Neutral Citation Number: [2022] EWHC 2392 (Admin)

Case No: CO/2022/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/09/2022

Before :

MR JUSTICE CAVANAGH

- -

Between :

THE KING (on the application of) Ms HELEN TIMSON	**Claimant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant**
-and-	
SEVERN TRENT WATER PLC	
	Interested Party

- -
- -

Jenni Richards KC and Tom Royston (instructed by **Bindmans LLP**) for the **Claimant**
Clive Sheldon KC, Katherine Apps and Gethin Thomas (instructed by **Government Legal Department**) for the **Defendant**
Jason Coppel KC (instructed by **DWF**) for the **Interested Party**

Hearing dates: 19 and 20 July 2022

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Approved Judgment

Mr Justice Cavanagh:

Introduction

1. In these proceedings, the Claimant challenges the lawfulness of the Defendant's written guidance to officials ("decision-makers") who are responsible for deciding whether it is in a benefit claimant's interests to have deductions made from their subsistence benefit in order to pay sums which are owed by those claimants to utility companies. The deductions are known as Third Party Deductions ("TPDs"). The Claimant contends that the Defendant's policy approach to TPDs in respect of fuel and water debts, as set out in the written guidance, generates decisions, such as those made in her case, in an unlawful way.
2. The Claimant is a former police officer who is unable to work because of significant disabling physical and mental health problems. She is dependent on means-tested benefits, including the income-related employment and support allowance ("IRESA"). She has a low income and has fallen into debt. These debts include arrears of utility bills.
3. The Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 ("the 1987 Regulations"), make provision for the deduction from benefits of certain liabilities that are owed by a claimant, before the benefits are paid to the claimant. The sums deducted are paid directly to the creditor. This arrangement applies to certain types of "legacy" benefits, including IRESA, but does not apply to Universal Credit.
4. The present case is concerned with deductions of debts owed to water and energy companies. Deductions are made for arrears and for ongoing usage. There is a cap on the amount that can be deducted in respect of arrears. The Defendant decides whether to make a TPD, following a request by a utility company. These requests are made after a claimant has fallen into arrears and after other attempts by the utility company to reach an agreement with the claimant in respect of their energy or water debts have failed. The utility company's request to the Defendant for TPDs is often made in bulk format, by submitting Excel spreadsheets which contain the details of a large number of claimants in respect of whom TPDs are sought. The consent of the claimant is not required before these deductions are made, but, so far as water and fuel TPDs are concerned, the relevant provisions in the 1987 Regulations provide that the Defendant may only make TPDs if they are in the interests of the claimant's family (or, if, as in the present case, the claimant is single, in the interests of the claimant themselves).
5. At various times in recent years, utility companies, including the Interested Party, a water company, have been paid sums by the Defendant by way of TPDs from the Claimant's IRESA in respect of arrears and ongoing usage. I will summarise the factual position in relation to the Claimant later in this judgment, but, in short, the most recent TPD arrangements which applied to the Claimant consisted of TPDs in favour of the Interested Party between 24 September 2019 and 5 July 2021, and TPDs in favour of E.ON (formerly Npower), an energy company, between 9 March 2021 and 5 July 2021. Currently, both the Interested Party and E.ON have in place arrangements with the Claimant pursuant to which she pays an agreed sum towards ongoing usage and a token sum towards the arrears that she owes, and the utilities are not currently seeking TPDs in relation to the Claimant. However, there is always a possibility that the arrangements may break down and that a water or energy company

might apply to the Defendant for a TPD in relation to the Claimant at some point in the future (although there is a moratorium on new TPDs for ongoing fuel costs, unless the claimant consents - see, further, below. This moratorium applies from 26 April 2022 until 6 April 2023. No similar moratorium applies to TPDs in favour of water companies.)

6. The Claimant contends that the policy that has been adopted by the Defendant for the exercise of the discretion whether to impose TPDs, as set out in written guidance that has been given to decision makers, is unlawful. I will begin by summarising the parties' submissions. Given the detail of those submissions, both oral and in writing, this summary, whilst setting out the main substance of the parties' respective cases, cannot deal with every nuance of their arguments.

Summary of the Claimant's submissions

7. The Claimant does not contend that the 1987 Regulations are ultra vires because they provide that TPDs can be imposed without the consent of a claimant. Nor does she contend that the Defendant acted unlawfully in imposing TPDs upon her in breach of the Defendant's own policy and guidance. Rather, she submits that the Defendant's policy approach to TPDs, as set out in written guidance that the Defendant has issued to decision-makers, in documents known as the Decision Maker Guidance manual ("DMG") and the Overview document, in many cases systemically generates unlawful decisions, including those made in the Claimant's case. The Claimant contends that this means that the TPD scheme, as operated by the Defendant, is ultra vires the legislative framework, in the sense recently described by the Supreme Court in **R(A) v Secretary of State for the Home Department** [2021] UKSC 37; [2021] 1 WLR 3931.
8. In **R(A)**, at paragraph 46, Lord Sales and Lord Burnett of Maldon CJ, with whom the other Justices agreed, identified three categories or types of case in which a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others. The Claimant submits that the policy in relation to TPDs is unlawful by reference to two of these categories, Category (i) and Category (iii).
9. Category (i) unlawfulness exists:

> "where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way." (**R(A)**, paragraph 46).

10. Category (iii) unlawfulness exists:

> "where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position." (Ibid)

11. In essence, the Claimant contends that the guidance in the documents is unlawful in Category (i) and Category (iii) terms because it (1) directs a decision-maker that the question whether a claimant consents to a TPD is not a relevant consideration or

material factor, when the true position is that a claimant's wishes are an important and often determinative consideration (this is claimed to be Category (i) unlawful); (2) misdirects decision-makers by implying that they do not have an obligation to seek representations and information from the claimant before taking a decision about whether to impose a TPD, and by omitting to tell decision-makers in terms that in many cases, in order to act fairly, they will need to contact claimants in order to ascertain their wishes and to give them an opportunity to make representations (this is alleged to be Category (iii) unlawful). The Claimant submits that such consultation is required because it is only by consulting with claimants, and, in particular, by finding out whether they will consent to a TPD and, if not, why not, that the Defendant is in a position properly to decide whether to impose the TPD. In her skeleton argument, the Claimant said:

> "….wherever deductions are opposed by the claimant it could only rarely – and only after detailed investigation – be possible for the Defendant to be satisfied that the claimant was wrong about their own interests."

12. There is a third ground of challenge, which was set out in the Claimant's skeleton argument as follows:

> "The way in which the Defendant operates the Deductions Scheme and the guidance she provides to her officials effectively precludes consideration of the circumstances of claimants."
>
> ….
>
> "The fact that it will frequently be in a customer's interests to risk not discharging their obligations to the utility company is excluded from consideration."
>
> ….
>
> "A lawful policy would recognize that the claimant's position, and any reasons they give for it, will be a highly relevant consideration which may demonstrate that no deductions can lawfully be made."

13. This is different from the other two grounds in that, rather than claim that the guidance is unlawful because it directs the decision-makers to ignore the claimant's wishes, or effectively directs the decision-maker not to give the claimant an opportunity to make representations, the Claimant is contending that the guidance has the effect of directing decision-makers to ignore the circumstances of the claimant altogether. This third ground is referred to only briefly at paragraph 63 of the Amended Statement of Facts and Grounds. It amounts to a further Category (iii) challenge.
14. The Claimant submits that it cannot simply be assumed that a TPD is in the interests of a person who is claiming the relevant benefits and who is in debt to the utility company. She says that there may be reasons why a compulsory deduction to ensure that they can pay their water and/or energy bills and can start to pay off accrued debts

may not be in the interests of a claimant. The Claimant points out that there is no risk of water supplies being cut off even if a customer is not paying their water bills and is in debt to the water company. This is prohibited by law (see below). An energy company may disconnect a customer or install a pre-payment meter but the Claimant says that the risks of this, in a case such as hers, are small. So far as the risks of other forms of enforcement action, and in particular court enforcement action, are concerned, she says that she, and those in a similar position, have little to fear. They may have no credit rating to lose, and they may have no fear of bankruptcy. A court might well require them to repay their arrears at a lower weekly figure than the TPD. In any event, if a claimant has no assets, the utility company might decide that it is not worth its while taking them to court and so, in practice, they may not be pursued for their water or energy debts. Moreover, the Claimant says that it may not be in the interests of a claimant such as her to have money deducted for utility debts from their benefits, because that will reduce the money available for payments for other goods or services such as food, medicine, or accommodation, which may be even more important to a claimant than making utility payments, especially payments for arrears. Still further, the Claimant says that a claimant may consider that the TPD process may not be in a claimant's interests because it reduces a claimant's sense of control over their life, by forcing them to prioritise one set of debts over others, and by preventing them from having a free hand in budgeting decisions. It is infantilising.

15. In light of these considerations, the Claimant submits that, in many cases, the Defendant cannot know whether it will be in a claimant's interests to impose a TPD unless and until the Defendant has consulted with the claimant and obtained the claimant's views and has been provided with any further information which the claimant is able to provide, over and above the information that was already provided by the utility company. The Claimant submits that the written guidance in the DMG and the Overview document do not provide for this and so render the Defendant's approach, in many cases, unlawful, both at common law and in breach of the claimants' rights under the European Convention on Human Rights ("ECHR").
16. So far as the common law is concerned, the Claimant submits that the written guidance renders the Defendant's actions systemically unlawful in many cases in three respects: (1) the Defendant's actions are inconsistent with the statutory purpose of TPDs (the "**Padfield**" challenge); (2) the Defendant has failed to take adequate steps to obtain necessary information before deciding whether to impose a TPD (the "**Tameside**" challenge); and (3) the Defendant has failed to act fairly. The Claimant says that, applying **R(A)**, this renders the Defendant's policy and guidance liable to challenge by way of judicial review.
17. So far as the ECHR is concerned, the Claimant contends that the Defendant's approach to TPD deductions for utility debts is an unjustified interference with claimants' rights under Article 1 of Protocol 1 to the ECHR ("A1/P1") and/or is unjustified discrimination contrary to Article 14.
18. The relief sought by the Claimant is a declaration about the respects in which the TPD scheme is unlawful. She does not press her claim for damages under the Human Rights Act, recognising that they would be small.

Summary of the Defendant's and Interested Party's submissions

19. So far as the common law challenge is concerned, the Defendant and the Interested Party emphasise that, in **R(A)**, Lord Sales and Lord Burnett of Maldon CJ said, at paragraph 63, that:

> "where the question is whether a policy is unlawful, that issue must be addressed looking at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way."

20. The Defendant and the Interested Party submit that this shows that it is not enough for the Claimant to be able to show that the written guidance and policy operated by the Defendant might have the effect, in rare or occasional cases, that a claimant's case will be dealt with in an unlawful way. The Claimant must go further and show that the effect of the guidance and policy is that a material and identifiable number of cases will be dealt with in an unlawful way. They submit that the judgment in **R(A)** has severely limited the permissible scope of attack against Government policy and guidance in respect of the approach to the exercise of discretions.
21. Moreover, the Defendant and the Interested Party emphasise that, to bring the present case within Category (i) or Category (iii) unlawfulness, it is necessary for the Claimant to show that the guidance documents include a positive statement of law which is wrong, for Category (i), or purport to provide a full account of the law but make a specific misstatement of the law, or omit something which means that, read as a whole, the policy presents a misleading picture of the true position, for Category (iii).
22. The Defendant and the Interested Party say that the Claimant's case falls at this first hurdle because the DMG and Overview document do not contain positive statements of the law or purport to provide a full account of the law. Rather, the documents are simply guidance as to the exercise of a discretion.
23. If, contrary to this first submission, the documents are to be read as setting out the law, then the Defendant and the Interested Party submit that the Claimant's submission misstates and misunderstands the guidance. The documents do not say that the wishes of the claimant are irrelevant in every case, and they do not say that the decision-maker should never contact the claimant to seek their views or to seek further information from them. The documents do not say that the particular circumstances of the claimant are irrelevant. In most cases, however, it will be obvious, on the basis of the information supplied by the utility company, that a TPD will be in the interests of the claimant and so, in most cases, it will be unnecessary to contact the claimant to seek their views or to seek further information.
24. The Defendant and Interested Party say that there is therefore no inconsistency between the written guidance and the legislative purpose, that there is no systemic failure to obtain adequate information before decisions are made, and the approach taken by the Defendant and its decision-makers does not lead to unlawful unfairness.
25. In addition, the Defendant and Interested Party say that, in any event, the Claimant can only challenge the policy and guidance on these terms if the error, if there was one, applied to her case and this is not so. The Defendant accepts that errors were made in the Claimant's case, but says that these errors did not reflect, or result from, the Defendant's policy as set out in the written guidance.

26. So far as the ECHR challenges are concerned, the Defendant and the Interested Party submit that there are a number of cumulative reasons why these must fail. In summary, these are that (1) the Claimant is not a victim for the purposes of section 7 of the Human Rights Act 1998; (2) there has been no deprivation of the Claimant's property for the purposes of A1/P1; (3) a third party deduction for fuel and water charges is not a restriction of use; (4) even it was a deprivation/restriction of use, and came within the scope of A1/P1, it was not unlawfully in breach of A1/P1 because the deprivation/restriction from use was not manifestly without reasonable foundation; (5) being in receipt of benefits to which the 1987 Regulations apply is not a "status" for the purpose of Article 14; (6) in any event, the Claimant is not in a relevant analogous position to a person who is not in receipt of the relevant benefits for the purposes of the 1987 Regulations: and (7) once again in any event, the scheme of the 1987 Regulations, as applied by the Defendant's guidance and policy, is in pursuit of a legitimate aim or aims and is not manifestly without reasonable foundation.
27. The Defendant and the Interested Party also submit that there are further procedural and other reasons why the claim should be dismissed or no relief should be granted. They say that, even if the claim has merit, the claim should be dismissed because it is academic or hypothetical, as the Claimant's TPDs were stopped before she commenced her claim. They say that the common law claim is out of time or barred for lack of promptness because the DMG has been publicly available for many years. They say, in addition, that section 31(2A) of the Senior Courts Act 1981 applies, so that relief should be refused on the ground that it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. Furthermore, they say that the declaratory relief sought is overbroad.

The structure of the remainder of this judgment

28. I will deal with the issues in this case in the following order:

(1) The legislative framework;

(2) The statutory purpose, and legitimate aims, of TPDs that are imposed in favour of utility companies;

(3) Restrictions on disconnection, and the use of pre-payment meters;

(4) The DMG and Overview document;

(5) How the TPD scheme for fuel and water debts has been operated in practice;

(6) The TPDs imposed upon the Claimant and subsequent events relating to her;

(7) The case-law authorities on the circumstances in which written guidance to decision makers may render unlawful the exercise of a statutory discretion;

(8) The **Padfield**, **Tameside** and fairness obligations;

Discussion: Common law

(9) What is meant by "the interests of the family"?;

(10) Ground 1: Does the written guidance contain an incorrect statement of the law to the effect that consent or lack of it is not a relevant consideration or material factor? [NB the Ground numbers that I am using are different from the Ground numbers in the Amended Statement of Facts and Grounds];

(11) Ground 2: Does the documentation misdirect decision-makers by implying that they do not have an obligation to seek representations and information from the claimant before taking a decision about whether to impose a TPD, and/or by omitting to tell decision-makers in terms that in many or all cases, in order to act fairly, they will need to contact claimants in order to ascertain their wishes and to give them an opportunity to make representations?;

(12) Ground 3: Is there a Category (iii) breach because the written guidance effectively precludes consideration of the circumstances of claimants?;

Discussion: Convention claim

(13) Is the Claimant a "victim" for the purposes of the HRA, section 7?;

(14) The claim for breach of the Claimant's A1/P1 rights;

(15) The claim for breach of Article 14;

Other issues

(16) Should relief be withheld because the claims are academic or hypothetical?;

(17) Should the common law claim be dismissed because it is out of time?;

(18) Does section 31(2A) of the Senior Courts Act 1981 apply?; and

(19) Conclusion.

29. The Claimant has been represented before me by Ms Jenni Richards KC and Mr Tom Royston. The Defendant was represented by Mr Clive Sheldon KC, Ms Katherine Apps, and Mr Gethin Thomas, and the Interested Party by Mr Jason Coppel KC. I am grateful to all advocates for their helpful and very detailed submissions.

(1) The legislative framework

IRESA

30. The entitlement to employment and support allowances, including IRESA, is derived from Part 1 of the Welfare Reform Act 2007, which provides, in the relevant parts of sections 1 and 4:

1. Employment and support allowance

(1) An allowance, to be known as an employment and support allowance, shall be payable in accordance with the provisions of this Part.

(2) Subject to the provisions of this Part, a claimant is entitled to an employment and support allowance if he satisfies the basic conditions and either—

(a) the first and the second conditions set out in Part 1 of Schedule 1 (conditions relating to national insurance) or the third condition set out in that part of that Schedule (condition relating to youth), or

(b) the conditions set out in Part 2 of that Schedule (conditions relating to financial position).

(3) The basic conditions are that the claimant—

(a) has limited capability for work,

(aa) has accepted a claimant commitment,

(b) is at least 16 years old,

(c) has not reached pensionable age,

(d) is in Great Britain, and

(e) is not entitled to income support, and

(f) is not entitled to a jobseeker's allowance (and is not a member of a couple who are entitled to a joint-claim jobseeker's allowance).

….

(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.

(5) An employment and support allowance is payable in respect of a week.

…

(7) In this Part—

"contributory allowance" means an employment and support allowance entitlement to which is based on subsection (2)(a) (and see section 1B(2));

"income-related allowance" means an employment and support allowance entitlement to which is based on subsection (2)(b).

….

4. Amount of income-related allowance

(1) In the case of an income-related allowance, the amount payable in respect of a claimant shall be—

(a) if he has no income, the applicable amount;

(b) if he has an income, the amount by which the applicable amount exceeds his income.

(2) Subject to subsection (3), the applicable amount for the purposes of subsection (1) shall be calculated by—

(a) taking such amount, or the aggregate of such amounts, as may be prescribed, and

(b) if in the claimant's case the conditions of entitlement to the support component are satisfied, adding the amount of that component.

(3) Regulations may provide that, in prescribed cases, the applicable amount for the purposes of subsection (1) shall be nil.

(4) The conditions of entitlement to the support component are—

(a)that the assessment phase has ended,

(b)that the claimant has limited capability for work-related activity, and

(c)that such other conditions as may be prescribed are satisfied."

TPDs

31. The Defendant has had the power to impose TPDs at source from prescribed welfare benefits since 1978.

The Social Security Administration Act 1992, section 5(1)(p)

32. The statutory power to make regulations which provide for TPDs is now to be found in section 5(1)(p) of the Social Security Administration Act 1992, which provides:

"5.— **Regulations about claims for and payments of benefit**.

(1) Regulations may provide—

(p) for the circumstances and manner in which payments of such a benefit may be made to another person on behalf of the beneficiary for any purpose, which may be to discharge, in whole or in part, an obligation of the beneficiary or any other person;…."

The 1987 Regulations

33. Regulation 35(1) of the 1987 Regulations provides:

"35.— **Deductions from benefit and direct payment to third parties**

(1) Deductions may be made from benefit and direct payments may be made to third parties on behalf of a beneficiary in accordance with the provisions of Schedule 9 and Schedule 9B."

34. Paragraph 1 of Schedule 9, the interpretation paragraph, states that "family" in the case of a claimant who is not a member of a family means that claimant.
35. The power to deduct TPDs applies to specified benefits, which are defined in paragraph 1 to include IRESA but, as I have said, this does not extend to Universal Credit. Specified benefits are "legacy" benefits which pre-date Universal Credit and include income support, whether paid alone or with incapacity benefit or severe disablement allowance.
36. The types of deductions that can potentially be made pursuant to the 1987 Regulations are set out in paragraph 2(1) of Schedule 9, which states:

"2(1) The specified benefit may be paid direct to a third party in accordance with the following provisions of this Schedule in discharge of a liability of the beneficiary or his partner to that third party in respect of–

(a) housing costs;

(b) miscellaneous accommodation costs;

(bb) hostel payments;

(c) service charges for fuel, and rent not falling within head (a) above;

(d) fuel costs;

(e) water charges; and

(f) payments in place of payments of child support maintenance under section 43(1) of the Child Support Act 1991 and regulation 28 of the Child Support (Maintenance Assessments and Special Cases) Regulations 1992."

37. Paragraph 7C also permits deductions to be made in respect of certain types of eligible loans (mainly loans from credit unions or similar charitable bodies). Paragraph 7E permits deductions to be made in respect of tax credits overpayment debts and self-assessment debts, but only with the agreement of the claimant. Regulation 4 of the Fines (Deductions from Income Support) Regulations 1992, SI

1992/2182 ("the Fines Regulations") also permits TPDs to be made from income support in respect of fines levied on an offender. There is also provision in other legislation for TPDs to recover arrears in Council Tax and the Community Charge.

38. Paragraph 2(3) of Schedule 9 provides:

> "(3) A payment to be made to a third party under this Schedule shall be made, at such intervals as the Secretary of State may direct, on behalf of and in discharge (in whole or in part) of the obligation of the beneficiary or, as the case may be, of his partner, in respect of which the payment is made."

39. TPDs for fuel costs are dealt with in paragraph 6(1), which provides:

> "(1) Subject to sub-paragraphs (6) and (6A) and paragraph 8, where a beneficiary who has been awarded the specified benefit or his partner is in debt for any fuel item to an amount not less than the rate of personal allowance for a single claimant aged not less than 25 and continues to require the fuel in respect of which the debt arose "the relevant fuel"), the Secretary of State, **if in its opinion it would be in the interests of the family to do so**, may determine that the amount of the award of the specified benefit ("the amount deductible") calculated in accordance with the following paragraphs shall be paid to the person or body to whom payment is due in accordance with paragraph 2(3)." (emphasis added).

40. The remainder of paragraph 6 provides, in short summary, that the sum to be deducted will be an amount equivalent to the estimated average weekly cost necessary to meet the continuing needs for the relevant fuel, plus an amount in respect of the original or accrued debt equal to 5% of the personal allowance for a single claimant aged not less than 25 years for such period as is necessary to discharge the accrued debt.
41. TPDs for water costs are dealt with in paragraph 7(2), which provides:

> "(2) Where a beneficiary or his partner is liable, whether directly or indirectly, for water charges and is in debt for those charges, the Secretary of State may determine, subject to paragraph 8, that a weekly amount of the specified benefit shall be paid either to a water undertaker to whom that debt is owed, or to the person or body authorised to collect water charges for that undertaker, but only if the Secretary of State is satisfied that the beneficiary or his partner has failed to budget for those charges, **and that it would be in the interests of the family to make the determination**." (emphasis added)

42. The amount to be deducted is the same as with fuel charges, namely the amount which is estimated to be the average weekly cost necessary to meet the continuing need for water consumption, plus, in respect of the original or accrued debt, an amount equal to 5% of the personal allowance for a single claimant of not less than 25 years (paragraphs 7(2) and (5).
43. It will be seen that there is a difference between the provision for TPDs for fuel liabilities and for water charges, in that, in respect of water, there is an additional precondition that the Secretary of State must be satisfied that the beneficiary or his

partner has failed to budget for those charges. Nothing rests on this for present purposes. In practice, a water utility only applies to the Defendant for a TPD if a customer is significantly in arrears. The same applies to energy utilities.

44. Paragraph 8(2) provides that, unless the claimant consents, the maximum aggregate deductions for housing costs arrears, rent arrears and service charges for fuel and water, fuel costs (including arrears), water charges (including arrears) and various other deductions cannot exceed 25% of benefit.
45. Paragraph 9(1B) sets out a priority between certain debts. Housing costs, miscellaneous accommodation costs, hostel payments and service charges for fuel and rent not falling within paragraph 2(1)(a) take priority over fuel costs, which take priority over water charges.
46. The "interests of the family" condition does not apply to all types of TPD. It does not apply to the power to impose TPDs for some other liabilities, including child support maintenance (Schedule 9B) and court fines (the Fines Regulations, regulation 4).

Temporary restrictions on new TPDs for fuel costs

47. Regulations 3 and 4 of the Social Security Benefits (Claims and Payments) (Modifications) Regulations 2022, SI 2022/428, have made temporary modifications to paragraph 6 of the 1987 Regulations. For the period from 26 April 2022 to 6 April 2023, no new TPDs can be made for ongoing consumption of fuel, unless the claimant consents. This has no effect on pre-existing TPDs and it does not prevent new TPDs from being imposed in order to make deductions for arrears of fuel costs.

The right to challenge a TPD decision

48. A claimant may apply to the Secretary of State for review of a deductions decision under section 9 of the Social Security Act 1998. The Defendant refers to these reviews as Mandatory Reconsiderations. If a review succeeds, the TPD decision is retrospectively changed with effect from the date of its implementation. In other words, following a successful review, the claimant will be paid the benefits that had been held back and paid to the third party pursuant to the TPD.
49. If a review application is unsuccessful, there is a right of appeal from the determination to the First-tier Tribunal under section 12 of the Social Security Act 1998. A claimant is not liable to pay the Defendant's costs if such an appeal fails.
50. The Secretary of State also has a power to vary a decision made under regulation 35 of, and Schedule 9 to, the 1987 Regulations. This power, which is called the power of supersession, is contained in section 10 of the Social Security Act 1998. The power to supersede differs from the power to review, because its effect is not retrospective. Rather, its effect is to change the decision from the date of the supersession. A supersession power is available specifically under regulation 6(2)(a) of the Social Security and Child Support (Decision and Appeals) Regulations 1999, SI 1999/991, if there has been or is an anticipated "relevant change in circumstances.", or under regulation 6(2)(b) if the decision was wrong in law or was based on an error of fact.
51. In addition, the Secretary of State has a complaints system, which is operated independently of its decision-making powers under the 1987 Regulations and separately from the system of decisions, reviews, supersessions and appeals under sections 8-12 of the 1998 Act. Under this complaints system the Secretary of State

may consider making a special, non-statutory payment. If a person is not satisfied and believes there has been maladministration, they may ask to escalate the complaint to the Independent Case Examiner, or a person's MP may make an application to the Parliamentary and Health Service Ombudsman.

The Human Rights Act 1998 ("HRA")

52. Section 6(1) of the HRA provides that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."
53. Section 7(1) and (3) of the HRA provide that:

> **"7 Proceedings**.
>
> (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a)bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b)rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> (1) ….
>
> (2) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.
>
> ….
>
> (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

54. Article 34 of the ECHR provides:

> "34 **Individual applications**
>
> The Court may receive applications from any person, non-govern mental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

A1/P1

55. A1/P1 provides as follows:

"Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Article 14

56. Article 14 provides as follows:

"Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

(2) The statutory purpose and legitimate aims of the TPD regime

57. Before considering the common law and ECHR challenges, it is helpful to identify the purpose and legitimate aims of the statutory regime relating to TPDs. I accept the Defendant's formulation of the purpose and aims as being as follows:
    (1) To ensure priority debts are paid where there is no dispute as to the existence and quantum of the underlying debt; and
    (2) To protect the welfare of claimants and their families by shielding them from potentially severe consequences of failing to address particular priority debts. This is achieved by paying a prescribed amount to a creditor to help remove the risk of hardship arising from potential enforcement action, for example, eviction or the disconnection of a fuel supply, or a County Court judgment which could result in ineligibility to open a bank account, reduced credit rating and other detriment. It is also preferable in most cases (in the context of electricity) to "self-disconnection" by a claimant not paying into a pre-paid meter.
58. I would add, to the list of potentially severe consequences of failing to address priority debts, the risk that the creditor might outsource the debt to a third party debt collection agency, and the stress that ongoing debt often engenders.

(3) Restrictions on disconnection, and the use of prepayment meters

Water

59. Section 61(1A) of, and Schedule 4A to, the Water Industry Act 1991 prohibits disconnection of any dwelling which is occupied by a person as their only or principal home for non-payment of water charges. There is no scope for the installation of a pre-payment meter for a water supply.

Fuel

60. There is no equivalent statutory provision which prohibits disconnection of energy supply. Such disconnection is, therefore, theoretically possible, but the Claimant submitted, and the Defendant did not dispute, that disconnection of energy supply is very rare in practice. This is because stringent regulatory restrictions are imposed on disconnections affecting vulnerable people by Condition 27 of the Standard Conditions of Gas Supply Licence and of the Standard Conditions of Electricity Supply Licence. Condition 27 of the Standard Conditions of Gas Supply Licence and Condition 27 of the Standard Conditions of Electricity Supply Licence each provide, for example, that the supplier must not disconnect a domestic customer for non-payment of charges unless it has first taken all reasonable steps to recover those charges, and must not disconnect, in Winter, a domestic premises for unpaid charges if it knows or has reason to believe that the customer is of pensionable age and lives alone or lives only with persons who are of pensionable age or under the age of 18. The supplier must take all reasonable steps to avoid disconnecting, in Winter, domestic premises for unpaid charges if the premises include a person who is of pensionable age, disabled or chronically sick.
61. Moreover, many of the energy suppliers have signed up to a voluntary agreement, known as "The Vulnerability Commitment", under which they will never:

> "... knowingly disconnect a vulnerable customer at any time of year, where the household has children under the age of 6 (or under the age of 16 during the Winter Moratorium) or where for reasons of age, health, disability or severe financial insecurity, that customer is unable to safeguard their personal welfare or the personal welfare of other members of the household."

62. As for the installation of pre-payment meters for electricity or gas supply, such meters can be installed either by agreement or by the energy supplier applying to court for an order (known as a warrant) permitting them to install a meter. There are stringent regulatory restrictions on the power of companies to install pre-payment meters in the homes of disabled customers. Condition 27.5A of the Standard Conditions of Gas Supply Licence, and of the Standard Conditions of Electricity Supply Licence provides that a pre-payment meter may be used where it is safe and reasonably practicable in all the circumstances of the case for the domestic customer to do so. Condition 28B.1 precludes obtaining a warrant to fit such a meter 'where such action would be severely traumatic… and would be made significantly worse by the experience'. Condition 28.1A precludes companies from requiring such a meter where it is not 'safe and reasonably practicable', a term which requires consideration of 'whether the customer requires a continuous supply for health reasons'.
63. The reason why such safeguards exist in relation to pre-payment meters for gas or electricity is that they give rise to the risk of "self-disconnection", i.e. the risk that customers who have very limited funds might decide that they cannot afford to pay into the gas or electricity meters.

64. TPDs are not imposed in cases where the fuel is paid for by a pre-payment meter.

(4) The DMG and Overview document

65. The Defendant's policy and guidance in relation to TPDs, which is at the heart of the Claimant's challenge, is to be found in two documents, the DMG and the Overview document, which are both addressed to decision-makers. Ms Waterman, the witness for the Defendant, described the DMG as "a technical document, the purpose of which is to assist decision-makers in exercising their powers, to help ensure that decisions are accurate and consistent." She described the overview as "internal operational guidance". The DMG is publicly available, on the Gov.UK website, whilst the Overview document is not. The Overview document is available to decision-makers on the "DWP Intranet".

The DMG

66. The discretion to impose TPDs for fuel and water debts that has been granted to the Defendant by the 1987 Regulations, is, of course, exercised in practice by departmental officials (the decision-makers, known as "DMs" in the document), pursuant to the **Carltona** principle.
67. The DMG gives guidance on a very wide range of matters to those who take decisions affecting benefits. The guidance on TPDs in the DMG is, therefore, just one section of a much larger guidance document. The introduction to the DMG states as follows:

> "01001 Decisions on claims and applications are made by the Secretary of State. In practice the Secretary of State does not make decisions personally. Instead, under the Carltona principle officials act on the Secretary of State's behalf, provided that the Secretary of State is satisfied that they are suitably trained and experienced to do so. Throughout this Guide these officials are called decision makers (DMs).
>
> 01003 The Secretary of State provides training and approved guidance to DMs on how to make decisions on their behalf. The DMG itself is one such form of guidance, advising DMs how to apply [Social Security] law. DMs should note that approved guidance must be followed when applying the law to the facts of the case. However, DMs may request advice from DMA Leeds on the application or clarification of the DMG in cases of doubt.
>
> 01004 The DM takes all necessary actions on behalf of the Secretary of State, including 1. gathering information 2. making decisions on claims and applications 3. dealing with administrative matters such as suspension of payment.
>
> …
>
> 01006 The DM must make a decision by considering all the evidence and applying the law, including any relevant case law, to the facts of

each case. Where the legislation specifies or implies discretion, the DM's judgement must be reasonable and made with unbiased discretion."

68. The section of the DMG which deals with TPDs lists the types of liabilities that are covered by the TPD scheme and then states as follows:

"**46134** When a decision is made to

1. start or

2. stop or

3. change

a third party deduction, this will be by way of a supersession of an earlier decision (see DMG Chapter 04).

Liability for debt

46136 Deductions and payments to third parties can only be made if the claimant or partner is liable to pay the debt. A claimant or partner will normally be liable for a debt if named on the bill.

1 SS (C&P) Regs, Sch 9, para 2(1)

46137 A debt may be disputed by the claimant or partner. This is a factor for the DM to consider when deciding whether they are liable to pay the debt. Although the Department cannot get involved in the dispute, enquiries should be made of the third party.

46138 Give the claimant the opportunity to provide evidence to support any claim that the debt is not liable to be paid.

46139 Deductions should only be made where there is evidence that the claimant or partner is liable to pay the debt."

69. The relevant section of the DMG then summarises the legal requirements and limitations upon TPDs. For example, it sets out the type of benefits that can be the subject of a TPD, and the maximum amount that can be deducted for the payment of arrears, and states that, in relation to certain types of liabilities, a TPD cannot exceed 25% of a family's benefit unless the claimant agrees. In each paragraph, there is reference to the relevant provision in the 1987 Regulations or other statutory instrument.

The section of the DMG dealing with TPDs for fuel costs

70. TPDs for fuel costs are dealt with at paragraphs 46296 to 46360. Paragraph 46301 sets out the rules in paragraph 6(1) of Schedule 9 to the 1987 Regulations for TPDs for fuel debts. Like much of the paragraphs in the DMG, this simply repeats or summarises what is said in the regulations.

71. The DMG goes further, however, in the passages that deal with "interests of the family", which state as follows:

"Interests of the family

46304 It will normally be in the interests of the claimant or their family to introduce third party deductions where

1. the debt

1.1 is unlikely to be paid before disconnection is threatened **or**

1.2 has resulted in the threat of disconnection **or**

1.3 has resulted in disconnection **and**

2. no other source of fuel is available for the same purpose **and**

3. there is no other suitable way of dealing with the debt.

46305 Third party deductions will always be in the interests of the family where there is a risk to health or safety. For example there may be a risk where the family includes children under 11

2. people over 70

3. people who are disabled

4. people who are long term sick.

Note: This list is not exhaustive.

46306 Do not assume that third party deductions would not be in their interests just because the claimant is single or a member of a couple without young children.

46307 Third party deductions will not normally be in the interests of the claimant or their family if

1. they have

1.1. **shown evidence of a determination to clear the debt** and

1.2. undertaken to clear the debt themselves [Me: this will be known by the docs supplied] or

2. there are other options available to deal with the debt.

46308 The DM must consider

1. the alternative means of cooking and heating available to the family

2. the availability and value of budget payment arrangements and

3. seasonal factors.

46309 The claimant may ask for a prepayment meter as an alternative to third party deductions. The fuel company may be willing to install a meter calibrated to recover the arrears. The DM should consider which arrangement would best suit the interests of the family. Only one of these arrangements can be in operation at any time."

(emphasis included)

72. The DMG also deals with priority between fuel debts. This passage states:

"Priority between fuel debts

46343 The criteria may be met for deductions for both gas and electricity debts. But it may not be possible to implement both deductions. This may happen where, for example, there is not enough specified benefit in payment.

46344 The DM should decide which debt takes priority, taking into account

1. all the circumstances and

2. any requests of the claimant.

1 SS (C&P) Regs, Sch 9, para 9(3)

46345 Priority should be given to whichever fuel is most needed to ensure the health and safety of the claimant or family."

73. In addition, the DMG deals with superseding the TPD decision. As I have said, in this context, the word "supersession" means changing or substituting a new decision for the original decision, which applies only for the future. The relevant paragraph states as follows:

"Superseding the third party deduction decision

46352 The decision to implement deductions should not be superseded where the only reason to do so is that the claimant wishes to take control of the budgeting. This is because the claimant's desire to take control of the budgeting is not, in itself, a relevant change of circumstances.

46353 The DM should supersede the outcome decision which includes the third party deduction decision for fuel costs, when a relevant change of circumstances occurs.

For example where 1. the average weekly cost estimated for the continuing need was not enough or was too much

Note: The claimant's agreement must be obtained if the deduction required stays at or would increase to the level mentioned in DMG 46351

2. the original debt has been cleared and deductions stop, or carry on for current consumption only (see DMG 46330)

3. the claimant changes address from one fuel company area to another and the debt is not transferable

4. the weekly deduction (including arrears) would leave the claimant with less than 10p

5. the claimant withdraws the agreement permitting deductions in excess of 25% of the applicable amount (see DMG 46351)

6. the claimant stops receiving a supply of fuel from the fuel company to whom payment is being made, for example where the supply has been disconnected due to meter interference. Or a claimant with deductions for gas may move to a house which is all electric

7. it is no longer in the interests of the family for deductions to continue."

The section of the DMG dealing with deductions for water costs

74. As with the part of the DMG which deals with fuel costs, most of the section that deals with deductions for water costs simply summarises the provisions of the 1987 Regulations and other delegated legislation. However, the part of the DMG which gives guidance to decision-makers on deductions for water costs says as follows in relation to the "interests of the family":

"Interests of the family

46365 Third party deductions will normally be in the interests of the claimant or the family where there is

1. a threat of a court summons and

2. no other suitable method of dealing with the debt.

46366 Third party deductions will not normally be in the interests of the claimant or their family if

1. they have

1.1. shown evidence of a determination to clear the debt and

1.2. undertaken to clear the debt themselves or

2. there are other options available to deal with the debt.

46367 Third party deductions will always be in the interests of the family where there is a risk to health or safety. For example where the family includes

1. children under eleven

2. people over 70

3. people who are disabled

4. people who are long-term sick.

Do not assume that third party deductions would not be in their interests just because the claimant is single or a member of a couple."

75. As for supersession, the section dealing with water costs says as follows:

Superseding the third party deduction decision

46397 The DM should supersede the third party deduction decision when a relevant change of circumstances occurs. For example where

1. the original debt is cleared or

2. the claimant changes address or

3. in the case of a metered water supply, the estimated weekly cost of continuing consumption is not enough or is too much or

4. in the case of unmetered charges, the annual charge increases (usually in April).

….

46398 The claimant's agreement should be obtained if the new total deductions exceed the level mentioned in DMG 46153. Where the claimant has already consented to a total above that level, any increase will require the claimant's further consent.

The TPD Overview document

76. This document is directed at giving practical advice to decision-makers when faced with a creditor's application for a TPD. It states as follows, in relevant part:

"Introduction

1. This chapter gives an overview of the principles and general rules of the Third Party Deductions (TPD) scheme, including general rules.

> More detail is given by deduction category in later chapters explaining the business process to be followed for each type of debt. …
>
> **Background**
>
> 2. Benefit customers are normally expected to meet their household expenses from their income in the same way that people in work do. The TPD scheme was designed to provide last-resort protection for a vulnerable minority of people on income-related benefits who have failed to budget and run up arrears of essential household outgoings and where other methods of payment have been tried without success.
>
> 3. Deductions should be considered where there is no other suitable course of action available to allow for clearance of the arrears. In helping our customers with debt management the scheme also aims to promote financial responsibility.
>
> **…**
>
> **Purpose of TPD**
>
> 5. The primary purpose of the scheme is therefore to protect the welfare of customers by shielding customers and their families from the consequences of getting into debt with essential household costs or to ensure compliance with a social obligation.
>
> 6. It is not intended to be a debt collection option for creditors except in very limited circumstances.
>
> 7. Paying a prescribed amount to the creditor removes the risk of the severe hardship likely to be caused by, for example, eviction or the disconnection of a fuel supply. TPD are normally made where it is in the interests of the family [there is a link here to the section of the DMG which explains what is meant by "interests of the family"].

77. The Overview document then gives advice about what to do when an application is received. The document states:

> "26. Consider contacting the relevant Third Party or the customer by telephone for any further information. When approaching the Third Party Creditor ask for:
>
> - confirmation of the amount of the debt
> - the amount to cover current consumption costs (if applicable)
> - any other information needed to process the application."

78. The Overview document gives brief guidance about the interests of the family:

> "**Interests of the family**

32. TPD should always be implemented if it is in the interests of the family, where the health and safety of the family could be put at risk, for example where a member of the family is:

- a child under the age of 11:
- over the age of 70:
- disabled
- long-term sick.

33. This list is not exhaustive and the DM should not assume that TPD would not be in the interests of the family because the customer is single or a member of a couple without children. Any representations made by the creditor as to the customer's circumstances should be taken into consideration when making the decision. For examples and guidance, see DMG Chapter 33 Interests of the family."

79. The Overview document also advises about what should happen if a customer asks that the TPD should stop:

"Customer requests that the TPD should stop

46. TPD should not be stopped because the customer requests this. This is because the customer's request does not constitute a relevant change of circumstances."

80. Paragraphs 50-52 of the Overview document state:

"**Customer Consent**

50. If the TPD exceeds 25% of the customer's applicable amount, complete form A86, issue it to the customer and BF for 2 weeks.

Customer Returns form A86

51. Where the customer returns form A86 giving consent, implement all the TPD. If the customer does not give their consent only implement TPD types that equal less than the 25% amount.

Customer does not return A86

52. Contact the customer by phone where possible, or issue a reminder letter. Without customer consent, the TPD in excess of the 25% amount cannot be implemented."

(5) <u>How the TPD scheme for fuel and water debts has been operated in practice</u>

81. I have been provided with evidence about this in the form of a witness statement dated 1 December 2021 from Ms Clare Waterman, a Policy Team Leader in the

Department of Work and Pensions, and a witness statement dated 6 December 2021 from Mr Mark Grice, an External Relationship Manager employed by the Interested Party. The Claimant has also given evidence in her witness statements about her own experience of the scheme.

82. In practice, applications for TPDs are only made where a claimant is in arrears in relation to their fuel or water bills, and where other efforts to take steps to reduce the arrears have failed. Such applications are only made when there is no dispute as to the debt and where the application for a TPD is an alternative to court or other enforcement action.
83. As for the numbers of TPDs for fuel and water debts the Defendant's evidence was that, at May 2021, there were 198,357 TPDs in relation to water debts. Mr Sheldon KC said that the Defendant's unaudited figures for February 2022 were that there were some 35,000 TPDs in respect of electricity debts, and about 27,700 in respect of gas debts. No figures were provided for those claimants who have more than one TPD.

The JSI

84. The Defendant has agreed a Joint Statement of Intent ("the JSI") in relation to TPDs with the fuel suppliers licensed by the Office of Gas and Electricity Markets ("Ofgem") and the water and/or sewerage companies licensed by the Office of Water Services "Ofwat"). The JSI is dated 1 February 2004. The aims of the JSI include that the customer has a continuation or restoration of the fuel supply, court action is avoided for non-payment of a debt for water and sewerage charges, and suppliers will receive payments from the Defendant which will meet the cost of current consumption and reduce the customer's debt.
85. The JSI further states:

> "9. Where a customer is in debt a supplier will first try and recover the debt by suitable means other than TPD. If these attempts are unsuccessful and the supplier is aware that a customer is in receipt of Income Support, Jobseeker's Allowance or Pension Credit TPD shall be considered by the supplier before disconnecting the fuel supply or instigating court action for a water debt.
>
> 10. …. The application shall normally be by letter along the lines of one of the examples in Annex A."

86. The template letters for fuel suppliers in Annex A contain boxes which ask the supplier to "Tell us about any other payment methods which have been tried… and how and why they failed" and "Please provide any other information on family or household background, which may support this application". The template letters for water suppliers also ask for any other relevant information, such as family and/or household background and circumstances. The template letters, both for fuel and water suppliers, also contain tick boxes to answer the question "Does the customer know that this application is being made?" and add, "(If not, please tell them straight away)".
87. Paragraph 21 of the JSI states:

> "21. A TPD shall continue for as long as the DM considers it necessary to discharge the customer's obligations and the level of deductions remains acceptable to the supplier. The decision to implement deductions will not be superseded by the DM where the only reason to do so is that the customer wishes to take control of the budgeting. (This is because the customer's desire to take control of the budgeting is not in itself a relevant change of circumstances.)"

The spreadsheets used for applications for TPDs

88. Notwithstanding what is said in paragraph 10 of the JSI, in practice most applications for TPDs are in fact made in bulk by suppliers by means of a spreadsheet, rather than by individual letters of application (though Ms Waterman said that some utility suppliers still use individual letters). Mr Grice said that the letters annexed to the JSI have not been used by the Interested Party for several years. I have been provided with copies of the template Fuel Request Excel Spreadsheets and Water Request Excel Spreadsheets which were used until recently. Those spreadsheets were populated with information about the claimant/customer, such as name, date of birth, address, account number, amount of weekly usage, and amount of arrears. They did not contain any information about the claimant's personal circumstances. They did not state whether the customer had been informed of the application. (In the Supplementary Bundle of documents there is another version of a spreadsheet, which appears to have been used in the Claimant's case, which contained two "flags" or requirements, one that two payment plans had been offered and one that legal action had been threatened. The spreadsheet also contained the following information, under the heading "Supporting": "previous payment arrangements with this customer have failed a legal notice of court action has been issued in respect of this debt." Mr Grice, the witness for the Interested Party, said that this was the spreadsheet that was used prior to 2019. It was replaced at that point with the water Excel spreadsheet which did not require this information).
89. In December 2021, the Defendant notified the suppliers that a new Excel Spreadsheet should be used. This Spreadsheet, unlike those previously in use, requires the supplier to confirm that the customer has failed two payment plans for the debt, and that enforcement action will be taken if deductions from benefits are not made. The supplier is also required to state whether it has notified the customer that it has applied for deductions for these benefits. In addition, there is a box for "Any other relevant information". This new spreadsheet was introduced by the Defendant in response to these proceedings.

What happens after a TPD has been imposed

90. Once a TPD has been imposed, the relevant sums will automatically be deducted from the claimant's benefits before the benefits are paid and will be paid to the utility supplier instead. The claimant will automatically be notified by the Defendant in writing once the TPD has been put in place (the Claimant says that this does not happen in every case, in her experience, but I accept that the Defendant's processes provide for such a letter to be sent out).
91. If a claimant informs the Defendant that they dispute a TPD decision, the processing site will first attempt to resolve this with them. If that is not successful, it is escalated to a Mandatory Reconsideration (i.e. a review). If the claimant is dissatisfied with the

review, then they are entitled to appeal to the First-Tier Tribunal. Ms Waterman said that in practice Mandatory Reconsiderations are rare.

92. After these proceedings were commenced, it became clear that some decision-makers were unaware that there was a power to reconsider a decision at the request of a claimant, rather than at the request of a utility company. Ms Waterman issued a note to decision-makers on 21 November 2021 to clarify this. I deal with this further, below.

The approach adopted by the Interested Party

93. Mr Grice explained how the Interested Party deals with a customer who has fallen into debt. Whilst no doubt the approaches taken by other water and fuel suppliers will differ in their details, I am content to proceed on the basis that the general approach will be broadly similar.
94. The Interested Party follows guidance issued by the Ofwat for dealing with household customers in debt. The Ofwat guidance requires companies to be proactive in attempting to contact customers who fall into debt as soon as possible. The customers should be provided with a reasonable range of payment frequencies and methods. Correspondence should be in clear language and should clearly set out the action that might be taken if the debt is not cleared, whilst being non-threatening. When agreeing payment arrangements, the customer's circumstances should be taken into account wherever possible. The Interested Party will not normally agree to a payment plan that will result in the customer paying anything below £20-30 per month, because a lower sum would not clear the outstanding debt within a sensible time period and would result in further arrears being accrued. However, when it is established that a customer is unable to afford the standard payment plan, the Interested Party may consider proposing a Payment Plan Concession ("PPC") instead. This is a payment arrangement that covers the customers' ongoing water bills, whilst making smaller contributions to their debt/arrears. The payments towards arrears under a PPC may range from £3.75 per week to zero. The Interested Party will also direct customers towards organisations offering debt advice, such as Citizens' Advice Bureaux.
95. If these arrangements are not possible or are not successful, and a TPD is unavailable, the Interested Party may proceed towards litigation. However, in general the Interested Party does not take debt recovery proceedings in court against customers who are unemployed or who are not home-owners, because the costs of such proceedings are substantial and it may well not be possible for the Interested Party to recover anything. If the Defendant declines to impose a TPD (for example because a customer is not in receipt of relevant benefits) then the Interested Party will repeat the offer of an affordability scheme such as PPC, but customers often do not agree to them, sometimes because they are unwilling to disclose their finances. This is an industry-wide issue and not something that only the Interested Party experiences. If the Interested Party decides not to take legal action, it may outsource the debt to a third-party debt collection agency instead. A debt collection agency will automatically add a charge, currently £39, to reflect some of its administration costs, and may take legal action to enforce the debt. Debts are only written off when a customer has absconded and trace processes have been unsuccessful, or debts exceed 6 years old and all other collection activities have been exhausted, or the customer has become insolvent or died.

96. Mr Grice said that TPDs are used as a last resort in situations where it is believed that the Interested Party cannot collect by any other means, and the TPD process is only used where it is believed that the Interested Party is unable to collect by any other means. Mr Grice's statement contained a detailed description of the stages that are followed before TPDs or enforcement action is considered. It is not necessary to set them out in this judgment. Different approaches are adopted for low-risk, medium-risk and high-risk debtors, and special arrangements are made for vulnerable customers. If customers are in receipt of relevant benefits, they may be invited to apply to join the Defendant's Water Direct scheme (this is the Interested Party's name for TPDs and so amounts to an invitation to submit to a TPD), pursuant to which deductions are made from benefits towards water bills, with the customers' consent.
97. The Interested Party uses an automated system to trigger an application for a TPD in a particular case, once the other options have been exhausted. The Interested Party's system will only trigger such an application if it is known that the customer is in receipt of a relevant benefit, if the customer has at least one failed payment plan in the current debt episode, and has arrears in excess of £50. The threshold of arrears being in excess of £50 is a water industry-wide standard.
98. Once a decision has been made to apply for a TPD, but before the application is made, the Interested Party writes to the customer to provide them with an opportunity to contact the Interested Party within two weeks to enter into a satisfactory payment plan, failing which, they are told, an application will be made for a TPD. If no satisfactory payment plan is agreed within two weeks, an application to the Defendant for a TPD will automatically be generated by the Interested Party's systems.
99. Mr Grice said that the amount recovered by the Interested Party in 2020-2021 by way of TPDs was £14.9 million. He said that, in the Interested Party's experience, 65%-70% of the total amount of TPD applications are made without the customer's consent.

Problems with the decision-making process in practice

100. As I have said, until recently, the information supplied by utilities to the Defendant did not routinely inform the Defendant: (1) whether the claimant had been informed that an application for a TPD was to be made; (2) whether or not the claimant objected to a TPD (if this information was known to the utility supplier); or (3) about any personal circumstances of the claimant or their family which might be relevant to the decision whether to impose a TPD.
101. This problem was addressed in a statement that was made in open court at the permission hearing on 13 October 2019, which was followed up by a note to managers that was circulated by Ms Waterman on 10 November 2021, and which was cascaded to decision-makers. Ms Waterman said in the note to managers that:

> "At present I do not believe that we gather enough information from the supplier in the Excel spreadsheet. It is possible that we do not seek sufficient information from the supplier or possibly the claimant to enable us to make a judgement at this point. From my discussions so far with operational colleagues they appear to assume from the spreadsheet that the supplier has completed their actions without

> necessarily checking further with the supplier or claimant, or looking further than the spreadsheet, If the Excel spreadsheet is relied on by itself, I doubt we are gathering enough information from the spreadsheet to consider the interests of the family.
>
> If the claimant disputes the debt, DMs will generally stop the deductions.
>
> In the Judicial Review we have said in open court before the permission hearing on 13 October 2021:
>
> "The Defendant accepts that the Excel spreadsheet would appear not to contain sufficient information, without more, for the Decision Maker Guidance, Joint Statement of Intent or Overview to be applied only on the basis of the boxes available in a case where:
>
> a. an individual either contested the debt,
>
> b. there were other ways in which the debt could be collected or
>
> c. if the Claimant disputed the deduction would be in the interests of the family.
>
> As set out in the letter of 20 August 2021 it is not known if this Excel spreadsheet was used for this Claimant by the creditors.
>
> The Defendant is in the process of revising this particular form.
>
> ….
>
> Process Improvement Required – update the spreadsheet/ forms to comply with and align to the Suppliers Joint Statement of Intent by asking for confirmation that actions as outlined in the JSI has taken place." (emphasis original)

102. This led to the introduction of the reformulated spreadsheet to which I have referred above.
103. Also in the same note, Ms Waterman said as follows:

> "Claimants need an opportunity to challenge or disagree with this process at some point…. I can see a strong operational case for giving claimants time to provide us with information, should they wish to before all decisions are made."

104. No arrangements have been made to give effect to this recommendation. Ms Waterman said in her note that the DMG already provides for this. This is a question I will consider when dealing with Ground 2, below.

(6) The TPDs imposed upon the Claimant and subsequent events relating to her

105. There is no challenge in these proceedings on the basis that the Defendant's policy, as set out in the guidance documents, was lawful but was misapplied in the Claimant's case (and, in any event, a failure to follow a published policy in an individual case is not automatically unlawful: see **R (All the Citizens and Anor v Secretary of State for Culture, Media and Sport** [2022] EWHC 960 (Admin), at paragraphs 95-102 and 110-115). Rather, they are a complaint of systemic unlawfulness arising from the policy and guidance adopted by the Defendant to the exercise of the discretion relating to TPDs in general. Indeed, if these proceedings had been a challenge to the specific treatment of the Claimant, they would face insuperable difficulties: the TPDs that had been imposed on the Claimant's benefits were removed before the judicial review proceedings were issued, so any defects in the way that the TPDs were imposed in 2019 and 2021 are academic, and, in any event, in so far as she had a complaint about the TPDs that had been imposed upon her, the Claimant had alternative remedies in the form of a request for a review and an appeal to the First-Tier Tribunal. In these circumstances, therefore, it is necessary only to give a relatively brief summary of the facts relating to the Claimant.
106. The Claimant has been made subject to a number of TPDs. For example, four water debt TPDs have been imposed on behalf of the Interested Party, in 2009, 2014, 2015 and 2019. I will only deal with the two most recent TPDs that have been imposed on the Claimant, in 2019 one by the Interested Party in relation to water debts, and one in 2021 by E.ON in relation to fuel debts.

The 2019 water TPD

107. By early 2019, the Claimant was in arrears with her water bills. On 4 February 2019, the Claimant agreed with the Interested Party to a payment plan of £9.13 per month. The Claimant failed to make payments in accordance with this payment plan, on 19 February 2019 the Interested Party invited her to contact them to discuss payment. On 25 March 2019, the Interested Party wrote to the Claimant to tell her that if she did not respond to a proposal for Water Direct payments [i.e. a voluntary TPD], a TPD application would be made. The Claimant contacted the Interested Party by telephone and email to say that she objected to TPDs. As a result, the Interested Party did not apply for a TPD at that stage, but, on 6 and 7 April 2019, invited the Claimant once again to discuss payment plans. There was no response and, on 23 July 2019, an unsuccessful attempt was made to speak to the Claimant by telephone and a Notice of Action letter was issued. On 6 August 2019 a final notice (a red reminder) was sent to the Claimant to encourage payment and/or communication. Further attempts were made to speak to the Claimant by telephone on 9, 12 and 19 August 2019, but without success. On 24 August 2019, the Interested Party sent a solicitor's notice to the Claimant stating that an application for a TPD would be made within 14 days if no response was received from her. No response was received from the Claimant, despite another attempt to telephone her on 2 September 2019.
108. On 10 September 2019, the Interested Party made an application on a bulk spreadsheet to the Defendant for a TPD in respect of the Claimant. At the time the outstanding debt was £387.86, and the Interested Party applied for a deduction of £9.09 per week, £3.70 of which was to pay for arrears and £5.39 was to pay for current usage. The Interested Party did not inform the Defendant that the Claimant opposed the imposition of a TPD.

109. Deductions under the water TPD commenced on 18 September 2019. The deductions were not initially credited by the Defendant to the Claimant's account and so the Interested Party believed that other ways to recover the debt would need to be considered. This error was discovered on 10 June 2020, and the deductions that had already been paid were credited to the Claimant's account.
110. The Defendant cannot locate the applications made by the utility companies, including the Interested Party, in relation to the Claimant's TPDs. The Defendant has been unable to identify who the decision-maker was, or what the reasons for the decision to impose the TPD were. In light of the evidence before me, however, it is clear that the decision-maker would simply have had before them the details from the spreadsheet (in its then-current form). These would not have included the information that the Claimant opposed a TPD, or any other information about the Claimant's personal circumstances.

The 2021 fuel TPD

111. E.ON has not joined these proceedings as an interested party and has not filed any evidence. There is no evidence before me of the steps that were taken before an application was made in 2019 for a TPD for the Claimant. As with the 2019 water TPD, the Defendant has been unable to locate any information about the form in which the fuel TPD application was made or the way in which it would have been dealt with. It is not known whether the application was made as part of a bulk spreadsheet or by way of template letter. In these circumstances, I infer that E.ON would have taken steps to agree a payment plan with the Claimant before making an application for a TPD. It is likely that the application would have been in the form of the then-current fuel Excel spreadsheet. This was all the information that the Defendant's decision-maker had before them when the decision was taken. Unlike the Interested Party, E.ON did not inform the Claimant that it was intending to seek a TPD before doing so. She would have informed E.ON that she opposed a TPD if she had been asked.
112. The 2021 fuel TPD was imposed on the Claimant with effect from 3 March 2021. The sum of £3.75 was deducted for arrears and a further sum of £10.50 per week was deducted for ongoing usage. At that time, the Claimant's arrears owed to E.ON were £960.38.
113. In April 2021, after she had discovered that a fuel TPD had been imposed upon her, the Claimant contacted the Defendant and asked the Defendant to stop the deductions. I should make clear that this was not on the basis that the Claimant wished to ignore completely her financial obligations to the Interested Party. Rather, she wanted to set up a Standing Order, rather than submit to automatic deductions, because it gave her control of her money and enabled her to cancel or postpone the payments to the Interested Party if she wanted to give preference to other spending priorities or debts. She was informed, in a letter dated 20 April 2021, that the Defendant could not do so, and that her only option was to approach E.ON. This information was incorrect. The Defendant has a power, of its own motion, to review or supersede TPDs.
114. When this error was identified, and the Claimant was informed that the Defendant intended to treat her Pre-Action Protocol letter as an application for Mandatory Reconsideration, she was asked to provide any additional information or evidence that she wished to have considered. Her solicitors turned down this request. The Claimant declined to provide additional information or evidence for a Mandatory

Reconsideration because she did not consider that a Mandatory Reconsideration could address her fundamental complaint.

115. In addition, when this came to light, and it became clear after investigations, that the error in relation to the Claimant was not a one-off, Ms Waterman issued a note of clarification on 25 November 2021, to be sent to managers at the two DWP sites that handle TPD applications, Handsworth and Barnsley.

116. The note states:

> "We have become aware that claimants who are subject to third party deductions for fuel and water are being told incorrectly that these deductions cannot be stopped by DWP. Also claimants are not being given the option to dispute a decision or offered a mandatory reconsideration decision, so they are not provided with a formal decision refusing to stop deductions which would then attract appeal rights.
>
> If a claimant contacts DWP to stop a third party deduction, you should consider the following:
>
> a) Is the claimant requesting the stop because they are disputing the debt? If so the Guidance on Dispute of liability at paragraph 43 must be followed
>
> b) Is the claimant requesting the stop because they do not wish to pay by deductions from their benefit? If so advise the claimant to contact the creditor so that an alternative payment option may be considered.
>
> c) Has the claimant has recently submitted a meter reading? If not advise them to do so as this may reduce the current consumption amount.
>
> If after considering the above the TPD is not stopped and the claimant still wants it to stop, you must forward the case to the Dispute Resolution Team for an MR [mandatory reconsideration] to be considered if within 13 months of the date of decision, an MR can be carried out within one month of the date of decision and where a late request is received with good
>
> reason this can be extended to 13 months. You should follow the guidance on mandatory reconsideration found here:
>
> ESA - 04 Handling Reconsiderations | DWP Intranet
>
> JSA - Mandatory Reconsiderations | DWP Intranet
>
> IS - Mandatory Reconsiderations | DWP Intranet
>
> Remember to ask the claimant why they want the deductions to stop and if they are asking for an MR out of time why are they making the request late, these reasons along with all the information that was relied on to make the original decision to start deductions must be forwarded with the MR1 to the Dispute Resolution Team (DRT) for

the relevant benefit, this includes the information that was received in the request for a TPD and the decision to make a TPD."

117. This error, namely that claimants were being told, wrongly, that the Defendant could not do anything to stop a TPD once it was in place, is not the subject of these proceedings. However, a further difficulty came to light at the same time. Ms Waterman said that it had not been the intention of the DMG or the Overview document to direct the decision-makers that consent is not relevant to the decision, or that the decision-makers should not consider all of the circumstances, including the claimant's views. She acknowledged, however, that some staff at the Handsworth benefit office may have misunderstood the reference at paragraph 46352 of the DMG, in relation to supersession that "the decision to implement deductions should not be superseded where the only reason to do so is that the claimant wishes to take control of budgeting" to mean that consent is not relevant to the original TPD decision, and that the claimant's wishes were never of any relevance.

Supersession of the Claimant's TPDs

118. On 5 July 2021, the Defendant superseded her earlier decisions relating to the 2019 fuel TPD and 2021 water TPD and suspended the deductions. On the face of it, this was outside the Defendant's normal policy and was inconsistent with regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, because there was no change of circumstances, as at that stage the Claimant had not made any alternative agreement to pay utility charges, and no admitted error of law or fact. For obvious reasons, the Claimant makes no legal challenge to this decision.
119. On 7 September 2021, the Claimant agreed with the Interested Party to pay, by standing order, £22.15 per month in respect of usage and £1 per month in respect of arrears. The Interested Party also waived the Claimant's past debt to the Interested Party as a gesture of goodwill. On 8 December 2021, the Claimant agreed with E.ON to pay, by standing order, £44.70 per month in respect of usage and £1 per month in respect of arrears. This is £31.37 per month less than would have been deducted if the TPDs had continued.
120. At present, therefore, the Claimant is not subject to any TPDs. However, there is no certainty that this will continue indefinitely. In a letter dated 17 August 2021 to the Claimant, the Interested Party said that the figure of £1 towards arrears was not an amount that the company would normally be able to accept, and they were prepared to accept it for six months only as a gesture of goodwill, after which it would be reviewed. In fact, the arrangement has continued beyond the six-month deadline.

(7) The case-law authorities on the circumstances in which written guidance to decision makers may render unlawful the exercise of a statutory discretion

R(A)

121. The sole judgment in **R(A)** was given by Lord Sales and Lord Burnett of Maldon CJ (with whom Lord Reed PSC and Lords Lloyd-Jones and Briggs JJSC agreed). At paragraph 1 of the judgment, their Lordships said that:

> "This appeal is concerned with the standards to be applied by a court when it is asked to conduct a judicial review of the contents of a policy document or statement of practice issued by the Government."

122. In **R(A)**, the claimant, a convicted sex offender, brought a claim for judicial review of the Child Sex Offender Disclosure Scheme Guidance which outlined a co-ordinated approach which police forces could adopt when members of the public requested information about whether persons who had contact with children had any convictions for sex offences involving children. In other words, the Guidance was concerned with the circumstances in which police forces should disclose to members of the public, in response to an enquiry, whether a person had a conviction for a child sex offence. The Guidance was non-statutory and was made pursuant to the Secretary of State's common law powers. Police forces were not obliged to adopt it. The Child Sex Offender Disclosure Scheme gave effect to the statutory duty of a police force, under section 327A(1) of the Criminal Justice Act 2003, to consider whether to disclose information in its possession about the relevant previous convictions of any child sex offender managed by it to any particular member of the public. Sections 327A(2) and (3) provided that that there was a presumption that the responsible authority should disclose such information if the offender posed a risk of causing serious harm to children and disclosure was necessary for the purpose of protecting a child or children from serious harm caused by the offender.
123. The first version of the Guidance had been successfully challenged by the same claimant, on the basis that it did not include a requirement that the police should consider whether a potential disclosure subject should be asked whether he wished to make representations: it therefore failed to ensure that the decision-maker had all the necessary information to conduct the requisite balancing exercise under Article 8 ECHR: **R(X) v Secretary of State for the Home Department** [2012] EWHC 2954 (Admin) [2013] 1 WLR 2638. As a result of **R(X)**, the Guidance was amended and a provision was inserted to the effect that "If the application raises concerns, the police must consider if representations should be sought from the subject to ensure that the police have all necessary information to make a decision in relation to disclosure." "Concerns" would be raised, inter alia, if the subject has convictions for child sex offences.
124. The message given by the Guidance, therefore, was that, where the subject of a disclosure request has convictions for child sex offences, the police force was required to consider whether to seek representations from the subject, but was not necessarily required to do so as a matter of course. The Guidance did not give any specific advice as to the types of cases in which representations should be sought.
125. It was common ground in **R(A)** that the common law duty of fairness (as set out in **R v Secretary of State for the Home Department, ex parte Doody** [1994] 1 AC 531, at 560, per Lord Mustill) applied and so, depending on the circumstances, the duty of fairness may require that the subject be given an opportunity to make representations before a decision is made to make disclosure (**R(A)**, paragraph 19). There is a general presumption at common law that information should not be disclosed, because of the adverse impact on the subject, unless there was potentially grave harm to the public if the information was withheld (paragraph 20).

126. By the time the case reached the Supreme Court, the main submission that was advanced on behalf of the claimant was that the Guidance was unlawful, both at common law and in breach of Article 8, because (i) it failed to recognise and reflect

the importance of consulting with people who are at risk of suffering a violation of their Article 8 rights by reason of disclosure and (ii) this meant that there was a significant and/or unacceptable risk of a breach of Article 8 and/or the common law. On the latter issue, the Court of Appeal had ruled that the test in domestic law for the legality of a public scheme in relation to a complaint of a failure to provide proper opportunities for affected persons to make representations is whether the scheme is inherently unfair ([2016] EWCA Civ 597, per Laws LJ, applying **R (Tabbakh) v Staffordshire and West Midlands Probation Trust** [2014] EWCA 827; [2014] 1 WLR 4620 ("**Tabbakh**")).

The test for judicial review of a policy at common law

127. The Supreme Court in **R(A)** rejected the "inherent unfairness" test for determining that a written policy or guidance was unlawful at common law that had been set out in **Tabbakh**. The Supreme Court referred to guidance given by the House of Lords in **Gillick v Norfolk and Wisbech Area Health Authority** [1986] AC 112 ("**Gillick**") and said that Gillick sets out the test to be applied (**R(A)**, paragraph 38). The Supreme Court said, at paragraphs 34-38, that the following principles can be derived from **Gillick**, as it was interpreted by Underhill LJ in **R (Bayer plc) v NHS Darlington Clinical Commissioning Group** [2020] EWCA Civ 449; [2020] PTSR 1153 ("**Bayer**"), at paragraph 200:

(1) it was not the role of policy guidance to eliminate all uncertainty regarding its application and all risk of legal errors by decision-makers;

(2) the drafter of a policy statement is not required to imagine whether anyone might misread the policy and then to draft it to eliminate that risk;

(3) it was only if the guidance, on a reasonable reading of it, positively encouraged the decision-maker to think that they could take the decision in an unlawful way, or positively approved such conduct, that the guidance would be unlawful;

(4) it is not necessary, in order to be lawful, that the guidance must invariably produce conduct on the part of decision-makers that would be lawful;

(5) the best encapsulation of the test is: does the policy in question authorise or approve unlawful conduct by those to whom it is directed?

128. At paragraph 39 of the judgment in **R(A)**, the Supreme Court made clear that the scope for intervening on the basis that a written policy or guidance was unlawful is narrow:

> "There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate a policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court. Since there is no such obligation, there is no basis on which a court can strike down a policy which fails to meet that standard. The principled basis for intervention by a court is much narrower, as we have set out above."

129. The Supreme Court said, at paragraph 40, that if it were otherwise, the courts would be drawn into reviewing and criticising the drafting of policies to an excessive degree.
130. At paragraph 41, the Court said:

> "The test set out in **Gillick** is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy, as objectively construed. The test does not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations: see also our judgment in **BF (Eritrea)** [2021] 1 WLR 3967"

131. Applying this approach, the Supreme Court said that the guidance under consideration in **R(A)** was not contrary to common law (or Article 8). The Court acknowledged that there will be cases where the application of the **Gillick** test for lawfulness of a policy may be less clear than in **R(A)**. One such case was the first challenge to the Guidance relating to disclosure of information about child sex offenders. The Supreme Court said that they agreed with the decision in **R(X)** to the effect that the original version of the Guidance had been unlawful. This was because, reading the Guidance as a whole, it was clearly intended to set out for decision-makers a reasonably complete decision-making procedure to be followed, and, read objectively, it misdirected decision-makers as to how they should proceed, by implicitly indicating that they did not have to invite representations whereas in many cases they had a legal obligation to do so (**R(A)**, paragraph 43).
132. The Supreme Court approved a distinction which was drawn in **Bayer**, between (1) cases in which the published policy or guidance has been issued by the Secretary of State to his or her staff to explain to them the legal framework in which they perform their functions, in which cases there can be no question of those who are expected to implement the policy taking independent legal advice and making up their own minds as to what the law is, and (2) cases in which the Secretary of State is providing guidance to a separate body, such as a health Trust, which is responsible for exercising the relevant discretion and which is in a position to form its own view about how to exercise the discretion, and to take appropriate advice. The standard of scrutiny of written guidance is higher in the first type of case than in the second. (paragraphs 44-45).
133. The Supreme Court identified three types of cases where a policy might be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others at paragraphs 46 and 47, as follows:

> "46 In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i e the type of case under consideration in **Gillick** [1986] AC 112); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain

> the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. In a case of the type described by Rose LJ [in **Bayer**], where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the Secretary of State at the head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it may more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness will be assessed on that basis. In the present case, however, the police are independent of the Secretary of State and are well aware (and are reminded by the Guidance) that they have legal duties with which they must comply before making a disclosure and about which, if necessary, they should take legal advice.
>
> 47 In a category (iii) case, it will not usually be incumbent on the person promulgating the policy to go into full detail about how exactly a discretion should be exercised in every case. That would tend to make a policy unwieldy and difficult to follow, thereby undermining its utility as a reasonably clear working tool or set of signposts for caseworkers or officials. Much will depend on the particular context in which it is to be used. A policy may be sufficiently congruent with the law if it identifies broad categories of case which potentially call for more detailed consideration, without particularising precisely how that should be done. This was the approach adopted by Green J in **R (Letts) v Lord Chancellor (Equality and Human Rights Commission intervening)** [2015] 1WLR 4497 ("**Letts**")."

134. In the present case, as I have said, the Claimant contends that the relevant guidance documents give rise to Category (i) and Category (iii) unlawfulness.
135. At paragraph 63 of its judgment, the Court said that:

> "….But where the question is whether a policy is unlawful, that issue must be addressed looking at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way."

136. The Supreme Court rejected a "looser formulation" of the **Gillick** test that had been applied by Green J in **Letts**, relying on **Tabbakh**, namely, "Would the guidance if followed (i) lead to unlawful acts, (ii) permit unlawful acts or (iii) encourage such unlawful acts." The Supreme Court made clear that the **Gillick** test should not be interpreted in this wide way (see judgment, paragraph 48).

137. The Supreme Court also rejected a number of other bases upon which the lawfulness of written policies or guidance had been challenged. The Court rejected the test put forward in obiter dicta by Richards LJ in **Tabbakh** to the effect that a policy will be unlawful if it is "inherently unfair", and similarly rejected the idea that there was a freestanding principle, distinct from, and wider than, **Gillick**, that a policy will be unlawful if it creates an unacceptable risk that an individual will be treated unfairly, as seems to have been envisaged in **Tabbakh**. The Court emphasised that it is the authoritative guidance given in **Gillick** that should be applied. As the Court put it at paragraph 84(3), the test of inherent unfairness referred to in **Tabbakh** is to be analysed as an aspect of the **Gillick** principle. The test for the lawfulness of a policy is not a statistical test, which the court would be ill-equipped to undertake, (paragraphs 55-65).
138. The Court also warned against the application of wider principles of review, such as asking whether there is a real or unjustified risk of unfairness or illegality. Once again, the Court emphasised that it is the test in **Gillick** that should be applied (paragraph 68). Also at paragraph 68, the Court said that it was consistent with **Gillick** to find that a procedure is unlawful if the effect of the procedural rules set out in the guidance is that a significant number of cases introduced into the system would be decided unfairly and hence unlawfully.

BF (Eritrea)

139. The **BF (Eritrea)** case was heard by the same constitution of the Supreme Court as heard **R(A)**. In **BF (Eritrea)**, the Claimant challenged guidance given by the Secretary of State to decision makers to assist them in determining whether an asylum seeker was over 18 years of age. The guidance provided that the Home Office would not accept that an individual was under 18 if his physical appearance or demeanour very strongly suggested that he was significantly over 18 years of age and no other credible evidence to the contrary. The Supreme Court held that this was not unlawful.
140. In **BF (Eritrea)**, the Supreme Court applied the test that was set out in **Gillick**, and that was explained in **R(A)**. In **BF (Eritrea)**, the Court said as follows:

> "48. In our judgment in the **A** case, to which we refer, we have sought to provide general guidance regarding the principles to be applied to test the lawfulness of policy guidance. In a case where the lawfulness of policy guidance is in issue, it has to be asked what the obligation or obligations were of the person promulgating the guidance with regard to its content.
>
> (i) The **Gillick** obligation
>
> 49. The principal obligation is that explained in **Gillick**, so in our opinion the parties were right to focus on this in their submissions in this court. The **Gillick** obligation is not to give policy direction to recipients to do something which is contrary to their legal duty: see the **A** case [2021] 1 WLR 3931, paras 29–47 .
>
> 50. In Mr Hermer's submission, criterion C in the context of both versions of the EIG and Assessing Age "permits or encourages unlawful conduct" by immigration officers (to use Lord Scarman's

formulation in **Gillick** at p 181F), in the requisite sense. According to Mr Hermer, criterion C "permits" or "encourages" unlawful conduct because it does not sufficiently remove the risk that immigration officers might make a mistake when they assess the age of an asylum seeker who claims to be a child.

51. In our view, this submission involves a misinterpretation of what was said in **Gillick** and cannot be sustained. As we explain in our judgment in the **A** case, the meaning of the formula used by Lord Scarman is much narrower than suggested by Mr Hermer. It involves comparing two normative statements, one being the underlying legal position and the other being the direction in the policy guidance, to see if the latter contradicts the former. Mr Hermer's submission as to the effect of **Gillick** distorts this test by comparing a normative statement with a factual prediction, i.e. comparing the underlying legal position with what might happen in fact if the persons to whom the policy guidance is directed are given no further information. If correct, this would involve imposing on the person promulgating the guidance a very different, and far more extensive, obligation than that discussed in **Gillick** . It would transform the obligation from one not to give a direction which conflicts with the legal duty of the addressee into an obligation to promulgate a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty. There is no general duty of that kind at common law.

52. Whenever a legal duty is imposed, there is always the possibility that it might be misunderstood or breached by the person subject to it. That is inherent in the nature of law, and the remedy is to have access to the courts to compel that person to act in accordance with their duty. An asylum seeker has the same right to apply to the courts as anyone else. Save in specific contexts of a kind discussed below and in our judgment in the **A** case, there is no obligation for a Minister or anyone else to issue policy guidance in an attempt to eliminate uncertainty in relation to the application of a stipulated legal rule. Any such obligation would be extremely far-reaching and difficult (if not impossible in many cases) to comply with. It would also conflict with fundamental features of the separation of powers. It would require Ministers to take action to amplify and to some degree restate rules laid down in legislation, whereas it is for Parliament to choose the rules which it wishes to have applied. And it would inevitably involve the courts in assessing whether Ministers had done so sufficiently, thereby requiring courts to intervene to an unprecedented degree in the area of legislative choice and to an unprecedented degree in the area of executive decision-making in terms of control of the administrative apparatus through the promulgation of policy."

141. At paragraph 51, the Court described the obligation in relation to policy and guidance as being "not to give a direction which conflicts with the legal duty of the addressee."

Cardona v Secretary of State for the Home Department

142. In this case, [2021] EWHC 2656 (Admin), [2022] 1 WLR 1855, having set out paragraph 46 of **R(A)**, Linden J said:

> "70. Importantly, as I read this passage, the Supreme Court was not suggesting in this passage that each case should be examined with a view to deciding whether it falls into any of these categories and, if so, which. The categories are intended to be illustrations, to be found in the case law, of how positive statements or omissions, or a combination of the two, in policies or guidance may authorise, encourage or approve unlawful conduct on the part of those to whom they are directed."

143. Whilst I agree that the Supreme Court did not intend to impose a rigid categorisation upon types of unlawful cases in paragraph 46 of **R(A)** –the Justices introduced the three Categories in paragraph 46 of **R(A)** by saying that they were speaking "in broad terms" – it will nonetheless usually be helpful to make use of the categories of cases identified by the Supreme Court at paragraph 46 of **R(A)** as a guide when considering whether written policy or guidance is unlawful, and this is what the parties, and I, have done in the present case.

Summary of the guidance given in Gillick, R(A), and BF(Eritrea)

144. In my judgment, for present purposes, the law as to when written guidance to decision makers may render unlawful the exercise of a statutory discretion can be summarised as follows:

(1) The obligation is an obligation not to give policy direction to recipients to do something which conflicts with the legal duty of the addressee. The test is: does the policy in question authorise or approve unlawful conduct by those to whom it is directed?;

(2) The court must look at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way;

(3) In particular, a procedure will be unlawful if the effect of the procedural rules set out in the guidance is that a significant number of cases introduced into the system would be decided unfairly and hence unlawfully. However, the test is not a statistical test;

(4) There are three categories or types of cases in which this might happen. The ones with which this case is concerned are Categories (i) and (iii);

(5) Category (i) is where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way;

(6) Category (iii) is where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. A case is more likely to fall into category (iii) if a Secretary of State has issued guidance to his or her own staff explaining the legal framework in which they perform their functions;

(7) However, in a Category (iii) case, it will not usually be incumbent on the person promulgating the policy to go into full detail about how exactly a discretion should be exercised in every case. A policy may be sufficiently congruent with the law if it identifies broad categories of case which potentially call for more detailed consideration, without particularising precisely how that should be done;

(8) The authorities set out above show that the circumstances in which a written policy or guidance may render unlawful decisions that are taken pursuant to a statutory discretion are narrower than was sometimes believed. The test is not simply whether the guidance is inherently unfair, or if the guidance, if followed, would (i) lead to unlawful acts, (ii) permit unlawful acts or (iii) encourage such unlawful acts, or would lead to a real or unjustified risk of unfairness or unfairness;

(9) Also, it was not the role of policy guidance to eliminate all uncertainty regarding its application and all risk of legal errors by decision-makers, and the drafter of a policy statement is not required to imagine whether anyone might misread the policy and then to draft it to eliminate that risk; and

(10) it is not necessary, in order to be lawful, that the guidance must invariably produce conduct on the part of decision-makers that would be lawful.

(8) The Padfield, Tameside and fairness obligations

145. The Claimant does not contend that the written guidance given to decision-makers in relation to fuel and water TPDs conflicts with the statutory requirements for such TPDs, as set out in the 1987 Regulations. She does not contend that the written guidance misdescribes the contents of the 1987 Regulations. Rather, she contends that the written guidance directs decision-makers to ignore an important relevant consideration – whether the claimant consents – and fails to direct them that in many cases they are required to seek representations and information from the claimant before taking a decision. The Claimant submits that the approach as set out in the written guidance is therefore unlawful because it is in breach of three obligations of public law, namely the **Padfield**, **Tameside** and fairness obligations. Essentially, the Claimant contends that the written guidance has the effect of depriving claimants of procedural safeguards that they are guaranteed by law, pursuant to the obligations recognised in **Padfield** and **Tameside**, and the obligation of fairness.
146. There was no significant dispute between the parties as regards the content and scope of these obligations.

The Padfield obligation

147. The **Padfield** obligation is well-settled. A public authority must exercise statutory powers in such a way as to promote the policy and objects of the legislation. A Minister must not use their discretion in a way that thwarts or runs counter to the policy and objects of the Act concerned: see **Padfield and others v Minister of Agriculture, Fisheries and Food** [1968] AC 997, at 1030c.

The Tameside obligation

148. The **Tameside** obligation requires the decision-maker to make reasonable attempts to obtain the information necessary for their decision making (**Secretary of State for Education v Tameside MBC** [1977] AC 1014, 1065A-B).
149. The **Tameside** obligation was summarised by Haddon-Cave J in **R (Plantaganet Alliance) Ltd v Secretary of State for Justice** [2014] EWHC 1662 (QB); [2015] 2 All ER 261, at paragraphs 99-100. The statement of principle was summarised and approved by Underhill LJ, giving the judgment of the Court, in **R (Balajigari) v Home Secretary** [2019] EWCA Civ 673; [2019] 1 WLR 4647, at paragraph 70, as follows:

> "The general principles on the **Tameside** duty were summarised by Haddon-Cave J in **R (Plantagenet Alliance Ltd) v Secretary of State for Justice** [2015] 3 All ER 261, 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 (Associated Provincial Picture Houses Ltd v Wednesbury Corpn** [1948] 1 KB 223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see **R (Khatun) v Newham London Borough Council** [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries 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 inquiries if no reasonable authority possessed of that material could suppose that the inquiries 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."

The obligation of fairness

150. The principles of fairness were summarised by Lord Mustill in **Doody** at 560 as follows:

> "From [the authorities], I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

151. As Lord Mustill observed in **Doody**, the application of these principles to a particular case is context-specific. **Doody** was concerned with whether prisoners who had been sentenced to life imprisonment should have the opportunity to make representations before the Secretary of State determined the minimum period of imprisonment the prisoner would have to serve before being considered for parole. The House of Lords said that they should.
152. Ms Richards KC also relied upon observations made by Lord Sumption JSC and Lord Neuberger of Abbotsbury PSC in **Bank Mellat v HM Treasury (No 2)** [2013] UKSC 38; [2013] UKSC 39; [2014] AC 700. This case was concerned by a direction made by the Secretary of State which prohibited all persons operating in the financial sector in the United Kingdom from entering into or continuing to participate in any transaction or business relationship with the claimant, a major Iranian commercial bank, on the grounds that the Treasury reasonably believed that the development or production of nuclear weapons in Iran posed a serious risk to the national interests of the United Kingdom. The Supreme Court held, by a majority, that the failure to afford the bank the opportunity to make representations before the sanctions were imposed was unfair and unlawful. Both Lord Sumption and Lord Neuberger were in the majority on this issue.
153. At paragraph 29, Lord Sumption said:

> "29 The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law."

154. Having cited authorities, including **Doody**, Lord Sumption said, at paragraph 31:

> "31 It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each directive is made….."

155. Lord Sumption addressed the significance of the fact that the statute provides for a right to challenge a decision after that event at paragraphs 35 and 36:

> "35 The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise….
>
> 36 It does not of course follow that a duty of prior consultation will arise in every case. The basic principle was stated by Lord Reid 40 years ago in **Wiseman v Borneman** [1971] AC 297, 308, in terms which are consistent with the ordinary rules for the construction of statutes and remain good law:
>
> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation". Cf Lord Morris of Borth-y-Gest, at p 309B—C."

156. Lord Neuberger said as follows at paragraphs 178 and 179:

> "178 As Lord Sumption JSC says in paras 29—30, where the executive intends to exercise a statutory power to a person's substantial detriment, it is well established that, in the absence of special facts, the common law imposes a duty on the executive to give notice to that person of its intention, and to give that person an opportunity to be heard before the power is so exercised. While this has been described as a "rule of universal application . . . founded on the plainest principles of justice" (per Willes J in **Cooper v Wandsworth Board of Works** 14 CBNS 180, 190), it has more recently been expressed in somewhat more measured terms. In **R v Secretary of State for the Home Department Ex p Doody** [1994] 1 AC 531, 560, Lord Mustill said that "fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations . . . either before the decision is taken . . . or after it is taken, with a view to procuring its modification . . ."

> 179 In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute."

157. Mr Sheldon KC said that Lord Neuberger was "speaking for himself" in the sense that none of the other Justices expressly adopted the formulation at paragraph 179 of his judgment, but in my view Lord Neuberger's observations, whilst not laying down hard-and-fast rules, provide helpful guidance. This paragraph was cited with approval by the Court of Appeal in **R(Balajigari)** at paragraphs 59-60.
158. In **R(Moseley) v Haringey LBC** [2014] UKSC 56; [2014] 1 WLR 3947, Lord Wilson JSC said, at paragraphs 23 and 24:

> "23 A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in **R v Devon County Council, Ex p Baker** [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.
>
> 24 Fairness is a protean concept, not susceptible of much generalized enlargement. But its requirements in this context must be linked to the purposes of consultation. In **R (Osborn) v Parole Board** [2014] AC 1115, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed JSC in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement ""is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested: para 67. Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel": para 68. Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the

> question was not: ""Yes or no, should we close this particular care home, this particular school etc?" It was: ""Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our borough, should we make one in the terms which we here propose?""

159. At paragraph 26, Lord Wilson said that amongst other general points which emerge from the authorities is that:

> "…. in the words of Simon Brown LJ in **Ex p Baker** [1995] 1 All ER 73, 91, ""the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit"

160. The legal context that was under consideration in **R (Moseley)** was far removed from the present case. In **R (Moseley)**, the Supreme Court was concerned with the requirements of consultation by a local authority which was proposing to introduce a council tax reduction team for the benefit of local residents who could not afford to pay the full amount of council tax.
161. Another authority that was relied upon by Ms Richards KC was **R (Balajigari) v Home Secretary**. This was an immigration case. The Court of Appeal held that where the Secretary of State was minded to refuse indefinite leave to remain under a certain paragraph of the Immigration Rules on the basis of the applicant's dishonesty or other reprehensible conduct, he was required as a matter of procedural fairness, inter alia, to give the applicant an opportunity to respond before drawing a conclusion as to whether there had been such conduct. In **R (Balajigari)**, the Secretary of State had submitted that the availability of a procedure for administrative review, after the decision had been taken, meant that procedural fairness did not require that an opportunity be given to make submissions in advance of the decision being taken. The Court of Appeal did not accept this submission (see paragraph 58). Underhill LJ, giving the judgment of the court, said:

> "59 In the first place, although sometimes the duty to act fairly may not require a fair process to be followed before a decision is reached (as was made clear by Lord Mustill in the passage in **R v Secretary of State for the Home Department, Ex p Doody** [1994] 1 AC 531 which we have quoted earlier: see para 45), fairness will usually require that to be done where that is feasible for practical and other reasons."

162. Underhill LJ then set out the observations of Lord Neuberger at paragraph 179 of **Bank Mellat**, set out above, and continued:

> "60 This leads to the proposition that, unless the circumstances of a particular case make this impracticable, the ability to make representations only after a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully

> informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come. In the related context of the right to be consulted, in **Sinfield v London Transport Executive** [1970] Ch 550, 558, Sachs LJ made reference to the need to avoid the decision-maker's mind becoming "unduly fixed" before representations are made. He said: "any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals before the mind of the executive becomes unduly fixed."
>
> 61 More fundamentally, it is a central feature of the administrative review procedure, stated at paragraph AR2.4 of Appendix AR, that the reviewer will not consider any evidence that was not before the original decision-maker except in certain specified cases (broadly described as the correction of case-working errors). That means that the applicant would normally only be able to assert that he or she had not been dishonest but would not be permitted to adduce evidence in support of that assertion. That limited type of legal review is clearly inadequate here. It is precisely because the applicant had no notice of the Secretary of State's concerns that he or she had no opportunity to put evidence before the original decision maker."

163. Mr Sheldon KC submits that this passage in the Court of Appeal's judgment in **R(Balajigari)** is obiter dicta, does not reflect the reasoning of the majority of the Supreme Court in **Bank Mellat**, and should not be followed. I take the view that I should follow this recent careful analysis of the law by the Court of Appeal and, moreover, I agree with it. There is no inconsistency between this passage and the passage from the judgment of Lord Sumption in **Bank Mellat** cited above. Of course, as the courts have said on innumerable occasions, the courts must take account of the facts and circumstances of the particular case.

Discussion: Common law

(9) What is meant by "interests of the family"?

164. In order to determine each of the three common law grounds of challenge to the Defendant's written guidance to decision-makers, it is necessary first to consider what is meant by "interests of the family" in the 1987 Regulations. There is no dispute that, where a claimant is single or lives alone, the "interests of the family" mean "interests of the claimant".

165. The 1987 Regulations do not provide a definition of "interests of the family" and in my view it is not possible to provide a comprehensive and complete list of considerations that might be relevant to the "interests of the family" in this context. However, the following observations can be made.

It is the interests of the user that matter, not the interests of the utility companies, and there will be cases in which a TPD is not in the interests of the family

166. By the time a debt has accrued and other steps to agree payment have failed, so that a TPD is in contemplation, it will almost always be in the interests of the utility company that a TPD is imposed. This will guarantee payment of ongoing charges and will provide a secure mechanism for recovery of the accrued debt. But the statutory pre-condition is not that a TPD is in the interests of the utility company. The requirement is that the TPD must be in the interests of the family. Their interests are not entirely aligned.
167. The very fact that relevant provisions of the 1987 Regulations include the condition, before a TPD is imposed, that the TPD is in the interests of the family, means that Parliament must have recognised that there will be some cases in which a TPD is not in the interests of the family. If TPDs were always in the interests of the family, then there would have been no need for the condition.

Disconnection

168. When the power to impose TDPs was first granted to the Secretary of State in 1978, the most important reason why it would be in the interests of a claimant to be subjected to a TDP was because it would avert the risk of disconnection. In relation to water TDPs, however, this is no longer a risk, if it ever was, because statute now prohibits the disconnection of water and sewerage supplies from a dwelling because of non-payment of charges. In relation to electricity and gas supplies, there is no absolute statutory bar on disconnection. However, it is a last resort, and in some categories of cases, the Standard Conditions of Gas Supply Licence and of the Standard Conditions of Electricity Supply Licence prohibit disconnection if the supplier knows or has reason to believe that the customer is of pensionable age and lives alone or lives only with persons who are of pensionable age or under the age of 18 (see above). The supplier must also take all reasonable steps to avoid disconnecting, in Winter, domestic premises for unpaid charges if the premises include a person who is of pensionable age, disabled or chronically sick. Moreover, many energy suppliers have signed up to the Vulnerability Commitment, pursuant to which they will not knowingly disconnect a vulnerable customer at any time of year, where the household has children under the age of 6 (or under the age of 16 during the Winter Moratorium) or where for reasons of age, health, disability or severe financial insecurity, that customer is unable to safeguard their personal welfare or the personal welfare of other members of the household.
169. These restrictions mean that there is no risk of disconnection for non-payment of fuel bills for some categories of customers, and there is a reduced risk of disconnection for others. However, there is an absolute bar on disconnection only in a limited number of cases (where the customer is of pensionable age and lives alone or only with others of pensionable age or under the age of 18). If the customer is not vulnerable, as defined, there is no bar on disconnection. Many of those who fall into fuel debt will be vulnerable, but some will not be, and the Vulnerability Commitment does not

apply to all fuel companies and is voluntary and so could be withdrawn from at any time.

170. In practice, this means that those who are vulnerable, such as the Claimant, are at little if any risk of disconnection from electricity or gas supplies, but there are other claimants who will be at real risk of disconnection. This may well mean that it is likely that many claimants to whom TPDs apply will not be at risk of disconnection for non-payment of fuel and energy bills, any more than they will be at risk of disconnection from water supplies, as they will be in the vulnerable category.
171. It follows that, for many claimants, it will not be in their interests to be subjected to TPDs because of fears that they will be disconnected if they go deeper into debt, as there is no real risk of disconnection. Certainly, it cannot be assumed that it is a "given" that TPDs will always be in the interests of claimants, because the alternative would be disconnection.

Pre-payment meters

172. There is no scope for the installation of pre-payment meters for water supplies. So far as gas and electricity supplies are concerned, pre-payment meters can be installed, even if the customer does not consent, if the supplier obtains a warrant from the court to install a meter at the customer's home. However, there are restrictions, set out in the Standard Conditions of Gas Supply Licence and of the Standard Conditions of Electricity Supply Licence, as to when this will be approved. Pre-payment meters will not be installed where such action would be severely traumatic or where it is not 'safe and reasonably practicable', a term which requires consideration of 'whether the customer requires a continuous supply for health reasons'. Nevertheless, as I understand it, there are very many households in the UK with pre-payment meters.
173. I accept that it will almost always be in a claimant's interests to avoid having a pre-payment meter installed at their property. This is because it gives rise to a risk that the occupant or occupants will decide to refrain from "feeding" the meter because they do not have the money to do so, or because they prioritise other spending, and this would mean that they would go without gas or electricity. Consideration will only be given to the instalment of pre-payment meters, without a customer's consent, if the customer has a history of being unable to pay their fuel bills, and so there will be a real risk that their financial difficulties will deter them from making use of the meters.
174. It follows that it may well be in the interests of a claimant to have a fuel TPD imposed as an alternative to the installation of a pre-payment meter, but there will be some categories of claimants who are not at significant risk of such a meter being installed.

The risk of other types of enforcement action

175. I accept the Defendant's submission that it will very often be in a claimant's interests to be subjected to a TPD, because the alternative other types of enforcement action are likely to be more onerous for them. TPDs are only sought when a customer has fallen into debt and attempts to agree a payment plan have been unsuccessful.
176. Legal action by the supplier will be worse for a customer than a TPD, because it will give rise to additional costs, it is inherently stressful, it will adversely affect their credit rating, and it gives rise to the risk of bankruptcy. All of these potential consequences are more unpleasant than a TPD, especially as the TPD does not go

further than to require the claimant to pay debts that they owe to the utility company, and is capped at 25% of the total benefit.

177. The Claimant submits that legal action will not invariably be worse than a TPD, and says that in her own case it holds no fear because (a) it is highly unlikely that the utility companies will take her to court, as they know that she has no money to satisfy any judgment and it would just be throwing good money after bad; (b) she has no credit rating and so has nothing to lose if legal action affects her credit rating; (c) she has been made bankrupt before and has no fear of bankruptcy and (d) the 1987 Regulations provide for a set level of repayment for accrued debts, equal to 5% of the personal allowance for a single claimant aged not less than 25 years, and a court might well order repayment of the accrued debt at a lower rate.

178. I accept that, in the Claimant's case, and in a very limited number of other cases, the risk of legal action by the utility companies holds no fear for them. However, I do not accept that it necessarily follows that a TPD would not be in their interests. There can be no certainty that the utility company will not lose patience and bring legal proceedings even against an impecunious claimant. There can be no certainty that such legal action will be as painless as the claimant expects it to be. Their circumstances may change and a county court judgment may cause greater problems than the claimant originally anticipated. There is no certainty that the rate of repayment of arrears that a court may order will be lower than the fixed rate for TPDs. Still further, there are other means of enforcement, beyond the utility company taking legal proceedings. The utility company may transfer the debt to a debt collection agency, which may use bailiffs and may be dogged and persistent in the pursuit of the debt in ways which the claimant may find unpalatable. It is very rare for the utility company to give up on or forgive the debt entirely. In practice, this only happens when the customer absconds and cannot be traced, or becomes insolvent or dies. It is highly unlikely, therefore, that the utility company will simply give up on the debt if no TPD is imposed.

179. It follows, in my judgment, that the fact that other and less palatable means of enforcement are the alternative will mean, in the vast majority of cases, that, a TPD will be in the interests of the claimant.

180. I should add that I feel considerable unease about the thrust of the Claimant's argument in relation to this consideration. The Claimant's point is ultimately that she does not need to worry about paying a debt that she accepts she owes, or about paying for future usage, because she can get away scot-free if she ignores her financial obligations to the utility companies. She recognises that this is an unattractive argument, but she submits that this is a court of law, not a court of morals. If the practical reality is that it is not in her interests to be subjected to a TPD because the alternative is that she can continue to receive gas, electricity and water supplies indefinitely, without having to pay for them and without having to pay her accrued debts, then the statutory precondition for TPDs is not met.

181. I accept, of course, that this is a court of law, not a court of morals, but the 1987 Regulations must be interpreted and applied in accordance with their statutory purpose. Part of that statutory purpose is to provide a statutory mechanism which enables utility companies to recover, in appropriate cases, debts and ongoing charges from claimant customers which would, absent a TPD, be irrecoverable. It would not be consistent with the statutory purpose to say that it is not in the interests of a claimant to have a TPD imposed upon them, because the alternative is that the utility company is left with no option but to continue supplying them in the knowledge that they will never be paid for the supplies. Moreover, as the Overview document noted

at paragraph 3, part of the statutory purpose is to promote financial responsibility, and it would not be in the long-term interests of a claimant to reward them for ignoring or flouting their financial obligations, or to allow them to go ever deeper into debt.

182. Accordingly, I do not accept that it will not be in the interests of a claimant to have a TPD imposed upon them if they believe that, without it, they will remain connected and will avoid ever having to pay any part of what is owed to the utility company.
183. By the same token, I do not think that it would be consistent with the statutory purpose for the conclusion to be reached that it is not in the interests of a claimant to be subjected to a TPD because they can allow themselves to be made insolvent and so escape liability for their debts to the utility company.

A claimant's desire for autonomy and for control of their own finances

184. The Claimant says that she is strongly opposed to TPDs because she regards them as infantilising, and as depriving her of control of her own financial affairs. She says that it should be for her to decide how to deal with her debts, and that there may be occasions when she would prefer to give priority to other debts that she owes, especially as she is at no real risk of disconnection and is not frightened of enforcement action.
185. I do not accept that a desire for autonomy and for control of one's own finances is a relevant consideration when deciding whether a TPD is in the interests of a claimant. Again, the statutory purpose is relevant. The 1987 Regulations provide for a mechanism by which debts of certain types are recovered from a claimant without their agreement. In other words, the whole point of the regime in the 1987 Regulations is that, if the conditions for TPDs are satisfied, autonomy and choice is taken away from the claimant. The law makes special provision for certain type of debts, such as housing debts and utility debts, to be recovered from claimants regardless of whether they consent or not, and regardless of whether the claimant would prefer to use the money for other living expenses or to pay other debts. To the extent that the TPD regime is regarded as infantilising, because it takes agency away from the individual, this is inherent in the legislative framework.
186. The Claimant says that she and claimants like her may decide that other debts or payments are more important than utility bills, especially as she does not fear disconnection or enforcement action, but it would run counter to the legislative purpose to say that it is in the interests of a claimant to permit them to give preference to other financial obligations. The 1987 Regulations provide for a hierarchy of debts, providing a mechanism for the compulsory recovery of some debts via TPDs, and not for other types of debts, and, indeed, providing for an order of priority between the debts that can be recovered by means of TPDs – with housing debts taking priority over fuel debts, which in turn take priority over water debts.

When might it not be in the interests of a claimant to be subjected to a TPD?

187. As I have said, it is clear from the structure of the legislation that Parliament envisaged that there will be cases in which it is not in the interests of the claimant to

be subjected to a TPD, even if there is no doubt that a debt has been accrued. The 1987 Regulations do not specify what those circumstances might be. I can think of three types of case.

188. The first would be cases in which there has been insufficient discussion or negotiations between the utility company and the claimant about other, less onerous, methods of paying off the debt and paying for ongoing usage, such as a payment plan. In practice, it should only be if attempts to agree one or more payment plans have failed, or the claimant has failed to comply with an agreed payment plan that a utility company will apply for a TPD. However, the legislation does not make this a precondition. Paragraph 6(1) of Schedule 9 to the 1987 Regulations provides that a claimant must be in debt to a certain minimum amount with the fuel supplier, but it does not specify that particular steps to agree ways of paying off the debt must have taken place before a TPD is sought. Paragraph 7(2) of Schedule 9 provides, in a water case, that a claimant must be in debt for water charges and must have failed to budget for those charges, but again it does not specify that the water company must have tried to agree a payment plan or the like before asking for a TPD.
189. Accordingly, in theory at least, there may be cases in which it will not be in the interests of a claimant for a TPD to be imposed because the utility company has failed adequately to explore other ways of paying off the debt and making provision for ongoing usage, such as payment plans, which would remove the need for a TPD and would be more palatable for the claimant.
190. The second type of case I can envisage in which it might not be in the interests of the claimant for a TPD to be imposed would be if their financial circumstances are likely shortly to change. It may be, for example, that negotiations for a payment plan had come to naught, and then, shortly before the utility company made its application for a TPD, the claimant became aware that they would shortly obtain well-paid employment, or would come into an inheritance, such that a TPD was not in their interests because they were now able to pay off their debt and to pay for ongoing usage in the normal way.
191. The third type of case is where the claimant had shown an unwillingness to take any steps to address their debts but then, at the eleventh hour, demonstrated a credible change of mind and a willingness to co-operate with voluntary methods of paying their debts. (I should mention that, in about one-third of cases, TPDs are imposed with the agreement of the claimant, often, no doubt, because the claimant accepts that it is a helpful way of clearing their debt and of paying for future usage.)
192. The DMG itself indicates that considerations such of these are relevant. At paragraph 46307, when dealing with fuel debts, the DMG says that TPDs will not normally be in the interests of the claimant or their family if they have shown evidence of a determination to clear the debt, undertaken to clear the debt themselves, or if there are other options available to deal with the debt.
193. This is not intended to be an exhaustive list of the types of cases in which a TPD would not be in the interests of the claimant. They are the only ones that I can think of but there may well be others.
194. In practice, however, it will be rare that a TPD would not be in the interests of the claimant.

(10) Ground 1: Does the written guidance contain an incorrect statement of the law to the effect that consent or lack of it is not a relevant consideration or material factor?

195. The Claimant says that this is a category (i) error. She says that the documentation directs a decision-maker that the question whether a claimant consents to a TPD is not a relevant consideration or material factor, and that this is contrary to law. The Claimant submits that the consent or otherwise of the claimant is relevant in every case and matters because, even though consent is not a statutory requirement, the refusal to consent is an important consideration when deciding whether the TPD is in the interests of the family. If the claimant does not consent, then a much more detailed level of scrutiny is required.
196. The Defendant accepts that consent may be a relevant consideration, but it will rarely be decisive. The Defendant further submits that in any event, the written guidance did not direct decision-makers that consent is not a consideration or material factor.

Does the law require the decision-maker to take account of whether or not the claimant consents to a TPD?

197. If a claimant consents to a TPD, then that is a strong consideration in favour of the conclusion that the TPD will be in the interests of the claimant: if the claimant themselves agree that the TPD is in their interests, then this is likely to be the case.
198. It does not follow, however, that a refusal to consent, of itself, is a significant consideration or material factor when determining whether a TPD is in the interests of the claimant. The law as set out in the 1987 Regulations is clear: consent is not a requirement before a TPD can be imposed. The mere fact that a claimant objects to a TPD does not make any difference, one way or another, to the answer to the question whether the TPD would be in the interests of the family. It may be that the reasons why the claimant objects, rather than the fact of rejection, are relevant, but this is a separate question that I will deal with when dealing with Ground 2. So far as Ground 1 is concerned, I do not accept that refusal of consent, simpliciter, is a relevant consideration. As I have said above, I do not accept that a claimant's preference to have autonomy to control their own finances can be a reason why a TPD would not be in the family's interests. The Defendant conceded that there may be some cases in which consent is a relevant consideration, but I cannot think of any such cases (save to the extent that a refusal to consent may bring to light other reasons why the TPD is not in the family's interests).
199. So far as the **Padfield** obligation is concerned, it does not run counter to the policy and objects of the 1987 Regulations for the decision-maker to refrain from asking the claimant whether she or he objects to the imposition of a TPD. As I have said, the 1987 Regulations do not require the decision maker to take this into account. Again, there is no breach of the **Tameside** obligation. There cannot be a duty to obtain information about a matter which the decision-maker is under no obligation to take into account. Still further, there is no breach of the duty to act fairly. There is a separate question, to be considered under Ground 2, as to whether the decision-maker is under an obligation to seek representations generally from the claimant before taking the decision, but fairness does not impose an obligation specifically to ask whether the claimant consents to a TPD. The reason is the same as with the **Tameside** obligation. Fairness does not require the decision-maker to ask a question which is legally irrelevant.
200. The Claimant submits that a refusal of consent is relevant because it should place the decision-maker on alert and should lead to a closer degree of scrutiny. However, there is a difference between a bald statement of a refusal to agree to a TPD, which in

my view is of no relevance, and a statement of a refusal to agree to a TPD accompanied by reasons for that refusal. The reasons may be relevant, and that is a matter that I shall consider when dealing with Ground 2. The point that is being made by the Claimant in Ground 1 is that the law requires that the Defendant must take into account the bare fact that a claimant objects to a TPD.

Does the documentation direct the decision-maker that the question whether a claimant consents to a TPD is not a relevant consideration or material factor?

201. In case I am wrong on the first issue, I move on to consider this second issue.
202. In her skeleton argument, the Claimant refers to three places in the documentation in which, she says, the decision-maker is told that consent is not a relevant consideration.
203. The first is at paragraph 46 of the Overview document. This deals with supersession. It states:

"**Customer requests that the TPD should stop**

46. TPD should not be stopped because the customer requests this. This is because the customer's request does not constitute a relevant change of circumstances."

204. Though not mentioned in the Claimant's skeleton argument, the same guidance is given in the DMG at 46352 (paragraph 73, above).
205. The second passage is not in the DMG or Overview but in the JSI. At paragraph 21 of the JSI, set out at paragraph 87, above, it is said that supersession will not take place where the only reason to do so is that the customer wishes to take control of budgeting, because the customer's desire to take control of budgeting is not in itself a relevant change of circumstances. As the Claimant's skeleton argument observed, this was the identical point as was made in paragraph 46 of the Overview document.
206. In my judgment, neither of these passages goes so far as to say that consent is not a relevant consideration or material factor to the decision whether to impose the TPD in the first place. These passages are dealing with supersession. Supersession can take place where there is a change of circumstances or an original error of law or fact. All these passages are saying is that a statement by a claimant that they do not consent to the TPD does not amount to a change of circumstances which should result in supersession. For the reasons already given, this is an accurate statement of the legal position. The refusal or withdrawal of consent does not, of itself, amount to a relevant consideration. It follows that even if, contrary to my interpretation, these passages purported to instruct decision-makers on the position at the time of the original decision, they would not misrepresent the law.
207. The third passage relied upon by the Claimant is the passage in the Overview document at paragraphs 50-52, set out at paragraph 80, above. This passage does not purport to direct, and cannot reasonably be read as directing, decision-makers that consent is of no relevance. Rather, this passage is concerned with cases in which a TPD is being sought for in excess of 25% of the claimant's benefit. In such a case, paragraph 8(2) of Schedule 9 to the 1987 Regulations provides that the TPD can only be deducted if the claimant agrees. Paragraphs 50-52 of the Overview document do no more than state this. The Claimant focuses on the statement in paragraph 51 to the

effect that "If the customer does not give their consent only implement TPD types that equal less than 25% of the amount" but this does no more than reiterate that TPDs that amount to more than 25% of benefit can only be imposed by consent.

208. None of the passages relied upon by the Claimant is a statement of general application to the effect that consent is wholly irrelevant to the decision whether or not to impose a TPD. The **R(A)** guidance makes clear that, for there to be category (i) unlawfulness, it is necessary that there is a positive statement of the law, addressed to the decision-maker, that is wrong. Even if, contrary to my view, the law requires the question of consent to be taken into account, there is no passage in the TPD which says otherwise. There are lists of relevant considerations, for example at paragraph 33 of the Overview document, but these are expressly stated to be non-exhaustive, and there is no positive statement that consent is irrelevant.

(11) Ground 2: Does the documentation misdirect decision-makers by implying that they do not have an obligation to seek representations and information from the claimant before taking a decision about whether to impose a TPD, and/or by omitting to tell decision-makers in terms that in many cases, in order to act fairly, they will need to contact claimants in order to ascertain their wishes and to give them an opportunity to make representations?

Does the law require that claimants be contacted before the decision is made to ask them if they have any representations to make or information to provide?

209. In my judgment, the answer is "yes".
210. It is true that the 1987 Regulations do not in terms impose a requirement to notify claimants and ask them if they have any representations to make or information to provide, but in my judgment it is clear that there is always a possibility that the claimant may have relevant information to provide to assist the decision-maker in coming to a conclusion as to whether the TPD would be in the interests of the family. It is not sufficient to rely solely on the information provided by the utility supplier. In particular, the claimant may have up-to-date information about their financial circumstances of which the decision-maker would otherwise be unaware, if the decision-maker was dependent entirely on the information provided by the utility supplier. They may be able to argue that it was premature to impose a TPD because the supplier had not given them a fair chance to agree an effective payment plan without resorting to a TPD, or they may be able to persuade the decision-maker that they had had a change of mind and were prepared positively to engage with the utility supplier. This is not to suggest that it is likely the utility supplier would have provided its information in bad faith, but, rather, that the supplier may not have been aware of recent developments, or its information, though given in good faith, may have been inaccurate (especially as applications are made in bulk).
211. Before a TPD request has been made, the supplier will have been in lengthy contact with the claimants and will have given them the opportunity to provide information about their financial affairs. I accept that the Secretary of State is entitled to take account of the fact that these steps will have been taken, but the fact remains that there is a possibility that the claimant will have further representations or information, specifically about the TPD, which they want to pass on to the decision-maker.
212. There is also the possibility that there is relevant information that the claimant can give to the decision-maker which is not relevant to the "interests" issue, but which is

relevant to the decision as to whether there should be a TPD. They may be able to show that there was an error on the part of the utility company, and that they are not in debt at all.

213. In my judgment, a failure on the part of the decision-maker to give the claimant the opportunity to make representations and provide information would be a breach of the obligation of fairness. Whilst the matter at issue may not be as significant for claimants as the issue for those who have been sentenced to life imprisonment in **Doody**, it is nonetheless of real and significant importance for the claimants. A TPD may result in a reduction of up to 25% of their benefits, a very significant sum, especially as claimants will be on low incomes. It is true that the deducted amount is not "their" money, in the sense that it reduces the level of benefits that they are entitled to, rather than deducts sums from money that is already theirs, but the practical effect is the same: they are losing up to 25% of benefits. It is true also that the deduction is used to pay legal liabilities that are owed by the claimants, but once again the practical reality is to reduce significantly the spending money that they have.
214. Given the impact of a TPD upon a claimant, and bearing in mind the guidance in **Doody** and the other authorities referred to above, I am satisfied that the common law requires that claimants are given the opportunity to make representations and to provide information before the decision is taken. Even though, as I have said, a mere refusal to agree to a TPD is not relevant, there may be relevant things that the claimant can say, and may be relevant information that the claimant can provide, of which the decision-maker would not otherwise be aware. There is no way of being certain as to whether the utility company can provide the decision-maker with all of the relevant information. There is no way of being certain that the decision-maker is apprised of all relevant information, unless and until the claimant is given an opportunity to make representations and to provide information if they so wish.
215. In my judgment, the obligation goes further than it went in **R(A)**. In **R(A)**, the obligation was only to consider whether it was necessary to seek representations. In relation to TPDs, I take the view that there is a legal obligation to seek representations in every case, because it is not until the claimant has been given the opportunity to make representations/give information that the decision-maker is in a position to decide whether there are any relevant representations/information that the particular claimant can provide. Unlike the position in **R(A)**, in the present case it is not possible, at least in the great majority of cases, for the decision-maker, looking solely at the information provided by the utility company, to decide whether they would be assisted by representations/further information from the claimants. The response of the claimant may be that they agree to the TPD, or that they are opposed to the TPD but give no reasons for it, in which case the information-gathering will be of no practical assistance. But there may well be other cases in which representations and/or information will assist the decision-maker. (It may well be that if the utility company can show that the claimant has consented in advance to a TPD, there is no need for the Defendant to seek representations, but that is not the type of case that this litigation is concerned with.)
216. I appreciate that there are safeguards that are built into the system and which come into play after the decision has been taken. A claimant can ask for a Mandatory Reconsideration (review) after the decision has been taken, and can appeal to the First-Tier Tribunal if dissatisfied. They can apply for supersession. They can avail themselves of the Defendant's complaint scheme. But, applying the guidance of the Court of Appeal in R **(Balajigari)**, this is not enough to render the scheme fair. The

claimant should have an opportunity to make representations before the decision is taken, not only to avoid confirmation bias affecting subsequent reviews/reconsideration, but because many claimants will be close to the breadline and, if a deduction is wrongly made, a delay of even a few weeks could cause real hardship.

217. Applying the test in **Wiseman v Borneman** which was approved by Lord Sumption in **Bank Mellat**, I am satisfied that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.

218. I do not think that to impose a duty to make enquiries of claimants would render the process of deciding whether to impose TPDs "impossible, impractical or pointless" (to use the words of Lord Neuberger in **Bank Mellat**). It is true that many thousands of TPDs are imposed each year, the majority of which are imposed without the consent of the claimant. Currently, in most cases, the decision-maker acts on the basis of information supplied by utility companies in bulk spreadsheets and, presumably, is able to come to their decision speedily. However, I do not think that the imposition of the requirement to make enquiries of the claimant would make it impossible to take decisions on TPDs, though it may prolong the process by a couple of weeks.

219. In addition to being in breach of the duty of fairness, I consider that a failure to invite representations and/or information from claimants in advance is a breach of the **Tameside** duty. I accept, of course, that there can be a breach of the **Tameside** duty only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. However, in cases like the present, in my judgment, no reasonable authority could be confident that it had sufficient information to take the "interests" decision unless it had given the claimant an opportunity to make representations and/or provide information (or, perhaps, unless the utility had confirmed that the claimant consented to the TPD). In her note of 10 November 2021, Ms Waterman herself said that "I can see a strong operational case for giving claimants time to provide us with information, should they wish to before all decisions are made."

220. It may well be that in very many cases, no information or representations will be forthcoming, but this does not detract from the obligation to offer an opportunity to say something. (I do not agree with the Claimant that the mere fact that a claimant expresses opposition to a TPD is a red flag which means that the Defendant must carry out a very detailed investigation before imposing a TPD.)

221. I should add, for what it is worth, that I do not think that there is any breach of the **Padfield** duty in this regard. However, as I have said, to require that enquiries are made of claimants before a decision is taken would not frustrate the purpose of the legislation.

Is there Category (iii) unlawfulness, as a result of implications arising from, or omissions in, the guidance documents which had the effect of directing decision-makers that there was no need to seek representations and/or information from claimants about their families' "interests"?

222. The Claimant does not contend that the written guidance states in terms that decision-makers should not seek representations or information from claimants. However, Ms

Richards KC submits that this is the clear message that is sent to decision-makers by implication and/or omission in the documentation.

223. The Defendant says that Ground 2 fails at the outset, and that no question of Category (iii) unlawfulness can arise in the present case, because the written guidance does not purport to summarise the law but is simply advising on advisory decision-making. I do not accept this submission. This case is concerned with guidance that has been issued by the Secretary of State to her own staff, who are the decision-makers, explaining the legal framework in which they perform their functions. The decisions will never be made by anyone other than civil servants in the Defendant's department, acting under the **Carltona** principle. It is true that the documents make clear to decision-makers that they are to exercise their own discretion but it is clear that, looked at as a whole, the purpose of the DMG and the overview document is to give guidance to explain the legal framework in which they perform their own functions (see **R(A)**, paragraph 46). It is intended to be a detailed description of the legal duties that apply to decision-makers. Indeed, at many places in the documentation, reference is made to the relevant provisions within the 1987 Regulations. Paragraph 01003 of the DMG says that "The DMG itself is one such form of guidance, advising DMs how to apply [Social Security] law" and that "DMs should note that approved guidance must be followed when applying the law to the facts of the case."

224. The next question is whether, taken as a whole, the documents should be read to direct, by implication and/or omission, that it is not necessary to seek representations and/or information from claimants before taking the decisions as regards their families' "interests".

225. I have not found this easy to decide. Whilst it is true that nowhere in the DMG or the Overview document is it said in terms that decision-makers should seek representations/information from the claimants, there are passing references at several places which hint at the possibility that the decision-maker might contact the claimants before taking their decision. In particular:

(1) Paragraph 46138 of the DMG says that the decision-maker should "give the claimant the opportunity to provide evidence to support any claim that the debt is not liable to be paid." This does suggest that the decision-maker should contact the claimant before the decision is made, but it relates to whether there is a debt, rather than whether a TPD would be in the family's interests, and it does not appear to have been understood in practice to mean that decision-makers should contact claimants as a matter of course;

(2) Paragraph 46307 of the DMG, dealing with fuel, says that deductions will not be in the interests of the family if the claimant has shown evidence of a determination to clear the debt or undertaken to clear the debt themselves, and says that claimants may ask for a prepayment meter as an alternative to TPDs. This is information which would most readily be available by contacting the claimant themselves, but it might also be available from the supplier;

(3) Paragraph 46366 says that in deciding on priority of fuel debts, a decision-maker should take account of "any requests of the claimant". This suggests that claimants should be consulted, but it is in the specific context of priority of fuel debts; and

(4) Perhaps the clearest indication is paragraph 26 of the Overview document, which says that the decision-maker should "consider contacting the relevant Third Party

> [the supplier] or the customer by telephone for any further information." However, this does not go so far as to say that the decision-maker should, as a matter of course, contact the customer and implies that there is no need to do so if the information can be obtained from the Third Party, and if there is some particular information which the decision-maker has identified that they require.

226. In my view, a reasonable and objective reading of the DMG and Overview documents, taken as a whole, is that decision-makers are directed that they are under no obligation to contact claimants for representations/information before they take their decision. Whilst the documents do not discount entirely the possibility that such contact should be made, the clear impression given, albeit by implication and omission, is that contact with the claimant is not normally required.
227. I am encouraged in this conclusion by the fact that decision-makers have in practice read the guidance as not requiring them to seek the representations/information from claimants before taking a TPD decision. Whilst the meaning and effect of the written guidance is a matter of law, the fact that in practice the decision-makers have read it as I interpret it gives me encouragement in my interpretation.
228. The next question is whether it can be seen at the outset that a material and identifiable number of cases, and a significant number of cases, will be dealt with in an unlawful way. In my judgment, the answer is "yes". If I am right that there is a legal obligation to invite representations/information in every case, then guidance which gives the firm impression that this is not necessary will mean that every case will be dealt with in an unlawful way. Even if this is too broad an approach, it is clear, in my judgment, that there will be a material and identifiable number of cases, which is more than insignificant, in which representations or information would have made a difference, and so the decision was wrong because the decision-maker did not invite representations or information from the claimant.
229. I recognise that the case-law authorities make clear that it is not the role of the written guidance to eliminate all uncertainty regarding its application and all risk of legal errors by decision-makers, but the problem with the written guidance in the present case is more fundamental: albeit by implication and omission, it gives the positive indication that it is not necessary to seek representations/information from the claimants as regards their interests, when this is required by the legal obligations of fairness and the **Tameside** obligation.

(12) Ground 3: Is there a Category (iii) breach because the written guidance effectively precludes consideration of the circumstances of claimants?

230. I can deal with this very briefly. In my judgment, the answer is plainly "No".
231. If, either by implication or omission, the written guidance had directed the decision-makers that they should give no consideration to the circumstances of claimants before deciding whether it was in their families' interests to impose a TPD, this would plainly be a breach of the law. The personal circumstances of the claimants may be centrally relevant to the "interests" issue. Just to take one example, if the claimant had the prospect of obtaining well-paid employment, and they promised to pay off the debt and to pay ongoing charges, this may well be a reason to refrain from imposing a TPD.
232. However, there is nothing in the written guidance which suggests, by implication or omission, that the personal circumstances of a claimant are irrelevant. Whilst the

DMG refers to various matters that are relevant to the "interests" issue, there is no suggestion that they are exhaustive and, indeed, at paragraph 46305, dealing with fuel debts, the DMG says in terms that the considerations referred to were not exhaustive. Moreover, many of the considerations that are specifically referred to deal with the personal circumstances of the claimants: see, eg 46305, which refers to age and sickness. As the Supreme Court made clear in **R(A)**, it is not usually incumbent on the drafters of written guidance to go into full detail about exactly how a discretion should be exercised in every case.

Discussion: Convention rights

233. The Claimant's Convention rights challenge occupied considerably less space in the Claimant's skeleton argument and less time in the oral argument that the common law claim.

(13) Is the Claimant a "victim" for the purposes of the HRA 1998, section 7?

234. The Defendant and Interested Party submit that the Claimant's claims under the HRA 1998 fail at the outset because she is not a "victim", as is required by section 7 of the HRA 1998.
235. In **Axa General Insurance Ltd v HM Advocate** [2011] UKSC 46, [2012] 1 AC 868, Lord Hope of Craighead DPSC said that the question is whether the consequences for the claimant of the point in issue were too remote or tenuous for them to be directly affected by it. If the risk was purely hypothetical, the claimant is not a victim.
236. Applying that test, I am satisfied that the Claimant is a "victim" for these purposes. It is true that she is not currently subject to a TPD. But there is a real, rather than remote and tenuous, risk that she might be made subject to a TPD in future. Her financial situation is precarious and she remains in receipt of IRESA. She has reached an agreement with the Interested Party and E.ON to pay a small weekly contribution to her debts and to pay her ongoing fuel and water costs at an agreed rate, as a result of which her TPDs were removed in July 2021. However, there is no certainty that these arrangements will not fall down at some point in the future, especially as the supersession which took place in July 2021 was outside the Defendant's normal policy and, indeed, on the face of it, was outside the scope of the statutory power to supersede, as there was no change of circumstances and no admitted error of law or fact. The Interested Party has said in a letter dated 17 August 2021 that the current arrangement was a gesture of goodwill and would be reviewed.
237. It is also true, as the Defendant points out, that regulations temporarily in place prohibit fuel usage TPDs at least until 6 April 2023. But there is no prohibition on water TPDs and no prohibition on TPDs for fuel arrears.

(14) The claim for breach of the Claimant's rights under A1/P1

The Claimant's submissions

238. The Claimant submits that IRESA due to her is her possession, because it is a cash benefit, prescribed by law. She submits that when a TPD is imposed, a claimant's

possession is expropriated, at the election of their creditors, without the involvement of the court, in a way that was not adequately "accessible, precise and foreseeable". She says that it is not "accessible" because the scheme does not ensure that claimants are informed that a TPD may be imposed, and no opportunity is given to them to make representations before the decision is taken. It is not "precise and foreseeable" because there is no precise and foreseeable guidance on how the critical issue of the "interests of the family" should be determined. She says that this means that it is not a "lawful" interference with peaceful enjoyment of possessions and is consequently incompatible with A1/P1.

239. In addition, the Claimant submits that the TPD regime fails to strike a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. Ms Richards KC accepts that the statutory scheme strikes a fair balance, but that the way that it is operated in practice does not. She does not accept that the relevant test is whether the way in which the scheme is operated is "manifestly without reasonable foundation". She accepts that the test applies in general to welfare cases, but she submits that it does not apply in the present case because the challenge is not to the legislative scheme itself, but to the way that it is operated in practice by civil servants. Ms Richards KC submits that how the Defendant goes about making her decisions is not a matter of high policy, economics or social policy, and so the "manifestly without reasonable foundation" test does not apply.

The Defendant's submissions

240. The Defendant submits that A1/P1 is not engaged because the effect of a TPD is not to deprive the Claimant of a possession. She had no right to the full amount of the benefit payment. At most she had a contingent right, or a right that had not accrued.
241. If, contrary to the Defendant's primary case, the TPD regime comes within the scope of A1/P1, it is, at best, a control of use, consisting of the payment of a debt which has been voluntarily taken on, and this does not amount to the deprivation of a possession.
242. If A1/P1 is engaged, the Defendant submits that the test is whether the deprivation/restriction on use is manifestly without reasonable foundation. The Defendant says that TPDs are plainly proportionate, and that the system for TPDs is accessible, precise and foreseeable.
243. On behalf of the Interested Party, Mr Coppel KC adopted the Defendant's submissions.

Is A1/P1 engaged: Does a TPD result in interference with a claimant's possessions, for the purposes of A1/P1?

244. In my judgment, the answer is "yes". The full amount of a claimant's IRESA benefit is their possession, and the imposition of a TPD is a control of use.
245. Social security benefits are possessions for the purpose of A1/P1: see **Stec and others v United Kingdom (Admissibility)** [2005] 41 EHRR SE18, at paragraphs 47-56, and especially paragraph 53. The Defendant does not dispute this, but contends that, where a TPD is imposed, there was no right to payment of the full amount in respect of the IRESA, because the scheme of the primary legislation itself provides for payment to be made to a third party to whom the benefit claimant owes a debt. In other words, the amount deducted from the IRESA to pay the TPD never belonged to the claimant in the first place. Mr Sheldon KC points out that section 4(1) of the

Welfare Reform Act 2007 provides for "the amount payable in respect of a claimant", not "the amount payable to a claimant" or "the amount accrued by" the claimant. He referred to **R (Reilly) v Secretary of State for Work and Pensions** [2016] EWCA Civ 413; [2017] QB 657 ("**Reilly No 2**"), in which the Court of Appeal held that there was no deprivation of a possession under A1/P1 following the reduction of benefit entitlement as the result of the imposition of a benefit sanction. In such circumstances, the benefit never accrued to the claimant.

246. I do not accept the Defendant's submission. A1/P1 is concerned with substance, not form, and so one should look at the reality of the matter. In my judgment, the effect of the statutory provisions is that a claimant becomes entitled to the full amount of the benefit, from which a sum is then deducted or diverted to pay the claimant's existing debt to the utility supplier or other creditor. A TPD does not reduce the amount of a claimant's benefit: rather it compulsorily makes use of part of that benefit to pay a debt. In a real sense, the claimant still obtains something of value from the part of the employment and support allowance that is applied to the TPD, because the TPD reduces the claimant's financial liability to the creditor. In my judgment, this means that a TPD is a classic form of a control of use of a claimant's possession. It also distinguishes this case from the case of **Reilly No 2**, relied upon by the Defendant. **Reilly No 2** was concerned with a sanction that was imposed upon claimants who did not meet the eligibility requirements for jobseeker's allowance because they had not participated in a scheme entitled "work for your benefit". They forfeited the right to jobseeker's allowance entirely (see judgment, paragraphs 114-117). It was, as Underhill LJ said at paragraph 115 of the judgment, "a right which never legally accrued."

247. In contrast, in a TPD case, the right to the benefit has legally accrued, but the 1987 Regulations require that part of the benefit is paid to a third party to discharge debts or ongoing obligations on the part of the claimant. There was no merely contingent right to the full benefit, as the Defendant contends. In my judgment, the present case is similar to that which was considered by the European Court of Human Rights ("ECtHR") in **Banfield v United Kingdom** (Admissibility Decision 6223/04. 8 October 1995). In **Banfield**, the pension payable to a retired police officer was reduced by 65% after he was convicted of a criminal offence and imprisoned. The United Kingdom government contended that there had been no interference with a possession, because the amount of pension to which the claimant would become entitled was determined by the rules, which included the rule that provided for forfeiture after a criminal conviction. The Court did not accept the United Kingdom's submission and held that where a state occupational pension is reduced as a disciplinary measure, there is an interference with the claimant's peaceful enjoyment of their possessions for the purposes of A1/P1 (judgment, page 10). The present case is an a fortiori case. In **Banfield**, the claimant forfeited the part of the pension that was the subject of the reduction altogether. In a TPD case, whilst the claimant is not free to make use of the amount deducted as they might wish, the fact remains that the deducted amount is used to reduce their liabilities to a third party. If forfeiture of part of a benefit is an interference with the peaceful enjoyment of a person's possessions, then it is all the clearer that the allocation of part of a benefit to pay a claimant's debts or financial obligations is an interference with the peaceful enjoyment of a person's possessions.

248. The wording of the statutory provisions does not assist the Defendant's argument. Section 5(1)(p) of the Social Security Administration Act 1992, which is the primary legislation under which the 1987 Regulations are made, makes provision for "the

payment of a benefit to another person on behalf of the beneficiary" in order to discharge an obligation of the beneficiary. This wording is entirely consistent with the view that the benefit belonged to the beneficiary, because reference is made to payment to a third party "on behalf of the beneficiary." Similarly, the heading to regulation 35 of the 1987 Regulations refers to "Deductions from benefit and direct payment to third parties". Once again, this emphasises that what is happening is that a deduction is being made from the benefit entitlement of the claimant, rather than a reduction in the amount of the benefit that has been accrued. The Defendant points out that section 4(1) of the Welfare Benefits Act 2007 refers to benefits payable "in respect of" the claimant, but this does no more than recognise that in practice part of those benefits may be paid to a third party. In that event, the claimant still receives something of value.

249. The Defendant submits that there is no control of use of the Claimant's possessions, because the Claimant cannot claim an entitlement to be free of a debt voluntarily incurred: **Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank** [2004] 1 AC 546, at paragraphs 90-91, per Lord Hobhouse. However, in the present case the Claimant is not claiming an entitlement to be free of a debt voluntarily incurred. This would arise if she was claiming that she has no obligation to pay her fuel debts or for her ongoing fuel obligations. Though, at times in her argument, the Claimant was contending that she did not feel under any pressure to pay her debts, she did not dispute that she owed these obligations to the Interested Party and to E.ON, and, in any event, this is not what the A1/P1 challenge is about. Rather, the A1/P1 challenge is about whether the control (by means of a TPD) of her use of her possession, the IRESA benefit, is consistent with her rights under A1/P1.

The relevant legal principles relating to breaches of A1/P1

250. A summary of the relevant legal principles has been provided by the ECtHR in its final decision in **Saliba v Malta** (App no 4251/02), dated 8 February 2006, at paragraphs 31-37 of the Court's judgment. The Court said:

> " 31. As the Court has stated on a number of occasions, Article 1 of Protocol No. 1 comprises three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest .... The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (see, among other authorities, **James and Others v. the United Kingdom**, judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37; **Iatridis v. Greece** [GC], no. 31107/96, § 55, ECHR1999-II; **Beyeler v. Italy** [GC], no. 33202/96, § 98, ECHR 2000-I).

….

33. In order to determine whether there has been a deprivation of possessions within the meaning of the second rule, the Court must not confine itself to examining whether there has been dispossession or formal expropriation, it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are "practical and effective", it has to be ascertained whether that situation amounted to a de facto expropriation (see, among other authorities, **Sporrong and Lönnroth v. Sweden**, judgment of 23 September 1982, Series A no. 52, pp. 24-25, § 63, and **Vasilescu v. Romania**, judgment of 22 May 1998, Reports of Judgments and Decisions1998-III, p. 1078, § 51).

….

36. A measure aiming at controlling the use of property within the meaning of this second paragraph can only be justified if it is shown, inter alia, to be "in accordance with the general interest". Moreover, any interference with the property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see **Sporrong and Lönnroth** cited above, pp. 26-28, §§ 69-74, and **Brumărescu v. Romania** [GC], no. 28342/95, § 78, ECHR 1999-VII). Furthermore, the issue of whether a fair balance has been struck "becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary" (see **Iatridis** cited above, § 58, and **Beyeler** cited above, § 107).

37. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. The rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see **Iatridis** cited above, § 58) and entails a duty on the part of the State or other public authority to comply with judicial orders or decisions against it (see **Belvedere Alberghiera v. Italy**, no. 31524/96, § 56, ECHR 2000-VI). Moreover, the requirement of lawfulness means that rules of domestic law must be sufficiently accessible, precise and foreseeable (see **Hentrich v. France**, judgment of 22 September 1994, Series A no. 296-A, pp. 19-20, § 42, and **Lithgow and Others v. the United Kingdom**, judgment of 8 July 1986, Series A no. 102, p. 47, § 110)."

251. As I have said, the interference in the present case is a control of use rather than an out-and-out expropriation, but **Saliba** makes clear that, in a control of use case, just as in a deprivation or expropriation case, a fair balance must be struck between the

demands of the general interests of the community and the requirement of the protection of the individual's fundamental rights, and the rules of domestic law must be sufficiently accessible, precise and foreseeable. However, the fact that the case is concerned with a control of use rather than deprivation of property may be relevant: for example, it may have an impact upon the "fair balance" issue.

252. In the present case, the Claimant contends that, as a result of the way that the TPD is operated in practice, the fair balance requirement has been breached and also the requirement that the rules of domestic law must be sufficiently accessible, precise and foreseeable have been breached. It is convenient to look first at the "accessible, precise and foreseeable" issue, and then at the "fair balance" requirement.

Does the way that the scheme is operated in practice mean that it is in breach of the requirement that the rules of domestic law must be sufficiently accessible, precise and foreseeable?

253. As I have said, the Claimant does not contend that the statutory framework is itself in breach of A1/P1. She says, however, that the way that it is operated is not sufficiently accessible, precise and foreseeable. The main thrust of Ms Richards KC's submissions on this issue were directed towards the contention that there was a breach of the accessibility requirement. She said that this was because the first time a claimant hears of a utility company's proposal to receive deductions is after the Defendant has already decided to commence them.

254. In fact, this was frequently not the position in practice. The Interested Party always, as a matter of course, notifies a customer of its intention to seek a TPD before the application is made. However, it appears that not all utility companies behaved in the same way. The Claimant's evidence is that she was not told by E.ON that it was going to apply for a TPD in relation to her. The spreadsheets in use prior to December 2021 did not require a utility provider to inform the Defendant that the claimant had been notified that an application for a TPD was to be made. The position has now changed, however. The spreadsheets in use from December 2021 onwards require the supplier to state whether it has notified the customer that it has applied for deductions for these benefits. This is a clear indication to the supplier that the claimant should be warned in advance. This brings the spreadsheets into line with the template letters that are still used by some utility suppliers: the template letters require the supplier to notify the Defendant whether the claimant has been informed of the application and directs them to tell them straight away if not.

255. It was common ground between the parties that I should consider these issues on the basis of the current version of the spreadsheets. On this basis, in my judgment, the way that the Defendant operates the scheme in practice does not fail the "accessibility" test on the basis that the claimant is not even forewarned that an application for a TPD is taking place. Since December 2021, the way that the scheme is operated in practice is designed to mean that claimants are forewarned, whether template letters or spreadsheets are used by utility suppliers to make their applications.

256. Moreover, I do not accept that the TPD scheme, as currently operated, is insufficiently precise and foreseeable. The 1987 Regulations, when read with the DMG, set out, in sufficiently precise and foreseeable terms, the circumstances in which a TPD may be imposed. Both the 1987 Regulations and the DMG (though not the Overview document) are publicly available. It is true that DMG does not set out all of the

relevant considerations that may be taken into account when deciding whether to impose a TPD, but it would be wholly impracticable to do so, and A1/P1 does not require this degree of precision.

257. This leaves the question whether the TPD scheme, as currently operated, is insufficiently accessible because it does not specifically require that claimants are contacted and invited to make representations/provide further information before the decision is taken. Once again, I have found this a difficult question to decide. I have already found that this renders the scheme, as set out in the written guidance, in breach of the common law, but it does not necessarily follow that it is also in breach of A1/P1. My conclusion is that this feature of the scheme is not in breach of A1/P1. As I have said, at least since December 2021, the scheme is designed to ensure that claimants are notified in advance before a TPD is imposed upon them. This means that, if they are minded to do so, they can contact the Department of their own volition to make representations/provide relevant information. There is express scope in the guidance for considering all the relevant considerations. Whilst this is not enough to prevent there being a breach of the common law, it is sufficient, in my view, to establish that the scheme satisfies the "accessibility" requirement of A1/P1, especially when coupled with the opportunities that the scheme gives to those upon whom a TPD is imposed to challenge the decision, by Mandatory Reconsideration and an appeal to the First-Tier Tribunal, or by making use of the Defendant's complaint scheme. Ms Richards KC makes the point that neither a revision request nor an appeal has a suspensive effect on deductions and that claimants are people who are struggling to live on a very low income. I see force in this argument, and it was relevant to my decision as to why the guidance failed to satisfy minimum standards of common law procedural fairness, but on balance it does not alter my view that there is no breach of the "accessibility" requirement of A1/P1. I also bear in mind the margin of discretion that the Convention grants to Member States (addressed in greater detail in the next section of this judgment).

"Fair balance": what is the test?

258. The Claimant accepts that, in most cases involving social security benefits, the issue is whether the actions of the public authority are "manifestly without reasonable foundation". However, she says that a different, stricter, test applies in the present case because the challenge is not to the legislative regime or to TPDs themselves, as this case is not concerned with the legislation, but with the way in which civil servants operate the legislation. This case is not concerned with high economic or social policy.

259. The leading authority on the standard of scrutiny in cases relating to economic and social policy is **R(SC) v Secretary of State for Work and Pensions and others** [2021] UKSC 26; [2022] AC 223. The guidance in **R(SC)** was helpfully summarised by Swift J in **R (T, Wayland, Keating and Barrow) v Secretary of State for Work and Pensions** [2022] EWHC 351 (Admin) ("**Wayland**") as follows:

> "27. In his judgment in **SC** between paragraphs 97 and 142, Lord Reed undertook an extensive review of the case law of the European Court of Human Rights and domestic case law. No summary I could attempt here would do justice to that review. In essence, he explains the apparent conflict between statements in a number of cases favouring a

wide margin of review when the decision challenged involves legislative or executive judgment on a matter of social and economic policy (where the standard has been formulated by the phrase "manifestly without reasonable foundation"), and statements in other cases to the effect that where discrimination is alleged on a so-called "suspect ground" close scrutiny is required (a point often put in terms of need for "weighty" or "very weighty" reasons to explain the distinction under challenge). The overall point emerging from Lord Reed's analysis is that no purpose is served by seeing the issue as a form of contest between shibboleths in which, in any (or every) particular case, one test must always be the trump card to the exclusion of any other consideration. Lord Reed recognises that the cases do not speak with a single voice because there is no mechanical formula that suits every set of circumstances. The phrases commonly set in opposition to each other – manifestly without reasonable foundation, or a need for weighty reasons – are no more than descriptive of a conclusion, reached in the case in hand, of the proper limit of legal scrutiny. In each case there is a specific balance to be struck depending on the circumstances. Apparently similar considerations may have difference significance from case to case because other circumstances are or are not present.

28. Lord Reed's overall conclusion is between paragraphs 158 and 162 of his judgment. As I see it, the material passages from those paragraphs are these:

"158. Nevertheless, it is appropriate that the approach which this court has adopted since **Humphreys** [2012] 1 WLR 1545 should be modified in order to reflect the nuanced nature of the judgment which is required, following the jurisprudence of the European court. In the light of that jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a "suspect" ground is to be justified. … But other factors can sometimes lower the intensity of review even where a suspect ground is in issue, as cases such as **Schalk, Eweida** and **Tomas** illustrate, besides the cases concerned with "transitional measures", such as Stec, Runkee and British Gurkha. Equally, even where there is no "suspect" ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children.

> 159. It is therefore important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant. As was recognised in **Ghaidan v Godin-Mendoza** … and **R(RJM) v Secretary of State for Work and Pensions** …, the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification.
>
> 161. It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the "manifestly without reasonable foundation" formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. …"

260. Applying that guidance, I accept that it is important to avoid a mechanical approach to the standard of scrutiny. Nevertheless, in my judgment the present case is one in which a wide margin of judgment must be afforded to the Defendant, appropriately described as meaning that the judgment of the executive about how to operate the TPD scheme will be respected unless it is generally without reasonable foundation. I do not accept the Claimant's submission that, at least in a case such as this, there is a difference between high social and economic policy, as embodied in the legislative provisions themselves, and the way that the legislation is operated in practice, which should lead to a stricter degree of scrutiny of the way that the legislation is operated. The guidance given to decision-makers is itself a matter of policy (as is indicated in **R(A)**, in which the words "policy" and "guidance" are used interchangeably by the Supreme Court), and it has an impact on the judgment of the primary decision-maker on something which is quintessentially a matter of social policy, the payment of social security benefits. This is not a case in which the challenge is based on any "suspect" grounds, such are disability, race or sex.

Applying the appropriate test, has a "fair balance" been struck?

261. In my judgment, applying the "manifestly without reasonable foundation" test, it cannot be said that the TPD scheme, or the way that it is operated in practice, fails to strike a fair balance between the demands of the general interests of the community and the requirement of the protection of the individual's fundamental rights. The scheme is not flawless, particularly because it does not ensure that, as a matter of course, claimants are invited to make representations/provide information, but, nevertheless, bearing in mind the margin of discretion given to Member States, a fair balance of the general interests of the community and the requirement of protection of claimants' rights have been struck. It is common ground that the legislative framework itself strikes a fair balance. There is no reason to think that the written

guidance given to decision-makers means that they fail to take relevant considerations into account, or take irrelevant considerations into account. The observations I made above, when dealing with the requirements of accessibility, precision and foreseeability are relevant for this purpose. Since December 2021, claimants have been made aware that an application for a TPD is pending, and so have the opportunity to make representations or give information if they think fit. They have the right to seek a review and to appeal if still dissatisfied.

Conclusion on the A1/P1 challenge

262. For the reasons set out above, the Claimant's A1/P1 challenge fails.

(15) The claim for breach of Article 14

263. In my judgment, it is clear that the Claimant has no claim for breach of Article 14, notwithstanding that her claim comes within the scope of A1/P1. There are several cumulative and, to an extent, overlapping reasons for my conclusion.

The Claimant does not have a relevant "other status" for the purposes of Article 14.

264. There is a very great deal of jurisprudence on the meaning of "other status" for the purposes of Article 14. It is clear that "other status" goes very far beyond "protected characteristics" such as those for which provision is made in domestic legislation in the Equality Act 2010 (such as race, sex, disability and sexual orientation). Indeed, in many cases the issue of "other status" is not a live issue at all. In **SC**, Lord Reed said as follows at paragraph 71:

> "… the issue of "status" is one which rarely troubles the European court. In the context of article 14, "status" merely refers to the ground of the difference in treatment between one person and another. Since the court adopts a stricter approach to some grounds of differential treatment than others when considering the issue of justification, as explained below, it refers specifically in its judgments to certain grounds, such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. But in cases which are not concerned with so-called "suspect" grounds, it often makes no reference to status, but proceeds directly to a consideration of whether the persons in question are in relevantly similar situations, and whether the difference in treatment is justified. As it stated in **Clift v United Kingdom**, para 60, "the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified". Consistently with that purpose, it added at para 61 that "while … there may be circumstances in which it is not

> appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by article 14 of the Convention should be narrowly construed". Accordingly, cases where the court has found the "status" requirement not to be satisfied are few and far between."

265. However, there are some cases in which the "other status" requirement is not satisfied. In **SC**, as Swift J pointed out in **Wayland** at paragraph 23, the Supreme Court accepted that "other status cannot be defined solely by the difference complained of." Swift J held that the claimants in **Wayland** could not establish a "status" for the purposes of Article 14 for the following reasons (in paragraph 23):

> "In this case, the Claimants' direct discrimination claim is put on the basis of less favourable treatment of them as persons in receipt of one or other of the legacy benefits. They compare themselves to persons in materially identical circumstances who have made a claim for Universal Credit. Notwithstanding the example provided by the judgment in **SC** of a case where the difference between the status relied on and the difference in treatment relied on was marginal, I do not consider that the Claimants' direct discrimination claim in this case rests on any matter that can properly be said to be "other status" for the purposes of an article 14 claim. There is no meaningful difference between the other status relied on – being a person in receipt of a legacy benefit – and the less favourable treatment alleged, namely the failure to raise the amount paid as personal allowance to persons in receipt of a legacy benefit. Analysed in this way there is nothing that can sensibly be described as a direct discrimination claim – i.e. a claim of less favourable treatment on grounds of an impermissible reason. The only complaint that arises concerns why the 2020 Regulations did not extend to legacy benefits. That is a complaint about the rationality of the decision, or whether it was a decision taken for a proper purpose, or following consideration of relevant matters, and so on. Put another way, it is a complaint about whether the decision taken met the well-known common law standards that measure the legality of decisions made by public authorities. It is not, coherently, a complaint about discrimination in the enjoyment of Convention rights."

266. A similar analysis was adopted by the Court of Appeal in **Siddiqui v Siddiqui** [2021] EWCA Civ 1572, at paragraph 111.
267. The "other status" relied upon by the Claimant is that of a "benefit claimant" (Amended Statement of Facts and Grounds, paragraph 57). However, the status is more accurately described as that of a benefit claimant who owes debts to utility companies. The legal challenge has no relevance to benefit claimants in general: it is applicable only to those who are in debt to utility companies and so who are at risk of being the subject of an application for a TPD. As with **Wayland**, there is no meaningful difference between this status and the less favourable treatment alleged, which is treatment that can only be applied to a benefit claimant who is in debt to a utility company. The treatment complained of - the procedural steps that apply to TPD cases – can never have any application to non-benefit claimants (and can never have any application to benefit claimants who receive benefits, such as Universal

Credit, which are outside the TPD regime). Again as with **Wayland**, this is really a complaint about whether the decision-making meets the well-known common law standards that measure the legality of decisions made by public authorities. It is not, coherently, a complaint about discrimination in the enjoyment of Convention rights, and so cannot be shoe-horned into an Article 14 complaint.

268. Accordingly, the Article 14 claim fails because the Claimant does not have an "other status" for Article 14 purposes.

In any event, the Claimant is not in a relevant analogous position to a person who is not in receipt of the same benefits and who is in debt to a utility company.

269. In order for there to be a breach of Article 14, it is necessary that the comparator group to the persons with the "other status" are in an analogous situation to them.

270. In **Siddiqui v Siddiqui**, at paragraph 112, Underhill LJ said:

> "As set out in **Clift v UK**, at [66], "the requirement to demonstrate an 'analogous position' does not require the comparator groups to be identical". What is required is that the "applicant must demonstrate that, having regard to the particular nature of his complaint, he was in a relevantly similar situation to others treated differently". This is sometimes said to require a specific and contextual analysis."

271. The requirement that the comparator group is in a relevantly analogous situation cannot be satisfied in the present case. This is really another way of expressing the point that I have just made. If a person is not in receipt of the relevant benefits, then there is no scope for application of the procedure of determining whether to impose a TPD upon them, and so there is no scope for them being treated more favourably, procedurally or in any other way, than those who are receiving relevant benefits and who are in debt to a utility company. The comparison is between chalk and cheese.

Even if there is an "other status" and a comparator group in an analogous situation, the difference in treatment is justified

272. Even if there is an "other status", the difference in treatment is not on a "suspect ground". The question is whether the difference in treatment is "manifestly without reasonable foundation." For the reasons given in relation to A1/P1, the TPD scheme is not manifestly without reasonable foundation. However, I stress that, in my judgment, the Article 14 analysis does not get this far: the Article 14 claim fails at the "other status" and "analogous situation" hurdles.

Other matters

(16) Should relief be withheld because the claims are academic or hypothetical?

273. The Defendant and the Interested Party submit that, regardless of their underlying merits, the Claimant should not be granted relief because her claims are academic or hypothetical.

274. I do not know whether such an argument was advanced at the permission stage (though I assume that it was) but in any event, if such an argument was advanced, it was not accepted. It is not a particularly attractive argument after two full days of argument at a substantive hearing.
275. In any event, I am satisfied that relief should not be refused on the basis that the Claimant's claims are academic and hypothetical. I accept that the Court has a general discretion to withhold substantive relief if a claim is academic or hypothetical (see, eg **R (Stratton) v Enfield LBC** [2022] EWHC 404 (Admin)). I also accept that the Court may do so even after hearing detailed argument on the merits of the claims at a substantive hearing.
276. The Defendant submits that there are two reasons why the claims are now academic and hypothetical. The first is that the Claimant is no longer subject to any TPDs. She was subject to two TPDs at the time when she commenced proceedings, on 9 June 2021, but the Defendant superseded both the Interested Party's TPD and E.ON's TPD a few weeks later, on 5 July 2021, and so is no longer subject to TPDs. The second reason is because the Defendant has taken steps to address the admitted failings in the Claimant's case, and to improve the TPD process generally. In particular, the Defendant has revised the standard form spreadsheet that suppliers use to make their applications and Ms Waterman has issued clarifications to decision-makers to make clear to them that the Defendant has a power to reconsider TPD decisions, even if the supplier has not asked her to.
277. In my judgment, these factors do not render the claims academic or hypothetical. As I have already said, the supersession of the Claimant's TPDs appear to have been the result of a decision by the Defendant to supersede her TPDs even though the normal grounds for supersession did not apply. Whether this was done for tactical reasons in an attempt to bring these proceedings to an end, or for some other reasons, this does not mean that the Claimant no longer has any interest in the issues in this case. She has already been the subject of at least 5 TPDs, she is still in a precarious financial position, and the possibility that she might face further TPD applications is more than remote and tenuous.
278. As for the changes that have been made by the Defendant, these are positive steps and should mean that the risks that a claimant may not even be aware that a TPD application has been made in respect of them are greatly reduced. However, as things stand, the position remains that the written guidance given to decision-makers does not inform them that contact should be made with claimants to ask them if they have any representations to make or information to provide before the decision is taken, and so the aspect of the scheme as operated which I have found to be unlawful at common law is still in place.
279. I note also that an argument that the claim was academic was rejected by the Supreme Court in **R(A)**, which agreed with the courts below that the case was a suitable vehicle for a review of the guidance in that case (see **R(A)**, paragraph 25). In my judgment, the present case has been a suitable vehicle for the review of the guidance relating to TPDs. The present case has significance for other claimants who are the subject of TPDs (who number in their hundreds of thousands) not just the Claimant.

(17) Should the common law claim be dismissed because it is out of time?

280. The Defendant submits that the common law claim is out of time or barred for lack of promptness because the DMG have long been publicly accessible as they are

published on the Gov.UK website, and the Claimant has herself been subject to TPDs for a number of years.

281. In my judgment, this would be a wholly unsatisfactory basis upon which to dismiss a claim which has (at least in part) succeeded on its merits. The claim is of general importance and does not deal with an issue that was specific to the Claimant. The relevant written guidance remained in force at the time when the claim was presented (and still remains in force) and the Claimant was subject to TPDs at the time when she presented her claim. Moreover, as the Defendant acknowledges, the Excel spreadsheets and the Overview document only came to the Claimant's attention after the claim was issued.
282. I recognise that in the **All The Citizens** case, the Divisional Court dismissed a claim in part because it was out of time as the guidance that was being challenged was nearly 10 years old. However, in the exercise of my discretion I decline to do so in the present case. This case is different from **All The Citizens** in that, in that case, the Court had found there to be a lack of merit in the underlying challenge, and the relevant Guidance was due to be replaced shortly in any event (see judgment, paragraphs 154-156). Neither of these considerations apply to the present case and, as I have said, part of the relevant guidance was not in the public domain and only became available after the proceedings had commenced.
283. It is true that no application for an extension of time has been made. If such an extension is required, I grant it, of my own volition.

(18) Does section 31(2A) of the Senior Courts Act 1981 apply?

284. Finally, the Defendant submits that relief should be refused, pursuant to section 31(2A) of the 1981 Act, on the ground that it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. The Defendant submits that, in reality, the only reason that the Claimant would have advanced, if she had been consulted, for refraining from imposing the TPDs was that she was opposed to them. This cannot, of itself, be sufficient. Also, the Claimant rejected the offer of Mandatory Reconsideration.
285. Sections 31(2A)-(2C) of the 1981 Act provide as follows:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, ….
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

286. As the Divisional Court (Singh LJ and Swift J) said in **R (The Good Law Project, Runnymede Trust) v The Prime Minister, Secretary of State for Health and**

Social Care [2022] EWHC 298 (Admin):

"129. The effect of these provisions was explained by the Court of Appeal (Lindblom, Singh and Haddon-Cave LJJ) in **R (Plan B Earth) v Secretary of State for Transport** [2020] EWCA Civ 214; [2020] PTSR 1146, at paragraphs 272-273 :

"272. The new statutory test modifies the **Simplex** test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of 'exceptional public interest'. Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely 'highly likely'. And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been 'substantially different' for the claimant.

273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is 'highly likely' that the outcome would not have been 'substantially different' if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old **Simplex** test and the new statutory test, 'the threshold remains a high one' (see the judgment of Sales LJ, as he then was, in **R (Public and Commercial Services Union) v Minister for the Cabinet Office** [2018] ICR 269, para 89 ("PCSU")."

287. The Divisional Court in the **Good Law Project** case added that "Such a conclusion needs to be based on evidence and not on ex post facto speculation: see **PCSU**, at paragraph 91 (per Sales LJ)."
288. In my judgment, it would be wrong to refuse to grant relief on section 31(2A) grounds.
289. First, I cannot be satisfied that it would highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. I do not know what representations or additional information the Claimant might have provided to the Defendant if afforded the opportunity to make representations or provide information before the TPD decisions were taken. It is striking that the Defendant superseded the TPDs in July 2021, shortly after the proceedings were commenced, despite the fact that there were no new relevant facts.

The only thing that had happened was that the Claimant has made representations on the law, and set out the facts of her case in detail, in the legal proceedings. In those circumstances, it is impossible for me to conclude that it would be highly likely that the outcome would not have been substantially different if the Claimant had been made an opportunity to make representations/provide information before the decisions were taken.

290. It is also worth noting that in the **Good Law Project** case, the Divisional Court bore in mind that the Second Claimant, a pressure group, had brought the claim in the public interest, even though the Second Claimant was not directly affected by the issues in the case. In the present case, it is clear that, though she has a direct personal interest, the Claimant also brings these proceedings in the public interest. She waived her claim to human rights damages.

291. Even if I had been minded to find that the requirements of section 31(2A) had been met, I would have declined to refuse to grant relief because there are reasons of exceptional public interest why I should grant relief in the form of a declaration. This is because TPDs are imposed upon over a hundred thousand claimants each year and so any breaches of common law duties affect a very large number of people. Also, the deficiency in the written guidance that I have held to exist can relatively simply and easily be remedied, by adding a direction to the effect that claimants should be offered the opportunity to make representations and/or provide relevant information to the decision-maker before the TPD decision is taken.

(19) Conclusion.

292. For the reasons given above, the claim for judicial review succeeds on one aspect only. This is that the Defendant's written guidance to decision-makers in relation to TPDs is unlawful because, by implication and omission, it has the effect that, read as a whole, the guidance presents a misleading picture of the true legal position to decision-makers, in that it does not make clear that claimants should be offered the opportunity to make representations and/or provide relevant information to the decision-maker before the TPD decision is taken. The claims in relation to the ECHR are dismissed.

293. I will receive and consider written submissions from the parties about the terms of a suitable declaration (which I hope can be agreed).