Neutral Citation Number: [2022] EWHC 167 (Admin)

Case No: CO/638/2021

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 28/01/2022

Before

MR JUSTICE SWIFT

- -

Between

THE QUEEN

on the application of

FLINN KAYS

Cla

- and –

SECRETARY OF STATE FOR WORK AND PENSIONS

Defe

- -

- -

TOM ROYSTON (instructed by Leigh Day) for the **Claimant**

JOANNE CLEMENT (instructed by GLD) for the **Defendant**

Hearing dates: 23 and 24 November 2021

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Approved Judgment

MR JUSTICE SWIFT

A. Introduction

1. Mr Kays is 19 years old. Since September 2020 he has been a student at Bath Spa University studying for a degree course. This claim concerns whether the Secretary of State for Work and Pensions acted lawfully when on 13 November 2020 she refused Mr Kays' claim for Universal Credit.

2. Mr Kays suffers from attention deficit hyperactivity disorder (ADHD), autism spectrum disorder (both diagnosed in 2010), sensory processing disorder and auditory processing disorder (both diagnosed in 2019). He also suffers from Von Willebrand disease (VWD) and from Ehlers Danlos

syndrome (EDS). The consequence of EDS is joint hypermobility and laxity resulting in joint dislocations and subluxations, pain, and fatigue. VWD is a blood clotting disorder.

3. As a child, Mr Kays was in receipt of Disability Living Allowance. Since age 16, Mr Kays has been in receipt of Personal Independence Payment ("PIP"). PIP is a non-means-tested benefit payable to adults with disabilities or long term health problems. Mr Kays receives both the mobility component of PIP and the daily living component. PIP is payable at either a standard or an enhanced rate depending on the extent of the effect of a person's disability on his relevant activities. Mr Kays is paid both the components at the enhanced rate.

4. On 13 October 2020, after starting his course at Bath Spa University, Mr Kays applied for Universal Credit. On 13 November 2020 that claim was refused. Mr Kays received an automated response message that stated his claim had been refused "… because you're in full-time education".

5. The provisions on entitlement to Universal Credit are contained in the Welfare Reform Act 2012 ("the 2012 Act") and the Universal Credit Regulations 2013 ("the 2013 Regulations"). The "basic conditions" for entitlement are at section 4 of the 2012 Act. By section 4(1)(d) one of the basic conditions is that an applicant "is not receiving education". "Receiving education" is defined in the 2013 Regulations (regulation 12(2)) and includes undertaking a full-time course of "advanced education", which by regulation 12(3) is defined to include a degree course. However, by section 4(2) of the 2012 Act, regulations may provide for exceptions to the requirement to meet any of the basic conditions, and by section 4(6) of the 2012 Act regulations may specify circumstances in which a person is to be treated as receiving or not receiving education. The relevant regulation is regulation 14 of the 2012 Regulations.

6. Mr Kays' case in these proceedings is that an amendment made to regulation 14 by the Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations 2020 ("the 2020 Regulations") was unlawful. The 2020 Regulations were made on 3 August 2020, laid before Parliament on 4 August 2020 and came into force on 5 August 2020. Mr Kays contends it was this amendment that caused the Secretary of State, in November 2020, to decide to refuse his claim to Universal Credit, a claim that would have been allowed under the version of regulation 14 that had been in force from the date the 2013 Regulations were made until the date the 2020 Regulations took effect.

7. Regulation 14, as originally made, set out six exemptions to the requirement not to be receiving education. Regulation 14(1)(b) disapplied the requirement where the claimant to Universal Credit was:

"… entitled to Attendance Allowance, Disability Living Allowance or Personal Independence Payment and has limited capability for work."

As amended by the 2020 Regulations the requirement not to be receiving education is disapplied by regulation 14(1)(b) if the claimant for Universal Credit is entitled to any of Attendance Allowance, Disability Living Allowance or Personal Independence Payment.

"**14. Exceptions to the requirement not to be receiving education**

(1) A person does not have to meet the basic condition in section 4(1)(d) of the Act (not receiving education) if—

…

(b) the person is entitled to attendance allowance, disability living allowance or personal independence payment and it has been determined—

(i) that the person has limited capability for work or limited capability for work and work-related activity on the basis of an assessment under Part 5 of these Regulations or Part 4 or 5 of the ESA Regulations;

(ii) that the person is to be treated as having limited capability for work under Schedule 85 or limited capability for work and work-related activity under Schedule 9;

(iii) that the person is to be treated as having limited capability for work or limited capability for work and work-related activity under regulation 19(2)(b) or (4)(b) of the Universal Credit (Transitional Provisions) Regulations 2014,

and that determination was made on or before the date of claim to universal credit, where the person is receiving education on the date the claim is made, or the date on which the person starts receiving education, where the person starts receiving education after the date of claim to universal credit …"

8. It is common ground between Mr Kays and the Secretary of State that the difference between the original version of regulation 14(1)(b) and the version as amended by the 2020 Regulations is a difference of timing. Prior to making the 2020 Regulations, the Secretary of State came to accept that the effect of regulation 14(1)(b) in its original form was that a person such as Mr Kays, undertaking full-time advanced education and in receipt of Personal Independence Payment, could make a claim for Universal Credit and that claim would trigger the necessary assessment of whether the benefits claimant had limited capability for work.

9. This was not what the Secretary of State had intended regulation 14(1)(b) to achieve. Her intention had been that regulation 14(1)(b) should provide an exception to the requirement not to be receiving education only for those who, before making a claim for Universal Credit, had already been assessed as having limited capability for work. In this way, the Secretary of State's view was that regulation 14(1)(b) acted as an incentive to disabled persons already in receipt of state benefits to undertake advanced education with a view in future to reducing their reliance on state benefits. All this being so, the Secretary of State made the 2020 Regulations. The effect of the alteration made by the 2020 Regulations was to make it clear that any assessment of limited capability for work and work-related activity had to precede the application for Universal Credit.

10. More recently, the Secretary of State has made the Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations 2021 ("the 2021 Regulations"). The 2021 Regulations were made on 1 November 2021, laid before Parliament on 4 November 2021 and came into force on 15 December 2021. They amended regulation 14(1)(b) for a second time. As now amended this latest version of regulation 14(1)(b) limits the exception to the requirement not to be in education for persons entitled to Attendance Allowance, Disability Living Allowance or Personal Independence Payments, to those who have been determined to have limited capability for work and work-related activity before the date on which they start receiving education.

11. Mr Kays' case is that the amendment made to regulation 14(1)(b) by the 2020 Regulations was unlawful for any of four reasons: first, that it was unlawful to make the amendment without prior consultation; second, that the decision to make the amendment was irrational as the change made by the 2020 Regulations did not achieve the Secretary of State's purpose, a matter proved by the amendment that has since been made by the 2021 Regulations; third, that the amendment to

regulation 14(1)(b) gave rise to discrimination contrary to ECHR article 14; and fourth that before making the 2020 Regulations the Secretary of State failed to comply with her obligations under section 149 of the Equality Act 2010 ("the public sector equality duty").

B. Decision

(1) The consultation claim

12. The Claimant's consultation ground rests on two premises. The first is that, as a matter of fairness, consultation should have taken place before the 2020 Regulations were made. The second is that the reason the Secretary of State has given to explain why consultation was not necessary, rests on a mistake. For example, in the Explanatory Memorandum published with the 2020 Regulations and produced to the Joint Committee on the Statutory Instruments, the amendment to regulation 14 was described as restoring an "original policy intent", and under the heading "consultation outcome" it was stated "given that the amendment restores the original policy intent, no consultation has been undertaken". The Claimant says this "policy intent" was not apparent when the 2013 Regulations were made and was unevidenced prior to November 2018.

13. I do not accept the Claimant's submission based on fairness. Any court should hesitate before reading an obligation to consult into statutory provisions concerning the making of secondary legislation. The first and obvious point in this case is that when making the 2020 Regulations the Secretary of State was not subject to any express obligation to consult. There is nothing to that effect either in section 4 of the 2012 Act (the relevant power used when the 2020 Regulations were made), or section 42 of the 2012 Act (which contains general provisions on how regulations made in exercise of the powers in Part 1 of the 2012 Act are to be made, and in this instance required any statutory instrument made by the Secretary of State to be subject to the Parliamentary negative resolution procedure).

14. The second point is that although prior consultation is not required, relevant statutory provisions do attach different procedural requirements when secondary legislation such as the 2020 Regulations is made. Part 13 of the Social Security Administration Act 1992 requires the Secretary of State to refer proposals for regulations to be made under the 2012 Act to the Social Security Advisory Committee ("the SSAC"). When a reference is made, the SSAC provides a report to the Secretary of State setting out such recommendations as it thinks appropriate (see section 147 of the 1992 Act). The SSAC was originally established by section 9 of the Social Security Act 1980 to provide advice and assistance to the Secretary of State in the discharge of her functions under various enactments relating to the social security system. Those enactments now include the 2012 Act. The SSAC is independent of the Department for Work and Pensions. It comprises up to 14 members drawn from academia, business and the voluntary sector, and includes persons with expertise on social security law and policy. No doubt the intention is that when deciding the form that regulations should take, the Secretary of State will have the benefit of the SSAC's expertise. There are exceptions to the requirement to refer proposed regulations to SSAC. One is where the Secretary of State considers that a reference is inexpedient because of urgency. When that is so, the Secretary of State must refer the regulations to the SSAC as soon as practicable after they have been made: see section 173(1)(a) and (2). Another relevant exception is when the SSAC agrees that a referral need not be made.

15. In this instance, on 30 July 2020 shortly before the 2020 Regulations were made, the Department for Work and Pensions wrote to the SSAC to inform it that the 2020 Regulations would not be the subject of prior referral because they had to be made as a matter of urgency. Subsequently, in September 2020, the Secretary of State provided information to the SSAC to enable it to decide

whether a reference was needed. By letter dated 18 November 2020, the SSAC confirmed it had decided it did not wish to consider a reference on the 2020 Regulations.

16. The way in which the procedural provisions in the 1992 Act were applied in this case has no relevance either to the way in which the Claimant puts this part of his case, or the reasons why this part of his case fails. However, the existence of these provisions in the 1992 Act underlines the reasoning of Maurice Kay LJ and Rimer LJ in R(BAPIO) v Secretary of State for the Home Department [2007] EWCA Civ 1139 to the effect that it will rarely be appropriate for a court to read-in consultation requirements attaching to powers to make secondary legislation. That case concerned a contention that changes to the Immigration Rules made in exercise of powers under the Immigration Act 1971 should have been the subject of prior consultation. All three members of the court rejected the submission that consultation was required as a matter of fairness: see per Sedley LJ at paragraph 41-47. Maurice Kay LJ added the following at paragraph 58 of his judgment.

“58. I wholly agree with Sedley LJ's reason for concluding that a duty to consult did not arise in this case, namely the non-specific nature of the alleged duty and the lack of clear principle by which to define it. For my part, however, I would not so readily reject one of the alternative submissions made by Ms Laing on behalf of the Home Secretary. Whilst I do agree with Sedley LJ that the Rules are susceptible to judicial review on grounds such as ultra vires or irrationality, I doubt that, as a matter of principle, a duty to consult can generally be superimposed on a statutory rule-making procedure which requires the intended rules to be laid before Parliament and subjected to the negative resolution procedure. I tend to the view that, in these circumstances, primary legislation has prescribed a well-worn, albeit often criticised, procedure and I attach some significance to the fact that it has not provided an express duty of prior consultation, as it has on many other occasions. The negative resolution procedure enables interested parties to press their case through Parliament, although I acknowledge that their prospects of success are historically and realistically low. They also retain the possibility of challenge by way of judicial review on the sorts of substantive ground to which I have referred. For these additional reasons I would be minded to reject the appeal to procedural fairness as the basis of a legal duty of consultation. I do not feel driven to this conclusion by authority. Indeed, I share Sedley LJ's view that the Nottinghamshire case (above, paragraphs 29 and 30) and Bates v Lord Hailsham (above, paragraph 32) are not or are no longer directly in point. However, as a matter of principle, I consider that where Parliament has conferred a rule-making power on a Minister of the Crown, without including an express duty to consult, but subject to a Parliamentary control mechanism such as the negative resolution procedure, it is not generally for the courts to superimpose additional procedural safeguards. In one sense, this view gains support from the reasoning by reference to which Sedley LJ would dismiss the appeal. The lack of specificity and the absence of a clear principle of limitation which exist in the present case would, in my view, be present in most cases in which an unexpressed duty to consult might be postulated.”

Rimer LJ agreed with this: see his judgement at paragraph 64-65.

17. This reasoning applies equally in circumstances of the present case. There is no room within which an obligation to consult arising from the principle of fairness could exist. I do not accept the Claimant’s submission attempting to distinguish regulations made under the 2012 Act from these statements of general principle. One aspect of this submission was that there had been consultation prior to the 2013 Regulations. That is correct. In 2012, at the request of the Secretary of State, the SSAC conducted public consultation on a draft version of what became the 2013 Regulations. However, this does not establish any relevant precedent. The 2012 Act was a sea-change for social security payments. The 2013 Regulations were part of that change. It is hardly surprising that on that

occasion the Secretary of State proposed public consultation. But that fact says nothing as to what fairness requires on any subsequent occasion. In her first witness statement in these proceedings Ms Zoe Garrett, a senior manager in the Universal Credit Policy Team at the Department of Work and Pensions, states that since March 2020 (when she took up her present post) twenty-one sets of regulations affecting Universal Credit have been made, none of which was the subject of prior public consultation. There is, then, no persistent practice of consultation that can assist the Claimant's submission in this case.

18. In support to his submission to the contrary, the Claimant relies on the judgment of Mostyn J in R(RF) v Secretary of State for Work and Pensions [2018] PTSR 1147. This case concerned a challenge to regulations made under the 2012 Act (the Social Security (Personal Independence Payment) (Amendment Regulations) 2017). The 2017 PIP Regulations amended earlier regulations made in 2013 (the 2013 PIP Regulations) and affected the eligibility of certain claimants suffering from psychological conditions to Personal Independence Payments. Mostyn J's primary conclusion was that the change made by the 2017 Regulations resulted in unlawful discrimination contrary to ECHR article 14 read with article 8. A subsidiary ground of challenge was that the 2017 Regulations should have been the subject of prior consultation. Having concluded that the claimant succeeded on the Convention rights ground, Mostyn J dealt with the subsidiary ground briefly, as follows:

"63. Similarly, I am of the view that a measure which introduces a change (and I emphasise introduces) of this magnitude should have been consulted on, and that the failure to do so was unlawful. If it was apt to consult first time round, then it was even more apt to do so this time round when the change was so momentous."

This conclusion was obiter, and clearly treated as so by the Judge. Further, it does not appear that leading counsel for the Secretary of State referred the Judge either to the provisions of Part 13 of the 1992 Act or the judgment of the Court of Appeal in BAPIO. To that extent I am satisfied that the conclusion at paragraph 63 was also reached per incuriam. Be that as it may, I do not consider this part of the conclusion reached in RF's case dictates the correct answer to the consultation challenge in this case.

19. The second part of the Claimant's consultation ground is directed to the Secretary of State's reason for not consulting – that there was no consultation because the change to regulation 14(1)(b) made by the 2020 Regulations did not reflect any change of policy. The Claimant's submission is that they did because they specified that the capability for work assessment had to have occurred before any claim for Universal Credit had been made. In support of this submission the Claimant relies on material dating back as far as 2011 when the then Welfare Reform Bill was debated in Parliament. In addition, the Claimant relies on statements made by the Department for Work and Pensions in correspondence with Disability Rights UK in 2016, and in versions of the Department of Work and Pensions' policy document on student eligibility for Universal Credit published prior to November 2018.

20. I have carefully considered all this material, but I do not consider it makes good the argument the Secretary of State acted unlawfully by not consulting prior to making the 2020 Regulations. Reliance on the comments made by the then Minister of State at the Department of Work and Pensions during debates on the Welfare Reform Bill take the Claimant nowhere. The Claimant points to statements to the effect that the introduction of Universal Credit would not mean any significant change in entitlement to non-contributory benefits for persons in education. Even assuming this material is admissible, the statements relied on are both general and were made when even the primary

legislation was at a very formative stage. Moreover, it is common ground that the provision made under the 2012 Act and the 2013 Regulations for disabled students in education did differ from their entitlement under the Employment Support Allowance regime: the latter provided, so far as concerned disability-related benefits, for disabled students to be treated as if they had limited capability for work, while the former does not. Further still, any point about the accuracy of statements made in 2011 is some way distant from the legality of a decision on consultation that did not arise until 2020.

21. The remainder of the evidence the Claimant relies on shows two things. The first is that the Department for Work and Pensions' position – that disabled students met the requirement for Universal Credit only if they had in the context of some prior claim already been assessed as having limited capability for work – only became clear over time. There is a clear statement to this effect in an email to Disability Rights UK on 17 March 2017. The same point is then made in Version 14 of the Department for Work and Pensions' policy document on student eligibility for Universal Credit, published in November 2018. The second matter that emerges from the documents is that it also took some time for the Secretary of State to accept that regulation 14(1)(b), as made in the 2013 Regulations, did not have the effect of restricting claims to Universal Credit to disabled students who had already been assessed as having limited capability for work. That conclusion was reached in the decision of the First-tier Tribunal in Badu v Secretary of State for Work and Pensions issued on 22 September 2017 (see the Tribunal's reasons at paragraphs 11-17). The Secretary of State was aware of this decision but decided to take no action to amend regulation 14(1)(b). Matters only came to a head in the context of a claim filed on 4 March 2020 by Sidra Kauser (CO/987/2020). That claim raised the issue on regulation 14(1)(b) already considered by the First-tier Tribunal in Badu. On 31 July 2020 the Secretary of State conceded this claim, recognising that regulation 14(1)(b) as made, did not have the effect she had believed it to have – i.e., it did not limit the availability of Universal Credit only to disabled students who had already, prior to their application to Universal Credit, been assessed as having limited capability for work.

22. Taken together, these matters do not make good the Claimant's submission that the Secretary of State failed to consult on the change to regulation 14(1)(b) made by the 2020 Regulations because of a mistake and therefore acted unlawfully. The reference to there being no consultation because there was no change of policy amounts to the Secretary of State saying she saw no need to consult because the policy the amendment the 2020 Regulations pursued had already been the subject of consideration within her Department and been determined to be appropriate. On the evidence I have seen this had been the position at least since early 2017. The Secretary of State's reason was not to the effect that consultation had already occurred (which would have been incorrect), rather it was that she did not consider there was any need to consult on a settled policy position. Given (a) the absence of any express obligation to consult, (b) the principles stated in the judgments in BAPIO against reading consultation requirements into statutory provisions for making secondary legislation, and (c) the lack of any relevant past practice of consultation when regulations amending the 2013 Regulations were made, this was a conclusion lawfully open to the Secretary of State. The Claimant's consultation challenge therefore fails.

(2) The rationality challenge

23. The Claimant's submission is that the decision to amend regulation 14(1)(b) in the form set out in the 2020 Regulations was irrational because the amendment fell short of the Secretary of State's objective. The Secretary of State's objective has always been that only disabled persons already in receipt of Universal Credit before entering full-time education should continue to receive Universal

Credit when in full-time education. Her rationale is to avoid discouraging this group from undertaking full-time education which might improve their future earning capacity. That rationale does not apply to disabled persons like the Claimant, going into higher education who have not previously had to rely on income-related state benefits.

24. However, while the amendment made by the 2020 Regulations made it more difficult for the Claimant to claim Universal Credit, it did not prevent his claim. Regulation 14(1)(b) as amended by the 2020 Regulations, required the necessary capability for work assessment be made before the claim for Universal Credit was made but did not require the assessment to be undertaken before the claimant commenced higher education. An amendment to that effect was only made by the 2021 Regulations which came into effect on 15 December 2021.

25. All this is true. What happened to the Claimant after the decision of 13 November 2020 to refuse his claim for Universal Credit is a case in point. On 24 November 2020 the Claimant's mother made a claim on his behalf later described by the Department for Work and Pensions (in a letter dated 6 September 2021) as a claim for "New Style NIC-based ESA". That claim failed as the Claimant had made insufficient National Insurance Contribution payments in the two years prior to the date of the claim. However, the claim was then regarded as remaining open as a claim for National Insurance credits made under regulation 8B of the Social Security (Credits) Regulations 1975/556. In September 2021 the Department for Work and Pensions decided to award the Claimant National Insurance credits. That decision prompted the Claimant's referral for a work capability assessment. The conclusion of that assessment was that the Claimant had limited capability for work. That decision was communicated to the Claimant on 3 November 2021. On 19 November 2021 the Claimant made a new claim for Universal Credit. That application met the requirement in regulation 14(1)(b), as amended by the 2020 Regulations, that the assessment of limited capability for work was made before the claim for Universal Credit.

26. In submissions this was referred to as "the work-around". In substance any person in the Claimant's position may make a claim for new style ESA (i.e., the contributory version of Employment and Support Allowance available through the Universal Credit system). That claim will almost certainly fail for lack of relevant of National Insurance contributions. But if it does fail for that reason, the Department for Work and Pensions will consider whether the claimant is entitled to be credited with any National Insurance Contribution (a National Insurance Credit). A capability for work assessment is required for that purpose. If the assessment results in the conclusion that the claimant has limited capability for work, that conclusion is sufficient for the purposes of a subsequent application for Universal Credit.

27. The Claimant submits that the existence of the work-around was known to the Secretary of State when she decided to make the 2020 Regulations; that she therefore realised that there was a mis-match between the proposed amendment to regulation 14 and her objective that Universal Credit be available to disabled persons in education only if they had been in receipt of it before entering full-time education; that the mis-match gave rise to arbitrariness in that claims were not ruled out as the Secretary of State's policy would require but only made them more laborious; so that her decision to make the 2020 Regulations was irrational.

28. I do not accept the Claimant has demonstrated that the decision to make the 2020 Regulations was irrational. The decision to make the 2020 Regulations seems to have been taken at great speed. As I see it, the timing of the decision came to be dictated by the timetable in the Kauser litigation, specifically that the Secretary of State was due to file and serve her evidence and Detailed Grounds of

Defence by Friday 31 July 2020. The decision to concede that claim required the Secretary of State to act to bring regulation 14(1)(b) into some form of alignment with her policy intent. On 30 July 2020 a ministerial submission was provided to the Secretary of State in anticipation of a decision on whether to make the 2020 Regulations. The submission stated that a decision was needed by 31 July 2020 to permit regulations to be laid before Parliament the following Monday (3 August 2020) to come into force on Wednesday 5 August 2020. I can only assume this highly compressed timetable was the consequence of the deadline in the litigation. In this sense, the urgency was self-induced. The date for filing and service of the Detailed Grounds and evidence in the Kauser litigation would have been known for some weeks, so the process of amending regulation 14(1)(b) did not need to wait until the last minute.

29. Notwithstanding the speed with which the decision needed to be taken, the ministerial submission did recognise that the proposed amendment to regulation 14(1)(b) might not be the required final solution. Paragraph 14 of the ministerial submissions stated as follows:

"We are aware, as are stakeholders, that allowing a LCW determination whilst the person was receiving ESA does provide a potential alternative route to meeting the exception via initially making a new claim to ESA to seek a LCW determination and then claiming UC. We will look to keep the operation of policy under review with a view of attempting to establish to what extent this might be the case and determine whether this remains appropriate. In the meantime, as these regulations clarify our current policy, this provision and that for claimants with a specific medical condition remain in place."

I do not think it was irrational for the Secretary of State to adopt this approach – an approach in the nature of "wait and see". The 2020 Regulations were consistent with the Secretary of State's intention that for this class of applicant a claim for Universal Credit should not itself be the event triggering the capability for work assessment. The ministerial submission recognised that once regulation 14(1)(b) was amended, as then proposed, claims might still be possible by persons in full-time education who had not previously been in receipt of Universal Credit (or an equivalent legacy non-contributory benefit), but recommended that the amendment be made as proposed and the situation then be kept under review to decide if further amendment was appropriate. Given the general complexity of the rules of the benefit system it is not irrational to take one step at a time. The step proposed in the 2020 Regulations may not have been the step required if regard was had only to strict logic. But that alone is not sufficient to rule it out as an option lawfully open to the Secretary of State. One possibility was that practical experience might show that the amendment made to regulation 14(1)(b) by the 2020 Regulations was a sufficient implementation of her policy position. She was lawfully entitled to take one small step, leaving herself the option of considering the real-world consequences of that action, before deciding whether further action was required.

(3) The article 14 claim

30. The Claimant's next submission is that the amendment made to regulation 14 by the 2020 Regulations resulted in unlawful discrimination against him in enjoyment of his Convention rights under article 1 of Protocol 1 to the ECHR. The Secretary of State accepts that entitlement to Universal Credit falls within the ambit of that provision. The Claimant puts his case in three ways: first, discrimination on grounds of other status in that disabled students who have had a capability for work assessment prior to making a claim for Universal Credit are treated differently from those who have not; second, that the effect of the amendment made by the 2020 Regulations is that in terms of access to Universal Credit, disabled students are treated the same as able-bodied students; and third,

that limited availability of Universal Credit to disabled students who have had a prior capability for work assessment (i.e. an assessment occurring other than on the occasion of the claim for Universal Credit) tends to favour older disabled students over younger ones, and is therefore unlawful age discrimination.

31. My conclusion is that each of these claims fails. The "other status" discrimination claim does not get past first base. It is well known that the requirement to show that the difference of treatment complained of was on grounds of some "other status" is not onerous. Most recently, in his judgment in R(SC) v Secretary of State for Work and Pensions [2021] 3 WLR 428, Lord Reed put the matter in this way:

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

32. However, even though relevant status may on occasion be wafer-thin, it remains the case that the status relied on cannot be defined only by reference to the difference of treatment relied on. On its facts, SC concerned a situation where only a subtle difference existed between the rule complained of and the other status relied on to found a discrimination claim. In that case, in the Court of Appeal, Leggatt LJ reasoned that while it had to be possible to identify a ground for the difference in treatment in terms of a characteristic which was not merely a description of the difference in treatment itself, there was no requirement that the other status relied on had independent existence in the sense of "… social or legal importance for other purposes or in other contexts than the difference of treatment complained of". From this he concluded that the status relied on, "being a child member of a household containing more than two children", was relevantly distinct from the rule complained of that the benefits applicant claimed "… the individual element of child tax credit for no more than one other child or qualifying young person", the so-called "two child limit" on any claim for Child Tax Credit. The Supreme Court agreed both with the reasoning and the conclusion.

33. It is obvious that the distinction in that case, between what was relied on as the difference in treatment and the relevant other status, was a very subtle distinction indeed. As Lord Reed pointed out, it may only be a rare occasion where the status requirement is not met. Nevertheless, it is important that some distinction does exist between the status and the treatment complained of. If no such distinction is present the complaint is not, in any intellectually coherent sense, a complaint about discrimination. Rather it collapses into a complaint about some other public law standard, be it

rationality, failure to act for a permissible purpose, or failure permissibly to assess relevant considerations. On the facts of the present case the status identified, of a disabled student who has not been the subject of a capacity for work assessment before making a claim for Universal Credit, corresponds precisely to the rule that is challenged – i.e., the requirement inserted into regulation 14(1)(b) by the 2020 Regulations that the limited capacity for work determination be made "on or before the date of the claim to Universal Credit". The treatment complained of coincides exactly with the status relied on – i.e., the reason alleged to amount to discrimination. For this reason alone, this part of the discrimination claim fails.

34. In any event, even if my conclusion on the other status point is wrong, the distinction that regulation 14(1)(b) drew by reference to the date of the capability for work assessment, was justified. The basic condition at section 4(1)(d) of the 2012 Act puts persons in full-time education outside the scope of Universal Credit. That is for sound reason, explained in the evidence of the Secretary of State. At paragraphs 20 and 23 of her first statement Ms Garrett puts the matter as follows:

"20. This policy position was adopted to avoid duplicating the provision already available through the student support system. Those whose who are studying in the categories above have, to a large extent, opted out of the jobs market. Their primary activity is study. Their primary financial support comes from the student finance system. This includes means tested maintenance loans, support from parents and discretionary bursaries and grants. These students have access to the student finance system for meeting their everyday living costs. The aim of UC is to support the very same everyday living costs. Parliament did not intend for those studying and receiving financial support as students should also be able to claim UC.

…

23. The Secretary of State's policy intention making Regulation 14(1)(b) of the Regulations was that only claimants who had (a) already being determined by the Secretary of State for having limited capability for work; or (b) those who were treated as though they had limited capability for work under Schedule 8 to the UC Regulations would fall within the exception to the general rule that a person receiving education is not entitled to UC. The policy rational is that disabled students would ordinarily have their needs met through the student finance system in the same way as other students, as well as additional support through the Disabled Students Allowance and particular bursaries and grants targeted at disabled students. The exception in Regulation 14(1)(b) is aimed only at those disabled students who are already in receipt of UC (or legacy benefits such as ESA) and who wish to enter into full-time education. The Secretary of State's policy is to ensure that those disabled claimants who are already receiving these benefits are not discouraged from moving into full-time education, which would better their prospects of obtaining employment, by the risk of losing their existing benefits. In other words, the policy is in place to enable existing benefit claimants, who might not otherwise consider a course of study, to embark upon such a course, in order to improve their prospects of obtaining work and reduce, or even end, their reliance upon state benefits. The exception is not targeted at disabled students who are not in receipt of UC (or ESA) at the time they move into full-time education. These students will have taken the decision to move into full-time education in circumstances where they are not reliant on income-related state benefits and where they know they will be reliant on support with their everyday living expenses from the student finance system. Additional expenses incurred as a result of a student's disability will be met through disability-related benefits, such as PIP/DLA, through the Disabled Student's Allowance and through University bursaries."

I accept this evidence. As I have said already in the context of the Claimant's rationality challenge, it could be said (and the Claimant does say) that the amendment to regulation 14(1)(b) made by the 2020 Regulations realised this objective only imperfectly, and the objective was only met by the further amendment to regulation 14(1)(b) made by the 2021 Regulations. This may be so. Nevertheless, the change made to regulation 14(1)(b) by the 2020 Regulations is a form of realisation of this objective and is therefore justified. If material at all for this purpose, the availability of the so-called work-around for persons such as the Claimant operates as a form of mitigation. It does not detract from the proportionality of the action taken by the Secretary of State; rather it provides some small contribution to the balance struck by the amendment, which is a fair balance.

35. The second discrimination submission relies on the judgment of the European Court of Human Rights in Thlimmenos v Greece [2001] 31 EHRR 15, and is to the effect that, as amended, regulation 14(1)((b) fails to establish a sufficient difference between the position of disabled students and able-bodied students, respectively. This submission fails on justification for the reasons just set out. The amendment does not put disabled students in the same position as non-disabled ones. The only non-disabled students exempted from the "is not receiving education" requirement, are those who may be treated as having limited capability for work by reason of regulation 39(6) of and Schedule 8 to the 2013 Regulations, or regulation 40(5) of and Schedule 9 to the 2013 Regulations. The number of such non-disabled persons is likely to be very small. More importantly, the position of disabled students cannot properly be assessed by reference only to access to Universal Credit. The extract from Ms Garrett's statement above explains the different benefits available to disabled students to meet additional expenses incurred in consequence of their disabilities.

36. The Claimant's age discrimination claim also fails at the justification stage. For this purpose, the contrast is between disabled students who prior to entering full-time advanced education have relied on non-contributory state benefits (and in that context have been subject to a work capability assessment) and those who have not and who, like the Claimant, moved directly from secondary education to higher education. The latter group will tend to be younger than the former. Hence, goes the submission, regulation 14(1)(b) as amended introduced a form of age discrimination. Even assuming this to be so, that difference in treatment is justified for the reasons at paragraph 23 of Ms Garrett's witness statement (see above).

37. In the premises, each part of the Claimant's discrimination challenge fails.

(4) Public sector equality duty

38. The 2020 Regulations were supported by an "Equality Analysis" dated 30 July 2020. The Secretary of State contends that this document evidences her compliance with the public sector equality duty so far as concerns her decision to make the 2020 Regulations. The Claimant submits otherwise. He contends that in three respects the Equality Analysis document shows a failure to comply with section 149 of the Equality Act 2010.

39. The first submission is that the assessment was conducted on a false premise – i.e. the premise that the 2020 Regulations were doing nothing new. I do not accept this submission. The assessment makes clear that the 2020 Regulations did initiate a change "… to make clear that a disabled student with a qualifying benefit… must already have been determined to have [limited capability for work] …" (see the section headed "Brief Outline of Policy"). The document does point out that the change made to regulation 14 to this effect gave effect to a "current [Universal Credit] policy", but this does not assist the Claimant because what the Equality Analysis document demonstrates is an assessment of entitlement to Universal Credit as it would be once the 2020 Regulations were made. For the

purposes of compliance with the public sector equality duty whether this policy was a “new” policy or a restatement of an existing one is not to the point. What matters is that there was consideration of the practical change to be made.

40. The Claimant’s second submission is that the assessment fails to demonstrate due regard was had to the impact on some disabled students of the change made which restricted access to Universal Credit. I do not accept this submission either. The assessment recognises, in terms, that some disabled students (those not at the time of an application for Universal Credit already assessed to have to have limited capability for work) will no longer meet the requirements to receive Universal Credit. The assessment then continues as follows:

“Whilst it is acknowledged that some people with a disability will not be entitled to UC, this difference in treatment is considered to be justified. Students cannot normally satisfy the entitlement conditions for UC. Exceptions are generally made where students have additional needs that are not met through the student support system. Disabled students do not represent such an exception because they can access fees and living costs support for their higher education courses through the student support system. This includes the Disabled Students Allowance for those in higher education and discretionary bursaries and grants if undertaking further education. The application of this policy is limited to a disabled person with AA/DLA/PIP who has already been determined to have LCW as it is intended as extra available support to such a claimant in order to give them better prospects of moving to work given that they are already in the benefit system. Others are able to make decisions about becoming a student in the light of the student funding availability to them or will continue to be a student on the basis of the student funding that they have already secured.”

The Claimant submits that this assessment is insufficient because it does not recognise that disabled students may be less able than others to supplement their income for example by undertaking part-time work. This point is not made in the assessment document but that does not show failure to have the due regard required by section 149. Section 149 of the 2010 Act does not require a decision-maker to have considered every conceivable matter; what section 149 requires is coherent and robust consideration of the likely consequences of a proposed decision within the framework that section sets. In this case it was sufficient for the Secretary of State to identify the sources of income and support that would be available to disabled students once the 2020 Regulations were made. This addressed the core consequences of the amendment to regulation 14. The quality of the assessment would not be materially improved by considering the possible impact of disability on the possibility of additional income from part-time work. The range of variables likely to affect any student’s ability to supplement his income from part-time work is significant, making any such assessment highly speculative. When assessing the likely impact of the 2020 Regulations, the Secretary of State was entitled to focus on consequences that were better-known and more certain.

41. The Claimant’s third submission fails for essentially the same reason. The Claimant contends that the assessment did not recognise that the change to regulation 14 would tend to disadvantage students who moved straight from secondary to higher education when compared to those who for some period had relied on subsistence benefits. The group disadvantaged by the amendment to regulation 14 would therefore tend to be younger than the group not disadvantaged. Thus, submits the Claimant, the age discrimination assessment was flawed. The material part of the assessment document is brief, and states as follows:

“Age

The age of the person has no bearing upon the application of policy, but it will primarily benefit those who are at the younger end of the claimant base as students usually represent a younger constituent of the general population. We do not envisage an adverse impact on these grounds."

This section, therefore, deals directly with the more general point that it is younger people who tend to be in full-time higher education. The Claimant relies on this to show that the assessment of the 2020 Regulations was materially incomplete. However, the point of substance is for the purposes of the public sector equality duty claim, the Claimant's age discrimination submission is materially the same as his disability discrimination submission. Both focus on the distinction drawn between students who go into higher education straight from school and those who do not. Thus, the matter the Claimant relies on in each instance as having not been afforded due consideration is the same. This point, that some disabled students would be disadvantaged, is the one referred to in the passage I have set out above (appearing in the Equality Analysis under the heading "Disability").

42. For these reasons the public sector equality duty ground of challenge also fails.

C. Disposal

43. In the premises, each of the Claimant's grounds of challenge fails, and the application for judicial review is dismissed.
