[2018] AACR 13

R (on the application of RF) v Secretary of State for Work and Pensions [2017] EWHC 3375 (Admin)

CA (Mostyn J) **CO/2496/2017**
21 December 2017

Personal independence payment – 'planning and following journey' descriptors – psychological distress – judicial review of amending regulations – whether disability discrimination objectively justified – expert evidence – UN Convention on the Rights of Persons with Disabilities 2006

Entitlement to the disability benefit known as personal independence payment (PIP) is governed by the Welfare Reform Act 2012 ("the 2012 Act") and the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) ("the 2013 Regulations"). Depending on the number of points that claimants score for difficulties with certain daily living and mobility activities, as set out in the Schedule to the 2013 Regulations, they may qualify for the standard or enhanced rate of the daily living and/or mobility components of PIP. Mobility activity 1 is "planning and following journeys" with six descriptors, two of which refer to the claimant's "overwhelming psychological distress" (OPD) (descriptors 1b and 1e). On 28 November 2016 the Upper Tribunal decided in *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 531 (AAC); [2018] AACR 12 that a claimant was not disqualified under the other scoring descriptors (1c, 1d or 1f) if their inability to plan and follow a journey was caused by OPD. On 22 February 2017 the Department for Work and Pensions (DWP) laid before Parliament the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 (SI 2017/194) ("the 2017 Regulations"). The intention of the 2017 Regulations was to reverse the effect of *MH v SSWP (PIP)* by inserting the phrase "For reasons other than psychological distress" in each of descriptors 1c, 1d and 1f. A claimant, RF, supported by the 1st and 2nd Interveners (MIND and the Equality and Human Rights Commission) sought judicial review of the 2017 Regulations on three grounds: (i) that the 2017 Regulations were in breach of art 14 of the ECHR and so unlawful; (ii) that the 2017 Regulations were *ultra vires* Part 4 of the 2012 Act; and (iii) the Secretary of State's failure to consult before making the 2017 Regulations was unlawful.

Held, allowing the judicial review claim on all three grounds, and quashing paragraph 2(4) of the 2017 Regulations, that:

1. applying the four stage test for determining whether actual discrimination is objectively justified (*Huang v Secretary of State for the Home Department* [2007] 2 AC 167), (i) the objective of the 2017 Regulations was to save money and was based on a policy intention that had never been explained to the outside world and was furthermore based on a hypothesis about different levels of need which was untenable (paragraph [44]), and as such was manifestly not sufficiently important to justify the limitation of a protected right; (ii) the measure was not rationally connected to the objective, the changes being based on the subjective opinions of the DWP's adviser, whose opinion evidence did not meet the principles governing the admissibility of expert evidence in civil proceedings (paragraphs [45]-[53]); (iii) the DWP conceded that a less intrusive measure to save money could have been used without unacceptably compromising the achievement of the objective (paragraph [55]); and (iv) the particular measure chosen failed the fair balance test (paragraphs [56]-[58]). Furthermore, the measure was manifestly without reasonable foundation, being "blatantly discriminatory against those with mental health impairments and which cannot be objectively justified (paragraph [59]), and as such also infringed art.19 of the UN Convention on the Rights of Persons with Disabilities (paragraphs [60]-[61]).

2. the 2017 Regulations were *ultra vires* Part 4 of the 2012 Act for the same reasons as under ground (i); there was no proportionate or rational connection between the exclusion of the psychological distress cohort from certain descriptors and the extent to which their ability to carry out mobility activities is limited (or severely limited), and so the measure was incompatible with the purpose of the scheme as defined in the parent statute (paragraph [62]).

3. a change of the magnitude involved in the 2017 Regulations should have been consulted upon and the failure to do so was unlawful (paragraph [63]).

DECISION OF THE COURT OF APPEAL

Martin Westgate QC and Alison Pickup, instructed by Public Law Project, appeared for the claimant

James Eadie QC and Joanne Clement, instructed by The Government Legal Department, appeared for the defendant

Tom Royston, instructed by Mind Legal, appeared for the first intervener

Caoilfhionn Gallagher QC made written submissions for the second intervener

APPROVED JUDGMENT

Mr Justice Mostyn:

1. In these judicial review proceedings, the claimant seeks that para 2(4) of the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 (SI 2017/194) (the 2017 regulations) should be quashed. She is supported by the first and second interveners. It is not disputed that she has standing to bring this claim. However, as Mr Eadie QC rightly stated, her individual circumstances do not add anything to the issue of principle which I have to decide.

2. Para 2(4) provides:

> "In the table in Part 3 (mobility activities), in relation to activity 1 (planning and following journeys), in descriptors c, d and f, for "Cannot" substitute "For reasons other than psychological distress, cannot."

These regulations were made on 22 February 2017, laid before Parliament on 23 February 2017, and came into effect on 16 March 2017. They went through under the negative resolution procedure.

3. The "table in part 3" is the table in part 3 of schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) (the 2013 regulations). Descriptors c, d and f in that table would now read (with the amendment <u>underlined</u> by me):

> c. <u>For reasons other than psychological distress,</u> cannot plan the route of a journey.
>
> d. <u>For reasons other than psychological distress,</u> cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.
>
> f. <u>For reasons other than psychological distress,</u> cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid.

4. The parties and the interveners understand perfectly well the statutory architecture within which this amendment was made, as well as the relevant legislative history. If there

were to be an appeal from my decision then no doubt that would be fully laid out for the higher court. However, so that the neutral reader can make sense of this judgment, it is necessary for me to set out the background. A full account of the scheme and its gestational history is set out in the decision of the Upper Tribunal in *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0531 (AAC).

5. In December 2010, the new coalition Government launched a consultation on the reform of Disability Living Allowance (DLA) (Cm 7984). The ministerial foreword stated:

> "We are steadfast in our support for the principles of DLA, as a non-means-tested cash benefit contributing to the extra costs incurred by disabled people. However, we need to ensure that the benefit reflects the needs of disabled people today, rather than in the 1990s. It is time that we had a disability benefit which is easier for individuals to understand and provides clear criteria and consistent awards.
>
> This is why I want to replace DLA with a new benefit – Personal Independence Payment. This is our opportunity to improve the support for disabled people and better enable them to lead full, active and independent lives. Personal Independence Payment 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.
>
> Personal Independence Payment will also be a more dynamic benefit – it will take account of changes in individual circumstances and the impact of disabilities, as well as wider changes in society, such as social attitudes and equality legislation."

6. Para 15 of chapter 2 of the consultation document stated:

> "… we intend to consider individuals' ability to carry out a range of activities key to everyday life, including some related to a broader definition of mobility. Those least able to do so will be awarded the greatest support in the new benefit. There is some evidence to suggest that individuals whose impairments have the greatest impact are likely to experience higher costs. The new assessment will therefore allow us to prioritise support to individuals who face the greatest challenges and expense. As we implement the new assessment we will assess the extent to which it accurately meets these aims."

And chapter 4, table 2, stated:

> "By definition, all people affected will be in receipt of Disability Living Allowance (DLA), the vast majority of whom will also be defined as disabled according to the Disability Discrimination Act (DDA) definition. Proposals to replace DLA with a new benefit that is better focused on helping disabled people to lead independent lives provide an opportunity to promote equality of opportunity to those least likely to live full and active lives. It is likely that some disabled people with lesser barriers to leading independent lives will receive reduced support, but this has been justified by the policy aim to focus support on those with greatest needs"

Thus, the dominant set of ideals or beliefs underpinning the reform, indeed its very core objective, was that the focus would be on the impact of the impairment. Now, the analysis would be on effect, not cause. The relevant question for the decision-maker would be "what?" not "why?"

7. There was no hint in the document that the government held the view that those whose inability to perform a given mobility activity arose from psychological distress in fact had a lesser need than those whose identical inability arose for some other reason. Let alone that such a view would be incorporated into the new assessment system with the result that such claimants would receive either reduced or nil awards of the new benefit. Unsurprisingly, given that it was unstated, none of the consultees addressed this view.

8. In April 2011, the Government published its response to the consultation (Cm 8051). At para 15 on page 4 it proposed:

> "There will be two components of Personal Independence Payment; a daily living component and a mobility component, each with a standard and enhanced rate."

9. In this document, again, there was not the slightest hint of the view which I have mentioned above. On the contrary, the text clearly drew no distinction between various incapable claimants. This was entirely consistent with the core ideals underpinning the reform. At para 40 on page 23 it was stated:

> "We are developing the assessment for Personal Independence Payment to enable support to be targeted at individuals who require the most assistance to live full, active and independent lives. As part of this, we want it to reflect a more complete and structured consideration of the impact of an individual's health condition or impairment, whether physical or mental, on everyday activities. The detail of the assessment is being developed in collaboration with a group of independent specialists in health, social care and disability, including disabled people themselves"

And at para 41:

> "It would not be practical to consider all everyday activities, so we propose that the assessment should focus on those key everyday activities which are essential to enabling participation and independence. It is positive that the activities we are proposing featured strongly in the consultation responses, both from individuals and from organisations. The assessment will consider an individual's ability to carry out all of the activities, although some activities will relate to the daily living component and others to the mobility component. At this stage, we believe that the activities should be:
>
> Daily living component …
> Mobility component
> - planning and following a journey
> - moving around."

Nothing was said that gave an indication that it was the Government's view and intention that assessment of an individual's inability to carry out the activity of "planning and following a journey" would and should be less if it arose from psychological distress, as opposed to something else.

10. In May 2011, the Government published its initial draft of the assessment regulations together with a technical note. Here, the shape of the scheme emerged more clearly. As had been anticipated, the relevant activities (named "descriptors"), whether of daily living or of mobility, would, if proved to the satisfaction of the decision-maker, be awarded points. You would need a certain number of points to get a standard award, and more still to get an enhanced one. At this stage, the draft did not advance the proposed points to be awarded or the entitlement thresholds for the awards. These were left blank.

11. The draft fleshed out the mobility descriptors in schedule 2 of the proposed regulations. For "planning and following a journey" (which is all I am concerned with here) they were listed and described as follows:

> "a. Can plan and follow a complex journey unaided.
>
> b. Cannot follow any journey alone due to such a journey causing overwhelming psychological distress to the claimant.
>
> c. Can follow a complex journey only (i) if the journey has been planned by another person; or (ii) with the continual prompting or intermittent assistance.
>
> d. Cannot follow any journey due to such a journey causing overwhelming psychological distress to the claimant.
>
> e. Can follow a simple journey only (i) if the journey has been planned by another person; or (ii) with the continual prompting or intermittent assistance."

12. Here we find in the (then) descriptors b and d the first references to "overwhelming psychological distress". This was not defined in the draft regulations. As drafted the clause *"due to such a journey causing overwhelming psychological distress to the claimant"* is an adverbial subordinate clause. It tells the reader more about the main clause "cannot follow any journey". The use of the conjunction "due" introduced a causative requirement. The sentence could have been phrased with identical meaning thus: "*for reasons of overwhelming psychological distress the claimant cannot follow any journey."* Under the (then) descriptors b and d the decision-maker has to ask "why?" as well as "what?".

13. The intrusion of this causative requirement is surprising given the dominant set of ideals or beliefs underpinning the reform, to which I have referred above. Why was it there? Whatever may have been the intention of the Department the reason, so far as the public was concerned, and so far as it goes, was given on page 30 of the accompanying technical note which stated:

> "For those descriptors which refer to overwhelming psychological distress, there must be evidence of an enduring mental health condition. The level of distress must be so severe that the individual cannot manage day-to-day activities for several hours afterwards. There must be evidence that overwhelming distress has/would occur, not just that it might."

14. In his witness statement on behalf of the defendant, at para 60, Dr Bolton stated his view that this paragraph in the technical note made plain that psychological distress was only relevant for those descriptors where it was mentioned. I do not agree with this. On the contrary, I do not read either the phrasing of the descriptors b and d (or of the passage in the technical note) as setting up two distinct classes of claimants with the implicit requirement that the decision-maker had to decide into which class each claimant fell. If the argument

were right then it would require the decision-maker to have to determine in every case whether the inability in question was caused by psychological distress or by something else. This would represent a radical shift away from the dominant set of ideals or beliefs to which I have referred. A much more natural reading, consistent with the objective of the reform, is to conclude that descriptors b and d represented additional grounds available to those claimants whose inability was the result of psychological stress.

15. The notes to (the then) descriptors c and e on the following page say:

> "C: may apply to individuals with moderate learning disabilities, cognitive impairments or severe visual impairments… It may also apply in cases where an individual is unable to ask directions whilst travelling due to a health condition.
>
> E: may apply to individuals with severe learning disability, cognitive impairment or severe visual impairment (who have not adapted to their impairment)"

The use of the modal verb "may" followed by the infinitive "apply" clearly denotes some future possibilities, no more. It cannot be construed either literally, or purposively, to exclude claimants who happen to suffer from psychological distress from relying on these descriptors.

16. The Government's explanatory note supporting the second draft of the assessment regulations was produced in November 2011 and took on board a number of the submissions received following the publication of the first draft. Descriptors b, c, d and e were slightly redrafted, and their proposed point scores were set out for the first time, as follows:

B	Needs prompting for all journeys to avoid overwhelming psychological distress to the individual. *For example: may apply to individuals are only able to leave the home when accompanied by another person*	4
C	Needs either – (i) supervision prompting or a support dog to follow a journey to an unfamiliar destination; or (ii) a journey to an unfamiliar destination to have been entirely planned by another person.	8
D	Cannot follow any journey because it would cause overwhelming psychological distress to the individual. *For example: may apply to individuals who are unable to leave the home at all*	10
E	Needs either – (i) supervision prompting or a support dog to follow a journey to a familiar destination; or (ii) a journey to a familiar destination to have been planned entirely by another person.	15

This section was prefaced, as before, with the words I have set out at para 13 above.

17. On 16 January 2012, the Government published a consultation document which gave the proposed entitlement thresholds. For the mobility component this was 8 points for the standard rate and 12 points for the enhanced rate. Thus, satisfaction of b alone would not lead to an award. Satisfaction of d alone would lead to a standard award. The current weekly awards for the mobility component are £22 for the standard rate and £58 for the enhanced rate.

18. On 29 March 2012, the Welfare Reform Act 2012 (the "2012 Act") received Royal Assent. This contains the parent power for the making of regulations to bring the new PIP scheme into effect. Section 77(2) provides, as prefigured, that PIP has two components, namely the daily living component and the mobility component (section 77(2)). I am only concerned with the latter which is governed by section 79. Section 79(1) provides that a person is entitled to the mobility component at the standard rate if the person's ability to carry out mobility activities is limited by his or her physical or mental condition. Section 79(2) provides that a person is entitled to the mobility component at the enhanced rate if the person's ability to carry out mobility activities is severely limited by his or her physical or mental condition. "Physical or mental condition" is not defined in the Act. Section 79(4) provides that the relevant mobility activities may be prescribed. Section 80(1)(c) and (d) provide that a person's ability to carry out mobility activities is to be determined in accordance with regulations. Regulations made under section 80(3) must provide that the ability to carry out mobility activities is to be decided on the basis of an assessment. These sections were brought into force on 10 June 2013.

19. On 13 December 2012, the Government published its response to the consultation of 16 January 2012, and produced revised draft regulations which were laid before Parliament that day. This further redrafted the descriptors in the form in which they later passed into law a few weeks later. For the first time, a definition of "psychological distress" appeared. This was "distress related to an enduring mental health condition or an intellectual or cognitive impairment."

20. Para 6.13 of the response stated:

> "This [mobility] activity has received numerous comments in relation to the wording 'overwhelming psychological distress', with particular reference to why we proposed to award more points for needing support to undertake journeys to familiar locations than where someone cannot undertake journeys because of overwhelming psychological distress. We believe that individuals who are unable to leave their homes as a result of overwhelming psychological distress will face additional costs and barriers and that therefore a high level of points should be awarded in recognition of these extra costs. However, we believe that individuals who can leave their homes but require considerable support to do so, such as needing constant supervision or to take more journeys by taxi, may face even higher extra costs and barriers, and that this reflects a higher overall level of need. We therefore consider it appropriate to award them higher priority in the benefit."

And para 6.16 stated:

> "Some respondents suggested that descriptor B in the second draft was technically the same as descriptor E and our differentiation between the two was incongruous. However, we believe there is a significant difference between someone who requires prompting to leave the house in order to follow a journey and someone who is unable to follow a familiar journey at all unless accompanied by another

> person. We believe this justifies the differences between the descriptors. However, in light of this point and other comments referred to above, we have simplified the criteria and made some changes to terminology to make them clearer and simpler to apply. For example the differentiation between the new descriptor B and new descriptor F is clearer now."

21. These passages appear to divide claimants into two, and only two, sets. The first set is populated by those individuals who are unable to leave their homes. This has two sub-sets: (a) those who are unable to leave their homes as a result of overwhelming psychological distress; and (b) those who are unable to leave their homes for some other reason. The second set contains those individuals who can leave their homes. This has two subsets: (a) those who require considerable support to do so, and (b) those who merely require prompting to do so.

22. The proposal appears to suggest that points would be awarded to those in set 1(a) but not 1(b). This is hard to follow given that the impact for those housebound individuals is surely the same. It seems to be a benevolent bonus for those housebound because of psychological distress. Set 2(a) clearly applies to all those who, for whatever reason (including psychological distress), can leave their homes but who require considerable support to do so. There is no basis, in my judgment, for reading "apart from those claimants suffering from psychological distress" into the definition of set 2(a). Nor is there any logical reason to read set 2(b) as being populated only by those suffering from psychological distress. And nothing in the oral statement by the Minister to Parliament on that day gave any hint that those who were only able to leave their homes with considerable support because of psychological distress would be treated less favourably than those equivalently afflicted but for a different reason.

23. On 25 February 2013, the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) were made. They came into force along with Part 4 of the 2012 Act on 10 June 2013. As stated above, Schedule 1 Part 3 contained the table for mobility activities. This provided:

Column 1 **Activity**	**Column 2** **Descriptors**	**Column 3** **Points**
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	10

	dog or orientation aid.	
	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

24. At this point it is necessary to refer to written evidence filed by the claimant and the first intervener about what specialist consultees were given to understand, during the period of gestation of these regulations, as to the scope of the "psychological distress" factor. The claimant filed witness statements by Ms Lambert of the National Autistic Society, Mr Butler of Disability Rights UK, Mr Anders of Revolving Doors and Ms Kotova of Inclusion London. The first intervener filed a statement from Mind's director of external relations, Ms Sophie Corlett. All of these people worked at organisations which contributed to the consultation process in the run-up to the 2013 regulations. None of them recalls being told of an intention to distinguish overwhelming psychological distress from other mental health issues. On the contrary, had the intended distinction been made clear, all of these people would have raised concerns and objections. Sophie Corlett, in her witness statement points out that a particular concern of Mind was to ensure that awards were not restricted simply because of a person's condition, as they had been under DLA. She states that at no point in the consultation did Mind understand the Department to have the policy intention of excluding psychological distress, uniquely amongst impairments, from qualifying a person for the enhanced rate of the mobility component. Indeed, she says that Mind was given assurances to the opposite effect. She refers inter alia to an email from one of the Department's civil servants dated 30 January 2012, in response to a question from Mind about provision for claimants with mental health problems. The email offered reassurance that "someone who needs supervision to make even a familiar journey will receive the enhanced rate of mobility."

25. The guides for the operation of the new PIP scheme did not reveal any such policy intention either. I need only refer to the version produced in May 2014. There are no notes for descriptor c – nothing is written to suggest that a claim under this descriptor will fail if the reason is psychological distress. Similarly, the notes to descriptor f do not in any way suggest that a claimant under this descriptor is disqualified if the reason is psychological distress. The notes to descriptor d are interesting. They read:

> "For example: may apply to individuals who cannot due to their sensory or cognitive impairment work out where to go, follow directions or deal with unexpected changes in their journey when it is unfamiliar. It does not apply to claimants who require someone with them for support only, as this is covered by descriptor b. The accompanying person should be actively navigating for this descriptor to apply."

Again, there is nothing to suggest that those suffering from psychological distress are disqualified from claiming under this descriptor. Indeed, the reference to "sensory or cognitive impairment", which is, it will be recalled, a potential cause of psychological distress in the definition in the regulations, would suggest the very opposite.

26. My attention was drawn to the PIP descriptor log dated 18 August 2015 which gives further internal guidance to decision-makers. It states for the mobility activity of "planning and following a journey" that it only applies to people with physical conditions "if the condition results in either sensory or cognitive impairment or overwhelming psychological distress. [The activity] relates to the cognitive and sensory ability to plan and follow a journey, but not the physical ability to move." This interpretation is not consistent with anything in the regulations or indeed in the parent statute. But it is interesting that it lumps together sensory or cognitive impairment with overwhelming psychological distress. In the notes to descriptor c it states that it applies to claimants with cognitive or developmental impairments, but it does not state that it does not apply to claimants suffering from psychological distress. The same applies to descriptors d and f.

27. So even the decision-makers were given no explicit guidance by the Department that claimants under descriptors c, d and f were disqualified if the cause of their inability was psychological distress.

28. It is therefore not surprising that the Upper Tribunal decided on 28 November 2016 in *MH* that a claimant under descriptor c, d or f was not disqualified if his or her inability was caused by psychological distress. I have read that judgment carefully and I agree with it fully. I have had the benefit of exposition of far more of the background than did the Upper Tribunal. I have little doubt that had the tribunal judges had this benefit they would have expressed their decision with even more conviction. The Department has been granted permission to appeal[1].

29. The Department decided, however, to insure against the possibility of their appeal failing by amending the 2013 regulations. As their stance was that this was merely an exercise in clarification and restoration of what was originally intended, it was not necessary, therefore, to consult on the changes and it was appropriate to pass them under the negative resolution procedure without debate. This was to be contrasted to the 2013 regulations, which had been the subject of extensive consultation, and which had proceeded under the affirmative resolution procedure.

30. It is not (now) disputed that it was the intention of the Department when formulating the 2013 regulations to make a policy distinction between those afflicted by psychological distress and those who were not and to treat the former group less favourably. Not only has Dr Bolton said so in his witness statement, but ministers have said so to both Houses of Parliament[2]. It was stated in terms in the explanatory memorandum which accompanied the 2017 regulations. This intention had its foundation on the opinion of those advising the Secretary of State. I will consider later whether that opinion was reasonable or tenable. But as I have made clear, that intention was never communicated to the outside world, and cannot be deduced from either a literal or purposive construction of the regulations.

31. Mr Eadie QC says that the original legislative intent can be deduced from the terminology of descriptors b and e (which were not altered) and contrasting them to descriptors c, d and f in their original form. Here are two situations where the claimant's

[1] The appeal has been listed for hearing in June 2018. If I dismiss the claimant's challenge to paragraph 2(4) of the 2017 regulations then I imagine that the appeal will be withdrawn. If I allow the challenge then the appeal will proceed; if it succeeds then the effect of the 2017 regulations will be to all intents and purposes reinstated, and we will be back where we started.

[2] Penny Mordaunt MP so stated in a written statement on 23 February 2017 as did Damian Green MP on 28 February 2017. Lord Henley said so in the debate on the unsuccessful annulment motion in the House of Lords on 27 March 2017.

psychological distress is expressly cited. As explained by me above, like it or not, they introduce a causation requirement for the fact-finder. The maxim of statutory interpretation *inclusio unius, exclusio alterius* (that is: express mention of one thing excludes all others) leads to the conclusion therefore that psychological distress is an impermissible reason for reliance on descriptors c, d and f. The architecture of the descriptors clearly shows, it is argued, that those who cannot "undertake" a journey because of psychological distress are a separate class confined to b and e, while everyone else who is incapable of doing so for some other reason can rely on (and only on) c, d and f.

32. For the reasons I have set out at some length above I do not accept this argument. I am very clear that neither a literal, nor a purposive, construction of the 2013 regulations leads to this conclusion.

33. It can be seen that the 2017 amendment introduces for the decision-maker an explicit causation requirement in relation to descriptors c, d and f where one was not in terms present before. Before, as I have found above, on a literal and purposive interpretation of the words, the fact-finder only had to find that the claimant was incapable of planning the route of a journey or of following the route of an unfamiliar or familiar journey without another person, assistance dog or orientation aid. Now, the fact-finder had to ask, and answer, the question why the claimant was incapable of doing so. If the answer was "psychological distress", then the claimant would not satisfy the descriptor, and so no points for the purposes of a PIP claim would be awarded.

34. Therefore, this was a very big change to the criteria which would likely affect, disadvantageously, tens of thousands of claimants. In the Government's equality assessment of February 2017, it was estimated that if the decision of the Upper Tribunal were reversed then by 2021 (when the transitional period would be over) 337,000 cases annually would be affected, £900m annually would be saved.

35. Mr Eadie QC, leading counsel for the defendant, and its witnesses Dr Bolton and Ms Parker, assiduously emphasise, however, that this separate class is populated only by those claimants who are incapable of making a journey for reasons of psychological distress alone. If there is some other reason, then the claimant will not be confined to the separate class. During argument, I asked Mr Eadie QC whether the other reason would extend to an underlying condition as well as the manifestation or symptom of it. I asked this question as it seemed that para 64(c) of his skeleton argument conceded this. Mr Eadie QC asked to reflect on the matter overnight. The following morning, in a characteristically eloquent and forceful note, he eschewed any suggestion that another reason could be the underlying condition, rather than its symptom or manifestation. We had a discussion where we imagined that I had woken up with flu, and had to call in sick. Was I unable to work because I had flu or because I was feeling poorly? It seemed to me that the "reason" I could not work could equally be one or the other, but Mr Eadie did not agree.

36. In his supplemental note Mr Eadie stated at para 6:

> "However, the fact that an individual has a particular mental condition does not tell you whether they can or cannot perform the activities in Schedule 1. What is crucial is how the condition affects the individual, i.e. what symptoms they have. These are individual to the patient. Symptoms of mental health conditions can include psychological distress. They can also include symptoms such as cognitive impairment, hallucinations, impulsive/risk-taking behaviour, paranoia, phobias, suicidal intent and many others. Cognitive impairment has been described in the

> guidance notes published for healthcare professionals carrying out assessments for Personal Independent Payment (the PIPAG) as including orientation (understanding of where, when and who the person is), attention, concentration and memory. Dr Boardman [the expert witness for the first intervener] describes it as a disruption of intellectual functioning such as loss of attention, poor concentration and muddled thinking. Cognitive impairment may be permanent (as in the case of an individual with a learning disability or who has suffered a brain injury). Cognitive impairment may be temporary (as in the case of an individual who experiences a dissociative state). Cognitive impairment may fluctuate (as in the case of an individual with early-stage dementia)."

37. This definition, or categorisation, of cognitive impairment as a symptom rather than a condition is difficult to reconcile with the definition of psychological distress in the regulations. It will be recalled that this means "distress related to an enduring mental health condition or an intellectual or cognitive impairment". The verb "related to" plainly means "arising from". Thus, the definition sees a cognitive impairment, like a mental health condition, as a cause of psychological distress, rather than as a symptomatic product of an underlying condition. Putting that definitional problem to one side, it can be seen that the Secretary of State has accepted (and is to be taken as fixed with) a definition of cognitive impairment which is as wide as "loss of attention, poor concentration and muddled thinking".

38. On this view, the amendment will capture only a small number of cases. But this is very difficult, indeed impossible, to reconcile with the predictions in the equality assessment. I am not prepared to make my decision on the basis that only a small number of cases will be affected if the 2017 regulations are left intact.

39. The equality assessment makes explicitly clear that the proposed amendment would affect virtually the entire canon of mental illnesses. In this regard, I am supported by the expert evidence of a psychiatrist, Dr Boardman, adduced by the first intervener, who tells me that psychological distress is an almost invariable feature of most mental illnesses.

40. I now turn to the grounds relied on by the claimant in support of the application to quash para 2(4) of the 2017 regulations. They are:

i) The 2017 regulations are in breach of Article 14 of the European Convention on Human Rights, and are therefore unlawful.

ii) The 2017 regulations are ultra vires Part 4 of the 2012 Act.

iii) The defendant's failure to consult prior to making the 2017 regulations was unlawful.

41. It is agreed that the PIP scheme falls within Article 1 of the First Protocol to the European Convention on Human Rights (which is incorporated into our law by the Human Rights Act 1998). I am also satisfied that it falls within Article 8. Therefore, Article 14, which prohibits discrimination in the enjoyment of convention rights, is potentially engaged. This is also agreed. Article 14 prohibits discrimination on a number of grounds which include "other status". The courts have treated disability as falling within this rubric. This is also agreed. Discrimination happens where there is different treatment of people in the same position. If this is shown then the discrimination will be unlawful if the different treatment cannot be "objectively" justified. It is agreed that that is the issue in this case, as it is not disputed that

the effect of the 2017 regulations is to mete out different treatment to disabled people otherwise in the same position.

42. In determining whether actual discrimination is objectively justified the court applies a four-limbed test. It must be satisfied, the onus being on the discriminator, that:

i) the objective of the measure is sufficiently important to justify the limitation of a protected right; and

ii) the measure is rationally connected to that objective; and

iii) a less intrusive measure could not have been used without unacceptably compromising the achievement of the objective; and

iv) when balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

See *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 and *Bank Mellat v HM Treasury (No 2)* [2014] AC 700. A very recent example of the application of this test in the field of social security is *Stevenson v The Secretary of State for Work and Pensions* [2017] EWCA Civ 2123 (15 December 2017) where the Government just satisfied it: see paras 76 – 82 of the judgment of Lord Justice Henderson.

43. Although the onus is on the defendant there is an overarching standard of review of which I must be satisfied at all stages of the exercise. That is the "manifestly without reasonable foundation" test or standard. There can be no doubt that this applies to this social security measure: see *R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 [2016] 1 WLR 4550[3]. This reflects the wide margin of appreciation given to national governments when enacting measures with a macro-economic effect. Plainly, it will only be in a very strong and obvious case that the court will strike down a legislative measure which is an expression of the democratic process. I think that is the effect of the word "manifestly".

44. So, I turn to the four-limbed test, and I take the first two limbs together. What is the objective of the 2017 measure? In para 70 of his skeleton argument Mr Eadie QC says:

> "The Secretary of State has never contended that cost alone was the reason for making the 2017 Regulations. The objective was to restore the original policy intention, which was itself based on differing levels of functional need, but having regard also to the serious costs consequences of accepting the interpretation of the Upper Tribunal in *MH*. It is clear that the protection of a country's economic system is a legitimate aim under Article 14 of the Convention."

I have to say that I regard this attempt to clothe the obvious principal objective with other reasons as unpersuasive. I have explained above that the original policy intention was never explained to the outside world. As I explain below, it is based on a hypothesis about different levels of need which is untenable. It seems to me that the original policy intention, and the hypothesis, were tendentious, in the true sense of that word. The tendency being to save

[3]The "bedroom tax" case heard by a seven-judge panel of the Supreme Court.

money. Plainly, the objective was to save money. Plainly, if money was no object, the measure would not have been passed.

45. Is that objective sufficiently important to justify the limitation of a protected right? In my judgment, manifestly not. Is the measure rationally connected to the objective? The defendant argues that this limb is satisfied because the Secretary of State was entitled to rely on the expert view of his advisers (principally Dr Bolton) that the members of the psychological distress cohort generally have a lower level of functional need than the other impairment cohort. In this regard Mr Eadie QC also relies on the fact that during their gestation the regulations were scrutinised by an independent expert advisory group, and that the validity and reliability of the descriptors were thoroughly field tested.

46. Dr Bolton is not merely medically qualified. He is highly qualified as an expert in this field. But that high degree of expertise does not lead to a conclusion that he was entitled to make a generalised assertion without some factual or evidential basis. It is worth recalling the standards that are set for expert evidence for civil proceedings in court. In *The RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch) Hildyard J at paras 14 to 20 summarised the basic - principles governing expert evidence in civil proceedings. The first principle is that unless there is a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question which the court has to decide, the court should decline to admit evidence which *ex hypothesi* is not evidence of any body of expertise but rather the subjective opinion of the intended witness.

47. The view of Dr Bolton is no more than a subjective opinion or hypothesis. In his witness statement at para 8 he says:

> "The distinction drawn by the descriptors is based on the expertise and experience of myself and my colleagues within DWP, and thoroughly tested to ensure its validity. I am not aware of any empirical research analysing this issue and in the absence of any definitive assessment of disability benefit entitlement purposes, this is the only basis upon which judgments of this sort can be made."

With respect, I cannot accept this. If a distinction with such a dramatic effect is to be drawn then elementary fairness surely requires that empirical research be commissioned. In the absence of any empirical research the view is no more than a subjective opinion or hypothesis.

48. In my opinion, the subjective opinion or hypothesis of Dr Bolton offends the first principle of expert evidence set out above. I cannot see that lower standards should apply to a law-maker than to a judge applying the law. If anything, they should be higher.

49. The fact that the descriptors were discussed by the advisory panel is in my judgment irrelevant. There is no evidence that the group was in fact ever informed that the Department's adoption of the subjective opinion, or hypothesis, of Dr Bolton meant that descriptors c, d and f were to be interpreted as having closed the door to claims by those in the psychologically distressed cohort or class. And in any event, Mr Eadie QC accepted that the hypothesis was that of the Department alone.

50. I have the same view about the testing. The rather dense material from the testers in the trial bundle at 4/L/601-610 states that the objective of the testing was:

> "[to investigate] the extent to which the PIP assessment is an accurate measure of overall need (validity). It also considers how consistently the assessment performs,

> regardless of the assessor and the characteristics of the individual being assessed (reliability)."

And it concluded that the criteria formulated were generally both "valid" and "reliable". This is largely agreed by Professor Hanretty, an expert statistician instructed by the claimant.

51. I can accept all this but it misses the point that I have to decide. There is nothing in the testing data to indicate to me when considering activity 11 (planning and following a journey) that the psychologically distressed cohort was excluded from descriptors c, d and f. There is nothing in the text to suggest that they were and indeed the results appear to suggest that they would have been included in the testing of those descriptors. This is apparent to me when I study the results set out in tables 3, 5 and 7.

52. My conclusion is that the testing is a red herring.

53. I am satisfied, for the reasons I have given, that this discriminatory measure is not "rationally" connected to its objective.

54. My conclusion is that the defendant has not satisfied either the first or second limbs of the test.

55. I did not receive any considered argument on the third limb. Mr Eadie QC did not seek to argue that it was impossible to save the money in some other non-discriminatory way.

56. The fourth limb requires a balancing to be undertaken between the severity of the measure's effects on the psychologically distressed cohort, on the one hand, and the importance of the objective. In a way, this exercise has already been undertaken under the first, second and third limbs.

57. I accept entirely that when a formulaic system for assessing needs and thus entitlements is introduced there will be some hard, arguably unfair, results particularly for those cases near the frontiers of descriptors or thresholds. I reject any suggestion that a fair balance has not been struck because of the architecture of the scheme.

58. However, the legitimacy of a formulaic system does not save this particular measure from failing the fair balance test, for the reasons I have set out above.

59. Having decided that the defendant has failed to satisfy all four limbs of the test, and therefore cannot be objectively justified, I now have to consider whether the measure is manifestly without reasonable foundation. As I have stated above, this means that I must be very strongly satisfied that the four-limbed test is not met. I have no hesitation in so concluding. In my judgment, the 2017 regulations introduced (and I emphasise introduced) criteria to descriptors c, d and f, which were blatantly discriminatory against those with mental health impairments and which cannot be objectively justified. The wish to save nearly £1 billion a year at the expense of those with mental health impairments is not a reasonable foundation for passing this measure.

60. This conclusion is fortified by the written submissions of Ms Gallagher QC on behalf of the second intervener. She explains how the measure infringes Article 19 of the UN Convention on the Rights of Persons with Disabilities. This provides:

> **"Article 19 - Living independently and being included in the community**

> States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
>
> (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
>
> (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
>
> (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs."

61. In para 3.8 she wrote:

> "The impact of the 2017 Regulations is to draw an unprincipled distinction between different categories of disabled person, unconnected to their level of need or their level of functional impairment. Disabled persons who are unable to leave their homes at all due to overwhelming psychological distress will qualify under descriptor (e), but a disabled person who could leave his or her home and follow a journey, but only with another person, will not qualify for a PIP mobility award. This is fundamentally at odds with Article 19 CRPD's guarantees."

I fully agree with this. It is another reason why the discrimination within the measure cannot be objectively justified.

62. I turn to grounds (ii) and (iii). My decisions on these grounds are essentially determined by my decision on ground (i). Mr Eadie QC in his skeleton at para 72 more or less conceded that were I to find ground (i) proved in the way that I have, then it would follow that the parent statute would not grant the power to pass a subsidiary measure which has this effect. I agree. Mr Westgate QC explains very clearly why this is so. At para 87 of his skeleton he stated:

> "..if there is no proportionate or rational connection between the exclusion of the psychological distress cohort from certain descriptors within the PFJ Activity and the extent to which their ability to carry out mobility activities is limited (or severely limited), then the exclusion of this cohort is incompatible with the statutory purpose of Part IV of the [Act] which is that entitlement to PIP or to PIP at a particular level is determined by reference to functional impairment and not by diagnosis. It amounts to excluding individuals from the scope of PIP because of the nature of their disability and not because of its impact on their ability to carry out mobility activities."

I have found under ground (i) that there is no such proportionate or rational connection. Therefore, the measure is incompatible with the purpose of the scheme as defined in the parent statute.

63. Similarly, I am of the view that a measure which introduces a change (and I emphasise introduces) of this magnitude should have been consulted on, and that the failure to do so was

unlawful. If it was apt to consult first time round, then it was even more apt to do so this time round when the change was so momentous.

64. The claim therefore succeeds on all three grounds. I grant the claimant permission to seek judicial review and I quash para 2(4) of the 2017 regulations.

65. I remind everyone that the claimant has been granted anonymity and that any breach of that protection would be a serious contempt of court.

66. That concludes this judgment.