

Lord Justice Lewis:

INTRODUCTION

1. This is an appeal against a decision of Swift J. (“the Judge”) who dismissed a claim for judicial review by the appellant, Flinn Kays, against the refusal by the respondent, the Secretary of State for Work and Pensions, of his claim for universal credit. Mr Kays is a student who has been studying for a degree at Bath Spa University since September 2020. He has severe disabilities and is in receipt of a personal independence payment (“PIP”).
2. In brief, persons receiving full-time education are not, in general, eligible for universal credit. There are exceptions for certain students including those who are in receipt of disability living allowance or a PIP and also have limited capability for work. Previously, a student with a disability could apply for universal credit and he should have been referred for an assessment of his capability for work. The relevant regulations were amended, however, by the Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations 2020 (“the 2020 Regulations”) so that a person receiving full-time education had to have obtained a determination that he had limited capability for work before making a claim for universal credit.
3. Mr Kays applied for universal credit but his claim was refused as he had not been assessed as having limited capability for work before he made his claim. He contends that the 2020 Regulations are unlawful and it was unlawful to refuse his claim for universal credit on the basis of the amendments made by those regulations.
4. On this appeal, he submitted that the Judge was wrong to dismiss his claim for judicial review. In particular, he submitted that the respondent had acted irrationally in deciding not to consult before making the 2020 Regulations. He submitted that the way in which the defendant sought to achieve her objective was irrational in that it resulted in arbitrary results. He also submitted that the purpose of the 2020 Regulations was irrational and discriminatory as they drew arbitrary distinctions between groups of people. Finally, he submitted that the respondent failed to have due regard to the equality impact matters referred to in section 149 of the Equality Act 2010 (“the 2010 Act”).

LEGAL FRAMEWORK

Universal Credit

5. The previous system of welfare benefits was replaced with a single benefit known as universal credit by the Welfare Reform Act 2012 (“the 2012 Act”). That benefit provides for a payment which include a standard allowance to reflect basic living costs, and additional elements to reflect additional costs such as housing. In addition, additional amounts are included if a person has limited capability for work or work-related activity.
6. Eligibility for universal credit is dealt with by sections 3 and 4 of the 2012 Act and the regulations made under the Act. For present purposes, it is sufficient to note that a claimant had to meet the basic conditions. Section 4(1) of the 2012 Act provides that:

“4. Basic conditions

For the purposes of section 3, a person meets the basic conditions who –

(a) is at least 18 years old

.....

(d) is not receiving education...”

7. There is power to make regulations providing for exceptions from any of the requirements to meet the basic conditions. Regulation 14 of the Universal Credit Regulations 2013 (“the 2013 Regulations”) as originally made provided, so far as material, as follows:

“14. Exceptions to the requirement not to be receiving education

A person does not have to meet the basic condition in section 4(1)(d) of the Act (not receiving education) if

.....

(b) the person is entitled to attendance allowance, disability living allowance or personal independence payment and has limited capability for work.”

8. In other words, full time students would not be eligible for universal credit unless they fell within one of the exceptions. Those exceptions included cases where the student was in receipt of one of the specified benefits and had limited capability for work.
9. The defendant did not carry out any public consultation exercise on the draft regulations which became the 2013 Regulations. Section 172 of the Social Security Administration Act 1992 (“the 1992 Act”) required proposed regulations to be referred to the Social Security Advisory Committee (“the SSAC”). The draft regulations were referred to the SSAC which did carry out its own consultation exercise.

The Operation of the System

10. The universal credit regime was implemented for students at some time after 2013. The original policy intention was that a student would have to have had his capability for work assessed before he made a claim for universal credit. The 2013 Regulations did not, however, deal with that point. The first time that the department appeared to have stated its intention was in an e-mail sent on 17 March 2017 to Ken Butler, a welfare rights and policy advisor for a charity called Disability Rights UK. In accordance with the departmental intention or understanding of the 2013 Regulations, however, students who applied for universal credit and who did not already have an assessment showing that they had limited capability for work, were not referred for assessment. Instead, their claims for universal credit were generally refused.

11. In September 2016, a student, Ms Badu, applied for universal credit contending that she fell within the scope of the exception regulation 14(b). The department refused to refer her for an assessment of her capability for work and refused the claim for universal credit. On an appeal against that refusal, the First-Tier Tribunal (Social Entitlement Chamber) held on 22 September 2017 that the department could not refuse to refer a claimant for an assessment for work. The respondent had a duty under section 8 of the Social Security Act 1998 to determine claims. As the determination of the claim depended on whether the claimant had limited capability for work, the defendant had to assess that matter before determining the claim for universal credit. If the claimant were assessed as having limited capability for work, and met the other condition in regulation 14(b), she would be eligible for universal credit and that would be backdated to the date when the claim for universal credit was made.
12. The respondent did not, it seems, undertake any action in response to the ruling of the First-tier Tribunal (other than to refer Ms Badu for assessment of her capability for work). Rather, the respondent continued to refuse claims for universal credit where the claimant had not, at the time of the making of the claim, been assessed as having limited capability for work. That was not an appropriate response to the decision of the First-tier Tribunal. The appropriate response, if the department considered the ruling to be wrong, would have been to appeal the ruling, or if the department considered it were right, to amend the relevant regulations. It was also not a sensible approach as the issue would be likely to arise in other cases. That is what ultimately happened. In March 2020, another claimant, Ms Kauser, brought a claim for judicial review alleging that the respondent's approach was unlawful. On 30 July 2020, shortly before the respondent's evidence was due in that case, the respondent agreed that the approach that she had been following for some years was unlawful. A consent order was made by the Administrative Court on 7 October 2020 declaring that the respondent had breached regulation 14(b) of the 2013 Regulations by failing to determine whether the claimant had limited capability for work and failing to do so before deciding the claimant's entitlement to universal credit.

The Amendment to the 2013 Regulations

13. On 30 July 2020, a submission was made to the minister seeking approval as a matter of urgency of the 2020 Regulations amending regulation 14(b) of the 2013 Regulations. They were made on 3 August 2020, laid before Parliament on 4 August 2020 and came into force on 5 August 2020. Regulation 14 of the 2013 Regulations was amended to provide as follows:

“14. Exceptions to the requirement not to be receiving education”

A person does not have to meet the basic condition in section 4(1)(d) of the Act (not receiving education) if—

...

(b) the person is entitled to attendance allowance, disability living allowance or personal independence payment and it has been determined—

(i) that the person has limited capability for work or limited capability for work and work-related activity on the basis of an assessment under Part 5 of these Regulations or Part 4 or 5 of the ESA Regulations;

(ii) that the person is to be treated as having limited capability for work under Schedule 85 or limited capability for work and work-related activity under Schedule 9;

(iii) that the person is to be treated as having limited capability for work or limited capability for work and work-related activity under regulation 19(2)(b) or (4)(b) of the Universal Credit (Transitional Provisions) Regulations 2014,

and that determination was made on or before the date of claim to universal credit, where the person is receiving education on the date the claim is made, or the date on which the person starts receiving education, where the person starts receiving education after the date of claim to universal credit ...”

14. It was common ground between the parties that, as a result of the amendment, a student in full-time education who is in receipt of the specified benefits will only fall within the exception if a determination that he or she has limited capability for work was made before making the claim. The respondent would no longer be required to carry out an assessment of capability for work if a student claimed universal credit. The respondent could refuse the claim as the claimant would not meet the eligibility criteria – the student would not have had a determination of his or her limited capability to work before the date of making the claim.
15. There are two further matters that arise out of the amendment. First, there was a way in which a person who moved straight from school to full-time education could obtain a determination that he had limited capability for work. He could apply for an employment support allowance. That would normally be refused as he would not meet one of the conditions for such an allowance, namely having made certain national insurance contributions. However, an application could be made to credit the person with national insurance contributions. That would enable him to obtain a determination that he had limited capability for work. Having obtained that determination, he could then make an application for universal credit. He would then fall within the exception in regulation 14(1)(b), assuming he was in receipt of the specified benefits, as he would have had a determination of his limited capability for work before that claim for universal credit was made. Universal credit would be payable from the date that he made the claim for universal credit (not from the date when he first applied for employment and support allowance). The submission to the minister seeking approval for the 2020 Regulations had said this:

“We are aware, as are stakeholders, that allowing a LCW determination whilst the person was receiving ESA does provide a potential alternative route to meeting the exception via initially making a new claim to ESA to seek a LCW determination and then claiming UC. We will look to keep the operation of policy under review with a view to attempting to

establish to what extent this might be the case and determine whether this remains appropriate. In the meantime, as these regulations clarify our current policy, this provision and that for claimants with a specific medical condition remain in place.”

16. Secondly, the 2020 Regulations were made as a matter of urgency and were not referred to the SSAC before they were made. Section 173(1) of the 1992 Act provides that the defendant did not have to refer the proposed regulations if it appeared to the Secretary of State that “by reason of the urgency of the matter it is inexpedient to refer them”. In that situation, the respondent will have to refer the regulations at a later date unless the SSAC agrees that it does not wish the regulations to be referred. That happened in this case. Officials from the department informed the SSAC that the regulations had been made, a meeting was held and a number of questions were raised. The officials agreed to provide further information, including a description of scenarios showing what particular hypothetical persons would receive if in receipt of universal credit or not. By a letter dated 18 November 2020, the SAAC confirmed that it had decided that the 2020 Regulations did not need to be referred to it.
17. The respondent did not carry out any public consultation exercise prior to making the 2020 Regulations. As explained in paragraph 10.1 of the explanatory memorandum to the 2020 Regulations (and confirmed in other evidence), the reason was that “the amendment restores the original policy intent, no consultation has been undertaken”.

THE FACTUAL BACKGROUND

18. Mr Kays suffers from attention deficit hyperactivity disorder (ADHD), autism spectrum disorder (both diagnosed in 2010), sensory processing disorder and auditory processing disorder (both diagnosed in 2019). He also suffers from Ehlers Danlos syndrome which causes joint hypermobility and laxity resulting in joint dislocations and subluxations, pain, and fatigue. He also suffers from Von Willebrand’s disease which is a blood clotting disorder.
19. Mr Kays was in receipt of disability living allowance as a child. He has been in receipt of a PIP since the age of 16. PIP is a non-means-tested benefit payable to adults with disabilities or long term health problems. Mr Kays receives both the mobility component of PIP and the daily living component. PIP is payable at either a standard or an enhanced rate depending on the extent of the effect of a person's disability on his relevant activities. Mr Kays is paid both the components at the enhanced rate.
20. Mr Kays began a course in applied psychology at Bath Spa University in September 2020. In his witness statements, he explains in detail the effects of his disabilities on him and the extra costs that he incurs as a result of his disabilities. He has had a part-time job as a barman during his academic studies to help meet his living costs. Because of the Ehlers Danloss syndrome, and the effects on his joints, feet and ankles, he can only work for a limited number of hours a shift.
21. For completeness, I note that Mr Kays applied on 20 November 2020 for an employment support allowance as, by that means, he would be able to obtain an assessment of his limited capability for work and, once he had that, he could apply for universal credit. That application was rejected in error by the respondent. Mr Kays

then made a second application on 7 April 2021. The department did not respond and Mr Kays' mother tried eight times to call the relevant helpline between 23 April 2022 and 26 May 2022. She was put on hold for between 30 and 60 minutes each time but her calls were never connected to an adviser. The second application was, it seems, not processed as a result of an error on the part of the department. After making a complaint, Mr Kays was told on 3 September 2021 that he would be sent for an assessment of his capability for work. On 3 November 2021, Mr Kays was assessed as having limited capability for work. That would enable him to apply for universal credit and he would be eligible to receive it. He has, of course, lost additional amounts of universal credit that he would have received if his application had been dealt with earlier, and the assessment of limited capability for work carried out sooner. He has been paid nominal compensation (£75) and the Secretary of State has, through her official, accepted that the application was not handled as it should have been and that the department had fallen well below the standards it sought to achieve. In a witness statement prepared for these proceedings, the official has apologised for the way in which the application was handled and has said that she is investigating whether the amount of the compensation can be increased.

THE CLAIM FOR JUDICIAL REVIEW

22. On 23 February 2021, Mr Kays brought a claim for judicial review of the respondent's decision to refuse his claim for universal credit on the basis of the amendments made by the 2020 Regulations. The Judge dismissed the claim. He held that there was no obligation on the respondent to consult prior to making the regulations and the defendant had not acted irrationally by deciding not to consult. He determined that it was not irrational for the respondent to amend the regulations in the way that was done. He held that the amendments did not involve a breach of Article 14 of the Convention on the Protection of Human Rights and Fundamental Freedoms ("the Convention"), in part because there was no discrimination on grounds of status and also because any differential treatment was justified. Finally, he held that the defendant had complied with her duty under section 149 of the 2010 Act.

THE APPEAL

23. There are four grounds of appeal, namely,
- (1) The decision to make the 2020 Regulations without consultation was irrational because it was based on a false premise about the original policy intent when the 2013 Regulations were made and the Judge either misunderstood the appellant's position or he was wrong to conclude that the decision was not irrational;
 - (2) The 2020 Regulations achieved their purpose in an irrational and arbitrary way and the Judge failed to make necessary findings about the way in which the Regulations achieve their purpose, or was wrong not to accept that it is an irrational and arbitrary mechanism;
 - (3) The purpose of the 2020 Regulations is an irrational and discriminatory one and the Judge wrongly treated the availability of other disability-specific financial support as relevant to whether disabled students need universal credit, failed to give weight to the absence of any reason for ignoring the reduced ability of disabled people to work in comparison with non-disabled people and wrongly

accepted the purported distinction between people claiming benefit before entering education and those not doing so;

- (4) The respondent did not have due regard to the equality impact of making the 2020 Regulations and the Judge was wrong to find that the respondent understood the effects of the measure or was entitled to treat the impact as too speculative and wrong to find that adequate regard could be shown to the age impact by reference to the disability impact.

THE FIRST GROUND – RATIONALITY OF THE DECISION NOT TO CONSULT

Submissions

24. Mr de la Mare KC, with Mr Royston, for the appellant accepted that there was no statutory or common law obligation on the respondent to consult prior to making the 2020 Regulations. Mr de la Mare submitted that the decision not to consult because the 2020 Regulations were restoring the original policy of the 2013 Regulations was irrational. First, the original consultees would have responded to the draft regulations as made, not what the defendant subjectively thought she was doing when making the 2013 Regulations. Secondly, he did not accept that the original policy intent was properly identified by the respondent in the 2020 Regulations. Further, he submitted that the respondent had failed to have regard to a relevant consideration, namely that there had been no consultation on the policy as enacted in the 2020 Regulations and it was irrational not to consult in the circumstances.
25. Ms Clement KC, with Ms Eddy for the respondent, submitted that it was now accepted that there had been no duty on the respondent to consult. Further, the respondent had not consulted before making the 2013 Regulations. It was the SSAC which had, itself, chosen to carry out a public consultation exercise. Against that background, the decision not to consult was rational. The amendment simply reflected what the respondent had in fact been doing.

Discussion

26. The starting point is the common ground that there is no duty on the respondent, whether arising under statute or at common law, to consult on the making of regulations. The respondent did not, in fact, consult when making the 2013 Regulations. The respondent had a clear and settled policy as to what she wished the relevant regulations to achieve, namely that students in receipt of specified benefits had to have a determination of limited capability to work made before making a claim for universal credit. She was not obliged to consult, and did not see any need to consult on, the amendment necessary to achieve that policy. There is nothing irrational in that approach.
27. That approach reflects the view of the Judge in dismissing this ground of challenge. He said this at paragraph 22 of his judgment:

“.....The reference to there being no consultation because there was no change of policy amounts to the Secretary of State

saying she saw no need to consult because the policy the amendment the 2020 Regulations pursued had already been the subject of consideration within her Department and been determined to be appropriate. On the evidence I have seen this had been the position at least since early 2017. The Secretary of State's reason was not to the effect that consultation had already occurred (which would have been incorrect), rather it was that she did not consider there was any need to consult on a settled policy position. Given (a) the absence of any express obligation to consult, (b) the principles stated in the judgments in *BAPIO* against reading consultation requirements into statutory provisions for making secondary legislation, and (c) the lack of any relevant past practice of consultation when regulations amending the 2013 Regulations were made, this was a conclusion lawfully open to the Secretary of State. The Claimant's consultation challenge therefore fails.”

28. There is nothing wrong in the Judge's conclusion. Nor did the Judge misunderstand the position. As the Judge said, the respondent was not saying that consultation had been carried out previously and so no further consultation was needed. That was factually correct. The evidence does not suggest that the respondent has ever said that she had already consulted on the 2013 Regulations or failed to realise that consultees would have been responding to draft regulations which reflected a different legal position from the 2020 Regulations (whatever the respondent might have subjectively thought the 2013 Regulations as originally made might mean). Indeed, as a matter of fact the respondent never consulted on the 2013 Regulations. Rather, the position was that the respondent decided not to consult as she was amending the 2013 Regulations (and thereby changing the legal position) to achieve her policy aims. It does not matter whether they were the original policy aims in terms of what the respondent intended the 2013 Regulations to achieve when she made them, or the way in which she had in fact (albeit unlawfully) been operating them since at least 2017. In either event, she was not obliged to consult and did not wish to consult as her aim was clear and all that remained was to amend the 2013 Regulations so that they did achieve what she wanted them to achieve. That was not an irrational position to adopt. This ground of appeal fails.

THE SECOND GROUND – THE WAY IN WHICH THE 2020 REGULATIONS ACHIEVED THEIR PURPOSE

Submissions

29. Mr de la Mare submitted that the way in which the 2020 Regulations achieved their purpose led to arbitrary results. The system overall still enabled disabled students to obtain a determination that they had limited capability for work, albeit by the route of claiming employment support allowance and using the work capability assessment obtained for that purpose for claiming universal credit. The payment of universal credit could not be backdated, however, to the date when the applicant applied for employment support allowance. The wording of regulation 14(1)(b) made it clear that the student could only make a claim for universal credit once the determination had been obtained. That left it to the department to determine how quickly to carry out the

assessment and when, therefore, a disabled student might become eligible for universal credit. That, he submitted, was irrational.

30. Ms Clement submitted that there was nothing irrational about immediately responding to the need to amend the 2013 Regulations to reflect the fact that the respondent wished to prevent students from being able to claim universal credit and then being referred for a work capability assessment. There was nothing irrational about not immediately amending other features of the system but keeping matters under review. That was particularly so given the urgency of the need to amend the 2013 Regulations given that it was only on about 30 July 2020 that the respondent accepted that the regulations as originally drafted did not achieve the desired aims.

Discussion

31. The reason why the respondent amended the arrangements governing universal credit but did not amend the arrangements governing employment support allowance are set out in paragraph 14 of the submission to the minister which is reproduced at paragraph 15 above. The Judge concluded that that approach was not irrational, saying at paragraph 29 of his judgment, that:

“I do not think it was irrational for the Secretary of State to adopt this approach – an approach in the nature of "wait and see". The 2020 Regulations were consistent with the Secretary of State's intention that for this class of applicant a claim for Universal Credit should not itself be the event triggering the capability for work assessment. The ministerial submission recognised that once regulation 14(1)(b) was amended, as then proposed, claims might still be possible by persons in full-time education who had not previously been in receipt of Universal Credit (or an equivalent legacy non-contributory benefit), but recommended that the amendment be made as proposed and the situation then be kept under review to decide if further amendment was appropriate. Given the general complexity of the rules of the benefit system it is not irrational to take one step at a time. The step proposed in the 2020 Regulations may not have been the step required if regard was had only to strict logic. But that alone is not sufficient to rule it out as an option lawfully open to the Secretary of State. One possibility was that practical experience might show that the amendment made to regulation 14(1)(b) by the 2020 Regulations was a sufficient implementation of her policy position. She was lawfully entitled to take one small step, leaving herself the option of considering the real-world consequences of that action, before deciding whether further action was required.”

32. I agree. The respondent did not act irrationally by amending the 2013 regulations in a way which meant that she did not have to refer disabled students applying for universal credit for a work capability assessment, thereby addressing the claim raised by Ms Kauser that her approach was unlawful. The amendment meant that no such reference was necessary. An applicant in the claimant's position would not be eligible for universal credit as he would be in full-time education, and the exception for

students set out in regulation 14 did not apply as he would not have had a determination of limited capability for work made before making the claim. True it is that that left in existence the possibility of making a different claim, obtaining a determination of limited work capability and then making a claim for universal credit. It was not irrational, however, to close one, and the major, route by which a work capability assessment could be claimed by disabled students and to keep the other route under review. The 2020 Regulations did not amend the arrangements for employment and support allowance. They simply provided, amongst other things, that any assessment of limited capability for work or work-related activity obtained as part of an assessment under the regulations relating to employment and support allowance, had to be obtained before making an application for universal credit. So far as assessments take different times to complete, or there are delays, or simply errors as occurred repeatedly in the case of the way the respondent dealt with the appellant's claim, these are not the result of anything done by the 2020 Regulations. The fact is that the opportunity to obtain an assessment of work capability was contained in the relevant regulations before the 2020 Regulations were made. The decision taken by the respondent was not to alter the arrangements governing employment and support allowance immediately but to keep matters under review. There is nothing irrational in such an approach. This ground of appeal fails.

THE THIRD GROUND – WHETHER THE 2020 REGULATIONS ARE IRRATIONAL AND DISCRIMINATORY

Submissions

33. Mr de la Mare accepted that he was no longer submitting that the 2020 Regulations involved unlawful discrimination contrary to Article 14 of the Convention. Rather, he submitted that the 2020 Regulations were irrational and discriminatory. He submitted that the 2020 Regulations differentiated irrationally between two groups of people. One group comprised disabled people with limited capability for work who continued to receive universal credit, including an additional amount in respect of the person's limited capability for work or work-related activity, in order to reflect the increased living costs such people faced. The respondent said that removing their entitlement to universal credit would deter them from undertaking full-time education. The other group were disabled students who in fact had limited capability for work or work-related activity but whose capability had not been determined before making a claim for universal credit. They were precluded from receiving universal credit yet they too faced the same increased living costs as the first group but did not receive universal credit with the additional elements meant to meet those costs. The other allowances available, such as disabled students allowance, were tied to specific needs arising out of the disability such as the need for equipment or physiotherapy and were not intended to be used for living costs. Further, this group of disabled students would equally be deterred from undertaking full-time university education if they were unable to obtain universal credit or, perversely, he submitted, there would be an incentive for them not to go immediately to university after school but to defer for a period while they applied for universal credit and sought to obtain a work capability assessment. That, he submitted, was irrational and discriminatory at common law. He relied on dicta in *Kruse v Johnson* [1898] 2 Q.B. 91 that there may be cases where bylaws were unreasonable if they were partial and unequal in their operation as between different classes. He also relied upon the dicta of Lord Hoffman in *Matadeen*

v Pointu [1999] AC 98 at 109C-G, that treating like cases alike, and unlike cases differently may be seen as a general axiom of rational behaviour.

34. Ms Clement submitted that it was important to recognise that the appellant accepted that the differential treatment between the two groups was justified for the purposes of the Convention. That indicated that it was unlikely that any differential treatment would, nevertheless, be unlawful at common law. Ms Clement also relied upon the observations of Underhill LJ in *R (Pantellerisco)* [2021] EWCA Civ 1454 at paragraphs 57 to 59. Underhill LJ noted that the courts should accord a high level of respect to the judgment of the relevant public authorities in the field of social and economic policy which included social security benefits. He accepted that the complexity of the system meant that there may have to be bright lines and fixed criteria which did not fully differentiate between the circumstances of different individuals. The courts should, however, be slow to find such choices are irrational. Against that background, the general rule is that persons receiving education are not entitled to universal credit. The respondent had taken the view that disabled students would ordinarily have their needs met through the student finance system, with additional support through the disabled students allowance and bursaries and grants targeted at disabled students. The exception was limited to those who are already in receipt of universal credit and who wish to enter into full-time education. The respondent's policy was to ensure that those persons were not discouraged from moving into full-time education. That, Ms Clement submitted, was not irrational.

Discussion

35. In the present case, the starting point is that Parliament has determined that persons in full-time education should not be eligible for universal credit unless regulations make an exception. The regulations made by the respondent draw a distinction between two groups of disabled students who wish to enter into full time education. Those who do so straight from school are expected to finance their studies from the student support system. In addition, for disabled students, there may be bursaries and hardship grants available at university to assist with living costs. There also specific benefits available, such as disabled students' allowances, which will fund specific additional costs such as equipment required as a result of the disability. They will make their decisions about whether to go to university on the basis of the student funding available to them.
36. The second group are in a different situation. They are already in receipt of universal credit which will include within it the additional amount they receive to reflect the fact that they have limited capability for work or work-related activity. They will be making a choice about entering full-time education in a different situation from the other group. They will already be in receipt of benefits. When they are deciding whether to enter into full-time education, the aim is not to discourage them from entering education by requiring them to give up the universal credit that they are already receiving.
37. The respondent is entitled to make different provision for different classes, both as a matter of general principle and under the regulation-making powers conferred by section 42(2) of the 2012 Act. In the present case, the respondent has made different provision for two different groups where there is a rational distinction between those two groups. The respondent is entitled to make such distinctions. The choice may

seem to some to be a hard choice. It may, in due course, emerge that there are different and better choices, as Underhill LJ recognised at paragraph 59 of his judgment in *Pantellerisco*. That, however, does not mean that the distinction that the respondent has made at present is irrational. It reflects a rational difference between two groups: one of whom will be taking decisions about whether to pursue full-time education on the basis of the student finance available and one who will be taking decisions when they are already in receipt of certain benefits. For those reasons, I consider that the respondent has not acted irrationally. We have not received detailed submissions about the scope of any public law principle of discrimination. It is sufficient to say that any such principle, if recognised, will recognise that differential treatment between groups for a justifiable, or valid, reason is permissible. In the present case, the respondent is differentiating between different groups for a justifiable, or valid reason. This ground of appeal fails.

THE FOURTH GROUND – THE PUBLIC SECTOR EQUALITY DUTY

Submissions

38. Mr de la Mare submitted that the respondent had not adequately demonstrated that she had had due regard to the need to eliminate discrimination and advance equality of opportunity. He relied, in particular, upon the summary of principles at paragraph 25 of the judgment of McCombe LJ in *R (Bracking) v Secretary of State for the Home Department* [2013] EWCA Civ 1345 [2014] EqL.R. 60. He submitted that the respondent had failed to demonstrate that she had assessed the risk and extent of any adverse impact. Further, the respondent had failed to inquire and obtain even the most basic information necessary to assess the impact. This included identifying the number of disabled students likely to be affected and assessing the financial impact on disabled students. The respondent had been operating the policy, albeit unlawfully, for a number of years and had ample opportunity to acquire relevant information. Furthermore, the respondent's officials had been able to provide the SSAC with scenarios showing the likely financial impact of refusing universal credit on particular categories of students quickly. None of that information was provided to the minister. Further, the impact of the policy affected disabled students not simply because they were disabled but because they were young. They were the group aged about 18 or 19 who would go straight to university from school. Those who were already receiving universal credit were likely to be older than that group and were likely to comprise mature students. That issue had never been addressed.
39. Ms Clement submitted that the duty under section 149 of the 2020 Act was a duty to have due regard to certain matters, not a duty to achieve a particular outcome. Courts should not undertake an unduly forensic analysis of equality impact assessments, as recognised by Davis LJ in *R (Bailey) v London Borough of Brent* [2011] EWCA Civ 1586, [2012] EqLR 168 at paragraph 102. Further, the nature of the exercise in the present case directed the minister's mind to the issue of disability precisely because it was concerned with the question of amendments affecting the ability of disabled students to claim universal credit and that was relevant to assessing whether the minister had discharged her duty under section 149. She submitted that it would not be possible to know the number of students who might be deterred from entering full-time education nor the impact on those students as the amount of universal credit that a person might, if eligible, receive depended on individual circumstances. Finally, Ms Clement submitted that what was "due regard" was the regard appropriate in the

circumstances which included the need to move urgently once the respondent decided on 30 July 2020 to accept that her practice of refusing to assess claimants for work capability was unlawful.

Discussion

40. Section 149 of the 2010 Act provides, so far as material, that:

“(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

...

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to— (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it ...

(7) The relevant protected characteristics are— age; disability ...”

41. The general approach to whether the duty has been complied with is well established. In broad terms, the duty under section 149 is a duty to have due regard to the specified matters not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters, taking into account the nature of the decision and the public authority's reasoning (see, e.g, *Baker v Secretary of State for Communities and Local Government (Equality and Human Rights Commission intervening)* [2009] PTSR 809 at paragraphs 36–37, and *Bracking* [2014] Eq LR 60, at paragraph 25). As Lord Neuberger of Abbotsbury PSC observed at para 74 of his judgment in *Hotak v Southwark London Borough Council (Equality and Human Rights Commission intervening)* [2015] PTSR 1189 “the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment”.

42. Relevant principles are set out in the judgment of McCombe LJ the Court of Appeal in *Bracking*. As McCombe LJ noted at paragraph 26, it was the application of the principles to the facts that was in issue in that case. There, the relevant government

department decided to close a fund operated by an independent non-governmental body which, broadly, provided funding to assist disabled persons to lead independent lives. On the facts, McCombe and Kitchin LJ concluded that the information provided to the relevant minister did not give her an adequate awareness that the proposals would place independent living in serious peril for a large number of people. Elias LJ concluded that the material did not demonstrate that the minister properly appreciated the scope of the matters which she was obliged to have due regard to. The Court of Appeal concluded in that particular case that the minister had not complied with the duty imposed by section 149 and quashed the decision. As the Court of Appeal has subsequently observed, that decision has to be read in context and the application of the duty will differ from case to case depending upon the function being exercised and the facts of the case. Furthermore, courts should be careful not to read the judgment in *Bracking* as though it were a statute: see *Powell v Dacorum Borough Council* [2019] EWCA Civ 23, [2019] HLR 21 at para 51.

43. The key issue in the present case is whether the respondent did have due regard to the need to eliminate discrimination and advance equality of opportunity. I am satisfied that she did. The submission to the minister asked her to approve the equality analysis. That document summarised the scope of the section 149 duty. The document explained that the regulations were amended to make clear that disabled students in receipt of certain specified benefits such as disability living allowance or a PIP must already have a determination of limited capability to work in order to be eligible for universal credit. It explained that the policy only impacted on the disabled. It identified the adverse impact on disabled students, namely that they would not be entitled to universal credit when they entered further education if they had not already been assessed as having limited capability for work. They would have to access support for fees and living costs through the student support system and any discretionary bursary and grant they could obtain, and specified benefits intended to assist with additional costs arising from disability. The document explained why that was considered to be justified. It explained that one group of persons who were already in receipt of universal credit and who moved into full-time education would continue to receive universal credit. It explained why it considered that the differential treatment of that group was considered justified.
44. The respondent did therefore have sufficient information drawn to her attention to enable her to have due regard to the matters in section 149. She knew the policy would impact on disabled students, and indeed, on disabled students who had limited capability for work. She knew the consequences, namely that that group would not be eligible for universal credit. She knew that the adverse impacts would not be shared by one specific group of persons moving into full-time education. She knew the justification for requiring disabled students generally to access support through the student finance support network and grants and bursaries and allowances and why one group had received more favourable treatment. I agree with the Judge who said at paragraph 40 of his judgment:

“Section 149 of the 2010 Act does not require a decision-maker to have considered every conceivable matter; what section 149 requires is coherent and robust consideration of the likely consequences of a proposed decision within the framework that section sets. In this case it was sufficient for the Secretary of

State to identify the sources of income and support that would be available to disabled students once the 2020 Regulations were made. This addressed the core consequences of the amendment to regulation 14. The quality of the assessment would not be materially improved by considering the possible impact of disability on the possibility of additional income from part-time work. The range of variables likely to affect any student's ability to supplement his income from part-time work is significant, making any such assessment highly speculative. When assessing the likely impact of the 2020 Regulations, the Secretary of State was entitled to focus on consequences that were better-known and more certain. ”

45. Nor do I consider that the respondent failed to have regard in any material sense to the age of the disabled students adversely affected. It may be the case that those in the advantaged group, the students who are already in receipt of universal credit, are older than the disadvantaged group of disabled students who move straight from school to university and who will not be entitled to universal credit. The students who are adversely affected, however, are affected by reason of their disability and any additional living costs they face arise as a result of that disability not their age. The impact on disabled students had been considered. As the judge put it at paragraph 41 of his judgment:

“However, the point of substance is for the purposes of the public sector equality duty claim, the Claimant's age discrimination submission is materially the same as his disability discrimination submission. Both focus on the distinction drawn between students who go into higher education straight from school and those who do not. Thus, the matter the Claimant relies on in each instance as having not been afforded due consideration is the same. This point, that some disabled students would be disadvantaged, is the one referred to in the passage I have set out above (appearing in the Equality Analysis under the heading "Disability").”

46. For completeness, it is not necessary to reach a view on the relevance of the urgency surrounding the making of the 2020 Regulations. The need to exercise functions urgently may well, in an appropriate case, affect the way a public authority discharges its duty under section 149. It may, for example, affect the information that a public authority may reasonably be expected to obtain and consider before reaching a decision. It is more debatable whether that is the case where the urgency arises out of circumstances created by the public authority itself. That is the position here where the urgency arose out of the failure by the department to respond to the ruling by the First-tier Tribunal in September 2017 that it was operating the system in breach of its statutory duties until she conceded the judicial review at the end of July 2020. It is not necessary to decide that issue as I consider that the respondent did, in any event, discharge her duty under section 149 of the 2010 Act and did have due regard to the relevant matters set out in that section. This ground of appeal fails.
47. For those reasons. I would dismiss this appeal.

Lady Justice Falk

48. I agree.

Lady Justice Simler

49. I agree that this appeal should be dismissed for the reasons given by Lewis LJ, but add a few short observations of my own on the common law discrimination or irrationality argument.

50. It is hard in a case like this one, to avoid feelings of sympathy with the situation in which Mr Kays has found himself. He has persevered with his education in the face of his considerable disabilities, gaining a highly competitive place at Bath Spa University; and like many students, he has done his best to supplement his student finance with part-time work. However, his limited capability for work makes that difficult, and often impossible. The difficulties he and his mother have experienced in securing a limited capability for work determination for him against that background can only have added insult to injury, and are particularly regrettable.

51. Notwithstanding that, I recognise that legislation can legitimately, and often does, differentiate by identifying particular groups of people for certain treatment and at the same time failing to differentiate within these groups or by comparison with different groups of people who receive different treatment. The problems that such differentiation gives rise to are all the more acute where they concern a complex system such as universal credit, and the allocation of scarce financial resources giving rise to a range of practical and political assessments of a kind which the court is ill-equipped to judge. As Lewis LJ observes, and I agree, to be workable any such system may have to incorporate bright-line rules and criteria which do not differentiate fully between the circumstances of different individuals. However strong the temptation is in these circumstances, to find that some particular feature of such a system is "irrational" because it produces harsh results in particular cases, it must be avoided.

52. Here, the 2020 Regulations reflected a distinction between two groups of person (both with disabilities): the first group comprised those not already in receipt of a limited capability for work ("LCW") determination (or universal credit). They would be making decisions about whether to pursue full-time education on the basis of such student finance as was available. They would not be losing anything in consequence of the 2020 amendment, but their path to a LCW determination on an application for universal credit would close. The second, advantaged group comprised those already in receipt of universal credit with a LCW determination. They would be making decisions on the basis of benefits in payment. Their position was preserved in order to avoid discouraging them from seeking tertiary education by removing universal credit then in payment. The respondent reasonably concluded that these two groups were not in materially similar positions. The reason for that and for treating them differently in consequence engaged questions of social and economic policy on which views might legitimately differ. In these circumstances, and against the background of an unchallenged finding by the Judge that this distinction gives rise to no unlawful discrimination on suspect grounds, it seems to me that it cannot be impugned as irrational.