Neutral Citation Number: [2014] EWHC 2434 (Admin)

Case No: CO/3843/2013

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

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street
Birmingham

Date: 22/07/2014

Before:

MR JUSTICE HICKINBOTTOM

- -

Between:

THE QUEEN on the application of
STEVEN SUMPTER

Claimant

- and -

THE SECRETARY OF STATE
FOR WORK AND PENSIONS

Defendant

- -
- -

Martin Westgate QC and Ben Chataway (instructed by **Public Law Solicitors**)
for the **Claimant**
Clive Sheldon QC and Nicholas Moss (instructed by **the Treasury Solicitor**)
for the **Defendant**

Hearing dates: 9-10 July 2014

- -

Approved Judgment

Mr Justice Hickinbottom:

Introduction

1. A disabled person who satisfies various statutory criteria is entitled to Disability Living Allowance ("DLA"), a single welfare benefit with two components – the care component and the mobility component. The care component is designed to help with the additional costs of daily living activities, such as personal care, shopping and preparing meals. The mobility component helps with additional costs of getting around. Different rates are payable depending on the severity of the impact of the person's disability. For the care component, there are three rates. For the mobility component, there are two: the higher rate (currently £56.75 per week) and the lower rate (£21.55 per week). The higher rate is awarded to claimants who are "virtually unable to walk"; and, although there are various criteria by which this is measured, generally a claimant will satisfy that test if he is unable to walk more than 50m, unaided or using only manual aids or appliances. The higher rate mobility component is sufficient to lease a Motability vehicle.

2. The Claimant has post-viral syndrome. As a result, he cannot walk more than 50m, and he is in receipt of DLA middle rate care component and higher rate mobility component. He has a Motability vehicle.

3. The Government intend to replace DLA with a new benefit, Personal Independence Payment ("PIP"), which is being phased in. Some disabled people are already in receipt of it, rather than DLA. PIP is due to be in full effect, and DLA consequently abolished as a benefit for people aged 16 to 65, by 2017. The new benefit also has two components, the daily living component and the mobility component. We are concerned with only the latter. Again, it has two rates: the enhanced rate and the standard rate which, in monetary terms, are the same as DLA mobility higher and lower rates respectively. For the physically disabled, the criteria impose a threshold condition for the enhanced rate that the claimant cannot walk more than 20m, rather than the 50m usually adopted under DLA.

4. The Claimant is due to be transposed from DLA to PIP in 2016. He is concerned that, under the new regime, he may be found not to satisfy the 20m walking criterion, and thus lose his higher/enhanced rate mobility component and, with it, his Motability vehicle. He fears a consequent loss of independence, and that his quality of life will be impaired.

5. In these proceedings he challenges the Secretary of State's decisions to adopt and maintain the 20m PIP enhanced mobility rate criterion, and the Regulations into which it has been incorporated.

6. This court is of course not concerned with the substance or merits of the decision: how public money is distributed in welfare benefits is a matter for the Secretary of State and Parliament to which he is responsible. This court is only concerned with the lawfulness of the decision, focused on the process adopted.

7. The Claimant contends that, in adopting the 20m criterion, the Regulations are unlawful because the consultation that was part of the process that led to it being

adopted and retained was flawed, and because the Secretary of State failed to comply with his public sector equality duty under the Equality Act 2010.

8. Before me, Martin Westgate QC with Ben Chataway appeared for the Claimant, and Clive Sheldon QC with Nicholas Moss for the Secretary of State. At the outset, I thank them for their particularly helpful submissions.

Disability Living Allowance

9. Mobility assistance for the physically disabled was introduced by the Government after the Second World War, through the provision of specially adapted three-wheeled cars which were leased to disabled drivers. In 1976, Mobility Allowance was introduced to provide financial assistance for the disabled in getting about, irrespective of whether or not they could drive, as a benefit additional to Attendance Allowance which had been introduced in 1971 to assist disabled people with the additional costs of personal care. For those who could drive or benefit from the use of a car, practical assistance in obtaining their own vehicle was provided through the setting up of Motability, an independent charity established by Royal Charter in 1977 at the Government's request, which enabled Mobility Allowance claimants to use their benefit to secure a vehicle – a car, scooter or powered wheelchair – on beneficial terms, and provided assistance with the cost of adaptations for severely disabled drivers.

10. DLA was introduced in 1992 by the Social Security Contribution and Benefits Act 1992 ("the 1992 Act"), as a non-means-tested, non-contributory benefit for those who have personal care and/or mobility needs as a result of physical or mental disability. As I have described, it has two components – the care component replaced Attendance Allowance, and the mobility component replaced Mobility Allowance.

11. The qualifying criteria for each of the two mobility component rates are set out in section 73 of the 1992 Act. By section 73(1)(a) and (11), where the claimant is "suffering from physical disablement such that he is either unable to walk or virtually unable to do so", he is entitled to the higher rate, as are claimants with particular identified conditions (e.g. those who are both blind and deaf: section 73(1)(b), (2) and (11)). The higher rate is also available to those who are severely mentally impaired who display severe behavioural problems and who satisfy various care component criteria (section 73(1)(c), (3) and (11)); but the criteria are such that very few claimants meet them. However, by section 73(1)(d) and (11), a claimant who is "able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him or her, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time" is entitled to the lower rate. Therefore, broadly, those who are unable or virtually unable to walk because of physical disability are entitled to higher rate mobility; and those who are unable to move about out of doors without assistance because of non-physical disability are entitled to lower rate mobility.

12. Entitlement to the mobility component, and in particular the scope of "unable to walk or virtually unable to do so", is also dealt with in Part IV of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991 No 2890), made under the 1992 Act. Regulation 12 provides (so far as relevant to this claim):

> "(1) A person is to be taken to satisfy the conditions mentioned in section 73(1)(a) (unable or virtually unable to walk) only in the following circumstances –
>
> (a) his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to the place of residence or as to place of, or nature of, employment–
>
> (i) he is unable to walk; or
>
> (ii) his ability to walk out of doors is so limited, as regards the distance over which or the speed at which or the length of time for which or the manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk; or
>
> (iii) the exertion required to walk would constitute a danger to his life or would be likely to lead to a serious deterioration in his health; or
>
> (b) he has both legs amputated at levels which are either through or above the ankle, or he has one leg so amputated and is without the other leg, or is without both legs to the same extent as if it, or they, had been so amputated.
>
> …
>
> (4) Except in a case to which paragraph(1)(b) applies, a person is to be taken not to satisfy the conditions mentioned in section 73(1)(a) of the Act if he –
>
> (a) is not able to or virtually unable to walk with a prosthesis or artificial aid which he habitually wears or uses;
>
> (b) would not be unable or virtually unable to walk if he wore and or used a prosthesis or an artificial aid which is suitable in his case".

Thus, by regulation 4, in assessing ability to walk, the claimant is taken as using aids or appliances that would assist him.

13. This claim particularly focuses on regulation 12(1)(a)(ii), which defines "unable to walk or virtually unable to do so" in terms of four characteristics: distance, time, speed and manner of walking out of doors. The Social Security Commissioners and Upper Tribunal Judges (who replaced the Commissioners upon the coming into effect of the Tribunals, Courts and Enforcement Act 2007), the judges charged with considering second-tier appeals on points of law from claimants whose applications

for DLA have been refused, have repeatedly emphasised that whether a claimant is unable or virtually unable to walk for the purposes of DLA is essentially a matter of fact which must be determined by a decision-maker for the Secretary of State and, on appeal, by the first-tier tribunal by reference to those four criteria: see, e.g., CDLA/4388/1999 at paragraph 4, per Commissioner Rowland. In that determination, Commissioner Rowland specifically indicated that, in his view, "too much weight tends to be put on distance". However, first instance judges have generally found that, if a claimant is unable to walk 50 yards (or, now, 50 metres), unaided or with appropriate manual aids or appliances, then he or she falls within the statutory criterion and, if satisfying the other relevant criteria, is entitled to the mobility component at the higher rate.

14. Consequently, there has arisen an understanding that someone who is not able to walk more than 50m is "virtually unable to walk" for DLA purposes; and, therefore, claimants might expect to be awarded DLA higher rate mobility if their overall ability to walk, perhaps with a brief rest stop, is limited to less than 50m – although, if their range is over 50m, then they may still qualify if their speed or gait is exceptionally poor. That is reflected in material from disability advice services to which I was referred e.g. advice leaflets from Disability Rights UK, the Disability Law Service and the Tameside Metropolitan Borough Council Welfare Rights Service. For example, the Tameside Service advice says:

> "In practice, in most cases, the test has effectively became a '50 yard' test unless the speed of walking or the person's gait is exceptionally restrictive."

15. Indeed, DLA decision letters typically reflect the benchmark nature that 50m has assumed. For example, in the Claimant's case, his award letter said:

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

16. Furthermore, the figure of 50m has become familiar in other relevant contexts. For example, according to guidance issued by the Department of Transport, seating in commonly used pedestrian areas, transport interchanges and stations should be provided at intervals of no more than 50m ("A guide to best practice on access to pedestrian and transport infrastructure", Department of Transport, December 2005, paragraphs 3.4); and disabled parking bays in public car parks should preferably be located no more than 50m away from the facilities they serve (ibid at paragraph 5: see also "Accessible Train Station Design for Disabled People: A Code of Practice", Department of Transport, November 2011 at paragraph D2.1, to similar effect).

The Claimant

17. The Claimant Steven Sumpter is 34 years old. Whilst at university, he was diagnosed with post-viral syndrome. He has recently been diagnosed with maternally-inherited diabetes and deafness, and is currently being investigated for another inherited condition, mitochondrial encephalomyopathy. The severity of his symptoms fluctuates.

18. In 2010, he suffered a major relapse. In 2011, as a result of his condition, he applied for DLA and, on 5 January 2012, was awarded middle rate care component and higher rate mobility component. The latter enables him to lease a vehicle through the Motability scheme.

19. His condition varies from day-to-day. He can generally get around his own house by leaning on furniture and walls, and using them to propel himself in the direction he wishes to go. He is prone to fall. He cannot use a wheelchair in his home, because the house is not adapted to such use.

20. Outside, he can walk a short distance with a stick, although the distance he can walk is very variable from day-to-day. On a good day, he can walk to his parked car in the street outside his house. On other days, he can only get to his car by using a wheelchair. He has two wheelchairs, one self-propelled, which he can take in his car; and one motorised, which he can use to go to the village shop, and even into the nearest town although that is an hour away.

21. The Claimant is a member of We are Spartacus, a web-based community of disabled people, their carers and supporters which, in addition to providing an on-line information and support service, makes substantial contributions to issues that particularly concern disabled people including making submissions to the Government on proposed disability welfare measures.

Proposed Reform: Personal Independence Payment

22. In its first budget, the Coalition Government announced that it proposed to replace DLA with a new benefit, PIP. Although there was no statutory obligation to consult on this proposed reform, the Secretary of State determined to consult voluntarily; and, on 6 December 2010, published a public consultation document, "Disability Living Allowance Reform". In the foreword, the Minister for Disabled People set out the broad purpose of the proposed reform:

> "[PIP] will maintain the key principles of DLA, providing cash support to help overcome the barriers which prevent disabled people from participating fully in everyday life, but it will be delivered in a fairer, more consistent and sustainable manner. It is only right that support should be targeted at those disabled people who face the greatest challenges to leading independent lives. This reform will enable that support, along with a clearer, more straightforward assessment process."

23. That message was emphasised in paragraph 2 of the Executive Summary:

> "[DLA] has become confusing and complex. The rising caseload and expenditure is unsustainable, the benefit is not

> well understood and there is no process to check that awards remain correct. That is why the Government will reform DLA, to create a new benefit, [PIP], which is easier to understand, more efficient and will support disabled people who face the greatest challenges to remaining independent and leading full and active lives."

24. Those themes were taken up in the body of the report:

i) DLA was considered too complex and not well understood it could act as a barrier to work; and it was usually the subject of an indefinite award without any systemic check on the level of disability so that the award might continue even if the claimant's needs changed. It was proposed that the new benefit would be administratively simpler, with an assessment that was objective, more consistent and transparent, and fairer; and would have checks to make sure that, over time, the benefit was still at the right level. There was a clear message that the new benefit would be administered more rigorously.

ii) So far as sustainability was concerned, the paper said that, in 1976, it was expected that about 100,000 claimants would be entitled to Mobility Benefit; and, even in 1992, less than 290,000 claimed DLA (150,000 claiming mobility component). However, by 2010, 3.2m people received DLA, at an annual cost of £12 billion and rising. About 2.6m of the claimants received mobility component, of which about 1.7m were on higher rate. Numbers receiving DLA had increased by 30% in the period 2002-10. There was a need to create "an affordable and sustainable system" (chapter 1, paragraph 2). There was a clear message that one aim of the proposed reform was the reduction of rising costs, to ensure the benefit was sustainable in the future.

iii) In the light of the need for sustainability, it was made clear that it was a policy intention to focus resources on "those that need the greatest help to live independently" (chapter 1, paragraph 15), i.e. those with the greatest need. In terms of process, the document said that it was important for "the new assessment to have a stronger focus on individuals' specific needs and how these change over time" (chapter 2, paragraph 23). Question 6 and 7 put out for consultation thus asked:

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

iv) It was said that there would be a "broader focus on disability". For example, it said (chapter 2, paragraph 14):

> "The definitions currently used are subjective and reflect views of disability from the 1990s, not the modern day. For example, 'mobility' as currently defined concentrates

> on an individual's ability to walk, not their ability to get around more generally".

Although not a core theme of the paper, a review of the causes of mobility difficulties for which support would be given was therefore also presaged.

25. The consultation period was from December 2010 to February 2011. 5,500 responses were received. The Government's response to the consultation was published on 4 April 2011.

26. Dr William Gunnyeon is the Chief Medical Adviser and Director for Health and Well-Being at the Department for Work and Pensions. He was the senior official responsible for the Department's medical policy in relation to benefit assessment. In his evidence (6 June 2013 Statement, paragraph 3 and following), he said that the Secretary of State set up an independent Assessment Development Group to advise medical policy advisers in the Department on the development of the PIP assessment, including the activities and descriptors adopted, and the impact of health conditions and impairments. The members of the Group included individuals from various medical fields, as well as representatives from disability (including disability equality) organisations.

27. The Government's response to the consultation picked up the themes of the consultation document. It made clear that ensuring the benefit was affordable and sustainable was vital (paragraph 9), and that the Government were committed to reducing the expenditure on the benefit on adults to 2009-10 levels in real terms, i.e. to £11.8 billion. It identified process and indefinite awards as areas which needed review. It said (at paragraph 70) that a 2004-5 DLA National Benefit Review had suggested that a net £440m had been overpaid because of a failure to mark changes in claimants' circumstances (i.e. £630m less £190m underpaid for the same reason). It proposed that all future awards would be the subject of periodic review.

28. In relation to the two rates of mobility component, it said:

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

29. In response to Question 6, the Government said that they wanted the new assessment "to reflect a more complete and structured consideration of the impact of an individual's health condition or impairment, whether physical or mental, on everyday

activities" (paragraph 40). As it was not practical to consider all everyday activities, it was proposed to focus on key activities for each of the two components. For mobility, the activities were "Planning and following a journey", and "Moving around". The paper asked for responses to this course prior to the publication of more detailed assessment criteria against which the assessment would be made.

30. The paper stressed that the Government were keen to work with disabled people and their organisations to hear their views on these initial proposals (paragraph 42). In the foreword, the Minister said:

> "I am clear that as we design and develop how [PIP] will work in practice, we will need to continue to involve disabled people and their organisations. Their expertise will be essential and this document sets out in more detail how we plan to do this, so that their views are reflected in any changes we make."

Thus, although consultation was voluntary, the Secretary of State therefore made a substantial commitment to it in respect of this proposed reform, recognising the potential benefit of input from disabled people and organisations which represented them and had an interest in issues in which they were concerned.

31. An initial working draft of regulations on the PIP assessment criteria was published by the Secretary of State on 9 May 2011 ("the Initial Draft"), to inform the Parliamentary debate on the Welfare Reform Bill which was to be the primary legislative vehicle for the proposed reforms. They were accompanied by a supporting technical note or commentary, "Personal Independence Payment: Initial Draft of Assessment Criteria" ("the Commentary"). The regulations made clear that they were a working draft, and amendments would be made later.

32. The Commentary explained that, assessing individuals' actual costs arising from a health condition or impairment being impossible in practice, the Secretary of State had attempted to identify proxies for an individual's inability to participate in everyday life, and thus those in greatest need and those with the greatest need for assistance with the additional costs of satisfying such need (paragraphs 1.2 and 4.3). The regulations therefore included a scale of activities and descriptors against which claimants would be scored, the activities for the mobility component, as envisaged in the Government's response to the consultation, being "Planning and following a journey" and "Moving around". The total points awarded would be matched against a qualifying threshold for either the standard or the enhanced rate. The draft descriptors for the Moving around activity were as follows:

Descriptors	*Points*
a. Can move at least 200 metres unaided or with the use of a manual aid.	
b. Can move at least 50 metres but not more than 200 metres either unaided or with the use of a manual aid.	
c. Can move up to 50 metres unaided.	
d. Can move up to 50 metres only with the use of a manual aid.	
e. Can move up to 50 metres only with the use of a manual wheelchair propelled by the claimant.	

f. Can move up to 50 metres only with the use of an assisted aid.	
g. Cannot either – (i) move around at all or (ii) transfer from one seated position to an adjacent one unaided.	

33. As can be seen, the Initial Draft did not include the points that would attach to each descriptor; nor, of course, did it or could it indicate the proposed points threshold, although the Commentary gave an indicative weighting for each of the mobility activities as "High scoring".

34. The Executive Summary of the Commentary said:

> "1.4 We have… sought to develop an assessment which considers and reflects the impact of a broader range of impairment types than [DLA]. We believe our proposed assessment will take better account of sensory impairments, developmental disorders, learning disabilities, cognitive impairments and mental health conditions.
>
> 1.5 … These regulations will be subject to further developmental work and refinement and are not intended to be a final version…".

35. That was taken up in the body of the Commentary itself, which indicated the policy objective to bring individuals with non-physical disabilities more into the ambit of the mobility component:

> 5.6. The entitlement criteria for [DLA] have been largely unchanged since its introduction in 1992 and can prioritise support to individuals with a physical impairment over those with mental or cognitive function impairments. [PIP] provides an opportunity to start from first principles and create an assessment which better reflects the needs arising from the full range of impairments, including sensory impairments, developmental disorders, learning difficulties and mental health conditions. We are committed to designing entitlement criteria which treat people as individuals, focusing on the impact of a health condition or impairment, and which do not provide automatic entitlement for specific conditions.
>
> 5.6 We believe that the draft criteria we have developed achieve our aim of providing a more holistic framework for the assessment of individual need. While two activities focus specifically on mental and cognitive function and one on physical function, the remaining eight have been designed to capture the impact of a health condition or impairment regardless of whether it has a mental, intellectual, cognitive or physical basis. Furthermore, we have sought to incorporate a wider variety of everyday activities than those covered by the

> current [DLA] criteria. For example, we have introduced ability to plan and follow a journey as well as physically moving around, to reflect the equal importance of mental, cognitive and physical ability for an individual to be able to get around. Similarly, the inclusion of communication will enable the assessment to take better account of the impact of impairments which impact on sight, hearing speech and comprehension."

36. In respect of the activity "Moving around", the Commentary notes said:

> "This activity assesses physical ability to move around outdoors. This includes ability to transfer unaided between two seated positions, to move up to 50 metres, up to 200 metres and over 200 metres. Factors such as pain, breathlessness, fatigue and abnormalities of gait are taken into account when assessing this activity. The descriptors reflect the use of manual aids such as sticks or prostheses, self-propelled wheelchairs and assisted aids such as electric wheelchairs….
>
> *General notes:*
>
> *This activity should be judged in relation to a type of surface normally expected out of doors such as pavements and roads and includes the consideration of kerbs.*
>
> *A short journey is up to 50 metres (approximately half the length of a football pitch) such that an individual is able to achieve a basic level of independence such as the ability to get from a car park to the supermarket.*
>
> *An extended journey is more than 50 metres but less than 200 metres (approximately twice the length of a football pitch) such that an individual is able to achieve a higher level of independence such as the ability to get around a small supermarket.*
>
> *…*
>
> *Factors such as pain, breathlessness, abnormalities of gait and fatigue need to be taken into account when assessing this activity. Where an activity can only be completed at the expense of excessive fatigue, the individual should be regarded as unable to complete it.*
>
> *The person must be able to perform the activity safely and in timely fashion – however, this only refers to the actual act of moving. For example, danger awareness (e.g. traffic etc) is considered as part of [the Planning and following a journey] activity.*"

37. There are notes in respect of each of the Moving around descriptors, as follows:

A	Can move at least 200 metres unaided or with the use of a manual aid.
B	Can move at least 50 metres but not more than 200 metres either unaided or with the use of a manual aid. *Notes: identifies individuals who can move 50 to 200 metres unaided with or without the use of manual aids but have some limitation – for example, someone with severe arthritis of the lower limbs.*
C	Can move up to 50 metres unaided. *Notes: identifies individuals whose mobility is severely restricted and do not and cannot use aids and appliances – for example, someone with severe Chronic Obstructive Pulmonary Disease. Includes individuals who can move up to 50 metres but then require a wheelchair for anything further.*
D	Can move up to 50 metres only with the use of a manual aid. *Notes: identifies individuals who can use appropriate aids to move short distances unaided but have significant limitation – for example someone with multiple sclerosis affecting the lower limbs through increased tone and loss of coordination. Includes individuals who can move up to 50 metres but then require a wheelchair for anything further.*
E	Can move up to 50 metres only with the use of a manual wheelchair propelled by the claimant. *Notes: identifies individuals who can only move with a self-propelled wheelchair propelled by themselves.*
F	Can move up to 50 metres only with the use of an assisted aid. *Notes: identifies individuals who are reliant on motorised aids or physical support (such as someone pushing a wheelchair for them) such as individuals with a generalised neurological condition.*
G	Cannot either (i) move around at all or (ii) transfer from one seated position to another seated position located next to one another unaided. *Notes: identifies individuals with severe disability such as*

	quadriplegia or severe cerebral palsy where an individual cannot move 50 metres or cannot transfer unaided – for example, someone who is unable to get from a chair into a wheelchair by themselves.

Thus, in addition to distance, the criteria by which individual claims were to be differentiated focused on appliances and aids required.

38. Informal consultation on the Initial Draft took place between May and August 2011, during which the Secretary of State sought views on the criteria from user-led and representative organisations, which resulted in submissions from 78 organisations and 95 individuals.

39. Dr Gunnyeon said that a group of 1,000 DLA claimants were chosen for testing purposes (6 June 2013 Statement, paragraph 20). To assess the likely impact of the initial draft criteria on the benefit caseload, about 900 cases were considered by medics, and the relevant descriptor identified. A sample of 99 of these was further assessed by the medics, to test the validity and reliability of the assessment criteria, which indicated "there were problems with both the validity and reliability of the initial proposals" (paragraph 25). As the criteria proved not to be a valid or reliable measure, the likely impact of the Initial Draft was not published (paragraph 28).

40. As a result of the concerns with the Initial Draft criteria, the Secretary of State worked on a second set of criteria, and a second draft of the regulations ("the Second Draft") with commentary ("the Second Commentary") were published on 14 November 2011. These had been tested in a reassessment of the 900 sample cases to which I have referred, "to provide an indication of reliability and validity, plus estimated case load figures" (Dr Gunnyeon 6 June 2013 Statement, paragraph 29). The Second Draft criteria were found to be reliable and more valid (paragraph 30).

41. The Moving around descriptors read as follows:

Descriptors	*Points*
a. Can move at least 200 metres either – (i) unaided; or (ii) using an aid or appliance, other than a wheelchair or a motorised device.	0
b. Can move at least 50 metres but not more than 200 metres either – (i) unaided; or (ii) using an aid or appliance, other than a wheelchair or a motorised device.	4
c. Can move up to 50 metres unaided but no further.	8
d. Cannot move up to 50 metres without using an aid or appliance, other than a wheelchair or a motorised device.	10
e. Cannot move up to 50 metres without using a	12

wheelchair propelled by the claimant.	
f. Cannot move up to 50 metres without using a wheelchair propelled by another person or a motorised device.	15
g. Cannot either – (i) move around at all; or (ii) transfer unaided from one seated position to another adjacent seated position	15

42. The references to 200m and 50m were therefore retained: although descriptors D, E and F used the formula "Cannot move up to 50 metres without…", rather than the earlier "Can move up to 50 metres only with…". In addition to distance, the criteria by which individual claims were to be differentiated again focused on aids and appliances. Paragraph 4.31 explained:

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

43. Weightings, by way of points, were added; but there was no threshold score to qualify for each rate. No firm view had been taken as to entitlement thresholds (Second Commentary, paragraph 1.7). The Second Commentary said that the Second Draft had been produced following "informal consultation" and continued (at paragraphs 4.35 and 4.36):

> "4.35 … For the Mobility component, the descriptor weightings for activity 11 [Moving around] reflect the extra costs associated with mobility aids, ensuring that individuals who require aids and appliances to move very short distances receive some priority in the weightings, while individuals who use a wheelchair would receive greater priority. The approach taken with mobility activities ensures that an individual who is unable to get around as a result of either a physical or non-physical impairment should receive the same weighting.
>
> 4.36 The weightings proposed in the second draft criteria are our initial proposals only, to enable us to start a meaningful debate. We know that it is crucial to get this right and we want to hear the views of disabled people and disability organisations. We will also be formally consulting on the criteria – including the proposed descriptor weightings – once we have reached firmer views on the weightings and, in particular, entitlement thresholds. While we recognise that there is strong interest in what the thresholds will be, it is important that we get this right and do not publish anything that might

> be misleading. We will publish this information as soon as possible."

44. In respect of the activity "Moving around", the Second Commentary notes were similar to the Commentary on the Initial Draft, but the references to 50m and 200m were explained thus:

> "*Notes:*
>
> *This activity should be judged in relation to a type of surface normally expected out of doors such as pavements and roads and includes the consideration of kerbs.*
>
> *50 metres is considered to be the distance that an individual is required to be able to walk in order to achieve a basic level of independence such as the ability to get from a car park to the supermarket.*
>
> *50 to 200 metres is considered to be the distance that an individual is required to be able to walk in order to achieve a higher level of independence such as the ability to get around a small supermarket...".*

45. The notes then included specific comments on only descriptors C and D, as follows:

C	Can move up to 50 metres unaided but no further. *For example: identifies individuals who can move up to 50 metres unaided but then require a wheelchair for anything further.*	8
D	Cannot move up to 50 metres without using an aid or appliance, other than a wheelchair or a motorised device. *For example: identifies individuals who can use an aid or appliance to move up to 50 metres but then require a wheelchair for anything further.*	10

46. On 16 January 2012 the Secretary of State commenced a formal consultation, in the form of a consultation document, "Personal Independence Payment: Assessment Thresholds and Consultation" ("the 2012 Consultation"). The criteria were those set out in the Second Draft, but the proposed thresholds for entitlement to the standard and enhanced rates of the mobility component were given as 8 points and 12 points respectively. This was the first time that weightings and entitlement thresholds had both been published, and thus the first time that consultees would have known which descriptors would attract PIP mobility enhanced rate (i.e. descriptors E, F and G), and which standard rate (i.e. descriptors C and D). The document made clear that it was intended to refine further the draft assessment criteria once responses to the consultation had been received and considered (paragraph 5.6).

47. The consultation document confirmed that the need to use aids and appliances was used as a proxy for level of disability and additional costs:

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

48. To assist understanding and application of the descriptor criteria and weightings, the consultation document included a series of case studies, which were said to be "illustrative only, demonstrating the descriptors which may apply to a variety of individuals". Four of the case studies identified "likely descriptor choices" for Moving around:

i) Case study 1 described a woman ("Katie") with chronic fatigue syndrome who "can only walk a few metres so she uses a wheelchair pushed by another person if she goes out". It suggested an award of 15 points was likely under descriptor F.

ii) Case study 3 described a woman ("Victoria") with multiple sclerosis: "She spends most of her time in an electric wheelchair because she can only walk about 10-15 steps". The same descriptor F was suggested.

iii) Case study 6 described a 62 year old man ("Richard") with osteoarthritis in both knees and hand problems: "He can walk for short distances but the pain in his knees stops him after 20-30 steps…. He cannot use sticks because of his hand problems". An award of 8 points under descriptor C was identified as likely.

iv) Case study 7 described a man ("Andy") whose left leg had been amputated above the knee and who had sustained injuries to his right leg: "He finds it

> very tiring if he walks more than 40-50m so he often uses a wheelchair if he is going outdoors". An award of 10 points under descriptor D was suggested.

Thus, under the proposed criteria, Katie and Victoria would have been awarded PIP mobility enhanced rate, and Richard and Andy standard rate.

49. The questions for consultation included the following:

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

50. The consultation document included projected caseloads for the year 2015-16, calculated on the basis of the assessment of the sample of 900 to which I have referred. From these figures, it could be seen that, for DLA, it was projected that there would be 1,040,000 on higher rate mobility, and for PIP, it was projected that there would be 760,000; i.e. a fall of 280,000. The reasons for this fall – or the precise categories who would be most affected – were not specifically identified. In particular, the document did not give any breakdown as to how much of the likely reduction was attributable to the more rigorous assessment framework for PIP and/or the arrangements for the reviews of entitlement; nor did it indicate how many claimants were projected to qualify for PIP enhanced rate mobility as falling within the Moving around descriptor on the basis of physical disability, and how many were projected to qualify under the Planning and following a journey descriptor on the basis of non-physical disability. It simply said (at paragraph 4.17):

> "Two thirds of the current [DLA] caseload is made up of physical function conditions and one third mental function conditions. The 1.7m modelled [PIP] eligible caseload has a similar split between physical and mental function conditions."

51. A further consultation document was issued in March 2012, dealing with the "detailed design" of PIP ("DLA Reform and Personal Independence Payment – Completing the Detailed Design"). With regards to the Motability scheme, having stated the intention to ensure that "people with the greatest barriers to participation are able to access

other support services and support as easily as possible" (paragraph 7.15), it said (at paragraph 7.16):

> "At present, eligibility to the Motability scheme depends upon a person being in receipt of the higher rate mobility component of DLA. Following discussions with the Motability scheme we can confirm that the enhanced rate of the mobility component of [PIP] will act as the gateway to the Motability scheme in the future. The new assessment criteria for [PIP] will help to ensure that the Motability scheme will now be available to a broader range of disabled people with mobility barriers than was the case under DLA…."

52. In May 2012, the Secretary of State published an Impact Assessment and Equality Impact Assessment of the proposed reforms. The Impact Assessment repeated the figures for numbers of people affected, as were set out in the consultation document. It indicated that about 500,000 fewer people were expected to be in receipt of PIP by 2015-16 compared to the number who would have been entitled to DLA by that date (paragraph 19), with a yearly saving of £2.24 billion. It gave no further breakdown as to the likely impact of the reforms on those who suffer mobility problems due to physical disability.

53. The introduction to the Equality Impact Assessment restated concerns about the reliability of the current assessment process, commenting (at paragraphs 2 and 3) that:

> "2. … [DLA] awards can be decided on the basis of self-reporting of need, and although medical evidence is sought for certain awards, it is not mandatory or routinely provided. At present around half of all award decisions are made without any additional medical evidence.
>
> 3. The current [DLA] legislation provides automatic entitlements to certain rates on the basis of specific conditions and impairments, or the treatment an individual is receiving. As a result, eligibility for [DLA] is sometimes based on medical condition rather than the impact of that condition, meaning that support is not always appropriately targeted."

54. With reference to the protected characteristic of disability, the Equality Impact Assessment included the following, under the heading "Risk of negative impact":

> "26. Replacing [DLA] with a new benefit that is focused on supporting those individuals with the greatest barriers to participation provides an opportunity to promote equality of opportunity for disabled people least likely to live full and active lives. However, as the benefit becomes better targeted on those with the greatest needs it is likely that some disabled people, who may have self-assessed as needing support, but who have lesser barriers to participation, will receive reduced support.

> 27. Where these individuals have a carer in receipt of Carer's Allowance, this will also result in some loss of benefit due to the knock-on effects of reform. This would appear to be more likely to have an effect on disabled people, as carers are more likely to be disabled than the population in general."

And, under "Conclusion", it said:

> "30. The new benefit will be fairer, and may help to improve understanding that support is available both in and out of work. More regular reviews and a more objective, rather than self, assessment may mean reduced support for some people who have lesser or reduced barriers to participation. This is entirely consistent with the policy but it is possible that this group are more likely to be adversely affected. The knock-on effects of the policy affect disabled people as many of those who identify as disabled are also carers."

55. There were over 1,100 responses to the January 2012 consultation paper. On 13 December 2012, the Secretary of State published the Government's response and laid regulations before Parliament.

56. With reference to the descriptors for Moving around, the response document said:

> "1.3 … We have re-written the Moving around activity to make it easier to understand and apply. The feedback we received from most respondents showed this activity was not clear. It was commonly believed that only people who use wheelchairs could qualify for the enhanced rate of the Mobility component from this activity, despite this not being our intention.
>
> …
>
> 6.21 A considerable number of comments reflected significant concern that the enhanced rate of the mobility component would only be available to individuals who use wheelchairs. Concern was raised that individuals who do not use wheelchairs but face considerable barriers to physical mobility – such as those faced by many bilateral amputees – might miss out on the component. This has never been the intention of this activity. Some of the descriptors referred to wheelchairs but this was to establish whether an individual might need a wheelchair to move around in a reliable way, not whether they currently have or use one. If they were assessed as needing a wheelchair to be able to move up to 50 metres in a reliable way, they could be awarded the enhanced rate of the benefit, regardless of whether they actually have a wheelchair. For example, an individual who uses a frame might be able to walk 50 metres but in a way that is unsafe or takes a very long time. In such circumstances they might be assessed as needing a

> wheelchair to move this distance reliably. However, the activity was clearly confusing and concerning to people and as such we have re-written it to make the policy intent clearer.
>
> 6.22 The activity has been refocused to look at an individual's ability to 'stand and then move' a certain distance. In this way the activity continues to concentrate solely on an individual's physical ability to move around.…
>
> 6.23 The revised criteria do not make any reference to wheelchairs, removing the confusion this caused in the second draft. We believe that the amended criteria – while not changing the policy intent – are clearer to apply and ensure fair outcomes to individuals who face physical barriers to mobility.
>
> ….
>
> 6.27 Respondents pointed out that, due to the fact the descriptors referenced distances 'up to 50 metres', individuals who can move only very small distances, but who do not require a wheelchair, would not qualify for the enhanced rate of the mobility component, despite having significant mobility restrictions. In the revised criteria we have changed the descriptors to make clear that those individuals who do not need a wheelchair but can only move short distances of less than 20 metres will qualify for the enhanced rate."

57. The final version of the assessment criteria for the mobility activities were set out, as follows:

Activity	*Descriptors*	*Points*
11. Planning and following journeys.	a. Can plan and follow the route of a journey unaided.	0
	b. Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant.	4
	c. Cannot plan the route of a journey.	8
	d. Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.	10
	e. Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant.	10

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

58. The notes on the activity explained the relevance of 20m, 50m and 200m in the final criteria:

> "This activity considers a claimant's physical ability to move around without severe discomfort such as breathlessness, pain or fatigue. This includes the ability to stand and then move up to 20 metres, up to 50 metres, up to 200 metres and over 200 metres.
>
> *Notes:*
>
> *This activity should, be judged in relation to a type of surface expected out of doors such as pavements and roads on the flat and includes the consideration of kerbs.*
>
> *20 metres is considered to be the distance that a claimant is required to be able to walk in order to achieve a basic level of independence in the home such as the ability to move between rooms.*
>
> *50 metres is considered to be the distance that a claimant is required to be able to walk in order to achieve a basic level of independence such as the ability to get from a car park to a supermarket.*

> *50 to 200 metres is considered to be the distance that a claimant is required to be able to walk in order to achieve a higher level of independence such as the ability to get round a small supermarket.* "

59. The only specific descriptor with a particular note was D, as follows:

> "For example, this would include people who can stand and move more than 20 metres but no further than 50 metres, but need to use an aid such as a stick or crutch to do so."

60. Projections for numbers of claimants who were expected to be entitled to PIP as at 2018 were given: it was projected that, by 2018, 602,000 would be likely to be entitled to PIP enhanced rate mobility, compared with an estimated 1,029,000 who would have been entitled to DLA higher rate mobility. The sample claimants to whom I have referred were again tested against the changed criteria; and, when comparing the final version with the Second Draft, this projected a decrease in claimants entitled to enhanced rate mobility of about 51,000. Of this, the response to the consultation said (at paragraph 8.13):

> "… The decrease in the number of people receiving the enhanced rate of the Mobility component is likely to be because the final criteria are clearer and easier to apply, leading to more accurate testing results, rather than because the final criteria are less generous than the previous draft" (paragraph 8.13).

There was no breakdown given of the number of physically disabled claimants who would no longer be entitled. However, Dr Gunnyeon explained that further work suggested that, by 2018, the fall in physically disabled claimants under the Moving around descriptor who would be entitled to the enhanced rate would be only 5,000 compared with the Second Draft criteria (6 June 2013 Statement, paragraph 63).

61. The descriptors were described as "final", and the document said (at paragraph 1.8):

> "Given the considerable consultation and engagement that have gone into producing this final draft of the assessment criteria and regulations, including one informal and one formal consultation, we do not intend to carry out any further consultation activity. However, the regulations will be subject to approval by Parliament through the affirmative procedure. Subject to Parliamentary approval, we expect them to come into force on 8 April 2013."

62. On the same day as the Government's response to the consultation was published, the Social Security (Personal Independence Payment) Regulations 2013 ("the 2013 Regulations") were laid before Parliament, which included the final assessment criteria referred to above. The regulations were considered by the Delegated Legislation Committee on 5 February 2013 and debated in the House of Lords on 13 February. They were made on 25 February 2013 (SI 2013 No 377).

The PIP Statutory Scheme

63. The Welfare Reform Act 2012 was passed on 8 March 2012, its primary provisions being in respect of two new welfare benefits, Universal Credit and PIP.

64. Part 4 of the Act deals with PIP. Section 77 provides for the two components, the daily living component and the mobility component, and that there may be entitlement to one or to both. Section 79 provides for the mobility component to be paid at the standard rate or the enhanced rate, depending on whether the claimant's ability to carry out mobility activities is limited or severely limited by his or her physical or mental condition. Section 79(4) states that "mobility activities" means such activities as may be prescribed. Section 80 provides that the question whether a person's ability to carry out mobility activities is limited or severely limited by a person's physical or mental condition is to be determined in accordance with regulations.

65. The relevant regulations are the 2013 Regulations. The mobility activities for the purpose of section 79(4) of the 2012 Act and the 2013 Regulations are those set out in the table in Part 3 of Schedule 1 (regulation 3), which are in identical form to the final criteria set out in the Government's response to the 2012 Consultation (see paragraph 57 above). Whether a claimant, C, has limited or severely limited ability to carry out daily living or mobility activities as a result of C's physical or mental condition is to be determined on the basis of an assessment (regulation 4).

66. By regulation 6:

> **"**(1) The score C obtains in relation to mobility activities is determined by adding together the number of points (if any) awarded for each activity listed in column 1 of the table in Part 3 of Schedule 1 ("the mobility activities table").
>
> (2) For the purpose of paragraph (1), the number of points awarded to C for each activity listed in column 1 of the mobility activities table is the number shown in column 3 of the table against whichever of the descriptors set out in column 2 of the table for the activity applies to C under regulation 7.
>
> (3) Where C has undergone an assessment, C has —
>
> (a) limited ability to carry out mobility activities where C obtains a score of at least 8 points in relation to mobility activities; and
>
> (b) severely limited ability to carry out mobility activities where C obtains a score of at least 12 points in relation to mobility activities."

So, reading section 79 of the 2012 Act and regulation 6 of the 2013 Regulations together, a score of at least 8 points entitles a claimant to the standard rate of the mobility component, and a score of at least 12 points entitles him or her to the enhanced rate.

67. Due to concerns expressed during the Parliamentary debate, the 2013 Regulations were amended to make clear that, where a claimant's ability to carry out an activity is to be assessed, the claimant is only to be assessed as satisfying a descriptor if he or she can do so "(a) safely; (b) to an acceptable standard; (c) repeatedly; and (d) within a reasonable time period" (The Social Security (Personal Independence Payment) (Amendment) Regulations 2013 (SI 2013 No 455) amending regulation 4 of the 2013 Regulations), each of those terms being expressly defined.

68. The 2013 Regulations came into force on 8 April 2013; and from that month new claimants started to be assessed for PIP rather than DLA, with transitional provisions which mean that, for those aged 16 to 65, DLA will be phased out and replaced by PIP by 2017.

The 2013 Consultation

69. This claim was issued on 28 March 2013, on the grounds that the 2012 Consultation process was flawed – in particular, because consultees had not been given a proper opportunity to comment on the 20m threshold – and that the Secretary of State had failed to comply with his public sector equality duty. Kenneth Parker J gave permission to proceed on 2 May 2013, and the substantive hearing was listed for July 2013.

70. On 17 June 2013, the Secretary of State announced his intention to conduct a further consultation exercise, with a view to considering whether to amend the criteria for the Moving around activity. A week later, on 24 June, he published a further consultation document, "Consultation on the PIP assessment Moving around activity" ("the 2013 Consultation").

71. The consultation document set out the current Moving around descriptors, which of course had been used since April 2013 to assess entitlement to PIP. It said that the Secretary of State had received feedback from some disabled people and their organisations saying that they were unhappy with the changes made to the assessment criteria as a result of the 2012 Consultation and they wanted a further opportunity to have their views considered. The Secretary of State had thus decided to carry out an additional consultation exercise on the Moving around activity (paragraphs 1.4 and 1.5).

72. Having set out the criteria from the 2013 Regulations as the current criteria, the consultation document continued:

> "2.2 This means that anyone who cannot stand and then walk 50 metres safely, to an acceptable standard, repeatedly and in a reasonable time period automatically receives at least the standard rate of the Mobility component of PIP. People who cannot stand and then walk more than 20 metres safely, to an acceptable standard, repeatedly and in a reasonable time period receive the enhanced rate. People can also receive the standard or enhanced rate by adding together points from the *Moving around* activity and the *Planning and following journeys* activity.

> 2.3 Our intention has always been to focus the enhanced rate on those with the greatest barriers to mobility. In early drafts of the assessment we considered both how far a person could move and whether they needed an aid, appliance or a wheelchair to do so. However, the consultation responses we received indicated that this could be confusing if a person did not currently use an aid, appliance or wheelchair. The criteria set out in the current Regulations focus mainly on distance and 20 metres is used as a benchmark distance for determining whether someone is entitled to the enhanced or standard rate for people who do not also score points on the *Planning and following journeys* activity.
>
> 2.4 The benchmark of 20 metres was intended to allow us to distinguish between those who are effectively unable to get around due to physical mobility – for example, people who are only able to move between rooms in their house but go no further – and those who have some, albeit limited, mobility. We thought that these criteria could be applied consistently and would make it easy to differentiate between people who should be receiving the enhanced and standard rate…."

73. Only one question was put out for consultation, set out in Part 3: "What are your views on the *Moving around* activity within the current PIP assessment criteria?". The document continued:

> "3.2 We would like to know what you think about the *Moving around* activity assessment criteria set out in the current Regulations, including the current thresholds of 20 metres and 50 metres. As part of this we would like to know what you think the impact of the current criteria will be and whether you think we need to make any changes to them or assess physical mobility in a different way altogether.
>
> 3.3 We are not consulting on the *Planning and following journey*s activity or any other aspect of the assessment.
>
> 3.4 At present, for the reasons set out in paragraph 2.4 above, our preferred option is to retain the version of the assessment criteria for the *Moving around* activity set out in the current Regulations. However, we are carrying out this consultation in a fully open-minded manner and will carefully examine all the evidence provided. If we consider that we need to make changes to the *Moving around* activity once we have analysed all the representations received, we will do so.
>
> 3.5 In reaching our decision we will consider how any potential changes might affect individuals and the numbers of people likely to receive the benefit. We will also consider the potential impact of any changes on PIP and overall welfare expenditure and whether this is affordable and sustainable. We

> will publish a report summarising the responses received and how we reached our conclusions, once we have completed the consultation."

74. As part of the consultation process, as a result of questions at a meeting on 3 July with the Disability Benefits Consortium, the Secretary of State published further information on projections as at 2015 of how many people would receive 8, 10 or 12 points for the Moving around activity. Those showed that, of a projected caseload of 682,000, 120,000 would receive the enhanced rate and 137,000 the standard rate.

75. On 3 July 2013, a consent order was made in the claim providing that the final hearing of this claim should be vacated, and the claim stayed pending completion of the 2013 Consultation exercise.

76. The consultation period was six weeks, closing on 5 August 2013. On 6 September 2013, a report was sent from the PIP Assessment Policy, Health and Wellbeing Directorate to Ministers. That indicated that 1,145 responses had been received (paragraph 1).

77. The vast majority of the consultees indicated a clear preference for changing the Moving around criteria. The four main themes of respondents in support of change were:

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

ii) the current criteria are excessively tough with negative consequences on the daily lives of individuals with significant physical impairment;

iii) the consequent increased costs of other public services as a result of lost mobility will outweigh the savings achieved through PIP; and

iv) the reliability criteria will not be delivered appropriately or correctly, undermining assessment (paragraph 2).

78. The majority (55%) proposed that the current 20m threshold for qualifying for enhanced rate mobility should be replaced with a 50m threshold, which was the effective threshold for DLA higher rate mobility (paragraphs 16 and 48). Some suggested a distance between 20m and 50m; and some called for a longer distance, such as 100m (paragraph 48). Some suggested more radical proposals, such as a social model approach to disability benefits which would focus more broadly on (e.g.) an individual's ability to access shops etc, rather than looking at blunter proxies for additional cost such as an ability to walk a particular distance, upon which advice was given (in the case of that model, that the sophisticated individual assessment that would be required made the proposal "neither practical not desirable" (paragraphs 81-2)).

79. The core advice to Ministers was set out at paragraphs 5-9:

> "5. It is… necessary to remember the original policy intent behind PIP. To create a benefit:
>
> - that is financially sustainable

> • that is more modern and treats all impairment types equally;
>
> • that allows us to target support on all those with the greatest need; and
>
> • where awards are determined more objectively and consistently.
>
> 6. PIP has been developed with a recognition that to achieve these goals will result in some reprioritisation and therefore losers as well as gainers and without doubt the criteria for assessing physical mobility in PIP are tighter than those in DLA.
>
> 7. While respondents consider that the barriers and costs faced by all people who cannot walk more than 50 metres are significant, we believe that the use of 20 metres allows us to identify those whose physical mobility is most limited. We think it is justified to focus support in this way given the dual policy intent to create a more financially sustainable benefit and at the same time bring additional people into the benefit who did not previously receive support, provided we have fully analysed the potential impact and explored the possibility of mitigating that impact, and provided the method of determining who receives the benefit is fair.
>
> 8. On this basis we consider that the current 20 metres distance and the wider Moving around criteria meet the Government policy intent. Therefore, unless you wish to change this policy intent, we do not consider that you need to change the assessment criteria."

80. A further Equality Analysis was carried out, and attached to the report as Annex F (paragraph 170 and following of the report). This set out the projected 2018 figures of PIP mobility compared with unreformed DLA mobility, as set out above. The report, having noted the impact of the loss of benefit on disabled claimants, said (at paragraph 64):

> "… [T]his was recognised from the outset. In developing the PIP assessment we were aware that the vast majority of recipients of DLA were individuals with genuine health conditions and disabilities and genuine need, and that removing or reducing that benefit may affect their daily lives. However, we believe that these impacts can be justified as being a logical result of distributing limited resources in a different and more sustainable way…".

81. The report also contained a number of examples in the form of case studies, which highlighted the difference between the Second Draft and final assessment criteria. For example, case study 1 ("Harriet") fell within the category of claimant who could

walk over 20m but less than 50m most days. Once she had reached her limit, she used a wheelchair. Under DLA, she would be entitled to higher rate mobility. Under the 20m threshold criterion, she would only be entitled to PIP mobility at standard rate, not enhanced rate. The report confirmed that it is a goal of PIP to ensure that the impact of all impairment types are treated fairly, and it noted that, in relation to the mobility component, "there will be a roughly equal split in the number of people who receive the enhanced rate due to physical and non-physical impairments, recognising that the impact of not being able to get around can be the same, regardless of the cause"; and that, although some physically impaired will be "losers", 178,000 individuals not currently receiving DLA higher rate mobility will receive PIP enhanced rate mobility (paragraph 62).

82. The Equality Analysis is summarised in paragraph 56 of the report, as follows:

> "… [I]n short, the analysis identifies the following impacts on protected groups:
>
> • **The reduction in higher rate mobility caseload is more likely to affect those with primarily physical impairments**. This is as a result of the policy intent to target a finite amount of support at those individuals who face the greatest barriers to mobility, regardless of whether they have a physical or non-physical root cause.
>
> • **The reduction in the higher rate mobility caseload is more likely to affect women** as they are currently more likely to be in receipt of the higher rate. This is believed to be because women are slightly more likely to receive the DLA mobility component as a result of a physical impairment than men.
>
> • **The reduction in the higher rate mobility caseload is more likely to affect older people** as physical health conditions are proportionately more prevalent amongst the older population."

83. The report gave a breakdown as to how it was projected that PIP mobility awards would be broken down as between activities and rates, as follows (paragraph 188, table 11):

Activities Leading to Mobility Award	*Enhanced Rate*	*Standard Rate*
Activity 11 (Planning and following journeys)	278,000	361,000
Activity 12 (Moving around)	238,000	261,000

Both Activities	46,000	0
Combination	39,000	12,000

84. The report emphasised that the Secretary of State should take into account the public sector equality duty in coming to his decision (paragraph 59).

85. Paragraph 93 of the report indicated that the 20m threshold met the Government policy intent; no better means of meeting that intent had been identified; and, unless the Ministers wished to change that policy intent, the advisers saw no need to change the assessment criteria. However, if Ministers were considering changing the policy intent, the report said:

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

86. The recommendation of the report was simply that the Ministers "note this advice in reaching your decisions" (paragraph 12).

87. The Secretary of State published his response to the consultation on 21 October 2013, namely that he had decided not to amend the Moving around descriptor criteria in the 2013 Regulations. Reflecting the advice he had received, he said:

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

> reprioritisation of finite resources and those individuals with a physical health condition or impairment would be more likely to see a reduction in the mobility support they receive relative to those with non-physical impairments requiring support for moving around."

88. The Secretary of State's response incorporated a further Equality Analysis in which he stated as follows:

> "6.6 In developing the new benefit and its assessment criteria, the Department was aware that to achieve the policy objectives of PIP, some individuals who received DLA would see their benefit awards reduced or removed completely. Equally others would see their awards increase and some individuals who were not previously entitled to DLA would now receive PIP. This is an inevitable consequence of re-targeting finite resources and support."

89. The Equality Analysis set out the further information as to the predicted impact of the reforms on those who would otherwise be claiming DLA higher rate mobility as at 2018, namely that but for the reforms 1,030,000 claimants would be entitled to DLA higher rate mobility, whereas 602,000 were forecast to be entitled to PIP enhanced rate mobility. The analysis then went on to provide, for the first time in a published document, a detailed breakdown of how the 602,000 mobility claimants were expected to qualify:

> "6.25... The analysis shows that PIP enhanced rate Mobility awards are more evenly split between individuals with physical impairments as their primary disability and those with mental, intellectual, cognitive and sensory impairments compared to currently under DLA:
>
> [There was then set out, as table 3, table 11 from the advice to Ministers: see paragraph 83 above.]
>
> 6.26 As shown in table 3 above, we expect that a smaller proportion of the Mobility caseload will receive the enhanced rate Mobility component under PIP when compared to DLA. Given that currently those receiving higher rate Mobility tend to receive this because of physical impairments, we can estimate that the reduction in caseload will be more likely to affect those with primarily physical impairments. The Department believes this is an inevitable result of the policy intent set out above but that it can be justified as in the long-term it promotes more equal treatment between individuals with different types of disability compared with DLA, where access to the higher rate of the Mobility component is almost exclusively limited to those with physical impairments."

90. The analysis concluded:

> "6.52 The Government concludes that the impacts identified above are a logical result of achieving the policy intent to target a finite amount of support in a fairer, more consistent and sustainable manner at those individuals who face the greatest barriers to living independent lives."

91. By a further pre-action letter dated 13 November 2013, the Claimant gave notice of his intention to reinstate the proceedings, to pursue his challenge to the lawfulness of the Regulations, and to challenge the October 2013 decision not to amend the assessment criteria or 2013 Regulations in addition to the February 2013 decision to adopt those criteria in the 2013 Regulations.

92. Permission to amend the grounds and to proceed on the new grounds was given by Green J on 3 March 2014 and, on a further additional ground, by me on 7 April 2014.

The Grounds of Challenge

93. Mr Westgate relies on three grounds.

Ground 1: The 20m Threshold Ground: The consultation process was unfair and thus unlawful because consultees never had a proper opportunity to comment upon the 20m walking threshold for PIP enhanced rate mobility.

Ground 2: Insufficient Information: The consultation process was unfair and thus unlawful because consultees were not provided with sufficient information (notably on the impact the proposals would have on the cohort of physically disabled) to enable an intelligent response.

Ground 3: Public Sector Equality Duty: The Secretary of State failed to comply with his public sector equality duty under section 149 of the Equality Act 2010.

Consultation: The General Law

94. These grounds very much focus on the consultation process. In respect of the general law in relation to consultation, the following propositions are uncontroversial.

i) Whether required by statute or (as in this case) voluntary, if performed, consultation must be carried out properly (R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at paragraph 108).

ii) Key features of a proper consultation process were set out in R v Brent London Borough Council ex parte Gunning (1985) 84 LGR 168 at page 189 per Hodgson J (as approved by the Court of Appeal in Coughlan at paragraph 108), namely:

(a) consultation is undertaken at a time when the relevant proposal is still at a formative stage;

(b) adequate information is provided to consultees to enable them properly to respond to the consultation exercise;

(c) consultees are afforded adequate time in which to respond; and

(d) the decision-maker gives conscientious consideration to consultees' responses.

iii) However, fairness is the touchstone: for consultation to be lawful, it must be fair. That is the test. Although consideration of the particular facets of fairness identified in Coughlan may assist, whether the consultation process is fair is a fact-sensitive question that depends upon all the circumstances of the particular case looked at as a whole, and without drawing artificial distinctions between particular stages of the whole process (R (Medway Council) v Secretary of State for Transport [2002] EWHC 2516 (Admin) at [28] per Maurice Kay J (as he then was), R (J L and A T Baird) v Environment Agency [2011] EWHC 939 (Admin) at [52] per Sullivan LJ, and R (Royal Brompton and Harefield Hospital NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472 at [9] per Arden LJ; see also R (Osborn) v Parole Board [2013] UKSC 61 at [64]-[71] per Lord Reed JSC).

iv) It is a matter for the court to decide whether a fair procedure was followed: its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required (Osborn at [65] per Lord Reed).

v) If it is alleged that a consultation process is unfair, it is for the claimant to show that the unfairness was such as to render the consultation process unlawful. Especially with the benefit of hindsight, it may well be possible to identify how a consultation process might have been improved; but, even if it was less than ideal, it will become unlawful only if what has occurred makes it unfair as a matter of law. That is a substantial hurdle: in Baird, Sullivan LJ said that "in reality a conclusion that a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong (Baird at [51]; see also Royal Brompton at [13] per Arden LJ).

vi) The consultation documents must be intelligibly clear to the general body of interested persons, and present the issues fairly and in a way that facilitates an intelligent and effective response (R (Breckland District Council) v The Boundary Commission [2009] EWCA Civ 239 at [46] per Sir Anthony May P, and Royal Brompton at [8]-[14] per Arden LJ).

vii) To be fair and proper, consultation must be performed by the decision-maker with an open mind. However, an open mind is not the same thing as an empty mind (R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2011] EWHC 2986 (Admin) at [16] per Owen J, adopting a phrase used in the course of argument by Neil Garnham QC). Therefore, whilst a decision-maker cannot have a predetermined option, such that consultation is a sham, he may have a preferred option; but he must disclose that to potential consultees "so as to better focus their responses" (R (Sardar) v Watford Borough Council [2006] EWCA 1590 (Admin) at [29] per Wilkie J). A consultation may properly be focused upon a limited number of options or even a single proposal.

viii) The process must be considered as a whole; and, therefore, where a decision-maker is in fact prepared to accept and consider further representations after

the close of the formal consultation, then those subsequent events can be taken into account in assessing whether the process was fair; although it may be appropriate to give those subsequent events less weight, because (e.g.) the opportunity to make representations was not given such widespread publicity as was given during the formal process (Baird at [52]).

ix) In cases where there has been a consultation exercise, and it is decided to have a further consultation, the fairness of that further exercise must be considered in the context of the earlier and fuller consultation process. In such cases, it may not be unfair to any interested party for the further consultation exercise to be more limited, whether as to the identity of consultees, or the content and duration of the consultation (R (Milton Keynes Council) v Secretary of State for Communities and Local Government [2011] EWCA Civ 1575, especially at [36]-[38])

x) Proper consultation is an important part of the decision-making process. The purposes of requiring fairness in procedural matters such as consultation include to ensure high standards of decision-making by public bodies, to enable parties interested in the subject matter to identify and draw to the attention of the decision-maker relevant factors which he may have overlooked to enable responses that will best facilitate a sound decision, and to avoid the sense of injustice which a person affected by a decision may otherwise feel if not given a proper opportunity to have their views known and taken into account (Osborn at [67]-[70]) per Lord Reed, and Baird at [41] per Sullivan LJ). However, the obligations imposed upon a decision-maker in the course of consultation must not be unreasonably onerous, otherwise effective decision-making might be impaired and decision-makers might become reluctant to engage in voluntary consultation where (as in this case) there is no statutory duty to consult.

Ground 1: The 20m Threshold Ground

95. In this part of the judgment, unless otherwise indicated, for ease of exposition:

i) I shall assume that, where a benefit claimant is assessed as being able to carry out an activity, he or she is assessed as doing that activity safely, to an acceptable standard, repeatedly and within a reasonable time period (see paragraph 67 above).

ii) Although a claimant might obtain sufficient points for a particular rate of PIP mobility by aggregating points obtained from the Moving around activity and the Planning and following journeys activity, I shall assume that a claimant has no points for the latter and is entirely dependent upon the former.

96. Mr Westgate submitted that the 20m walking threshold for PIP enhanced rate mobility was a fundamental element in the proposal eventually adopted by the Secretary of State, transcribed into the 2013 Regulations. However, consultees never had a proper opportunity to comment upon it. It did not feature in the 2012 consultation at all. By the time of the 2013 consultation, matters had ceased to be at a formative stage: by then the other qualifying criteria for PIP mobility (including, notably, the criteria for the Planning and following journeys activity) had been fixed, and the Secretary of

State had ruled out any substantial relaxation in the Moving around criteria because finite resources had already been targeted elsewhere (notably at those who fall within the Planning and following journeys activity). The Secretary of State therefore cannot rely on the 2013 consultation to cure flaws in the 2012 consultation. In 2013, fairness required him, at least, to re-consult on both mobility activities; but he deliberately and expressly restricted the 2013 consultation to the Moving around activity. The consultation was thus unfair, and unlawful.

97. Because, in assessing the fairness of consultation, the Court is required to take a holistic approach, assessing whether the consultation exercise viewed in its totality was fair, the proper focus of this ground should be on the Secretary of State's decision in October 2013 to retain the 20m threshold in the 2013 Regulations criteria, and whether the consultation process as a whole (including the 2013 Consultation) leading to that decision was fair and lawful.

98. However, in addition to contending that the whole process through to October 2013 was fair, the 2013 Consultation curing any earlier defects, Mr Sheldon for the Secretary of State submitted that the 2013 Consultation was unnecessary as a matter of law, because the 2012 Consultation (whether including or excluding the further representations made and considered between the close of the formal consultation and the making of the 2013 Regulations) was in fact fair, and the introduction of the 20m threshold in the final draft criteria was not a fundamental change to the proposals that required renewed consultation. The 2013 Consultation consequently had nothing to "cure".

99. Therefore, before looking at the whole process through to October 2013, I need to consider those submissions which focus on the position as at December 2012 (after the close of the formal consultation) and February 2013 (when the Regulations were adopted).

100. Mr Sheldon accepted that, at the time of the 2012 Consultation through to December 2012, the Secretary of State had no intention of including as a threshold condition for PIP enhanced rate mobility that the claimant could walk less than 20m, or any distance shorter than 50m. It was a proposal that was not in the Secretary of State's mind. He did not consult on it. It emerged from the consultation process. Referring to R v London Borough of Islington ex parte East [1996] ELR 74 and page 88 per Keene J, R (Smith) v East Kent Hospital NHS Trust [2002] EWHC 2640 at [45] per Silber J and R (Elphinstone) v Westminster City Council [2008] EWHC 1287 (Admin) at [62] per Kenneth Parker QC sitting as a Deputy High Court Judge (as he then was), Mr Sheldon submitted that there is no duty to consult further on an amended proposal which has emerged from the consultation process, unless there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt, such that it would be conspicuously unfair for the decision-maker to proceed without giving consultees a further opportunity to make representations about the proposal as changed. In this case, he said, there was no such radical change.

101. Mr Sheldon submitted that, in contending that there was a fundamental change, the Claimant and Mr Westgate had misconstrued the reference to 50m in the Second Draft criteria. Those criteria are set out above (paragraph 41). It is common ground that it is clear from them that, if a claimant can walk over 50m unaided or using a

manual aid/appliance, he will fall into descriptor A or B, and not be entitled to the mobility component at either rate. If the claimant cannot walk 50m, then the Claimant had understood descriptors D, E and F to have a 50m threshold. Therefore, for example, where descriptor D said "Cannot move up to 50 metres without using an aid or appliance, other than a wheelchair or a motorised device", the Claimant read it as "Cannot walk 50 metres without using an aid or appliance, other than a wheelchair or a motorised device" or "Can only walk as far as 50m by using an aid or appliance, other than a wheelchair or a motorised device". Descriptor G included everyone who could not walk, including those who could not walk 50m. Thus, all claimants who could not walk 50m without resort to a wheelchair would be entitled to enhanced rate mobility.

102. However, Mr Sheldon submitted, that was not what was intended or said. The policy intent was that all those who could walk less than 50m would get some rate of mobility component, with those with the greatest barriers getting the enhanced rate and the remainder the standard rate. The former were identified by the need for a wheelchair to enable them to move. This was effected in the descriptors. Descriptor G applied only if a claimant could not move at all, subject to an ability to move what he described as a de minimis amount of movement, unexpressed but, said Mr Sheldon, intended to be around 10m. Descriptor D meant, "Can walk a distance more than that de minimis distance but short of 50m with an aid or appliance". Similarly, descriptor E meant, "Can move a distance short of 50m by use of a self-propelled wheelchair"; and descriptor F meant, "Can move a distance short of 50m by use of a motorised wheelchair". Thus, a claimant would only be entitled to enhanced rate mobility if he could not move at all, or could only move as far as the de minimis distance, before having to resort to a wheelchair.

103. In support of that construction of the criteria, Mr Sheldon relied upon the following:

i) The phrase consistently used was "… move *up to* 50m" (emphasis added). If it had been intended to set a 50m benchmark, then the words "up to" would not have been used as they would have been inapposite. The natural meaning of "move up to 50m" is that the person can move a distance which does not exceed 50m.

ii) That "move up to 50m" was not being used as synonymous with "move 50m" is apparent from descriptors C-F, when read alongside descriptor B, "Can move at least 50 metres but not more than 200 metres…". In context, descriptors C-F were addressing those who could move more than the de minimis distance but less than 50m.

iii) On the Claimant's interpretation, descriptor D would be entirely redundant, duplicating cases covered by descriptor B, i.e. persons who could move a distance of 50m using an aid or appliance other than a wheelchair.

iv) The explanatory notes (set out at paragraph 44 above) assist. 50m is relevant because, under the Second Draft criteria, claimants who could not move 50m would score at least 8 points, and thus be entitled to at least PIP standard rate mobility. A claimant would not be entitled to higher rate mobility unless he could not move at all, or could only move the de minimis distance. Paragraph 3.7 of the 2012 Consultation document referred to "individuals who use aids

and appliances to move very short distances can receive the standard rate, reflecting the extra costs incurred; while those who need [a] wheelchair to do so will receive the enhanced rate, reflecting the additional extra costs, barriers and overall level of need which often accompany wheelchair use".

v) Case study 6, "Richard", was someone who "can walk for short distances but the pain in his knees stops him after 20-30 steps…. He cannot use sticks because of his hand problems" (see paragraph 48 above). Descriptor C was identified as likely, i.e. "Can move up to 50m unaided but no further". Richard could only walk, perhaps, 20m, and certainly not 50m. He would be entitled to standard rate. If the Claimant's construction were right, he would fall in descriptor F or G, and be entitled to enhanced rate.

vi) It was reasonably obvious that the number of physically disabled people who would be entitled to PIP enhanced rate mobility would be substantially reduced from the number claiming DLA higher rate mobility (see paragraphs 126 and following below). This could only have been so if the 50m DLA threshold were abandoned.

104. On the basis of Dr Gunnyeon's evidence (e.g. 6 June 2013 Statement, paragraph 52) and Mr Sheldon's explanation, so far as the Second Draft criteria are concerned, I accept that the Secretary of State's intention was as described above; and that the criteria were intended to put that intention into effect. However, what is important here is not an exegetical exercise as to what the words used in the criteria mean, but rather how an interested party might reasonably have interpreted the Secretary of State's proposal.

105. It is clear from the evidence I have seen that the vast majority of respondent consultees (mainly people with disabilities and organisations interested in disability issues) construed the draft criteria as imposing a 50m threshold on enhanced rate mobility, i.e. if an individual could not walk 50m without a wheelchair then he would be entitled to the enhanced rate. In my view, that understanding was at least arguably reasonable, for the following reasons.

i) I cannot accept Mr Sheldon's submission that no one reading the Second Draft criteria could reasonably have understood them to mean that anyone whose walking distance was limited to 50m would be entitled to enhanced rate of PIP.

ii) The use of a double negative and the phrase "up to" 50m ("Cannot move up to 50m without…") meant that descriptors D-F were very difficult to construe. There was certainly no single unambiguous meaning. Mr Sheldon did not suggest otherwise. Indeed, the Secretary of State accepts that the Second Draft criteria for the Moving around activity were "very unclear" (Response to pre-action protocol letter dated 13 March 2013, paragraph 15; see also paragraphs 40, 44, 45 and 48, all of which accept the lack of clarity). In evidence before the Delegated Legislation Committee on 5 February 2013, the Minister for Disabled people accepted that using terms such as "up to" certain distances "meant it was not clear which descriptor applied to people". The lack of clarity was one reason why the further consultation in 2013 was performed. In

my view, the formula adopted in descriptors D-F was unfortunately mind-bogglingly opaque.

iii) Those interested in the 2012 Consultation – disabled people and organisations interested in disability – approached the exercise as one of reform of DLA, i.e. from a starting point of the concepts inherent in DLA, including the effective 50m walking threshold; i.e. the concept that "virtually unable to walk" included those who could not walk more than 50m unaided or with only manual aids/appliances. Unless the contrary was made clear, it was understandable and reasonable for them to assume that references to 50m were to a threshold, in the terms of the threshold there had been in the past under DLA.

iv) The Initial Draft criteria (which persistently used the phrase, "Can move up to 50m…") strongly suggested that it was the intention to retain that threshold. There was nothing to suggest that that intention changed when the wording changed to the more oblique wording of the Second Draft.

v) From the DLA starting point, whilst I accept that this would lead to some possible overlap or inconsistency between descriptors, descriptor C ("Can move up to 50m unaided and no further") might reasonably lead readers to construe descriptors D-F as describing people who could move only some distance less than 50m. That is reinforced by the use of the phrase "and no further" in descriptor C, which appears to be inconsistent with the exclusion of someone who can walk (say) 40m unaided.

vi) The notes to the Second Draft do not clarify the point, and certainly do not make the true intention clear. Whilst some, carefully considered, might be seen as inconsistent with the Claimant's construction, the note that "50 metres is considered to be the distance that an individual is required to be able to walk in order to achieve a basic level of independence such as the ability to get from a car park to the supermarket" (quoted at paragraph 44 above) appears to support the 50m threshold, given that it might be assumed that the benefit might be intended to give a claimant, at least, a "basic level of independence". Furthermore, the notes in the Initial Draft to descriptor G – a descriptor which did not substantively change – also appear to confirm that threshold: they state that "Cannot either (i) move around at all or (ii) transfer from one seated position to another seated position located next to one another unaided"… "identifies individuals with severe disability such as quadriplegia or severe cerebral palsy *where an individual cannot move 50 metres* or cannot transfer unaided – for example, someone who is unable to get from a chair into a wheelchair by themselves" (emphasis added).

vii) The case studies too are, at best, ambivalent. Whilst I understand why the Secretary of State put case study 6 ("Richard") in descriptor C, on the basis of his interpretation of the descriptors, it is difficult to see why case study 3 ("Victoria"), who "spends most of her time in an electric wheelchair because she can only walk about 10-15 steps", was put in descriptor F and not the same descriptor as Richard.

viii) Given that most of the respondents to the 2012 Consultation were disabled people or organisations interested in disability issues – in respect of the relevant issues, an informed and sophisticated readership – it is telling that the evidence is that virtually all construed the 50m as a benchmark. For example, Helen Dolphin, the Director of Policy and Campaigns at Disabled Motoring UK ("DMUK"), said (28 March 2013 Statement, paragraphs 6 and 7) :

> "6. When responding to the [2012 Consultation] on the proposal to implement [PIP], DMUK had understood that those who could walk 50 metres would not qualify for enhanced rate, but those who couldn't walk 50 metres, without using a wheelchair, would. This was made clear in our consultation response…
>
> 7. We were therefore shocked to learn that the benchmark had been changed to just 20 metres…"

I appreciate that that is not easy to reconcile with descriptor D which, on the Claimant's construction as I understand it, would apply to those individuals who could walk 50m with an appliance or manual aid, but, at 10 points, would result in standard rate mobility only. However, that was typical, both in its understanding of the relevance of 50m, and in the surprise and shock at the 20m threshold when it was introduced in the final criteria (see Karen Ashton 16 June 2014 Statement, paragraphs 9-19). Although some respondents – in fact, very few, but including We are Spartacus – saw ambiguity in the criteria (as Mr Westgate put it, "the high point of understanding" by interested parties), none appears to have considered that anything was intended but retention of the 50m threshold.

106. Whilst I fully accept that the criteria were a good faith attempt to set out descriptors with the intent to which I have referred, unfortunately the Second Draft criteria were, at best, convoluted, inherently unclear, ambiguous and confusing. No construction of them allows for full coherence. In all the circumstances – but particularly in the light of the historic 50m threshold in DLA and the use of 50m in these criteria – respondents wrongly but, in my view, understandably and reasonably considered that they included a 50m threshold, similar to the one that in practice applied to DLA higher rate mobility, such that if a claimant could walk less than 50m, unaided or with manual aids or appliances only, then that claimant would be entitled to PIP enhanced rate.

107. Mr Sheldon submitted further that the introduction of the 20m threshold emerged from the consultation process, and was not such a radical change to the proposals upon which there had been consultation to require any further consultation. However, that submission was based on the proposition that the 2012 Consultation was upon a proposal that, subject to the de minimis ability to walk to which I have referred, a claimant would only be entitled to enhanced rate mobility if he required a wheelchair to move; being entitled to only standard rate if he could walk, with or without manual aids and appliances, no more than 50m. The final criteria therefore (he said) did no more than replace the "wheelchair requirement" with a 20m walking threshold for entitlement to enhanced rate for those who cannot walk more than 50m. However, due to the lack of clarity in the 2012 Consultation as I have found it to have been,

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

108. Mr Sheldon submitted that, even if the 2012 Consultation Process as at December 2012, looked at discretely, might have been inadequate, the draft 2013 Regulations were subject to the affirmative resolution process in Parliament; and, therefore, between the close of the formal consultation on 13 December 2012 and the affirmative resolution on 25 February 2013, the Secretary of State received and considered further representations, and the criteria were the subject of debate by the Delegated Legislation Committee in the House of Commons and debate in the House of Lords, at which concerns about the mobility criteria were addressed. He particularly relied on the following (Amended Grounds, paragraph 92; and Dr Gunnyeon's 6 June 2013 Statement, paragraphs 66-9):

i) On 17 December 2012, the Minister for Disabled People and Minister for Welfare Reform hosted a seminar with Peers where they explained the changes that had been made in the final draft of the assessment criteria. At this meeting, Peers expressed their concern about the Moving around activity, specifically the inclusion of the 20m threshold. A number of Liberal Democrat MPs also raised the matter with the Minister for Pensions.

ii) The Secretary of State received a large volume of correspondence in the period following the publication of the final assessment criteria which set out objections to the introduction of the 20m criterion, and the reasons for those objections.

iii) In January 2013, We are Spartacus published a document entitled "Emergency Stop" which, amongst other things, set out their opposition to the introduction of the 20m criterion, pointing out, amongst other concerns, their belief that it might prevent individuals with severe walking difficulties from receiving the enhanced rate of PIP. That was one of many representations made by interested parties in this period.

iv) On 21 January 2013, the Minister for Disabled People appeared before the Work and Pensions Select Committee.

v) On 31 January 2013, Lord Freud and the Minister for Disabled People met with Peers in advance of the Regulations debate in the Lords. At the meeting, there was considerable discussion on the mobility criteria and an intended change to the Regulations was announced by Lord Freud (see paragraph 67 above).

vi) The Regulations were debated in the Commons by the Delegated Legislation Committee on 5 February 2013.

vii) On 13 February 2013, the PIP Regulations were debated in the House of Lords. There was a lengthy debate, much of which centred on the mobility criteria.

109. Looking at the process as a whole, even if, contrary to his primary submission, the formal 2012 Consultation was inadequate and the final criteria represented a fundamental change to the proposal, Mr Sheldon submitted that there was an adequate opportunity for those interested to make further representations to the Secretary of State after that formal process had closed, the opportunity was understood and taken up by many, and those representations were considered by the Secretary of State (including in the context of Parliamentary debate) before the 2013 Regulations were adopted on 13 February 2013. Therefore, whilst no doubt the process could have been improved, he submitted that the overall consultation process was not unfair so as to be unlawful even before the additional consultation took place in 2013.

110. Those submissions had power. However, as Sullivan LJ indicated in Baird (see paragraph 94(viii) above), the weight to be given to post-formal consultation representations as part of the consultation process may be limited because interested parties may have felt inhibited from making such submissions, especially where, as in this case, the Secretary of State (i) indicated that he intended to consult with disabled people and their representatives, and considered such consultation particularly important and valuable, and (ii) positively discouraged further representations by saying that the activity descriptors were "final" and no further consultation would take place (see paragraph 61 above).

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

112. However, as I have indicated, even assuming the process to February 2013 was not fair, that is not the vital issue in respect of this ground. The Secretary of State *did* perform the 2013 Consultation, and thus the determinative question is whether, in my judgment, the process looked at as a whole, and including that consultation, was fair.

113. Mr Westgate's submissions on this issue are set out succinctly in paragraphs 83-6 of his skeleton argument, as follows:

> "The [Secretary of State] cannot rely on the 2013 consultation exercise as having remedied the defects in the original 2012 Consultation, because by the time the 2013 Consultation had begun the [2013] Regulations were no longer at the formative stage.
>
> The [Secretary of State] objects that this submission is tantamount to alleging that the [2013] Consultation was a sham. That is not the case and there is a clear distinction between the obligation to consult at a formative stage and an allegation that the exercise is a sham. The former duty is imposed as an aspect of fairness so that persons entitled to be consulted may make

> representations when they have a realistic opportunity of affecting the outcome. The decision-maker may genuinely intend to keep an open mind and be prepared to change if a strong case is made yet the process may still be unfair if the effect of the previous decisions is to impose what is, in practice, an insurmountable hurdle, or where the dice are unfairly loaded…
>
> …
>
> 86. … [B]y the time the 2013 Consultation closed and in the circumstances the decisions that had already been made precluded any real possibility that the Moving around criteria would be changed to address the concerns raised in the consultation."

114. In particular, he submits that, by the time of the 2013 Consultation limited to the Moving around criteria, the Secretary of State had closed off consideration of one of the principal ways that would have been open to him to accommodate changes to the 20m benchmark, namely an adjustment to criteria in other activities notably Planning and following a journey.

115. The relevant evidence in relation to this issue is found in the statement of Dr James Bolton dated 16 May 2014. Dr Bolton is the Deputy Chief Medical Adviser and Deputy Director of Health and Wellbeing/Health Assessments at the Department for Work and Pensions, a post he has held since 2008. I have already set out the advice to the Ministers following the 2013 Consultation (see paragraph 76 and following above). Dr Bolton says (Statement, paragraphs 54-56):

> "54. After careful consideration, and having due regard to the obligations of the Public Sector Equality Duty, noting the impact of the current PIP mobility criteria on the groups with protected characteristics under the Public Sector Equality Duty; as well as the Human Rights Act and the UN Convention on the Rights of the Disabled People, the Minister decided not to make changes to the assessment criteria, including no changes to the mobility criteria.
>
> 55. The Minister expressly considered changes to the assessment other than changes to the Moving around activity, although these were the main focus of any considerations. These changes could have been either direct changes to other aspects of the assessment or as a knock-on effect of changes to the mobility criteria; for example, making changes to the points threshold.
>
> 56. The Minister was satisfied that the current criteria helped to meet the policy objective of targeting funds at those with the greatest needs, and after considering the views and evidence provided by the consultees, was not persuaded that the policy objective should be changed or met in a different way. Had the

> Minister wished to make changes to the Moving around activity that increased cost, we could have amended the wider PIP criteria to compensate, reprioritised from elsewhere in DWP, or sought additional funding from HMT."

In respect of possible changes as a result of the 2013 Consultation, Dr Bolton said this (paragraphs 21-24):

> "21. It was not possible ahead of the consultation to determine precisely how changes would be funded and implemented as there could be many permutations that the Minister would wish to consider. If the Minister had wanted to make changes to the Moving around activity that increased cost, we could have amended the wider PIP criteria to compensate, reprioritised from elsewhere in DWP, or sought additional funding from Her Majesty's Treasury…
>
> 22. It was not the case, as I understand has been suggested by the Claimant in this case, that the amount of resources required to fund awards became 'fixed' when the main PIP Regulations were made. Throughout its development, the criteria for the PIP assessment were not developed to achieve fixed savings but to meet the policy intent of targeting support on those with the greatest needs.
>
> 23. In advance of agreeing to further consultation, Ministers decided and made it clear that they were willing to accept a change in AME savings expected from the introduction of PIP in order to amend the 'Moving around' activity if it was appropriate to make changes.
>
> 24. The Department also gave careful consideration to the practical implications of making changes to the criteria before the consultation could be announced. For example, there was contingency planning for a process to backdate benefit payments to PIP claimants if changes were made to the criteria which resulted in individuals being better off under the amended scheme. "

Mr Westgate does not suggest that there are any reasons why I should not accept Dr Bolton's evidence; and I do accept it.

116. Mr Westgate concedes that, in the face of this evidence, he could not submit that, at the time of the 2013 Consultation, the Secretary of State had a predetermined option or closed his mind. Nevertheless, he submitted that, as the 2013 Regulations were in force by the time the consultation started and the Secretary of State did not consult on anything other than the 20m threshold criterion for Moving around, decisions had already been made that precluded any real possibility of that criterion being changed to address the concerns raised in the consultation.

117. In making that submission, he relied upon two authorities. R (Medway Council) v Secretary of State for Transport [2002] EWHC 2516 (Admin) concerned consultation on airports in the South East of England, which included proposals for expanding Heathrow, Stansted and Luton Airports, and constructing a new airport in North Kent, but no option for expanding Gatwick. As a policy matter, Gatwick had been excluded. Those who opposed expansion elsewhere wished to promote Gatwick as an alternative. Maurice Kay J (as he then was) found, as a fact, that the consultation was procedurally unfair because the consultation respondents had lost "their only real opportunity to present their case on Gatwick", as the Government policy "realistically, will present them with an insurmountable obstacle", it being "very difficult if not impossible" to persuade an Inspector or the Government itself to go against such a weighty policy (see [29]-[32]). In R (Montpeliers and Trevors Association) v City of Westminster [2005] EWHC 16 (Admin) at [25], Munby J (as he then was) found a consultation process unfair because "one of the options – and an option which on any view was of central significance – had already been excluded from further consideration". These cases show that, although a decision-maker may formulate options on which to consult and restrict the consultation to that option or those options, in certain circumstances it may be unfair and unlawful to exclude an option from a consultation exercise. They make clear that a decision-maker, as long as he keeps an open mind, might have a very much preferred option: what he cannot do is, for practical purposes, exclude a legitimate option.

118. However, the insuperable obstacle for Mr Westgate is the evidence or Dr Bolton to which I have referred: in my judgment, this evidence is fatal to the Claimant's case on this ground.

119. It is clear from this evidence that, as Mr Westgate concedes, the Secretary of State throughout had an open mind. However, Mr Westgate submitted that, because the available money for PIP was fixed at a cost-saving level, previous decisions (including the making of the 2013 Regulations in February 2013) effectively precluded as real possibilities changing the Moving around criteria at additional cost by precluding changing the criteria for the Planning and following a journey activity to reduce cost there. But, that is not the evidence. It is clear that changing the Moving around criteria was a real possibility: as Mr Westgate expressly (and, again, properly) conceded, the evidence was that the Department considered procedures and timetables to adopt if the Secretary of State decided to amend the criteria in 2013 Regulations. The Secretary of State had not closed off consideration of adjusting the criteria for other activities (including those for Planning and following a journey): Dr Bolton makes clear that, had the Secretary of State decided to make changes to the Moving around criteria with increased costs, then that could have been achieved in a variety of ways, including amending the criteria for other activities. That would or may have required further consultation with those interested in those other activities: but fair consultation can be performed step-wise in an appropriate case. The Secretary of State did not act unfairly merely because he did not re-consult on both of the PIP mobility activities at the same time. As Mr Sheldon submitted, because a proposal to change other criteria would or may have required further consultation does not mean that it had been closed off.

120. As a related submission, Mr Westgate suggested that changes to the Moving around criteria would only be made by a "trade-off" against the Planning and following a

journey criteria, i.e. the additional costs of one being set off by a reduction in cost of the other. However, that was not the case. Although the available funds for PIP mobility claimants were finite, they were not absolutely fixed at a particular level. Dr Bolton made clear that PIP was not required to make fixed savings compared with DLA; and further funds could have been sought from elsewhere in the DWP budget, or from HM Treasury. Indeed, as I have described (see paragraph 78 above), some consultees had suggested more radical proposals such as a social model. Annex D to the report to Ministers summarised all of the suggestions made by consultation respondents, and the evidence of Dr Bolton is that these were considered by the Secretary of State before he decided to maintain the criteria in the 2013 regulations.

121. Mr Westgate submitted that, in some way, a change in the Moving around criteria was not realistically possible, because it would have been contrary to the policy of reallocating resources from physically disabled people to the non-physically disabled. However, the policy pursued by the Secretary of State was to ensure better equality between those with physical impairments and those with mental, cognitive and intellectual impairments. That was a policy reprioritisation. Given the need to make the benefit sustainable for the future, it probably (indeed, almost certainly) meant that some non-physically disabled would benefit from the proposed reform, whilst some physically disabled would lose out. As paragraph 6.26 of the 2013 Equality Analysis said, it was "an inevitable result" of the policy intent to equalise physically and non-physically disabled people in the context of assistance with mobility, that "the reduction in caseload is more likely to affect those with primarily physical impairments". However, none of that in itself meant that the Secretary of State could not relax the Moving around criteria as to the 20m threshold, if he considered it appropriate to do so. Any additional money could be sought from either a change in the Planning and following a journey criteria, or elsewhere, as I have described. In any event, as I have indicated, the advice to Ministers following the 2013 Consultation even considered the possibility of a change in that underlying policy.

122. That deals with the body of interested parties in general. So far as the Claimant personally is concerned, it was made clear to him that:

> "… when assessing the public sector equality impacts of the proposal, the Secretary of State will consider alternatives and mitigating measures.
>
> Consultees are not prevented from making representations that assist the Secretary of State in this consideration and we welcome all comments on these issues." (Letter Treasury Solicitor to the Claimant's Solicitors, 4 July 2013)

123. In respect of this ground, Mr Westgate's submissions founder on the evidence. The process was of course not perfect. It is unfortunate that the terms of the 2012 proposals were not clearer. It is unfortunate that the 2013 Consultation did not take place prior to the adoption of the Moving around criteria in the 2013 Regulations. However, the test is not whether the consultation process could have been improved; it is whether it was unfair. It seems to me that there is no sensible evidential basis upon which I could find that the consultation process, looked at as a whole, was inadequate or unfair so as to be unlawful. In any event, in my firm judgment, it was clearly not unfair. The Claimant, and other interested parties, had a proper

opportunity to make their comments on the 20m criterion in the 2013 Consultation, which the Secretary of State considered with an open mind and without excluding any option as a real possibility. The report to Ministers following the 2013 Consultation was conspicuously full and fair. Those advising were entitled to make a recommendation to the Secretary of State, as they did, to maintain the Moving around criterion as set out in the 2013 Regulations. And the Secretary of State was entitled to come to the same view, having considered all of the options, the evidence and the consultation responses, with an open mind.

124. For those reasons, Ground 1 fails.

Ground 2: Insufficient Information

125. As his second ground, Mr Westgate submitted that the consultation process was unfair because consultees were not provided with sufficient information to enable an intelligent response. In particular, it was always the Secretary of State's intention to re-allocate resources from those with physical impairments to those with non-physical impairments, such that it was the inevitable result that the Moving around criteria would be substantially more restrictive than the criteria for claiming DLA higher rate mobility; and that, as a result, substantial numbers of properly assessed DLA claimants would lose their entitlement as a "trade-off" against benefits that would enure to non-physically disabled people. This was never made sufficiently clear in either the 2012 or the 2013 consultation.

126. I have dealt with some of the analytical fallacies of the "trade-off" point, as I see them, above (see paragraph 120). But Mr Sheldon contended that this ground too in any event effectively foundered on the evidence. He submitted that, from the 2012 Consultation materials, the following were clear:

    i) So far as assistance with mobility was concerned, the policy intention was to treat those with physical impairments and those with non-physical impairments equally.

    ii) DLA had led to rising numbers of claimants and rising costs, and that PIP would need to focus resources on those with greatest need.

    iii) Under PIP, fewer people would be entitled to enhanced rate mobility than would receive DLA higher rate mobility. In the 2012 Consultation paper, the impact tables showed that 760,000 were predicted to get enhanced rate mobility compared with 1,040,000 predicted to receive DLA higher rate mobility, i.e. 280,000 fewer (see paragraph 50 above).

127. I agree; and, even in the light of my comments concerning the 50m threshold above, I agree with Mr Sheldon's further submission that, taking those three matters together, it was reasonably obvious even in 2012 that the smaller number of PIP enhanced rate qualifying claimants would include many who had non-physical impairments.

128. Indeed, Mr Westgate accepted that that inference could be drawn; but he nevertheless submitted that it did not follow that consultees ought to have realised that this necessarily entailed a significant switch in resources from physically disabled people to those who are non-physically disabled. First, consultees reasonably took it that the

50m benchmark condition was to remain: that is in effect a re-run of Ground 1. Second, there was no indication that the percentage change that was projected would not be accounted for by more rigorous assessment procedures. Mr Westgate relied upon material which, he said, suggested that most if not all of the physically disabled "losers" of the higher/enhanced rate would lose their entitlement as a result of better or timely assessment of their needs, rather than as a result of changed criteria. For example, paragraph 26 of the 2012 Equality Impact Assessment (quoted at paragraph 54 above), said:

> "However, as the benefit becomes better targeted on those with the greatest needs it is likely that some disabled people, who may have self-assessed as needing support, but who have lesser barriers to participation, will receive reduced support."

However, that does not suggest that the criteria would not be tighter for the physically disabled: the "may" suggests only that incorrect self-assessment might be a contributor, and "lesser barriers to participation" is clearly a reference to barriers less than those encountered by others, particularly the non-physically disabled. In my view, none of the material suggested that there would not be a substantial fall in the number of physically disabled claimants who would qualify for PIP enhanced rate mobility compared with those who received DLA higher rate mobility.

129. In any event, the focus must again properly be on the 2013 Consultation process. The 2013 Consultation documents indicated that, by 2018, there would be a decrease in higher/enhanced rate mobility qualified claimants from 1,030,000 to 602,000 – a reduction of 428,000, almost all physically disabled – and, of the 602,000, only 289,000 would receive a score of 12 points or more from the Moving around criteria. As the number of non-physically qualified claimants was to rise significantly (we now know by about 200,000: see Baroness Hollis of Heigham: House of Lords Debate; 13 February 2013; Col 742), the number of physically disabled claimants to lose the higher/enhanced rate was clearly well in excess of 400,000 (we now know, about 600,000). Although they did not feature in the 2013 Consultation documents themselves, those figures were available at the time of that consultation. Furthermore, as I have indicated (paragraph 74 above), as part of the 2013 Consultation process, the Secretary of State published data on 2015 projections which showed, of a projected caseload of 682,000, only 120,000 would receive enhanced rate and 137,000 standard rate.

130. It is of course not necessary for a decision-maker to give precise figures in respect of the effects of a proposal – it is only necessary for him to give such information as the general body of interested persons requires to give an informed response. In my view, the information given – particularly in 2013 – was clearly sufficient to enable consultees to understand, in general but sufficient terms, the relative numbers of those projected to qualify for PIP enhanced rate mobility under the two relevant activities, Moving around and Planning and following a journey.

131. Dr Bolton indicates that "a number of [2013] consultees [including the National Association of Welfare Rights Advisors] recognised that around 600,000 people who currently qualify for the highest rate of DLA mobility would not qualify for the enhanced rate of PIP mobility"; whilst "many others recognised that the criteria would result in a large reduction in support for specifically people with physical disabilities,

but did not refer to the figures in their responses" (6 June 2013 Statement, paragraph 41). In my view, that is a reflection of the fact that, certainly by the 2013 Consultation, it was in fact well-recognised that the criteria adopted in the 2013 Regulations would result in a very large number/proportion of those entitled to higher rate mobility and who were physically disabled not being entitled to PIP enhanced rate mobility.

132. Indeed, relying upon the figures in the 2013 information to which I have just referred, in representations in the 2013 Consultation solicitors on behalf of the Claimant made the very point that:

> "The impact will be on those with this level of physical disability and will clearly be so great that the Government needs to consider whether some alternative way of making the financial savings that it seeks can be found…".

133. Mr Sheldon submitted, with force, that any failure of the consultation in this regard was immaterial, because, even if the information concerning the impact on the cohort of physically disabled people was inadequate, that deficiency was immaterial: the Claimant has not identified what further representations would or could have been made had the information been fuller, that might have affected the mind of the Secretary of State. However, for the reasons I have given, I am quite satisfied that the consultation was not deficient or unfair as a result of the inadequacy of this or any other information.

134. Ground 2 consequently fails.

Ground 3 (Public Sector Equality Duty)

135. As his third and final ground, Mr Westgate submitted that the Secretary of State failed to comply with his public sector equality duty under section 149 of the Equality Act 2010. The Equality Impact Assessment conducted in 2012 was flawed, because it failed to address the impact on those whose physical condition is such that they are virtually unable to walk. The Secretary of State cannot rely on the 2013 Assessment because by then he had already excluded one option by which the adverse impact on the physically disabled could be reduced or avoided, namely by readjusting the impact as between the physically and non-physically disabled.

136. Section 149 of the Equality Act 2010 provides that a public authority must, in the exercise of its functions, have "due regard" to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. It is common ground that the duty applied to the proposed assessment criteria in this case, the making of the 2013 Regulations and the further consideration of the issue in the 2013 consultation.

137. The duty requires a "conscious directing of the mind to the obligations" (R (Meany) v Harlow District Council [2009] EWHC 559 (Admin) per Davis J (as he then was)), "due regard" being the appropriate regard in all the circumstances. In R (Hurley) v

Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) at [78], Elias LJ illuminatingly explained:

> "The concept of 'due regard' requires the court to ensure there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision-maker. In short, the decision-maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors."

In R (Bailey) v London Borough of Brent Council [2011] EWCA Civ 1586 at [102], Davis LJ emphasised the importance of not interpreting the duty in such a way as to make decision-making unduly and unreasonably onerous.

138. Mr Sheldon submitted that this ground did not in substance add to the other grounds pursued. Again, I must agree.

139. This entire exercise concerned disabled people; and, on any consideration of the history which I have related above, whatever was published (which I deal with above), it is simply not arguable that the Secretary of State was not at all relevant times fully aware of the impact of the proposed reforms on disabled people, including those who fell within the cohort of physically disabled benefiting from DLA higher rate mobility. Before putting the 2013 Regulations before Parliament, a full Equality Impact Assessment was done and was available to the Secretary of State (see paragraph 52 and following above). It was known that the number of people who would qualify for enhanced rate mobility would fall substantially and, for the reasons I have given, it was reasonably obvious that many physically disabled people entitled to DLA higher rate mobility would not qualify for PIP enhanced rate. At the time of the 2013 Consultation and October 2013 decision to retain the criteria, a further Equality Assessment was done that set out both figures and the impact in terms of individuals by way of case studies and including particularly the impact of the decision in respect of Motability vehicles (see paragraphs 51 and 80 and following above).

140. When looked at fairly and in context, at all stages, the Secretary of State clearly had the impact of the proposals (including the particular impact on the cohort of physically disabled people), and his section 149 duty to have regard to that impact, well in mind. Indeed, although I well appreciate that the Claimant does not agree with the decision to impose the 20m threshold condition on PIP enhanced rate mobility for physically impaired people because of its impact on those individuals, the Secretary of State patently did have information available as to the impact on that cohort and on how it would affect individuals, and had due regard to that impact.

141. In respect of specific criticisms made by Mr Westgate in this context:

i) He submitted that the 2012 Equality Impact Assessment failed to acknowledge that the final criteria for Moving around were more restrictive than the

previous DLA criteria. I have dealt with the substance of that point above (paragraph 128). By February 2013, when the 2013 Regulations were adopted, it was patently clear that the proposed criteria (including the 20m threshold) were substantially more restrictive than the DLA criteria (including the effective 50m threshold).

ii) Mr Westgate submitted that the Secretary of State did not have regard to the number of physically disabled people affected, according to projections. However, that is not arguable: he had various analyses of the figures (see paragraphs 50, 60, 80-3 and 129 above), and there is no basis for suggesting that he did not have proper regard to the information in those.

iii) Mr Westgate suggested that the Secretary of State did not have regard to the consequences of the proposal for physically disabled people; but, again, he had the relevant information (including case studies, and the particular effect on those with Motability vehicles (see, e.g., paragraphs 51 and 80-3 above, and there is no basis for the suggestion that he did not have due regard to it.

iv) With regard to the 2013 assessments, Mr Westgate submitted that the Secretary of State cannot rely on the 2013 assessment because the consultation was not at a formative stage, and certain options had been closed off. That adds nothing of substance to Ground 1.

v) Mr Westgate, relying on the passage from the report to Ministers quoted above (see paragraph 89), submitted that the Secretary of State was concerned only with statistical equality rather than equality in real terms. However, looking at the material as a whole, it is clear that, from the outset of this reform programme, the Secretary of State was concerned with substantive equality as between the physically and non-physically disabled, which was one of the policy drivers behind the reforms.

142. In all the circumstances, this ground is not made good: indeed, I do not consider it is arguable that the Secretary of State was in breach of his duty under section 149.

Conclusion

143. I appreciate that the Claimant's underlying concern is about the way in which the changes to mobility benefit for the physically disabled may adversely affect him, and other disabled people like him. However, I reiterate that I am not concerned with the substance of the changes which have been made, but only with the question of whether the procedure adopted – particularly the consultation which the Secretary of State considered should be performed – is fair. On the basis of the submissions and evidence before me, and for the reasons I have given, my firm view is that the procedure adopted by the Secretary of State was not unfair, nor unlawful.

144. Therefore, despite Mr Westgate's efforts, as ever eloquent, valiant and able, this claim fails.