this evidence before the Court, and I have taken it into account when coming to a view on the Grounds put forward by the Claimant. However, I think that the Defendant is right to submit that much of this evidence is anecdotal in nature, and does not take the matter much further. Moreover, neither the Intervener nor the Disability Justice Project responded to the call for evidence as part of the Part 2 PIR and so, in any event, I do not think that any new evidence the Intervener put forward could retrospectively render unlawful the decision/alleged failure under challenge, which is dated 7 February 2019.

The Intervener's argument based on UNCRPD

212. The Intervener made submissions in relation to the challenges that are based on Article 6 and Article 14 of the ECHR, and relied upon a point that had not specifically been taken by the Claimant. This was the submission that the Court should take into account the relevant provisions of the UNCRPD when dealing with the Article 6 and Article 14 Grounds. This is on the basis that the UNCRPD has been incorporated into EU law by way of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009 (SI 2009/1181) ("the 2009 Regulations"). Ms Casserley, on behalf of the Intervener submits that this provides that, as at 8 July 2009, UNCRPD is an EU Treaty within section 1(2) of the European Communities Act 1972. She says that, accordingly, UNCRPD had legal effect in England and Wales as a result of section 2 of the European Communities Act 1972, and was therefore a source of substantive rights.

213. Ms Casserley points out that:

(1) Article 5 of UNCRPD provides that States Parties shall guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds;

(2) The Committee on the Rights of Persons with Disabilities has produced General Comment 6 in respect of Article 5. The Committee's role includes to interpret the Treaty Articles and to issue authoritative statements ("General Comments") to clarify specific provisions within the UNCRPD. Paragraph 22 of General Comment 6 says that appropriate and effective legal remedies and sanctions should be made available by States Parties;

(3) Article 13.1 of UNCRPD provides that States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-

appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages;

(4) A report of the Office of the UN High Commissioner for Human Rights which gave guidance for the implementation of Article 13, said (at paragraph 42), "The right to an effective remedy is a central component of the right of access to justice….To have effective remedies, persons with disabilities require: (a) equal and effective access to justice (ie available and accessible complaint mechanisms, investigation bodies and institutions, including independent judicial bodies capable of determining the right to reparation and awarding redress) …..";

(5) Article 31 of UNCRPD states that States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention…"

214. Ms Casserley submits that the Human Rights Act 1998 must be interpreted so as to give effect to the obligations accepted by the United Kingdom under the UN Convention. It is a mandatory tool of construction for domestic legislation. Ms Casserly cited **Burnip v Birmingham City Council and others** [2013] PTSR 117 (CA), at paragraphs 19-22, and **Mathieson v Secretary of State for Work and Pensions** [2015] 1 WLR 3250 (SC), at paragraphs 44 and 55. She submits that disabled people have been effectively deterred from exercising their right to enforce the discrimination provisions in the Equality Act 2010, and there is no "equal and effective" access to justice for the purposes of Articles 6 and 14.

215. As I understand Ms Casserley's written submissions, she is not contending that the UNCRPD and its associated documents give rise to a free-standing cause of action or ground of challenge, but that the terms of those documents inform the approach that should be taken to the challenges under Article 6 and Article 14.

Discussion

216. The starting point is that, in my judgment, it is clear that UNCRPD is not a source of substantive rights, for the reasons given by Mr Auburn and Mr Paines in their supplementary skeleton argument.

217. The 2009 Regulations give the UNCRPD the same status as a Treaty under section 1(3) of the European Communities Act 1972. It follows that the Convention has only been incorporated into domestic law to the extent that the Government is acting within the scope of EU law: **R (SG) v SSHD** [2016] EWHC 2639 (Admin) at 297. There is no challenge of a breach of the Defendant's EU law obligations in the present case. It follows that I do not have to grapple with the consequences of Brexit in this regard.

218. Outside the EU law field, UNCRPD has the status of an unincorporated treaty. As such, the Treaty does not have direct effect. See **R (NM) v Islington LBC** [2012]

PTSR 1582, at paragraph 98, per Sales J. In **R (MA) v Secretary of State for Work and Pensions** [2013] PTSR 1521 (CA) at paragraph 80, Laws LJ said:

> "…. care is needed to ensure that such a treaty is not seen as a source of substantive domestic legal rights. The point is important because the executive government, which enters into treaties in the name of the Crown, is not generally a source of law save where it exercises powers delegated by Parliament."

219. On the other hand, I accept that UNCRPD can be taken into account as an aid to interpretation of Article 14, at least to the extent that it may be ambiguous. In **Burnip v Birmingham CC** [2013] PTSR 117 (CA), at paragraph 22, Maurice Kay LJ said that the UNCRPD may be used as an interpretive aid for Article 14 ECHR where "the correct legal analysis of the meaning of article 14 discrimination in the circumstances of these appeals [is] elusive or uncertain." Nevertheless, the limitations of this approach must be borne in mind. In **R (Davey) v Oxfordshire CC** [2018] PTSR 281, at paragraphs 60-64, the Court of Appeal approved the observation of Morris J, in the court below, to the effect that great care must be taken in deploying provisions of a Convention or treaty which set out broad and basic principles as determinative tools for the interpretation of a concrete measure such as a particular provision of a United Kingdom statute. Provisions which are aspirational cannot qualify the clear language of primary legislation.

220. In my judgment, the provisions of the UNCRPD do not alter the approach that a court should take, in any event, when considering whether there has been a breach of Article 14, taken with Article 6, in circumstances such as this. There is no ambiguity in Article 14 which can be resolved by reference to the Treaty. The Articles of the UNCRPD contain broad and aspirational statements which, as the Court of Appeal indicated in the **Davey** case, are not of much help when the court is seeking to interpret a concrete measure in a statute (including the Human Rights Act). Moreover, the meaning and effect of Article 14 has been carefully considered and explained on numerous occasions by the appellate courts in this jurisdiction and by the ECtHR. These are much more fruitful sources of guidance than the general terms of the UNCRPD.

221. Accordingly, in my judgment, reference to the UNCRPD does not make a difference to my conclusions in relation either to the Article 6 challenge or the Article 14 challenge.

Conclusion

222. For these reasons, the Claimant's application for judicial review is dismissed.