IN THE UPPER TRIBUNAL **Case Nos.** CDLA/2208/2018
ADMINISTRATIVE APPEALS CHAMBER CDLA/2019/2018

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellants: Mr Tim Buley QC, instructed by Ms Carla Clarke, Solicitor, Child Poverty Action Group

For the Respondent: Ms Julia Smyth, instructed by Government Legal Service

Decision: The appeals are allowed to the following extent. The decisions of the First-tier Tribunal sitting at Norwich on 29 August 2018 under reference SC142/17/00733 and Stockport North on 7 June 2018 under reference SC944/17/02173 involved the making of an error of law and are set aside. Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, I remake the decisions as follows:

> The appeals of TS and EK are allowed.
>
> The extension of the requirement to have been present in Great Britain from 26 weeks out of 52 to 104 weeks out of 156 was a breach of their rights under Art.14 of the European Convention on Human Rights, read with Article 1 of Protocol 1, applied in accordance with the Human Rights Act 1998.
>
> For the purposes of his claim for DLA made on 16 December 2016, TS completed a sufficient period of presence in Great Britain on 6 June 2017.
>
> For the purpose of her claim for DLA made on 19 July 2017, EK completed a sufficient period of presence in Great Britain on 2 December 2017.
>
> Neither the First-tier Tribunal nor the Upper Tribunal (when considering a statutory appeal in a social security case) has jurisdiction to rule on whether there has been a breach of the public sector equality duty in section 149 of the Equality Act 2010.
>
> If (contrary to the above) the Upper Tribunal does have such jurisdiction, there was a breach of the duty in this case.

REASONS FOR DECISION

The issue

1. The appellants are both British citizen children with severe disabilities who lived abroad (in New Zealand and Australia) before returning to the UK. They bring these proceedings through their mothers as their appointees. They seek to challenge on the grounds summarised in [3] the current Past Presence Test ("the new PPT") which is to be found in reg 2(1)(a)(iii) of the Social Security (Disability Living Allowance) Regulations 1991/2890 ("the DLA Regulations)", as modified by reg.4(3)(c) of the Social Security (Attendance Allowance, Disability Living Allowance and Carer's Allowance) (Amendment) Regulations 2013/389 ("the Amendment Regulations"). The effect of the new PPT, which applies to persons such as the appellants who cannot rely on any rights under EU law, is to require, as a condition of entitlement to disability living allowance ("DLA"), that they have been present in Great Britain for 104 weeks out of the previous 156 weeks (i.e. 2 years out of 3). Before the Amendment Regulations, the Past Presence Test ("the old PPT") required presence in Great Britain for 26 weeks out of the previous 52. Other conditions of entitlement under the DLA Regulations prior to the coming into force of the Amendment Regulations already included that the claimant be ordinarily resident in Great Britain and not be "a person subject to immigration control" (as defined)[1].

2. To clothe the legal arguments with some figures, in 2016/17 (when TS's claim was made) the highest rate of the care component of DLA was worth £82.30 weekly, while the higher rate of the mobility component was worth £57.45. Further, a lack of entitlement to DLA (whether by reason of inability to meet the PPT or otherwise) may have knock-on effects. Receipt of DLA is a condition of entitlement to certain other benefits for the family, among them carer's allowance ("CA") (£62.10 weekly), the disabled child element of child tax credit (£3,140 annually) and (if the child receives the highest rate of the care component of DLA), the severely disabled child element (a further £1,275 annually). Similar provisions now exist within universal credit.

3. The appellants claim that the new PPT is unlawful on the grounds that:

> a. it is in breach of the Public Sector Equality Duty ("PSED") created by s.149 of the Equality Act 2010 ("the 2010 Act"); and/or
> b. it is in breach of Article 14 of the European Convention on Human Rights, read together with Article 1, Protocol 1;

and that accordingly the new PPT should not be applied as drafted, although the precise consequence is said to vary according to whether the breach found is a. or b.

[1] They were then amended to require habitual residence (rather than ordinary residence) in the Common Travel Area.

4. In order to make a. good, the appellants need to establish that the Upper Tribunal has jurisdiction on a statutory appeal to rule on whether there has been a breach of the PSED. The respondent disputes that it has such jurisdiction. As the evidence is detailed and the same for the human rights and PSED claims and because it appears likely that the case may go higher, I address the substance of the PSED claim even though, as will be seen, my conclusion is that the Upper Tribunal has no jurisdiction in that regard.

5. The structure of this decision is as follows:

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The individual cases

6. The appellant in CDLA/2208/2018, TS, is a boy born in 2008. He was refused DLA by a decision dated 13 March 2017. Child Poverty Action Group acted for him in the First-tier Tribunal ("FtT") proceedings, submitting that the Upper Tribunal's decision in *FM v SSWP (DLA)* [2017] UKUT 380 (AAC); [2018] PTSR 1036; [2019] AACR 8 (discussed below) was wrongly decided. No submission appears to have been made about the PSED. The FtT dismissed the appeal on the primary ground that the Court of Appeal's decision in *SSWP v Carmichael and Another* [2018] EWCA Civ 548 would preclude the FtT from disapplying the DLA Regulations as amended. It

indicated that in any event it was bound by the decision in *FM*. A District Tribunal Judge gave permission to appeal in the light of the Court of Appeal's decision, subsequent to *Carmichael*, in *JT v FtT and CICA* [2018] EWCA Civ 1735 that the FtT might after all be able to treat the DLA Regulations so far as relating to the new PPT as invalid and without effect. It recorded that the tribunal "simply considers that [*FM*] is simply binding upon the [FtT] and the main issue is as to whether the Tribunal has jurisdiction to grant the relief sought, or any relief." This was a little puzzling in that the question of what relief the FtT could give would never arise on its view that it was bound by *FM*. In any event, questions of relief have further moved on following the decision of the Supreme Court in *RR v SSWP* [2019] UKSC 52; [2019] 1 WLR 6430.

7. The appellant in CDLA/2019/2018, EK, is a girl born in 2003. She was refused DLA by a decision dated 5 September 2017. CPAG again acted in the FtT proceedings, arguing in particular that *FM* could be distinguished on various grounds and that, rather, the decision in *MM and SI v SSWP* [2016] AACR 38 should be applied by analogy: that case had held that the new PPT was unlawfully discriminatory in the case of refugees. Additionally, the PSED point was raised. The FtT rejected the attempts to distinguish *FM*, by which it considered it was bound. It does not appear to have ruled on the PSED point. The FtT refused permission to appeal, on the basis that it had correctly applied existing authority and that accordingly whether to give permission to appeal should be left to the Upper Tribunal to decide.

Existing authority and precedent in the Administrative Appeals Chamber

8. Both grounds a. and b. as set out in [3] are addressed in existing decisions of this Chamber of the Upper Tribunal. In *FM*, Upper Tribunal Judge Jacobs held:

> a. the child appellant in that case (who was in a similar position to the present appellants) did not have a "status" for the purposes of Art.14;
>
> b. in any event, the legislation creating the new PPT was not "manifestly without reasonable foundation"; and
>
> c. it was not necessary to decide whether or not the Upper Tribunal had jurisdiction to deal with a claimed breach of the PSED as he concluded that the Secretary of State was not in breach of it.

FM was refused permission to appeal to the Court of Appeal.

9. The issue of whether the Upper Tribunal has jurisdiction in relation to claimed breaches of the PSED was considered, however, on a basis which it is common ground was *obiter*, by Upper Tribunal Judge Wright in *A-K v SSWP (DLA)* [2017] UKUT 420 (AAC); [2018] 1 WLR 2657. He concluded that in statutory appeal proceedings the Upper Tribunal does not have such jurisdiction. The only way the Upper Tribunal could have jurisdiction would be

if judicial review proceedings were to be commenced in the High Court and made the subject of a discretionary transfer to the Upper Tribunal under Senior Courts Act 1981, s.31A. That route has not been followed in the present cases.

10. An application on behalf of the appellants for the case to be listed before a three-judge panel was rejected by the Chamber President, Farbey J, on 12 July 2019 and the cases were referred to me. On 16 July 2019 I gave permission to appeal in EK's case. As noted, TS already had permission.

11. It is convenient here to note the principles applicable where a judge of the Upper Tribunal is faced with matters which have already been the subject of decisions by other single judges. The three-judge panel in *Dorset Healthcare NHS Trust v MH* [2009] UKUT 4 held at para 37 that:

> "A single judge in the interests of comity and to avoid confusion on questions of legal principle normally follows the decisions of other single judges. It is recognised however that a slavish adherence to this could lead to the perpetuation of error and he is not bound to do so."

The Public Sector Equality Duty

12. Section 149(1) of the 2010 Act provides:

> "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."

While Mr Buley submits that all three limbs of s.149(1) are engaged, it is on (b) that he primarily relies.

13. By s.149(3):

> "(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[.]"

14. By section 149(7):

> "The relevant protected characteristics are-
> age;
> disability;
> …"

15. By section 156:

> "A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law."

Jurisdiction to consider breaches of the Public Sector Equality Duty

Foster, *Howker* and associated cases

16. Mr Buley submits that the Upper Tribunal's jurisdiction to consider breaches of the PSED arises via the principle articulated in *Foster v Chief Adjudication Officer* [1993] AC 754; R(IS) 22/93. In that case, reversing the decision of the Court of Appeal, Lord Bridge of Harwich, with whom all their other Lordships agreed, held (in relation to the Social Security Commissioners, the forerunners to the present Administrative Appeals Chamber of the Upper Tribunal):

> "My conclusion is that the Commissioners have undoubted jurisdiction to determine any challenge to the *vires* of a provision in regulations made by the Secretary of State as being beyond the scope of the enabling power whenever it is necessary to do so in determining whether a decision under appeal was erroneous in point of law."

17. Lord Bridge had earlier noted:

> "The jurisdiction issue, however, has far-reaching procedural implications for the future, it has been very fully argued and it is important that your Lordships should resolve it, the more so, perhaps, since the Court of Appeal's decision in the instant case runs counter to the practice of the Social Security Commissioners established by a long series of decisions, both by single Commissioners and by tribunals of Commissioners, holding that they had jurisdiction to decide and in fact deciding issues as to the *vires* of secondary legislation. Some of those decisions have been reviewed by the courts without any previous suggestion that issues of *vires* were beyond the jurisdiction of the Commissioners."

18. Lord Bridge did however leave open (at 766 F-G) whether there might be any distinction in this regard between substantive invalidity (as in the *ultra vires* case with which he was concerned) and procedural invalidity. In *Howker v SSWP* [2002] EWCA Civ 1623; [2003] ICR 405, the Court of Appeal followed *Boddington v British Transport Police* [1999] 2 AC 143 in holding

there was no such distinction, Peter Gibson LJ, with whom Mance LJ agreed, concluding that:

> "despite the practical difficulties for a commissioner in determining whether a regulation is invalid on any ground which might have allowed a challenge to its validity by way of judicial review, in my judgment he has the jurisdiction to make that determination" (at 417G).

19. The practical difficulties, in common with e.g. Art.14 challenges, include that it may require the body whose *vires* are in doubt to provide an evidential basis as best it can for matters which happened a long time ago, without the protection of the generally strict time limits which would apply in a judicial review challenge. Judicial review requires leave, whereas a *Foster/Howker* challenge does not. It is also the case that whereas judicial review is a discretionary remedy, and to an extent regulated by statute in the form of s.31 of the Senior Courts Act 1981 and the equivalent provision for judicial review cases in the Upper Tribunal, there is no equivalent express provision when a *Foster/Howker* jurisdiction is being exercised. However, it is clear from Peter Gibson LJ's acknowledgment of the "difficulties" that such issues were taken on board in *Howker*, but were judged not to stand in the way of the jurisdiction existing.

20. In *SSWP v Carmichael and Sefton Council* [2018] EWCA Civ 548; [2018] 1 WLR 3429 Leggatt LJ (dissenting, though that does not detract from the validity of the dictum) referred to *Foster* as

> "an example of the general principle established by cases such as *Boddington v British Transport Police* [1999] 2 AC 143 that the validity of a public law act or decision can be questioned in any proceedings where the determination of that issue is necessary in order to establish the existence of a private right."

21. Ms Smyth raised a point with which I have some difficulty, submitting that the effect of *Howker* was in some way limited because Mr Howker had been entitled under a previous decision and then lost it as the result of a supersession. Whether the submission was directed to substance or remedy, it does not in my view detract from the basic principle that a person's entitlement falls to be determined in accordance with the (lawful) legislation in force and that secondary legislation which is vitiated by a public law flaw must be disapplied.

The Equality Act 2010 - structure; section 113

22. Part 2 of the 2010 Act deals with "Key Concepts". These include in Chapter 1 "protected characteristics" (s.4) including, relevantly for present purposes, age and disability. Section 5 sets out how the protected characteristic of age is to be interpreted: see [107] below. Chapter 2 sets out "prohibited conduct", including the various forms of discrimination. Parts 3 to 7 set out the application to particular contexts. Part 9 (to which I return below) deals with enforcement. Part 11 is concerned not with discrimination but with

the advancement of equality: it is where s.149, the PSED, is to be found. Part 12 makes specific provision relating to disabled persons and transport.

23. Returning to Part 9, section 113 provides so far as relevant:

> "(1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part.
> …
> (3) Subsection (1) does not prevent—
> (a) a claim for judicial review;
> (b) proceedings under the Immigration Acts;
> (c) proceedings under the Special Immigration Appeals Commission Act 1997;
> (d) in Scotland, an application to the supervisory jurisdiction of the Court of Session.
>
> (4) This section is subject to any express provision of this Act conferring jurisdiction on a court or tribunal.
> …
> (7) This section does not apply to –
> (a) proceedings for an offence under this Act;
> (b) proceedings relating to a penalty under Part 12 (disabled persons: transport)."

24. Section 114 makes provision for the jurisdiction of the County Court to determine a claim relating to matters in Parts 3, 4, 6 and 7. In the absence of good reasons not to, the County Court will sit with assessors to hear such claims: s.114(7). Section 114 does not make any reference to a remedy for breach of section 149; nor does it otherwise refer to judicial review. It does however exclude from the County Court's jurisdiction "immigration cases" as defined in section 115. Remedies are addressed in s.119: in the case of contravention of any of the provisions referred to in section 114(1), the County Court has power to grant any remedy which could be granted by the High Court in proceedings in tort or on a claim for judicial review.

Existing authorities summarised

25. What effect section 113 has in this case is difficult and has been keenly contested. The field has been covered, to some degree, by three authorities which I need to consider in some detail: *Hamnett v Essex CC* [2014] EWHC 246 (Admin); [2014] 1 WLR 2562 (at first instance) and [2017] EWCA Civ 6; [2017] 1 WLR 1155 (on appeal); *Adesotu v Lewisham LBC* [2019] EWCA Civ 1405; and *A-K* (above). However, as will be seen, none in my view is binding on me, though I must have appropriate respect for each. I was also referred to one case (and there are others) in which the PSED was used as a defence to possession proceedings, and their relevance also needs to be considered. Ultimately, I have to construe the section, including what, if anything, is to be derived from the references to various forms of immigration proceedings in s.113(3)(b) and (c).

26. *Hamnett* concerned an application challenging two experimental road traffic regulation orders. Such orders are made under the Road Traffic Regulation Act 1984 ("the 1984 Act"), which provides for a mechanism, expressed to be exclusive, for challenging them in the High Court on the ground that they are not within the relevant powers or that relevant requirements have not been complied with. The grounds of challenge were (a) breach of s.29(6) and (7) of the 2010 Act (discrimination by reason of disability and failure to make reasonable adjustments in the exercise of a public function); (b) failure to have due regard to the PSED, contrary to s.149; and (c) irrationality.

27. Singh J at first instance concluded that the High Court did not have jurisdiction to consider the alleged breach of section 29, because of the terms of s.113. He concluded at [58] that the phrase "claim for judicial review" as used in section 113 is a term of art and refers only to a claim for judicial review in the strict sense of a claim under CPR Part 54 and thus did not extend to the statutory review created by the 1984 Act.

28. As regards the alleged failure to comply with section 149, he noted at [51] that there was no dispute that the court had jurisdiction to consider it and at [67] to [77] he went on to rule that the local authority had discharged the PSED.

29. On appeal to the Court of Appeal, there was one point only: whether Singh J had been correct to conclude that the High Court, notwithstanding the broad terms of the 1984 Act, did not have jurisdiction to consider the section 29 complaint, because of the terms of s.113. At [13], Gross LJ, giving the judgment of the court, observed:

> "So far as the application alleges breaches of section 149 of the 2010 Act, that occasions no jurisdictional difficulty; as is clear from the judgment (at para 51) there is no dispute that the High Court has jurisdiction to consider such a complaint and there is thus no tension with Schedule 9 to the RTRA 1984".

30. At [22] he referred to it as being "common ground" or one of the "matters not in dispute" that "the High Court has jurisdiction to deal with claims of a breach of the public sector equality duty".

31. Gross LJ then proceeded to examine whether Singh J's view regarding the section 29 claim was correct, concluding that it was, albeit for somewhat expanded reasons.

32. In the course of his judgment, the judge (a) expressly endorsed at [24(vi)] the position that a statutory review under the 1984 Act could not be characterised as an application for judicial review and (b) indicated in passing (at [29]) that:

> "As is not in dispute, questions as to the public sector equality duty …- a duty of process, as described to us – remain in the High Court."

33. *Adesotu v Lewisham London Borough Council* [2019] EWCA Civ 1405; [2019] 1 WLR 5637 concerned a statutory appeal in a homelessness case, under section 204 of the Housing Act 1996. Ms Adesotu had appealed to the County Court, asserting inter alia breaches of section 19 of the 2010 Act (Ground 1), section 15 of that Act (Ground 2) and section 149 of that Act (Ground 3, which had three sub grounds). Counsel for the local authority applied for Grounds 1 and 2 to be struck out on alternative bases, one of which was that the County Court had no jurisdiction to consider them on an appeal under s.204. HHJ Luba QC treated the application as extending to Ground 3(c). However, the strike-out application was made on alternative footings (see *Adesotu*, [8]) and the only jurisdictional issue falling for consideration appears to have been in relation to sections 15 and 19. The application was granted and Ms Adesotu appealed against the judge's order to the Court of Appeal.

34. The Court of Appeal, whilst acknowledging the many similarities between an appeal under s.204 and judicial review, followed the Court of Appeal's decision in *Hamnett*, regarding it as binding authority that a statutory appeal or statutory review is not a "claim for judicial review" for the purposes of s.113 of the 2010 Act.

35. *A-K* was a challenge to the basis on which the higher rate of the mobility component of DLA was extended, for the first time, to people with severe visual impairment. This had been effected by the Social Security (Disability Living Allowance) (Amendment) Regulations 2010 (SI 2010/1651) ("the 2010 Regulations"). However, under section 75 of the Social Security Contributions and Benefits Act 1992, the general position was that a person could not receive DLA after attaining the age of 65 unless the award had been made before that age was reached. The claimant, aged 71, did not fall within any of the exceptions to that rule and her application to increase the amount of DLA to which she was entitled to include higher rate mobility component pursuant to the then new extension was refused by the Secretary of State and on appeal by the FtT. She appealed to the Upper Tribunal, asserting age discrimination contrary to the 2010 Act and the Human Rights Act 1998.

36. Section 149 was brought into force on 5 April 2011 i.e. after the 2010 Regulations had been made. Accordingly, Judge Wright held at [57] and [58] that as the Secretary of State was not subject to the PSED when he made the 2010 Regulations, the PSED could not be relied upon to call them into question.

37. However, Judge Wright had received submissions which had ranged more widely, which he saw fit to address. They included a submission by Mr Buley, then appearing for the Secretary of State, that the effect of s.113 was that the Upper Tribunal had no jurisdiction on a statutory appeal to consider whether or not there had been compliance with the PSED. As Judge Wright noted:

> "It also at first blush appears a somewhat startling proposition because, if correct, it means in effect that the Upper Tribunal exercising its

> *Foster* appellate jurisdiction as to whether an awarding decision was "erroneous in law" would have to turn a blind eye to what might in theory be regulations that were unlawfully made due to a manifest failure on the part of the Secretary of State to have the section 149(1) "due regard" when making those regulations."

38. Nonetheless, Judge Wright accepted the submissions. Having set out the text of s.113, he observed:

> "61. A number of points deserve emphasis. First, section 113 covers the whole of the Act, and so covers section 149(1). Second, it has a wide application covering proceedings *relating to* a contravention of the Act. On the face of it, that covers this appeal as the appellant is arguing that the supersession decision and the regulations it applied were contrary to section 149(1) of the Act. Third, there is nothing anywhere else in the Act that confers jurisdiction on the Upper Tribunal exercising its statutory appellate jurisdiction. Fourth, however, section 113(3)(a) does allow the Upper Tribunal to address alleged contraventions of the Equality Act 2010 under its judicial review jurisdiction. This appeal, however, does not fall into that category.
>
> 62. This is a clear result of the statutory language, if perhaps an odd one. In *Hamnett –v- Essex County Council* [2017] EWCA Civ 6; [2017] 1 WLR 155, it led the Court of Appeal to conclude that the High Court no longer had the jurisdiction to rule on challenges to traffic regulation orders if the grounds of challenge rested on alleged breaches of section 29 of the Equality Act (though it would have retained jurisdiction to rule on challenges based on section 149 of that Act, as a judicial review court). So the effect of section 113 is far-reaching. It also arguably introduces somewhat cumbersome procedural issues. For example, if an appeal is brought before the Upper Tribunal in which a section 149(1) argument is made, that part of the appellant's case would need to be taken by the appellant to the High Court to institute judicial review proceedings. Although those proceedings could then be transferred back to the Upper Tribunal for them to run alongside what may remain of the appeal, the whole process may give rise to issues of whether the judicial review claim has been brought late. And splitting such challenges may be thought to have been something [*Foster*] and [*Howker*] had removed. However, we are where we are, and in my judgment the plain wording of section 113 ousts the Upper Tribunal's appellate jurisdiction."

Existing authorities: status and effect

39. Mr Buley submits that *Hamnett* is binding on the Upper Tribunal in the present case; alternatively, if not, then it is highly persuasive. I do not accept that it is binding as regards the point in issue. As noted above, the only point in issue in the Court of Appeal was whether Singh J had been right to conclude that the High Court on a statutory review did not have jurisdiction in respect of an alleged breach of section 29. Although Mr Buley's skeleton

argument submits that the Court of Appeal upheld Singh J's decision, "again rejecting the PSED argument on its merits but not on the basis of a lack of jurisdiction", it did not do so. In the passages set out above, it is clear that it recorded the agreed position that there had been jurisdiction in respect of s.149, but that is as part of the background and description of the arguments put to it in respect of s.29. Singh J's conclusion that there had not been any breach of s.149 was not being challenged on appeal.

40. Whether or not conceded points constitute part of the ratio of a decision was considered in *SSWP v Deane* [2010] EWCA Civ 699; [2011] 1 WLR 743:

> "29. If, however, the point was conceded, then we are not obliged to follow it. In *In re: Hetheringdon (deceased)* [1990] 1 Ch. 1, Sir Nicholas Browne-Wilkinson V.-C held at p. 10:
>
> > "In my judgment the authorities clearly established that even where a decision of a point in a particular sense was essential to an earlier decision of a superior court, that that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense."

41. In *R (Kadhim) v Brent Housing Board* [2001] QB 955, Buxton L.J. held:

> "33. We therefore conclude, not without some hesitation, that there is a principle stated in general terms that a subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before or consideration by that court.
> …
> 38. Like all exceptions to, and modifications of, the strict rule of precedent, this rule must only be applied in the most obvious of cases, and limited with great care. The basis of it is that the proposition in question must have been assumed, and not have been the subject of decision. … And there may of course be cases, perhaps many cases, where a point has not been the subject of argument, but scrutiny of the judgment indicates that the court's acceptance of the point went beyond mere assumption. Very little is likely to be required to draw that latter conclusion: because a later court will start from the position, encouraged by judicial comity, that its predecessor did indeed address all the matters essential for its decision."

42. Whilst I apply Buxton LJ's note of caution, I am doubtful that the Court of Appeal's consideration of the point went beyond mere assumption. It was a point they simply did not need to touch: it would no more have helped Ms Hamnett if the Court of Appeal had ruled that Singh J did not, after all, have jurisdiction to consider the breach of s.149 than did the judge's ruling, on the basis that he had jurisdiction, that there had been no breach and Ms Hamnett

was not inviting the court to address the point. It was in Buxton LJ's words above, not one of "the matters essential for its decision".

43. I therefore conclude that the Court of Appeal's decision in *Hamnett* is not binding authority on the point.

44. Nor in my view is its decision in *Adesotu* (and neither counsel suggests otherwise). As noted above, the strike-out application had been put on alternative bases. The only part of the application which was based on lack of jurisdiction was in relation to Grounds 1 and 2, which were founded on sections 15 and 19 of the Act. Although Ground 3(c), which was founded on section 149, was also struck out, it does not appear that that was on the basis of lack of jurisdiction: indeed, other parts of Ms Adesotu's challenge based on s.149 remained intact before HHJ Luba.

45. While the Court of Appeal ruled that *Hamnett* was binding on the issue of whether a statutory review or statutory appeal could constitute judicial review proceedings for the purposes of s.113, Mr Buley does not submit that the present appeal constitutes judicial review proceedings.

46. I therefore consider that there is no authority at Court of Appeal level by which the Upper Tribunal is bound.

47. The Upper Tribunal is bound by decisions of the High Court, when it is exercising a supervisory jurisdiction over the Upper Tribunal (not the case in *Hamnett*), but not otherwise. In substantive matters I respectfully follow the approach of the Tax and Chancery Chamber (David Richards J and Julian Ghosh QC) in *Gilchrist v Revenue and Customs Commissioners* [2014] UKUT 169 (TCC), for the reasons they gave. Nonetheless, the High Court's decision in *Hamnett* is entitled to respect.

48. In my view, it is clear that the High Court in *Hamnett* must be taken to have concluded that it had jurisdiction to consider the section 149 point. It may have been conceded in that case that it did, but Singh J went on to rule, in some detail, that the PSED was not breached on the evidence and without making any caveat as to the High Court's jurisdiction. Again, applying Buxton LJ's dictum, I would infer that the judge had indeed gone beyond mere assumption of the correctness of the concession that the High Court did have jurisdiction and that it formed a necessary part of the ratio for that part of his decision. As noted, the High Court in *Hamnett* was not exercising a judicial review jurisdiction but one of statutory review, and the Court of Appeal has ruled that the latter is not to be equated to the former. Yet, Singh J, going in my view beyond mere assumption, addressed the PSED claim. The logic of such an approach must be that he considered that the High Court, otherwise than in judicial review proceedings, had jurisdiction to consider breach of the PSED as part of Ms Hamnett's challenge to the orders. There appear to be only two possibilities: that he was wrong to do so (and that the Court of Appeal were prepared to record his view, wrong as on this hypothesis it was, without comment) or that there was an unstated consideration in play.

The possession cases

49. There is a long line of cases going back to *Wandsworth v Winder* [1984] UKHL 2 in which public law issues have been taken by way of defence to possession proceedings. As well as cases relying on the predecessor provisions under the Race Relations Act 1976 and the Disability Discrimination Act 1995, these include cases where the matter relied upon has been s.149 of the 2010 Act: see *Forward v Aldwyck Housing Group Limited* [2019] EWCA Civ 1334; *London and Quadrant Housing Trust v Patrick* [2019] EWHC 1263; [2020] HLR 3; and *Powell v Dacorum BC* [2019] EWCA Civ 23. There is (unsurprisingly) no discussion of s.113 in these authorities and all proceeded on the basis that the court did have jurisdiction in all cases to consider the PSED point when it was raised as a defence.

The treatment of immigration cases within s.113

50. I was not addressed on this at the oral hearing but on considering the matter afterwards was concerned at the possible implications of s.113(3)(b) and (c) for the construction of s.113 and so directed written submissions on the point.

51. Hereafter I mention only (b) "proceedings under the Immigration Acts" as the reference in (c) to SIAC acknowledges SIAC's particular jurisdiction but appears neither to add to, nor detract from, the point made below.

52. It appears to me that under the Immigration Acts any question of a contravention of the 2010 Act would be overwhelmingly likely[2] to arise in the context of a challenge to a decision by the State e.g. to deport, or to refuse leave to remain. It would be asserting that the non-compliance vitiated the adverse decision.

53. Ms Smyth submits that there is no material difference between such an analysis in respect of an immigration decision and a similar analysis in respect of a social security decision. In neither instance is there a direct claim relating to a contravention of the 2010 Act. She sets up two alternatives: either Mr Buley is correct in submitting that "proceedings relating to a contravention of this Act" is not apt to include cases such as the present, or s.113(1) must be taken to have some substantive effect. As Parliament does not legislate in vain, both judicial review and proceedings under the Immigration Acts[3] fall within the scope of s.113(1) and are dependent on s.113(3) in order to be permissible. In her submission, if Mr Buley is correct, there would be no sensible reason why social security appeals should not have been mentioned similarly to immigration cases.

54. Mr Buley's submission as to the rationale for the inclusion of s.113(3)(b) and (c) takes me on a tour of historical aspects of immigration law to which I

[2] There may be odd instances where the point is raised in a slightly different way, such as in *Miyanji v SSHD* [2017] EWHC 939, a claim for damages for unlawful detention, where one of the asserted grounds of illegality was breach of the PSED. The ground failed on the merits.
[3] Defined by reference to the UK Borders Act 2007, via Interpretation Act 1978, sch.1, para.1.

must refer in some detail. Immigration appeal rights were consolidated in the Nationality, Immigration and Asylum Act 2002. Permissible grounds of appeal under s.84 of that Act included:

> "(b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976;
> …
> (e) that the decision is not otherwise in accordance with the law."

55. He draws attention to the predecessor provisions to the 2010 Act in relation to race discrimination. Section 19B of the 1976 Act made it unlawful for a public authority to carry out any function in a way that would constitute discrimination within the meaning of the 1976 Act. While limited to race, and the scope of "discrimination" has become broader with the 2010 Act, it is the analogue to s.29 of the 2010 Act [which sits in Part 3]. Section 19B created private law rights to damages and may be contrasted with promotion of equality measures such as s.71 of the 1976 Act or (now) the PSED.

56. The equivalent (though not exact) of s.113 was s.53 of the 1976 Act, which (so far as material) stated:

> "(1) Except as provided by this Act or the Special Immigration Appeals Commission Act 1997 or Part 5 of the Nationality, Immigration and Asylum Act 2002 no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of a provision of this Act.
>
> (2) Subsection (1) does not preclude the making of an order of certiorari, mandamus or prohibition."

57. Accordingly, in order to "provide" for a challenge to be made in immigration proceedings to a decision on a ground that involved race discrimination, an express reference in s.84 of the 2002 Act to s.19B of the 1976 Act was required, the general "not in accordance with the law" ground being insufficient.

58. Thus, before the 2010 Act, because of the operation of s.53 substantive race discrimination points could be taken in immigration appeals but (given the lack of express statutory provision) not in social security appeals.

59. Mr Buley's submission then turned to the concern raised in my post-hearing Directions that if s.113(3)(b) refers to proceedings under the Immigration Acts but not social security appeals, there might be an implication that (a) raising illegality (in the form of non-compliance with the 2010 Act) as part of a challenge to an administrative decision <u>does</u> amount to the bringing of proceedings within s.113(1); and (b) that although such challenges in immigration proceedings were mentioned as to be carved out from the operation of s.113, similar challenges in other contexts (such as social security appeals), which are not mentioned, were not.

60. In his submission "considerable caution" should be placed on such reasoning, which can be at best "a clue" to the proper construction of s.113 (1) and should be outweighed by his other submissions, including – without limitation – those based on *Hamnett* and *Adesotu*, the nature of asserting a public law illegality en route to a decision on benefit entitlement and what he submits is a powerful point arising from s.113 itself. The section provides that the proceedings to which it relates must be brought in accordance with Part 9, but Part 9 provides for private law proceedings relating solely to "substantive" discrimination points and does not provide for proceedings relating to compliance with the PSED. If s.113(1) were to be construed so as to cover the PSED, proceedings relating to the PSED would have to be brought under Part 9, yet Part 9 provides no means of doing so.

61. It is then relevant to consider whether what was permitted in immigration cases by s.113(3) were challenges based on discrimination (as opposed to the promotion of equality). Mr Buley submits that that is indeed so. He has slightly misunderstood the reasoning behind my necessarily brief Directions, in thinking that I was suggesting that with the repeal of s.84(1)(b) of the 2002 Act in April 2011 it became no longer possible to bring substantive discrimination points in immigration appeals and therefore that s.113(3)(b) must be about the PSED. My point, rather, was that the "not in accordance with the law" ground appeared thereafter to cover anything which fell within that description – which might be substantive or might be the PSED. So Mr Buley's submission that with the repeal of s.53 of the 1976 Act the need for an equivalent of the express reference to the successor to s.19B fell, even if it be correct (as to which see the next paragraph), does not provide an answer to whether breaches of the PSED also fall within s.113(1) but are then saved in immigration cases by s.113(3). His submission is that s.113(3)(b) plainly makes immigration appeals a special case in relation to something; he goes on to submit that the "something" is substantive discrimination points.

62. The note of caution in the previous paragraph is because an express reference to race discrimination contrary to s.29 of the 2010 Act (i.e. the successor to s.19B of the 1976 Act) was introduced by s.51 of the Crime and Courts Act 2013 – i.e. effectively a reintroduction - from 8 May 2013 until 19 October 2014 when a reform of immigration adjudication took place, sweeping away much of the old scheme. The submissions of neither counsel provide an explanation for this, nor do my own researches. In any event, the point whether, and if so how, claims of breach of s.29 could be raised is in the present context less important than the fact that claims of breach of the PSED could be raised under the "not otherwise in accordance with the law" head.

Conclusion on jurisdiction

63. The reference to proceedings "relating to a contravention of this Act" is wide. In my view the contraventions of the Act referred to are not limited to those referred to in s.114. If they were, the reference in s.113(7)(b) excluding proceedings relating to a penalty under Part 12 would not be needed. I further note that sub-section (4) provides that s.113 operates "subject to any express provision of this Act conferring jurisdiction on a court or tribunal". It

does not say "shall not prejudice any existing legal principle conferring jurisdiction" (such as might have preserved a *Foster/Howker* line) but requires express provision. There is some, including in relation to tribunals (see, for instance, s.116 and sch 17 part 2 in relation to jurisdiction conferred on the Health, Education and Social Care Chamber of the FtT) but none conferring jurisdiction in respect of the PSED.

64. The mere fact that the duty in *Howker*, in common with the PSED in the present case, was a procedural duty, rather than what Mr Buley terms an "outcome duty", cannot of itself carry much weight in the face of the contrary language.

65. I do not find Mr Buley's point about the lack of mention of judicial review in Part 9 as powerful as he suggests it is: the existence of judicial review was in my view simply assumed without express statutory provision being needed (as, it appears, was the existence of the prerogative orders when s.53 of the 1976 Act was drafted), so that all that was needed was to carve it out from the operation of s.113(1).

66. Nor do I accept Mr Buley's point, only tentatively pursued, that under the Disability Discrimination Act 1995, the predecessor of the FtT could consider the predecessor to the PSED and that it would be odd if the 2010 Act had effected that "radical change" through the back door. The premise of the submission appears contrary to authority: see CDLA/3585/2007 at [9].

67. Section 113(1) states how "proceedings… must be brought." A tenant who resists possession proceedings on the ground that his landlord is in breach of the PSED is engaged in proceedings "relating to a contravention of this Act" but he is not "bringing" such proceedings. The ability to run such a defence has passed muster at Court of Appeal level on several occasions and clearly exists, as did equivalent defences under predecessor legislation. Section 113(1), therefore, is not concerned with every type of case in which an alleged contravention of the Act occurs. It is concerned only with "bringing" proceedings relating to a contravention of the Act.

68. One might consider that a person seeking to reverse through an appeal a decision to refuse him benefit, on the ground that the decision applied law that was invalid on public law grounds, is in a substantially similar position to the tenant who on a similar ground resists possession proceedings brought by a landlord to whom the PSED applies. Both are asserting the vitiation of an otherwise valid decision. However, the draftsman of the 2010 Act has chosen by s.113 to limit (but only to limit) how proceedings may be brought and thereby to limit the scope of the principle encapsulated by Leggatt LJ in the dictum at [20].

69. Seen in this light, the provision about immigration appeals would make sense. Where the Immigration Acts permit an Equality Act point to be taken, s.113(3) allows it. There is much to be said for the argument that most immigration appeals where race or other equality issues arose are in a comparable position to social security appeals in that regard and that if the

former are expressly permitted, the latter are not. While the consequence of that view is to exclude the possibility of challenging a breach of the PSED otherwise than through judicial review in relation to a wide range of decisions where the individual would have to launch an appeal or otherwise bring proceedings, including social security decisions, that appears to be what the draftsman of the 2010 Act has chosen.

70. How do such views sit with the authorities? Ms Hamnett was undoubtedly "bringing proceedings". The authority had made an experimental traffic regulation order removing disabled parking spaces, which disadvantaged Ms Hamnett, a wheelchair user, and hers was a claim under CPR Pt 8 to challenge it. The powers of the High Court under sch.9, para 36 of the 1984 Act extended to quashing the Order. The rationale for Singh J's consideration of the PSED challenge on the footing that the High Court had jurisdiction even though it was not a judicial review cannot be explained on the footing that the case did not involve "bringing proceedings". The proceedings were not a judicial review for the purposes of s.113 as both Singh J and the Court of Appeal held. It can only be rationalised on the basis that proceedings asserting a contravention of s.149 in some way fall outside s.113. That could only be that as Mr Buley submits, s.113 (to summarise) only bites on the statutory torts. I can see that (as carried some weight with the Court of Appeal in *Hamnett*) s.149 is qualitatively different, being a process section. But s.113 is only drafted to take account of process considerations inasmuch as it permits breaches of the PSED (and other matters) to be pursued by way of judicial review. It would seem to follow that if s.113 has the effect of cutting down jurisdictions which otherwise exist (and it plainly does, as that was the rationale for the Court of Appeal upholding Singh J's decision in relation to s29), the issue arises of why it did not also cut down the non-judicial review jurisdiction of the High Court. It cannot be to do with the inherent powers of the High Court as the particular jurisdiction Singh J was exercising was statutory – like that of the Upper Tribunal.

71. For the reasons I have previously given in relation to the language of s.113 and because I do not accept Mr Buley's point that, had the contrary been the case, Part 9 would have needed to make express provision for enforcement of the PSED, in my view the concession in *Hamnett* that the High Court, acting otherwise than on a judicial review, had jurisdiction to consider a breach of s.149 was wrongly made and inasmuch as Singh J adopted the concession by going on, without any reservation as to the jurisdictional issue, to rule on whether or not there had been a breach, I respectfully consider he was wrong to do so. Granted, the Court of Appeal appears to have accepted without a hint of negative comment that the position was as conceded before Singh J, but by then the PSED was not the matter before them. I have to say that, with respect, I consider *Hamnett* in this regard not to be good law.

72. I note that the challenges by Ms Adesotu, herself "bringing proceedings", based on s.149 escaped the striking-out process in the County Court which forms the subject of the Court of Appeal's decision, but I respectfully take a different view of the scope of the section from that which may have been taken by the County Court - depending on the issues before it - in that case.

73. Turning to *A-K*, whilst Mr Buley suggests Judge Wright may have received less than full input concerning the decisions of the High Court and Court of Appeal in *Hamnett* and no oral submission on them at all*,* in view of the conclusions I have reached about that case, if there was a lack of input, it does not call into question Judge Wright's decision, though it may have deprived him of the opportunity to give such extensive consideration to the correctness of *Hamnett* as I have had.

74. As noted at [37] above, Judge Wright found the Secretary of State's position "at first blush...a somewhat startling proposition." He concluded that nonetheless the Secretary of State's position was correct. I set out the text of his para.61 again for convenience:

> "A number of points deserve emphasis. First, section 113 covers the whole of the Act, and so covers section 149(1). Second, it has a wide application covering proceedings *relating to* a contravention of the Act. On the face of it, that covers this appeal as the appellant is arguing that the supersession decision and the regulations it applied were contrary to section 149(1) of the Act. Third, there is nothing anywhere else in the Act that confers jurisdiction on the Upper Tribunal exercising its statutory appellate jurisdiction. Fourth, however, section 113(3)(a) does allow the Upper Tribunal to address alleged contraventions of the Equality Act 2010 under its judicial review jurisdiction. This appeal, however, does not fall into that category."

75. He regarded his conclusion as "a clear result of the statutory language, if perhaps an odd one" and drew attention to the "somewhat cumbersome procedural issues" such a reading would cause, in terms of the need for an application for judicial review to be made to the Administrative Court and possibly then transferred to the Upper Tribunal, a sort of splitting which *Foster* and *Howker* might be thought to have removed.

76. I note and echo Judge Wright's surprise and his reservation about the effects of the reading he came to. As to the points on which he relied in his para.61, I agree with them all. With the benefit of the additional submissions made to me (the lack of which Mr Buley submits undermines the decision in *AK*), I nonetheless conclude that (notwithstanding any impression to the contrary which might be derived from *Hamnett)* there is no mechanism apart from judicial review within the social security adjudication process which permits compliance with the PSED to be raised.

77. For completeness, *JT v FtT and CICA* [2015] UKUT 478, to which I was also referred, was a judicial review, so is not directly in point on this aspect. Ms Smyth also relied on the case, especially what is said at [69]-[74] about the nature of the s.149 duty, in support of her submission that the FtT and UT have no jurisdiction in respect of it. As she has succeeded on this aspect on other grounds, I do not linger on this case.

The process leading to the new PPT

78. The following evidence is relevant both to the human rights claim and to the claim of breach of the PSED which (lest I be wrong in my conclusion on jurisdiction) I also examine below.

79. By way of background to what follows, prior to the introduction of Personal Independent Payment ("PIP"), relevant disability benefits were DLA (for which – to simplify – adults of working age and children were eligible, though there was some variation in the conditions) and attendance allowance ("AA") for people who claimed after reaching 65. Those who provided care for at least 30 hours a week for recipients of either DLA or AA who reached defined levels of disability were eligible for carer's allowance ("CA"), subject to the eligibility rules for that benefit.

80. In December 2010 the Government launched a public consultation[4] on DLA reform, explaining that it was proposing to replace DLA with PIP. Chapter 4 was entitled "Impact Assessment and Equality Impact Assessment". It indicated (emphasis added) that:

> "*We are considering equality impacts as the policy develops and we will produce an Equality Impact Assessment*. The overview below is our initial assessment of the potential impacts for the different equality groups, based on what is known at this stage about the proposals for reform."

81. The accompanying table, under "Age", indicated:

> "At this stage, it is not possible to assess *the impacts of the policy on different age groups,* beyond continuation of the rules relating to the age at which benefit can be claimed, but this *will be considered further once information on who will be affected by the policy is available*."

82. Mention must be made here of the CJEU's decision in *Lucy Stewart* (C-503/19) (judgment of 21 July 2011). While the case concerned a different benefit (incapacity benefit in youth) it, like the other disability benefits, relied on the old PPT. The CJEU held that test could not be relied upon to reject a claim from a person living elsewhere in the EU if the claimant could demonstrate a genuine and sufficient link to the UK by other means. In consequence, the UK was obliged in relation to cases to which EU law applied to implement something addressing the "genuine and sufficient link" test. However, in the present context, in which EU law has no relevance, *Lucy Stewart* is relevant less for what it holds than for its impact in terms of the increased public expenditure required following the judgment to pay disability benefits to people who had moved to other Member States of the EU.

[4] Cm7984.

83. In August 2011 a paper was presented to Ministers, addressing, amongst other things, ways of mitigating the additional financial burden which the judgment in *Lucy Stewart* had caused. "Mitigation options to pursue" included:

> "Changing the eligibility criteria for PIP by extending the period of the past presence test for those resident in the UK who do not have EU rights and those coming to Great Britain from elsewhere in the world, which we could achieve through regulations. (We could also consider extending this provision to the receipt of DLA, AA and CA)."

84. A Ministerial meeting took place on 18 January 2012. Emails record that the Minister (Mr Chris Grayling) wanted the "genuine and sufficient link" test in place as soon as possible and was also happy to "strengthen" the PPT to 2 years.

85. Some time just before 28 February 2012 officials and the Minister for Disabled People held a meeting to discuss the PIP Regulations Consultation. It is recorded that:

> "The Minister is keen to close down the issue of how children are treated who have returned to the UK – she has recently received a couple of pieces of correspondence about this."

(This must have been in the context of DLA and it was unlikely that the "correspondence" was saying that the rules should be made harsher).

86. In March 2012 the Minister was asked to sign off on the 2012 consultation document. The document explained (1.1) that PIP would be introduced initially for people aged 16-64. There was to be a phased process of implementation, beginning slowly to allow systems to be tested. It set out proposals on, amongst other things, residence and presence tests for PIP. The document (1.6) indicated that it included proposals to change the residence and presence conditions in DLA, AA and CA so that they aligned with the proposals for PIP.

87. In a section headed "Children" the document indicated (at 3.14):

> "Personal Independence Payment eligibility will not be extended to children when it is introduced in April 2013. The Government's response to the DLA reform consultation set out its intention that children below the age of 16 will still be able to claim DLA. We recognise that children's requirements are different from adults', and are committed to consulting formally before extending Personal Independence Payment to children."

88. In a section headed "Past presence test", the document explained the existing rule, indicating (at 3.23) the Government's view that "the test is now outdated and does not represent a long standing or sufficient connection with Great Britain." The Government therefore proposed "that the period should

be extended so that claimants can demonstrate a more enduring association with Great Britain to justify receipt of a benefit funded by the British taxpayer". The Government's "current thinking" was that "claimants should have spent, as a minimum, at least two years in Great Britain out of the last three years before they can access [PIP]." Those responding were asked to express their views on whether that test was "reasonable in order to demonstrate a long standing affiliation to Great Britain" or whether a longer period would be more appropriate and if so, how long it should be.

89. The section on Changes to Residence and Presence conditions in DLA, AA and CA provided (8.1) a summary of the proposed changes in bullet point form. They included

> "● Increase the past presence test (currently 26 weeks out of the previous 52 weeks) to two years out of the previous three years, applied on a one-off basis
> ● DLA will continue to be available for children and adjustments will be considered for very young children who would not be able to meet an extended past presence test due to their age."

Those responding were asked (Q21) whether they thought children should have to satisfy a shorter PPT and what would be a reasonable test for children.

90. Turning to the Impact Assessment (para 9.2) the document recorded that the Government was "considering equality impacts as the detailed policy is developed." The document did however, go on to provide a current assessment. Under "age", it recorded that

> "The affects (sic) for those under 16 are separate and not within the scope of this consultation."

In its closing section, the consultation document indicated:

> "Audience
> 10.1 This consultation is intended to seek views on the detailed proposals that will inform the secondary legislation on Personal Independence Payment. …
>
> Purpose of the consultation
> 10.2 This consultation document seeks your views to inform the secondary legislation on Personal Independence Payment and provide an update on policy and design decisions."

91. On 29 March 2012 a more detailed paper went to the Minister seeking instructions, principally with regard to transitional protection. Para 5 recorded the Minister's earlier agreement to changes, including the introduction of the new PPT, being made. Para 14 and Annex A however did address the position of children under three years, pointing out that as no child under two

years would be able to satisfy the new PPT, officials recommended modifying the test for that age group and two options were set out.

92. Consultation closed on 30 June 2012 and on 10 July 2012 a paper entitled "DLA reform/PIP consultation - main themes and recommended changes" was sent to the Minister. On 10 August 2012 a further paper followed, examining legislative strategy. The document noted that along with the various regulations needed for the purposes of PIP, there would be the "DLA/AA/CA amending regulations" (i.e. what in this decision I have termed the Amendment Regulations), which included provisions relating to residence and presence in order to mirror the approach taken by the Government in PIP.

93. A meeting with the Minister took place on 6 September 2012. No minutes are in evidence.

94. An official of the Social Security Advisory Committee ("SSAC"), constituted under s.170 of the Social Security Administration Act 1992, emailed on 12 September requesting sight of an Equality Impact Assessment ("EIA"). On 14 September, the Minister was asked to agree to sending the draft regulations and an explanatory memorandum to SSAC. SSAC did not in the event press its request for an EIA. SSAC's response was in evidence; in a two side response setting out "its thoughts on the Government's proposals on the detailed rules underpinning Personal Independence Payment" it made no mention of the new PPT.

95. The SSAC met on 3 October and considered a number of legislative proposals. The minute indicates that an official from the DWP made a presentation explaining that the proposed Amendment Regulations sought to make a number of different changes to disability benefits so as to align DLA with what was intended for PIP. The minutes record 5 points being mentioned. When residence and presence conditions were being discussed, the only matter specifically mentioned in the minute is the response to the *Lucy Stewart* case addressing the "genuine and sufficient link" point. On 5 October, SSAC indicated that the committee did not require a formal reference to it of the proposed Amendment Regulations.

96. The results of the 2012 consultation were published on 13 December 2012. Paras 3.29 – 3.34 reported on responses in relation to PIP. In relation to changes to residence and presence conditions in DLA, AA and CA, para 3.46 indicated the response was similar to or the same as the position on PIP and so no changes to the previous proposal were intended. It reported there had been little response to the question about children under 3 years old and the Government indicated it would retain the present arrangements.

97. However, in the section on "Equality Impacts", para 3.105 indicated, inter alia, that "Young people were also considered to be at risk of being discriminated against with regard to the habitual residence and past presence tests." The Government's response (para 3.108) was that it would continue to examine the effects on equality groups. Submissions went to the Minister,

culminating in a submission of 12 February 2013 seeking approval to the making and laying of (inter alia) the Amendment Regulations.

98. There is in evidence a document, undated and of unknown authorship, but presumably prepared around the same time and by an author within the DWP, stating in relation to the proposed new PPT that:

> "Our view is that we are not aware of any equality impacts. People coming to or returning to GB from non-EEA countries will be equally affected regardless of disability, nationality, age or gender."

99. There is relevant evidence in the form of witness statements concerning the consultation and legislative process. Ms Geraldine D'Arcy, a Policy Manager employed by the Department for Work and Pensions, provided a witness statement exhibiting excerpts from what was described as the "final, draft, unpublished EIA" which was carried out before the DLA Regulations were amended. She was not able to indicate with certainty whether it was she or a colleague who had drafted the section headed "Residence and Presence Rules" but she was "as sure as I can be" that the EIA would have been drafted to specifically consider the impact of the changes to the residence and presence conditions in relation to DLA (as well as in relation to PIP) because that was "our" area of policy responsibility in relation to disability benefits. She could not recall specific details as to why 104 weeks/two years was selected as the period for the new PPT. She indicated that she "understood" (source not identified) that DLA was compared to a contributory benefit, which are generally not payable until two years of national insurance contributions have been made." Earlier in her evidence, however, she had suggested that it had been considered that the 6 month period of the old PPT "would broadly mirror the financial contribution tests used to determine eligibility for contributory benefits." She provided evidence that

> "SSWP did have due regard to her obligations under PSED as can be seen by the EIA itself and the consultation document and Government Response."

100. The full draft EIA was subsequently produced at the request of the appellants' solicitors. Oddly, it was not simply an expanded version of what had previously been only extracts. The "extracts" version appears to have been "tidied up" prior to being produced at the earlier stage. If so, that was thoroughly inappropriate, as I am sure those now advising the respondent realise.

101. In relation to the full draft EIA, Mr Buley in written submissions on the appeal pointed out that Ms D'Arcy's evidence failed to explain why the EIA was not published and never ceased to be "draft", nor provided any evidence as to how it was taken into account in the decision-making concerning the enactment of the new PPT via the Amendment Regulations.

102. Further searches for documents were conducted by the respondent's lawyers. This led to a second witness statement by Ms D'Arcy. The key paragraphs need to be set out in full:

> "8. At paragraph 32 of my first statement, after discussing what was said in the draft EIA, I said that "SSWP accordingly decided that the proposed increase to the PPT would be implemented". Given what we have found in our recent searches I wish to retract this statement as it implies that SSWP considered the EIA and then decided to implement the proposed changes to the PPT. I recall that multiple people were working on this particular EIA and I also recall that we were all operating on the assumption that the EIA would need to go to the Minister who was signing off the Regulations. When I made my statement, I was therefore operating on the assumption that the EIA had gone to the Minister. However, in our extensive searches we have been unable to find conclusive evidence anything (*sic*) to suggest that the EIA was finalised or went to the Minister. In fact the submissions which we have located do not reference any EIA or the equality duty. During our searches we did find a letter from the Minister for Women and Equalities dated 22 November 2012 which said that Government Departments should call time on the production of EIAs. Although I can't recall exactly what happened, I think this may be a reason why the EIA was not finalised.
>
> 9. At paragraph 35 of my first statement, I said that "It remains SSWP's position that SSWP did have "due regard" to his/her obligations under PSED as can be seen by the EIA itself and the consultation documents and Government Response." I would also like to correct this sentence by removing reference to the EIA for the same reasons as set out above."

103. Ms D'Arcy apologised to the Upper Tribunal, explaining that she was doing her best to recall what was only one piece of work from many years ago and that there had been no intention to mislead. I accept the explanation and apology. As I noted above, one feature of *Foster*-type challenges is that they may require matters of public law decision-taking to be probed many years after the event, far longer ago than a judicial review would, and difficulty of recall and the absence of complete documentation may be a consequence of that.

104. As it is now known to have played no part in Ministerial decision-making, the relevance of the draft EIA is much diminished. It may however be relevant to note, to the extent it is considered indicative of thinking within the Department, that its stated purpose according to its opening paragraph was confined to benefits payable exclusively to (as a minimum) those aged 16 or over. DLA is mentioned only as the baseline from which PIP was to represent a change. Various groups with some link to age are discussed, such as students and interns, and pensioners, but not children.

105. The final piece of evidence to mention is the witness statement filed on behalf of the appellants by Mr Derek Sinclair. He is a Senior Parent Adviser at "Contact", a national charity for families with disabled children. He has worked as member of their Helpline team since 2003. Contact responded to the 2012 consultation as part of a campaign by a consortium of organisations active in the field entitled "Every Disabled Child Matters"[5]. Their response to question 21 submitted that to have a PPT of 2 years out of 3 would unfairly penalise children due to their age and would prevent families accessing vital support as an early intervention measure. Their submission was that for children over 6 months, the PPT should be retained at 26 weeks in the last 12 months. The National Deaf Children's Society, who made a separate response, also argued for retention of the existing PPT, pointing out that children (and, to a large extent, young people) have far less choice about where they live than do adults.

Compliance with the PSED

106. The group Mr Buley submits whose equality of opportunity is relevant for the purposes of this case has evolved somewhat in the course of argument but are now said to be children aged 3 to 16. As noted above, by s.4 of the 2010 Act, both age and disability are protected characteristics.

107. Section 5 provides:

> "(1) In relation to the protected characteristic of age—
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.
>
> (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages."

108. I believe that Ms Smyth does not in principle object to reliance on a group aged 3-16. That appears correct: it was not suggested to me that s.5 does not also apply to the list of "relevant protected characteristics" in s.149(7) and in my view rightly so. The term "protected characteristics" is used throughout the 2010 Act and the purpose of s.149(7) appears to be not to make fresh statutory provision covering the same ground as s.4 (on which s.5 is parasitic) but to limit the list of (s.4) protected characteristics that are relevant for s.149 purposes by excluding marriage and civil partnership. Thus, posing the question by reference to children in the age range 3-16 is legitimate. (The only reason why it is not by reference to all children to the age of 16 is because of the special provision made for the under-3s because of their greatly reduced ability – or in some cases the mathematical impossibility – of complying with the new PPT.) What 3s-16s share (as would

[5] Founder members, in addition to Contact (then known as "Contact a Family") were the Council for Disabled Children, Mencap and the Special Education Need Consortium (now known, I believe, as the Special Educational Consortium).

under 3s) is as Mr Buley submits, that they may by reason of their age have different needs from adults with regard to care; that the benefit consequences (see [2]) are different for them/their families than for adults, the likelihood that their living arrangements (including as to country of residence) are determined by others and that a two year period is a proportionately greater period of their lives and may be a key time developmentally.

109. However, Ms Smyth does submit that Mr Buley is in reality not seeking to complain about a failure to address disadvantages suffered by persons who share a relevant protected characteristic (i.e. age) that are connected to that characteristic, but rather is complaining about a disadvantage experienced by a sub-set (those who have lived abroad) and having lived abroad is not a protected characteristic.

110. She submits that the requirement is to examine the differential impact by reason of the protected characteristic of age, not to examine small, specific sub-groups within the protected group. In support, she relies on *R(A) v SSWP* [2016] EWCA Civ 29. That case concerned a female victim of domestic violence who occupied her home under a "sanctuary scheme", which involved converting one of the bedrooms into a safe room to which she could retreat if in fear of attack. Under the so-called "bedroom tax" legislation, this led to a loss of part of her housing benefit (albeit discretionary housing payments were made). The Court of Appeal, which had evidence before it of the number of people in sanctuary schemes and within those, the number who were affected by the bedroom tax, held:

> "59. It is clear that the Secretary of State did address the question of gender based discrimination. Those within the Sanctuary Schemes who would be adversely affected by reg.B13 were in fact few in number. It was not in the circumstances a breach of the PSED to fail to identify in the Equality Impact Assessment this very small group of those within the Sanctuary Schemes who had a need for an extra room; this was a very tiny and specific group. Nor would that specific group within the Sanctuary Schemes have been identified if the Equality Impact Assessment had specifically addressed the issue of gender based violence, including domestic violence, as it is a very restricted category of person even within the Sanctuary Schemes. When the group was identified, the position of those in Sanctuary Schemes that were adversely affected was addressed by the provision of DHPs. Those so affected were those with the need for a safe room and those in accommodation which had been adapted and from which it was not reasonable to move."

111. The Court of Appeal's ruling on this point was upheld by a bare majority in the Supreme Court, noting that there was no automatic correlation between being in a sanctuary scheme and having a need for an extra bedroom. Baroness Hale, dissenting, noted that "people in sanctuary schemes may be small in number but victims of gender-based violence are many" and therefore that the PSED should require public authorities at least to consider the impact of gender-based violence (at 4574 G-H).

112. In my view the case relied upon is distinguishable. There was a clear finding by the Court of Appeal that the protected characteristic of gender (or, in the language of s.149(7), sex) had been addressed. The issue was whether the failure to consider a "very tiny and specific group" within that vitiated what had been done. For the respondent to show that she had considered the impact of extending the PPT on children aged 3-16 generally, that would necessarily involve considering those who might fall foul of it, having recently lived abroad. Only if that had been done (as with the consideration of gender in the bedroom tax case) might there be an argument that the exercise was not vitiated by the failure to consider some particular sub-group – perhaps those returning from a particular country or those with a particular kind of disability. Baroness Hale, dissenting, in *MA* would have expected more to be done to be compliant, a view which appears to me to work against rather than for the respondent in this case.

113. If my conclusion were to be that the respondent had not considered the position of children aged 3-16 at all, it would be somewhat academic whether a failure to consider specifically the position of children of that age – or disabled children of that age - newly returned to Great Britain after a period living abroad would be such as to vitiate otherwise sufficient compliance with the PSED. I have no evidence as to numbers: and in the absence of evidence do not conclude that the cohort of disabled children seeking to return to the UK after having lived abroad is so small as to be de minimis; indeed, in days that were characterised by globalisation and increased international mobility that seems unlikely. To the possibly limited extent that it is relevant, I do not exclude the cohort (hereafter, for convenience "the expatriate cohort") as being in effect too niche a group.

114. In relation to limb (a) of s.149(1), Ms Smyth submitted that s.29 does not apply to the making of legislation, citing sch.3, pt.1, para. 2 to the 2010 Act and therefore what is complained of would not constitute "discrimination prohibited by or under this Act." She submits, relying on the view of Baroness Hale in *R(MA) v SSWP* [2016] UKSC 58; [2016] 1WLR 4550 at [80], that the words "prohibited by or under this Act" apply to the whole of s.149(1)(a). She makes her point also on the alternative basis that under part 3 of the 2010 Act, discrimination on the ground of age against those aged under 18 is not prohibited and so cannot constitute "discrimination… and any other conduct that is prohibited by or under this Act." I prefer her submission on this to Mr Buley's to the contrary but this merely serves to illustrate why Mr Buley was wise to focus his submissions on s.149(1)(b). Given the emphasis in Mr Buley's submission, the position under (a) has become of limited significance and I need not dwell on it further.

115. The principles applicable to the exercise of the PSED were helpfully summarised in *Bracking v SSWP* [2013] EWCA Civ 1345 at [26], in a formulation which has been adopted by the Courts in more recent cases such as *R (Houareau) v Secretary of State for Foreign and Commonwealth Affairs*

[2019] EWHC 221 (Admin) at [165][6]. *Bracking* was not cited to me, but its principles appear uncontroversial and are taken into account. I was however offered by Ms Smyth a number of propositions she submitted were relevant to the exercise of the duty in this particular case. They were in some respects qualified but not significantly disputed by Mr Buley and are in my view, in some cases in slightly modified form, supported by the authorities cited.

116. The duty is to have due regard to the specified matters, not to achieve a specific result: *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 41 at [31] (a case on the analogous section 71 of the Race Relations Act 1976). The question is whether the decision maker has had due regard in substance to the relevant matters and for that one has to turn to the substance of the decision and its reasoning: *Baker* at [37]. It is not necessary for a formal equality impact assessment to be carried out, nor even for there to be a specific reference to the PSED: see *Baker* and also *Brown* (cited below). It is "important to consider the decision-making process as a whole and to do so fairly" and not to "take one or two documents in isolation and out of context and subject them to critical analysis with a fine toothcomb": *Hoareau* at [178]. The weight and extent of the duty to have due regard are highly fact-sensitive and dependent on individual judgment: *Hotak v Southwark LBC* [2015] UKSC 50; [2016] AC 811 at [74]. The court went on at [75] to approve observations of Elias LJ *in R(Hurley) v Secretary of State for Business Innovation and Skills* [2012] HRLR 13 that:

> "it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said that "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision"."

There are cases in which a relatively broad-brush approach is sufficient, as in *R (West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441; [2016] 1 WLR 3923 at [85].

117. Ms Smyth also sought to rely on *R(Unison) v Lord Chancellor (No.3)* [2015] WLR 370, but I view that as essentially illustrative of the application of the duty in that particular case and derive no wider assistance from it.

118. As regards the desirability of an adequate paper-trail, Mr Buley relied upon *R(Brown) v SSWP* [2008] EWHC 3158 (Admin); [2009] PTSR 1506 (a case under the Disability Discrimination Act 1995). The Divisional Court, reviewing the authorities, held:

> "93. However, the fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have "due regard" to the needs set out in the section is not determinative of whether the duty under the statute has been

[6] The recent appeal ([2020] EWCA Civ 1010) did not concern the PSED.

> performed: see the judgment of Dyson LJ in *Baker* at paragraph 36. But it is good practice for the policy or decision maker to make reference to the provision and any code or other non – statutory guidance in all cases where section 49A(1) is in play. "In that way the [policy or] decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced": *Baker* at paragraph 38.
> …
> 96. […It] is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record - keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1): [authorities omitted]*."*

119. Mr Buley submits that while the 2010 consultation correctly identified matters to be considered, this was never done. By contrast, the 2012 consultation was largely about PIP reform. While the PPT was indeed mentioned, so far as children were concerned that was only about the under-3s. Indeed, the document specifically indicated that the effects on under-16s were separate and not within the scope of the consultation. The response to the consultation contained nothing showing the Government considering the impact of the proposed change on children and nothing more than a restated policy intention in relation to the under 3s. The draft EIA contained no material discussion of the position of children and in any event was never considered by the Minister. Now that the suggestion that the draft EIA formed part of how the PSED was performed has been withdrawn, the respondent according to Ms D'Arcy's evidence is relying solely on the 2012 consultation and response, which offer very little to support her case.

120. Mr Buley invites me to consider afresh the conclusion on the PSED reached by Judge Jacobs in *FM*, in which Ms D'Arcy likewise gave evidence. Her evidence is that in *FM*, a full copy of the draft EIA was provided to the Upper Tribunal and to the appellant in that case. What is apparent, though, is that Judge Jacobs cannot have known that the draft EIA was never put to the Minister, nor indeed that submissions to the Minister, found on the much more extensive search conducted in the present case, do not reference any EIA or the equality duty, for had those matters been in evidence before him, Ms D'Arcy's first witness statement in the present case would necessarily have been different. Indeed, Ms D'Arcy's evidence to Judge Jacobs was (*FM* [18]) that:

> "Before the legislation was amended, an equality impact assessment was carried out, thereby having regard to the Department's duty under section 149 of the Equality Act 2010."

121. Judge Jacobs accepted Ms D'Arcy's evidence that the draft EIA did deal with DLA (para 43). That was one of the factors he relied upon in concluding (at [46]) that he was

> "satisfied that the Secretary of State had due regard to the position of children in relation to the changes to the past presence test."

122. However, in my view on its face it was concerned only with new legislation governing PIP and consequential changes to AA and CA. The draft EIA makes no reference to changes to DLA entitlement or to the position of children in relation to DLA. I agree with Mr Buley that references to DLA are confined to it being the baseline starting point from which PIP was intended to depart for the groups to which PIP was to apply and, subject to phasing, to replace. In any event, the PSED is a duty on the Minister personally and we now know that the EIA was never put to him.

123. Ms Smyth submits that the respondent had due regard to the need to advance equality of opportunity for disabled people, because of the very nature of the benefits in issue. I am content to accept that is so, but it is not the focus of the case. She submits that "the whole purpose of preserving DLA for children" was in recognition of their specific needs. I would accept that the Government recognised children's requirements are different from adults' and so accepted a need for further consultation before extending PIP to children under 16.

124. Then, submits Ms Smyth, the consultation specifically posed the question whether a shorter PPT should apply for children and a specific graduated test was introduced for young children. Thus, the position of children coming from abroad was specifically addressed and a conscious policy decision taken that a shorter PPT should only apply for those children. I do not accept that because the position of one, limited, group of children was addressed, children generally (and so those aged 3-16) were sufficiently within the contemplation of the Minister (or the Department). What was addressed (8.1, second bullet point) was the position of children coming from abroad who would find it difficult or even impossible by virtue of their young age to meet the new PPT. That is not the same as considering, for children generally – and in particular those aged 3-16 who did not benefit from the limited relaxation – any disadvantages they might suffer or any need they might have (reflecting the language of s.149(3)). I reject Ms Smyth's attempt to brand as "unreal" any suggestion that while the needs of the under 3s were expressly considered, those of the 3s-16 group were forgotten. The issue of children retuning from abroad had been something the Minister for Disabled People had been "keen to close down" (see [85]) but this does not seem to have led to the issue in relation to children aged 3 or more receiving any consideration.

125. The 2012 consultation explicitly indicated that it was not intending to address the impact on under 16s. Small wonder, then, that only a few representations were made on that issue. (The phasing arrangements meant that there would continue to be adult claimants of DLA for a considerable

while, so mention of amending the PPT for DLA did not equate to considering the position of children.) The results of the 2012 consultation contained an express acknowledgment that

> "Young people were also considered to be at risk of being discriminated against with regard to the habitual residence and past presence tests"

and that work was to continue on examining equality impacts. However, the draft EIA contains no indication that such work was ever done and nor does any other part of the evidence. In any event, the duty under s.149 is imposed on the Minister and the EIA never went to the Minister. There is no indication that the s.149 test ever resulted in the needs of children other than the under 3s being thought about.

126. While Ms Smyth draws attention to the need to focus on the disadvantages experienced by the group by reason of the protected characteristic, I am satisfied that there are those identified by Mr Buley and set out at [108]. While it may be suggested (as does Ms Smyth) that even if children cannot themselves chose where to live, their parents have choices, that, while it may be true, does not provide an answer where children themselves, by reason of their age, have the right to have the advancement of their opportunity considered in accordance with s.149. If the consequence is additional strain on the family unit and reduced scope for helpful interventions during a 2 year period during childhood years (see the evidence at [150] and [151]), it does seem to me that that cannot be ignored. Ms Smyth submits that the case is at the very outer reaches of what the PSED is aimed at, but it is not for a court or, where it has jurisdiction, a tribunal, to decide what weight is to be given to such factors, but to see that the decision-maker gives them rigorous consideration. In the present case, taking the decision process as a whole and applying the authorities at [116], there appears to be no evidence that such consideration was given to the interests of children in the 3-16 age group.

127. I place little weight on the document referred to at [98] in view of how little is known about it, but it certainly does nothing to contradict this view.

128. If I were to conclude that there was a breach of the PSED in this case. I am conscious that in so doing I would be reaching a different view from Judge Jacobs in *FM*. He based his decision on "the whole process" as it appeared to him. The EIA was one factor (but we know now that the respondent did not take it into account, so that falls away). Judge Jacobs considered that the position of children was expressly part of the consultation process; so it was, but only to the very limited extent I have described. The position of children generated little interest – but it had been said expressly to be out of the scope of the consultation. The SSAC expressed no concern; I accept that that may be relevant, just as it might have been if the SSAC <u>had</u> expressed concerns, but ultimately the duties on the Secretary of State in relation to the SSAC and under s.149 are different. What he describes as the "analysis that took place after the consultation process was complete" appears on the evidence before

me to have consisted of a reiteration of the policy intent, given the paucity of reasons to do anything different (itself engendered by the terms of the consultation). The Government in the 2010 consultation acknowledged the need to assess the impact on age groups but could not do it at that time. The 2012 consultation addressed only the under-3s while expressly indicating that the effects on under-16s were outside scope and that its concern was to inform the secondary legislation on PIP (from which children were excluded). The response to the consultation did not engage with the points raised by the campaigning groups mentioned in Mr Sinclair's evidence. It indicated that it would continue to assess the effects on equality groups, yet as regards children in the 3-16 age group, this was not done.

129. Looking at the process as a whole, with the benefit of much fuller evidence than was available to Judge Jacobs and knowing as we do that a significant, though I accept not determinative, part of the case before Judge Jacobs cannot be sustained, I respectfully reach a different view on this issue.

Human Rights

The claim

130. The appellants claim that they have been discriminated against, contrary to Art. 14 of the ECHR, read together with Art.8 and/or Art.1 of Protocol 1. The respondent accepts that the claims fall within the ambit of Art.1 of Protocol 1, which is sufficient for the purposes of the Art.14 claim, and so I say no more about Art. 8. The appellants need to show that they have a "status" for this purpose and have either received less favourable treatment than someone whose circumstances are relevantly similar or the same treatment when their circumstances are relevantly different (*Thlimmenos* discrimination). In the present case, the comparison advanced is between a child with the requisite level of disability who before returning to the UK has lived abroad so as to fall foul of the new PPT and one who has lived in the UK throughout. This is most naturally to be seen as less favourable treatment of the expatriate cohort because the new PPT operates so as to deprive them of DLA for a period now extended to two years when the UK cohort do not experience that disadvantage.

Status

131. Mr Buley relies on *R(Carson) v SSWP* [2006] 1 AC 173 to show that country of residence may be a status and on *Sidabras v Lithuania* (2004) 42 EHRR 104 to show that past events may be a status in order to demonstrate that for the purposes of the present case, the appellants have a "status" of having previously lived abroad. Domestic authorities such as *Stevenson v SSWP* [2017] EWCA Civ 2123 and *Mathieson v SSWP* [2015] UKSC 47; [2015] 1WLR 3250 demonstrate a liberal approach to the question of status. The "concentric circles" propounded by Lord Walker in *R (RJM) v SSWP* [2008] UKHL 63; [2009] 1 AC 311 at [5] include, further out in the concentric circles, both residence and past employment and in Mr Buley's submission there is no reason not to include past residence by analogy. While reserving

her position if the case should go higher, Ms Smyth does not contest the issue of status at Upper Tribunal level.

132. In *FM*, a decision given in September 2017, Upper Tribunal Judge Jacobs found that past residence was in this context not a status. He reasoned inter alia that past residence abroad is not "a personal characteristic that is used to distinguish one group of people from another" but "merely a condition that a person has to satisfy, regardless of their personal characteristics, before a claim for an allowance will be entertained." That said, he acknowledged that in the authorities there were signs that the requirement for differentiating factors to amount to personal characteristics was lessening. In my respectful view, he was correct to identify that trend, now further seen in cases such as *Stevenson* (where the date of claim for income support was held to be a sufficient status) and *R (Stott) v Secretary of State for Justice* [2018] UKSC 59 in which following an extensive review of authorities the Supreme Court held that having received a particular type of sentence of imprisonment conferred a status. In the light of the further development of the trend identified by Judge Jacobs, I respectfully reach a different conclusion view from his on the issue of status.

Analogous position

133. It is then necessary to consider whether the expatriate cohort and the resident cohort of children are in an analogous position. Both, at the time of claim, are in the UK. That distinguishes *Carson v UK* (2010) 51 EHRR 13, relied upon by Ms Smyth, which concluded that pensioners living outside the UK were not in a relevantly similar position to those living within the UK "[g]iven that the pension system is…primarily designed to serve the needs of those resident in the United Kingdom" (at [86]). As well as being in the UK, the expatriate cohort, like the resident cohort, have the right to be there and are in comparable need.

134. Ms Smyth submits that *DA* shows that it is still necessary to identify a comparator. So it does, but Lord Wilson at [46]-[47] favoured simplicity, identifying the comparators who were the natural corollary of the complaint being made. In *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1WLR 1434 at 1444H-1445A Baroness Hale observed that

> "unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification."

I conclude therefore that the expatriate cohort and the resident cohort are in a relevantly similar situation.

Legitimate aim

135. Mr Buley submits that the evidence identifies a claimed "legitimate aim" of ensuring benefit is only paid to persons with a long-standing or sufficient connection with Great Britain. The relevant "connection" is that the person did not recently live abroad, but he questions why that is relevant to a benefit paid to meet current need, now the person is living in Great Britain and is entitled to do so. He refers to various parts of Ms D'Arcy's evidence to suggest that what is described as "connection to Great Britain" should in his submission be understood as a proxy for one or more out of cost-cutting and saving money, the extent of a person's financial contribution to Great Britain or concerns over immigration, the validity of each of which he proceeds to criticise in terms I consider further below.

136. Ms Smyth affirms the legitimacy of a criterion seeking to test for a long-standing connection to Great Britain. She submits that the evidence discloses that recent presence was used as a test by which to establish who had the closest connection with Great Britain and that, in the context of a benefit funded by general taxation when resources are limited by austerity and when it was necessary to address the implications of the *Lucy Stewart* judgment, it was legitimate to prioritise in such a way.

137. Ms D'Arcy's evidence explained that since DLA was introduced in 1992, the Government had considered it important that there should be a substantial connection between claimants and Great Britain, reflected in residence and presence conditions, and the old PPT requiring presence for at least 26 weeks of the 52 weeks preceding the claim was established. It was considered the test would establish an adequate connection to Great Britain and to "broadly mirror" the financial contribution tests used to determine eligibility for contributory benefits. She explained that between then and 2012 there were significant changes to national migration patterns; during the 2000s this was partly as a result of migration from the countries which had joined the EU since 2004. Since the mid 2000s annual net migration had fluctuated between approximately 150,000 and 300,000. "As a result", the DWP considered that the existing PPT no longer represented a long-standing or sufficient connection to Great Britain in many cases. The DWP was also concerned that pressure on the UK welfare budget would increase as a result of having to pay benefits to more claimants outside the UK elsewhere in the European Economic Area. Further, at a time of austerity following the financial crisis, the Secretary of State considered review of the PPT was necessary in order to target DLA spending where it was most necessary and towards claimants with the closest connection to Great Britain.

138. I accept that a measure to define a necessary link between a prospective claimant and a State is needed, but there were already provisions requiring (then) ordinary residence and that the person was not precluded from recourse to public funds.

139. I agree with Ms Smyth that the PPT is not about immigration control: the PPT had no relevance for EU citizens while for those from elsewhere other mechanisms of immigration and social security law already restricted the rights to benefit, while the PPT also affects those, such as the appellants'

families, for whom as British Citizens immigration law is not an issue. Migration was only relevant to the extent that it contributed to expenditure which the Government wished to save.

140. In my view the extending of the period required by the PPT plainly was driven by the need to save money. Ms D'Arcy cited pressure on the welfare budget and the impact of austerity following the financial crisis. The August 2011 paper (see [83]) had expressly referred to the genesis of changes to the PPT as being an option to mitigate the financial burden caused by the *Lucy Stewart* decision. No coherent explanation has been put forward for extending the PPT from 6 months to 2 years (the rationale put forward, somewhat tentatively, for a two-year period had previously been put forward as justifying the 6 month period) and the lack of such explanation supports the view that the more onerous condition was set to save money by reducing the number of those who could qualify, by making them wait.

141. In my view, references in the Consultation Document to a "sufficient" connection and "a more enduring association with Great Britain to justify receipt of a benefit funded by the British taxpayer" are essentially self-serving: the connection was considered insufficient and a more enduring association to be required because the Government wished to set the rules so as to enable savings to be made. This is further reflected in the lopsided question in the 2012 consultation which assumed the extension of the PPT to 2 years and only asked whether it should be made longer.

142. Mr Buley submits that cost-cutting by itself cannot be a legitimate aim for discrimination absent something to explain why it is appropriate to target the cost-cutting measure on one group rather than the other. However, that is to elide the question of legitimate aim and justification. I apply Lord Reed's observations in *SG*:

> "63. The next question is whether the Regulations pursue a legitimate aim. In my view that cannot be doubted. They pursue, in the first place, the aim of securing the economic well-being of the country, as the Secretary of State explained to the Parliamentary Joint Committee on Human Rights, and as is evident from the legislative history since the policy of reducing expenditure on benefits was first announced in June 2010. A judgment was made, following the election of a new Government in May 2010, that the current level of expenditure on benefits was unaffordable. The imposition of a cap on benefits was one of many measures designed to reduce that expenditure, or at least to constrain its further growth. It was argued on behalf of the appellants that savings in public expenditure could never constitute a legitimate aim of measures which had a discriminatory effect, but that submission is inconsistent with the approach adopted by the European court in the cases mentioned in para 10. It is also inconsistent with the acceptance of the economic well-being of the country as a legitimate aim of interferences with Convention rights under the second paragraphs of articles 8 to 11, and under A1P1. An interpretation of the Convention which permitted the economic well-being of the country to constitute a legitimate aim in relation to interferences with the substantive Convention rights, but not as a legitimate aim in relation to the ancillary

> obligation to secure the enjoyment of those rights without discrimination, would lack coherence.
>
> 64. In relation to the case of *Ministry of Justice (formerly Department for Constitutional Affairs) v O'Brien (Council of Immigration Judges intervening)* [2013] UKSC 6; [2013] 1 WLR 522, para 69, on which the appellants relied, I would observe that acceptance that savings in public expenditure can constitute a legitimate aim for the purposes of article 14 does not entail that that aim will in itself constitute a justification for discriminatory treatment. As I have explained, the question whether a discriminatory measure is justifiable depends not only upon its having a legitimate aim but also upon there being a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

"Manifestly without reasonable foundation"

143. Whether the difference in treatment is "manifestly without reasonable foundation" was re-affirmed to be the test by *R(DA) v SSWP* [2019] UKSC 21 at [65]. This may include consideration of whether the difference in treatment is manifestly disproportionate to the legitimate aim: *R(C) v SSWP* [2019] 1 WLR 5687, applied in *R(TD, AD and Reynolds) v SSWP* [2020] EWCA Civ 618. The court will proactively examine whether the foundation is reasonable: *DA* at [66].

144. As a preliminary to considering that issue, it is necessary to address the UN Convention on the Rights of the Child ("UNCRC"). The Convention is not part of domestic law; however, within the overarching inquiry into whether Art.14 has been infringed, it is appropriate to consider to what extent conclusion reached applying Art. 14 would harmonise with those of other international law instruments, such as the UNCRC. In *DA*, Lord Wilson indicated that

> "…a foundation for the decision not made in substantial compliance with article 3.1 [of UNCRC] might well be manifestly unreasonable."

145. The relevant provision and its interpretation were conveniently summarised by Lord Wilson in *Mathieson* at [39]:

> "Article 3.1 of the UN Convention on the Rights of the Child (1989) (Cm 1976), ratified by the UK, provides:
>
> > "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
>
> The UN Committee on the Rights of the Child, in its General Comment No 14 (2013) on article 3.1, analysed a child's "best interests" in terms of a three-fold concept. *In R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, at paras 105-106, Lord Carnwath described the committee's analysis as authoritative guidance. The first aspect of the concept is the child's substantive right to have his best interests assessed as a primary consideration

> whenever a decision is made concerning him. The second is an interpretative principle that, where a legal provision is open to more than one interpretation, that which more effectively serves his best interests should be adopted. The third is a "rule of procedure", described as follows:
>
> > "Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned … Furthermore, the justification of a decision must show that the right has been explicitly taken into account …"

146. In *SG* Lord Carnwath (at [108]) indicated his view that:

> "… the evaluation needs to consider, where relevant, the interests both of children in general and of those directly affected by the action. It also needs to indicate the criteria by which the "high priority" given to children's interests has been weighed against other considerations. In so far as that evaluation shows conflict with the best interests of the children affected, it needs either to demonstrate how that conflict will be addressed, or alternatively what other considerations of equal or greater priority justify overriding those interests."

147. The application of these principles is clearly apt to extend to the making of legislation and to the consideration of the interests of groups of children even if not defined at the time.

148. On such a basis, children aged 3 to 16 in what I have termed the expatriate cohort are properly the subject of the duty. The evidence shows that consideration of the interests of children was frequently expressly excluded from consultation and that what little there was was confined to the position of the under 3s, unable to meet the new PPT as it was proposed. The obligation attaches to groups of children, so considering the position of one very young cohort of children does not provide any indication that the duty was performed in relation to the older group. Nor is the position saved by suggesting that because the interests of some children were thought about, the interests of children generally were considered and that is good enough: that would be inconsistent with the UN Committee's third limb, describing the "rule of procedure". In my view, therefore, the UK was in breach of Art.3 of the UNCRC. But the question remains – but taking the Art.3 breach into account – is the UK's action manifestly without reasonable foundation?

149. Mr Buley submits that it is, in that a child with the exact same disability and need as a member of the resident cohort is prevented from accessing DLA by virtue of the mere fact of having lived abroad and has to endure that for two years. The same would be true of an adult, of course, but the challenge is not to the new PPT generally. In effect, the legislator hit upon those who had been living abroad prior to returning to the UK as the target for cost-cutting. Mr Buley submits that it is a question of proportionality and

points to the adverse impact evidenced in the witness statements of the appellants' mothers.

150. In TS's case, the statement describes the difficulties caused by the denial of DLA in relation to other benefits and because it resulted in being unable to obtain a blue badge for disabled parking. The lack of support in relation to mobility resulted in additional lifting, causing both his parents significant back problems. TS's father had to give up work to care for TS and TS's mother when the latter required operations to her back and neck and the family lived on child benefits and child tax credit alone and fell behind with bills.

151. In EK's case, the family could not afford to adapt shower facilities for her, meaning that her mother had to give her bed baths, with concomitant extra domestic work. EK's mother was prevented from working but could not access carer's allowance, even though she was engaged in providing regular and substantive care for a 14 year old child who cannot feed, clothe or bathe herself, use the toilet or walk without help. Extra costs faced by the household because of EK's disability included greater heating bills, additional continence pads, additional costs of transporting EK to appointments and maintaining a suitable diet. Because EK could not access DLA, the family could not use the additional elements of child tax credit designed to help with the additional day to day expenditure which disability involves.

152. Mr Buley draws on Lord Wilson's remarks in *Mathieson* at [48] that

> "Decisions founded on human rights are essentially individual"

and so it is with the present appellants that the Upper Tribunal must be concerned. He accepts that, while their families' circumstances may have been difficult, that will not be the case for everyone to the same degree; however, he submits there is no evidence to suggest that these cases should be seen as hard cases falling on the wrong side of a "bright line".

153. As to Ms D'Arcy's reliance in her evidence on the availability of support from other sources such as direct payments from social services or children's services, Mr Buley submits that a person from the resident cohort would be able to access that other support and the DLA and that both are considered necessary. It does not provide a basis for forcing someone from the expatriate cohort to manage for two years on the basis of less.

154. Mr Buley points to the greater burden on families in terms of having to work. He refers to Ms D'Arcy's inability to explain why 2 years was chosen and the lack of consideration given to the impact of the new PPT by the Government.

155. In *FM*, Judge Jacobs observed that "the new past presence test is a tough one to establish but it is not "manifestly without reasonable foundation". What he meant by "a tough one to establish" is not clear to me, but it is evident that he considered the new PPT to clear the "not manifestly without reasonable foundation" hurdle. He relied on two considerations as particularly important. One is the availability of funds from other sources: however, Ms D'Arcy's evidence does not suggest that these are replacement

funds and Mr Buley's suggestion that even with them, there would still be a shortfall caused by the absence of DLA appears correct. It respectfully seems to me that the judge's view is open to the same criticism as was made by the Supreme Court in *Mathieson* of the suggestion that there were other benefits available to the Mathieson family (see [15], per Lord Wilson and [59] per Lord Mance.)

156. The second particularly important consideration for Judge Jacobs was that in his view (at [38]) the new law "tak[es] into account the child's age, ensuring that the most disabled children can qualify sooner." This is a justification which does not appear to have been raised in evidence by Ms D'Arcy before him or before me and was not relied upon by Ms Smyth as part of the respondent's case before me. Put briefly, sections 72(1A)(b) (care component) and 73(4A) (mobility component) of the Social Security Contributions and Benefits Act 1992 ("the SSCBA") impose an additional qualifying hurdle for children under 16: their requirements must be in effect substantially in excess of what would be considered generally age-appropriate. Thus, per Judge Jacobs at [39], given the amount of attention that babies and young children generally require, it is more difficult for a baby or young child with disabilities to satisfy those conditions. Thus, the modification of the new PPT for children under 3 means that those who are disabled enough to satisfy that condition, particularly demanding though it be in its application to such young children, have to wait less long before they can meet the new PPT. Whilst I accept that a court or tribunal may take into account matters it considers go to justification whether or not the legislator themselves took them into account, for my part I would regard the effect Judge Jacobs describes, while undoubtedly present, as an essentially fortuitous spin-off of the policy in its application to under 3s, which as the 2012 consultation document indicated (see [89] above) was based solely on the time they have been alive. There is no indication that it was based on any rational approach towards the particular difficulty a disabled child aged under 3 may have in overcoming the legislative hurdles mentioned above in this paragraph, compared with a disabled child aged 4, 5 or some greater age, whose non-disabled comparator for the purposes of the statutory provisions may well still require high levels of attention. If with regard to that particular difficulty a bright line rule has been set, it has been set by accident and I respectfully place significantly less weight on it than did Judge Jacobs.

157. Ms Smyth's points include that any difference in treatment there may be suggested to be is not on the basis of a "suspect" ground and so the latitude to be afforded is wider. Further, it involves the allocation of socio-economic resources and so is pre-eminently a matter for the Executive. The matter had been referred to the SSAC without concerns being raised. All of those points I accept. She says that express consideration was given via the 2012 Consultation exercise and submissions to and comments from, the Minister. That I reject; I have explained above the very limited scope of the consultation exercise. Ms Smyth suggests that the Upper Tribunal is being invited to tread on the toes of the legislator and should not do so. This submission amounts to a reiteration that the latitude to be given to the legislator in this case should be wide (see above) and that the Upper Tribunal should not conclude that the making of the new PPT infringes on it. She submits that the measure should

not be held to be manifestly without reasonable foundation, merely because there might be another way of doing it. I would agree if that were the mere reason, but it is not, essentially for the following reasons.

158. Children aged 3-16 in the expatriate cohort are treated differently from those in the resident cohort because the new PPT only has any effect on the former. That is the difference of treatment requiring to be justified. The aim of making budgetary savings was a legitimate one. However, in deciding how to do it, there was a lack of consideration of the interests of children aged 3-16 in the expatriate cohort. These were complex and substantial, including by way of the knock-on effects on other benefits and the impact on the family in dealing with disability with a reduced level of assistance. As the figures in [2] indicate, the sums involved are substantial and there can be few families to whom they would not make a meaningful difference. The lack of consideration of those interests was a breach of Art.3 of the UNCRC. It also diminishes the weight to be put on the Amendment Regulations having been subject to some degree of democratic scrutiny. It makes it difficult for the respondent to show that adopting the new PPT was proportionate to the legitimate aim and in my judgment, despite the points in the respondent's favour mentioned in the previous paragraph, she has not succeeded in doing so.

Remedy

PSED

159. I venture into this topic as regards the PSED with some diffidence, bearing in mind my conclusion that the Upper Tribunal has no jurisdiction in respect of it. However, for the same reasons as it appeared appropriate to consider whether, on the footing that there is jurisdiction, there had been a breach, it likewise appears appropriate to address remedy.

160. Mr Buley's submission is that where a public law point is raised via the *Foster/Howker* route (as he argues is the case with the PSED here), the Upper Tribunal has no, or at most limited, discretion as to remedy. It is not axiomatic that the test applicable to judicial review in s.31(2A) of the Senior Courts Act 1981 should apply; there are areas of public law to which it has no application. Ms Smyth submits that any remedy would indeed be a matter for the Upper Tribunal's discretion.

161. I note that in *Howker*, the claimant's counsel (Richard Drabble QC), highly experienced in such matters, submitted (at [29]) that: "the Commissioner has the same jurisdiction to rule on the validity of the new regulation 27 as the Administrative Court on an application for judicial review", which suggests that remedy in such cases was thought to be a matter of discretion. In *AK*, Judge Wright at [46] says *Howker* counters the idea that there is a discretionary let-out: however, I am unable to read that case in that way.

162. The *West Berkshire* case makes clear at [87] that the court should not necessarily exercise its discretion as a disciplinary matter to quash a decision where there had been a breach of the PSED. The Court of Appeal pointed out

that there was in the cases a spectrum of circumstances relevant to the exercise of the court's discretion.

163. That was a judicial review. It is instructive to see also the approach of the courts where breach of the PSED is asserted as a defence. In *Forward v Aldwyck Housing Group Limited* [2019] EWCA Civ 1334, it had been conceded before the court below that the landlord had been in breach of the PSED before seeking and obtaining a possession order against Mr Forward on the grounds that he had breached his tenancy agreement and been guilty of conduct causing a nuisance or annoyance to neighbours. Longmore LJ, with whom the other Lords Justices agreed, said:

> "21. I would for my part decline to accept the proposition that, as a general rule, if there is a breach of the PSED, any decision taken after such breach must necessarily be quashed or set aside or even the proposition that there is only a narrow category of cases in which that consequence will not follow.
>
> 22. It may well be right that major governmental decisions affecting numerous people may be liable to be quashed if the government has not complied with the PSED" (citing *Hurley* and *Bracking*).

164. However, "These decisions cannot be applied indiscriminately to cases in which a decision is made affecting an individual tenant of a social or local authority landlord" (at [24]).

165. At [28] he referred to *Barnsley MBC v Powell* [2011] EWCA Civ 834; [2012] PTSR 56 which involved provisions of the Disability Discrimination Act in similar form to those now in the 2010 Act. Lloyd LJ had noted how, if a breach of the relevant duty had arisen in judicial review proceedings, it would have been open to the Administrative Court, if appropriately satisfied as to relevant considerations, not to set the decision aside. Lloyd LJ had continued at [37] of *Barnsley*:

> "37. By analogy, given that a breach of a public law duty is relied on by way of defence in the present case, it seems to me that it is open to the court in this situation to take the view that, if the decision would not have been set aside on an application for judicial review, it should not provide a basis for a defence to the proceedings for possession."

166. Longmore LJ reached the conclusion at [31] that the categories in which relief for breach of the PSED had been refused were not limited. A limitation as a matter of law

> "would be contrary to the general rule of public law that the nature of the relief granted is a matter of discretion and, as Lloyd LJ pointed out, the fact that the point is taken by way of defence can make no difference to that general position."

167. Noting the limitations on the grant of relief imposed by section 31(2A) of the Senior Courts Act 1981, he noted at [36] that:

> "It would be very odd if a non-material breach could be disregarded on a public law challenge but was fatal to a private law claim in which public law was relied on as a matter of defence. As Lloyd LJ pointed out in *Barnsley* the allowance of the defence to private law claims must carry with it the public law consequences of relying on such a defence."

168. The present situation is something of a hybrid. On the evidence it appears that the government's decision to change the PPT, including for DLA, AA and CA, was at least in substantial part to save money. The implication is that it does at least affect numerous people (else why bother?), whether or not it can be viewed as a "major Government decision". The position is not being raised by way of defence, as in *Forward*. Nonetheless, there are some similarities with that situation, in that the present appellants are submitting that (leaving aside for the purposes of the present argument their human rights claim) what would otherwise be a correct and lawful application of the law to them is vitiated by the non-compliance with the PSED; that, too is the position of the tenant against whom a possession order is made when there has been a breach of the PSED. Rather than strive to find an appropriate "box" into which the present challenge can be put, I prefer, with Lloyd LJ and Longmore LJ, to fall back on the general rule of public law that the nature of relief granted is a matter of discretion. Just as it would be odd if different rules applied to a public law breach according to whether it was raised by way of judicial review or as a defence in private law proceedings, so in my view the same must apply when the point is raised to challenge the legality of legislation on a statutory appeal. I would therefore conclude that if, contrary to my view, the Upper Tribunal has jurisdiction to consider breaches of s.149, the relief would in any event be a matter for its discretion.

169. If that be the test and – putting the matter at its more favourable to the respondent – s.31(2A) of the Senior Courts Act 1981 had to be applied by analogy, then applying that test as explained in *R(Plan B Earth) v Secretary of State for Transport and others* [2020] ESCA Civ 214, I find it impossible to conclude that had the PSED been complied with, it would be highly likely that the outcome for the appellants would not have been substantially different. No doubt the need to make savings was compelling; but there is no reason why other ways could not have been found. The PPT could have been made slightly longer for adults. The rates of DLA could have been adjusted. I say this not to set the Upper Tribunal up in a legislative role for which it is not equipped, but to suggest that there were options which it would have been for the legislator to evaluate and that the existence of such a range precludes me from saying that the s.31(2A) test would be met.

Human rights claim

170. At the oral hearing Mr Buley submitted that once a breach of Art.14 was established, the new PPT would have to be disapplied; and that, while conceivably the respondent might be able to justify the less onerous 26 week

period of the old PPT, she has not attempted to do so, with the consequence that no PPT should be applied to the present appellants' claims. Ms Smyth accepted in the light of *RR v SSWP* that if the Upper Tribunal were to hold that the new PPT was in breach of Art.14 in its application to children aged 3-16, it would have to disapply it, seemingly in substantial agreement with Mr Buley.

171. On considering the matter subsequently I became concerned that the appropriate remedy might not be as suggested to me by, as it appeared, both counsel and that if Ms Smyth's position was to be understood as a concession it may have been not appropriately made. I invited written submissions directed to my provisional view that, in the event that I were to find there was a breach of Art.14 in this case, what I should disapply should be reg 4(3)(c) of the Amendment Regulations, thus leaving extant the 26/52 week old PPT and that such a position appeared compatible with *RR.*

172. Section 6 of the Human Rights Act provides so far as relevant:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
> …"

173. In *RR* Baroness Hale, observed (at 27) that

> "There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear."

Whilst she accepted (at [30]) that

> "There may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision."

she was able to point to a significant number of cases in which statutory schemes could be applied, without the respective offending provisions.

174. The question appeared to me to be whether, as counsel had previously submitted, I should disapply the relevant legislation in the form in which it now

stands, or whether I should disapply the amending legislation which had brought it to that state. In my Directions I observed that the challenge in this case was specifically to the legality of the new PPT (see opening of Mr Buley's skeleton argument.) As regards substance, the appellants' case relied in substantial part on the length of the period of the new PPT (skeleton argument para 107) and on the adverse impact on the appellants and their families over that period (para 109). As regards procedure, Mr Buley placed substantial reliance on the alleged breach of the UNCRC through failure to address the position of children when enacting the new PPT (para 92). Those submissions are not directed to the previous 26/52 week PPT. I expressed doubt – given that it was not what was in issue in the case - that it was an answer to say, as had Mr Buley, that while the respondent might conceivably have been able to justify the shorter period, she had not attempted to do so.

175. Ms Smyth, in response, made some general, if uncontroversial preliminary points, which I consider are sufficiently addressed by this decision and so I do not dwell on them. She then sought to make brief observations going to the substance of the Art.14 challenge, which was not what had been directed and I do not take them into account. On turning to remedy, she indicated that:

> "[The respondent] does not accept that *RR* permits the Tribunal to "wind back" and disapply the amending legislation, with the result that the old PPT applies. That would not address the difference in treatment complained of, to which any remedy must be directed, and it would also be an impermissible legislative exercise by the Tribunal.
>
> On reflection, [the respondent] also does not accept that the Tribunal can do what the appellants invite it to do, which is to disapply the PPT altogether. That goes further than the appellants' own case as the Tribunal points out in its directions. Further, and crucially, the Tribunal could only properly do so if satisfied that the application of the old PPT would involve a difference in treatment which is manifestly without reasonable foundation. As the Tribunal points out, the appellants do not suggest that this is the case, and any submission to that effect would clearly be wrong.
>
> It follows that, if contrary to [the respondent's] substantive submissions, the Tribunal decides that there is a breach of Article 14 ECHR, it cannot award benefit by way of remedy."

176. She submits that *RR* holds that a court can only "level up", to address what it has found to be an unjustified difference in treatment between the two comparator groups relied upon. She submits that to disapply the new PPT, leaving the old PPT to apply, would not level up the two groups of comparator children. As to why it would be an "impermissible legislative exercise", she submits that, as demonstrated by the consultation documents, there were a number of matters which led the Government to conclude that the old PPT was not fit for purpose and there were different ways in which a reasonable legislature might have chosen to address them. In her submission

> "Applying a revoked legislative measure to address such differential treatment would involve the Tribunal making its own policy choice as to how to address that differential treatment, rather than simply disapplying an offending provision of secondary legislation (which is all that *RR* permits)."

177. For the appellants, Mr Buley submits that it would not necessarily be incompatible with *RR* to disapply reg.4(3)(c) of the Amendment Regulations. He submits, not that the Upper Tribunal is bound by *RR* to go further and disapply the PPT in its entirety, but that it is appropriate to do so. He accepts that whether to do so will depend on my reasons for finding a breach of Art. 14 and the extent to which they apply to the old PPT as well as to the new PPT. He accepts that much of his case on Art. 14 relates to the new PPT specifically. It would be open to me to conclude that the new PPT is in breach of Art.14 but that the old PPT is not, or that I am not in a position to say, and in such circumstances to disapply reg 4(3)(c) of the Amendment Regulations so as to award benefit after a 26 week period.

178. Mr Buley does however invite me to go further, submitting that the respondent has failed to explain why the difference in treatment is needed at all and that the consequences are harsh; the Upper Tribunal should not assume that a justification exists where the respondent has not identified it.

179. He submits that Ms Smyth's submission goes beyond what was directed; as will be apparent above, I agree and do not dwell on this. He also criticises the late withdrawal of a concession made as long ago as 24 December 2019. Adjudication on social security benefits is not adversarial litigation and I prefer to focus on the issues.

180. He then submits that the respondent's submission is based on a misunderstanding of *RR*. After recalling what *RR* mandates, Mr Buley differentiates it from the Upper Tribunal's *Foster* jurisdiction. It follows from that, he submits, that the Upper Tribunal need not concern itself with issues such as whether the secondary legislation is generally unlawful or ultra vires, issues of severability or whether a provision which has been repealed can be reinstated. All that is required by s.6 is to act in a way which prevents the breach.

181. As will be apparent from [175] above, the case was put to me on the basis of a challenge to the new PPT, not to the old PPT. My reasoning between [130] and [158] is based on the justification advanced for, and the impact of the new PPT. I simply cannot say what the position would be in relation to the old PPT. The respondent did not justify it, but that was because the case did not require her to attempt to do so. As that is the basis for my conclusions, it follows – as Mr Buley in his written submission accepts - that to disapply the PPT in its entirety would be more than is required to remedy the discrimination which I find to have occurred. On the basis of the premise of my substantive conclusions, that much appears to be common ground.

182. What remains in dispute is whether I can disapply erg.4(3)(c) of the Amendment Regulations. Ms Smyth objects to this on the basis that the Upper Tribunal's duty is to level up in order to address what it has found to be an unjustified difference. But what I have found to be an unjustified difference is the extension from 26 weeks out of 52 to 104 weeks out of 156 of the period for which past presence is required. Levelling up to address that unjustified difference involves setting the requirement back at 26 weeks out of 52 and I reject Ms Smyth's unreasoned submission to the contrary.

183. I also reject the submission that to set the requirement back at 26 weeks out of 52 is impermissible legislating on the part of the Upper Tribunal. The Upper Tribunal is under a legal duty to disapply secondary legislation to the extent that it has found it to give rise to discrimination contrary to Art.14. That is precisely what disapplying, in the circumstances of these cases, the relevant part of the Amendment Regulations achieves. If there were, as Ms Smyth submits, other alternatives which the legislature might have explored in order to address the perceived problems with the old PPT, her complaint might have been justified if the Upper Tribunal had sought to substitute one of those alternatives. However, it has not. The present decision simply disapplies secondary legislation in these cases, to address the discrimination which it has found to have occurred. That is, or should be, an entirely uncontroversial proposition in the light of section 6 of the Human Rights Act.

184. I need not dwell on Mr Buley's position as to what *RR* mandates; my conclusion is not inconsistent with what he advances.

The Social Security (Claims and Payments) Regulations 1987/1968 ("the C&P Regulations")

185. Does this help the appellants? To answer this question requires an excursion into the byways of social security procedural law. The chronology in the two cases is as follows.

186. TS's family returned to the UK on 6 December 2016. The claim for DLA was made on 16 December. The decision refusing DLA was dated 13 March 2017. A 26 week period of residence would have been completed on 6 June 2017.

187. EK's family returned to the UK on 2 June 2017. The claim for DLA was made on 19 July 2017. The decision refusing DLA was dated 5 September 2017. A 26 week period would have been completed on 2 December 2017.

188. The general rule in s.8(2) of the Social Security Act 1998 is that:

> "(2) Where at any time a claim for a relevant benefit is decided by the Secretary of State—
> (a) the claim shall not be regarded as subsisting after that time; and

> (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time."

(DLA is a "relevant benefit" for this purpose).

At first sight, therefore, one would be tempted to conclude that the completion of a 26 week period of presence, which only occurred after the respondent's decision in both cases, was a "circumstance…not obtaining" at the time of those decisions.

189. However, reg. 13A(1) of the C&P Regulations provides:

> "(1) Where, although a person does not satisfy the requirements for entitlement to disability living allowance on the date on which the claim is made, the Secretary of State is of the opinion that unless there is a change of circumstances he will satisfy those requirements for a period beginning on a day ("the relevant day") not more than 3 months after the date on which the claim is made, then the Secretary of State may award disability living allowance from the relevant day subject to the condition that the person satisfies the requirements for entitlement on the relevant day."

190. Coming cold to this provision, one might question how it can assist the appellants. The reference to "the date on which the claim was made" might be thought to be referring to when the claim was submitted to the DWP. On that view, the appellants would not satisfy the 26 week requirement until more than 3 months later, and the provision could not assist. Such a view would however overlook the existing line of authority on the interpretation of that provision.

191. In CSDLA/852/2002 the claimant had fractured his hip in an accident on 28 December 2001. DLA was claimed on 12 February 2002. By 28 March, the claimant would have satisfied the qualifying period of an initial 3 month disability (as to which see SSCBA ss 72(2) and 73(9)). The same provisions also required a 6 month prospective condition to be satisfied. The adverse decision was made on 15 May 2002. Mrs Commissioner Parker observed:

> "4. Regulation 13A thus permits an award of DLA where a claim is made no more than 3 months before the date from which the award takes effect, if the DM considers that by that date the claimant will satisfy the 3 months qualifying period for DLA and is then likely so to satisfy the qualifying conditions for a further 6 month period. The claim subsists until the matter is determined by the DM (s.8(2)(a) of the Social Security Act 1998).
>
> 5. A claim is to be treated as being continuously made until it is determined. Therefore, although Regulation 13A only benefits the claimant if the claim is made within the relevant 3 month period, it applies provided that the DLA conditions in question are satisfied by

> the date of the Secretary of State's decision under appeal and seemed likely to continue for both the 3 month qualifying period and the 6 month prospective period, so that the Secretary of State could then have made an advance award."

192. Whilst on the above chronology I can see that it was an integral part of the decision that a claim continued down to the date of decision, I am with respect having difficulty in seeing why the case required any reliance on reg.13A at all. The Commissioner reputed the above observations in CSDLA/553/2005, but that case does not assist me.

193. In CDLA/3071/2008, Upper Tribunal Judge Turnbull remarked that in the light of the two decisions of Mrs Commissioner Parker cited above

> "[T]he Secretary of State accepts, in my judgment rightly, that for this purpose at any rate the claim should be regarded as continuing down to the date when it was decided. The "date on which the claim is made" in reg.13A should therefore be regarded as meaning every date from that on which the claim was initially made down to the date of the decision on it."

It is not wholly clear to me whether the Secretary of State conceded both the point about the claim continuing down to the date of claim and that "the date on which the claim was made" in reg. 13A extended to every date down to the date of the decision on it. At any rate, if it was not such a concession, Judge Turnbull so held and the decision was not appealed against.

194. Although in *KH v SSWP* [2009] UKUT 54 Upper Tribunal Judge Jacobs had occasion to consider reg.13A, the issue was a somewhat different one: whether the date of claim for that purpose was the date on which a claimant requested a claim form or when the claimant submitted it (there is special provision in reg.6(8) of the C&P Regulations allowing the earlier date to be taken for certain purposes). *KH* was considered, in the materially similar context of reg.13, by Upper Tribunal Judge Mesher in *AW v SSWP (IB)* [2013] UKUT 20:

> "17. The decision of Judge Jacobs in *KH* in some ways raises more difficulties. On the one hand, he cited the decisions in CSDLA/852/2002, CSDLA/553/2005 and CDLA/3071/2008 without expressing any doubt as to the correctness of their reasoning, saying in paragraph 16 that his own reasoning was slightly different, but to the same effect. On the other hand, he had written in paragraph 12 that the "natural meaning of `the date on which the claim is made' in the context of regulation 13A is the date on which it is received", a sentence specifically relied on by Mr Cooper in support of his submission for the Secretary of State that in the present case an advance award of incapacity benefit could not have been made on 19 March 2003.

> 18. However, in *KH* the claimant satisfied all the conditions of entitlement to disability living allowance (DLA) within three months after the date on which her claim was received. The issue to be determined was whether the making of an advance award was ruled out because the gap between her requesting a DLA claim pack and the date of satisfying all the conditions of entitlement was more than three months and regulation 6(8) of the Claims and Payments Regulations provided that, if the claim form was returned within the time (normally six weeks) allowed, the date on which the claim was made was to be the date on which the request for the form was received. Judge Jacobs held that, despite its wording, regulation 6(8) was in substance a deeming provision and not to be applied more widely than its purpose required, so that in the context of regulation 13A the date of claim was to be the date of receipt of the claim. But the choice being expressed there was only between the date of the request for the claim form and the date of receipt of the completed claim form. Since latter date was within three months of the date on which the advance award would take effect, there was no need to consider whether the claim was also to be treated as made on every day down to the date of the decision on the claim. In the light of Judge Jacobs' later endorsement of the reasoning in the earlier decisions, nothing elsewhere in his decision, including the sentence specifically relied on by Mr Cooper, is to be taken as undermining the conclusions that follow from that reasoning. It is not so much that his reasoning was different, as he expressed it in paragraph 16 of the decision, as that his reasoning about the interpretation of regulations 6(8) and 13A made it unnecessary to apply the reasoning in the earlier cases.
>
> 19. Accordingly, the weight of the previous authority seems to me firmly in favour of the conclusion that on 19 March 2003 the Secretary of State had the power under regulation 13(1) of the Claims and Payments Regulations to make an advance award of incapacity benefit with effect from 8 June 2003. Further, that seems to me a conclusion that has many practical advantages. If, in circumstances like those as at 19 March 2003 in the present case, the Secretary of State had no option but to disallow the claim, but be in a position where on a further claim made on the same day an advance award could be made, that would seem to require a useless complication of procedure and of communication to the claimant. If an advance award could be considered on a further claim providing no additional evidence, why should it not be considered when the decision is given on the initial claim? I do not have to decide the question of law definitively. It is enough for present purposes that it is not the case that the only possible conclusion is that the Secretary of State had no power to make an advance award under regulation 13(1) on 19 March 2003.

195. I respectfuly agree with Judge Mesher's analysis of *KH*. I accept that a claim continues until decided but I do have reservations - at least to the extent of whether it formed part of the ratio in CSDLA/852/2002 - that "the date on which the claim is made" in reg 13A could be applied to every date down to

the date of decision and I acknowledge that there may be some force in Judge Jacobs's remarks in *KN*, quoted in para 17 of Judge Mesher's decision concerning the natural meaning of the words in inverted commas. However, it does form part of the ratio in CDLA/3071/2008. Judge Mesher considered that the weight of authority was firmly in favour of such a conclusion. Though for my part I would not say "firmly", I otherwise agree.

196. The relevance of the issue was only identified by a footnote in Mr Buley's second written submissions post-hearing. That should not be understood as a criticism but it does mean that I have not received submissions on the robustness or otherwise of the line of authority and it is not appropriate to prolong the parties' wait for this decision further. It appears that the respondent may have conceded its correctness in CDLA/3071/2008 and in any event has not appealed against other decisions which have purported to apply it. On a practical level, the reading is a beneficial one. In addition to the reasons advanced by Judge Mesher, it has the effect of maximising the practical utility of the advance award provisions, in circumstances when there may be a significant delay between the claim form being submitted and a decision being reached on the claim, while assessments are carried out, medical evidence obtained and so on. It is, moreover, appropriate - to the extent to which I properly can - to seek to provide an effective remedy for the breach of human rights which I have found to have occurred. As set out at [11], whilst I am not bound to follow the decisions of other single judges, as a single judge I would normally do so in the interests of comity and consistency and, for the reasons in this paragraph, I consider that it is appropriate to do so in this case, notwithstanding the modest reservations I have about the robustness of the line of authority. It follows therefore that the appellants are entitled to succeed in the terms set out at the head of this decision.

Concluding remarks

197. This case was listed for hearing in the early days of the Covid-19 lockdown. I considered that its complexity made it ill-suited to a remote hearing in the early days when everyone was having to get used to such hearings. The case was postponed for a couple of months and came to be heard at one of the earliest socially-distanced in-person hearings after these once again became possible. That required considerable efforts on the part of the court clerks and administrators, to whom I extend my thanks. I also express my appreciation to counsel for their submissions and to all who accommodated the various twists and turns in the hearing arrangements.

C.G.Ward
Judge of the Upper Tribunal
12 October 2020