Neutral Citation Number: [2020] EWHC 1976 (Admin)

Case Nos: CO/2515/2018 AND CO/2594/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/7/2020

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between:

THE QUEEN (on the application of LISA VINCENT and others)	**Claimant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant**

And Between:

THE QUEEN (on the application of JD, a protected party, by his father and litigation friend JM)	**Claimant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant**

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Ian Wise QC and Kirsten Heaven (instructed by **Harding Evans**) for the **Claimants in the Vincent claim**
Jamie Burton and Daniel Clarke (instructed by **Central England Law Centre**) for the **Claimant in the JD claim**
Edward Brown and Paul Skinner (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 9, 10 and 11 June 2020

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Approved Judgment

COVID-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.00am on 23 July 2020.

Mrs Justice Andrews:

INTRODUCTION

1. In recent years, the Government has introduced a range of measures designed to reduce and streamline the welfare benefits system. Among those measures was a change from the payment of grants by way of support for mortgage interest payments ("SMI") to a loan scheme, Loans for Mortgage Interest ("LMI") which was brought into effect by the Loans For Mortgage Interest Regulations 2017 ("the LMI Regulations") made pursuant to sections 18, 19 and 21 of the Welfare Reform and Work Act 2016 ("the 2016 Act"). The parts of the LMI Regulations with which this case is concerned came into force on 27 July 2017.

2. The three Claimants in CO/2515/2018 ("the Vincent claim") are two severely disabled women who cannot work and who are in receipt of Disability Living Allowance ("DLA") whose respective partners left work to care for them and are in receipt of Carer's Allowance; and the dependent child of the Second Claimant. I shall refer to the Second and Third Claimants respectively as "Mrs B" and "DB" or "D". JD, the Claimant in CO/2594/2018 ("the JD claim") is a young man with multiple physical and learning disabilities who lacks capacity and brings this claim by his father and litigation friend, JM.

3. By these claims for judicial review the Claimants seek to challenge the provisions of Regulation 16 of the LMI Regulations on grounds of unlawful discrimination under Article 14 of the European Convention on Human Rights ("ECHR") read in conjunction with Article 1 of Protocol 1 ("A1P1") and/or Article 8. In both claims, the challenge is principally aimed at the provision within Regulation 16(1)(a) that, upon sale of a property, the outstanding loan becomes "*immediately due and repayable.*" This was referred to in submissions as the "repayment on sale requirement" or "RSR" and I shall adopt the same shorthand in this judgment.

4. Article 14 ECHR provides, so far as material that:

   "*the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion… or other status.*"

   In order to show a breach of Article 14, it is sufficient that the facts fall within the ambit of another substantive Convention right; the claimant need not establish a violation of that other right.

5. It is accepted by the Defendant ("the Secretary of State") that an entitlement to welfare benefits, such as LMI, and the circumstances in which such a benefit must be repaid, fall within the ambit of A1P1 (see *Stec v The United Kingdom (Admissibility)* (2005) 41 EHRR 18 at [52] to [54].) She also accepts that the RSR falls within the ambit of Article 8 (see in this regard the illuminating analysis of Leggatt LJ in *SC v Secretary of State for Work and Pensions* [2019] EWCA Civ 615, [2019] 1 WLR 5687 at [53]-[59]), whilst noting that Article 8 will rarely, if ever, impose a positive duty on the State to provide welfare support (*ibid* at [29]-[36]).

6. The Claimants in the Vincent claim contend that the LMI scheme, by not exempting them from the repayment provisions altogether, or alternatively by not exempting them from the RSR, unlawfully discriminates against them as severely disabled people with a partner in receipt of Carer's Allowance (Ground 1) and/or as dependent children of such persons (Ground 2). Mr Wise QC, who together with Ms Heaven represented those Claimants, submitted that people whose disabilities are such as to qualify for Carer's Allowance and their dependent children are in a significantly different position to others who qualify for LMI (including other severely disabled people, such as JD).

7. The challenge in this claim is put solely on a *Thlimmenos* basis, i.e. a failure to treat differently persons whose situations are significantly different (see *Thlimmenos v Greece (*2001) 31 EHRR 15 and *R(SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 per Lord Reed JSC at [12]). Mr Wise relied in particular on *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250. In that case, regulations automatically suspending DLA after a child had been an in-patient in an NHS hospital for more than 84 days, were held by the Supreme Court to unlawfully discriminate against a severely disabled child who was required to remain in hospital for periods longer than 84 days, in comparison with other severely disabled children who were not required to remain in hospital for such long periods.

8. The challenge in the JD claim is more narrowly focused. Mr Burton, who appeared with Mr Clarke for JD, contends that the RSR indirectly discriminates against (i) disabled people generally and/or (ii) disabled people with high level needs which put them at higher risk of needing to move to another property. Mr Burton refers to the latter category as "enhanced risk claimants". The JD claim is put primarily on the basis of indirect discrimination, although it is also argued as *Thlimmenos* discrimination.

9. JD claims discrimination not only under Article 14 ECHR but also under ss.19 and 29 of the Equality Act 2010, although it is accepted by Mr Burton that if the claim succeeds under Article 14 there is no need to consider the Equality Act, and if it fails, it cannot succeed on those alternate grounds. (Mrs Vincent also advanced a claim for indirect discrimination under the Equality Act, but this was not pursued orally by Mr Wise as an independent ground). Finally, JD contends that there was a breach of the public sector equality duty under s.149 of the Equality Act ("PSED").

10. JD's approach is more nuanced than that of the claimants in the Vincent claim; he accepts that in many cases, even where the recipient of the LMI is disabled, it would be appropriate to require repayment (or some repayment) on sale of the existing property. However he contends that the failure to allow a disabled recipient of LMI to transfer (or "port") the loan to a new property in circumstances where this is necessary to enable them to acquire a new property in order to meet their disability-related needs, is objectively unjustified. His challenge therefore focuses on the automatic nature of the RSR, the key contention being that there should be more flexibility, or that some form of discretion should be introduced which would avoid a situation arising in which repayment of the LMI would mean that a severely disabled person cannot afford to move to more suitable accommodation when the need arises.

11. The Secretary of State resists both claims. She accepts that a disabled person is someone who has an "other status" for the purposes of Article 14. She also accepts that the cohort of disabled persons whose carers are in receipt of Carer's Allowance would satisfy the status requirements of Article 14, because the receipt of the allowance serves as a proxy for a requirement of a certain level of care. However, she does not accept that "disabled people with high level needs which put them at higher risk of needing to move house" is a status, as these concepts are too vague and imprecise, and there is no means of measuring or identifying either the "high level needs" or an "enhanced" risk of needing to move.

12. It is now well established that a status need not be innate or an inherent aspect of an individual's personality. It may be a feature of a person's circumstances or living situation on which a legal consequence depends: see the discussion of the domestic and European case law by Leggatt LJ in *SC* (above) at [70] – [76]. Yet however broad the concept of "status" may be, it must be possible to identify those who meet it and those who do not, by reference to readily ascertainable objective criteria. In *Mathieson,* for example, the yardstick was the duration of the child's stay in hospital and in *R (TP) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37 it was the fact that the severely disabled person had moved home across a local authority boundary.

13. I do not accept that the alternative "status" in the JD claim of "enhanced risk claimants" is a "status" for Article 14 purposes, as the features or criteria said to define it are far too nebulous to produce an objectively identifiable cohort. JD seeks to define status not by reference to something concrete, but by reference to a "risk" which is said to be "enhanced" by reason of his needs. JD has not said by what measure it is to be determined that, by reference to their respective needs, X has an "enhanced risk" of a need to move compared with Y.

14. Mr Brown, who appeared with Mr Skinner on behalf of the Secretary of State, accepted that the RSR has some differential impact on disabled persons generally, but contended that this was justified. He submitted that the PSED challenge has been brought out of time, and the Court should not entertain it. In any event, the Minister had sufficient "due regard" to the statutory factors at the relevant time.

THE CHANGE IN POLICY

15. Just over a year ago, the Government indicated an intention to introduce a change of policy in respect of the RSR, which will enable all owner-occupiers in receipt of LMI to "port" the loan to a new property which they have purchased, provided that a charge is registered on the new property to secure the loan. On 19 June 2019, the Parliamentary Under-Secretary of State for Family Support, Housing and Child Maintenance announced the change of policy, and funding for the change was announced by the Chancellor in the Budget on 11 March 2020. However, the new arrangements require legislative changes, and there has been delay in their implementation in consequence of the COVID-19 pandemic.

16. The proposed changes, which are broader in scope than anything that would suffice to meet the Claimants' objections to the RSR, do not make these claims academic. They have not yet been implemented, and there is no guarantee that they will be, though all the signs are auspicious. Nor do they amount to a tacit recognition by the

Secretary of State that these claims are well-founded. However, they do have potential ramifications so far as the relief sought by the Claimants is concerned. All the Claimants seek declarations. Declaratory relief is a matter of discretion and may well be inappropriate if the Government is taking steps that would address the concerns articulated by the Claimants irrespective of the existence of these claims for judicial review or their outcome.

RELEVANT LEGAL PRINCIPLES

17. In order to determine whether legislation is incompatible with Article 14, four questions need to be answered:

> (1) does the alleged discrimination concern the enjoyment of a right set out in the ECHR – in other words, do the facts fall within the ambit of a Convention right?
>
> (2) has the claimant been treated less favourably than a class of persons whose situation is relevantly similar?
>
> (3) is the difference in treatment on the ground of a "status" recognized under Article 14?
>
> (4) is there an objective and reasonable justification for the difference in treatment?

The answers to the third and fourth questions determine whether there is "discrimination" within the meaning of Article 14.

18. Where the complaint is one of *Thlimmenos* discrimination, the second and third questions are subsumed in the single question "are the claimants, by reason of their status, in a situation that is relevantly and significantly different from the comparator class?" and the final question is whether, if so, there is an objective and reasonable justification for the failure to treat them differently.

19. In *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634, [2009] UK HRR 1073 at [46], Elias LJ explained the distinction between indirect and *Thlimmenos* discrimination in these terms:

> "*The traditional concept of indirect discrimination is related to the concept that different cases should be treated differently to this extent: in both the applicant is saying that he or she is adversely affected by a rule which is framed to apply equally but which in fact fails to have regard to a material feature of his or her situation. In the case of traditional indirect discrimination, however, the complaint is that the alleged discriminator could be expected to adopt a different rule which does not have that effect and that it is unreasonable for him not to do so. By contrast, in the case where it is alleged that different cases should be treated differently, it is accepted that the rule itself may serve a legitimate function and be capable of justification in most circumstances but it is contended that a different rule should be adopted for the claimant and those in a similar situation, specifically ameliorating the effect resulting from their special features or characteristics.*"

20. That passage was cited with approval by Laws LJ in *R (MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (QB*)*, [2013] PTSR 1521 at [45]. Whilst accepting the distinction, he pointed out that in practical terms they may often be two sides of the same coin:

> *"indirect discrimination and Thlimmenos discrimination are closely allied applications of the principle of consistency: the former will often involve an assertion that the claimant should be treated differently from others who are covered by the rule complained of, and that is Thlimmenos discrimination."*

*(*Ibid, at [46]*)*. That reflects a recognition that in certain cases (of which this appears to be one) depending on what is deemed necessary to redress the alleged discrimination, the focus of the justification may be the same whether viewed as indirect or *Thlimmenos* discrimination.

21. Both these claims were stayed until after the determination by the Supreme Court of the issues in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 ("*DA*"). In that case, Lord Wilson JSC, with whom the majority agreed, said at [65]:

> *"… at any rate in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it."*

22. In the same case at [134] Baroness Hale PSC stated that:

> "*in indirect discrimination, it is the measure itself, rather than its discriminatory impact, which has to be justified. (This is the case in domestic law, and I see no reason why it should not also be the case in Convention law. If the discrimination is direct, of course, it is the discriminatory impact which has to be justified.)"*

This reflected a passage in her dissenting judgment in *R(SG) v Secretary of State for Work and Pensions* (above) at [189]. All counsel agreed that this represented the correct legal approach to a measure which is challenged on grounds of indirect discrimination.

23. Although it was argued both in terms of indirect and *Thlimmenos* discrimination, *DA* was viewed by the majority as a *Thlimmenos* case. Lord Wilson said at [54] that what the Government had to justify was its failure to amend the relevant regulations so as to provide for exemption of the relevant cohorts from the revised welfare benefit cap.

24. It seems to me that whichever way the matter is put, the focus in this case must be on whether the justification for the application of the RSR to all recipients of LMI and the Government's failure to amend it to allow the loan to be "ported" in certain circumstances by a severely disabled person, or to exempt disabled people in general (or disabled people in receipt of Carer's Allowance or enhanced risk claimants in particular) from the obligation to repay (or alternatively from the RSR), is manifestly without reasonable foundation. Of course, the application of that test does not lessen the need for careful scrutiny of the reasons advanced by the State in justification of the impugned measure: see *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550 at [30].

THE STATUTORY SCHEME

25. The enabling power for the LMI Regulations 2017 is contained in, inter alia, ss.18 and 19 of the Welfare Reform and Work Act 2016. So far as relevant, s.18 provides:

"18. Loans for mortgage interest etc

(1) The Secretary of State may by regulations provide for loans to be made in respect of a person's liability to make owner-occupier payments in respect of accommodation occupied by the person as the person's home.

…

(7) The regulations may-

(a) make provision about determining or calculating the amount that may be paid by way of loan under the regulations;

(b) require that a loan under the regulations be secured by a mortgage of or charge over a legal or beneficial interest in land or, in Scotland, by a heritable security.

(8) The regulations may define "owner-occupier payment".

…

(12) A statutory instrument containing regulations under this section is subject to annulment in pursuance of a resolution of either House of Parliament."

26. Section 19 provides, inter alia:

"19. — Section 18: further provision

(1) This section makes further provision about regulations under section 18.

(2) The regulations may include-

…

(d) provision about the time when, and manner in which, a loan must be repaid;"

27. Regulation 16 of the LMI Regulations provides, so far as is relevant, as follows:

"16. Repayment

(1) The outstanding amount shall become immediately due and payable, together with any further interest which accrues on that amount under regulation 15, where one of the following events occurs—

(a) the relevant accommodation is sold;

(b) legal or beneficial title in, or in Scotland, heritable or registered title to, the relevant accommodation is transferred, assigned or otherwise disposed of, unless paragraph (3) applies;

(c) in the case of—

(i) a claimant who is the sole legal owner of the relevant accommodation or the legal owner of the accommodation with someone other than a partner, the claimant's death;

(ii) a claimant with a partner who is the sole legal owner of the relevant accommodation or the legal owner of the accommodation with someone other than the claimant, the partner's death; or

(iii) a claimant and partner who are both legal owners (whether or not with anyone else) of the relevant accommodation, the death of the last member of the couple.

(2) Subject to paragraphs (4) to (7), repayment shall occur—

(a) in the event described in paragraph (1)(a) or (b), from the proceeds of sale, transfer, assignment or disposition;

(b) in the event described in paragraph (1)(c), from the relevant person's estate.

(3) This paragraph applies where legal or beneficial title is transferred to—

(a) the claimant's partner, following the death of the claimant, where the partner is in occupation of the relevant accommodation;

(aa) the claimant, following the death of the claimant's partner, where the claimant is in occupation of the relevant accommodation; or

(b) the claimant, from a former spouse or civil partner, under a court order or an agreement for maintenance, where the claimant is in occupation of the relevant accommodation.

28. There are other provisions, which it is unnecessary to quote, which make it clear that if there is insufficient equity available to discharge the outstanding amount, repayment will be limited to the amount of equity available, and if there is no available equity, the loan will be written off.

29. Moreover, provided the lender is approved and certified by the Financial Conduct Authority, other legal charges over the property will take priority over the loan charge. There is no inhibition on a severely disabled recipient of LMI re-mortgaging the property subject to the charge in order to pay for home improvements or modifications that cannot be funded by other grants or benefits. Subject to the overall limits, the LMI would help to defray the interest on the higher mortgage, as SMI did before it.

30. The recipient of LMI is also permitted to repay the loan in whole or in part before one of the triggering events for repayment occurs. There is no obligation to repay any sums that were advanced under the previous SMI scheme. Unlike many commercial loans, there is no time limit for repayment.

BACKGROUND TO AND PURPOSE OF THE LMI SCHEME

31. The background to and purpose of the LMI scheme is set out in detail in the first witness statement of Mr Geoffrey Scammell, the senior civil servant at the Department for Work and Pensions ("DWP") with lead responsibility for the policy relating to mortgage interest payments for those in receipt of income-related benefits. Mr Scammell has been employed by the DWP and its predecessor departments for 46 years and has direct personal knowledge of the detailed consideration that was given to the proposed change from SMI to LMI over a period of approximately 7 years. For the purposes of this judgment, the following summary of his evidence (which I accept) will suffice.

32. The overarching policy objective of SMI and LMI was (and is) to provide homeowners in receipt of a qualifying income-related benefit with a level of housing support that in most circumstances should be sufficient to prevent the lender from foreclosing on the mortgage. The benefit is payable at the point of need, namely, when the money is required to pay the mortgage provider. No help is provided towards mortgage capital repayments or arrears, or endowment or other insurance premiums. The amount of the payment will not necessarily suffice to pay the whole of the mortgage interest as it falls due, because the level of support is determined by applying a set rate of interest to the amount of outstanding mortgage, subject to certain capital limits. However, the fixing of the rate and the limits is carried out after close consultation with lenders.

33. The level of help provided takes into account the need to balance fairly the desirability of avoiding the repossession of the homes of owner-occupiers claiming benefits, against the interests of taxpayers (many of whom cannot afford to become homeowners themselves) and the competing demands placed on the Secretary of State's finite resources.

34. From 1948 until 2017, Government support for mortgage interest payments in the form of SMI was provided under a number of successive schemes. Over that time, there were many changes to SMI, most of which were designed to mitigate the growing cost of the scheme to the Exchequer.

35. In the immediate post-war period in which the National Assistance Act was introduced, only around 30% of householders in the UK were owner-occupiers. In those days, in order to qualify for a mortgage, an individual would generally need a steady stream of income from a reliable source, and might therefore be expected to be working. Relatively few people would qualify for SMI, and payment was in practice likely to be for a limited period whilst the recipient had lost their job and was unable to get back into work.

36. As time went on, the percentage of owner-occupiers more than doubled, and house price inflation led to a significant increase in the average level of mortgages. The increase in the proportion of homeowners with a mortgage led to an increase in the duration of claims for SMI. This was partly due to a growth in interest-only mortgages, which made home ownership more affordable, but in turn meant that many people were taking the mortgages into retirement because they could not afford to pay off the capital element sooner. By the 1990s it was far more likely that recipients of SMI would have a need for long-term support, and many of them were

elderly and/or disabled. As the amounts and rates of mortgage interest and the periods over which support was claimed increased, so did the cost to the Exchequer.

37. It also became possible for disabled persons, including those who would not otherwise have been able to afford to become homeowners, to acquire their own properties through shared ownership schemes, such as the Home Ownership for People with Long-term Disabilities ("HOLD") scheme. These are schemes by which a housing association or charity would acquire a share in a suitable property which they would rent to the disabled person at a rate that would be covered by housing benefit, (or now by the housing element of Universal Credit), and that person would finance the acquisition of his or her share in the property by means of an interest-only mortgage paid by SMI (or now by LMI). Two of the claimants in these cases financed the acquisition of their current homes through a shared ownership scheme.

38. It was a general rule that SMI would not be available if a claimant had taken out the loan at a time when they were already in receipt of a relevant qualifying benefit. However, there was an exception if the loan was taken out (or increased) to purchase a dwelling that would be more suited to the special needs of a disabled person. This recognized a wider social objective, because a disabled person already in receipt of benefits would otherwise have been disqualified from claiming SMI in circumstances where, for example, he wished to re-mortgage the property to release some money to pay for home improvements, or wanted to avail himself of a shared ownership scheme to acquire some personal autonomy by getting a foot on the housing ladder. Historically, therefore, disabled people who were unable to work had an advantage in terms of being able to claim SMI in wider circumstances than non-disabled people. This exception was carried forward into the LMI scheme (Schedule 1 para 3 (8) of the LMI regulations). However, following migration of legacy benefits to Universal Credit, the receipt of the latter before the loan is taken out will no longer be a bar to the receipt of LMI, and the historic advantage has been eliminated.

39. SMI and its successor LMI facilitate the rights of disabled people to live in the community and provide them with the opportunity to choose their place of residence on an equal basis to others (or even, historically, on a more favourable basis) by paying a portion of their mortgage interest. This is consistent with Article 19 of the UN Convention on the Rights of Persons with Disabilities.

40. One consequence of SMI being non-repayable was that over time the recipient would be acquiring equity in the property at the taxpayer's expense. With house price inflation, that equity could be considerable, and the individual could use it for whatever purposes they wished. Moreover, it could be passed on to that person's heirs when they died. It was never the purpose of SMI to facilitate, at a significant cost to the State, the acquisition of a potentially valuable capital asset by individuals on benefits. That consequence inevitably flowed from longer-term payments of a benefit which was initially designed as short-term assistance to enable the recipient to remain living in their own home.

41. In December 2011, the Government conducted an informal public consultation (a "call for evidence") in relation to SMI which set out some options for simplifying the help provided towards mortgage interest payments. The call for evidence noted that the Government remained committed to providing support to help owner-occupiers to remain in their homes. The options under consideration, which included converting

SMI to a loan secured by a charge over the property, sought to ensure that the support was cost-effective, simple to administer, and provided value for money for the taxpayer. The explanation given for that proposal was as follows:

> 4. *Our strategic vision for support for mortgage interest in the future is that it should provide short-term help to people at a time of personal crisis such as loss of employment or relationship breakdown and incentivise work. This is because it is only through full-time work that mortgages can ultimately be repaid.*
>
> 5. *Where there is longer term dependency on the State, for example, where a claimant is disabled or takes a mortgage into retirement, the Government believes that taxpayers should not in effect be helping people to acquire personal assets through any potential long-term rises in house prices. We are therefore seeking views on an option to put a charge on property in return for long-term payment support for mortgage interest.*
>
> 6. *A charge on the property, and an additional sum for interest and an administration fee, would be recouped on the death of the claimant or the sale of that property. Alternatively, the claimant could choose to pay off the charge at any point. This policy would be fair to taxpayers and enable claimants to remain in their own homes.*

42. The call for evidence also said this:

> 24. *Fairness to the taxpayer is also a core driver for change. Any change to the current arrangements must provide value for money, and also be delivered easily and accurately, without increasing the likelihood of administrative or procedural problems or error, which could result in overpayments /underpayments of benefit.*

43. An impact assessment dated 5 December 2011 which accompanied the call for evidence indicated that, as the policy was at an early stage of development, a full impact assessment would have to wait until the final design was determined. It envisaged that the proposed change from a grant to a secured loan would have little or no impact on recipients whilst they remained in their property, but on sale some (or in some cases all) of the equity would go towards redeeming the charge (as well as the principal loan). It said that it was reasonable to assume that many recipients would be able to meet all their repayment obligations from the equity in the property, and still have equity remaining.

44. The section on equalities data noted under "Disability" that around 40% of those in receipt of SMI were also in receipt of DLA and/or attendance allowance, but data from the Family Resources Survey indicated that a much higher proportion (around 70% of all households with at least one SMI recipient) also contained a disabled adult. It explained that the data from the survey offered a more robust estimate of Equality Act disabled people, but there were issues with the size of the sample. The measure of disability available on the administrative data was considered a poor proxy for the Equality Act measure, although in some ways that data provided better coverage of the SMI population. The disability results from both sources had to be treated with caution and interpreted in conjunction with each other.

45. There were mixed responses to the call for evidence, but most respondents favoured the proposal of recouping support for mortgage interest payments from long-term claimants through a charge on their property. A variety of organisations responded, including those who were concerned with the interests of disabled people such as MenCap, Capability Scotland, MySafeHome, and various citizens advice bureaux. Some respondents expressed concerns about the effect that recoupment would have on certain groups of people including the elderly, disabled people, carers and lone parents. Shelter, for example, pointed out that recouping costs might encourage more claimants to hand their keys in or sell, rather than take on extra debt. This could ultimately result in the State paying more through the additional costs of rehousing and paying housing benefit, and would be particularly costly for long-term claimants with a disability who live in an adapted property. They also said that recouping costs would diminish pensioners' equity on which they may be reliant for care costs. All these responses were taken into consideration by Mr Scammell and his team.

46. In April 2014, the Minister for Welfare Reform asked his officials to investigate the feasibility of delivery of an SMI loan scheme. Mr Scammell's evidence is that even at that early stage it was recognized that the proposed charge could act as a disincentive to moving if it were not made portable. It was also recognized that long-term disabled recipients who were unable to work were more likely to repay a loan through the charge.

47. The proposed change from a grant to a loan secured by a charge on claimants' properties was announced in the Summer 2015 Budget. A further impact assessment was conducted in July 2015. This identified the need for Government intervention in similar terms to the earlier documents. It noted that the loans policy would result in costs to the recipients equal to the amounts of SMI benefit that would otherwise have been paid, plus loan interest and costs. It stated that converting SMI into an interest-bearing loan meant that the benefit would be financed in a more sustainable and equitable way. It summarised the justification for the change in policy thus:

> "*support for homeowners, as for renters, when unemployed or sick is fair, but it is unfair to the taxpayer to subsidise assets for the homeowner. The policy increases the fairness of the welfare system by ensuring that the taxpayer recovers the value of payments made in support of an asset, instead of those benefits accruing solely to individuals.*"

48. Following the Budget announcement, provisions were included in the Welfare Reform and Work Bill to enable LMI to be introduced in place of the SMI scheme. During the Bill's passage through Parliament, an amendment was laid in the House of Lords by Lord Curry of Kirkharle to exempt disabled claimants in receipt of DLA or Carer's Allowance from the loan requirements and allow them to continue to receive SMI as a non-refundable benefit. In response to that proposal, the Minister reiterated that the purpose of SMI was not to secure an asset or to reduce any outstanding payments owed to lenders, but to mitigate the risk of repossession. He pointed out that SMI was supporting individuals to accrue a significant asset, whilst many taxpayers who were providing that support could not afford to buy their own homes, and said that it was accordingly fair that the support was recouped when equity is available when the property is sold. The Minister stated that he did not believe there to be a sustainable argument that people with disabilities should be exempted from refunding some of the equity that the taxpayer help them to accrue, whilst other people

supported during periods of financial need should not. The proposed amendment received no Parliamentary support. It was not even put to the vote.

49. In December 2015, the Minister received some advice from civil servants in the DWP which specifically addressed the proposal of the RSR. They considered that in most cases recovery at the time of sale would not present a problem, as many recipients of the benefit who decided to sell and move on (such as older people carrying the mortgage into retirement) would be downsizing and therefore would be likely to have sufficient equity to be able to afford the new property and repay the loan. It was thought that "in a very small number of cases" the RSR might prove problematic for individual claimants, and in some cases that it might deter them from moving. However, to legislate to provide exceptions to the general rule would prove difficult without introducing the exercise of discretion, and such an approach would require a cumbersome fact-finding and decision-making process that would be resource intensive and prone to a high level of challenge. For that reason, it was recommended that there should be no exceptions to the RSR.

50. One of the annexes to that document gave examples of circumstances where recovery of the loan on sale of the home may cause hardship. One of these examples was where the recipient of LMI was a carer for a disabled adult child who wished to move to a different area in order to be able to take on the additional role of carer for an elderly parent. The example envisaged that the new property would require significant adaptations to meet the child's disability needs, and that repayment of the loan would leave insufficient funds for these adaptations. It was suggested that the claimant might be able to mitigate that situation by various means, including applying to the local authority for assistance with funding the adaptations, but the possibility of alleviation was not presented as a complete solution.

51. Although that example does not concern the situation where the recipient of the LMI benefit is himself disabled, the potential hardship it identifies is exactly the same as might arise in that situation, or in a situation where the move was driven by the needs of the disabled child, rather than the elderly parent, namely, that the RSR would leave insufficient funds available to enable the acquisition of a suitable new home or pay for any necessary adaptations to it. It was obvious that this might act as a deterrent to moving.

52. The Minister, having considered the matter, asked for more work to be done, to specifically include consideration of porting the loan to a new home. As part of that further work, DWP officials conducted an analysis of the main circumstances in which it was anticipated that claimants with an SMI loan would sell their property. The results were sent to the Minister on 5 May 2016. It was explained that the reason why it was anticipated that most recipients of SMI who wished to sell up and move would be downsizing was *because they were unlikely to be able to secure the funding they required to move in other circumstances* (My emphasis). If they were downsizing, it was thought likely that they would have sufficient equity to be able to repay the loan and purchase suitable alternative accommodation - unless they chose to move to a more expensive area. This was because they were likely to have lived in the property for some years and built up a substantial amount of equity over that time.

53. The analysis stated that it would be made clear to claimants at the outset that recovery of the loan and interest would be made at the point of sale and the annual statement of

account would include a reminder. It would therefore be for individuals to factor this into their financial planning, including when they decided to sell the property. Although it was expressly recognized that recovering from the equity when the property was sold might prove problematic for a very small number of claimants who moved to another area whilst continuing to receive a qualifying benefit, there was no change to the recommendation that no exemptions be made to the RSR.

54. The Minister considered that recommendation and decided to accept it. There can be no doubt, therefore, that the Minister was alive to the fact that the RSR had the potential to cause hardship, including to persons with a disability, if repayment at the point of sale meant that there would be insufficient money left over to enable the LMI recipient to move to a property which was suitable (or more suitable) for his or her needs or the needs of a disabled person in the same household.

55. In 2017 the draft LMI Regulations were referred by the Minister voluntarily to the Social Security Advisory Committee, an independent statutory body that provides impartial advice to the Government on social security matters. Mr Scammell and members of his team attended the Committee to answer questions on 8 March 2017. One question concerned whether, if an older person needed to move home, for example to accommodate their accessibility needs, the RSR might prevent them from moving. Mr Scammell responded that this was unlikely to be a significant consideration for the majority of claimants. Information provided by the Council of Mortgage Lenders suggested that the average amount of equity in homes was in the region of £160,000, and the recovery of loan repayments would be unlikely to make serious inroads into that sum. He added: "*although there was nothing in the proposals which would mitigate the scenario portrayed in the question, help with the costs of converting a home to accommodate disability would probably be available.*" Whilst the question related specifically to an older person, the recognized disadvantage would be the same if that person were younger and profoundly disabled or suffered from a progressive disability. The example postulated that the RSR might cause the recipient of LMI to stay in a property which was no longer suitable for his or her accessibility needs. Mr Scammell's answer reflected the outcome of his department's research and frankly acknowledged that the identified hardship was not going to be addressed in the policy, although there might be other means of mitigating it.

56. An equality impact assessment (EIA) (entitled "Equality Analysis for Support for Mortgage Interest: Conversion from a benefit to a loan") was completed on 22 February 2017. This document and an impact assessment of 19 June 2017 were both taken into consideration by the Minister before the LMI regulations were laid before Parliament on 6 July 2017. The EIA expressly records that in undertaking the analysis that underpinned it, the UN Convention on the Rights of the Child ("UNCRC") and relevant provisions of the UN Convention on the Rights of Persons with Disabilities, were specifically taken into account. I have no reason to doubt that assertion.

57. The EIA noted that currently almost half of SMI recipients (52%) were pensioners, many of whom had received support for between 20 and 30 years, as they had chosen to take interest only mortgages which continued for their whole life. It pointed out that the cost of SMI to the Exchequer was sensitive to increases in mortgage interest rates. It stressed that converting SMI to a loan would make no difference to the availability of money for those who needed support with their mortgage. It would not

involve any recipient losing income at the point of claim. All current SMI customers would be affected equally.

58. In the analysis of impact on protected groups, although there was no administrative data available on the disability status of SMI claimants, the Family Resources Survey 2014-15 was used to estimate the proportion of SMI recipients who are disabled using a proxy group of mortgage holders in receipt of eligible income-based benefits and self-reported data on disability status. The statistics indicated that the policy was likely to have a disproportionate impact on disabled people.

59. The EIA noted that those disabled people who had taken out additional mortgages to meet the cost of necessary adaptations would continue to benefit from a higher capital limit. It stated that SMI as a loan would be available to all the claimants who could currently access it and it would not involve anyone losing income at the point of claim, so there should be no additional impact on claimants with disabilities. It then referred to the RSR and to the fact that if there was insufficient equity in the property to repay the whole of the loan, the balance would be written off, but it made no reference to the previously recognized possibility that the RSR might leave no surplus equity over for the recipient to be able to afford to move to a suitable alternative property. The conclusion was that there would be continued protection from the threat of repossession regardless of disability.

60. The impact assessment noted that the policy objectives were to give claimants the same level of protection against repossession as they enjoyed under the SMI regime, but to offer a better deal for the taxpayer by ensuring that the payments made to secure a potentially valuable asset could be recouped. It was placing the financing of SMI on a more sustainable basis. It set out various alternative policies that had been considered, and explained why it was felt that the option of converting SMI to an interest-bearing loan provided a fairer and more sustainable way of supporting mortgage payers within a constrained welfare budget and in a manner which ensured that the cost of lending was covered by the claimant. It expressly noted that the RSR would lead to a cost to the claimant because they would receive a smaller amount of equity on the sale of their property.

61. The impact assessment explained that:

> "*the policy will affect all those on SMI, though this is through repayments which are delayed until such time as recipients are financially able to repay this loan. Nevertheless, support remains available at the time of need. Households may choose not to take up this loan and finance their mortgage repayments in alternative ways. Those who currently claim SMI and do take up the support will retain the level of support they currently have.…*
>
> *SMI as a loan will be available to all the claimants who can currently access it as a benefit and will not involve any customers losing income at the point of claim so there should be no adverse impact on claimants with protected characteristics. The amount of SMI paid to any claimant plus interest will be recouped from the equity in the property when it is sold or otherwise disposed of. If there is insufficient equity in the property to repay the whole SMI loan, the balance will be written off. Thus there will be continued protection from the threat of repossession regardless of protected characteristics.*"

62. In respect of disabled people, it noted that*:*

> *"over one third (38%) of SMI recipients are claiming ESA and almost half (48%) are claiming Pension Credit. Claimants of these benefits are more likely to be affected by some form of disability than the population in general. Based on self-reported data on disability status according to the Equalities Act 2010 definition, in the proxy group for SMI claimants 74% of single claimants are disabled and 80% of couple claimants have one or more member that is disabled. In comparison, 17% of all single mortgagors have a disability and 21% of couples with mortgages have a member with a disability. This indicates the policy is likely to have a disproportionate impact on disabled people. All SMI claimants will continue to be protected from the threat of repossession regardless of disability status."*

63. So far as dependent children were concerned, the EIA and the impact assessment both noted that fewer people in the SMI proxy group had dependent children compared with all mortgage holders because SMI claimants were disproportionately of pension age. Moreover, in considering the effect on children in workless households (such as DB) under the Life Chances legislation the impact assessment concluded that:

> *"replacing SMI with the same level of support as a loan was supportive of Life Chances as the policy would ensure support was available at the time of need. The intention was to prevent repossession and distress to families which could harm the family unit. Where homelessness is prevented it also enables return to work more quickly and therefore may have a longer-term impact on stable family life of homeowners who are temporarily sick or unemployed."*

THE VINCENT CHALLENGE

64. The three claimants in the Vincent claim are said to be indicative cases which exemplify the impact of the change from SMI to LMI on disabled individuals in receipt of SMI/LMI and cared for by a partner/carer in receipt of Carer's Allowance and any dependent children.

65. Mrs Vincent was diagnosed in 1994 with secondary progressive multiple sclerosis. She is wheelchair dependent and is and will remain unable to work. She and her husband purchased their current family home for £116,500 in 2003 with the assistance of a £95,000 mortgage. Mr Vincent funded the mortgage repayments whilst he was still working, but he gave up his job to become his wife's full-time carer in 2008. In 2007 they re-mortgaged their property for £144,000, extracting around £49,000 of equity.

66. Essential adaptations to the property were carried out using a disabled facilities grant of £10,000 from the local authority. Disabled facilities grants are non-discretionary grants provided by local housing authorities towards the cost of providing facilities for disabled persons in their homes. They can be used for example to improve access, install a downstairs bathroom, or adapt heating and lighting controls to make them easier to use. They are available up to £30,000 in England, and no amount of the grant below £5000 or above £15,000 is repayable. Any part of the grant between those two

figures is only repayable if the property is disposed of within 10 years of the work being carried out and it is reasonable to require the repayment, having regard to the reasons for the sale (e.g. whether they were connected with the health or well-being of the disabled person or to enable them to live with or near someone from whom they require care). The £49,000 was used to pay for further works not considered essential by the local authority and to clear some debts.

67. Mrs Vincent was in receipt of SMI since February 2010, which of course she does not have to repay. She has therefore had eight years of financial assistance from the taxpayer towards the interest repayments on a £144,000 mortgage. She did not take out an LMI when the changes came into effect in 2018, and the provisions in issue in this claim will not affect her unless she does so. Mrs Vincent is concerned that if she were to take out an LMI and remain in her current property for the next 15 years, the obligation to repay would wipe out the equity when the property is eventually sold, or else it would deprive her of a form of security that could be used to do further work or to enable the couple to move to a one-storey property in due course. Those concerns are predicated on an unrealistic assumption that the current property will not increase in value over the next 15 years.

68. Mrs B suffers from a different but equally debilitating form of multiple sclerosis, and from pernicious anaemia, which were diagnosed in November 1998. DB is her younger child. He was 15 at the time that the claim form was issued, and sat his GCSEs in 2018. She is unable to mobilise without the use of crutches or a wheelchair and will never be able to work due to the nature of her illness and disabilities. She is in constant pain. Her husband gave up his job to become her full-time carer in 2001.

69. In 2010, after several moves and a spell in unsuitable local authority accommodation, Mr and Mrs B bought their present home, a 2-bedroom bungalow, through a shared ownership scheme. She received SMI to cover the cost of the interest-only mortgage. The stability of living in that home for several years has been beneficial for D and improved his capabilities and academic achievement. Mrs B's 53% share of the property was purchased for £100,700; Mr Scammell suggests that it would now be worth £145,000, although Mrs B believes it to be nearer £122,000. She too received a disabled facilities grant from the local authority to make adaptations to her property. Like Mrs Vincent she refused to accept the LMI in 2018, and the couple have been using the Carer's Allowance to pay the mortgage interest. She is concerned that the interest may increase and that she will be unable to afford to pay it without taking out the LMI.

70. Mrs B makes it very clear in her evidence that she would have taken up the loan if she had not been required to repay it. She says that as neither she nor her husband are working, the equity that she has built up in the property is the only asset that they have, and the only source of money to fund essential disability-related costs that she is likely to need in the foreseeable future because her condition is deteriorating (ignoring the potential availability of disabled facility grants or care provided under the Care Act 2014) . She anticipates that she will need to make further adaptations to her property very soon to improve access, or else move to a more suitable property relying on the equity. She is very concerned about the prospect of finding alternative accommodation, as there is little that is suitable in that area, and she says that moving elsewhere might have a detrimental impact on D, especially as regards his education.

71. The chief concern raised by the adult Claimants in the Vincent claim is that the obligation to repay an LMI loan (or alternatively the RSR) will prevent the equity built up in the property from being used for various other purposes including childcare costs; care costs if a carer is no longer available; home improvements and adaptations; the discharge of other debts; or putting down a deposit on a new property.

72. The Secretary of State accepts that other benefits which are specifically available for alterations to properties or to help defray care costs may be less generous than they once were, and could even be inadequate; and that paying privately from the equity might enable a person to carry out more alterations, do so more quickly or to a higher specification, or have a greater choice over how where and how much care they purchase. However, it is not and never was the purpose of this benefit to provide unlimited assistance to recipients to do any of these things, or to provide a means of making up for actual or perceived deficiencies in other forms of welfare benefit. It was the injustice of long-term recipients of this benefit being able to build up equity in the property for their own benefit (and potentially the benefit of their families) at the taxpayers' expense that underpinned the change in policy. To exempt a particular cohort of long-term recipients of the benefit from the requirement to repay would plainly undermine the policy underlying the change from grant to loan.

73. The EIA noted that most long-term recipients of SMI were unlikely to have dependent children because of the age demographic. Dependent children are not the recipients of this benefit, they have no obligation to pay it back, and so SMI or LMI has no direct effect on them at all. The purpose of SMI and LMI is to keep a roof over the head of a homeowner, by making a sufficient contribution towards the mortgage repayments to avoid foreclosure. The benefit is still available at the point of need and serves that purpose for all recipients, and to that extent it is to the benefit of all those who live in the family home, children and adults alike. There is no evidence that the dependent child of a disabled adult recipient in receipt of Carer's Allowance is any more likely to be affected by their parent's obligation to repay the money out of the proceeds of sale of the family home than the dependent child of any other recipient of LMI.

74. If the consequence of the change from a grant to a loan (and the RSR) is that their parent will have less equity available to generate cash to pay for childcare, school trips, or other needs, it does not mean that the child has a legitimate basis for complaining about it, let alone for requiring that as the child of a disabled recipient, he or she should be singled out for special treatment by releasing the parent from the obligation to repay the loan. In their written submissions the Vincent claimants contended that the impact on adult claimants in terms of loss of choice, inability to have recourse to equity to improve quality of life and living conditions is severe "*but will be felt in equal measure if not more by a dependent child who is subjected to consequences of the above on the disabled parent but is unable to assist*". I regard that argument as tenuous in the extreme.

75. It was also submitted that Articles 2 and 3 of the UNCRC required the best interests of children to be a primary consideration. Few dependent children are likely to be affected by the change to LMI, and those that are will be, at best, tangentially affected by the introduction of a requirement to repay out of assets available for that purpose a benefit payable to their parents which relates to mortgage payments on the family home. The best interests requirement is plainly satisfied by the conclusions in the EIA

that, in general terms, keeping a roof over the heads of a family where neither parent is working and can afford to pay the mortgage interest is a positive outcome for the children. If the price that the parent has to pay for staying in the family home is an obligation to pay back the Government when the home is sold, it makes no difference to the child's best interests. The alternative is for the parent not to take the optional LMI benefit and face the consequences for the family of foreclosure.

76. LMI is not targeted at the needs of dependent children. That is not and never was the purpose of the benefit. Any indirect impact upon them of their parent's obligation to repay the loan either at all, or on sale of the property, is no different to the impact that might be felt of any restrictions on a welfare benefit (such as a cap on the amount that might be claimed by the parent) that meant that there was less money to spend within the household, including on them. In *DA* the impact of the revised welfare benefit cap was to reduce benefits that could be claimed by a non-working single parent to below the poverty line, but the majority of the Supreme Court decided it was justified and rejected the challenge based on the alleged violation of Article 3 of the UNCRC. Likewise, I consider that the failure to create a carve-out from LMI or the RSR because of the tangential impact this might have on the minority of children dependent upon a disabled parent whose other parent is in receipt of Carer's Allowance was not manifestly without reasonable foundation or a violation of Article 3. In tacit recognition that these arguments were not the strongest, very little time was spent by Mr Wise in his oral argument on the claim by DB.

77. The Vincent Claimants say that they do not challenge the introduction of the LMI scheme, and yet they seek to challenge the obligation to repay, which is an inherent feature of any loan scheme (for it would not be a loan unless it had to be repaid). Although Mr Wise resiled somewhat from this position in the course of his oral arguments, and focused on the RSR, the Vincent claims are pleaded on the basis that disabled people cared for by a person in receipt of Carer's Allowance should be exempted from *any requirement* to repay the benefit (i.e. for them, it should remain a grant - the very proposal that Lord Curry sought to introduce and abandoned when the Bill went through Parliament). In other words, the justification for converting the grant to a loan, which is applicable to all other recipients, does not or should not apply to them because it fails to recognise their alleged significantly different circumstances. The Minister's answer to Lord Curry's amendment, quoted earlier in this judgment, seems to me to be a complete riposte to that complaint.

78. As Mr Brown pointed out, the decision to withdraw SMI and replace it with LMI is not in itself capable of giving rise to a claim for unlawful discrimination because a previous entitlement to a benefit is not a property right for the purposes of A1P1. See in this regard the observations of Ouseley J in *SC v Secretary of State for Work and Pensions* [2018] EWHC 864 (Admin), [2018] 1 WLR 5425 at [92]. However, even if it were a legitimate target, that decision cannot possibly be described as "manifestly without reasonable foundation". If one looks at the matter in *Thlimmenos* terms, it was not unreasonable, let alone manifestly unreasonable, for the Government, having decided to turn the benefit into a loan, to decide not to create a carve-out for any specific cohort of long-term disabled recipients of the existing benefit, such as those with partners in receipt of Carer's Allowance. In principle the Government was entitled to decide that the taxpayer should not be required to subsidise the acquisition of valuable property rights by the long-term funding of mortgage payments without

repayment, irrespective of whether the recipient is disabled or able to work, because that would be unfair.

79. The change was largely driven by the position of long-term recipients (many of whom are disabled and unable to work, if of working age); allowing an exemption for anyone in the Vincent class would defeat the objective of the change. Converting the grant into a loan secured on the property enables claimants who have received an equity windfall at taxpayers' expense to make repayment, thereby ensuring that there are greater resources for others and ensuring that the benefit remains sustainable. Parliament endorsed that approach through the normal democratic process.

80. Moreover, Mr Wise never gave any satisfactory explanation of why it was contended that disabled recipients of LMI who required the level of care that qualified for Carer's Allowance were in a significantly different position from all other recipients of LMI, either generally, or in terms of the impact that a requirement to repay the money at all, or alternatively on sale of the property, would have on them, such that it would be unfair not to create an exemption for them which would enable them to keep/make use of the equity and, in due course, leave it to their heirs.

81. Mr Wise submitted that this cohort are in a significantly different position to other persons eligible for LMI including other disabled or severely disabled people because (a) they cannot work and will not be able to do so and (b) their severe disabilities give rise to considerable ongoing and future care needs. It is true that many (though by no means all) people falling into the Vincent group would be unable to work, and their partner will have given up work to look after them, which is why the partner will qualify for Carer's Allowance. Because of this they are unlikely to have any source of finance other than the equity with which to repay the loan. But the evidence makes it plain that <u>most</u> long-term recipients of LMI, whether disabled or non-disabled, are unable to work. They too will be unable to afford to repay the loan except out of the equity of the property and they too, being elderly and/or disabled, may have significant needs. The general group will contain other severely disabled people with equivalent needs who are single and do not have a carer (such as JD) who also cannot work and have no independent source of finance. Other long-term recipients such as elderly people who are less profoundly disabled but still unable to work, would also be unable to afford to repay the loan except through the charge. They too could potentially suffer some hardship if required to repay the loan out of the equity during their lifetimes.

82. Indeed, it is unlikely that anyone in the comparator class other than those who received the benefit over a shorter term and went back to work (now the minority of recipients) would have sufficient income or other financial resources to enable them to repay the loan voluntarily, unless they received an unexpected windfall in the form of a legacy or a lottery win or were helped out financially by others. Thus most long-term recipients of LMI, whether non-disabled or disabled, would be in the same position as the Vincent claimants, i.e. the charge would restrict the amount of equity available for them to use for their own needs or purposes, including the financing of adaptations or putting down a deposit on a new property should they wish or need to move. This was something that the Government expressly recognized when the change was under consideration.

83. I am therefore not persuaded that the Vincent claimants, as a cohort, are in a *significantly* different position to other persons eligible for LMI or that it was incumbent upon the Government to single them out for special consideration of the impact of the changes on them as a group, either in terms of a repayment requirement generally or as regards the RSR in particular. Indeed, to single them out for special treatment might give rise to justifiable complaints by other recipients of the LMI who were required to pay it back, including but not limited to other long-term recipients who are disabled. No good reason was ever put forward for requiring someone in JD's position, for example, to repay the loan out of the equity that the money has helped him to accrue, but exempting Mrs Vincent or Mrs B from that requirement.

84. Even if they are in a significantly different position, the failure to treat them differently from other recipients of LMI by exempting them from the requirement to repay out of the equity if there was sufficient money to do so, was plainly justified for all the reasons stated above. The refusal to allow them to keep all or more of an equity windfall gained at the expense of taxpayers who might not be able to afford to buy their own properties, was not manifestly without reasonable foundation. That in itself is sufficient for the Vincent claims to fail; however, for the sake of completeness I will go on to consider the question of justification of the application of the RSR to this defined cohort of disabled people, without exemption, in the context of the JD claim.

THE JD CLAIM

85. JD, who is now 35 years old, was assessed by his local authority under the statutory scheme in place prior to the Care Act 2014 as having critical needs. He suffers from a wide variety of disabilities including learning disability, autism, ADHD. dyspraxia, obsessive-compulsive disorder, and cerebral palsy. His father JM has lasting power of attorney to manage his property and affairs under the Mental Capacity Act 2005. The nature of JD's disabilities means that he can be very noisy, which could be problematic for any new neighbours, though his current neighbours have been very tolerant.

86. JD's devoted parents did everything they could to secure his long-term future once he turned 18. His disabilities are such that shared accommodation schemes are unsuitable. A housing broker appointed by the local authority to assist the family concluded that private rental would not be suitable, and that JD had insufficient points to obtain social housing. Eventually, in 2009, with the assistance of a specialist broker, he entered into an arrangement with a housing association through the HOLD shared ownership scheme to buy a two-bedroom terraced house close to the family home. The full purchase price was £230,000 and JD's 43% share was funded using £98,900 borrowed from a building society on an interest-only mortgage. JM, as JD's appointee for welfare benefits purposes, claimed SMI to meet the interest payments on the mortgage. JD transitioned to LMI with effect from 4 November 2018.The local authority, which helped with some of the incidental transactional costs of acquiring the property, provides JD with four personal assistants who give him round the clock help.

87. This arrangement has enabled JD's parents to continue to provide him with significant support, including on occasion stepping in to take over if one of his personal assistants became unavailable for any reason. JD's parents are aware that they cannot continue with their supportive role indefinitely. It is always been their plan that JD's

brother would take over these responsibilities from them, but he lives in a different area and therefore it may be necessary for JD to move closer to his brother in order to benefit from his support. JM says that his own health and that of his wife has been deteriorating (they are both in their early 70s) and that JD's own deteriorating physical condition means that his current accommodation, which is laid out over 3 floors, is likely to become physically unsuitable for him. He is already having difficulties in using the stairs. JM is concerned that the RSR could mean that his son will be unable to afford to move to more suitable accommodation, even if it is of equivalent size and value to his current home, and that in consequence JD will either remain in accommodation which is no longer suitable for his needs or be forced to move into residential care, which is something that his family have been trying to avoid at all costs.

88. Unlike the Vincent claimants, JM does not contend that it is unfair for the loan to be repaid, or that a requirement to repay on sale is unjustified in all circumstances. He focuses on the automatic nature of the RSR and its potential impact on the ability of disabled people, particularly those with needs like his son's, to move to accommodation better suited to their needs. He contends that "enhanced risk" claimants should be allowed to port all or some of the loan to the new property and that a system could be devised whereby a person's need to move and the amount of the LMI that could be ported to the new accommodation could be determined by DWP officials.

89. JD's complaint about the RSR is of differential treatment between:

i) disabled people in the LMI scheme and non-disabled people in the LMI scheme; and

ii) disabled people, and non-disabled people who do not have an "enhanced risk" of needing to move.

I have already explained why I do not accept that an "enhanced risk claimant" is a status for the purposes of Article 14. If it were a status, then it seems to me to be at the outer limits of the concentric circles described by Lord Walker in *R(RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 [2009] 1 AC 311 at [5].

90. It is accepted by the Secretary of State that:

i) disabled people may have fewer realistic options in terms of accommodation choices;

ii) disabled people with deteriorating conditions may need to move to another home if it is not possible to make adaptations to their existing properties (for example if a single-storey property is required instead of a property with stairs); and

iii) disabled people may need to move to access disability-related care.

For those reasons, Mr Brown accepted that the RSR may have *some* differential impact on disabled people as against non-disabled people, although the extent of that impact is unknown. Of course, as the Court of Appeal recognized in *DA*, [2018]

EWCA Civ 504, [2018] PTSR 1606, if a rule has a disproportionate impact on one group, the issue of justification arises irrespective of the extent of the disproportionate impact. If (contrary to my earlier finding) an "enhanced risk claimant" is a status, the very definition of that status postulates a differential impact. It is self-evident that those who do not have an enhanced need to move will be less likely than someone who does to feel the impact of the requirement to repay the loan out of the sale proceeds in the event that the residual equity is insufficient to fund a move.

91. If a disabled person needs to move, either because their current property has become unsuitable or because they need to be closer to other family members, they are likely to have fewer options than a non-disabled person by reason of the need to find a suitable property, or one which can be adapted to meet the needs of their disability. Instead of downsizing they may need to acquire a larger property or one which is more expensive than their current accommodation. In certain circumstances, the RSR may reduce those options further in terms of affordability, but this will be a question of fact and degree depending on the amount of equity in the current property and the extent of need of the individual (even if one ignores the availability of other benefits or grants, such as disabled facilities grants, that might mitigate the impact of the RSR to some extent).

92. Yet, as Mr Brown pointed out, a person in JD's position who has purchased his home without any prior equity or capital (and who has received several years' worth of non-repayable SMI) would need to receive LMI over many years to extinguish the equity in his share of the property when it is sold. The sooner the property is sold, the less likely there is to be a problem. If JD were to move to new accommodation purchased through a HOLD scheme, (which seems on the evidence to be the only way in which he would be able to purchase another property) he would be entitled to claim LMI to assist with the mortgage payments on the new property. Even though 100% mortgages are no longer available, as JM says, so that there might be a need to finance a deposit, and although there is less provision for specialist mortgage broking and less help available with transactional costs than there was in 2009, the prospect that there would be insufficient money available to enable the move to go ahead after the LMI was repaid remains speculative.

93. Mr Brown contended that JD has suffered no detriment, and therefore lacks status to bring this claim, in that he has not yet been affected by the RSR and will not be if he moves at a time when (as his father fears may be the case) he has no equity in the property. In fact, in those circumstances he would gain a benefit, because the loan would be written off and any LMI on a replacement property would start with a clean state. In response to that objection, Mr Burton rightly points to the Strasbourg jurisprudence which shows that it is sufficient to meet the "victim requirement" in section 7 (1) and (3) of the Human Rights Act if JD runs the risk of being directly affected by the measure under challenge. I accept Mr Burton's submissions on this point. There is plainly a risk that JD (and Mrs Vincent and Mrs B) may be detrimentally affected by the RSR, in that it may inhibit their ability to move, though on the evidence that risk in the case of the Vincent Claimants (were they ever to decide to claim LMI) appears to be small.

JUSTIFICATION

94. If in principle, as all parties appeared to accept, an optional benefit such as LMI which is designed to help somebody on qualifying benefits to avoid repossession of their existing home by defraying the cost to them of the interest on their mortgage can take the form of a loan rather than a grant, then the loan must be repaid. The obligation to repay is the natural concomitant of the benefit being a loan rather than a grant. The person to whom the loan is offered knows the terms on which it is offered and is free to decide whether to accept it or reject it and to factor the RSR into their future financial planning. In the case of LMI, the terms are more favourable than commercially available loans, which the recipient is unlikely to be able to afford anyway. If rejection of the offer means they can no longer afford to pay the interest on their existing mortgage, then they would have to move to other accommodation, and even possibly go into the rental market, but that is a consequence of their choice, not the repayment terms of the LMI.

95. If they accept the loan and they have no means of repayment other than the equity in the property, which is accumulating because the loan is helping them to keep up the mortgage payments in a rising property market, then it is not unreasonable, unfair or disproportionately burdensome to expect the accumulated equity to be used for that purpose if there is sufficient of it, and to release them from the repayment obligation if and to the extent that there is not. That was the view formed by the Secretary of State when the change was first envisaged, and it remained the position at all material times thereafter.

96. It is also normal practice when lending money to charge interest and an additional sum to cover administrative costs. The rate of interest that is charged on the LMI is variable and reviewed every 6 months. Subject to those periodic reviews it is calculated in line with the UK Gilt rate, which is the rate at which the Government is able to borrow. Thus the amount of interest that the recipient of LMI pays on the loan reasonably reflects the amount that the taxpayer has incurred in providing the benefit to him or her. The sum that the Government requires to be repaid is proportionate to the benefit received from the loan and the outlay to the taxpayer. The scheme does not require someone to pay back a sum which they cannot afford.

97. Given that a consequence of helping someone to pay off their mortgage over a longer term (though not the aim of the policy) is that he or she is able to acquire an appreciating capital asset, it cannot be unreasonable in principle to secure the loan, interest and costs by means of a charge over that property and to require repayment out of any equity that accrues over time. The Government has fairly determined that the need to repay will only occur at a time when the equity is available for that purpose. It will not call in the loan, and it deliberately ruled out placing a time limit on the borrowing. The three triggering events chosen (and consulted on) are sale, transfer of the property, or death of the recipient or their surviving partner.

98. The specific target of JD's claim for judicial review is the automatic obligation to repay on sale. The legitimate aim of the RSR is to achieve repayment of the loan. It is rational to use a house sale as a trigger for repayment. That is the time at which charges over a property are normally repaid, because the value of the property and any residual equity in it is realised on sale. At that point, therefore, any capital appreciation can be measured. Moreover, and significantly in this context, the purpose

of the LMI is served (or comes to an end) when the original property is sold, because the primary justification for its existence is to enable the homeowner to avoid repossession of *that* property. As the EIA and impact statements recognized, irrespective of any disability, the RSR has no impact at all on the value of the LMI to the individual at the time when he or she needs it (when the obligation to pay the mortgage interest arises). They receive the same help that they were entitled to receive under the SMI regime.

99. It was never the objective of the benefit to enable a recipient to accumulate enough money to buy *another* property. The aim of the benefit comes to an end on sale of the property irrespective of whether the homeowner is disabled, cared for by someone in receipt of Carer's Allowance, an "enhanced risk" claimant, or none of these. This seems to me to be enough in itself to justify the general application of the RSR to all recipients without exception. When the property is sold, it is reasonable, fair, and proportionate to call in the loan, for the simple reason that it has served its purpose and the appropriate time has come to pay it back provided there are sufficient funds to enable the borrower to do so.

100. A requirement to repay the loan at a point in time at which the value of the property and the borrower's interest in it are realised, cannot be described as manifestly without reasonable foundation, even if the consequential inability to use all that equity for other purposes (which affects all recipients) may have a disproportionately detrimental impact on a small minority of severely disabled recipients who need to move, but cannot afford to do so if they repay the Government then. It was never intended that they should be able to spend that money for their own purposes; indeed to allow them to do so would run directly contrary to the rationale for turning the grant into a loan in the first place.

101. Insofar as LMI serves a subsidiary purpose of facilitating the initial access to suitable accommodation for disabled people, or the adaptation of existing premises to make them suitable, that purpose is not undermined by requiring the loan to be repaid on sale of a property which, on JD's formulation, has become *unsuitable* for the needs of the recipient (*a fortiori* if he or she no longer requires it for some other reason). LMI would remain available to help facilitate the purchase of a suitable replacement property.

102. The RSR does not impede or preclude the facilitation of the rights of disabled people (or disabled people in receipt of Carer's Allowance) to become homeowners in general, even though in practice it may do in an individual case where the disabled person receiving LMI for his current property has a restricted choice of alternative dwellings and the amount to be paid back out of the available equity would mean he could not afford to move to somewhere more suited to his disabilities. The prospect of individual hardship, even the prospect of a small minority of seriously disabled people having to remain in unsuitable accommodation or else having to give up being homeowners, does not make the RSR manifestly disproportionate to its legitimate aim or the failure to exempt all, or certain cohorts of, disabled recipients from it, manifestly without reasonable foundation.

103. In this context I do not accept that the evidence of Mr Graeme Jackson, the Head of Investment and Development at Advance, the largest provider of shared ownership accommodation under the HOLD scheme, demonstrates that the failure to make such

an exemption for "enhanced risk claimants" would lead to a significant degree of hardship. Mr Jackson states that currently 10 of his customers are planning to move from shared ownership accommodation, whereas previously only 4-5 a year looked to do so. However, he also says that the numbers of his customers have increased cumulatively over the years. As Mr Brown observed, if the number of customers moving into shared ownership accommodation increases then so too, over time, will the number moving out of it. In any event, there is no evidence from Mr Jackson that the 10, or any of them, would be unable to afford to move if they could not port their LMI. At its highest Mr Jackson's evidence demonstrates a concern on his part that this problem might arise in some cases; but that takes matters no further than the evidence of JD's father.

104. Requiring repayment at the time of sale also has important cashflow implications, enabling the State to recoup its outlay sooner rather than later and generating funds in a manner which enables the benefit to be put on a more sustainable footing than SMI This meant that against a wider background of benefit reductions, and the introduction of the welfare cap, the Government was able to continue paying this particular benefit at the same rates as before. Waiting for possibly many years until the recipient (or their partner) dies before obtaining repayment would mean that less money would be available year on year to fund the scheme. I accept, of course, that saving money cannot in and of itself amount to justification for discrimination, but fairness to the taxpayer, which includes recouping the taxpayer's outlay at an appropriate opportunity, is a relevant factor and one to which the Secretary of State was entitled to afford significant weight in the balancing exercise.

105. The evidence of Mr Scammell makes it clear that the Treasury has costed the LMI scheme and made money available for it on the basis that sufficient money will be recouped on sales to make it sustainable. Mr Burton submitted that in the case of an "enhanced risk claimant" who needs to move, if the RSR prevents him from affording to do so, the impact on cashflow is neutral; but it does not follow from that that the failure to make an exception for such hard cases is unjustified. The RSR was rationally regarded as an essential part of the affordability of the scheme and the fact that in some cases the equity may prove insufficient to enable the loan to be recouped, and in others the RSR may deter someone from selling, (thus defeating the purpose of enabling the State to recoup the money at that time) does not affect the overall evaluation of sustainability as one factor favouring an across-the-board application of the RSR.

106. The recipient of the LMI is still free to keep and use any equity that is surplus to what is required to make repayment. An automatic right to transfer the loan would enable the recipient to take the *whole* benefit of the appreciation, thereby frustrating one of the main objectives of the LMI policy (returning the cash to the State in a rising market).

107. I appreciate that the fact that the RSR is itself a rational measure does not necessarily justify any potentially discriminatory impacts it may have on those with a relevant status. However, the detrimental impact that the RSR will have on any individual (or group of individuals) must always depend on a number of factors, predominantly the amount of equity available and the amount of the LMI that must be repaid at the time of sale. If there is a large amount of equity and very little LMI there may be no impact

at all, other than that the recipient will keep a smaller windfall at the taxpayer's expense (which cannot fairly be described as a detriment).

108. There is no good reason why disabled people, or those whose carers are in receipt of Carer's Allowance, should be singled out for special consideration and exempted from a repayment which they can afford, when other recipients of LMI have to pay the money back on sale, just because they would like to be able to use the equity for their own purposes as they have no other source of income besides benefits. The Minister's riposte to Lord Curry's proposed amendment is to my mind unanswerable. In any event, a requirement to repay when, for example, the sale proceeds are ample and there will still be a sufficient surplus available to a homeowner to enable them to move cannot be castigated as manifestly without reasonable foundation: quite the opposite. The work done by the civil servants in the DWP when they investigated the likely impact of the RSR indicated that this situation was the most likely to arise in practice.

109. If the situation is the reverse, and the amount to be repaid to the Government is large and the equity is too small to repay it, (which is unlikely to arise unless someone who has not built up substantial equity under the SMI regime has been in receipt of LMI for many years, or the housing market crashes) there will be no impact either, because there will be no means of repayment and the loan (or the unpaid balance as the case may be) will be written off. In that situation, regardless of any disability, the recipient of the benefit would probably be unable to afford to move irrespective of the RSR.

110. The impact of the RSR on those individuals whose position falls somewhere in between those two extremes will be a matter of fact and degree and depend on an infinite range of different factual permutations. It should also be borne in mind that there are other benefits available which may mitigate the impact on an individual in any given case. That potentially reduces the size of the cohort who would suffer the identified hardship in JD's case of having to remain in unsuitable accommodation, though of course it would not eliminate the hardship in every case.

111. Given the acknowledged differential impact that the RSR may have on disabled people generally, but bearing in mind the difficulty of measuring that impact, is the failure to allow the loan to be "ported" to the new property in cases where the disabled person needs to move in order to meet his or her disability-related requirements, and cannot adapt their existing property, manifestly without reasonable foundation? In my judgment, the answer to that question is plainly no.

112. Mr Burton submitted that since the SMI/LMI scheme by its very nature allows recipients to accrue equity, and it also allows them to decide to move, it should also allow them to use the equity for that purpose. It would be no more unfair for a severely disabled person who needs to move and cannot otherwise afford to do so, to be allowed to port the loan to the new property, than it would be for him to be allowed to increase his existing mortgage at the taxpayer's expense to generate sufficient funds to adapt the existing property, (and give the lender priority over the DWP) which he can already do. If facilitation of home ownership for disabled people is part of the policy underlying this benefit, then there is nothing incompatible with it in allowing the loan to attach to the new property.

113. Those arguments were put most attractively by Mr Burton, but it does not follow that the failure to make an exception for cases of that nature is unjustified. It is reasonable for the State not to permit the retention of an accrued equity (or some of it) within a claimant's lifetime thereby ensuring that the benefits of a rising housing market accrue equally across the whole body of taxpayers as well as to individual claimants. It is equally reasonable to refuse to create a carve-out from the RSR that would give disabled people (or a small cohort of them) even more support than that which they already enjoy in the form of different types of state support which are paid to them on account of their disabilities, bearing in mind that (i) the principal aim of the LMI is still met at the point of need irrespective of whether the recipient is disabled or non-disabled and (ii) the benefit has served its intended purpose when the recipient no longer wishes to live in that property.

114. Mr Burton further contended that the Government failed to consider the potential differential impact on disabled people or "enhanced risk claimants" before the change of policy was introduced. He submitted that the cohort of disabled people of working age who were more likely to need to move were left out of account altogether, and criticized the DWP for failing to use available statistics relating to the numbers of disabled people on the HOLD scheme. However, as Mr Scammell's evidence demonstrates, there was careful and conscientious consideration of the specific hardship complained of, and of the position of disabled people and how the proposed changes would affect them. Given that the change to LMI was driven by the perception that long-term recipients of SMI were gaining an unfair advantage at the expense of taxpayers, unsurprisingly the focus was on them. As the history of the LMI Regulations which I have outlined above demonstrates, the Minister and his advisors considered the impact that the RSR would have on long-term recipients of the benefit who would be unable to finance repayment through work, having expressly acknowledged that the majority of those long-term recipients will be disabled and that the change would have a disproportionate impact upon them.

115. I do not accept Mr Burton's submission that this was a case in which, as Leggatt LJ put it in *JT v First-tier Tribunal* [2018] EWCA Civ 1735 [2019] 1WLR 1313 at [90] the decision maker had not *"addressed the particular issue before the court and... taken account of the relevant human rights considerations in making its decision."* Whilst it is true that the documents do not specifically address the case of a severely disabled person in receipt of LMI who may not be able to afford to move from accommodation which has become unsuitable if he has to repay on sale, the Secretary of State was not required to descend to that level of detail. The Minister and those advising him did address the case of an elderly person who may suffer that consequence, and the closely analogous case of a carer for an adult disabled child who may be unable to afford to move to a property that meets that child's disability needs. I have already made the point that the potential hardship of which complaint is made in JD's case was specifically considered. It was recognized that in a number of cases (likely to be a small minority) there might not be enough money left over to enable the LMI recipient to buy another suitable property after selling the existing property and paying off the loan, and that this could act as a deterrent to moving. That, plus the recognition of the differential impact on disabled recipients of SMI/LMI in general, was quite enough to show that the Secretary of State made a conscious decision that the RSR was justified despite acknowledging the possibility that in some cases it

might impact more harshly on disabled recipients than on non-disabled recipients. That decision was reasonable.

116. However even if I am wrong about that, and Mr Burton is correct in his argument that because the Minister failed to address the very specific example identified in JD's claim, "*the decision requires even greater scrutiny by the Court and the Court may .. have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider,*" I would reach the same conclusion. The examples the Minister did consider were so close as to make no appreciable difference to the outcome of the balancing exercise.

117. Portability was specifically considered as a means of amelioration of that perceived hardship. The Minister commissioned a specific study to be carried out with that in mind. That option was explored by the DWP officials, but the idea was rejected on the rational basis that to legislate to introduce exceptions to the RSR would be extremely difficult without introducing an element of discretion, and such an approach would require a cumbersome fact-finding and decision-making process that would be resource-intensive and prone to a high level of challenge (there would be an automatic right of appeal to the First-tier Tribunal).

118. In his second witness statement Mr Jackson refers to discussions which he had with MPs and civil servants after he became aware of the RSR (before the LMI regulations came into effect) in which he raised concerns about the impact on people with disabilities "if the purpose of the sale was to move to a new property which would be better suited to their needs" and that he sought an exemption to allow the loan to be ported to the new property in such circumstances. However, as Mr Brown pointed out, allowing the porting of the benefit in all situations where a property would be "more suited" to the needs of a disabled person would preclude repayment even in circumstances where there was no need for the disabled person to use the proceeds of sale to move. Since it is unrealistic to set a targeted rule which properly reflects any disparate effect, the only realistic means of overcoming the hardship identified by JD would be a detailed evidence-based case by case assessment.

119. In recognition of this, JD postulates a decision-making process in which a DWP official would be charged with making a subjective value judgment on a case-by-case basis as to whether (and to what extent) a disabled person has moved, or intends to move, to meet their disability-related needs, and if so, as to how much of the LMI should be repaid out of the proceeds of sale and how much "ported" to a new loan. Mr Burton contended that this would be no more problematic than the type of decision-making that was already part of the SMI/LMI scheme in circumstances in which a loan would be approved under what is now para 3(8) of Schedule 1, or the type of assessment to be made when someone wishes to avail themselves of the HOLD scheme (though that scheme has very different aspirations and objectives to LMI).

120. Irrespective of how difficult or straightforward such a process might be, it would plainly be resource intensive and introduce an unnecessary layer of complexity into what was intended to be a simple transition from a grant to a loan which achieved the same objectives at the point of need. It was reasonable <u>not</u> to introduce that type of process, for the reasons stated when rejecting it. Bearing in mind the relatively few LMI recipients who were likely to suffer the perceived detriment, it was reasonable

and proportionate to reject such a process in favour of adopting a system that would enable the LMI scheme to be *"delivered easily and accurately, without increasing the likelihood of administrative or procedural problems or error"* (in the language of the original call for evidence).

121. I have considerable doubts as to whether a decision on "enhanced need to move" based on unidentified criteria would be workable, as the factors in every case would be different. How could an official evaluate whether JD's desire to move was caused by a disability-related need, and if so whether his need to move was greater than that of another person within the cohort? JD's case, by focusing specifically on those with severe disabilities who need to but cannot afford to move because their existing properties no longer meet their disability related requirements, implicitly accepts that allowing an exemption to the RSR for all disabled people regardless of whether they need the money to purchase a suitable property could rationally be regarded as unfair to the taxpayer. However, even if it would be possible to conceive of a workable system for allowing an exemption or "porting" of the benefit to a new property for disabled people fulfilling certain criteria, that does not make the Government's decision to reject introducing such a process into the repayment mechanism in favour of an easy to apply bright-line test unreasonable, let alone manifestly unreasonable. As noted by Lord Mance in the case of *Mathieson*, at [51] broadly drawn rules are an important feature of the benefit system; the rules cannot be framed to address individual cases.

122. The Minister considered the hardship that might be caused by refusing to allow loans to be ported to a new property by someone who would continue to receive qualifying benefits, precisely the hardship of which JD complains. He was entitled to conclude that it was appropriate to apply the RSR equally to all, thereby ensuring that there are sufficient resources available on a sustainable basis to allow others to access the benefit in the future. That involved exercising an economic and political judgment as to how much State support would be given to meet the needs of persons with disabilities, and deciding to draw the line at allowing them to keep a windfall at the taxpayer's expense when the property acquired through a mortgage financed by LMI is sold, being fully aware of the fact that in some cases this might prevent their moving to more suitable premises (and thus necessarily keeping them in less suitable or even unsuitable premises). Irrespective of whether he turned his mind specifically to the case of an "enhanced needs claimant" the Minister formed a rational view that the scheme, including those features of it, represents a fair level of support to disabled people and is consistent with what can reasonably be afforded by the State.

123. This is precisely the type of value judgment which Parliament is best placed to make and with which the Court should not lightly interfere. The Minister balanced all relevant considerations and struck the balance between the needs of the individual and the interests of the community as a whole in a manner which in my judgment was conspicuously fair. If the Court were to use Elias LJ's formulation of the questions to pose in a case of indirect discrimination, namely: "*could the Secretary of State have been expected to adopt a different rule that did not have that effect, and was it unreasonable for her not to do so?* then, bearing in mind all the factors which were properly taken into consideration and weighing them against the specific identified hardship, the answer to both those questions is no.

124. I am satisfied that the RSR, and any differential impact it has on a member of any of the three different cohorts contended for in this litigation, is not manifestly without reasonable foundation. The balance has been struck in a way which is not manifestly disproportionate to the legitimate aim. The failure to carve out an exception for disabled people generally or the Vincent cohort in particular, or to allow porting of the LMI in limited circumstances depending on the exercise of a subjective value judgment on a case by case basis, does not amount to indirect or *Thlimmenos* discrimination. There has been no breach of Article 14 read with A1P1 or Article 8. It follows that the parallel claims under the Equality Act must also fail.

THE PSED

125. The Vincent claimants make no complaint of breach of the PSED. It is accepted that JD's claim was not issued until 3 July 2018, a year after the LMI regulations came into effect, and almost 5 months after JM received a letter from the Secretary of State on 15 February 2018 specifically notifying him of JD's transition to LMI. Although JD is profoundly disabled, JM has looked after his interests at all material times and there is no satisfactory reason why he could not have issued proceedings promptly. However, the matter has been argued out on its merits, the Secretary of State has suffered no prejudice from the delay, and if there had been any force in the argument, I would not have refused an extension of time. As it is, it is unnecessary for me to dwell on the lateness of this ground of challenge or the reasons for it, because I am satisfied that it is unsustainable on the evidence, whether articulated as a breach of duty at the time of making the LMI Regulations or as a continuing failure to comply with the PSED in maintaining the RSR without allowing "porting" of the benefit to a replacement property.

126. Disability is a protected characteristic under s.149(7) of the Equality Act 2010. The most pertinent provisions of s.149 are as follows:

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

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

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to: -

(a). remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it…"

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

127. The relevant principles relating to the exercise of the PSED are adumbrated by McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [25]-[26] and were endorsed by Lord Neuberger in *Hotak v Southwark LBC* [2016] UKSC 30, [2016] AC 811 at [73]. The duty is personal to the decision maker, who must consciously direct his or her mind to the obligations; the exercise is a matter of substance which must be undertaken with rigour, so that there is a proper and conscious focus on the statutory criteria and proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them.

128. Whilst there is no obligation to carry out an EIA, if such an assessment is not carried out it may be more difficult to demonstrate compliance with the duty. On the other hand, the mere fact that an EIA has been carried out will not necessarily suffice to demonstrate compliance. In this case there was a consultation process and not just an EIA but Ministerial submissions and two impact assessments. Moreover, at the express request of the Minister, there was a specific investigation of portability as a means of ameliorating hardship that might be caused by the RSR.

129. As to the proper approach to be taken by the court to this procedural duty, a useful and elegant summary is to be found in the earlier judgment of Elias LJ in *R (Hurley) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin) at [78], a passage that was expressly approved in *Bracking*. As he concluded:

> "*the concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria… the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognize 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.*"

130. The obligation to have "due regard" to the need to advance equality of opportunity of disabled people, including any steps to take account of those disabilities, and remove or minimise disadvantages arising from them, arose prior to the implementation of the change in SMI from a grant to a loan. The PSED does not require the decision maker to identify every possible disadvantage that might arise, though it does require him to give active consideration to whether there would be any disadvantages to people with protected characteristics and if so how they might be overcome or ameliorated. In this case that is precisely what the Minister did.

131. There is no obligation on the State to provide any form of assistance to anyone with mortgage interest payments. LMI (and SMI before it) provide a means of furthering equal opportunities – they enable those who cannot work, for whatever reason, including those with long-term disabilities, to avoid repossession, and help disabled people to acquire, adapt and stay in their own homes in circumstances in which they might otherwise be unable to afford to do so. Indeed, given the statistics it is common ground that disabled people are more likely than non-disabled people to be beneficiaries of LMI.

132. Moreover at the time of its implementation, LMI contained provisions (Schedule 1 paragraph 3(8)) which conferred positive advantages on disabled persons, since at that time, they remained in the advantageous position of being able to qualify to claim LMI for a mortgage taken out at a time when they already received a qualifying benefit. LMI could be claimed in respect of a re-mortgage taken out to release equity

to provide for adaptations or home improvements for a disabled person, and in respect of the mortgage element of a HOLD scheme. The fact that advantage has since been neutralised on the introduction of Universal Credit is irrelevant to the question whether there was due regard to the needs of disabled people at the time when the measure was introduced.

133. Equalities data was taken into consideration from the outset of the proposals to change from SMI to LMI. The results of the consultation process, including feedback from organisations supporting disabled people, were taken into consideration. An EIA was carried out, but even before that happened, the Minister was alerted to the impact that the RSR might have on long-term recipients of the benefit, the possibility that it might leave insufficient money available to the recipient to enable them to move, and the prospect of it acting as a disincentive to moving, and he expressly asked for further work to be done to investigate portability. That work was done, he considered what DWP officials said about it, and he accepted their recommendation not to make an exception and the reasons for it.

134. The thrust of the complaint appears to be that although it was expressly appreciated that the RSR could produce hardship and some cases might act as a disincentive to moving, there was no conscious consideration that disabled people, or at least some of them who fell into the category of "enhanced risk claimants", might end up remaining in unsuitable accommodation because they could not afford to move. That does not mean that there was a failure to comply with the PSED. The example given in the annexe to the submission to the Minister of the parent with caring responsibilities for a disabled adult child who would be unable to afford to move to a property which would require adaptation to meet the child's needs, may not be precisely on all fours with JD's situation, but it is sufficiently analogous to satisfy the requirements of the PSED. It identifies the same hardship.

135. I do not accept that the PSED required conscious consideration of the additional possibility that being unable to afford to make necessary adaptations to the new property might mean staying in accommodation which was no longer suitable (as opposed to, for example, otherwise suitable accommodation that was too far away from family members or next door to unsympathetic neighbours). The Minister was aware of the prospect that a recipient of LMI, including a disabled recipient, might not be able to afford to move to suitable accommodation. He took it into account. He considered, and ultimately discounted, ways in which it might be ameliorated. That was more than enough to satisfy the PSED.

136. Although the duty must be carried out with substance and rigour, that does not mean that the Minister is obliged to consider different cohorts within the generic class of persons with a protected characteristic or envisage every possible way in which the legislative scheme (including the RSR) might impact upon them. I am not impressed with any of the criticisms made in respect of the manner and substance of the approach taken to the PSED; the Minister and his officials in the DWP plainly took it very seriously, and I am satisfied on the evidence that the duty was discharged even before the EIA was carried out. Whilst the EIA did not specifically address the impact of the RSR on those with protected characteristics but concentrated instead on the impact of the change from grant to loan, it did not need to, because the impact of the RSR had already been considered.

137. As to the complaint that there has been an ongoing failure to comply with the PSED, that is demonstrably ill-founded given that the Government has actively engaged with the concerns articulated by JM and others, including Mr Jackson, regarding the potential of the RSR to prevent disabled persons from moving to more suitable accommodation. Mr Scammell's evidence indicates that the Government has taken very seriously the concerns raised with them since the implementation of the LMI Regulations about the impact of the RSR on people in JD's position. He confirms that the potential problems of people with disabilities were among the considerations that have driven the change in policy which, when it is implemented, will facilitate a move by allowing the LMI to be ported in all circumstances where the owner-occupier is using the equity in their home to purchase a new property and is prepared to charge the new property as security for the LMI repayment obligations.

CONCLUSION

138. For all the above reasons, I dismiss both these claims for judicial review.