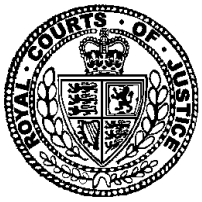

Neutral Citation Number: [2021] EWHC 465 (Admin)

Case No: CO/1689/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 March 2021

Before:

MR JUSTICE BOURNE

- -

Between:

The Queen
on the application of
Alison Turner

Claimant

- and -

Secretary of State for Work and Pensions **Defendant**

-and-

Equality and Human Rights Commission

Intervenor

- -

Adam Straw and **Jesse Nicholls** (instructed by Leigh Day) for the Claimant
Clive Sheldon QC and **Katherine Eddy** (instructed by the Government Legal Department) for the Defendant
Chris Buttler and **Angharad Price** (instructed by the Equality and Human Rights Commission) for the Intervenor

Hearing dates: 12-13 January 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 3rd March 2021 at 10.00am.

Mr Justice Bourne:

Introduction

1. This is a very sad case. It concerns Errol Graham, who died of starvation in or around June 2018 aged 57. Mr Graham was disabled, suffering from long-term depression and hypothyroidism. He had been in receipt of benefits from 2003 onwards. In 2017 his continuing eligibility for Employment Support Allowance ("ESA") was reviewed. Mr Graham did not engage with the process and, on or around 17 October 2017, the Defendant decided to discontinue payment of ESA. It seems that Mr Graham thereafter made no further contact with any family, friends, agencies or authorities. Rent arrears accrued at the property where he was a tenant of Nottingham City Homes and eviction procedures were commenced. On 20 June 2018, bailiffs broke down the door of the flat and found Mr Graham's body.

2. The Claimant challenges the lawfulness of the Defendant's policy on ESA and her decision in Mr Graham's case.

Statutory background

3. Under the Welfare Reform Act 2007, ESA was introduced to replace Incapacity Benefit for those whose ability to work is limited by a physical or mental condition. It is an income replacement benefit, recognising that claimants will have lost potential earnings by reason of their reduced ability to work.

4. This case concerns means-tested income-related ESA (some claimants receive "contributory ESA" which depends on prior National Insurance contributions). Universal Credit has now replaced income-related ESA in most new claims, but many claimants continue to receive income-related ESA.

5. A claimant for ESA must satisfy conditions specified in section 1 and schedule 1 of the 2007 Act. These include having "limited capability for work". Section 1(4) states:

> "(4) For the purposes of this Part, a person has limited capability for work if–
>
> (a) his capability for work is limited by his physical or mental condition, and
>
> (b) the limitation is such that it is not reasonable to require him to work."

6. Section 8 provides that the question of capability for work shall be determined in accordance with regulations. The relevant regulations in the present case are the Employment and Support Allowance Regulations 2008.

7. Regulation 19(1) of the 2008 Regulations provides that the question of capability is to be determined on the basis of a "limited capability for work assessment", sometimes referred to as a "WCA". This entails the assessment of the claimant's ability to perform activities specified in schedule 2 to the Regulations. Points are awarded if a claimant's case corresponds to various descriptors listed in the schedule, and a total of 15 points is necessary to establish limited capability for work.

8. The key regulations for the purposes of this challenge are regs 21-24.

9. Under reg 21(1)(b), information or evidence required to determine whether a claimant has limited capability for work may be requested in the form of a questionnaire. Under reg 22, a claimant who fails without good cause to comply with the request referred to in regulation 21(1)(b) and a subsequent request "is to be treated as not having limited capability for work".

10. Similarly, reg 23 provides that the claimant may be called for a medical examination to determine limited capability for work. Under reg 23(2), a claimant who fails without good cause to attend for or to submit to such an examination "is to be treated as not having limited capability for work".

11. Reg 24 states, so far as material:

> "The matters to be taken into account in determining whether a claimant has good cause under regulation 22 (failure to provide information in relation to limited capability for work) or 23 (failure to attend a medical examination to determine limited capability for work) include—
>
> (a) whether the claimant was outside Great Britain at the relevant time;
>
> (b) the claimant's state of health at the relevant time; and
>
> (c) the nature of any disability the claimant has."

12. The present case concerns a claimant who did not provide the information sought by the DWP and did not attend an examination and who therefore, on the face of it, would be "treated as not having limited capability for work" if he did not show "good cause" for that omission.

13. Regulation 29 further provides (so far as is material):

> "(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.
>
> (2) … this paragraph applies if—
>
> …
>
> (b) the claimant suffers from some specific disease or bodily or mental disablement and, by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work."

14. Those found eligible for ESA are placed in either the "work-related activity group" or the "support group". Those in the work-related activity group are required to make use of an assigned work coach to do certain activities to keep them close to the labour market. Work-related activity is defined by section 24 as "activity which makes it more likely that the person will obtain or remain in work or be able to do so". Those

in the support group, who are found to have limited capability for work-related activity (as well as limited capability for work), are not subject to that requirement.

15. Like limited capability for work, limited capability for work-related activity is determined in accordance with provisions of the 2008 Regulations. Under reg 34 this is, similarly, determined by applying descriptors found in schedule 3. Further, reg 35(2) provides:

> "A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if—
>
> (a) the claimant suffers from some specific disease or bodily or mental disablement; and
>
> (b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity."

The policy under challenge

16. The Claimant originally challenged the policy as it stood at the time of the events which are summarised below. The Defendant has since made significant changes. That led to a narrowing of the grounds. The Claimant maintains her challenge to aspects of the policy which, she contends, have not been remedied by the revised policy.

17. I will set out the relevant matters in chronological order, beginning with the policy as it stood at the time of the decision in Mr Graham's case.

18. The relevant material is or was found in the Defendant's internal operational guidance entitled "WCA Outcomes (ESA)" and in a document entitled "Decision Makers' Guide" ("DMG").

19. The Claimant essentially objects to the combined effect of two aspects of the policy. First, the benefit claimant in each case is given the burden of showing "good cause" for a failure to complete a questionnaire or attend a medical examination. Second, the Claimant contends that the policy (even after revision) does not impose on decision makers a sufficient requirement to inquire into the facts in cases where benefit claimants suffering from mental illness are not engaging with the DWP.

20. It is helpful to set out some of the relevant policy references in terms. The following extracts give the essence of the relevant policy but are not intended to be comprehensive.

21. The WCA Outcomes policy has a section dealing with cases in which claimants fail to attend a WCA, or fail to participate in or comply with the process. This states, in particular:

> "**Did Not Attend a WCA**

5. When the claimant fails to attend a WCA assessment, MSRS produces an electronic outcome. MSRS holds all contact made between the claimant and HAAS. This includes all letters, telephone contacts including unsuccessful attempts, and appointment history.

6. HAAS will issue a letter, BF223 to the claimant asking for the reasons they did not attend. Claimants will be requested to return their response to BC within 15 calendar days. A reply envelope is enclosed with the BF223.

Consequences:

Failure to take prompt action will result in:

• failing in your duty on behalf of DWP to safeguard vulnerable claimants by not checking the Mental Health flag

• Failure to action, failure to return ESA50 or attend the WCA, means the claimant will not receive their correct entitlement and be overpaid

• increase the value of any overpayment, adding to official error

• rework to correct the claim.

…

9. When an MSRS record shows a Mental Health flag, the DM should check if the claimants has attended or received any of the following:

• Sanctions Safeguard Visits for non-attendance at mandatory interviews.

• Telephone call from BC/JCP collecting good cause information for DNA WCA

• Returned BF223

10. If the answer is yes to any of the above, the DM will consider Good Cause as normal as the claimant has already had their responsibilities explained, or responded to provide Good Cause reasons. See DMG42261 … and the DNA Toolkit for further instructions around good cause.

11. When considering Good Cause the DM may decide the claimant would benefit from a home visit. To do this they must engage the Assessment Provider to complete this. The DM does not have to get GP evidence and neither does the claimant.

> These cases should be treated as exceptions, DMG 42261 applies.
>
> 12. If the answer to all of the three bullet points above is no, and the DM is considering not accepting good cause, refer the case for a pre-disallowance Safeguard visit, see Core Visits .... Complete form MF37 …, ensuring all the appropriate boxes are complete, including:
>
> - The claimant's condition
> - The claimant's representative/third party
> - Details of action taken to contact the claimant/representative
> - If a previous safeguard visit has been undertaken
> - If Good Cause has been considered
>
> 13. All of the above must be completed or the Assessment Referral could be returned."

22. Safeguarding visits, also known as "core visits", were attempted twice in the present case. At the inquest into Mr Graham's death, the Coroner recorded DWP evidence that there was at that time no guidance on what to do after "failed safeguarding visits".

23. Under the heading "Did Not Attend (DNA) Toolkit for Band C Decision Makers and Managers", the policy goes on to state:

> "1. When ESA was introduced it was stressed how important it is to work with our claimants and move them closer to the labour market.
>
> 2. Decision Makers (DMs) have a crucial role to play in this and any rulings made by a DM must be made while considering the statement above. The actions of a DM can influence claimant behaviour and it is important DMs are aware of the consequences their actions may bring.
>
> 3. This toolkit highlights the basic things that should be considered when making DNA decisions, and as the preferred method of communicating with the claimant is by phone, also includes suggested questions to ask the claimant. There are extensive instructions for DMs. See DMG Chapter 42 …
>
> **Note:** Take care to safeguard vulnerable claimants.
>
> **Evidence and Best Practise** [*sic*]
>
> **Always try to speak to the claimant on the phone**

> 4. Any evidence collected over the phone is valid, but the DM must always ask for evidence of appointments, such as appointment cards or letters to be sent in.
>
> 5. The onus is on the claimant to provide any evidence required to make a fair and balanced decision. DMs must not make assumptions. However, it is also not appropriate for a DM to decide they are willing to accept good cause as it is the claimants first FTA, see DMG 01344 (link is external)."

24. A few paragraphs later the guidance continues:

> "**Always check Legacy notepad, LMS conversations and CAM**
>
> 8. In all cases records must be checked for previous history of avoidance, similar explanations for non attendance in the past, or previous FTA markers or rearranged WCA and WFI appointments. This gives a better picture of claimant behaviour and builds evidence for your decision.
>
> **Explain to the claimant the importance of attending their appointment and the consequences of not attending**
>
> 9. This message is important if we are to ensure that claimants take responsibility for their actions. However, the claimant is advised at the point of claim, in the ESA40 and in the ESA35 that they might be called for an assessment and warned of the possible consequences, before they get the appointment letter."

25. Further references are found in the Decision Makers' Guide. Chapter 42 is entitled "Limited Capability for Work and Limited Capability for Work-Related Activity". A section of that chapter is entitled "Treated as not having limited capability for work". Within that section I note the following in particular:

> "42456 Before a claimant can be treated as not having LCW, the DM has to be satisfied that the prescribed conditions are met. These include the way in which the information or attendance was requested and the amount of notice given.
>
> …
>
> "**Consideration of good cause**
>
> 42500 When a claimant fails to return the questionnaire or fails to attend or submit to examination, consideration of good cause includes
>
> 1. whether the claimant was outside GB at the relevant time **and**
>
> 2. the claimant's state of health at the relevant time **and**

3. the nature of any disability the claimant has.

Note: The list is not exhaustive (see DMG 42501 - 42543 for further guidance on good cause).

42501 The claimant will have been asked to give the reasons for not complying with the Secretary of State's request for information or to attend or submit for examination. The DM should bear in mind the guidance about evidence, including corroboration, in DMG Chapter 01.

42502 The list is not exhaustive; the regulations state "include". The onus of proving good cause lies with the claimant who fails to comply. The test of good cause is whether the DM judges the reason for non-return or non-attendance or failure to submit to be reasonable and likely on the balance of probabilities. See DMG Chapter 01 for guidance. The DM needs to ascertain the precise facts and apply the concept of "good cause".

42503 The DM may determine that a claimant is treated as not having LCW if

1. they have failed to return the questionnaire **or**

2. they have failed to attend or submit for examination **and**

3. have not replied to enquiries **or**

4. the reasons given do not amount to good cause.

General considerations

42504 When considering whether the claimant showed good cause, the DM should ensure that they fully explain how they made their determination by recording

1. findings about the claimant's state of health at the time and the nature of their disability

2. what evidence was considered

3. what findings were made on the evidence

4. what steps they took to contact the claimant

5. whether the claimant is vulnerable

6. whether there were previous failures and whether good cause was accepted

7. the reasons for their determination on good cause.

Claimant's state of health

42505 The claimant may state that they were unable to attend a face–to–face assessment due to the state of their health on the date of the appointment (see DMG 42532). Claimants may have difficulty in producing further medical evidence to support their statement, as GPs are not obliged to provide this. Failure to provide such evidence is not of itself a reason for refusing to accept that good cause was shown.

42506 The DM should consider whether the stated health problem prevented the claimant from contacting Medical Services to re–arrange the appointment. The DM should also consider the nature of the claimant's health condition and whether it could reasonably have lead [sic] to the claimant being, for example, incapacitated, forgetful, confused, unmotivated or too anxious to comply with the process because of their health condition.

42507 DMs are reminded that the nature of the claimant's disability is a factor that must be taken into account when considering whether good cause is shown (see DMG 42500). The DM should make every effort to ensure that all sources of evidence are considered before making a determination on good cause. Evidence about the claimant's health may be obtained from

1. form BF223 (good cause enquiry form)

2. any fit notes supplied

3. ESA1 claim form

4. ESA50 questionnaire where one is available

5. any evidence previously submitted that is relevant

6. ESA85 report where one is available.

42508 This may be particularly relevant in cases where the claimant has

1. mental health conditions affecting memory or concentration

2. a learning difficulty, for example where this affects comprehension

3. medication which affects memory or concentration

4. a sensory impairment, such as being registered blind."

26. The reference at paragraph 42501 to DMG Chapter 01 is to a lengthy chapter which explores numerous aspects of evidence and decision making. It includes a passage entitled "Burden of proof":

> "01405 A clear understanding of where the burden of proof lies helps the DM to weigh the evidence and decide whether further evidence should be sought. DMs should note that
>
> 1. initially the burden lies with the claimant to prove that the conditions for a claim or application are satisfied[1] but they should do as much as possible to ensure that the claimant has every opportunity to provide all relevant evidence and where the information is available to them rather than the claimant, then they must make the necessary steps to enable it to be traced
>
> 2. where they wish to show that an exception to a condition of entitlement is not satisfied, the burden of proof rests with them[2]
>
> 3. there is no presumption in favour of the claimant though for IIDB the claimant is normally presumed to have the PD if he has worked in the prescribed occupation; for example, a cotton weaver with byssinosis (see DMG Chapter 67 for full guidance)
>
> 4. where an allegation is denied by the claimant it is generally for DMs to prove the facts.
>
> 5. the burden of proving that the conditions for revision or supersession are satisfied lies with the person who applies for revision or supersession
>
> 6. in overpayment cases the burden of proof for the purposes of determining the sum to be recovered falls on them[3] (see DMG Chapter 09).
>
> 7. where a criminal court convicts a person of an offence related to obtaining or receiving benefit, that conviction shifts the burden of proof relating to the same benefit and period at issue from them to the claimant[4].
>
> Note 1: An example of 2. is where there is a claim for a SF funeral payment, it is for the DM to show that the claimant is not entitled because a close relative is not in receipt of a qualifying benefit.
>
> Note 2: Where 5. applies the question of whether the conditions for revision or supersession are satisfied must be considered separately from the question of whether the decision should be revised or superseded."

27. Meanwhile Chapter 42 of the DMG then gives some worked examples.

28. The first example concerns "Jack", a claimant with severe learning difficulties who does not return a questionnaire. The DWP receives a form filled out by a social worker, explaining that Jack had significant difficulties understanding correspondence. In the example, good cause is accepted. Jack then fails to attend an examination and does not respond to a follow-up communication. Having regard to his disability, the decision maker again accepts good cause and determines that Jack will need ongoing support for his benefit claims.

29. There is then a contrasting example of "Tamara", who fails to attend two appointments and does not respond to further communications. The example states that "there is no evidence in the claim form, fit note or ESA50 which indicates that her health condition is likely to impact her ability to attend". The decision maker determines that there was no good cause and Tamara is treated as not having LCW.

30. The DMG states in terms (at paragraph 42509) that an absence of good cause for a failure to attend is not to be inferred purely from the fact that the claimant has previously attended a WCA.

31. The policies make clear that if, following such inquiries as are made, the claimant does not discharge the burden of proving good cause, the claim for ESA will be disallowed.

Factual background

32. Mr Graham began claiming Incapacity Benefit with effect from 23 September 2003. He attended medical examinations in connection with his claims in 2004 and 2007 and was assessed as qualifying for Incapacity Benefit.

33. In due course Mr Graham's case was considered for migration to ESA. He attended an examination on 29 December 2011, and was found not to have "limited capability for work". He pursued an appeal which was unsuccessful. However, he made a new claim for ESA on 22 May 2013. On 7 September 2013, he attended a limited capability for work assessment. On that occasion he was found to have had "anxiety and depression for many years" with suicidal thoughts and a reported "lack of motivation". As a result, he was placed in the support group and therefore was granted ESA without being subject to work-related requirements, subject to review six months later.

34. He attended a further limited capability for work assessment on 1 June 2014. On this occasion it was decided that he must be treated as having limited capability for work and for work-related activity under regulation 35(2), on the basis that if this were not found, there would by reason of a mental disablement be a substantial risk to his health. He was again placed in the support group, subject to a further review after another three years.

35. Events concerning Mr Graham's health in that next three year period are covered by the witness statement of the Claimant. She, since May 2008, has been in a relationship with Lee Burton, who is Mr Graham's son. She and Mr Burton had a son in 2009, and they also look after the Claimant's daughter who was born in 2006. She says that Mr

Burton and Mr Graham were close and Mr Graham spent a lot of time with Mr Burton, with her and with the children from 2009 until mid-2015.

36. The Claimant was aware that Mr Graham had mental health issues, but these originally seemed manageable. However, she describes him suffering the sudden onset of acute symptoms on or around 1 June 2015. She and other family members called an ambulance for him. He was taken to hospital, where he was compulsorily admitted under section 2 of the Mental Health Act 1983 (i.e. for a limited period for assessment).

37. Mr Graham's medical notes record that Mr Burton had described him as saying that he had "no need for worldly possessions" and that he presented with "severe/psychotic depression" and "heightened risk of suicide" with risks of "self neglect, unable to communicate, not eating, drinking or functioning in general …".

38. Mr Graham remained in hospital for several weeks, during which time the Claimant and Mr Burton visited him frequently. According to the Claimant, Mr Graham effectively discharged himself after he was allowed to leave the hospital and return to his flat. A letter dated 29 July 2015 from a Community Mental Health Nurse to his GP (produced at the Inquest) records that he declined further input into his care. The nurse visited on 9 July 2015 and "found him to demonstrate good care of self and home", and he denied any suicidal ideation.

39. Although the Claimant and Mr Burton left supplies at Mr Graham's flat for some time, he would not meet them. A friend of Mr Graham told the Claimant that Mr Graham blamed them for his compulsory admission. They last saw him in late July 2015, by chance in the street, but he would not speak to them. They did not meet him again. From late 2015 onwards the Claimant had health problems of her own. In August 2016 Mr Burton was involved in a violent event which would lead to him receiving an 8 year prison sentence which he is still serving.

40. In July 2017, the time came for the Defendant to review the ESA claim. The Defendant's officials at that time did not know about any of the events from 2015 onwards. They contacted Mr Graham's GP, asking him to complete a form to provide information about his current medical circumstances. The doctor completed the form, but noted that Mr Graham had not been seen at the practice since 2013 and had not taken any medication since 23 November 2015. The 2015 hospital admission was not mentioned, although a hospital discharge summary had been sent to the GP surgery.

41. Mr Graham's case was considered by a registered nurse on the Defendant's behalf on 7 August 2017. Her notes record that she had seen the forms previously completed by Mr Graham and said:

> "I am unable to advise on the evidence held … Not been seen at the GP surgery since 2013 … the claimed level of disability is unclear. An assessment is needed to determine the level of function."

42. Mr Graham was therefore sent a written invitation to an appointment on 31 August 2017. The covering letter explained that failure to attend could affect his benefit.

43. Unfortunately Mr Graham did not attend on 31 August 2017. Nor did he respond to a letter of 1 September 2017, asking him why he had not attended, or a telephone call on 9 October 2017 or a text message. When a further call on 10 October 2017 was unanswered, the case was referred to the DWP Visiting Team for a safeguarding visit. Notes indicated that this was an appropriate step to take because the available medical evidence referred to depression and therefore to possible vulnerability.

44. Despite two attempts to conduct the safeguarding visit on 16 and 17 October 2017, Mr Graham gave no reply to the intercom at the entrance to the building, or to a letter which was left at the premises or to a further telephone call.

45. On 17 October 2017, the Defendant sent Mr Graham a decision letter informing him that he had not shown good cause for not attending the assessment on 31 August 2017. His ESA claim was closed with effect from 1 September 2017, although he had in fact been paid up to 10 October 2017.

46. The decision letter advised Mr Graham that if he disagreed with the decision, he should telephone or write to the DWP to request a reconsideration, and that he would have a right of appeal following such a reconsideration.

47. The Defendant also notified Nottingham City Council that Mr Graham was no longer eligible for ESA. His ESA eligibility was the foundation for his eligibility for Housing Benefit. Nottingham City Council stopped Mr Graham's Housing Benefit from 10 October, and he stopped paying rent in November 2017. That caused Nottingham City Homes to attempt to contact him by letter and telephone. A Rents Account Manager attended the flat in February 2018 and actually spoke to him through the door, but Mr Graham began shouting and punching the door, so the manager left. That manager also tried to contact Mr Graham's next-of-kin, namely Mr Burton, but the number was out of service. Nottingham City Homes began eviction proceedings but Mr Graham did not respond to any further communications on that subject. As I have said, he was found by the bailiffs on 20 June 2018.

48. An inquest took place in June 2019. The medical cause of death was determined to be starvation. Having conducted a wide ranging assessment of Mr Graham's circumstances and the question of whether any of the agencies involved with him could have predicted or prevented his death, the Coroner said (among other things):

> "It is not possible for me to make a finding as to the reasons why Errol did not respond to the DWP at this time. There simply is not sufficient evidence as to how he was functioning, however, it is likely that his mental health was poor at this time - he does not appear to be having contact with other people, and he did not seek help from his GP or support agencies as he had done previously.
>
> …
>
> I have considered carefully the evidence available to the DWP at the time this decision was made. It is in my view a hugely important decision to take, particularly with the knowledge that this man had longterm illness that was unlikely to have

> improved significantly – also that he was reliant on this benefit as his sole income. Whilst I accept that there may have been no obvious 'good cause' for Errol not attending the WCA, there was other evidence of longterm depression and hypothyroidism from the recent GP information - I accept it was limited information, but more detail could have been sought from the GP. In addition I understand from Ms Hunt that currently there is no guidance for DWP staff following 'failed safeguarding visits' as occurred in this case. There is currently no requirement to seek more information before making a decision to cease benefit following failed safeguarding visits. Again I cannot say on a balance of probabilities that the cessation of Errol's ESA led directly to his death, but I do think the sudden loss of all income, and the threat of eviction that followed from it, will have caused huge distress and worry, and significant financial hardship. I do not believe Errol had any other source of money to buy food or other provisions, nor to pay for utilities. He did not ask for help from family, NCH, his GP or other support agencies, or contact the DWP to explain his circumstances. Dr Thangavelu described in his evidence that Errol was vulnerable to life stressors. It is likely that this loss of income, and housing, were the final and devastating stressors, that had a significant effect on his mental health.
>
> …
>
> **Conclusion**
>
> In my findings I have identified a number of missed opportunities to better support Errol, a vulnerable man with long term depression. I cannot however say that there is a direct causal connection between any of these missed opportunities when considered alone, and Errol's death. As is so common sadly with hindsight at an Inquest, a number of agencies had pointers suggesting his deteriorating health, but these were not put together into the full and very worrying picture until after his death. The safety net that should surround vulnerable people like Errol in our society had holes within it. Errol needed the GP to try harder to see him, certainly from 2015 onwards. He needed the DWP to obtain more evidence at the time his ESA was stopped, to make a more informed decision about him, particularly following the failed safeguarding visits. If anyone had known he was struggling, help could have been provided. We do not know why he did not seek it."

The revisions to the Defendant's policy

49. Giving evidence at the Inquest, the Defendant's Chief Psychologist said that he was leading a review of the Defendant's safeguarding policy and procedures which was intended to be completed by Autumn 2019.

50. The Defendant also considered Mr Graham's case at an Internal Process Review on 14 August 2019. It also set up a Serious Case Panel, which made recommendations in March 2020 with a view to achieving greater cross-departmental consistency in supporting vulnerable claimants.

51. These initiatives led to new guidance on ineffective safeguarding visits. On 1 October 2020 the Defendant issued a revised ESA policy. Relevant new material is found in a passage entitled "Core Visits – ESA Guidance". It requires that where the DWP knows that a claimant has a condition which could affect their ability to understand or comply with their obligations, "a Core Visit to their home must be considered prior to any sanction or disallowance decision being made", and:

> "To mitigate the risk of hardship to claimants where we have safeguarding concerns, consideration should also be given to contacting (where relevant and appropriate):
>
> • the claimant's appointee, Power of Attorney (POA) or next of kin
>
> • the claimant's Community Psychiatric Nurse (CPN)
>
> • social services
>
> • the police."

52. If two Core Visits have been ineffective (because the claimant is not at home or does not co-operate), then:

> "… the claimant's details must be referred to the HEO of the person who made the referral to discuss the case in more detail as part of the case conference. Pending the outcome of the case conference, the claimant's award will not end and payments will not be stopped.
>
> Case conferencing will take place between the HEO and the referrer to determine all the facts of the case following two ineffective visits prior to making a decision on the claim.
>
> The case conference will review the information available to them and provide an assurance check. This will include reviewing, for example:
>
> • the circumstances prompting the referral for a visit to be made
>
> • previous interactions with the Department, including attendance at any interventions as part of the conditionality to receive ESA
>
> • any documentation or notes available regarding the claimant, for example a medical report following attendance at a WCA

> • any information we currently hold from third parties (this may include a next of kin or organisations such as social services)
>
> • whether a deferral of the original intervention/appointment is appropriate at this stage until safeguarding enquiries are made.
>
> The case conference will also consider whether to involve the local partnership manager who may be aware of local organisations who can offer support.
>
> The case conference participants must be satisfied that agreed actions have been taken and all relevant information has been adequately considered.
>
> The HEO must review the information and note on the relevant systems the actions considered/agreed."

53. Meanwhile, it seems that references in the WCA Outcomes policy to claimants having the burden of showing good cause remain in effect.

The grounds of challenge

54. The grounds of challenge which are maintained, notwithstanding the changes to the policy, are summarised by the Claimant's counsel at paragraphs 4 and 5 of their skeleton argument.

55. The way in which the grounds are presented has undergone some evolution since they were pleaded in the Statement of Facts and Grounds and were the subject of the order of Morris J granting permission. Morris J granted permission for what were pleaded as Substantive Grounds A, B and C and Procedural Ground A. However, only Substantive Grounds B and C have been pursued at this hearing. Each was pleaded as applying, separately, to the Defendant's policy and to the individual decision in Mr Graham's case.

56. As presented at the hearing, ground B (interpretation of regulation 24) and ground C (application of section 149 of the Equality Act 2010) have to some degree merged or have at least been combined. However, they have continued to be the subject of separate argument in relation to, first, the policy and second, the individual decision.

57. For convenient further reference, I have (1) addressed the grounds as they are presented in the Claimant's skeleton argument and (2) changed their numbering. They are summarised in the following passage, quoted from paragraphs 4 and 5 of the skeleton argument but renumbered by me:

> "1. The Defendant's current policy is unlawful for the following reasons:
>
> a. Firstly, it is well recognised that a substantial number of claimants will be prevented from responding to the DWP or putting forward evidence to show they had a good cause for not responding, because of mental illness. In such cases, placing the onus or burden on the claimant to prove why he or she had

> good cause is contrary to caselaw and inconsistent with the objectives of the legislation. Yet the policy places that onus of proving good cause on the claimant. The policy is therefore unlawful as it incorporates an error of law, provides a misleading impression of what the law is, and permits or encourages unlawful decision making.
>
> b. Secondly, in a case like this, where the claimant is vulnerable and has a long-term mental disability which may give him a good cause, regulation 24 of the Employment Support Allowance Regulations 2008 and s.149 of the Equality Act 2010 imply a duty to inquire. The DWP must make all reasonable inquiries to obtain sufficient information to be able to properly assess whether the claimant has a good cause arising from his health or disability, including where necessary from external individuals and bodies. That is a rigorous duty in part because many such claimants will be at serious risk of harm or death if their benefits are terminated.
>
> c. The policy is unlawful because of a combination of these two factors: Firstly, it fails to identify the duty to make inquiries, indicating instead that there is merely discretion to make inquiries in respect of external sources. Secondly, it states that the onus to provide the evidence to prove good cause is on the claimant. That suggests the caseworker is not required to make further inquiries and therefore the policy permits or encourages unlawful action, namely failure by the DWP to comply with the legal duty to inquire.
>
> 2. The DWP's decision to terminate Mr Graham's benefits in October 2017 was also unlawful.
>
> a. That was firstly because the DWP failed to give due regard to the needs specified in s.149 EA 2010.
>
> b. Secondly, it failed to comply with the duties arising from reg.24 and/or s.149 EA 2010 to take all reasonable steps to obtain sufficient information to be able to properly assess whether Mr Graham had a good cause arising from his health or disability.
>
> c. Thirdly, the onus was placed on Mr Graham to prove he had a good cause, even though his mental illness may well have prevented him from doing so."

Ground 1: the challenge to the policy

58. Ground 1 was originally pleaded as Substantive Grounds B and C. It is founded on a mixture of fact and law.

59. On the factual side, the Claimant contends by ground 1a (as set out above) that many benefit claimants will be prevented by mental health problems from putting forward evidence to show a good cause for not responding to the Defendant. An expert report by a consultant psychiatrist, Dr Jed Boardman, explains that mental health conditions are commonly found among ESA claimants, that such conditions often impair functioning and, in short, may make it difficult for claimants to interact with the DWP. Some patients lack insight into the very nature of their condition, some may be unable to organize their lives and some will shun contact with authorities and retreat into social isolation. For such individuals, stopping their benefit can cause severe risks including self-neglect, in some cases with fatal consequences.

60. The basic factual contention is, broadly speaking, not controversial. The Defendant adduced evidence from a Director General, Emma Haddad, who says:

> "… the DWP has nonetheless always appreciated that a claimant's health or disability may be preventing them from attending, and has measures in place to address that risk."

61. Ms Haddad explains that safeguarding visits are carried out only with vulnerable claimants, and one such category is of people who require additional support to be able to access DWP benefits or use DWP services.

62. As to the legal foundation for ground 1, Mr Straw, representing the Claimant, submits that a policy is unlawful if it provides a materially misleading impression of the law and thereby could lead to erroneous decisions being taken. He relies on examples of the Court taking that approach, such as *R (Letts) v. Director of Legal Aid Casework* [2015] 1 WLR 4497.

63. The policy, Mr Straw contends, is misleading because it wrongly places the burden on a claimant to show good cause for a failure to respond and because, as he says under ground 1b, it permits or encourages failure by the DWP to fulfil a legal "duty to inquire" arising from reg 24 of the 2008 Regulations and from section 149 of the Equality Act 2010.

64. It is common ground that the policy does, ultimately, place the burden on a claimant to show "good cause". Mr Straw submits that that is unlawful.

65. Mr Straw first relies on *Charlton v. Secretary of State for Work and Pensions* [2009] EWCA Civ 42. There the Court of Appeal considered the meaning of regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995, a forerunner provision which also provided for a person to be "treated as" incapable of work despite having been assessed as capable. Moses LJ said at [46]:

> "Sufficient information may be elicited by reference to the claimant's completion of the initial questionnaire, questioning during his medical examination, or by any evidence he may choose to give on an appeal to the Tribunal. The process to be adopted by the decision-maker or Tribunal is to be regarded as inquisitorial and not adversarial. It is a process described by Diplock J in *R v Medical Appeal Tribunal (North Midland Region ex-parte Hubble*) 1958 2 QB 228 at 240 as a fact-

> gathering exercise in which there is no formal burden of proof on either side. There should be no difficulty provided the decision-maker or Tribunal recall that the essential question is whether there is an adequate range of work which the claimant could undertake without creating a substantial risk to himself or to others."

66. Mr Straw further relies on *Kerr v. Department for Social Development (Northern Ireland)* [2004] UKHL 23, [2004] 1 WLR 1372. That case concerned the question of whether a person in receipt of benefits could, as a relative of a deceased person, recover a funeral expenses payment or whether the claim was defeated by the existence of a relative in "equally close contact" with the deceased who was not in receipt of benefits or who had more capital. Baroness Hale at [61] noted that it was established "*that the process of benefits adjudication is inquisitorial rather than adversarial*", and continued:

> "62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.
>
> 63. If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it. As Mr Commissioner Henty put it in decision CIS/5321/1998: "a claimant must to the best of his or her ability give such information to the AO as he reasonably can, in default of which a contrary inference can always be drawn." The same should apply to information which the department can reasonably be expected to discover for itself."

67. Mr Straw submits that the Defendant's policy departed from that principle by requiring a benefits claimant to prove good cause despite being potentially prevented from doing so by mental illness. He points out the lack of mandate for that approach in the legislation, comparing the use of the neutral phrase "without good cause" with other provisions such as regulation 61 which states that a claimant who fails to take part in a work-focused interview "must show good cause". That approach, he submits, is contrary to the statutory objective of "sustaining members of the community whom Parliament has decided should be sustained through the welfare state", which is reflected in the fact that the resolution of benefits claims is not an adversarial process:

see *Novitskaya v London Borough of Brent* [2009] EWCA Civ 1260, [2010] PTSR 972 per Arden LJ at [24].

68. In response, Mr Sheldon QC and Ms Eddy for the Defendant first submit that placing the burden on a claimant to explain his own non-attendance is reasonable, because the explanation is highly likely to be within the claimant's knowledge and is much less likely to be within the Defendant's knowledge. Mr Sheldon also makes the important point that ESA is administered to about 1.9 million claimants. The Defendant has to deal not only with meritorious claims from those with mental health problems, but also with claimants who do not do enough to progress their claims or whose claims may not be valid at all. The system would be unworkable if the burden of proof in such cases were on the Defendant.

69. Mr Sheldon QC also points out that the policy documents quoted above nevertheless place a number of qualifications on the application of a burden of proof on claimants. Decision makers are reminded to do as much as possible to enable claimants to provide the necessary evidence. They must themselves have regard to a claimant's disability when making a decision on good cause, and the nature of a disability may itself prove good cause. Whilst relevant information may be provided by a claimant, it may also be found in material which is otherwise available to decision makers. A claimant's vulnerability is stated to be a relevant factor for decision makers.

70. In my judgment, the references in the policy to a burden of proof were lawful. The point being emphasized by Baroness Hale in *Kerr* was that the process of benefits adjudication is inquisitorial rather than adversarial. That is why she considered that it would "rarely" be necessary to resort to concepts such as the burden of proof, but "rarely" does not mean "never". More importantly, it was expressly recognised in the passage quoted from *Kerr* that a claimant generally "can and must supply … information", and a case may be resolved against a benefits claimant who fails to provide such information which is reasonably required.

71. Where the issue is "good cause" for a claimant's failure to attend an assessment, it is logical and reasonable to look to the claimant for the explanation. However, cases such as *Kerr* are a reminder that the claimant is not the only possible source of an explanation and, moreover, that the Defendant's officials must consider any relevant information which is reasonably available to them.

72. In those circumstances I do not consider that the references in the policy to a burden of proof were or are such as to provide a materially misleading impression of the law. It seems to me that, read as a whole, the policy made it clear to decision makers that, as was said in *Kerr*, it was necessary for both partners in the process to play their part.

73. For that reason I do not agree with Mr Straw that in the case of a claimant whose disability prevents them from showing good cause for not attending an assessment or returning a questionnaire, the practical effect of the policy is to penalise them for their disability. The policy instead (for example at paragraph 42507 quoted above) instructs decision makers to consider that question.

74. However, it is also necessary to consider the second limb of ground 1 and then to consider both limbs in combination.

75. By ground 1b, Mr Straw argues that where the claimant is vulnerable and has a long-term mental disability which may provide "good cause" for a failure to comply with the application process, regulation 24 of the 2008 Regulations and section 149 of the Equality Act 2010 place a duty on the Defendant to "make all reasonable inquiries to obtain sufficient information to be able to properly assess whether the claimant has a good cause arising from his health or disability, including where necessary from external individuals and bodies".

76. The point being made under regulation 24 is straightforward. That regulation, quoted above, requires decision makers to have regard to matters including the claimant's state of health and any disability he may have. A public law decision maker must in general ask himself the right question and "take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly": *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 at 1065B per Lord Diplock. Therefore, Mr Straw argues, in a case such as this the Defendant has a duty to make the necessary inquiries to find out whether any illness or disability of a claimant does in fact provide "good cause" under regulation 24.

77. Mr Straw goes on to argue that the Defendant's duties in such a case are intensified by reference to section 149 of the Equality Act 2010, which provides (so far as material):

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities."

78. Undoubtedly there is a duty to inquire, by reference both to general public law principles and to regulation 24 specifically. However, in my judgment section 149 does not materially affect the interpretation of that duty, as I shall now explain.

79. The fairly full quotation from section 149 above is necessary in order to emphasize what the section does and does not cover. In particular one must focus on section 149(1). The section, and the "public sector equality duty" or "PSED" which it creates, are concerned with eliminating discrimination (etc), advancing equality of opportunity and fostering good relations. In the present case only the second aim, of advancing equality of opportunity between those with and those without the protected characteristic of disability, is relevant.

80. In complying with that duty, certainly a public authority must have regard to the matters specified in subsection (3), but that is specifically with a view to advancing equality of opportunity. It is not a free-standing duty to remove or minimise disadvantages or to meet needs. And, as Mr Straw rightly says, the PSED is a duty to have regard, not a duty to achieve a particular result.

81. Mr Straw emphasizes that compliance with the PSED may include a duty of inquiry. In *R (Bracking) v Secretary of State for Work and Pensions* [2014] Eq LR 60, the Court of Appeal referred with approval to the statement of the principle in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) DC, where Aikens LJ explained at [85] that in having due regard to the need to take steps to take account of disabled persons' disabilities (under a predecessor provision to section 149(4)[1]):

> "… the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration."

82. The context in *Brown* was a decision to close a number of rural post offices. The effect of the PSED was that a public authority making such a decision was bound to have regard to the need to advance equality of opportunity (inter alia) between those with, and those without, disabilities. That involved having regard to the need to take steps to take account of people's disabilities. That in turn entailed a duty to find out what steps might be needed by people with disabilities.

[1] The provision at stake in *Brown* and in *McDonald* (below) was section 49A of the Disability Discrimination Act 1995.

83. The present context is rather different. Whilst *Brown* concerned a decision which by itself had nothing to do with meeting the needs of people with disabilities but which was liable to have a significant impact on them, the present case concerns a policy which is entirely devoted to those whose ability to work is limited by a physical or mental condition. The relevant parts of the policy, indeed, are concerned with the needs of those whose disability could hinder or prevent them from complying with the claims process.

84. This case has more in common with *R (McDonald) v Kensington & Chelsea RLBC* [2011] UKSC 33, [2011] PTSR 1266. That was a challenge to a local authority's decision to make changes to a care plan for a disabled individual, on grounds including an alleged failure to have regard to the PSED and to take account of the Claimant's disability. In response to a submission that an absence of reference to the section in the Respondent's documentation enabled the inference of a failure to apply the duty, Lord Brown said at [24]:

> "This argument … is in my opinion hopeless. Where, as here, the person concerned is ex-hypothesi disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons, it may be entirely superfluous to make express reference to section 49A and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section. That, I am satisfied, is the position here. The question is one of substance, not of form. This case is wholly unlike *Pieretti v Enfield London Borough Council* [2011] PTSR 565 (which held that the section 49A duty complements a housing authority's duties to the homeless under Part 7 of the Housing Act 1996)."

85. Similarly, in *R (Isaacs) v Secretary of State for Communities and Local Government* [2009] EWHC 557 (Admin), it was submitted that a planning decision had been made in disregard of the forerunner to the PSED in section 71 of the Race Relations Act 1976. That submission failed because the decision maker had had regard to a policy document which expressly addressed the relevant issues of race relations. Elias J (as he then was) said at [53]:

> "The classic situation where the Section 71 obligation bites is where some policy is in the course of being considered. The duty, to put it loosely, to have regard to race relations implications is very important. But where a policy has been adopted whose very purpose is designed to address these problems, compliance with Section 71 is, in my judgment, in general automatically achieved by the application or implementation of the very policies which are adopted to achieve that purpose."

86. In the present case, it seems to me obvious from the policy documents and from the 2008 Regulations themselves that the Defendant, in formulating its policy, had due regard to the need to advance equality of opportunity between disabled and non-disabled people, including the need to take steps to meet the specific needs of disabled

people. I see no basis for any submission that, in formulating its policy, the Defendant did not take steps to acquire any reasonably necessary information.

87. That, however, is not how the Claimant's case is put. Rather, Mr Straw argues that the duty to inquire and to acquire information arises (under regulation 24 itself and by way of the PSED) when decisions are made in the cases of individual claimants. He contends that the policy is unlawful because it does not properly identify that duty and instruct decision makers to comply with it.

88. In my judgment, section 149 does not materially affect the duties of decision makers when deciding the question of "good cause" in individual cases, precisely because decision making in this area is directly and expressly concerned with the needs of people with disabilities. The 2008 Regulations and the Defendant's policy (then and now) both direct decision makers to have regard to the effects of disability. As in the case of *Isaacs*, having that regard satisfies the PSED.

89. I therefore conclude that the duty of inquiry in individual decision making in cases of this kind is of the *Tameside* variety and is an aspect of the public law duty of rationality. However, it is also coloured by the principle in *Kerr*, namely that in benefits adjudication each "partner" has a role to play and the Defendant's officials must take reasonable steps to acquire such information, relevant to the matters specified in regulation 24, as is reasonably accessible to them.

90. In my judgment the policy complies with those requirements. In particular, the guidance at paragraph 42507 of the DMG – "*DMs are reminded that the nature of the claimant's disability is a factor that must be taken into account when considering whether good cause is shown (see DMG 42500). The DM should make every effort to ensure that all sources of evidence are considered before making a determination on good cause*" – and at paragraph 01405 – "*where the information is available to* [decision makers] *rather than the claimant, then they must make the necessary steps to enable it to be traced*" – is correct and appropriate.

91. Mr Straw points out that the Defendant applies a more interventionist policy on "sanctions", i.e. action taken by the Defendant such as withholding benefits when a claimant is in breach of the statutory provisions, e.g. by failing to attend work-related activity. In that context, like the present one, the Defendant's officials may make two attempts to carry out a safeguarding visit. If those attempts are unsuccessful, paragraph 127 of that policy provides:

> "To avoid any hardship to claimant's [sic] in a vulnerable group every attempt must be made to ensure the claimant's welfare. In the event of two ineffective visits, the HEO must attempt to contact the following sources to establish the claimant's welfare:
>
> - Claimant's Appointee/POA/next of kin,
> - Claimant's Community Psychiatric Nurse,
> - Social Services,
> - Police."

92. Mr Straw makes the point that if contacting those sources is mandatory in a sanctions case, then it could also be made mandatory in a "good cause" case such as the present one.

93. However, the fact that such provision is made in the one policy does not mean that its omission from the other is unlawful. I note in any event that the relevant passage in the sanctions policy continues:

> "Note: The contact with these people/organisations is to ensure a claimant's welfare (we have a moral obligation to make organisations aware of potential incidents around vulnerable claimants) and not to gather information to support the Labour Market process."

94. It could well be preferable, and appropriate, for the same welfare approach to be taken in the policy under consideration in this case. However the difference of approach, properly understood, is not relevant to the Claimant's legal objection which concerns the extent and application of a duty of inquiry.

95. Instead, it seems to me that the policy is sufficient to comply with both *Tameside* and *Kerr*, by reminding decision makers to consider all relevant sources of evidence. The nature and intensity of the necessary inquiry will no doubt vary according to the facts of every individual case.

96. Nor have I reached any different conclusion by considering the effect of the burden of proof and the nature of the duty of inquiry in combination. In my judgment, it is lawful for the policy to refer to a burden of proof as I have said, and the policy makes clear to decision makers what type of inquiries they should carry out before applying that burden and making decisions as to "good cause". The policy does not misstate the law or create a risk that wrong decisions will be taken in a significant number of cases.

97. Finally I note that the policy at the time of the individual decision did not specifically instruct decision makers to consider contacting a next-of-kin or other agencies, and did not require a case conference (with benefits continuing meanwhile) after two failed safeguarding visits. Such provision has now been made and is in my view a significant improvement to the policy. It should help to prevent tragic outcomes like that of Mr Graham, though I cannot say what if any effect it would have had in his case.

Ground 2: the challenge to the decision in Mr Graham's case

98. The Claimant submits that the Defendant's decision to terminate Mr Graham's benefits in October 2017 was unlawful because the Defendant:

a. failed to have due regard to the needs specified in section 149 of the Equality Act 2010;

b. failed to comply with duties arising from reg 24 of the 2008 Regulations and/or section 149 of the Equality Act 2010 to take all reasonable steps to obtain sufficient

information to be able to properly assess whether Mr Graham had a good cause arising from his health or disability; and/or

c. placed the burden on Mr Graham to prove "good cause" for not attending his assessment, even though his mental illness may well have prevented him from doing so.

99. As I have said at paragraph 88 above, section 149 does not materially affect the duty of a decision maker taking a "good cause" decision under this legislative scheme, because regulation 24 and the Defendant's policy both require regard to be had to any disability that a claimant may have.

100. Instead, a decision maker must act rationally, must have regard to all matters which are relevant to the matter in hand and therefore must comply with the *Tameside* duty to make such inquiries as are reasonably necessary in the circumstances, having regard to the legislative context.

101. The parameters of the *Tameside* duty were helpfully summarised in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647, where the judgment of the Court (Underhill, Hickinbottom and Singh LJJ) stated at [70]:

> "The general principles on the Tameside duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (Admin)* at paras. 99-100. In that passage, having referred to the speech of Lord Diplock in Tameside , Haddon-Cave J summarised the relevant principles which are to be derived from authorities since Tameside itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, at para. 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the

> more important it must be that he has all the relevant material to enable him properly to exercise it."

102. Despite the tragic circumstances of this case, in my judgment the Claimant falls well short of establishing that the Defendant failed to comply with this duty.

103. The Defendant's officials knew that Mr Graham had previously made successful claims and in the process had been able to overcome the rejection of his 2011 claim and an appeal. They knew that he had attended assessments in September 2013 and June 2014.

104. They also knew that he had a "mental disablement" by reason of which, in 2014, it was decided that there would be a substantial risk to his health if he were not treated as having limited capability for work and for work-related activity. They rightly responded to that fact by making inquiries of his GP surgery, deciding that an assessment was needed and, when Mr Graham did not attend for the assessment, making two attempts to conduct a safeguarding visit as well as trying to contact him by letters and telephone calls and by text message.

105. However, they did not know about the acute illness which Mr Graham suffered in 2015 or his ensuing isolation. As I have said, the inquiry made of the GP surgery very unfortunately did not uncover the fact of the 2015 hospital admission. The fact that Mr Graham had not seen his GP in the intervening time could have been a sign that his condition had improved, not that it had deteriorated. The Defendant's officials did not know of any individual who might have been expected to provide relevant information and had no reason to assume that, for example, a Community Psychiatric Nurse would be in a position to assist.

106. Meanwhile, the Defendant's officials were confronted with a complete cessation of contact by Mr Graham and an absence of any attempt by him to do anything to permit his ESA review to progress.

107. Neither the legislation nor the Defendant's policy at the time mandated any further specific steps to be taken in that situation.

108. In these circumstances, I do not consider that no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision.

109. Mr Straw contends that there were "strong indications that [Mr Graham's] mental health or disability may have given him good cause for not responding". I am not sure it is fair to describe those indications as "strong", given that the information about Mr Graham's mental health and lack of motivation was obtained by way of his having co-operated in the past.

110. The contention as to "strong indications" draws support from an addendum expert report by Dr Boardman, dated 11 January 2021, and which was the subject of an application by the Claimant of the same date. The Defendant does not oppose any of Dr Boardman's evidence being adduced in relation to mental health and psychiatric issues generally, but does object to the adducing of Dr Boardman's opinion of what the Defendant should have done in Mr Graham's case. I have admitted the report in

evidence, and have found Dr Boardman's evidence about the mental health context to be of assistance. However, his expert psychiatric view on Mr Graham's case does not materially assist me in determining how reasonable officials, not qualified in or practising psychiatry, should have dealt with the benefits issues.

111. Be that is it may, there was a response by the Defendant's officials to those indications, in the form of the inquiry to the GP surgery, the two attempts at a safeguarding visit and the attempted contact by telephone and text.

112. Mr Straw argues that the Defendant was bound to make the further inquiries which the revised policy would today require. He makes the circular point that "contacting the GP was insufficient, since the GP did not provide any relevant information about Mr Graham's current health or disability". His case is that, as the revised policy would now require, consideration had to be given to contacting any next of kin or attorney, a Community Psychiatric Nurse, social services or the police.

113. It seems to me that such further inquiries, judged at the time and not in hindsight, may have been of the kind described in *Balajigari* as "sensible or desirable" but were not inquiries which no reasonable benefits authority could have neglected to carry out. It is true that claimants with mental health problems can be highly vulnerable, as Dr Boardman's evidence demonstrates. It is also true that the standard of reasonableness is to be judged in context, including the gravity of the potential effects of an adverse decision: *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [126] per Lord Reed. But the context also included a lack of any information that Mr Graham's condition had deteriorated. It included the fact that he had previously co-operated with the Defendant as recently as 2014 but on this occasion was not engaging at all. And it also included the fact that, at any time after the decision, a single telephone call by or on behalf of Mr Graham could have re-opened his case.

114. Nor do I consider that any error of law arose from the application of a burden of proof in Mr Graham's case. As I have already said, the approach taken to burden of proof in the Defendant's policy was lawful. More than that, however, in this case the Defendant did not simply require Mr Graham to prove "good cause". It conducted the inquiries which it considered reasonably necessary to find out whether there was a "good cause" for his failure to attend the assessment, and Mr Graham sadly did not engage at all.

115. In case I am wrong, I will add that I do not think that this case falls within section 31(2A)(b) of the Senior Courts Act 1981. It may well be that the outcome for Mr Graham would not have been substantially different if further inquiries had been pursued, but the facts are not clear enough for me to conclude that that is "highly likely".

The EHRC's submissions on regulation 29

116. On 17 November 2020 I granted permission to the Equality and Human Rights Commission to intervene in the claim by filing a skeleton argument and making concise oral submissions, such intervention to be confined to the scope of the judicial review grounds for which the Claimant was granted permission.

117. Mr Buttler and Ms Price, representing the Intervenor, make two connected submissions in relation to what was originally pleaded as Substantive Ground B, i.e. the question of whether the Defendant's policy, by an inadequate application of any duty of inquiry and/or by placing the burden of proof on a claimant, gives a materially misleading impression of the legal effect of regulation 24 and may lead to erroneous decision making. They submit that:

a. the Defendant's policy is defective because it does not identify a requirement on decision makers, when deciding whether a claimant should be treated as not having limited capability for work pursuant to regs 22-24 of the 2008 Regulations (e.g. for want of "good cause" in the present case), to consider what Mr Buttler describes as the "additional safety net" of reg 29 of the 2008 Regulations; and

b. the duties of inquiry under regulations 24 and 29, construed in this way, are an important part of securing the Defendant's compliance with her obligations under ECHR Article 3 and under Article 28 of the UN Convention on the Rights of Persons with Disabilities ("UNCRPD").

118. Mr Sheldon QC objected on the ground that these submissions stray outside the scope of the permitted grounds of challenge, and invited me to disregard them for that reason. I decided to hear the oral argument on their substance before deciding whether they were in scope.

119. Regulation 29 is quoted at paragraph 13 above. Headed "Exceptional circumstances", it provides for a person who does not have limited capability for work in accordance with an assessment nevertheless to be treated as having limited capability for work if a finding to the contrary would occasion a substantial risk to their health by reason of, inter alia, a "mental disablement". It is similar to regulation 35, quoted at paragraph 15 above, which applies to work-related activity and which was applied in Mr Graham's case in 2014.

120. The key question addressed by Mr Buttler in oral submissions was whether that safety net – which, he submits, brings with it its own duty of inquiry to ascertain whether there is a mental disablement and a consequent risk – applies to a person such as Mr Graham, who under reg 23 is "treated as not having limited capability for work" by having failed without good cause to attend an examination, and who therefore has not been the subject of an assessment. If it does then, Mr Buttler contends, a lawful decision-making process under reg 24 must (1) inquire into and (2) resolve the reg 29 question as well, and a lawful policy must instruct decision makers in those terms.

121. That interpretation, say Mr Buttler and Ms Price, is supported by the obligations of public bodies to protect life and to protect against inhuman and degrading treatment and by the terms of Article 28 of UNCRPD.

122. It seems to me that this issue is not within the scope of the Claimant's grounds of challenge. The pleaded Substantive Grounds B and C were based on the proposition that decision makers were bound by regulation 24 to pursue sufficient inquiries into a claimant's state of health and by section 149 to pursue sufficient inquiries into the needs arising from disability. The Intervenor's proposition, that further inquiries are mandated by reg 29 whenever a negative decision is made under reg 24, is a different one.

123. I bear in mind that the Claimant's Statement of Facts and Grounds (at paragraph 53) refer to reg 29. However, that is in support of a different submission, namely the need for an overall purposive reading of the relevant Regulations.

124. Mr Straw and Mr Nicholls in their skeleton argument (footnote 5) express agreement with the Intervenor's submissions and indicate that the Claimant adopts them "as far as she is entitled to". That implicitly and correctly recognises that the Claimant would need to amend her claim in order to adopt the Intervenor's point. There is no amendment application before me and in my view it would be too late to entertain one.

125. The proposed issue of interpretation is not straightforward. As Mr Sheldon QC pointed out, an analogous argument in relation to predecessor legislation in similar terms was rejected by the Court of Appeal in *Charlton* (above) at [31] per Moses LJ. That decision, however, was not or not expressly concerned with some of the issues raised by the Intervenor such as the effect of the State's obligations to vulnerable individuals under ECHR Articles 2 and 3.

126. In these circumstances it would not be appropriate for me to purport to resolve the issue raised by the Intervenor, when it is not in issue in the judicial review and has not been fully explored by the parties, notwithstanding its clear and forceful presentation by Mr Buttler and Ms Price.

Standing

127. I do not consider that the facts of this case give rise to any question of principle about standing which needs to be decided. Ordinarily a personal representative or, in the absence of a personal representative, a next-of-kin might have brought a claim such as this. I am told that no personal representative in this case has been identified. In the unusual circumstances of this case the Claimant stepped into Mr Burton's shoes. The issue of standing did not prevent a grant of permission, and there is no value in deciding the hypothetical question of whether that issue might have prevented the grant of any substantive relief.

Conclusion

128. For the reasons set out above, the grounds of challenge fail and the claim is dismissed.