Neutral Citation Number: [2013] EWCA Civ 1565

Case No: C3/2013/1626/SSTRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
Mr Justice Charles sitting with Upper Tribunal Judges Jacobs and Lane
Case Nos. JR/2638 & 2639/2012 CO/2385/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2013

Before :

LORD JUSTICE MAURICE KAY,
VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LORD JUSTICE ELIAS
and
LORD JUSTICE VOS

Between:

SECRETARY OF STATE FOR WORK AND PENSIONS **Appellant**

- and -

THE QUEEN ON THE APPLICATION OF MM & DM **Respondent**

- and -

(1) MIND
(2) THE NATIONAL AUTISTIC SOCIETY
(3) RETHINK MENTAL ILLNESS
(4) EQUALITY & HUMAN RIGHTS COMMISSION

Interveners

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Ms Nathalie Lieven QC and **Mr Tim Buley** (instructed by the **Public Law Project**) for the **Appellant**
Mr Martin Chamberlain QC, Mr Gwion Lewis and **Ms Katherine Apps** (instructed by **The Treasury Solicitor**) for the **Respondent**
Mr Richard Drabble QC and **Mr David Blundell** (instructed by the **Charities**) for the **1st, 2nd and 3rd Interveners**

Mr Robin Allen QC and **Ms Catherine Casserley** (instructed by the **Equality and Human Rights Commission**) for the **4th Intervener**

Hearing dates : 21, 22 October 2013

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Approved Judgment

Lord Justice Elias:

1. The Welfare Reform Act 2007 introduced a new benefit, the employment and support allowance (ESA), which replaced incapacity benefit (IB) and other disability benefits. This appeal concerns the process of assessing whether a claimant is eligible for the benefit. The procedures currently employed involve, in the typical case at least, the claimant completing a questionnaire and attending a face to face interview. The respondents to this appeal (whom I shall hereafter call "the claimants") contend that this adversely affects mental health patients (MHPs) defined as people with impaired mental, cognitive, or intellectual difficulties. It is alleged that because of their particular difficulties, the decision-maker will not necessarily obtain a properly informed appreciation of either their disabilities or their ability to work and may therefore reject claims on a false basis. Further, it is submitted that the process of completing the questionnaire and undergoing the interviews causes some MHPs disproportionate stress when compared with claimants suffering from other disabilities. The claimants' primary case below was that these adverse consequences could be minimised, and even in some cases eliminated, if the Secretary of State amended the procedures in accordance with a duty to make reasonable adjustments under the Equality Act 2010 so as to require the decision-maker in every case to obtain further medical evidence (FME) before a decision is reached, save where that information has already been voluntarily provided. It was submitted that this would improve decision making and in some cases it would become clear, in the light of the FME, that the need for the questionnaire and/or the interview could be dispensed with.

2. As an alternative submission, and following an amendment to their claim during the course of the hearing below, the claimants alleged that a less rigorous adjustment could be made. It was submitted that even if FME need not be sought in every claim made by a MHP, the decision-maker should at least be required to consider obtaining FME in the case of MHP claimants and if FME was not sought, should explain why it was thought to be unnecessary. This proposed adjustment has been referred to both below and in submissions to us as the "evidence-seeking" adjustment.

3. Permission to bring proceedings for judicial review was granted by Edwards-Stuart J who transferred the case to the Upper Tribunal (Administrative Appeals Chamber) (hereinafter "the Tribunal") specifically on the grounds that the Tribunal consists of members with experience of the workings of the state benefit system. The application was heard by Charles J sitting with Upper Tribunal Judges Jacobs and Lane. In addition to the parties, the Tribunal benefited from evidence and argument by four intervening parties. These included three charities with special expertise in the field of mental health, namely Mind, The National Autistic Society and Rethink Mental Illness. The fourth intervener was the Equality and Human Rights Commission. The interveners made submissions to this court through Mr Drabble QC acting for the charities, and Mr Allen QC acting for the Commission. We are grateful to them, and indeed all counsel, for their assistance.

4. I analyse the relevant provisions of the Equality Act below. Suffice it to say at this stage that in determining whether there was a duty to make a reasonable adjustment, the Tribunal had to decide two matters. The first was whether the

current process for assessing eligibility for ESA did in fact place MHPs at a substantial disadvantage when compared with other claimants. The second question, which arises only if the substantial disadvantage is established, was whether it is reasonable to expect the Secretary of State to make the adjustment sought.

5. The Tribunal concluded the first issue in the claimants' favour in a judgment issued on 22 May, and it subsequently issued a formal declaration to that effect. It did not, however, finally resolve the second question. It rejected the primary way in which the claimants had put their case, namely that FME should always be obtained for MHPs, on the grounds that this would be unduly onerous. But it reached no definitive view on the alternative evidence-seeking adjustment. However, by section 136 of the Equality Act 2010, if the facts adduced before the court establish a *prima facie* case of an act of discrimination, then the court must find discrimination unless the defendant proves otherwise. In this case the Upper Tribunal held in a decision on remedies promulgated in writing on 24 May, that a *prima facie* case had been established that the evidence-seeking recommendation would amount to a reasonable adjustment and that the burden therefore shifted to the Secretary of State to show that it would not be reasonable. The Tribunal directed the Secretary of State to carry out an investigation into the reasonableness of this adjustment and to file further evidence on the matter. At that stage it was envisaged that a further hearing on the reasonableness of the evidence-seeking adjustment would be held in October but matters were stayed pending the outcome of this appeal.

6. The appeal is on four grounds, three of which relate to the finding that the current procedures give rise to a substantial disadvantage. First, the Secretary of State submits that irrespective of the merits of the case, the Tribunal had no jurisdiction to grant the declaration of substantial disadvantage at the behest of these claimants and their claims ought to have been dismissed. Second, he says that it was not open to the Tribunal properly assessing the evidence before it to conclude that MHPs were in fact placed at a substantial disadvantage. Third, he alleges that the Tribunal misdirected itself as to the meaning of "substantial disadvantage" and found that certain adverse experiences were capable of amounting to a substantial disadvantage when as a matter of law they were not. The fourth and quite distinct ground is that the Tribunal impermissibly converted itself into a policy maker and went beyond its judicial remit when it issued the directions it did requiring the Secretary of State to carry out an investigation and to disclose specified information at the adjourned hearing. I will consider these grounds after setting out the background to the application and the essential findings of the Tribunal.

The background

7. By 2006 over 2.7 million people were claiming IB and more than half had been receiving that benefit for more than five years. The Government was concerned that a large number of those receiving IB never returned to work even though many wanted to do so. It considered that helping people back to work where possible would improve the physical and mental health of the beneficiaries and would no longer involve writing off groups of people as being incapable of work. The introduction of ESA was designed to achieve those objectives.

8. Those claiming ESA fall into three principal groups. First, there are those who are found to be fit to work notwithstanding some disability, who will be denied the benefit; second, those who are not likely to be able to work at all and are described as having limited capability for work-related activity (also known as the support group); and third, those who with the appropriate additional support could eventually return to work and are described as having limited capability for work.

9. In order to determine the category into which any particular claimant might fall, the Act requires the claimant to undertake a work capability assessment (WCA). This is designed to assess an individual's functional ability, focusing on what he or she can do rather than what he or she cannot do. In broad terms there is a points system whereby points are scored depending on the extent of the claimant's ability to function: the higher the points scored, the more limited the capability for work. The intention is that the WCA should provide a focussed assessment which has regard to the particular needs of the individual. The assumption of the old system of assessment, the personal capacity assessment, was that you had to be fully fit in order to work and that curing the incapacity was the only route back to work. The new system is designed to effect a fundamental change to that approach.

The process of making a claim

10. There are two different categories of claimants for this benefit. First, there are those who are making new claims for ESA; then there are those already in receipt of a benefit. In some cases this will be IB and in others ESA itself.

11. New claimants will make an application using Form ESA1, which is used throughout Great Britain. The information provided includes personal details of the claimant; brief details of the illness or disability, including contact details for a doctor; a medical statement which those entitled to statutory sick pay will already have and which others will have to obtain from their doctor; and information on other benefits claimed and any pensions or health insurance which might affect the type of benefit to be awarded. The medical statement from the doctor is known as a Statement of Fitness to Work. It contains a diagnosis of the claimant's condition and comments on the functional effects of that condition. Once an application is received, the applicant is treated as entitled to ESA until the claim is investigated.

12. In the case of somebody making a renewed claim, whether having formerly been entitled to IB or having earlier been awarded ESA, no new ESA1 is required but the claimant must still go through the WCA and the decision maker will consider all the available information relating to the previous claims.

13. In all cases the application itself can be made on-line or by telephone. It is sent to the DWP, who then make a referral to its medical services provider which is currently Atos Healthcare (Atos). In a case where ESA or IB has been paid previously, the referral includes relevant information in respect of the previous decisions; with a new claim, it will include the diagnosis from the medical statement and other relevant information. It is transferred by means of an IT platform, the Medical Services Referral System (MSRS), which holds the relevant case details and information about the claimant's medical condition. For MHPs, a flag is added to the relevant file.

14. Atos handles the procedures thereafter. In most cases it will, on receipt of the case, issue a Form ESA50. This is a questionnaire directed to the claimant. Exceptionally, such as in the case of terminally ill patients for example, no forms are issued at all. The purpose of the ESA50 is to allow the claimant to go into far greater detail about the nature and extent of the illness or disability than is contained in the original ESA1. Recipients are advised to ask for help in filling in the questionnaire if necessary and some assistance is provided from Job Centre Plus. Exceptionally, a DWP officer will visit a claimant's house to give advice about answering the questionnaire. There is no obligation on a claimant to return any medical statements with the ESA50 although the form does emphasise that the claimant should send any relevant medical reports or any other information which they would want the decision maker to consider.

15. The ESA50 includes a number of free text sections where claimants can explain the nature of their disabilities in their own words; a section where they indicate the medication or treatment they are under, together with the contact details of GPs or other persons providing care or treatment; a section requiring the claimant to answer questions designed to elucidate what physical problems they face; and finally, a section designed to reveal the nature and extent of any cognitive or intellectual disfunctions.

16. If the ESA50 is not returned (and there is a 28 day period for doing that) and there appears no good reason for not returning it, the claim will be disallowed. But if good cause is found the claimant will be allowed further time to complete it. And in the case of somebody suffering from a mental health condition the case is directly referred to an Atos health care professional (HCP) to consider whether FME should be requested and a face to face assessment carried out. Accordingly, the failure to complete the form will not defeat the eligibility of MHPs to obtain their benefit.

17. Usually, following the receipt of the ESA50 there will be a face to face interview with the claimant. This is carried out by a health care professional (HCP) employed by Atos. Given the function of the assessment, their role is not to carry out a diagnosis and determine the appropriate treatment; it is to focus on the capability for work and to relate this to the legislative requirements. They are drawn from various medical disciplines and include doctors, nurses and physiotherapists. They work in assessment centres across Great Britain. They have specific training in dealing with specific mental health problems. They do not, however, make the final decision although they will make a recommendation based on information derived from the questionnaire, the interview and any FME which they may have obtained. The final decision is taken on behalf of the Secretary of State by an official of the DWP. That decision will be taken in the light of reports from the HCP setting out the recommendation and the reasons for it, and the supporting evidence.

18. If a claim is disallowed then the claimant can appeal to the Social Entitlement Chamber of the First Tier Tribunal (FtT). Typically, however, before the FtT considers it, the claim will have been reconsidered by a different decision -maker in the department who will also consider any fresh evidence made available. The FtT carries out a full re-hearing. Sometimes the appeal is dealt with on paper but

more often there is an oral hearing at which both parties can attend. There will almost always be FME obtained for that determination.

The Independent Review

19. There is a statutory structure in place to ensure that there is effective monitoring and evaluation of the relevant processes. This is carried out by the Independent Reviewer who was at the relevant time Professor Harrington, a leading occupational health specialist. The Officer is charged with producing annual reports required by section 10 of the 2007 Act.

20. There were three annual reports prepared by Professor Harrington. He consults widely and receives information about the operation of the procedures from many sources, including the interveners. It is not necessary to recount the detail of these reports. Suffice it to say that his recommendations have been almost universally accepted by the Secretary of State. Initially he highlighted various teething problems but in his first report he expressed the view that that the DWP could be "reasonably pleased" with what they had done.

21. He did, however, change his approach towards one important issue. Initially he considered that ultimately the onus had to be on the claimant to produce relevant information. But subsequent experience concerning the operation of the procedures led him to consider that the process would be improved if the Department were to be more pro-active. In his third report he explained why he had altered his view and what should be done in the future:

> "36. The year one Review said that: "the onus is and must be on the claimant to provide information to support their claim ---- it is difficult to see any justification or method of operating such a system without requiring the majority of claimants to be their own advocates.
>
> 37. During the year two Review it became clear that the Decision-makers were seeking to gather increased amounts of further documentary evidence as recommended in year one. This was seen as positive progress whilst also recognising that, in an ideal world, further documentary evidence will be provided at an earlier point in the claim process. Concerns remained that further documentary evidence was often only being provided as part of the reconsideration process.
>
> 38. However, some charities have suggested that the collection of further documentary evidence should be a mandatory duty on either Atos or on the Decision-maker. They have argued that claimants cannot, for a number of reasons, collect this information themselves and therefore the Department should take responsibility for doing so.
>
> 39. This view has been widely canvassed over the course of this year and put to charities, representative and disability groups, politicians, senior officials in DWP and, most importantly, to the Decision-makers during this year's unannounced visits to Benefit Delivery Centres.

> 40. A consensus has clearly emerged. There should be a requirement in every claim to consider seeking further documentary evidence and, if that evidence is not sought, that the decision not to should be justified.
>
> **Recommendation**
>
> Based on this, I recommend that:
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> Decision-makers should actively consider the need to seek further documentary evidence in every claimant's case. The final decision must be justified where this is not sought.
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> 41. Given the unique circumstances of their condition, particular care should be taken when the claimant has a mental, intellectual or cognitive condition as these individuals may lack insight into the effects of their condition on their day-to-day functioning."

22. As the Tribunal noted, this recommendation fell short of the mandatory obligation to obtain FME in every case, which the Tribunal rejected as a reasonable adjustment even when limited to MHPs. The recommendation was, however, the source of the evidence-seeking adjustment which, subject to this appeal, the Tribunal will have to consider at the reconvened remedy hearing.

23. The Secretary of State responded to Professor Harrington's suggestion and initially considered that the obligation could be introduced at the stage when Atos was gathering and considering relevant material. He said this:

> "We would anticipate that the best way of implementing the intent behind this recommendation would be to introduce an additional element in Atos' process. This would take the form of making explicit the requirement for Healthcare professionals to actively consider further evidence and to include a justification where they decide that further evidence would not be necessary. Decision-makers would then ensure that this justification has been provided, and where they question or disagree with a justification, would have the option to request Atos to go back and gather the further evidence that may be required."

24. However, he was not prepared to commit himself to implementing the proposal for reasons which were expressed as follows (para 48):

> "As with any potential changes in our processes, we need to ensure that the additional resources required in terms of administration and processing times is balanced by a demonstrable impact on the quality of decision-making and customer experience, in order to maintain an appropriate emphasis on the value for money of the process. We will therefore work on reviewing the implications of any such changes set out above before we can be clear on whether to implement. On that basis the Department supports the intent

> of the recommendation and provisionally accepts the desirability of making appropriate changes, subject to the caveat that we must first work to ensure it can be implemented in a cost-effective fashion before taking a final decision."

25. In fact, before the Tribunal the Secretary of State appeared to be resiling from the position that the recommendation was in principle acceptable. In a witness statement to the Tribunal, Dr Gunnyeon, the Departmental officer responsible for the monitoring and development of the work capability assessment, said that the Secretary of State was not satisfied that the proposed adjustment would necessarily add sufficient value to justify the costs and potential delay which might result from its implementation. He added that "FME is already being requested in cases where it is appropriate."

26. The Tribunal was understandably confused as to precisely what the Department's stance was and sought clarification. The Department made it clear that it was carrying out an assessment of Professor Harrington's evidence-seeking proposal as part of the process of considering and implementing the Professor's recommendations. This was not, however, limited to MHPs and it was not accepted that it had a duty to make the adjustment sought in relation to that group. The Tribunal concluded (para 81) that this response fell short of a proper assessment of the evidence-seeking adjustment as it applied to MHPs.

The effect of the proposals

27. The UT accepted (para 72) that if the evidence-seeing adjustment were to be adopted, it would alter the current practice in a quite significant way. The reason is that save where it is volunteered, FME is currently only obtained by Atos HCPs in a limited number of cases. In broad terms these include the following situations: cases where the evidence is likely to confirm that those already in receipt of either IB or ESA should continue to receive ESA (but not, it seems, for someone making an initial claim when a face to face interview is almost always conducted); cases where a claimant is noted to have an appointee, which will occur where the claimant is not able to manage his or her own affairs; and cases where there is a suicide risk because the claimant has referred to a previous suicide attempt, has suicidal ideation, or there is a history of self harm. In those classes of case (and both claimants fall into the suicide risk category) FME must be obtained. The current procedures expressly provide, however, that it will not be sought simply to confirm that an examination is required or to provide further information to assist the HCPs.

28. In addition, even where FME is sought, the Tribunal found that the request will only rarely be made before the ESA50 has been requested (para 50(iv)). Typically this might occur where there is a strong possibility that support group criteria will be satisfied or the claimant has an appointee. Moreover, FME is not necessarily obtained before any face to face examination.

The difficulties facing MHPs

29. Evidence was provided by the claimants, who are MHPs, as to their own circumstances and those of five other individuals selected for the purpose of illustrating a range of problems. MM is a man whose claim to ESA was rejected by the DWP, but his appeal to the FtT was successful. However, he faces regular reviews and is concerned that he will lose the benefit in future unless the procedures are changed. DM, the second claimant, has a severe mental illness and was in receipt of IB for a number of years. She will now be subject to an assessment for ESA sometime next year. When she last underwent an assessment in 1995 she was deeply traumatised and despite being awarded IB, she suffered a relapse and was readmitted to hospital.

30. These experiences, and information provided by the claimants about the difficulties facing other patients, informed the Upper Tribunal. But the burden of obtaining the detailed evidence identifying the difficulties facing MHPs as a class was borne by the charity interveners who have, in their different ways, vast experience in the field. Their evidence included an expert report from Dr Boardman, a consultant psychiatrist instructed by MIND to comment on aspects of the claims procedure, including the WCA.

31. From that detailed evidence, the Upper Tribunal identified the following particular problems which MHPs as a group face, whilst recognising that the extent to which any particular MHP will suffer from these problems will vary.

> "(i) In terms of filling out a form, seeking additional evidence and answering questions, claimants with [mental health problems] as a class have the following problems and difficulties because of their [mental health problems], some of which overlap:
>
> a) insufficient appreciation of their condition to answer questions on the ESA50 correctly without help,
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> b) failure to self-report because of lack of insight into their condition,
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> c) inability to self-report because of difficulties with social interaction and expression,
>
> d) inability to self-report because they are confused by their symptoms,
>
> e) inability because of their condition to describe its effects properly,
>
> f) difficulty in concentrating and in understanding the questions asked,
>
> g) unwillingness to self-report because of shame or fear of discrimination,

h) failure to understand the need for additional evidence because of cognitive difficulties,

i) problems with self-motivation because of anxiety and depression which may prevent them approaching professionals for help and assistance,

j) false expectation that conditions will be understood without them needing additional help, and

k) lack of understanding that professionals named in the form will not automatically be contacted in the assessment process.

ii) in terms of further aspects of the process for the determination of their entitlement to ESA, claimants with MHPs as a class have or have to face the following problems and difficulties because of their MHPs:

a) particular conditions (e.g. agoraphobia and panic attacks and autism spectrum disorder) make attending and/or travelling to a face-to-face assessment difficult,

b) finding the process itself intimidating and stressful, and, in some cases, that having a long-lasting negative effect on their condition,

c) a desire to understate conditions,

d) the masking of health problems as physical problems,

e) dealing with assessors who have little or no experience of mental health problems,

f) the difficulties of identifying many symptoms of a condition and its impact on what a person needs without proper training and knowledge,

g) the lack of time during a short assessment to identify a person's needs,

h) fluctuation in condition, and

i) scepticism about the condition."

32. It is important to note that these problems fall into two categories, although they overlap. Some of these difficulties go to the adverse experience which might be felt because of what, from the vantage point of some MHPs, will be perceived to be stressful, embarrassing or confusing features of the process, in particular the

completion of the questionnaire and the face to face interview. Other difficulties lead to the decision maker having inadequate or even false information about the nature and extent of the illness thereby increasing the risk that a false functional assessment will be made which in turn may jeopardise the right to an ESA. I will call these "adverse experiences" and "outcome effects" respectively.

33. The Secretary of State accepted that some MHPs might experience some of these difficulties but contended that procedures had already been adequately modified to cater specifically and in various ways for MHPs and it is for that reason that their applications are flagged. For example, MHPs are strongly encouraged to bring a friend or supporter to any interview; if they fail to attend an interview certain follow up steps will be taken to try to discover why and perhaps to arrange another interview whereas for other claimants the HCP would move to a recommendation; FME is already obtained for suicide risks and those who have an appointee, claimants who in practice will be MHPs; and contrary to the understanding of some MHP claimants, there is already specialist training to ensure that HCPs are able to identify, and deal with the problems created by, different mental health conditions.

34. Notwithstanding these modifications, the Tribunal was satisfied that the difficulties faced by MHPs placed them at a substantial disadvantage when compared with other disabled persons who do not experience mental health problems. It concluded that if the proposed evidence-seeking adjustment were made it would certainly ameliorate these problems with respect to both adverse experience and outcome effects:

> "In our judgment, the present practice relating to FME, has the result that in a significant number of claims by claimants with MHPs the existence and impact of the difficulties result in those claimants, and thus that class of claimants, being placed at a disadvantage that is more than minor or trivial and/or suffering an unreasonably adverse experience:
>
> i) by being required to complete an ESA50 when this is not needed,
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> ii) in the completion of the ESA50,
>
> iii) by being required to attend a face-to-face examination / assessment when this is not needed,
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> iv) during a face-to-face examination / assessment, and
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> v) during the final decision-making process and the communication of that decision by the DWP decision-maker.
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> In our judgment, if appropriately directed FME was made available earlier in the decision-making process in respect

> of claims by claimants with MHPs, it is likely that, in a significant number of such claims:
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> i) the HCP would be better informed before requiring an ESA50 and at the face-to-face examination / assessment, with the result that the decision-making process in respect of the class, and the way in which it is perceived by claimants with MHPs as a class, would be improved because the Difficulties would be better addressed and so avoided or reduced, and
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> ii) the DWP decision-maker would also be better informed in his or her assessment of the claim, the recommendations of the Atos HCP and his or her approach to the acknowledged vulnerabilities and difficulties of claimants with MHPs as a class and so individuals within it."

Reasonable adjustments and the Equality Act

35. The laws regulating disability discrimination are designed to enable the disabled to enter as fully as possible into everyday life. This requires not merely outlawing discrimination against the disabled; it also needs those who make decisions affecting the disabled to take positive steps to remove or ameliorate, so far as is reasonable, the difficulties which place them at a disadvantage compared with the able bodied. Baroness Hale identified the reason for this in *Archibald v Fife Council* [2004] ICR 954. After noting that traditional anti-discrimination law requires treating the relevant characteristic, for example, race or sex as irrelevant, she explained why this approach does not suffice with respect to the disabled:

> "The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment…..It is common ground that the 1995 Act entails a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others."

And the purpose of this is, as Sedley LJ noted in *Roads v Central Trains Ltd* [2004] EWCA Civ 1541 at para 30:

> "so far as reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public."

36. The concept of reasonable adjustment was first adopted in the Disability Discrimination Act 1995. The scope of that obligation was then extended in 2005,

and the Equality Act has consolidated, simplified and made certain amendments to the earlier legislation.

37. The Act is now structured, so far as reasonable adjustments are concerned, in the following way. First, section 20 of the EA 2010 sets out in generic terms the content of the duty to make reasonable adjustments. It provides as follows:

> "20. Duty to make reasonable adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

38. This section does not impose the duty to make adjustments; it simply defines what may be required when the duty is imposed. However, not all three requirements are engaged in all cases; the scope varies depending upon the circumstance in which the duty arises and different schedules to the Equality Act apply to different situations, for example in the fields of education and premises.

39. The relevant schedule in this case is schedule 2. This must be read together with part 3 of the Act which applies to those providing services and exercising public functions. The task of assessing claimants for ESA involves the exercise of a public function.

40. Section 29(6) provides that a person exercising a public function "must not ... do anything that constitutes discrimination, harassment or victimisation." The obligation to make reasonable adjustments is applied to persons exercising public functions by section 29(7).

41. Schedule 2 to the Act then specifies the nature of the duty with respect to public service providers. Apart from applying all three requirements in sections 20(3), (4) and (5), it also modifies the concept of reasonable adjustment in certain ways. Two paragraphs are of particular relevance to this appeal. First, para 2(4) provides as follows:

> "(2) For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally."

Second, para 2(5) provides a specific definition of what constitutes a "substantial disadvantage" in this field of operation:

> "(5) Being placed at a substantial disadvantage in relation to the exercise of a function means—
>
> (a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or
>
> (b) if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment..."

42. The term "substantial" is defined in section 212(1) as meaning "more than minor or trivial." It is not, therefore, a particularly high hurdle to establish substantial disadvantage.

43. The modification of the duty so that it applies to disabled persons generally creates what is frequently referred to as an anticipatory duty: the person exercising the public function has to anticipate the reasonable steps necessary to ensure that disabled persons generally, or of a particular class, will not be substantially disadvantaged.

44. The final provision to which reference should be made, and which is also central to a ground of appeal, is section 21 which is as follows:

> "(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
>
> (3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

45. Accordingly, by section 29(6) there is a duty not to discriminate; by section 21(2) discrimination includes, amongst other matters, a failure to make reasonable adjustments; and by section 21(1) this in turn arises where there is a failure to comply with any of the three requirements. In this case the alleged failure is only in respect of the first requirement in section 20(3).

The proceedings for enforcing breach

46. Generally, proceedings relating to a contravention of the Equality Act 2010 have to be brought in accordance with Part 9 of that Act: see section 113(1). Part 9 provides that discrimination claims relating to the exercise of public functions can be brought by a claim in the county court: see section 114(1). The county court has power to grant not only damages but also any remedy which could be granted by the High Court in a claim for judicial review: see section 119(2).

47. However, by section 113(3)(a), Parliament has provided that the obligation to bring proceedings in accordance with part 9 of the Act "does not prevent a claim for judicial review." Hence judicial review could properly be pursued here.

Grounds of appeal

Could the court grant a remedy to these claimants?

48. The first ground of appeal disputes the power of the Tribunal to grant any relief at the behest of these claimants, including the declaration that the procedures place MHPs at a substantial disadvantage. The Secretary of State accepts that because the duty to make reasonable adjustments is cast in generic terms, it is a public duty which would, absent any indication to the contrary, be enforceable in an action for judicial review by someone with the appropriate standing. What bars that remedy in this case, he submits, is section 21(3) of the 2010 Act. The first limb of that provision has the effect that the breach of the duty to make reasonable adjustments can be relied upon only where a party is seeking to establish that he or she has been subject to discrimination by that failure. Whilst section 113(3)(a) allows a claim for judicial review where that is appropriate, it does not alter the fact that any breach of duty can only be pursued in the context of someone claiming discrimination. And the only persons who can bring any such claim are those to whom the duty to make reasonable adjustments is owed, or to whom it may in the future be owed. It would not, for example, be open to any of the charities to claim standing to enforce the generic duty because they are not owed the duty and can pursue no discrimination claim in their own right for breach of it.

49. The Tribunal rejected this submission and held that the charity interveners would have had standing to bring judicial review. It held that it would "fly in the face of the underlying purpose of the Equality Act to hold otherwise, particularly having regard to the exclusion of judicial review claims from the mandatory terms of section 113." In the Tribunal's view section 21(3) did not affect that conclusion because it is concerned only with an action by way of statutory tort brought by individuals and was of no relevance to judicial review claims which could be brought by anyone with appropriate standing, including the interveners.

50. I respectfully disagree with that analysis of section 21(3) and no counsel sought to support it. In my view the effect of that subsection is that the duty must be treated as though it simply does not exist save for the purpose of establishing an act of discrimination against a disabled person. There can be no legal proceedings save in the context of establishing that a duty to make reasonable adjustments has been infringed in relation to a disabled person. I appreciate that the second limb of section 21(3) states that the effect of the first limb is that "the breach will not be actionable in any other way". But whatever meaning is given to the word "actionable" - even if it is limited to actionable as a statutory tort as the Tribunal seemed to think - it cannot in my view cut back on the clear language of the first limb. In my judgment, therefore, any relevant proceedings must involve seeking to establish a claim of discrimination against at least one disabled person to whom the duty to make reasonable adjustments is owed.

51. In this case two MHPs are bringing the complaint and they have claimed ESA. On the face of it, they are persons to whom a duty to make the evidence-seeking adjustment would be owed. However, Mr Chamberlain QC, counsel for the Secretary of State, submits otherwise. He says that they cannot bring a claim under section 21(2) because even if there is a failure to make a reasonable adjustment concerning FME with respect to MHPs in general, there is no such breach in relation to them. They are both suicide risks and therefore under the current rules FME has to be obtained in their cases in any event. Although it is true that FME was not in fact obtained in the case of MM, that was by an oversight. It was recognised that it ought to have been.

52. Mr Chamberlain drew an analogy with a blind man who uses a stick but not a guide dog. He would not be able to complain about a rule of a restaurant which barred a blind man from taking a guide dog into the restaurant because the duty has no relevance to him. Although he is blind, he is no more affected by any failure to make the adjustment to allow guide dogs than any sighted person. He is not prejudiced by the failure to make that adjustment and would not be able to bring a discrimination claim with respect to it. Similarly the policy here requires FME to be obtained for these claimants and so the failure to implement the adjustment on a wider basis for all MHPs does not affect them. Although MM could allege that there was a failure to make a reasonable adjustment by reason of the failure to obtain FME, that would not involve the Tribunal having to make any finding of generic disadvantage as a result of the policy applied to MHPs in general because he is not affected by that policy. It is conceded that there had been a breach of a relevant duty to provide FME for this particular category of MHPs, and it would be irrelevant and wrong for a Tribunal to engage with the question whether a similar or related duty is owed to all MHPs. Similarly with respect to DM: if the procedures are properly implemented, an FME should be obtained in the future when her entitlement to the benefit is re-assessed. She does not need to rely upon establishing that the evidence-seeking adjustment is owed to all MHPs.

53. I see the force of that argument and if the current policy to obtain FME for those deemed a suicide risk overlapped entirely with the proposed evidence-seeking adjustment, I would accept it. The failure to extend a duty already owed to these claimants to their MHP colleagues would not affect them personally or involve

any breach of duty in relation to them. But in my view the premise of the argument must be that the duty to make the adjustment sought could make no difference to the claimants so that they have no interest whether it is complied with or not, but in my judgment that premise is false. The claimants do have an interest in the adjustment being made. In my judgment the duty to obtain FME for suicide risks does not entirely overlap with the proposed duty to consider whether to do so with respect to MHPs in general. That is so even assuming that it would lead to FME being sought. In my view the current policy requiring FME to be obtained for suicide risks does not secure for these claimants all that the proposed evidence-seeking adjustment would achieve.

54. First, the proposed adjustment requires the decision maker to keep the possibility of obtaining FME under review throughout the decision making process. It would require consideration even before the questionnaire has been sent out. The policy as it applies to those deemed a suicide risk is not so focused; it is only to obtain FME at some point in the proceedings before an HCP makes a recommendation. It should ensure that the decision maker will be fully informed before any relevant decision is made but it would not necessarily lead to FME being obtained in time to enable a decision to be reached without the need for the MHP to undertake the potential stress of completing the questionnaire or having to participate in face to face interviews.

55. Second, it seems to me that a blanket rule to consider obtaining FME for all MHPs would make it less likely that the requirement to obtain the FME for suicide risks would be overlooked, as it was with MM. The fact that someone is an MHP is flagged up and that status will stand out more than the fact that a particular MHP is a suicide risk. Once the issue is addressed, it will readily be apparent that a particular MHP is a suicide risk. Accordingly the likelihood of the decision maker failing to obtain FME would be greatly reduced.

56. In my view the analogy of the blind man using a stick is not apt. A closer analogy is a situation where the rule provides that no guide dogs can be admitted to a restaurant save where the blind man was a friend of the owner. In the absence of the owner, there would be a risk that the friend would not be recognised as such and the guide dog might be refused entry. That would not happen if the generic rule admitting all guide dogs applied. The friend would therefore still have an interest in the wider rule being adopted.

57. In my judgment, therefore, section 21(3) does not bar these claimants from bringing a claim under section 21(2) and it follows - and I do not understand Mr Chamberlain to dispute this - that they can assert their claim by way of judicial review. Thus the Tribunal was in principle able to find that prima facie discrimination had been committed against these claimants, and was therefore entitled to declare, as a step relevant to the establishment of a breach of duty, that the current policy created a substantial disadvantage to MHPs in general.

58. Before leaving this ground I should mention an argument advanced by Mr Drabble to the effect that the interveners could have sufficient standing in principle to bring judicial review proceedings, provided that in the course of those proceedings they were establishing an act or acts of discrimination which would fall within section 21(2). He accepted that the effect of section 21(3) was that any

proceedings designed to establish a breach of the duty of reasonable adjustment would have to involve demonstrating that there was a breach in relation to at least one MHP to whom the duty was owed. But he says that there is no reason why the interveners should not be permitted to pursue judicial review proceedings to establish what is in effect a generic breach of duty provided it is in the context of proving a specific breach of the duty. There may be cases where MHPs themselves are reluctant for one reason or another to bring proceedings but where the public interest would justify the interveners having such standing. I see the force of that submission but I do not decide the point because it does not arise directly on the facts and may require fuller argument than was advanced before the court.

Was there evidence to justify the finding of substantial disadvantage?

59. This is a root and branch attack against the finding of the Upper Tribunal that MHPs suffered from a substantial disadvantage compared with those not so disabled because of the policy not to seek FME save in certain relatively limited circumstances. Absent this finding, the question of reasonable adjustment would not arise.

60. The Tribunal was satisfied, however, that MHPs would be disadvantaged and that the evidence suggested that this would be in two quite distinct ways. First, there was a greater risk in these cases that the decision maker would not reach the right decision because the information available from the claimant himself or herself would often be insufficient to indicate the true nature and extent of the illness from which they were suffering. Second, the Tribunal concluded that the process itself imposes a greater stress and anxiety on this group than others. Many MHPs find it particularly onerous to fill out questionnaires or to attend face to face interviews. The UT concluded that if FME were provided at an appropriate stage it might mean that some cases could be determined by the Atos HCPs without the need for a questionnaire to be filled out and/or for an interview to be conducted, as the case may be.

61. It is submitted that having regard to two factors in particular, the Tribunal were not entitled to reach that conclusion. First, Mr Chamberlain relied upon statistical evidence showing the proportions of different categories of disabled persons who were refused benefit by the Department but succeeded on appeal. If MHPs had been adversely affected on the grounds that the decision-makers lacked potentially important evidence affecting their claims, one would have expected this to be reflected in a larger proportion of MHPs succeeding on appeal to the FTT when FME is made available. In fact the statistics refute that; they show that the proportion succeeding is some 42% compared with an average success rate of 38%. Also the proportion of MHP claimants appealing is statistically similar to the proportion of claimants overall which is some indication that they do not feel disproportionately unfairly treated. Moreover, Dr Gunnyeon provided evidence to the effect that in only some 8% of cases did the FtT judges identify FME as the primary reason for allowing the appeals. This too suggests that there is not in practice any significant problem of decisions being made without FME. The natural and obvious inference, it is asserted, is that MHPs are not disadvantaged at the initial level. This is reinforced by the fact that there are, as we have seen,

already a variety of ways in which the system has identified and catered for the special position of MHPs.

62. The second alleged error relates to the source of information. It is submitted that it was improper for the Tribunal to have regard to generalised, substantially anecdotal, statements about the problems facing MHPs. It was not possible for the Secretary of State to counter this evidence because it lacked any real focus. In so far as the evidence relied upon the experiences of actual MHPs, the details of the patients were not disclosed. The Tribunal ought to have required the claimants and interveners to supply details of these alleged disadvantages so that the Secretary of State could properly respond.

63. The Tribunal considered both these matters. It held that the statistics were of limited value not least because it was not known why different groups succeeded on appeal. As to the nature of the evidence, the Tribunal did not accept that the evidence was too generalised. The test itself is a generic one; the evidence came from witnesses with considerable expertise; and the Secretary of State could have provided general evidence of his own if he did not accept that the evidence adduced in support of the claimants was a fair representation of the difficulties experienced by MHPs.

64. In my judgment, this is in substance a perversity challenge, namely that there was no proper factual basis sustaining the conclusion. I bear in mind that the task of challenging a conclusion on the facts - always a heavy one - is even stronger where the decision is taken by a specialist tribunal with members who have particular expertise in the field. It has been emphasised on a number of occasions by the Supreme Court that appellate courts should be very reluctant to interfere even with legal conclusions of such bodies in the field of their expertise: see e.g. the observations of Hale LJ in *Cooke v Secretary of State for Social Security* [2002] 3 All E R 729 paras 15 and 16 which has been approved by the Supreme Court on a number of occasions, including most recently in *Eba v Advocate General of Scotland* [2011] UKSC 29; [2012] AC 710 at para 45 per Lord Hope of Craighead. That difficulty is compounded when the Tribunal only had to be satisfied that the disadvantage was more than trivial.

65. Mr Chamberlain submits that the observations in *Cooke* are not apposite here. The Tribunal has no special expertise in relation to the discrimination issues arising in this case and that it would be inappropriate to treat its analysis with undue deference. I would accept that this is so with respect to the legal construction of the various statutory provisions; they fall within the broad discrimination field and are not technical areas which turn on any special understanding of the law and practice relating to welfare benefits. However, in my view the observations in *Cooke* still have some relevance. The Tribunal included two specialists who are daily dealing with the practices in the social welfare field and are far better equipped than this court to analyse and assess the evidence relating to the particular difficulties which MHPs may face in handling procedures. A court ought to be even more cautious than usual about overturning a finding which is one of mixed law and fact.

66. In my judgment, Mr Chamberlain has not established that the conclusion was either perverse or unfairly reached. I do not accept that the evidence was in some

way unfairly before the UT because not properly particularised. I do recognise that when considering particular disabled groups a question does arise as to whether the group is sufficiently homogenous for fair generalisations to be made. But as the UT pointed out, the Secretary of State did not suggest any re-categorisation or sub-division of this group, and indeed MHPs are treated as a homogenous group for the purposes of the claims procedures. I do not in fact understand the Secretary of State to be asserting that the generalisations were false, though I would accept that it is difficult to identify the extent to which particular problems may be shared amongst the members of the group. Nonetheless the Tribunal identified various ways in which FME would assist MHPs with a range of mental disabilities, and in my judgment there was sufficient evidence to justify the conclusion that MHPs were placed, as a group, at more than a trivial disadvantage.

67. I confess that I would not perhaps have dismissed the statistics as readily as the Tribunal appears to have done. There are, after all, only limited ways of meeting generalised assertions of the kind relied upon here; and statistical evidence is one of them. At the very least the statistics would seem to rebut any claim that the disadvantages to MHPs are endemic and extensive. But the Tribunal gave reasons for having reservations about them, not least that there may be a variety of explanations for the apparent lack of any obvious prejudice suffered by MHPs. Moreover, the statistics do seem to rest on the assumption that one would expect the proportion of MHP claimants succeeding in their claims to reflect the proportion of claimants at large, and that premise may be unsound. But in any event the statistics provide only part of the material before the Tribunal and it was for that body to give them such weight as it considered appropriate. In my judgment they came nowhere near compelling a finding in the Secretary of State's favour.

68. There is also the important point that it seems to me that their significance is limited to assessing whether MHPs were disadvantaged in outcomes. They do not have anything to say about the disadvantages resulting from the unnecessarily stressful experiences which sometimes result from the processes themselves.

69. Mr Chamberlain placed considerable emphasis on the fact that the Tribunal found (para 121) that the claimants had not satisfied the Tribunal on the balance of probabilities that in any of the examples they provided the claimants had been put at a substantial disadvantage. I would accept that this certainly lends support to the proposition that the extent of substantial disadvantage is limited, a matter of some importance when it comes to the question whether it would be unreasonable not to make the adjustment. But the Tribunal recognised the force of this and held nevertheless that looking at the matter more broadly, the adoption of the evidence-seeking adjustment would have made a difference both to outcomes and adverse experiences of the process (para 119). There is nothing inconsistent in the Tribunal's approach.

Is an unreasonably adverse experience a relevant substantial disadvantage?

70. The third ground of appeal relates to paragraph 5 of schedule 2 to the Act set out above. Mr Chamberlain submits that this envisages two mutually exclusive provisions: either the case is one which concerns the conferring of a benefit in

which case the only question is whether the claimant is "placed at a substantial disadvantage in relation to the conferment of the benefit"; or it is one concerning the imposition of a detriment, in which case the alleged disadvantage is "suffering an unreasonably adverse experience when being subjected to the detriment". It cannot be both. The first focuses on the outcome of the decision and the second on the adverse experience of the process.

71. Mr Chamberlain submits that here we are only concerned with conferring a benefit since in every case the issue is whether a particular welfare benefit, ESA, should be granted or not. Accordingly, the focus should be on paragraph (a) which is concerned with outcome. The Tribunal was not entitled to treat the adverse experience as a relevant disadvantage since it is not a disadvantage identified in paragraph (a) but arises only where the function results in being subject to a detriment within paragraph (b).

72. The Tribunal rejected this submission on the grounds that the premise that the exercise of a function must necessarily lead either to a benefit or a detriment was wrong. It may be both, depending on the circumstances. Here it is a benefit for someone who has never received ESA before, but a detriment for someone who was in receipt of it (or IB) and is at risk of having the benefit removed.

73. I agree with that analysis. It involves defining benefit and detriment by reference to the effect on the individual but in my opinion that is justified in a statutory provision of this nature. Even so, that does not fully meet Mr Chamberlain's point since if he is right that there are different disadvantages depending upon whether something is a benefit or detriment, it would still be necessary to apply the different provisions of paragraphs (a) and (b) once the question of benefit or detriment had been determined for any particular claimant.

74. However, on the assumption that benefit and detriment should be construed in the way I have suggested, if Mr Chamberlain were right it would have bizarre consequences. It would mean that those seeking a benefit for the first time would only be able to bring a discrimination claim if they could identify one category or type of disadvantage relating to outcome; and those at risk of having the benefit removed would have to identify another relating to the experience of the process. Parliament could not conceivably have intended such an arbitrary consequence. If the experience of undertaking, say, a face to face interview places MHPs under unnecessary and unacceptable stress not suffered by others, that cannot sensibly be said to give a remedy if the claimant is potentially subject to a detriment because he is at risk of losing the benefit but not if he is seeking a benefit.

75. Moreover, even if Mr Chamberlain is correct to say that the Secretary of State is exercising a benefit-conferring function even in relation to those at risk of losing the benefit, there is no logical reason why the concept of an adverse experience under (b) should not also fall within the concept of "substantial disadvantage" in (a), as indeed the Tribunal held. I recognise that Mr Chamberlain can properly say that the difference in language in paragaphs (a) and (b) must be intended to mean something, and I confess that I find paragraph 2(5) a difficult provision to construe. On the face of it, the two paragraphs do indeed appear to be covering different kinds of disadvantage. But I agree with Mr Allen QC, counsel for the Equality and Human Rights Commission, that paragraph (a) must be intended to

be complementary to paragraph (b). I can see no rational reason why Parliament would have intended the concept of discrimination to vary depending upon whether a benefit or detriment was in issue. I suspect that in each case the intention was to try to embrace the fact that, in (a), there may be a relevant disadvantage in relation to the process involved in acquiring the benefit even although the benefit is in fact conferred; and in (b), there may equally be a relevant disadvantage in the process leading to the imposition of the detriment, over and above suffering the detriment itself. It may have been thought that this is better explained by using different language in the two paragraphs. Whether that is so or not, I would not be prepared to accept that Parliament must have intended that the right to claim discrimination in this context would depend upon the classification of the function as one conferring a benefit or a detriment.

76. Furthermore, it seems to me clear that the concept of substantial disadvantage in paragraph (a) cannot just be focusing on outcome because the paragraph envisages the possibility that that there may be a substantial disadvantage even where a benefit is in fact conferred. That disadvantage can only be suffered as a result of the process, and in my view there is no reason why it should not include an unreasonably adverse experience.

77. In my judgment, therefore, the Tribunal properly identified relevant disadvantages in this case as potentially relating both to the actual determination or outcome itself, and to the process leading up to it.

Did the Tribunal overstep its powers?

78. Having found that there was a substantial disadvantage but that *prima facie* the evidence-seeking adjustment was reasonable, the Tribunal then turned to the question of reasonableness. It said this (paras 142-145):

> "142. As we have mentioned earlier, it was common ground that a number of factors fall to be taken into account in determining what steps it is reasonable for a provider to take to avoid a substantial disadvantage (see paragraph 89(vii) above).
>
> 143. *The relief to be granted.* We also acknowledge that the court and not the DWP is the ultimate statutory decision-maker under the Equality Act and so the judicial review approach of remitting the decision to the relevant statutory decision-maker is not appropriate.
>
> 144. It was argued that, as in a claim in the County Court, on the evidence before us we should make a finding on what the reasonable adjustment should be and order the SSWP to implement it. We accept that we could do this on this claim for judicial review and that in many cases this is what the county court and the judicial review court, as the decision-maker under the Equality Act 2010, can and should do.

> 145. But, in our judgment, it is also open to the court to adjourn to obtain more evidence to determine what is or is not reasonable and that this may often be the appropriate course for it to take before deciding what steps it should order the provider to take in performance of the statutory duty, to make reasonable adjustments."

79. Then at paragraph 168 it said this:

> "We have concluded that before we make a final determination and order as to the reasonable steps the SSWP should have taken or is to take to avoid the substantial disadvantages we have found to exist, the SSWP should be directed to carry out an investigation / assessment within a defined time as to how the Evidence Seeking Recommendation, as we understand it (see paragraphs 70(v) to (viii), 72 and 73 above) could be implemented. Without it, we are not in a position to reach a properly informed decision, with sufficient particularity, on what reasonable steps the SSWP should have taken or should be ordered to take."

80. The Tribunal then gave a remedies decision in which it spelt out in some detail what evidence it required and in what form. It ordered as follows:

> "By 3 July 2013 the SSWP is to carry out an investigation / assessment (that does not involve him undertaking any step that he wishes to argue it is not reasonable for him to take as a step to avoid the Substantial Disadvantages because such step is resource-intensive or for any other reason) and by reference thereto is to file such further evidence as he wishes to rely on in respect of the Reasonableness Issue that, without prejudice to the generality of the foregoing:
>
> i. develops, particularises and supports any case he wishes to advance that it is not reasonable for him to implement in whole or in part the ESR or to take any steps in accordance with that recommendation and its purpose (as set out in paragraphs 70(i), (v) to (viii), 72, 73, 163 to 167 of the judgment) to change the Present Practice.
>
> ii. addresses the matters identified in paragraph 169 of the judgment, and
>
> iii. addresses with particularity what pilots or trials (if any) the SSWP proposes to carry out to assess the likely value or impact of any changes he proposes to make to the Present Practice, and in general terms the nature of pilot(s) and trial(s) that could be carried out to assess the

> likely value or impact of an implementation of the ESR, and why he has decided not to carry any of them out."

81. The Secretary of State submits that it was inappropriate for the Tribunal to issue directions of this nature and I agree. It seems to me that the Tribunal is acting under the misapprehension that it is its task to determine what a reasonable adjustment would be and it is therefore seeking the appropriate evidence to fulfil that function. That is not, in my judgment, a proper approach. The court's task is to determine whether any of the adjustments proposed by the claimants would be reasonable; it is not "to reach a properly informed decision, with sufficient particularity, on what reasonable steps the SSWP …. should be ordered to take." As the Tribunal itself said when setting out the issues (on which there was common ground (para 89(vi)):

> "The Applicants must identify an adjustment that has a real prospect of remedying the established disadvantage they rely on in such detail that it informs the SSWP of the case he has to meet and to engage the question and the passing of the burden on whether that adjustment can reasonably be made."

82. The duty of the Tribunal is to determine whether the adjustment identified by the claimant is reasonable; and in some cases (as here) the burden may shift to the other party to demonstrate that it is not. But it is not the duty of the Tribunal to determine for itself what constitutes a reasonable adjustment or to supervise the process of evidence gathering. As Mr Chamberlain submits, this involves the Tribunal determining policy issues, which is constitutionally improper and which the Tribunal is in any event not properly equipped to do. It is not for the court to step into the Secretary of State's shoes and to require the Secretary of State to incur public funds in ways he or she might consider inappropriate. I recognise that the directions were formulated with sensitivity; they did not require the Secretary of State to undertake any step which he wished to contend was unreasonable; and as to the evidence, it was qualified by reference to such evidence "as [the Secretary of State] wishes to rely on". Nonetheless, in my opinion the Tribunal exceeded its jurisdiction by issuing these directions at all.

83. It was perfectly proper for the Tribunal to adjourn to allow further evidence to be adduced on the reasonableness issue. In a case of such importance as this, and in particular when the alternative evidence-seeking adjustment was only proposed during the course of the hearing itself, the Tribunal was rightly concerned that the Secretary of State may not have had the chance to focus properly on that particular adjustment and should have the opportunity to adduce further evidence in support of his case. I also accept that the Tribunal could properly indicate that it was not satisfied that the material it had seen demonstrated that the proposed adjustment would be unreasonable, and it was helpful for it to indicate the kind of material it thought might assist it to reach a conclusion on the question. But it is ultimately for the Secretary of State to adduce such evidence and advance such arguments as he thinks appropriate in order to discharge the burden now placed upon him.

84. Accordingly, I would quash the directions and uphold the Secretary of State's submission that the Upper Tribunal had misunderstood the scope of its powers and ought not to have issued the directions it did.

Disposal

85. I would reject the appeal on the first three grounds but uphold it on the last ground and quash the directions issued by the Upper Tribunal in relation to the renewed hearing on remedies.

Lord Justice Vos:

86. I agree.

Lord Justice Maurice Kay:

87. I also agree.