Neutral Citation Number: [2021] EWHC 608 (Admin)

Case Nos: CO/820/2020 and CO/1616/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 17/03/2021

Before :
MR JUSTICE KERR

- -

Between :
THE QUEEN on the application of
(1) GAVIN BLUNDELL
(2) MARK BROOKS
(3) DENIS LAIRD
(4) WILLIAM SLATER

Claimants

- and –

SECRETARY OF STATE FOR WORK AND PENSIONS

Defendant

And between :
THE QUEEN on the application of
CHRISTOPHER DAY

Claimant

-and-

SECRETARY OF STATE FOR WORK AND PENSIONS

Defendant

- -
- -

Mr Richard Drabble QC and **Mr Tom Royston** (instructed by **Shelter Legal (England and Wales)**) for the **Claimants in the first claim**
Mr Richard Drabble QC and **Mr Michael Spencer** (instructed by **Hackney Community Law Centre**) for the **Claimant in the second claim**
Mr Jason Coppel QC and Ms Joanne Clement (instructed by **Government Legal Department**) for the **Defendant**
Hearing dates: 12th and 13th January 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE KERR

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 of hand-down is **17:00** on **17 March 2021**

Mr Justice Kerr :

Summary

1. These five claimants in two claims contend that the defendant (**the Secretary of State**) is unlawfully fettering her discretion to decide, where necessary in individual cases, how much to deduct from a person's universal credit to pay off fines imposed under the criminal law. The Secretary of State has a policy of deducting at a fixed rate; any change must be achieved by the individual applying to the magistrates' court to vary the rate of payment of the fines.

2. The Secretary of State says that is lawful because the discretion has been properly exercised by reductions in the fixed rate from time to time; and because she does consider deduction rates in individual cases in relation to other debts that are not court imposed fines; and because the individual can apply to the court to vary the rate of payment of any fine. To say that the Secretary of State is fettering her discretion is, she argues, to elevate form over substance.

3. I regard those competing contentions as the main battleground in these claims. However, the claimants also assert that the Secretary of State's policy is irrational. And they complain of breaches of the Equality Act 2010 (**the Equality Act**) by failing properly to perform the public sector equality duty and, in the case of one claimant, Mr Day, by discriminating against him indirectly without justification and failing to make reasonable adjustments in his case.

4. The Secretary of State denies that any individual disability discrimination against Mr Day is made out. She accepts that the public sector equality duty was not properly performed before enacting the relevant regulations informing her policy on deductions in respect of court fines, but says it is highly likely that if she had performed that duty, the outcome would not have been substantially different for Mr Day and others like him and relief must therefore be refused (section 31(2A) of the Senior Courts Act 1981 (**the 1981 Act**)).

Relevant statutory provisions

5. The criminal courts have long had powers to impose fines and to adjust rates of payments of fines and to remit, i.e. cancel, fines. A fine must reflect the seriousness of the offence and the offender's financial circumstances must be considered (Criminal Justice Act 2003 (**CJA 2003**) section 164 (see now section 124 of the Sentencing Act 2020)).

6. A magistrates' court may allow time to pay or order payment by instalments. Their amount and frequency may be varied (Magistrates' Courts Act 1980 (**MCA 1980**) sections 75 and 85A). A further means enquiry may be made. Imprisonment for default may be imposed (sections 82 and 86). A fine may be wholly or partly remitted (section 85(1) MCA 1980 and section 165 CJA 2003).

7. The Courts Act 2003 (**CA 2003**) provides for collection of fines by "collection orders". There are "fines officers" appointed by the Lord Chancellor (section 36). Their decisions are regarded as "not involving the making of judicial decisions and as not involving the exercise of any judicial discretion" and therefore their functions may be contracted out (CA 2003, section 36A).

8. Schedule 5 (given effect by section 97(1)) enacts the regime for fines officers to collect fines. It is detailed and, as the Secretary of State points out, provides for increased administrative enforcement of fines through collection orders. The court may apply to the Secretary of State asking her to deduct "relevant benefit" amounts towards paying off the fine.

9. Indeed, the court must make such an application if the debtor is an "existing defaulter" and the court decides the default cannot be disregarded, unless the court decides that it is impracticable or inappropriate to make the application (paragraph 7A of Schedule 5 to the CA 2003).

10. The position is then as set out in the Secretary of State's summary in the skeleton argument of Mr Jason Coppel QC and Ms Joanne Clement, which I gratefully adopt; "P" being the debtor:

> "14. In broad terms, the court must make a collection order relating to the payment of the sum due (whether or not an application for benefit deductions has been made). If the court has not made an attachment of earnings order or application for benefits deductions, the court must state the payment terms (being either a term requiring P to pay the sum within a specified period, or terms requiring P to pay the sum due by instalments of specified amounts on or before specified dates) (paragraph 14). If the court has made an attachment of earnings order or application for benefit deductions, the collection order must state the reserve terms (paragraph 15 of Schedule 5). These are essentially the payment terms which have effect if the application for benefit deduction fails. An application for benefit deductions will "fail" if it is withdrawn by the Court or for some reason the Secretary of State decides not to make deductions (see paragraph 17).
>
> 15. The fines officer and/or the magistrates' court have a broad range of powers to vary the payment terms at any time, including a power for P to pay the sum due by specified instalments, to vary the number of instalments and to vary the amount of any instalment:

(1) on an application by P to the fines officer if there has been a material change in P's circumstances or P is making further information about his circumstances available (paragraph 22)

(2) on an appeal to the magistrates' court against any decision of the fines officer (paragraph 23)

(3) on a fines officer making a referral to the magistrates' court if an individual has defaulted on payment terms (paragraph 26);

(4) on an appeal to a magistrates' court against a further steps notice (paragraph 39)

on a fines officer making a referral to the magistrates' court under paragraph 42, where a magistrates' court has the power to exercise any of its standard powers in respect of persons liable to pay fines. This includes powers to remit the fine, reduce the fine, withdraw the benefits deduction application and/or agree new payment terms."

11. The "relevant benefit" from which deductions may be made is a benefit from which the Secretary of State may make deductions under section 24 of the Criminal Justice Act 1991 (**CJA 1991**). That includes (by amendment) universal credit. Section 24(1)(b) empowers the Secretary of State to make regulations allowing her (among other things) to "deduct sums from any such amounts and pay them to the court" towards paying off the fine.

12. Those regulations, by section 24(2)(d), may include:

> "provision as to the calculation of such sums (which may include provision to secure that amounts payable to the offender by way of universal credit, income support, a jobseeker's allowance, state pension credit or an employment and support allowance do not fall below prescribed figures)...".

13. The Secretary of State has enacted the Fines (Deductions from Income Support) Regulations 1992 (**the Fines Regulations**). They start by repeating, for some reason (see regulation 2), the power of the court just mentioned, to apply to the Secretary of State asking her to deduct sums from universal credit to help pay off a fine. Before making the application, the court must enquire into the offender's means.

14. Regulation 4(1A)-(1C) of the Fines Regulations sets parameters for what may be deducted:

> "(1A) Subject to paragraphs (1C) and (1D) and regulation 7, where the Secretary of State receives an application from a court in respect of an offender who is entitled to universal credit, the Secretary of State may deduct from the universal credit payable to the offender an amount permitted by paragraph (1B) and pay that amount to the court towards satisfaction of the fine or the sum required to be paid by compensation order.
>
> (1B) The amount that may be deducted under paragraph (1A) is any sum which is no less than 5 per cent. of the appropriate universal credit standard allowance for the offender for the assessment period in question under regulation 36 of the UC Regulations but no greater than £108.35.
>
> (1C) No amount may be deducted under paragraph (1A) where it would reduce the amount of universal credit payable to the offender to less than 1 penny."

15. The court may withdraw an application to the Secretary of State at any time. The Secretary of State must cease making deductions if such an application is made and must do so once the fine is paid off (see regulation 8 of the Fines Regulations).

16. The making of deductions from universal credit is also regulated by the very fully titled Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment Support Allowance (Claims and Payments) Regulations 2013 (**the Claims and Payments Regulations**). These are substantial, as their title presages. Again, drawing on the summary in the Secretary of State's skeleton argument, I learn that:

> "Part 5 of the Claims and Payments is concerned with deductions from benefits to make … payments to third parties. Regulation 60 states that deductions may be made from benefit and direct payments may be made to third parties on behalf of a claimant in accordance with … Schedule 6 and 7. Schedule 6 governs deductions from benefit and direct payment to third parties."

17. Paragraphs 3, 4 and 5 of Schedule 6 require the court's attention. Paragraph 3 is headed "Limitations applicable to deductions made under this Schedule". Up to three separate deductions, not more, may be made from the list of candidates, which are housing costs, rent and service charges, fuel costs, water charges, payments in place of child support maintenance, eligible loans, integration loans, council tax and, at the end of the list under paragraph 3(2)(k), court fines.

18. Paragraph 4 is headed "Maximum amount". Subject to immaterial exceptions, for any assessment period the Secretary of State may not deduct an amount from a claimant's award of universal credit (**UC**) if that would result in deduction of more than 40 per cent of the UC standard allowance under various provisions (found elsewhere) that go to make up the award of UC.

19. Paragraph 5 is headed "Priority as between certain debts". It is lengthy. It applies where there is not enough UC in any assessment period to cover all deductions that could otherwise be made, without exceeding the statutory maximum set by paragraph 4. The Secretary of State must "give priority to … deductions in the order in which they are listed in sub-paragraph (2) …" (see paragraph 5(4)).

20. So, sub-paragraph (2) is the provision setting the order of priority. The priority is in the order lettered (a) to (q). Where the deduction is to pay a fine and the amount of the deduction is set at the minimum, five per cent of the standard allowance, it is fifth in priority on the list, appearing at letter (e). But where the deduction is to pay a fine and the amount of the deduction exceeds the five per cent minimum, it is at the bottom of the order of priority, at letter (q).

Facts

21. The parties agree that deducting fine payments from benefits is in the public interest. As the claimants observe, it benefits the public by enabling fines to be paid where collection could otherwise be uncertain; and benefits the debtor by providing a reliable and accessible means of payment. In similar vein, the Secretary of State notes that deductions from benefit shield debtors and their families from the consequences of non-payment such as eviction, disconnection of fuel supply or imprisonment for default.

22. The power to deduct certain debt payments from benefits has existed since 1978. The Fines Regulations have existed since 1992 as already explained. In 2010, the Equality Act of that year was passed. It created, among other things, the so-called public sector equality duty (**PSED**) by section 149, in force from 5 April 2011. At about the same time, the government was planning to introduce UC.

23. In November 2011, the government carried out an equality impact assessment in respect of UC. It included an estimate (at paragraph 3.1) that about 2.9 million of the potential UC households "self-report at least one disabled person", using the statutory definition in the Equality Act; and that about 60 per cent of those households were likely to be entitled to a disability benefit.

24. In December 2012, the government carried out a final, general impact assessment in respect of UC. It was not specifically equalities based, but included at Annex 4, entitled "Risks and opportunities to promote equality", some brief further consideration of equalities issues arising from implementing UC, including specifically the effect on people with disabilities.

25. When the Claims and Payments Regulations came into force from 2013, their effect combined with the earlier Fines Regulations was that the maximum deduction from the UC standard allowance was £108.35 or 40 per cent of the standard allowance, per assessment period, as explained above. Up to three deductions can be made, as already explained; and only from the standard allowance, not from "top up" benefits such as disability benefits.

26. The government has kept its policy in relation to deductions (within the legislative parameters) under review. In March 2018 (without carrying out any further equality impact assessment) the government announced that from October 2019 it would reduce the maximum deduction from a UC award from 40 per cent to 30 per cent of the standard allowance.

27. The claimants are all UC claimants. They made various claims, or new claims, in 2018 and 2019. Their circumstances and claims vary. All have encountered financial difficulties. Some have problems with substance abuse and a history of rough sleeping. In various ways, they suffer from social and financial and in some cases mental health problems. All have incurred court fines for criminal offences such as fare evasion, public order offences, begging, assault and (in Mr Day's case) fraud.

28. From those fines, deductions have been made, in varying amounts at various times. The claimants have tried, with varying degrees of success, to get their deductions reduced. They have not always gone about it in the best way. They have all had deductions of 30 per cent of their UC standard allowance made. In some cases, the full 30 per cent was taken for fines; at other times, it was a composite amount, including other debts.

29. From October 2019, the Secretary of State's current policy on deductions became effective. It has been applied to the claimants since then. It is this policy (**the deductions policy**) whose legality these claimants challenge. One of three elements of the deductions policy is "[e]nforcing social obligations" where other repayment methods have failed or are not cost effective. Social obligations include court fines as well as other obligations such as child maintenance payments and council tax arrears.

30. The deductions policy provides for a maximum of three deductions, in line with the legislation. It then states that (subject to two exceptions not here relevant):

> "[t]here is an overall maximum amount that can be deducted from someone's [UC]. This is the equivalent [sic] to 30% of the benefit unit's [UC] Standard Allowance. This limit is set to reduce the risk of claimants facing hardship because of the amount being deducted from their [UC] payment."

31. Deductions are taken at the maximum permitted level subject to the cap of 30 per cent. The order of priority in the Claims and Payments Regulations is followed if there is insufficient UC for all deductions to be taken. There is then a section on "[d]eductions causing financial hardship". Claimants in financial difficulty can ask for reductions in the level of deductions from some types of debt (a benefit debt, repayment of a Social Fund loan and rent arrears).

32. In the case of deductions from other types of financial obligation, however, "they cannot have their deductions reduced", the deductions policy states. The explanation given if explanation is the right word, is that these "other deductions have set rates, not maximum rates, with the exception of fines". Court fines are then the subject of a further section in the deductions policy.

33. It requires a minimum deduction rate of five per cent of the person's (or household's) (the **benefit unit**'s) UC standard allowance. The maximum is the statutory £108.35 per month. The maximum is reduced by the amount of any other deductions from UC, to avoid exceeding the ceiling of 30 per cent of the UC standard allowance for each benefit unit.

34. The deductions policy makes no provision for reducing the deduction rate for fines on the ground of financial hardship. The deduction rate for fines, according to the policy, can only be reduced to the extent necessary to avoid exceeding the overall cap of 30 per cent of UC standard allowance. The explanation for that is in the Secretary of State's skeleton argument, supported by the evidence of Mr Craig Dutton, her UC policy team leader:

> "The … Deductions Policy has never provided for the reducing deductions for court fines on the grounds of financial hardship. This is because the court fine system is considered as a whole. If an individual feels that the court fine deductions made from benefits are causing financial hardship, they can and should apply to the fines officer/magistrates court to remove the deductions from benefits order (and enter into direct arrangements with HMCTS to repay the fine). It is through this route than an individual's particular circumstances, including financial circumstances, will be considered by a fines officer/magistrates' court and an appropriate repayment plan agreed."

35. As Mr Dutton explains, since court fines appear at the bottom of the priority list in Schedule 6 to the Claims and Payments Regulations, no amount above the minimum five per cent of standard allowance is considered unless the extent of other deductions allows for this without exceeding the 30 per cent cap; in which event court fine deductions will be taken in such amount as to bring the overall deductions up to 30 per cent of standard allowance.

36. In January 2020, the Magistrates Association produced a guide to UC and deductions, including the following explanation:

> "Up to three deductions can be taken at a time which will add up to the maximum of 30%. So, if only one deduction is taken, it will be 30% but if three are taken they could all be at 10%. If more than three deductions are requested, they will be prioritised and only the top three will be payable…. Court financial impositions are ninth in the list of priority."

37. The guide went on to explain that the law requires the court to apply for a "deductions from benefit order" (**DBO**) where the defendant is an existing defaulter, unless it is thought inappropriate or impractical to apply. Where an application is made:

> "The rate of repayment through a deduction is set by the DWP. This rate will not be known by the court upon imposition so the court cannot find it inappropriate or impractical purely on the basis that they do not know what the deduction rate will be or they are concerned the weekly amount might be higher than the court might have imposed.…..
>
> … it is important for magistrates to remember that if a DBO is made, the deduction rate will be fixed by DWP not the court. The magistrates should therefore not state in open court what figure or percentage is likely to be deducted.
>
> …..
>
> The court does not have the power to vary the deduction rate. However, the court may see applications coming back before them whereby offenders are applying for their DBOs to be removed and replaced with payment terms. The court must scrutinise these applications carefully, as a DBO is one of the most effective fine enforcement tools for people on [UC]. It should be remembered that if there are other deductions are still being taken [sic] even if a DBO is removed in relation to a court fine payment, then the maximum of 30% will still be taken for the other deductions. The court should conduct a full means enquiry and scrutinise the offender's income and outgoings, determining what are essential and non-essential payments. … ."

38. According to Mr Dutton's evidence, 17 per cent of UC claimants with court fines have deductions made of 30 per cent of their UC standard allowance. The average deduction level for court fines as at April 2020 was £50, which is less than half the maximum permitted under the Fines Regulations. Some UC claimants with court fines have no deductions made at all. As at March 2020, of all UC claimants with DBOs in place, 30 per cent paid no deduction towards their court fines.

39. Mr Dutton confirms that "[i]f a claimant contacts DWP to request that the deductions in respect of court fines are reduced, they will be informed that DWP will not reduce a court fine on account of hardship". Instead, the offender will be directed to Her Majesty's Courts and Tribunals Service (**HMCTS**) which may request revocation of a DBO. The fines officer will consider the offender's circumstances and whether there has been a material change.

40. The Secretary of State, Mr Dutton explains, regards HMCTS as "better equipped to address the level at which court fines are both set and repaid for offenders. She "does not consider it necessary to duplicate that process when it is already in place elsewhere in the fines collection system".

41. HMCTS deals with fines enforcement in the manner explained by Ms Amy Morgan of its National Compliance and Enforcement Service (**NCES**). Requests from debtors

with court fines for their DBO to be withdrawn can be made by telephone, letter or email. The fines officer lists the application before the court which made the DBO, usually in the defendant's absence.

42. If the DBO is withdrawn, Ms Morgan explains, the court orders the fine to be paid another way, for example by weekly instalments or in full by a certain date. The defendant can also ask the court to reduce or remit the fine or even (surprisingly, to my mind) challenge the underlying conviction.

43. Mr Sam Shipstone, of Citizens Advice Leeds, gives evidence for the claimants. He emphasises that vulnerable debtors with court fines often do not have the wherewithal to apply to the court. For those that do, he says, the court informs the debtor complaining of hardship, correctly, that the court cannot alter the rate of deduction from UC and directs debtors to make "ineffective representations to the DWP instead"; thus passing the debtor from "pillar to post".

44. Mr Shipstone also explains that default is much more likely where a debtor must arrange direct payments to the magistrates' court. Where deductions from benefit are made, the debtor does not have to arrange a payment proactively. Deduction from benefit removes barriers to payment such as delayed clearance of funds, credit card debts or an overdraft.

45. Mr Day (the claimant convicted of fraud) regards himself as disabled though he has been found able to work and does not receive any top up benefits (over and above UC standard allowance) through disability. He suffers from depression, diabetes and other ill health conditions. He says he meets the definition of a disabled person under the Equality Act. For this claim only, the Secretary of State is content to assume that is correct. Disability related benefits are awarded using different criteria from the definition found in the Equality Act.

46. These claims were brought in February and April 2020. In March 2020, the government announced that from October 2021 the maximum rate of deduction from UC standard allowance would be reduced further to 25 per cent. The aim of the two decisions reducing the cap downwards, from the statutory maximum of 40 per cent to 30 per cent and further to 25 per cent from October 2021, was (as explained in her skeleton argument) "to ensure that those on [UC] are supported to repay debts in a more sustainable and manageable way".

47. A series of orders was made in the two claims, over the summer of 2020. Mostyn J initially refused permission on the papers, in one of them. They were eventually permitted to proceed following an oral hearing before Lieven J, who granted permission for them to proceed to a full hearing, to be heard together.

48. The Secretary of State then carried out an equality impact assessment in relation to her policy for "UC Third Party Deductions", in September 2020. This assessment, among other things, looked at the impact of the policy on disabled people claiming and receiving UC. Claimants receiving disability living allowance (**DLA**) or personal independence payments (**PIP**), or the "Limited Capability for Work Element" (**LCW**) alongside their UC were used as a proxy for claimants with disabilities in the sense used in the Equality Act.

49. The author noted that about 20 per cent of UC claims in payment in any given month are flagged as paid to "disabled" people, in receipt of DLA, PIP or LCW. The proportion of those claims with deductions was close to the norm. The average amount deducted for those where deductions were being made was lower for "disabled" claimants (in the sense of those in receipt of relevant benefits related to disability) than overall. The differentials were small.

Issues, Reasoning and Conclusions

50. The grounds of challenge were formulated in various ways in the two claims. I will consider the parties' contentions in the order in which they were addressed in both parties' submissions.

First ground: fettering of discretion

51. The claimants' case is simple: the Secretary of State has adopted a rigid arithmetical formula embodying an inflexible rule, rather than, as the legislation requires, exercising a discretion. A public authority "offends against legality by failing to use its powers in the way they were intended, namely to employ and utilise the discretion conferred upon it" and "offends against procedural propriety by failing to permit affected persons to influence the use of that discretion" (de Smith's Judicial Review, 8th ed (2019) at 9-002).

52. The claimants cite all the usual authorities: Lord Reid's speech in *British Oxygen Co Ltd v. Minister of Technology* [1971] AC 610, 625C-F; *R. v. Secretary of State for the Home Department ex p. Venables* [1998] AC 407, per Lord Woolf MR (in the Court of Appeal) at 433B-E; and in the House of Lords, per Lord Browne-Wilkinson at 496G-497C; *R. (Lumba) v. Secretary of State for the Home Department* [2012] 1 AC 245, per Lord Dyson at [21]; and *West Berkshire DC v. Secretary of State for Communities and Local Government* [2016] 1 WLR 3923, CA, per Laws and Treacy LJJ at [16].

53. The Secretary of State, the claimants say, may have a policy but is unlawfully shutting her ears to requests to depart from it in exceptional individual cases on the ground of financial hardship. The Fines Regulations give the Secretary of State discretion to deduct "any sum" from fines, within the set parameters, or no sum at all; while the deductions policy sets a deduction rate fixed arithmetically with no possibility of departure from it in individual cases.

54. The claimants say that is a text book case of a fetter on the exercise of a statutory discretion. The deductions policy prevents what the legislation requires: deduction of (within the legislative parameters) "any sum" or none; instead, it mandates deduction of the sum required to produce the maximum 30 per cent of standard allowance that must be deducted from court fines except where the legislation precludes this because of other deductions from other benefits.

55. It is no answer, say the claimants, that a hard up debtor with court fines is not prejudiced by the rigidity of the deductions policy because he can apply to the magistrates' court to change the method of payment, for example by lowering the amount of regular instalments. That is not an exercise of the discretion to set benefit

deduction rates; it shows an abdication of the discretion to do so, in reliance on a different function exercised by a different body.

56. As to the facts, the claimants complain that the remedy of application to the magistrates' court is inadequate. It operates outside the deductions regime altogether. That regime is there precisely because, as the deductions policy itself states, "other repayment methods have failed or are not cost effective". Thus, the claimants submit, the deduction regime cannot be responsive to a debtor's situation in precisely the class of case where it is most needed.

57. Further, while a debtor must have a bank account to receive UC, the bank will not pay out on a direct debit or standing order if the account is overdrawn. All that would be needed to comply with the law would be for the Secretary of State to extend to court fines the flexibility she extends in the case of other types of payment obligation. That does not mean that every case must be looked at individually; only cases where a request is made on an exceptional basis.

58. The claimants point to the problem that the magistrates' court or fines officer will not necessarily know what the effect, if any, of varying the payment rate will be on deductions and therefore on alleviating financial hardship. Thus, as explained in the January 2020 Magistrates Association guide, "if a DBO is removed in relation to a court fine payment, then the maximum of 30% will still be taken for the other deductions".

59. The fines officer or magistrates may, the claimants argue, merely be transferring a payment obligation from one type of payment to another, without reducing hardship. For that reason, the guide discourages the court from announcing in court an overall deduction from benefits rate which it does not know. As the guide states, "[t]he rate of repayment through a deduction is set by the DWP. This rate will not be known by the court … The magistrates should … not state in open court what figure or percentage is likely to be deducted."

60. The Secretary of State submits that none of the claimants has in fact had deductions for court fines taken at as much as the maximum £108.35, or 30 per cent of standard UC allowance if lower. The average deduction for court fines was £50 as at April 2020, less than half the maximum permissible amount in the Fines Regulations. In the case of the claimants, she says they could have achieved lower payment rates if they had taken further or different steps from those they took.

61. Aside from the individual claimants' position, she submits that (as the claimants do not dispute) it is lawful and quite normal to adopt a policy governing the exercise of a statutory discretion and to decide that the policy will govern the generality of cases. She goes on to argue that the court fine system must be considered as a whole and that an individual's personal circumstances are considered in various ways.

62. They are considered when the court decides to impose a fine in the first place; when payment by instalments is ordered or varied; when a further means enquiry is carried out in cases of non-payment; when deciding whether to remit a fine in whole or part following a change of circumstances; before deciding whether to apply to the Secretary of State for a DBO; when deciding whether to withdraw an application for a

DBO on revisiting the payment terms of a fine; and when considering an offender's application to vary the payment terms.

63. In the light of those aspects of the regime overall, the Secretary of State submits, in her skeleton argument that she:

> "has not acted unlawfully in adopting the Deductions Policy in circumstances where an individual's particular financial circumstances / financial hardship will be considered by another actor within the same fines collection process – i.e. by the Magistrates' Court or the fines officer."The Secretary of State accepts in her skeleton that "the power to make deductions from benefits is different to a power to enter into a direct repayment agreement" but insists that "the *purpose* [her italics] of both approaches is to enforce the social obligations in question and to collect court fines"; and that it is lawful to decide that it is by this route that an individual's particular circumstances will be considered and not by consideration on an individual basis of the appropriate rate of deductions from UC.

64. In oral argument, as set out in the introduction to this judgment, Mr Jason Coppel QC added the contention that the discretionary element of the Secretary of State's function had been satisfactorily exercised by two across the board reductions (one forthcoming in October 2021) to the maximum percentage of UC standard allowance to be deducted; and by the willingness of the Secretary of State to consider variations to the rate of deduction from benefits in the case of other types of payment, not being court fines.

65. She disputed the claimants' proposition that recourse to the fines officers and the magistrates' courts was inadequate; they are, she submitted, "better equipped to address the level at which court fines are both set and paid". She "does not consider it necessary to duplicate that process when it is already in place elsewhere in the collection system". She is not required by law "to set up an alternative decision making process to consider the very same points that could, and should, be made to fines officers and magistrates' courts".

66. In the course of oral argument, Mr Coppel and Ms Clement drew my attention to Cranston J's decision in *R (Mayaya) v. Secretary of State for the Home Department* [2011] EWHC 3088 (Admin), [2012] 1 All ER 1491. In test cases, there was a challenge to two aspects of the Secretary of State's published policy on the grant of leave to remain and humanitarian protection.

67. The first challenged part was, as the judge described it ([1]), that "all offences attracting a sentence of 12 months or more are deemed serious crimes and automatically exclude a person from obtaining humanitarian protection leave". The second was that "while those who have been granted discretionary leave are ordinarily eligible for indefinite leave to remain, ie settlement, after six years, those who have committed serious crimes may only obtain indefinite leave to remain after ten years of discretionary leave to remain".

68. Both policies were said to be an unlawful fetter on the Secretary of State's discretion, as well as a violation of the principle that she should not impose higher hurdles by means of a policy than are set by the Immigration Rules (*Pankina v. Secretary of State for the Home Department* [2011] QB 376, CA). In his evaluation, Cranston J

examined in detail the statutory context, the Immigration Rules and the EU Qualification Directive (Directive 0204/83/EC).

69. He concluded that the 12 month imprisonment threshold was consistent with the undefined term "serious crime" in the Qualification Directive. He noted that, in his judgment, "the criminal courts do not pass sentences of 12 months or more for offences which are not serious" ([42]). He rejected the submission that the prohibition against fettering of a statutory discretion was infringed by the 12 month imprisonment threshold. At [46], he reasoned:

> "As we have seen the policies on humanitarian protection and discretionary leave are published and they contain the 12 months' threshold. As I have concluded, that length of sentence makes an offence serious. That sentence is fixed by the court, which will have considered the seriousness of the offending, and in doing so the aggravating and mitigating circumstances: see the Sentencing Guidelines Council's guideline 'Overarching Principles: Seriousness' (2004). It seems entirely rational for the Secretary of State to adopt the court's sentence as to whether the threshold of seriousness has been reached and for her not to have to reinvestigate the background features of the offending to decide whether it was, in fact, serious. The court has already done that. To my mind a 12 months' sentence threshold is a reliable and rational measure of seriousness, which has been set by a court, and is not an unlawful fetter on the Secretary of State's discretion."

70. Consequently, he ruled at [47] that "the non-fettering rule has no application in relation to the 12 months' threshold". After rejecting the submission that the 12 months' threshold violated the *Pankina* principle, he went on to consider the other aspect of the policy: that "those excluded from humanitarian protection but granted discretionary leave 'do not become eligible for settlement until they have completed ten continuous years of discretionary leave'" ([52]). He held, by contrast, that "the no-fettering principle does bite in this instance" ([53]).

71. The judge declined to quash the policy; it was lawful, he was satisfied, apart from the part which "breaches the no-fettering principle by suggesting that a person must always have at least ten years' discretionary leave to be granted indefinite leave to remain" [(69]). Specific decisions applying that part of the policy were therefore flawed and unlawful but the Secretary of State had since revisited those cases individually, so no further relief was required beyond allowing the claims where those specific flawed decisions had been made.

72. The Secretary of State submitted, in effect, that *Mayaya* endorses the proposition that the rule against fettering discretion may be complied with where a particular policy is rigid and does not admit of exceptions but a different decision maker exercising a different function satisfactorily addresses or has already addressed the circumstances of the individual case. That is also the position in the present case, according to the Secretary of State.

73. Turning to my reasoning and conclusions in respect of this first ground, I start by reminding myself about the nature of the rule against fettering of discretion. Its purpose is to uphold the rule of law and keep the executive accountable to the public for its use of statutory powers. It does that by requiring fidelity to the statute conferring the discretion and procedural fairness to individuals seeking succour from

its exercise, even if they can do so only exceptionally in the face of a legitimate policy from which the decision maker is asked to depart.

74. Although the rule against fettering of discretion may, in some cases, overlap with the requirement to exercise powers rationally, I do not think it is merely a species of the genus of irrationality. It will often be entirely rational for a decision maker to fetter a statutory discretion. It is frequently administratively convenient to do so and there is nothing irrational about promoting administrative convenience. To decide an issue rationally does not mean you decide it in a manner faithful to the terms and purpose of the statutory power.

75. If the decision of this court in *Mayaya* was intending to say anything different, I would respectfully not follow slavishly the reasoning in it. In upholding the 12 months' imprisonment threshold, the judge remarked at [46] (quoted above) that it "seems entirely rational for the Secretary of State to adopt the court's sentence". I do not disagree with that statement but I do not think it follows without more that the rule against fettering discretion is complied with.

76. The 12 months' imprisonment threshold at issue in *Mayaya* was a rigid part of the Secretary of State's policy, which admitted of no exceptions; not even if, for example, an out of time appeal against sentence would have been allowed had it been brought in time. The determination of sentence by the court had, by definition, already taken effect and become a firm and fixed point of reference, before the Secretary of State's involvement in the issue of leave to remain.

77. In the present case, by contrast, the financial position of the UC claimant is fluid and ever-changing, which is why the issue of deductions, or the manner of paying off fines, may need to be looked at more than once or twice after imposition of the court's sentence. For that reason, I do not think it would be appropriate to apply the reasoning in *Mayaya* to the different facts and different statutory policy in play here.

78. I consider next the powers of the fines officer and the court to adjust the rates at which fines are paid and their role in the statutory scheme as a whole. The Secretary of State regards her role in making deductions from benefit as one that "duplicate[s] that process" (in the words of her skeleton argument). Yet, intriguingly, she accepts that the power to make deductions "is different to a power to enter into a direct repayment agreement".

79. It is not easy to square those two statements. The Secretary of State attempts to do so by asserting that "the *purpose* [her italics] of both approaches is to enforce the social obligations in question and to collect court fines". That is true, but the means of achieving the purpose is very different. One involves direct seizure of money from the hands of the debtor; while the other just gives him an opportunity to hand over the money, having failed to do so previously.

80. That is quite a significant difference. The first is direct enforcement of a debt; the second, mere encouragement to pay it. A creditor requiring security for a debt knows the difference very well indeed. Managers of reputable banks would guffaw in disbelief at the notion that giving someone time to pay off a mortgage on a property "duplicates" taking a charge over the property.

81. Two of the judges who considered this matter on the papers (Mostyn J and (as he then was) Lewis J) used the phrase "alternative remedy" to describe the option of applying to the fines officer or magistrates' court for respite from financial hardship. The Secretary of State pointedly did not adopt that terminology and did not submit that judicial review should be refused on the basis that the claimants' rights in court were an adequate alternative remedy.

82. That is understandable because the Secretary of State's position is to deny that she has acted unlawfully in any way. The "alternative remedy" jurisprudence is normally concerned with redress in the form of a remedy against the unlawfulness complained of. The alternative remedy is not said to legalise what would otherwise be illegal; it is said to provide redress against the illegality sufficient to dissuade the court from granting relief by way of judicial review.

83. Here, by contrast, the Secretary of State *is* saying that the powers of the fines officers and magistrates' courts *do* legalise what might otherwise be an unlawful fetter on the exercise of her powers to deduct (subject to parameters) "any sum" from UC standard allowance. This is to assert in effect that the rule against fettering does not bite, or is excluded, where another means of achieving the statutory purpose is available to the beneficiary of a statutory power.

84. Leaving aside the possible exception of *Mayaya*, about which I harbour respectful doubts as already explained, I am aware of no authority for that proposition. It could undermine the protection of the rule against fettering of discretion. It seems to me to be a distortion of the common law. If it is to be recognised, I think it should be in a higher court than mine. For my part, I am not able to accept it.

85. The Secretary of State's position is also open to the possible objection that she is abdicating her discretion by placing it in the hands of another. It is trite law that a power conferred on X may not be exercised by Y (unless, applying the *Carltona* principle, Y may be treated as X): see e.g. *H. Lavender & Son Ltd v. Minister of Housing and Local Government* [1970] 1 WLR 1231, which I drew to the attention of the parties during the hearing; and cf. *R (Ealing LBC) v. Audit Commission* [2005] EWCA Civ 556, CA.

86. In my judgment, it is – at any rate in this case - no answer to the charge of fettering a discretion to say that it does not matter because someone else can "un-fetter" it. The present case calls for individual consideration, where necessary, by the person responsible for exercising the statutory power. It is not an answer, at least in this case, to a complaint that the Secretary of State is shutting her ears to a debtor seeking reduced deductions, to say that he can go elsewhere and get a less exacting payment rate instead.

87. In argument, Mr Coppel said there is no common law rule that the Secretary of State must make an individual decision in each case. That is true but is not what the claimants are complaining about. Mr Richard Drabble QC, representing them, did not submit that the Secretary of State (or her officials) must consider each case individually. He submitted that she or her officials must be prepared to consider in an individual case departing from the normal policy if a request is made for exceptional treatment because of financial hardship.

88. Mr Coppel submitted that the Secretary of State had lawfully exercised her discretion by setting maximum percentage rates for deductions at, first, 30 per cent and more recently, 25 per cent from October 2021. He argued that the common law required no more; the changes to the deductions policy for the generality of cases showed that she was not closing her ears and mind to the plight of those suffering financial hardship. They were not persons who (in Lord Reid's phrase in the *British Oxygen* case) had "something new to say".

89. I cannot accept that argument. The alternative route to easing financial hardship, via the magistrates' court, is inferior to what the statutory provisions enact. The court cannot save the debtors from themselves by taking their money at source to pay off their fines. The deductions regime is paternalistic: the debtor cannot be left to pay off court fines voluntarily; they must be made to do so, for their sake and society's. The Secretary of State's passivity leaves unperformed the duty upon her to make that happen in appropriate cases.

90. Nor, by similar reasoning, can I accept that the statutory scheme is an overarching unified system harmonising executive and judicial components, as the Secretary of State suggested through counsel. It does not operate properly as such, as shown by the Magistrates' Association guide of 2020 and by parts of the history of deductions in the case of these individual claimants. As Mr Drabble demonstrated from the evidence, what the magistrates may give with one hand, the Secretary of State's policy may take back with the other.

91. The system operates awkwardly. It is not just that the debtor must have the nous to make an application. If he does so and the magistrates are willing to help, deductions from benefit to pay court fines will in some cases be replaced by deductions reaching the same total amount to pay other debts. The magistrates will not always know how much real help against hardship they are giving; hence they are asked by their association not to speculate about it in open court.

92. I conclude that the Secretary of State's policy and practice are not lawful in their present form. There would be no legal difficulty if the deductions policy admitted of exceptions, even rare exceptions, in individual cases. The claimants themselves accept that. But it does need revising to enable that to happen. For those reasons, the first ground of challenge succeeds.

93. I add one further observation, for completeness. Mr Coppel suggested that if relief were granted in respect of this ground of challenge, the validity of many thousands of deduction orders and deductions could be called into question, with multiple claims for restitution. I do not think there is any prospect whatever of that. These are all cases where a debt is due and owing and the only issue is the manner and speed of discharging the debt. A debtor could have no possible claim for restitution of, or damages in respect of, what he himself owes.

Second ground: irrational policy

94. Four of the claimants, supported by the charity Shelter, assert that the deductions policy is irrational and therefore unlawful. I can deal with this ground of challenge more briefly. They say it causes serious and arbitrary hardship and a real risk of

reoffending; that it is illogical; and that it was not properly evaluated before being introduced.

95. The potential for serious and arbitrary hardship is, the claimants say, supported by the effect of the deductions policy which is to go beyond inflicting the degree of hardship necessary to give effect to the punitive nature of a fine. Relying on the evidence of Mr Shipstone and other witness statements from Shelter, they say the policy must inexorably push a large number of vulnerable debtors to below subsistence level and on a path to homelessness and destitution.

96. The logical flaws asserted in support of the claimants' irrationality challenge travel the same ground as already examined in considering the first ground. The claimants complain that the Secretary of State has adopted the misconception that the regime for collecting fine payments in the magistrates' court is a duplication of the regime for deciding on the appropriate level of deduction from UC standard allowance and other benefits.

97. Finally, the claimants submit that, while the Claims and Payments Regulations were scrutinised by the Social Security Advisory Committee, the policy itself was not considered in that exercise. That absence of prior evaluation should make the court's scrutiny the more exacting; for intensity of review in an irrationality challenge is informed by whether the decision maker herself evaluated the measure before introducing it (see *Secretary of State for Work and Pensions v. Johnson* [2020] EWCA Civ 778, per Rose LJ at [84]-[85]).

98. The Secretary of State counters that it is for her, not the court or the claimants, to strike the balance between effective collection of fines, on the one hand, and ability to pay without undue hardship, on the other. There is nothing irrational about deciding to strike that balance in the manner provided for in the deductions policy.

99. She submits, further, that the relatively low level of fine defaulters suffering deductions from UC standard allowance at more than half the maximum of £108.35 each month bears out the reasonableness of setting the overall deduction rate at 30 per cent and also of leaving to the magistrates' court the task of adjusting the rate and frequency of payment or the decision whether to remit a fine altogether.

100. In my judgment, the claimants do not come close to surmounting the high threshold of a free standing irrationality challenge. The Secretary of State is right to say that it is a matter for her judgment what policy to adopt and how to strike the balance between effective fine collection and any financial hardship that may cause in individual cases.

101. It is not disputed that collecting fines is an important aspect of enforcement of the criminal law. The court must, therefore, approach with great caution arguments such as that of the claimants who say that the deductions policy "inflicts arbitrary disparity", punishing some offenders more heavily than other "offenders of comparable culpability who happen to be wealthier".

102. I find nothing irrational in the way the Secretary of State has decided to strike the balance just mentioned, either when setting the overall deduction rate at 30 per cent or, more recently, when lowering it prospectively to 25 per cent from October 2021.

103. Nor is it irrational, in my judgment (leaving aside the problem of fettering discretion, which I have addressed separately) to decide that the administrative burden of dealing with individual cases is better placed on the magistrates (and fines officers) than on the Secretary of State, even though the former have no power to set rates of deduction from benefits while the Secretary of State does. That is a matter for her judgment on how best to allocate public resources.

104. Nor do I find merit in the point that the deductions policy was inadequately considered prior to its introduction. As Mr Coppel submitted that could, at best, impel the court to look more closely at the justification for the deductions policy than it might otherwise do. The rationale for the policy and the way in which it is operated are sufficiently explained in the witness statement of Mr Dutton to reach the relatively low threshold of *Wednesbury* reasonableness.

105. For those brief reasons, the second ground of challenge fails. I come next to the third and fourth grounds, which invoke discrimination law and the Equality Act.

Third ground: disability discrimination

106. Mr Day says the Secretary of State has discriminated against him on the ground of disability, under the Equality Act. He asserts, first, that he is disabled within section 6 of (and Schedule 1 to) that Act; second, that the policy is a "provision, criterion or practice" (**PCP**) which has placed him at a particular disadvantage when compared with non-disabled persons (section 19(2)(b)); third, that the Secretary of State cannot show that the policy is a proportionate means of achieving a legitimate aim (section 19(2)(d)); and fourth, that she has failed to make the required reasonable adjustments (sections 20(3), 21(1) and 29(7)).

107. Mr Day submits that his depression, diabetes and other ill health conditions have a substantial and long term effect on his ability to carry out normal day to day activities. The Secretary of State is content to proceed on that assumed basis in these proceedings. Mr Day does not accept that the assessments of his ability to work for disability benefits purposes apply the same test as the test in the Equality Act. The results of those assessments – broadly, that he is able to work – do not, he submits, prevent him being disabled under the Equality Act.

108. He submits, through Mr Drabble, that the policy puts him at a "substantial disadvantage" in relation to deductions from his benefits, in comparison with persons who are not disabled (section 20(3) of the Equality Act). The Secretary of State is therefore under a duty to take such steps as are reasonable to avoid the disadvantage. The deductions policy applies alike to those disabled under the Equality Act and those who are not. But the former class, including Mr Day "are generally less able to cope on an income set significantly below the subsistence level" (in the words of Mr Drabble's skeleton argument).

109. Mr Day submits that he should not have to apply to the magistrates' court; that could deliver, at best, a less convenient and advantageous payment regime for his court fines. He is more daunted than most in dealing with the court system, because of his disability. He becomes very stressed when attempting to manage his finances; his disability makes him less able than most to do so. He has twice defaulted on fine payments which left him very upset and stressed.

110. He also failed to apply for arrears of his utility bill payments to be deducted directly from benefits, which would have been to his advantage, because his depression and low mood made it very difficult for him to sort the issue out, according to his evidence.

111. The reasonable adjustment which, he submits, the Secretary of State should have been willing to make to accommodate his disability would have been to depart from the policy in his case and deduct less than the full overall 30 per cent, rather than refusing to do so and leaving him with the less satisfactory and more difficult alternative of applying to the magistrates' court. The Secretary of State has refused to do this because, wrongly, she does not accept that the policy places Mr Day or other disabled people at a substantial disadvantage.

112. Further, the Secretary of State cannot, in Mr Day's submission, show that her deductions policy is a proportionate means of achieving the legitimate aim of protecting disabled benefit recipients from enforcement action, including the threat of imprisonment for default on fine payments. On the contrary, the policy increases the risk of default by such persons by requiring them to enter into a direct payment arrangement with the court.

113. The Secretary of State denies that the policy places disabled people at a particular disadvantage. First, she says that in broad terms, the more money is deducted from benefits, the more protection is obtained against the risk of enforcement action through non-payment of fines. Furthermore, the position of those whose disabilities make them unable to work (not including Mr Day) are eligible for disability related benefits which are awarded over and above UC standard allowance and are not subject to deductions under the policy.

114. Mr Coppel criticised as unsupported by evidence Mr Day's sweeping generalisation that disabled persons are "generally less able to cope on an income set significantly below the subsistence level". The claim is one of indirect discrimination; there should therefore be an identifiable pool of persons for the purpose of comparison and there should be evidence, as would be required before an employment tribunal or county court, of the particular disadvantage in the real world, not just assertion of an abstract proposition.

115. Further, the Secretary of State submitted that the deductions policy is justified, i.e. is a proportionate means of achieving the legitimate aim of protecting benefit recipients with court fines against enforcement action. The Secretary of State had carefully considered how to strike a fair balance between the need to meet financial obligations such as paying off court fines and the need to meet day to day living needs. Part of that calculus is the ability of a person, whether disabled or not, to apply to the court to vary the terms of payment.

116. The adjustment now sought by Mr Day – departure from the policy and deduction of the minimum of five per cent of UC standard allowance – would be very difficult, not least because a decision would have to be made in each case whether a UC claimant was disabled under the Equality Act. That would be very burdensome, as there are around two million UC claimants with deductions taken from their standard allowance, of whom tens of thousands have court fines. And the UC deductions process is fully automated.

117. On this issue, I prefer the submissions of the Secretary of State. I agree with Mr Coppel that this court is not equipped with the evidence on which to base the findings I am invited to make by Mr Drabble. The evidence is not sufficient to support a finding by this court of "particular disadvantage" for indirect discrimination purposes and "substantial disadvantage" for the purposes of the reasonable adjustments duty.

118. I agree with the Secretary of State that Mr Day's case under these headings relies on generalisation and assumption rather than proven fact. His claim would have been better brought in the county court where it could have been pleaded appropriately as a private law discrimination claim, with scope for further information, disclosure and cross-examination to the extent necessary.

119. Mr Day's difficulty is that there is, on the evidence, no clearly identified group of disabled persons (in the Equality Act sense) from whose benefits deductions are being taken to pay off court fines. It is for Mr Day to identify persons within that group and to prove the impact of comparing their position with that of people who are not disabled but are receiving UC standard allowance from which deductions are being taken to pay off court fines.

120. That comparison is not appropriately made by considering the position of persons receiving, or (like Mr Day) not receiving disability related benefits available to those who satisfy different tests of disability which are not the Equality Act definition. The different definitions and tests produce a different cohort of people which makes the relevant comparison not possible.

121. Furthermore, those who meet the criteria entitling them to disability related benefits are in a different position from those who, like Mr Day, do not, but may (as I assume Mr Day does) meet the Equality Act definition. The policy does not generate deductions from those disability related benefits which are paid over and above UC standard allowance; those in receipt of such top up benefits are in a different position from Mr Day and others who do not qualify for them but do meet the Equality Act definition of disability.

122. For those brief reasons, the third ground of challenge is not made out and I reject it and turn to the fourth and final ground.

Fourth ground: public sector equality duty

123. Mr Day submits that the policy should be quashed, in addition, because the Secretary of State has failed to perform her duty under section 149 of the Equality Act to have "due regard" to the goals set out in that section, i.e. the PSED. The Secretary of State accepts that she did not carry out an equality impact assessment specifically to consider the policy before it was adopted in October 2019. She does not make a positive case that she performed the PSED.

124. However, she submits that any failure in that regard is immaterial and has had no effect on what would have been "highly likely" to have been the outcome for Mr Day (in the words of section 31(2A) of the 1981 Act). She points out, first, that the standard UC allowance is not designed or intended to meet additional needs of disabled people or additional costs they may incur; it is the disability related benefits that are intended to achieve those objectives.

125. Mr Coppel emphasises that the deductions policy as adopted in October 2019 was a continuation of the deductions policy for legacy benefits, as amended to apply to UC on its introduction. The only change made in October 2019 was to reduce the overall maximum deduction from 40 per cent to 30 per cent of UC standard allowance. Mr Coppel submits that the equality analysis carried out in September 2020, after these claims were brought, shows that the deductions policy does not have any particular or disproportionate impact on the disabled.

126. He submits that the same conclusion would have been reached if an equality impact assessment had been carried out before the change to the policy in October 2019 and that therefore if the "conduct complained of" (see section 31(8) of the 1981 Act) – namely, the failure to perform the PSED in 2019 – had not occurred, i.e. if the PSED duty had been performed, the outcome for Mr Day would be highly likely to have been not substantially different.

127. Mr Day complains that the September 2020 impact assessment was flawed because it used as a proxy for disabled persons under the Equality Act the class of persons eligible for disability related benefits, who are not the same people. Mr Drabble submits that persons such as Mr Day have been left out of account: those whose disability falls within the Equality Act definition yet falls short of precluding them from working and therefore qualifying for top up benefits.

128. The effect on this sub-group of disabled people has not been assessed and that constitutes a breach of the PSED, according to Mr Drabble. Mr Coppel counters that the government does not hold data on the number of disabled persons meeting the Equality Act definition who are in receipt of UC; the only sensibly available proxy is to consider those on top up benefits. That amounts to "due" regard in all the circumstances; vast numbers of people receive UC and it would be a Herculean task to identify the cohort that is assumed to include Mr Day.

129. On this issue, I accept Mr Day's submission that the PSED was not performed prior to introduction of the policy as adopted in October 2019 and its predecessors going back to 2013. The equality impact assessment in 2011 said nothing about deductions from benefits or court fines. The general impact assessment in 2012 did not do so either. At the time the deductions policy was adopted, in modified form, in October 2019, the Secretary of State was in breach of the PSED. She did not, indeed, seriously contend otherwise.

130. Furthermore, as Mr Drabble correctly submitted, the September 2020 equality impact assessment was a "rearguard action" (in Moses LJ's phrase, cited by McCombe LJ in *Bracking v. Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, at [25(4)]. It was not apt to cure the prior breach of the PSED. It came after the event, perhaps prompted by these claims or other similar complaints. It was not a substitute for having due regard to the Equality Act objectives at the time the policy, and its earlier incarnations, were adopted.

131. However, I do accept the Secretary of State's submission that I must refuse relief under section 31(2A) of the 1981 Act. I reach the clear conclusion that timely performance of the PSED would have been highly likely to have led to an outcome for Mr Day and others in his position that was not materially different.

132. In my judgment, it is highly likely that the deductions policy would have been adopted anyway. The *ex post facto* September 2020 equality impact assessment found no material adverse impact from the policy on disabled persons, using eligibility for disability related benefits as a proxy for the Equality Act definition. There is no good reason to suppose that the conclusion would have been any different if the exercise had been done three or five years earlier.

133. I think it was well within the scope of the "due regard" duty to use statistics available to the government as a proxy. The PSED did not require a monumental data collection exercise to define the differently constituted class of persons disabled within the Equality Act definition. I am also not surprised to learn that the 2020 impact assessment found no material adverse impact on those it treated as disabled, for the reason given by Mr Coppel: they were entitled to top up benefits, over and above UC standard allowance.

134. For those reasons, which are essentially the same as advanced by the Secretary of State, I find that there was a failure to perform the PSED and the fourth ground of challenge is made out but is then defeated by my obligation to refuse relief under section 31(2A) of the 1981 Act.

Conclusion: disposal

135. It follows from the above that the claim succeeds on the first ground, but the other three grounds do not succeed. I will hear the parties on the appropriate form of relief. Subject to hearing argument, I do not propose to quash the policy. There are many parts of it that are good in law and untouched by this judgment. Severance of the good parts from the bad may not be easy. I am minded to grant a declaration in a form which I hope will be agreed between the parties.