Neutral Citation Number: [2015] EWCA Civ 1033

Case No: C1/2014/2640

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION,
ADMINISTRATIVE COURT IN BIRMINGHAM
MR JUSTICE HICKINBOTTOM
[2014] EWHC 2434 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2015

Before :

LORD JUSTICE PATTEN
LORD JUSTICE McCOMBE
and
LADY JUSTICE GLOSTER

- -

Between :

THE QUEEN (on the application of STEVEN SUMPTER)	**Appellant**
- and -	
SECRETARY OF STATE FOR WORKS AND PENSIONS	**Respondent**

- -
- -

Martin Westgate QC and Ben Chataway (instructed by Irwin Mitchell LLP) for the Appellant
Clive Sheldon QC and Nicholas Moss (instructed by Government Legal Department) for the Respondent

Hearing date : 14 and 15 July 2015

- -

Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. This is an appeal by Mr Steven Sumpter ("Mr Sumpter") from the order of 22 July 2014 of Hickinbottom J dismissing Mr Sumpter's application for judicial review against the Secretary of State for Work and Pensions ("the Respondent"). By the amended claim and supporting grounds Mr Sumpter claimed (so far as now relevant) (1) a declaration that the Social Security (Personal Independence Payment) Regulations 2013 were unlawful; (2) an order quashing the Secretary of State's decision of 21 October 2013 "refusing to amend the descriptors and points set listed in respect of Activity 12 in Part 3 of Schedule 1 of the Regulations"; (3) an order requiring the Respondent to "conduct a lawful consultation exercise and to make a further decision as to whether and how to amend the Regulations"; and (4) an order preventing the Respondent from serving written notification upon any person under regulation 3 of the Personal Independence Payment (Transitional Provisions) Regulations 2013, inviting such person to make a claim for Personal Independence Payment ("PIP") "until such time as lawful regulations for the assessment of [PIP] have been put in place". There was also, before the judge, a claim to a declaration that the Respondent had failed to comply with the public sector equality duty imposed by section 149 of the Equality Act 2010; that claim is no longer pursued. By the Appellant's Notice issued on 11 August 2014, pursuant to which permission to appeal was granted by Vos LJ on 12 January 2015, Mr Sumpter did not pursue the claim to an injunction mentioned in (4) above. However, on inquiry of counsel for Mr Sumpter (Mr Westgate QC) at the hearing of the appeal as to the nature of relief sought, if the appeal were successful, counsel produced a note indicating that, in principle, such an order was still being sought.

2. The thrust of the claim made before the judge challenges the lawfulness of the consultation process conducted by the Respondent, both before and after the making of the Regulations.

3. The background facts of the case are fully set out in the judge's judgment [2014] EWHC 2434 (Admin), which I gratefully adopt, and of which that which immediately follows, in this section and in section (B) of this judgment, is a summary.

4. The claim arose out of the decision by the Government to replace the benefit, called Disability Living Allowance ("DLA"), which was provided to certain disabled people, with PIP. DLA had been introduced in 1992 by the Social Security Contribution and Benefits Act 1992. It was a non-means-tested, non-contributory benefit for those who had personal care and/or mobility difficulties as a result of physical or mental disability. Pending full introduction of PIP, DLA continues to be paid to a number of existing claimants, including Mr Sumpter. It had two components – the care component and the mobility component. The care component was designed to help with the additional costs of personal care, such as shopping and preparing meals. The mobility component helped with the additional costs to a disabled person in getting around in the course of his or her daily life. There were three rates of care payment and two of mobility payment. In the latter case, there was the higher rate (stated by

the judge to be £56.75 per week) and the lower rate (so stated as £21.55 per week). The higher rate was awarded to those who were "virtually unable to walk" and it had come to be accepted (as we were informed by counsel, as a result of decisions before Commissioners and later in the Tribunals) that a claimant would usually satisfy this test if he or she was unable to walk more than 50 metres. Payment at this rate was sufficient to enable such a claimant to lease a "Motability" vehicle.

5. Mr Sumpter has disabilities which have hitherto entitled him to middle rate care component and higher rate mobility component payments under DLA. He is unable to walk more than 50 metres and he has a Motability vehicle. He is due to transfer from DLA to PIP in the near future.

6. The new benefit, PIP, is being phased in in stages and is due to be in full effect by 2017, with DLA being abolished for persons between the ages of 16 and 65 by that date. PIP is also made up of two components: the daily living component and the mobility component. This case is only concerned with the latter. This component, like the parallel components of DLA, has an enhanced rate and a standard rate. However, for the physically disabled (like Mr Sumpter), the criteria for payment of the enhanced rate impose a threshold condition that the claimant cannot walk more than 20 metres, rather than the 50 metre "rule of thumb" that had become the norm under DLA. While that "rule" was not (as such) statutory, it had become the understanding or lore in the field that 50 metres was the qualifying criterion. The judge noted that the letter awarding the benefit at enhanced rate to Mr Sumpter stated,

> "You can walk
>
> - less than 50 metres
> - slowly
> - in a poor manner
>
> You are unable or virtually unable to walk, so you are entitled to the higher rate of mobility."

7. It is also the case that the 50 metre threshold appears in other analogous statutory or official contexts, for example in guidance from the Department for Transport as to the desirable minimum intervals between seating facilities in pedestrian areas.

(B) Replacement of DLA by PIP, the process and the challenge to the process

8. The proposed change from DLA to PIP was announced in the first budget of the last government. There was no legal obligation on the Respondent to engage in consultation about the proposal at all, but he decided to do so. The consultation was carried out in a number of stages, which I shall summarise, again with gratitude to the fuller account set out in the judge's judgment. The broad policy was stated in the first consultation document of 6 December 2010 in these terms:

> "22. [PIP] will maintain the key principles of DLA, providing cash support to help overcome the barriers which prevent disabled people from participating fully in everyday life, but it

> will be delivered in a fairer, more consistent and sustainable manner. It is only right that support should be targeted at those disabled people who face the greatest challenges to leading independent lives. This reform will enable that support, along with a clearer, more straightforward assessment process."
>
> 23. "[DLA] has become confusing and complex. The rising caseload and expenditure is unsustainable, the benefit is not well understood and there is no process to check that awards remain correct. That is why the Government will reform DLA, to create a new benefit, [PIP], which is easier to understand, more efficient and will support disabled people who face the greatest challenges to remaining independent and leading full and active lives."

9. In paragraph 24 of his judgment, the judge summarised the expansion of these themes in the document. He referred to the Respondent's statements as to the perceived complexity of DLA, concerns for its sustainability, and the intention to focus resources on "those that need the greatest help to live independently". The judge referred to the two consultation questions posed at this stage which are pertinent for our purposes, namely:

> "**Question 6**: How do we prioritise support to those people least able to live full and active lives? Which activities are most essential for everyday life?
>
> **Question 7**: How can we best ensure that the new assessment appropriately takes account of variable and fluctuating conditions?"

In paragraph 14 of Chapter 2 of the document it was said that,

> "The definitions currently used are subjective and reflect views of disability from the 1990s, not the modern day. For example, 'mobility' as currently defined concentrates on an individual's ability to walk, not their ability to get around more generally".

10. The consultation between December 2010 and February 2011 yielded 5,500 responses. An Assessment Development Group was set up to advise the Respondent on the development of assessment for PIP, including as to the activities and descriptors to be adopted and upon the impact of health conditions and impairments. This group included representatives from disability organisations.

11. The response to the consultation stated that the Government was committed to reducing expenditure on payment of the benefit to adults to 2009-10 levels, i.e. to £11.8 billion. It proposed that all awards would be subject to periodic reviews.

12. In relation to the two rates of mobility component, the response said this:

> "28. At present, the higher and lower rates of the DLA mobility component are based on different criteria. With the exception of some automatic entitlements, higher rate mobility is generally awarded for physical health conditions or impairments, whereas lower rate mobility is linked to the need for supervision or guidance when outdoors. This means that there is some overlap between lower rate mobility and the care component, as the care component is largely based on the need for supervision or attention. In the new assessment, there will be separate criteria for each component, based on an individual's ability to carry out certain everyday activities. These criteria will determine entitlement to both the standard and enhanced rates of the component, depending on the impact of a health condition or impairment."

Dealing with question 6 in the consultation it was said that, as it was not practical to consider all everyday activities, it was proposed to focus on key activities. For mobility, the activities were "Planning and following a journey" and "Moving around". Responses to this proposal were invited prior to publication of more detailed assessment criteria. The intention to consult further was indicated.

13. Working draft regulations, with supporting technical notes, entitled "Personal Independence Payment: Initial Draft Assessment Criteria", were published on 6 May 2011 to assist the Parliamentary debate upon the enabling Bill. There was a scale of activities and descriptors against which, it was proposed, claimants would be "scored". The draft descriptors for the "Moving around" activity were as follows:

Descriptors	*Points*
a. Can move at least 200 metres unaided or with the use of a manual aid.	
b. Can move at least 50 metres but not more than 200 metres either unaided or with the use of a manual aid.	
c. Can move up to 50 metres unaided.	
d. Can move up to 50 metres only with the use of a manual aid.	
e. Can move up to 50 metres only with the use of a manual wheelchair propelled by the claimant.	
f. Can move up to 50 metres only with the use of an assisted aid.	
g. Cannot either – (i) move around at all or (ii) transfer from one seated position to an adjacent one unaided.	

The points to be "awarded" were not published at this stage, but the Executive Summary included this:

> "1.4 We have… sought to develop an assessment which considers and reflects the impact of a broader range of impairment types than [DLA]. We believe our proposed

> assessment will take better account of sensory impairments, developmental disorders, learning disabilities, cognitive impairments and mental health conditions.
>
> 1.5 … These regulations will be subject to further developmental work and refinement and are not intended to be a final version…".

In paragraph 35 of his judgment the judge quotes further from the document expanding upon the policy objective of bringing individuals with non-physical disabilities more fully into the mobility component and, in paragraph 36, he sets out the notes relating to each of the "Moving around descriptors". These showed that the criteria by which claims were to be differentiated were directed to aids and appliances used, in addition to ability to cover particular distances.

14. Informal consultation on this draft took place between May and August 2011, resulting in responses from 78 organisations and 98 individuals. In addition a group of existing DLA claimants were chosen as test subjects and about 900 cases were considered in this process to test the likely impact of the initial draft criteria on the benefit caseload. The head of the Assessment Development Group gave evidence that the criteria proved at that stage not to be valid or reliable and the likely impact was not, therefore, published. As a result a second draft was produced and published on 14 November 2011. These criteria were re-tested in an assessment of the 900 cases and were found to be more reliable. The "Moving around" descriptors were in these terms:

Descriptors	*Points*
a. Can move at least 200 metres either – (i) unaided; or (ii) using an aid or appliance, other than a wheelchair or a motorised device.	0
b. Can move at least 50 metres but not more than 200 metres either – (i) unaided; or (ii) using an aid or appliance, other than a wheelchair or a motorised device.	4
c. Can move up to 50 metres unaided but no further.	8
d. Cannot move up to 50 metres without using an aid or appliance, other than a wheelchair or a motorised device.	10
e. Cannot move up to 50 metres without using a wheelchair propelled by the claimant.	12
f. Cannot move up to 50 metres without using a wheelchair propelled by another person or a motorised device.	15
g. Cannot either – (i) move around at all; or (ii) transfer unaided from one seated position to another adjacent seated position	15

15. While retaining the distances of 200 m and 50 m, heads D, E and F said, "Cannot move up to 50 metres without…", rather than the previous, "Can move up to 50 metres with…" The focus on aids and appliances was continued and paragraph 4.31 of the document stated:

> "42. The descriptors continue to differentiate between the use of aids such as walking sticks and crutches; self-propelled manual wheelchairs; and wheelchairs propelled by others or a motorised device. This ensures that the extra costs associated with some mobility aids are reflected."

The points appeared for the first time but no "points scores" were identified for qualification for the two rates of mobility component.

16. On 16 January 2012 the Respondent launched a formal consultation. The document was entitled: "Personal Independence Payment: Assessment Thresholds and Consultation". The criteria remained as per the second draft summarised above, but this time the proposed thresholds for entitlement were announced as 8 points for the standard rate and 12 points for the enhanced rate. Thus, descriptors E, F, G were proposed as attracting the enhanced rate and C and D would attract the standard rate. Refinement of the assessment criteria was said to be envisaged after responses had been received and considered. The need to use aids and appliances as a proxy for disability levels and additional costs was re-stated. Paragraphs 3.6 to 3.8 of the document put it this way:

> "3.6 For the Mobility component, the proposed thresholds reflect and differentiate between the extra costs incurred by an individual requiring support to get around. They also ensure that individuals whose ability to get around is severely impacted by impairments affecting either physical or non-physical ability can receive the Mobility component at the enhanced rate – reflecting our key principle of developing an assessment which considers the impact of impairments equally, regardless of their nature.
>
> 3.7 For [the Moving around activity], individuals who use aids and appliances to move very short distances can receive the standard rate, reflecting the extra costs incurred, while those who need wheelchair to do so will receive the enhanced rate, reflecting the additional extra costs, barriers and overall level of need which often accompany wheelchair use…
>
> 3.8 We recognise that there are likely to be strong views on the entitlement thresholds and how these relate to the descriptor weightings previously proposed. We have now begun a further consultation on the second draft of the assessment criteria, including the weightings and entitlement thresholds, and would welcome any views that people and organisations have."

In addition seven hypothetical case studies or worked examples were supplied, which are quoted in full in paragraph 48 of the judge's judgment. The consultation questions included the following:

> **"Q3 What are your views on the latest draft Mobility activities?**
>
> In the explanatory note we set out revised proposals for the activities relating to entitlement to the Mobility component…. Are the changes an improvement? Do you think we need to make any further changes?
>
> **Q4 What are your views on the weightings and entitlement thresholds for the Mobility activities?**
>
> In the explanatory note we set out proposals for the weightings of descriptors in the activities relating to entitlement to the Mobility component…. In this document we have set out the entitlement thresholds for the benefit. How well do you think they work to distinguish between differing levels of ability in each activity? How well do you think they work to prioritise individuals on the basis of their overall need? Do you think we need to make any changes to weightings or thresholds?"

17. The consultation document provided certain projected and comparative "caseloads" under DLA higher rate and PIP enhanced rate. For DLA the figure for the year 2015-6 was 1,040,000; for PIP it was 760,000, a fall of 280,000. The reasons for the projected fall were not given. The judge put it this way, in paragraph 50 of the judgment:

> "50. ... In particular, the document did not give any breakdown as to how much of the likely reduction was attributable to the more rigorous assessment framework for PIP and/or the arrangements for the reviews of entitlement; nor did it indicate how many claimants were projected to qualify for PIP enhanced rate mobility as falling within the Moving around descriptor on the basis of physical disability, and how many were projected to qualify under the Planning and following a journey descriptor on the basis of non-physical disability. It simply said (at paragraph 4.17):
>
> Two thirds of the current [DLA] caseload is made up of physical function conditions and one third mental function conditions. The 1.7m modelled [PIP] eligible caseload has a similar split between physical and mental function conditions."

18. A supplementary consultation document was issued in March 2012, the details of which it is not necessary to amplify. The Impact and Equality Impact Assessment published in May 2012 indicated that about 500,000 fewer were expected to be in receipt of PIP by 2015-6 compared with the number that it was thought would have

been entitled to DLA, with a consequent yearly saving of £2.24 billion. No further breakdown was given as to the impact on those who suffered mobility problems owing to physical disability. The Equality Impact Assessment included this, at paragraph 26,

> "26. Replacing [DLA] with a new benefit that is focused on supporting those individuals with the greatest barriers to participation provides an opportunity to promote equality of opportunity for disabled people least likely to live full and active lives. However, as the benefit becomes better targeted on those with the greatest needs it is likely that some disabled people, who may have self-assessed as needing support, but who have lesser barriers to participation, will receive reduced support.
>
> 27. Where these individuals have a carer in receipt of Carer's Allowance, this will also result in some loss of benefit due to the knock-on effects of reform. This would appear to be more likely to have an effect on disabled people, as carers are more likely to be disabled than the population in general. ...
>
> 30. The new benefit will be fairer, and may help to improve understanding that support is available both in and out of work. More regular reviews and a more objective, rather than self, assessment may mean reduced support for some people who have lesser or reduced barriers to participation. This is entirely consistent with the policy but it is possible that this group are more likely to be adversely affected. The knock-on effects of the policy affect disabled people as many of those who identify as disabled are also carers."

19. There were 1,100 responses to this further consultation and the Government response was published on 13 December 2012. On the same day the Respondent laid the Regulations in draft before Parliament. The response indicated an important change to the descriptors for the "Moving around" activity. This was said:

> "1.3 … We have re-written the Moving around activity to make it easier to understand and apply. The feedback we received from most respondents showed this activity was not clear. It was commonly believed that only people who use wheelchairs could qualify for the enhanced rate of the Mobility component from this activity, despite this not being our intention.
>
> …
>
> 6.21 A considerable number of comments reflected significant concern that the enhanced rate of the mobility component would only be available to individuals who use wheelchairs. Concern was raised that individuals who do not use wheelchairs but face considerable barriers to physical mobility

> – such as those faced by many bilateral amputees – might miss out on the component. This has never been the intention of this activity. Some of the descriptors referred to wheelchairs but this was to establish whether an individual might need a wheelchair to move around in a reliable way, not whether they currently have or use one. If they were assessed as needing a wheelchair to be able to move up to 50 metres in a reliable way, they could be awarded the enhanced rate of the benefit, regardless of whether they actually have a wheelchair. For example, an individual who uses a frame might be able to walk 50 metres but in a way that is unsafe or takes a very long time. In such circumstances they might be assessed as needing a wheelchair to move this distance reliably. However, the activity was clearly confusing and concerning to people and as such we have re-written it to make the policy intent clearer.
>
> 6.22 The activity has been refocused to look at an individual's ability to 'stand and then move' a certain distance. In this way the activity continues to concentrate solely on an individual's physical ability to move around.…
>
> 6.23 The revised criteria do not make any reference to wheelchairs, removing the confusion this caused in the second draft. We believe that the amended criteria – while not changing the policy intent – are clearer to apply and ensure fair outcomes to individuals who face physical barriers to mobility.
>
> ….
>
> 6.27 Respondents pointed out that, due to the fact the descriptors referenced distances 'up to 50 metres', individuals who can move only very small distances, but who do not require a wheelchair, would not qualify for the enhanced rate of the mobility component, despite having significant mobility restrictions. In the revised criteria we have changed the descriptors to make clear that those individuals who do not need a wheelchair but can only move short distances of less than 20 metres will qualify for the enhanced rate."

The table setting out the descriptors was this:

Activity	*Descriptors*	*Points*
11. Planning and following journeys.	a. Can plan and follow the route of a journey unaided.	0
	b. Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant.	4

	c. Cannot plan the route of a journey.	8
	d. Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.	10
	e. Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant.	10
	f. Cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid.	12
12. Moving around.	a. Can stand and then move more than 200 metres, either aided or unaided.	0
	b. Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided	4
	c. Can stand and then move unaided more than 20 metres but no more than 50 metres.	8
	d. Can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres.	10
	e. Can stand and then move more than 1 metre but no more than 20 metres, either aided or unaided.	12
	f. Cannot, either aided or unaided, – (i) stand; or (ii) move more than 1 metre.	12

The notes on the descriptors stated (inter alia) this:

> *"20 metres is considered to be the distance that a claimant is required to be able to walk in order to achieve a basic level of independence in the home such as the ability to move between rooms.*
>
> *50 metres is considered to be the distance that a claimant is required to be able to walk in order to achieve a basic level of independence such as the ability to get from a car park to a supermarket.*
>
> *50 to 200 metres is considered to be the distance that a claimant is required to be able to walk in order to achieve a higher level of independence such as the ability to get round a small supermarket."*

20. The projections for the number of expected claimants for PIP as at 2018 were given in the response as follows. It was thought that by 2018 602,000 would be likely to be entitled to enhanced rate PIP, as compared to an estimated 1,029,000 who would have been entitled to higher rate mobility under DLA. No breakdown was given of the number of physically disabled claimants who would no longer be entitled. The descriptors were described as final, but the requirement of Parliamentary approval through the affirmative resolution procedure was mentioned. Debates took place in both Houses in February 2013 and the Regulations were approved. They were made on 15 February, coming into force on 8 April 2013.

21. It is not necessary to set out the precise terms of the Regulations. It suffices to say that the descriptors are in identical form to those contained in the response to consultation document, already referred to, and a score of 8 points entitles a claimant to standard rate of the mobility component of PIP and 12 points entitles him or her to the enhanced rate.

22. It is, I think fair to say, that the first mention of the precise threshold distance of 20 metres, which appeared for the first time as descriptors c, d and e under Activity 12 in the 2012 response document (paragraph 19 above), "put the cat amongst the pigeons". Along with what the judge described as "the vast majority of consultees", Mr Sumpter had understood that where earlier versions of descriptors D, E and F said, "Cannot move *up to 50 metres* without using an aid or appliance, other than a wheelchair or motorised device…", it meant "Cannot walk *50 metres* without using an aid or appliance…" etc. Thus, all claimants, including those in descriptor G, who could not walk 50 metres without resort to a wheelchair would be entitled to the enhanced rate mobility component of PIP.

23. The Respondent has always contended that Mr Sumpter's understanding (and that of other consultees who understood the same) did not represent what the Respondent had either intended or said. The intention had been (as quoted by the judge) that, "…a claimant would only be entitled to enhanced rate mobility if he or she could not move at all, or could only move as far as the de minimis distance, before having to resort to a wheelchair…" (See paragraph 102 of the judgment, last sentence).

24. The arguments of the Respondent as to the true construction of the consultation descriptors as a matter of language are set out in paragraphs 102 to 103 of the judge's judgment. The debate about it is, in my judgment, now arid and unhelpful in the light of future developments. The judge accepted the evidence on behalf of the Respondent that his intention had been as he maintained. The judge also recited that the evidence showed that the vast majority of respondents to the consultation (mainly people with disabilities and organisations interested in disability issues) construed the draft criteria as imposing a 50 metre threshold on enhanced rate mobility, i.e. if an individual could not walk 50 metres without a wheelchair, then he or she would be entitled to the enhanced rate mobility component of PIP.

25. The judge took the view, in my judgment rightly, that that understanding on the part of consultees was at least arguably reasonable. The judge sets out his reasons for taking that view in paragraph 105 of the judgment and I agree with him entirely. I share the judge's view that the formula originally adopted in descriptors D-F was "mind-bogglingly opaque". I would add that it was particularly so in view of the fact that the 50 metre threshold had become a widely understood criterion under DLA and,

if the Respondent was going to change it, he should obviously have said so far more clearly. The judge accepted that the 2012 consultation criteria were set out in good faith but he found (in paragraph 106), and again I agree, those criteria were "at best, convoluted, inherently unclear, ambiguous and confusing. No construction of them allows for full coherence". He continued,

> "106. ... In all the circumstances – but particularly in the light of the historic 50m threshold in DLA and the use of 50m in these criteria – respondents wrongly but, in my view, understandably and reasonably considered that they included a 50m threshold, similar to the one that in practice applied to DLA higher rate mobility, such that if a claimant could walk less than 50m, unaided or with manual aids or appliances only, then that claimant would be entitled to PIP enhanced rate."

He followed that passage a little later with this:

> "107. ... due to the lack of clarity in the 2012 Consultation as I have found it to have been, consultees reasonably considered that earlier proposal to include a 50m threshold. It seems to me that a reduction in threshold from 50m to 20m would at least arguably be a radical change. In any event, in my view a change from the wheelchair requirement (based upon the assumed additional costs involved in wheelchair use) to a 20m threshold condition (based upon an assumed ability to get round the home, a completely new basis for a criterion, to that time the focus being exclusively on the ability to move out of doors) is more than arguably a radical change in proposal such as to make a consultation process, without an opportunity for those affected and interested to make comments upon it, unfair."

26. Before the judge, the Respondent was at pains to point out that in spite of the arguments as to the lack of clarity in the consultation process over the 20 metre issue, full Parliamentary debate ensued and in the meantime the Respondent received a large amount of correspondence concerning that matter. One organisation active in this field also published a document setting out its opposition to the 20 metre criterion. Thus, it was argued, there was adequate opportunity for interested parties to make further representations on the point after the formal consultation process had closed, but before the Regulations were made.

27. As for the process to this stage, the judge said this:

> "111. For those reasons, had it been necessary for me to have determined whether the consultation process would have been fair if it had stopped at December 2012 or February 2013, the question would have been difficult and it should not be assumed that I would have found it to have been fair and lawful. Indeed, I have the gravest doubt as to whether I would have found it to be so. "

28. It was on 28 March 2013 that these proceedings for judicial review were issued, relying upon the grounds that the 2012 consultation was flawed, in particular because of the lack of proper opportunity for consultees to comment upon the 20 metre threshold criterion and upon an alleged failure to comply with the public sector equality duty. Service was acknowledged, with summary grounds of resistance, on 18 April 2013. The claimant responded to these grounds by a response document dated 25 April 2003. Kenneth Parker J gave permission to apply for review by order dated 2 May 2013.

29. On 17 June 2013, the Respondent announced his intention to conduct a further consultation and a week later (24 June) a further consultation document (entitled "Consultation on the PIP assessment *Moving around* activity") was published. The consultation period was six weeks, closing on 5 August 2013.

30. On 28 June 2013 the Respondent lodged a consent application for a stay of the proceedings pending the conduct of the further consultation exercise. This was ordered by Hickinbottom J on 3 July 2013.

31. In the new consultation document, the section entitled "Background" included this at paragraph 1.3 and 1.4:

> "We have received feedback from some disabled people and their organisations saying that they are unhappy with the changes that were made to the assessment criteria for the *Moving around* activity as a result of the consultation and want a further opportunity to have their views considered."

The Respondent's thinking in launching this additional consultation was set out in paragraphs 2.2 to 2.4 in these terms:

> "2.2 This means that anyone who cannot stand and then walk 50 metres safely, to an acceptable standard, repeatedly and in a reasonable time period automatically receives at least the standard rate of the Mobility component of PIP. People who cannot stand and then walk more than 20 metres safely, to an acceptable standard, repeatedly and in a reasonable time period receive the enhanced rate. People can also receive the standard or enhanced rate by adding together points from the *Moving around* activity and the *Planning and following journeys* activity.
>
> 2.3 Our intention has always been to focus the enhanced rate on those with the greatest barriers to mobility. In early drafts of the assessment we considered both how far a person could move and whether they needed an aid, appliance or a wheelchair to do so. However, the consultation responses we received indicated that this could be confusing if a person did not currently use an aid, appliance or wheelchair. The criteria set out in the current Regulations focus mainly on distance and 20 metres is used as a benchmark distance for determining whether someone is entitled to the enhanced or standard rate for

> people who do not also score points on the *Planning and following journeys* activity.
>
> 2.4 The benchmark of 20 metres was intended to allow us to distinguish between those who are effectively unable to get around due to physical mobility – for example, people who are only able to move between rooms in their house but go no further – and those who have some, albeit limited, mobility. We thought that these criteria could be applied consistently and would make it easy to differentiate between people who should be receiving the enhanced and standard rate…."

32. The question on which consultation was sought was: "What are your views on the *Moving around* activity within the current PIP assessment criteria?" Expanding on that it was stated that the department would like to know what consultees thought would be the impact of the then current criteria and whether they thought any changes were needed or whether assessment of physical mobility in a different way altogether was needed. In paragraph 3.3, it was stated:

> "We are not consulting on the *Planning and following journeys* activity or any other aspect of the assessment."

At paragraph 3.4 and 3.5 there was this:

> "3.4 At present, for the reasons set out in paragraph 2.4 above, our preferred option is to retain the version of the assessment criteria for the *Moving around* activity set out in the current Regulations. However, we are carrying out this consultation in a fully open-minded manner and will carefully examine all the evidence provided. If we consider that we need to make changes to the *Moving around* activity once we have analysed all the representations received, we will do so.
>
> 3.5 In reaching our decision we will consider how any potential changes might affect individuals and the numbers of people likely to receive the benefit. We will also consider the potential impact of any changes on PIP and overall welfare expenditure and whether this is affordable and sustainable. We will publish a report summarising the responses received and how we reached our conclusions, once we have completed the consultation."

33. On 3 July 2013, further figures were published on projected recipients of 8, 10 or 12 points under the "Moving around" activity. Of a projected caseload of 682,000, it was anticipated that 120,000 would receive enhanced rate and 137,000 standard rate.

34. The judge records that 1,145 responses were received to the consultation and that the four main themes of the responses were these:

> "i) there is no evidence-based rationale behind 20 metres;

> ii) the current criteria are excessively tough with negative consequences on the daily lives of individuals with significant physical impairment;
>
> iii) the consequent increased costs of other public services as a result of lost mobility will outweigh the savings achieved through PIP; and
>
> iv) the reliability criteria will not be delivered appropriately or correctly, undermining assessment (paragraph 2)."

Various alternative criteria were proposed, including a return to the 50 metre threshold that had become common under DLA. Ministers received advice upon this further consultation exercise and the judge sets out its core at paragraph 79 of the judgment. Paragraphs 63 to 64 of the advice were in these terms:

> "63. PIP has been developed with a recognition that to achieve these goals will result in some reprioritisation and therefore losers as well as gainers and without doubt the criteria for assessing physical mobility in PIP are tighter than those in DLA. The first figures on the likely impact of PIP on the benefit caseload in January 2012, since updated, made clear the scale of the impact in relation to the Mobility component. It has become increasingly apparent, however, that while they had seen the numbers, many people only fully appreciated the reality of the impact on DLA recipients with physical impairments once the current criteria, with the 20 metre distance, were published.
>
> 64. The responses to the consultation, and in particular the many case studies and examples provided, highlight the potential impact of the loss of benefit on disabled people. While we think that in many cases these examples represent a worst-case scenario – often not considering alternative forms of support available and in particular not taking into account the effect of the reliability criteria – there is no doubt that for those individuals who lose benefit there will be consequences, financial and potentially more widely. As above, this was recognised from the outset. In developing the PIP assessment we were aware that the vast majority of recipients of DLA were individuals with genuine health conditions and disabilities and genuine need, and that removing or reducing that benefit may affect their daily lives. However, we believe that these impacts can be justified as being a logical result of distributing limited resources in a different and more sustainable way, provided we have analysed the potential impact and explored the possibility of mitigating that impact, and provided the method of determining who receives the benefit is fair"

At the outset of the advice (paragraph 9), Ministers were told:

> "9. Should you wish to change 20m to 50m, this would create a DEL [Departmental Expenditure Limit] cost of £3m and reduce scored PIP AME [Annually Managed Expenditure] savings by £936m by 2018. HMT [HM Treasury] are highly likely to ask DWP [the Department for Work and Pension] to fund both from existing budgets."

35. In responding to the fresh consultation on 21 October 2013, the Respondent indicated that he had decided to make no change to the relevant parts of the Regulations. Summarising the advice he had received, he said this:

> "4.2 Throughout the development of PIP, the Government recognised that achieving these goals would result in some reprioritisation of expenditure and therefore some people would lose and some gain.
>
> 4.3 When developing the Mobility criteria, we were aware that although DLA includes deeming provisions which award the higher rate Mobility component to claimants who are deaf blind, severely visually impaired and severely mentally impaired, the higher rate Mobility component is predominantly awarded to claimants with physical mobility difficulties only. The DLA lower rate Mobility component has been awarded to those individuals who require guidance or supervision outdoors. This means that many claimants with mental, intellectual and cognitive impairments do not receive DLA higher rate Mobility, despite facing significant barriers to mobility and therefore to independent living. The PIP Mobility component has been designed to reflect the impact of impairments on an individual's ability to get around, regardless of whether it has a physical or non-physical root cause. The Government was aware that this approach would mean a reprioritisation of finite resources and those individuals with a physical health condition or impairment would be more likely to see a reduction in the mobility support they receive relative to those with non-physical impairments requiring support for moving around."

36. On 13 November 2013, Mr Sumpter's solicitors gave notice of his intention to re-instate the proceedings and to pursue the challenge to the lawfulness of the Regulations and to challenge the further decision not to amend them. The grounds of challenge raised, as advanced before the judge, were that (1) the consultation process was unfair and thus unlawful because consultees had not had a proper opportunity to comment upon the 20 metre walking threshold for PIP enhanced rate mobility; (2) the consultation was unfair and thus unlawful because consultees were not provided with sufficient information, in particular on the impact of the proposals on the physically disabled, to enable intelligent response; (3) breach of the public sector equality duty.

37. The judge rejected each of these grounds of challenge.

(C) The Judge's Decision

38. The judge set out comprehensively what he described as "uncontroversial" propositions of law. I agree that those propositions were and are uncontroversial.

39. On the first ground of claim, I have already recorded what the judge had to say about the criticisms, on Mr Sumpter's behalf, of the 2012 consultation, in particular as to the emergence, at a very late stage, of the 20 metre threshold criterion. However, he went on to consider the impact of the later 2013 consultation and its outcome. As appears from paragraph 113 of the judgment, the thrust of argument before the judge was that by the time the regulations had been made in March 2013, the matter was no longer at the formative stage; the previous decision imposed in practice an insurmountable hurdle or, putting it another way, "the dice were unfairly loaded" against change being made. It was argued that the limited consultation conducted in 2013 as to the "Moving around" activity closed off one of the principal ways in which it would have been open to accommodate a revised mobility benchmark, namely a possible adjustment to the "Planning and following a journey" descriptor.

40. In essence, the judge rejected this ground of challenge to the consultation process on the facts derived from the written evidence before him. He quoted the important parts of the witness statement of Dr James Bolton, the Deputy Chief Medical Adviser and Director of Health and Well-Being/Health Assessments in the Respondent's department. The extracts are quoted at paragraphs 115 of the judgment. I confine myself to repeating two short extracts from that evidence. At paragraphs 54-55 of his statement, Dr Bolton said this:

> "54. After careful consideration, and having due regard to the obligations of the Public Sector Equality Duty, noting the impact of the current PIP mobility criteria on the groups with protected characteristics under the Public Sector Equality Duty; as well as the Human Rights Act and the UN Convention on the Rights of the Disabled People, the Minister decided not to make changes to the assessment criteria, including no changes to the mobility criteria."

At paragraph 55 of the statement there was this:

> "55. The Minister expressly considered changes to the assessment other than changes to the Moving around activity, although these were the main focus of any considerations. These changes could have been either direct changes to other aspects of the assessment or as a knock-on effect of changes to the mobility criteria; for example, making changes to the points threshold."

41. That evidence was not challenged, but Mr Westgate QC (appearing for Mr Sumpter before the judge as he did before us), while accepting that the Respondent did not enter the 2013 Consultation with a closed mind, argued that, as the Respondent did not consult on anything other than the 20 metre threshold criterion, decisions had already been made as to other features of the qualifying criteria that precluded any real possibility of that 20 metre criterion being changed, whatever the answers to the new consultation might have been. He relied upon *R (Medway Council) v Secretary of State for Transport* [2002] EWHC 2516 (Admin).

42. The judge found that Dr Bolton's evidence was fatal to this ground of challenge, as he found that the evidence made it clear that the Respondent entered the consultation with an open mind and that, at the outset of the consultation in 2013, the changing of the "Moving around" criteria was a real possibility.

43. On this first ground, the judge's overall conclusion is to be found in paragraph 123 as follows:

> "In respect of this ground, Mr Westgate's submissions founder on the evidence. The process was of course not perfect. It is unfortunate that the terms of the 2012 proposals were not clearer. It is unfortunate that the 2013 Consultation did not take place prior to the adoption of the Moving around criteria in the 2013 Regulations. However, the test is not whether the consultation process could have been improved; it is whether it was unfair. It seems to me that there is no sensible evidential basis upon which I could find that the consultation process, looked at as a whole, was inadequate or unfair so as to be unlawful. In any event, in my firm judgment, it was clearly not unfair. The Claimant, and other interested parties, had a proper opportunity to make their comments on the 20m criterion in the 2013 Consultation, which the Secretary of State considered with an open mind and without excluding any option as a real possibility. The report to Ministers following the 2013 Consultation was conspicuously full and fair. Those advising were entitled to make a recommendation to the Secretary of State, as they did, to maintain the Moving around criterion as set out in the 2013 Regulations. And the Secretary of State was entitled to come to the same view, having considered all of the options, the evidence and the consultation responses, with an open mind."

44. On the second ground, it was argued for Mr Sumpter that consultees were inadequately informed as to the Respondent's intention to re-allocate resources from those with physical impairments to those with non-physical impairments, such that it was the result that the "Moving around" criteria would inevitably be more restrictive in respect of physical mobility than the parallels under the DLA regime. The result would be that substantial numbers of former DLA claimants would lose entitlement.

45. The judge, however, agreed with the submissions for the Respondent that it was clear from the 2012 materials that the policy intention was to treat those with physical and non-physical impairments similarly; DLA had led to rising numbers of claimants and to rising costs and PIP would focus upon those with the greatest need; under PIP fewer people would be entitled to enhanced rate mobility component than under DLA. The judge took the view that, even taking into account his misgivings as to the clarity or otherwise of the descriptors in the 2012 documents, it was reasonably obvious that the smaller number of enhanced rate qualifying claimants would include for the first time many with non-physical disabilities. Mr Westgate had argued that this would not necessarily have led consultees to realise that entailed a significant switch of resources from the physically disabled to the non-physically disabled. It was argued

that such losses as might be understood to have resulted could well have been taken to be a result of more rigorous assessments.

46. Looking at the 2013 materials the judge considered that the transfer of priorities envisaged in them would obviously lead to the conclusion that some would lose entitlement. There was no obligation for the Respondent to give figures, only such information as would enable consultees to give an informed response. His conclusion can be encapsulated in the final sentence of paragraph 130 of the judgment, where he said,

> "130 ... In my view, the information given – particularly in 2013 – was clearly sufficient to enable consultees to understand, in general but sufficient terms, the relative numbers of those projected to qualify for PIP enhanced rate mobility under the two relevant activities, Moving around and Planning and following a journey."

47. The judge also found that there was no breach of the public sector equality duty. As I have said, that point is not pursued on appeal and I say no more about it.

(D) The grounds of appeal and my conclusions on them

48. The grounds of appeal, dated 8 August 2014, although relatively lengthy (pp. 10 to 14 of our appeal bundle 1), in their essentials simply contend that the judge was wrong in the conclusions that he reached and re-assert the grounds of challenge that were argued before him.

49. The applicable law was not seriously in issue, either before the judge or before us. Before Hickinbottom J the principles were uncontroversial and he set them out in the passage of the judgment to which I have referred. Equally, before us, while both parties said that the starting point on the law relating to challenges to public authority consultations is now to be found in the Supreme Court decision in *R (Moseley) v Haringey LBC* [2014] 1 WLR 3497 (decided after the judge gave his judgment) both acknowledged that in *R (Robson and Barrett) v Salford City Council* [2015] EWCA Civ 6 at [22], Richards LJ said that the decision in *Moseley* was largely an endorsement by the Supreme Court of principles already established in this court and was an illustration of the application of those principles.

50. The overriding principle is that consultations must be "fair", an easy concept to state, but sometimes rather less easy to apply in practice. The application of the duty is "intensely case-sensitive" (per Arden LJ in *R (United Company Rusal PLC) v The London Metal Exchange* [2014] EWCA Civ 1271 at [28], a case in which (as we were told) the Supreme Court, since *Moseley*, has refused permission to appeal to that court.

51. In their skeleton argument for the appeal, Mr Westgate, Mr Chataway and Ms Ashton (the last of whom did not appear before us) drew out certain salient points, arising from the cases, which they argued were of particular relevance here as follows. To be procedurally fair consultation must be when proposals are still at a formative stage; sufficient information must be given to enable intelligent consideration and response; the product of consultation must be conscientiously taken into account. These

requirements, it was submitted, are linked to the purposes of the consultation. Certain products of fair consultation, derived from the judgments in *Moseley* were stressed, namely the achievement of better decisions based upon all relevant information, the avoidance of any sense of injustice that persons subject to the decision might otherwise receive and the reflection of the principle of democracy and public participation in the decision-making process. Reference in these respects was made to paragraphs [23] to [28] of Lord Wilson's judgment in *Moseley*. It was also argued, by reference to paragraph [26] that the demands of fairness are likely to be higher when an authority is considering depriving someone of an existing benefit.

52. It was further argued for Mr Sumpter that the judge ought to have held expressly that the initial consultation was unfair and unlawful because of the lack of clarity in relation to the 20/50 metre criterion, which unfairness the judge himself identified. It was accepted, however, that fairness of the process overall had now to be considered and the consultation, conducted after the making of the 2013 Regulations, could be taken into account as part of that process. It was also accepted that the whole consultation exercise in this case did not have to be repeated in the 2013 exercise, whatever the flaws in the process up to that stage.

53. Perhaps in the forefront of Mr Westgate's argument before us (and certainly in the first few minutes of his oral submissions he cited it) was the *Medway* case (supra). Mr Westgate argued that, by the time of the 2013 consultation, the structure of the new PIP had been settled in the Regulations and it included the 20 metre criterion. Thus, Mr Sumpter (and others like him) faced an insurmountable obstacle in seeking to extract a change of mind from the Respondent: there was "no level playing field" and "the dice were loaded" by that stage against those who wanted to argue against the new 20 metre criterion. Mr. Westgate argued that this went beyond a complaint that the Respondent's mind was closed by the time of the 2013 consultation. Nonetheless, as before the judge, it was accepted by Mr Westgate before us that on the evidence the Respondent's mind *was* "open" to a change in the relevant descriptors throughout the 2013 consultation.

54. It will be recalled that in *Medway*, as far back as July 2002, the relevant Minister was conducting a consultation about airport capacity in the South-East of England, prior to publication of a White Paper on the subject. Options included expansion at the airports at Heathrow, Stansted and Luton, and also a possible new airport at Cliffe in Kent. Expansion at Gatwick was, however, expressly ruled out of the consultation process. Objectors to the form of the consultation challenged the exclusion of Gatwick on the basis that the exclusion, would prevent forever any objection to planning proposals, in other parts of the country, founded on the argument that Gatwick should be expanded. Any such objection, it was argued, would founder upon the hardened policy decision already taken on the basis that Gatwick was to be excluded. Maurice Kay J (as he then was) held that while in due course objectors to planning applications at other sites could argue that expansion at Gatwick was an alternative, the exclusion of Gatwick from the White Paper would be likely to prove an insurmountable hurdle to that argument succeeding. Thus, the consultation deprived the consultees of their only real opportunity to present the case for expansion at Gatwick.

55. Mr Westgate argued that this case was similar and that the 2013 consultation in this case never surmounted the alleged unfairness of the 2012 consultation process. In a

similar fashion to the prejudice to the claimants in the *Medway* case, the consultees did not have the chance to comment upon the 20 metre criterion when the policy as a whole was in a formative stage. He accepted that the Respondent had an open mind in conducting the new consultation exercise (just as, he said, the Minister was found by the judge (at [26]) to have had an open mind in the *Medway* case). However, he argued, the circumstances were such that it would have been extraordinary for the Respondent to decide at that stage "to 'unpick'" what he had already implemented. He pointed us to areas in the documentation where it appeared that any change would have delayed the implementation of PIP; there would have been "knock on" technology issues, a need for re-assessment of some claimants who had already been tested for the new benefit and there would have been attendant further administrative costs. Moreover, any decision to amend the regulations would have had to be laid before Parliament and would have been subject to the negative resolution procedure. Inferentially, on this last point, the submission was that inertia must have been attractive to the Respondent so as to avoid further Parliamentary process.

56. It was argued that the consultation was unduly narrow, in that any decision on alteration to the "Moving around" descriptor would have required re-consideration of the "Planning and following a journey" criteria. However, the Respondent had expressly excluded consultation upon the criteria for that latter activity. Thus, the new consultation exercise was inhibited and unfair. The consultees in 2013 had not been put back into the position in which they would have been able to comment on the 20 metre criterion as if the initial consultation had been clear, unambiguous and, therefore, fair. It is said, therefore, that Mr Sumpter and those in a similar position lost the opportunity to make comment at the time when it really mattered, namely in the course of the 2012 consultation and before the Regulations were made. By 2013, the "Planning a journey" element (upon which any change to the "Moving around" element would be likely to turn) was then fixed and consultation upon it was barred.

57. I have sought to summarise the thrust of Mr Westgate's very clear and full submissions in support of his principal grounds of appeal. I intend no discourtesy to him in not reciting each and every factor to which he referred in the course of those submissions. In the end, however, it seemed to me that his argument came close to a contention that it was impossible for the Respondent to "rescue", by the 2013 consultation, what was submitted to be the real unfairness in the 2012 procedure in the introduction of the 20 metre criterion. However, as already indicated, Mr Westgate eschewed any such argument. In reality, however, if Mr Westgate's argument were to be accepted, it is hard to see how the Respondent could ever maintain the lawfulness of the 2013 Regulations, without scrapping the whole process prior to their making, together with the resultant regulations, and starting again. Again, however, such an argument was not expressly advanced, but it seems to me to be the logical result of Mr Westgate's submissions.

58. In my judgment, it was not necessary for the judge to make an express finding, one way or the other, as to the fairness/lawfulness of the consultation procedure prior to 2013. It was right for the judge to note and to take into account the serious lack of clarity in the 2012 consultation document when it came to the 50/20 metre points, and, in my judgment, he was right to question whether the process would have been lawful if it had stopped there. However, he was faced with a composite challenge to the lawfulness of the decision to make, and thereafter not to amend, the Regulations.

It was and is common ground that the task for the judge was to decide on the overall fairness (and thus, the lawfulness) of the consultation processes as a whole. Clearly, the 2012 consultation document had its deficiencies which the judge recognised and the true question for him was whether, looked at overall, the information given throughout the process was fair and adequate and whether the consultees had a real opportunity to affect the policy to define the Mobility activity as formulated at a time when there was a real possibility that that policy might be changed.

59. I will consider below the criticism of the information provided, the second principal ground of appeal. It seems to me, however, that Mr Westgate's first ground of appeal is not made out. My reasons are essentially those given by the judge.

60. Once it was accepted, as it had to be on the evidence, that the Respondent approached the 2013 consultation with an open mind, it seems to me that the challenge to the process as a whole must fail. It is explained in the evidence that all options were open as to the "Moving around criteria", even if that meant changing the criteria for "Planning and following journeys" or looking for funding elsewhere. The reality was that consultees such as Mr Sumpter had every opportunity to present to the Respondent the difficulties that the move from a 50 metre benchmark to a 20 metre one would cause to them. It is clear that such opportunity was taken. In reality, it would have gone nowhere to contend in the consultation that the physically disabled should continue to be favoured at the expense of those who suffered other disabilities. No doubt none would have wished to present such an unattractive argument. Given the Respondent's overall policy to make PIP available to a wider category of the disabled, new beneficiaries obviously had to come into the equation and there would have been no point in contending that they should be excluded.

61. It seems to me that the Respondent recognised that some consultees had felt disadvantaged by not having appreciated what the true proposal in 2012 was and, while not accepting the process had been unfair, he sought to put that perceived disadvantage right by inviting further responses from those who felt that the initial consultation had not been clear, at least to them. In my view, the argument for Mr Sumpter would prevent decision makers, in the Respondent's position, from trying to put right errors in consultation processes that are pointed out to them by looking again at the areas of criticism. As I understand the law, consultation has to be fair; it does not have to be perfect. With the benefit of hindsight, it will no doubt often be possible to show that a consultation could have been carried out rather better, but that will not necessarily mean that it was unfair. That is what the judge said at paragraph 123 of his judgment and I agree with him.

62. Turning to the criticisms made on behalf of Mr Sumpter as to the sufficiency of information provided to consultees by the Respondent, Mr Westgate argued that it was not made sufficiently clear that the intention to re-allocate resources from those with physical impairments to those with non-physical impairments would have the result that the "Moving around" criteria would be significantly more restrictive than the criteria for claiming higher rate DLA mobility treatment. He put it, in his oral argument, that it was not clear that the true "competition" was not between a 20 metre and a 50 metre threshold but rather between the "Planning and following a journey" criteria and the "Moving around criteria". The unforeseen consequence, it was said, was that substantial numbers of former DLA claimants would lose out.

63. I do not accept this argument. It seems to me that the effect of the policy must have been obvious, in particular to the more sophisticated representative bodies, many of whom responded fully to the consultation. The figures were there for all to see in the 2012 documentation. As pointed out for the Respondent, the impact tables showed that 760,000 were predicted to get enhanced rate mobility compared with 1,040,000 predicted to receive DLA higher rate mobility, i.e. 280,000 fewer. In the 2013 document, a table showed that by 2018 the projected number of PIP enhanced rate mobility recipients would be 602,000, against 1,030,000 who would have received higher rate mobility under DLA. Again, I find myself in agreement with the judge in finding that it was reasonably obvious that the smaller number of PIP enhanced rate claimants would include many with non-physical impairments, at the expense of those with physical impairments who had done better under DLA. The objections to the change in criteria from the old DLA criteria, which the consultations evoked, must show that it was fully appreciated that there would be those who would lose out under the new scheme. The consultations both in 2012 and 2013 gave the potential losers every opportunity to object to that.

64. For these reasons, I am convinced that Hickinbottom J was correct in dismissing the claim for judicial review, essentially for the reasons that he gave. I would, therefore, dismiss this appeal.

65. **Lord Justice Patten**

I agree.

66. **Lady Justice Gloster**

I also agree.