Neutral Citation Number: [2023] EWCA Civ 656

Case No: CA-2022-002107

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Cavanagh
[2023] EWHC 2392 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2023

Before :

LORD JUSTICE PHILLIPS
LORD JUSTICE EDIS
and
LORD JUSTICE WARBY

- -

Between :

THE KING (on the application of MS HELEN TIMSON)	**Respondent/Claimant**
- and -	
THE SECRETARY OF STATE FOR WORK AND PENSIONS	**Appellant/Defendant**
SEVERN TRENT WATER LIMITED	**Interested Party**

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Clive Sheldon KC, Katherine Apps KC, and Gethin Thomas (instructed by **Government Legal Department**) for the **Appellant**
Jenni Richards KC, and Tom Royston (instructed by **Bindmans LLP**) for the **Respondent**
Jason Coppel KC (instructed by **DWF**) for the **Interested Party**

Hearing dates : 25 and 26 April 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9th June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Edis :

1. The principal issue in this appeal is whether Cavanagh J was right to hold that the Secretary of State for Work and Pensions had issued unlawful guidance which allowed decision makers to make an order for a third-party deduction (always called a "TPD") from Ms. Helen Timson's benefits without first giving her an opportunity to make representations. The deduction was made under the exercise of a power by the Secretary of State which arises under Regulation 35 of and Schedule 9 to the Social Security (Claims and Payments) Regulations 1987 ("the Regulations"). Paragraphs 6(1) (fuel costs) and 7(2) (water charges) of Schedule 9 to the Regulations permit deductions for the utility supplies to which they relate.

2. This is a short point in the context of a complex system. The answer appears to me to be obvious: yes, he was right. It is important that the court should not be drawn into deciding issues which are not necessary to this decision. I think that this occurred to some extent before the judge, and that submissions of the parties have, to some extent, invited this court to take the same course. In my judgment this should be resisted.

The key provisions

3. Paragraph 6(1) of the Regulations, as now in force, says:-

> (1) Subject to sub-paragraphs (6) and (6A) and paragraph 8, where a beneficiary who has been awarded the specified benefit or his partner is in debt for any fuel item to an amount not less than the rate of personal allowance for a single claimant aged not less than 25 and continues to require the fuel in respect of which the debt arose ("the relevant fuel") , the Secretary of State, if in its opinion it would be in the interests of the family to do so, may determine that the amount of the award of the specified benefit ("the amount deductible") calculated in accordance with the following paragraphs shall be paid to the person or body to whom payment is due in accordance with paragraph 2(3).

4. Paragraph 7(2) of the Regulations, as now in force, says:-

> (2) Where a beneficiary or his partner is liable, whether directly or indirectly, for water charges and is in debt for those charges, the Secretary of State may determine, subject to paragraph 8, that a weekly amount of the specified benefit shall be paid either to a water undertaker to whom that debt is owed, or to the person or body authorised to collect water charges for that undertaker, but only if the Secretary of State is satisfied that the beneficiary or his partner has failed to budget for those charges, and that it would be in the interests of the family to make the determination.

5. The effect of both provisions is that the Secretary of State can only make such deductions if in "its" opinion it would be in the interests of the family to do so. The wording which has that effect differs slightly between the provisions, but it is common ground that they have the same meaning.

6. Income-Related Employment and Support Allowance ("ESA") is a "specified benefit" for the purposes of paragraphs 6 and 7 of the Regulations. Ms. Timson receives this benefit, as well as other benefits which are not specified benefits.

7. At paragraph 1, the Regulations define "family" as follows:-

> *"family"* in the case of a claimant who is not a member of a family means that claimant and for the purposes of state pension credit *"a family"* comprises the claimant, his partner, any additional partner to whom section 12(1)(c) of the 2002 Act applies and any person who has not attained the age of 19, is treated as a child for the purposes of section 142 of the Contributions and Benefits Act and lives with the claimant or the claimant's partner;

The challenge

8. The claimant in this case is Ms. Helen Timson, now the Respondent to this appeal by the Secretary of State. She is a "beneficiary" for the purpose of the Regulations. Beneficiaries are usually called "claimants" in the documentation, and it would be artificial to use any other word when referring to claimants in general. Where, therefore, I need to refer to Ms. Timson I shall do so by name and will avoid describing her as "the claimant" in order to avoid confusion.

9. Ms. Timson lives on her own, and is, therefore, the "family" for the purposes of the Regulations. She suffers from mental and physical disabilities, and is dependent upon means-tested benefits. In the past, she fell into arrears with her utility providers, Severn Trent Water and E.ON. She was subject to TPDs between September 2019 and July 2021 for her water charges, and March 2021 and July 2021 for fuel costs. Neither deduction was made with her consent. Both TPDs were stopped in July 2021 in a supersession of earlier decisions. Following this, she made arrangements with both providers to pay a sum towards ongoing usage and a token sum towards arrears.

10. By these proceedings, Ms. Timson sought to challenge the way in which the TPD scheme is implemented in the Decision Makers Guide and in an Overview Document issued by the Secretary of State. Where I refer to "the Guidance" I refer to these documents taken together. The judge held that these documents amount to directions to the officials to whom the operation of the scheme is delegated. The challenge failed except in the single respect which is now the subject of this appeal. It is not necessary for the purposes of this judgment to rehearse the arguments or to summarise the parts of the comprehensive and clear judgment which relate to failed challenges. It will be necessary to return to them briefly at the end of this judgment when dealing with the Secretary of State's appeal against the costs order made by the judge. The judge awarded Ms. Timson her costs notwithstanding the failure of a significant part of her case.

11. Neither is it necessary to summarise the whole of the complex scheme of which the Regulations are a part. It is only necessary to refer to those aspects of it which are relevant to the contention that there is a legal obligation on the Secretary of State to give a claimant an opportunity to make representations before making a TPD.

12. This legal obligation is said to arise from three different sources:-

    i) The duty of fairness.

    ii) The true construction of the Regulations.

    iii) The duty of the Secretary of State to determine reasonably what enquiries should be made prior to imposing a TPD. It is said that it is unreasonable to determine that an enquiry to ascertain the views of a claimant was not required. This has been referred to as the *Tameside* duty, based on the decision of the House of Lords in *Secretary of State for Education v Tameside MBC* [1977] AC 1014.

13. There is a Respondent's Notice which seeks to support the judge's decision on rather broader grounds than those which commended themselves to him. It does not seek to appeal against his rejection of other challenges. The Respondent's Notice invites the court to consider not only whether there was a duty to allow an opportunity to make representations, but also how the Secretary of State should decide issues which might be raised in representations.

The TPD scheme

14. The Overview Document begins by setting out what it describes as "the Background", as follows:-

> 2. Benefit customers are normally expected to meet their household expenses from their income in the same way that people in work do. The TPD scheme was designed to provide last-resort protection for a vulnerable minority of people on income-related benefits who have failed to budget and run up arrears of essential household outgoings and where other methods of payment have been tried without success.
>
> 3. Deductions should be considered where there is no other suitable course of action available to allow for clearance of the arrears. In helping our customers with debt management the scheme also aims to promote financial responsibility.

15. The "last-resort protection" described here is further explained in a subsequent passage:-

> 5. The primary purpose of the scheme is therefore to protect the welfare of customers by shielding customers and their families from the consequences of getting into debt with essential household costs or to ensure compliance with a social obligation.
>
> 6. It is not intended to be a debt collection option for creditors except in very limited circumstances.
>
> 7. Paying a prescribed amount to the creditor removes the risk of the severe hardship likely to be caused by, for example, eviction or the disconnection of a fuel supply. TPD are normally made where it is in the interests of the family…..

The decision of the judge

16. At paragraphs [164]-[194] of his judgment, the judge examined the evidence before him on the subject of the "interests of the family". He did not consider the possibility of eviction, as mentioned in the Overview Document, presumably because that is not a possible outcome in modern times.

17. He noted that disconnection from water and sewage supplies for non-payment of charges is prohibited by statute. The position in respect of fuel costs is more complex, and he summarised it in this way:-

> 170. In practice, this means that those who are vulnerable, such as the Claimant, are at little if any risk of disconnection from electricity or gas supplies, but there are other claimants who will be at real risk of disconnection. This may well mean that it is likely that many claimants to whom TPDs apply will not be at risk of disconnection for non-payment of fuel and energy bills, any more than they will be at risk of disconnection from water supplies, as they will be in the vulnerable category.
>
> 171. It follows that, for many claimants, it will not be in their interests to be subjected to TPDs because of fears that they will be disconnected if they go deeper into debt, as there is no real risk of disconnection. Certainly, it cannot be assumed that it is a "given" that TPDs will always be in the interests of claimants, because the alternative would be disconnection.

18. The Guidance was not challenged on the basis that it suggested that a claimant might be at risk of eviction or disconnection if no TPD were made when this is not, or at least not always, the case. No doubt it will need to be reformulated in the light of this decision, and that of the judge. It is not for the court to suggest any particular formulation of the proper approach to assessing the interests of the family, nor to decide how any particular representations which may be made by claimants should be treated.

19. The judge then considered the risk of a pre-payment meter being fitted as a means of collecting a debt and securing payment of continuing charges. This is a step which may be taken without the consent of the occupier of premises with a court order, but only in respect of fuel costs. It is not an option for water charges. The judge summarised his conclusion as follows:-

> 174. It follows that it may well be in the interests of a claimant to have a fuel TPD imposed as an alternative to the installation of a pre-payment meter, but there will be some categories of claimants who are not at significant risk of such a meter being installed.

20. It therefore appears that there is a cohort of claimants who will not face either eviction or disconnection (against which TPDs are a last-resort protection according to the Overview Document). They may not fear enforcement by county court proceedings because such proceedings are not likely to be issued by the water or fuel suppliers. They are expensive and would only produce a judgment which would not be readily

enforceable. It might be thought that this cohort's interests would lie in no TPD being made because in reality they have an assurance of a continued supply without any enforceable obligation to pay for it. This was the position advanced by Ms. Timson which the judge said caused him "considerable unease". He rejected that argument on the basis that other means of enforcement of debts might exist which might cause hardship to a claimant, such as, for example, the retention of third-party debt collectors.

21. The judge also rejected an argument based on the claimant's desire for personal autonomy. He summarised that argument in this way:-

> 184. The Claimant says that she is strongly opposed to TPDs because she regards them as infantilising, and as depriving her of control of her own financial affairs. She says that it should be for her to decide how to deal with her debts, and that there may be occasions when she would prefer to give priority to other debts that she owes, especially as she is at no real risk of disconnection and is not frightened of enforcement action.

22. The two arguments which are summarised in paragraphs [20] and [21] above were rejected by reference to the statutory purpose of the Regulations. It is important to appreciate that they arose in the context of arguments about what, if anything, a claimant might be able to say which might make a difference. The Secretary of State submitted that the answer would almost always be "nothing". If that were so, it would support the contention that it was not unfair to deny the opportunity to make representations before the decision was made. Inevitably, this line of argument drew the court into considering what submissions this particular claimant, Ms. Timson, might have made if she had been given the chance. This does not mean that the decisions on the merits of those submissions were necessary to the resolution of the question of whether fairness, the *Tameside* duty, or the true construction of the Regulations required claimants to be given that chance. The judge explained his decisions as follows:-

> 182. ……Part of that statutory purpose is to provide a statutory mechanism which enables utility companies to recover, in appropriate cases, debts and ongoing charges from claimant customers which would, absent a TPD, be irrecoverable. It would not be consistent with the statutory purpose to say that it is not in the interests of a claimant to have a TPD imposed upon them, because the alternative is that the utility company is left with no option but to continue supplying them in the knowledge that they will never be paid for the supplies. Moreover, as the Overview document noted at paragraph 3, part of the statutory purpose is to promote financial responsibility, and it would not be in the long-term interests of a claimant to reward them for ignoring or flouting their financial obligations, or to allow them to go ever deeper into debt.
>
> 185. ……..The 1987 Regulations provide for a mechanism by which debts of certain types are recovered from a claimant without their agreement. In other words, the whole point of the regime in the 1987 Regulations is that, if the conditions for TPDs

> are satisfied, autonomy and choice is taken away from the claimant. The law makes special provision for certain type of debts, such as housing debts and utility debts, to be recovered from claimants regardless of whether they consent or not, and regardless of whether the claimant would prefer to use the money for other living expenses or to pay other debts. To the extent that the TPD regime is regarded as infantilising, because it takes agency away from the individual, this is inherent in the legislative framework.

23. In this last passage, the judge refers to the relevance of the consent of a claimant to the making of a TPD. It was necessary for him to consider this issue, because one of the failed grounds of challenge contended that the Guidance was unlawful because it provided that the consent of a claimant was irrelevant. The Regulations are clear that consent is not required for the making of a TPD for fuel or water charges unless the aggregate amount calculated in accordance with the relevant provision exceeds a sum calculated in accordance with paragraph 8(4). Where a claimant or their partner does not receive child tax credit, paragraph 8(4)(a)(iv) of the Regulations provides that the aggregate amount of all TPDs in the case of employment and support allowance shall not exceed 25% of the applicable amount for the family as is awarded under paragraph (1)(a) and (b) of regulation 67 (prescribed amounts) or paragraph (1)(a) to (c) of regulation 68 (polygamous marriages) of the Employment and Support Allowance Regulations. In many cases, including that of Ms. Timson, this will be less than 25% of their total benefits because they will be in receipt of other benefits as well. The judge treated the way in which the Decision Makers Guide dealt with consent in the context of the claimant's first challenge to the lawfulness of the policy contained in it. This challenge failed and it is only necessary to say that the judge observed that the mere fact that a claimant did not consent was not relevant, although their reasons for refusing consent may be. This was properly addressed under the challenge which he upheld because a claimant should be afforded the opportunity to set those reasons out before a TPD is made. The judge had to decide a more broadly based challenge than the single issue before us, which may be why he felt it necessary to make decisions about what the interests of a claimant might be.

24. A further relevant feature of the scheme for TPDs concerns the ways in which a claimant may challenge a TPD decision after it is made. It is suggested by the Secretary of State that this renders the system fair, and satisfies the *Tameside* duty. There is, it is submitted, no need for any prior opportunity to make representations, because the statutory scheme provides that opportunity afterwards. The judge summarised these routes of challenge in this way:-

> **The right to challenge a TPD decision**
>
> 48. A claimant may apply to the Secretary of State for review of a deductions decision under section 9 of the Social Security Act 1998. The Defendant refers to these reviews as Mandatory Reconsiderations. If a review succeeds, the TPD decision is retrospectively changed with effect from the date of its implementation. In other words, following a successful review,

> the claimant will be paid the benefits that had been held back and paid to the third party pursuant to the TPD.
>
> 49. If a review application is unsuccessful, there is a right of appeal from the determination to the First-tier Tribunal under section 12 of the Social Security Act 1998. A claimant is not liable to pay the Defendant's costs if such an appeal fails.
>
> 50. The Secretary of State also has a power to vary a decision made under regulation 35 of, and Schedule 9 to, the 1987 Regulations. This power, which is called the power of supersession, is contained in section 10 of the Social Security Act 1998. The power to supersede differs from the power to review, because its effect is not retrospective. Rather, its effect is to change the decision from the date of the supersession. A supersession power is available specifically under regulation 6(2)(a) of the Social Security and Child Support (Decision and Appeals) Regulations 1999, SI 1999/991, if there has been or is an anticipated "relevant change in circumstances.", or under regulation 6(2)(b) if the decision was wrong in law or was based on an error of fact.
>
> 51. In addition, the Secretary of State has a complaints system, which is operated independently of its decision-making powers under the 1987 Regulations and separately from the system of decisions, reviews, supersessions and appeals under sections 8-12 of the 1998 Act. Under this complaints system the Secretary of State may consider making a special, non-statutory payment. If a person is not satisfied and believes there has been maladministration, they may ask to escalate the complaint to the Independent Case Examiner, or a person's MP may make an application to the Parliamentary and Health Service Ombudsman.

25. The judge considered whether a TPD would always be in the interests of a claimant. If so, this would suggest that an opportunity to make representations would not be required on the grounds of fairness or the *Tameside* duty. He did this in the following passage of the judgment. In it, he once again found himself considering the merits of hypothetical decisions which might be made by the Secretary of State:-

> **When might it not be in the interests of a claimant to be subjected to a TPD?**
>
> 187. As I have said, it is clear from the structure of the legislation that Parliament envisaged that there will be cases in which it is not in the interests of the claimant to be subjected to a TPD, even if there is no doubt that a debt has been accrued. The 1987 Regulations do not specify what those circumstances might be. I can think of three types of case.

188. The first would be cases in which there has been insufficient discussion or negotiations between the utility company and the claimant about other, less onerous, methods of paying off the debt and paying for ongoing usage, such as a payment plan. In practice, it should only be if attempts to agree one or more payment plans have failed, or the claimant has failed to comply with an agreed payment plan that a utility company will apply for a TPD. However, the legislation does not make this a precondition. Paragraph 6(1) of Schedule 9 to the 1987 Regulations provides that a claimant must be in debt to a certain minimum amount with the fuel supplier, but it does not specify that particular steps to agree ways of paying off the debt must have taken place before a TPD is sought. Paragraph 7(2) of Schedule 9 provides, in a water case, that a claimant must be in debt for water charges and must have failed to budget for those charges, but again it does not specify that the water company must have tried to agree a payment plan or the like before asking for a TPD.

189. Accordingly, in theory at least, there may be cases in which it will not be in the interests of a claimant for a TPD to be imposed because the utility company has failed adequately to explore other ways of paying off the debt and making provision for ongoing usage, such as payment plans, which would remove the need for a TPD and would be more palatable for the claimant.

190. The second type of case I can envisage in which it might not be in the interests of the claimant for a TPD to be imposed would be if their financial circumstances are likely shortly to change. It may be, for example, that negotiations for a payment plan had come to naught, and then, shortly before the utility company made its application for a TPD, the claimant became aware that they would shortly obtain well-paid employment, or would come into an inheritance, such that a TPD was not in their interests because they were now able to pay off their debt and to pay for ongoing usage in the normal way.

191. The third type of case is where the claimant had shown an unwillingness to take any steps to address their debts but then, at the eleventh hour, demonstrated a credible change of mind and a willingness to co-operate with voluntary methods of paying their debts. (I should mention that, in about one-third of cases, TPDs are imposed with the agreement of the claimant, often, no doubt, because the claimant accepts that it is a helpful way of clearing their debt and of paying for future usage.)

192. The DMG itself indicates that considerations such of these are relevant. At paragraph 46307, when dealing with fuel debts, the DMG says that TPDs will not normally be in the interests of the claimant or their family if they have shown evidence of a determination to clear the debt, undertaken to clear the debt

> themselves, or if there are other options available to deal with the debt.
>
> 193. This is not intended to be an exhaustive list of the types of cases in which a TPD would not be in the interests of the claimant. They are the only ones that I can think of but there may well be others.
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> 194. In practice, however, it will be rare that a TPD would not be in the interests of the claimant.

26. The judge found that the law requires that claimants be contacted prior to a decision so they can be asked whether they have any representations to make or information to provide. This was because in every case there will be a real possibility that the claimant has information regarding family interests which is relevant to the decision, which cannot be obtained except through contacting them. He referred to the three examples set out in the passage in [25] above as being cases where that possibility arose.

27. He held that failure to allow an opportunity to make representations before the decision would be a breach of fairness, because the impact of an erroneously imposed TPD could be severe, especially given the low income of claimants. The judge expressed this conclusion in this sentence from paragraph [213], which is criticised as a perverse finding in one of the grounds of appeal.

> "A TPD may result in a reduction of up to 25% of their benefits, a very significant sum, especially as claimants will be on low incomes."

28. The judge applied *R v. SSHD, ex p. Doody* [1994] 1 AC 607 and held that the claimants should therefore be given an opportunity to make representations or provide information. This is true in *every* case, since the possibility of relevant information cannot be ruled out until the claimant is contacted, and cannot be ruled out by information provided by a utility provider alone. There are undoubtedly post-decision safeguards, but following *R. (oao Balajigari) v. Home Secretary* [2019] EWCA Civ 673 the judge held that these are not sufficient, both because of confirmation bias and because the negative consequences will bite long before the safeguard can right the wrong. Including a new step of contacting claimants would not render the TPD process impossible or impractical, which would be a ground for not doing this, see *Bank Mellat v HM Treasury* [2013] UKSC 38; [2013] UKSC 39. At most it would elongate the process of making a decision.

29. Further, a failure to contact claimants would be a breach of the *Tameside* duty. The judge concluded that no reasonable authority could be confident it had sufficient information on a claimant's interests without giving the claimant an opportunity to make representations and provide information on those interests.

30. The judge rejected an argument based on the proposition that failure would be a breach of the duty recognised in *Padfield v Ministry of Agriculture Fisheries and Food* [1968] AC 997.

31. The judge then expressed his conclusions about the Guidance. He had earlier analysed and summarised correctly the law relating to challenges to guidance as expressed in a line of authorities culminating in *R. (A) v. Secretary of State for the Home Department* [2021] UKSC 37. For my purposes it is enough to set out paragraph 46 of that judgment of Lord Sales JSC and Lord Burnett of Maldon CJ:-

> "46. In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i e the type of case under in Gillick [1986] AC 112); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. In a case of the type described by Rose LJ, where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the Secretary of State at the head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it may more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness will be assessed on that basis."

32. The judge said that he had not found it easy to decide whether, taken as a whole, the documents should be read to direct, by implication or omission, that it is not necessary to seek representations and/or information from claimants before taking the decisions as regards their families' "interests".

33. He said:-

> "Whilst it is true that nowhere in the DMG or the Overview document is it said in terms that decision-makers should seek representations/information from the claimants, there are passing references at several places which hint at the possibility that the decision-maker might contact the claimants before taking their decision."

34. After careful analysis of the Guidance the judge decided that it did direct decision makers that it was not necessary to give claimants an opportunity to make representations before making a TPD direction. He then rejected the Secretary of State's submission that the Guidance does not purport to summarise the law, because taken as a whole it clearly does attempt to give guidance on the legal framework which decision makers apply. He decided that the "*hints"* he referred to fell short of actually saying that the decision-maker should contact a claimant regarding the TPD decision (one example says that they 'should consider' contacting them). He said that the most reasonable reading of the Guidance is that it implicitly directs decision-makers that, whilst they *may* contact a claimant for relevant information, they are under no obligation to do so. This conclusion was, he said, supported by the fact that this is how decision-makers have generally interpreted the Guidance themselves.

35. The judge concluded that a significant number of cases will, as a consequence of this, be dealt with in an unlawful way. In a broad sense, every case decided without prior contact with the claimant will be dealt with unlawfully. More specifically, there will be a significant number of cases in which representations could have made a difference, which renders the decision unlawful. The Guidance was therefore unlawful in the way identified in the third category described in *R (A) v. Home Secretary* at [46].

The grounds of appeal

36. The Secretary of State advances 6 Grounds of Appeal:-

i) Ground 1: The judge should not have found that the Guidance was unlawful because it was unfair or involved a breach of the *Tameside* duty. The system taken as a whole was fair because it allowed for *de novo* review and appeal, and enabled a claimant to make representations at any stage. She was not prevented from making representations prior to the decision being made, and any such representations would be taken into account. However, it would only be in a very rare case that a different outcome would result if prior representations were called for. The judge's three examples in the passage at [25] above were not true examples of cases which were not properly catered for already. The scheme requires contact between the claimant and the utility suppliers prior to the making of a TPD and in the unlikely event that this did not produce all relevant information this could be corrected by review following the TPD decision. Further, it was not unreasonable for the Secretary of State to conclude that the information provided by the utility suppliers on their spreadsheets when making applications for TPDs was sufficient to enable a rational decision. In this context, the Secretary of State points out that the decision maker would also have access to DWP records if they chose to research the case further.

ii) Ground 2: This ground contends that the judge erred in law in relying on a passage in Lord Neuberger's judgment in *Bank Mellat* at [178]-[179]. It is said that Lord Sumption's judgment in the case represents the majority decision and is in less expansive terms. Lord Sumption accurately set out the law as explained in *R v. Secretary of State for the Home Department (ex p. Doody)* [1994] 1 AC 531 at 560 and the judge failed to apply the law correctly. This involves distinguishing *R(Balajigari) v. Secretary of State for the Home Department* [2019] EWCA Civ 673.

iii) Ground 3: This ground contends that the judge misread the Guidance and consequently erred in finding that it was unlawful in the way identified in *R(A) v. Home Secretary*.

iv) Ground 4: Two findings of fact are said to have been perverse and to vitiate the judge's decision. These are:-

a) The finding described at [27] above. The Secretary of State invites us to read this as a statement that the claimant stood to lose 25% of all her benefits from a TPD when it was only 25% of the specified benefit which was at risk and the rest of her benefit income was not. If that is a correct reading of the judgment then the judge did fall into that error.

b) At paragraph [110] the judge found that the only material before the decision maker would be that contained in a spreadsheet supplied by the utility company. This is said to have been an error because the decision maker would also be able to access the claimant's benefit records which might be a source of significant personal or medical information about her. The judge said:-

> "The Defendant cannot locate the applications made by the utility companies, including the Interested Party, in relation to the Claimant's TPDs. The Defendant has been unable to identify who the decision-maker was, or what the reasons for the decision to impose the TPD were. In light of the evidence before me, however, it is clear that the decision-maker would simply have had before them the details from the spreadsheet (in its then-current form). These would not have included the information that the Claimant opposed a TPD, or any other information about the Claimant's personal circumstances."

v) Ground 5: This ground concerns a stay which the judge refused pending appeal. A stay was subsequently granted by the Court of Appeal and this does not arise for decision.

vi) Ground 6: The judge's costs order is said to be in error because the judge failed to make an order in favour of Ms. Timson for only part of her costs which he ought to have done because "she did not succeed on the principal basis for her claim".

The Respondent's Notice

37. Ms. Timson seeks to uphold the decision of the judge in her favour for the reasons he gave and additionally because:-

i) He adopted too narrow an approach to identifying the interests of the claimant. In particular, he was wrong to reject the argument based on personal autonomy.

He was also wrong to hold that the risk of legal action would be worse than a TPD in "the vast majority of cases".

ii) He held that a claimant had, essentially, a binary choice between a TPD and ignoring debts altogether. It may well be in a claimant's best interests to be able temporarily to prioritise other obligations or needs over their obligation to pay utility debts. The judge was wrong to hold that there is a legislative "order of priority of debts" at [186]. TPDs are only partly designed to pay debts. They also meet ongoing needs and the TPD therefore prioritises the meeting of this need over other needs, such as feeding a child. There is no legislative basis for this priority.

38. The Respondent's Notice also seeks to make a criticism of the judge's approach to the practicability of making enquiries of claimants before making a TPD decision, and to repeat the argument based on *Padfield* which the judge rejected. The judge determined the practicability argument in favour of Ms. Timson. In my judgment the *Padfield* argument gives rise to no arguable basis on which the judge's decision could be upheld if the Secretary of State's appeal succeeds. It is unnecessary to say any more about these two contentions in the Respondent's Notice.

The submissions

39. We received helpful written and oral submissions from counsel for the Secretary of State, for Ms. Timson and for the Interested Party, Severn Trent Water Limited.

40. I do not consider it necessary to summarise the submissions, except in one respect. In the written Appellant's Replacement Skeleton Argument reliance is placed on some evidence which was not before the judge but which was relied upon in support of the application to stay the order he made following on the judgment now under appeal. This evidence sets out the suggested difficulties in setting up a system to offer claimants the opportunity to make representations before a TPD decision is made. Mr. Sheldon KC in oral submissions placed little or no reliance on this material and in my judgment he was right to take that course. The evidence plainly does not satisfy the test for the admission of fresh evidence on appeal and I consider that it should be left out of account in dealing with this appeal. This means there is no basis for challenging the judge's conclusion that it would be practicable to operate such a system. I have referred to that conclusion at [28] above.

Discussion

41. I will take the Grounds in a different order from that in which they were advanced. Grounds 3 and 4 concern the judge's findings of fact. It is sensible to establish the facts before applying the law, particularly in an area where, as will appear, context is extremely important. I will take Ground 4 first.

Ground 4

42. Ground 4 challenges two findings of fact on the ground that they were perverse. In my judgment neither complaint has merit.

43. The judge said that a claimant might lose "up to" 25% of their total benefits, see [27] above. He then said that a TPD "may result in a reduction of up to 25% of their benefits". If he had said that in all cases a claimant was at risk of losing up to 25% of all their benefit income he would have been wrong, which is no doubt why he did not say it. The way he put it was clearly intended to take claimants in the position of Ms. Timson into account. She was not at risk of a deduction of 25% of all her benefits because a TPD can only be made in respect of a specified benefit, and she receives other benefit income which is not from specified benefits. The precise arithmetical proportion of total benefit income which may be diverted by a TPD will therefore vary, but cannot exceed 25% of benefit income. For the purposes of the real issue in this appeal, whether claimants generally should be given an opportunity to make representations before a TPD direction is made, it was reasonable for the judge to approach the question on the basis that a direction may result in a "significant sum" ceasing to be available because these claimants are on low incomes. That is the basis on which he approached the question and there is nothing perverse about that.

44. The judge was actually right to approach the case on the basis that decision makers would depend upon the information supplied by the utility providers in their spreadsheets. It is true that, if they chose to access it, the decision makers could also access the benefit records of the claimant whose case they were considering. However, there was no evidence to suggest that they ever, in fact, did this or, if they did, how frequently they did it. The form of the spreadsheet is discussed by the judge at paragraphs [88] and [89] of his judgment. At the time of the TPDs in this case (2019) it appears to have held very little information about the individual claimant. Although it was subsequently amended in 2021, that remains true. One of the changes made in that latest version of the spreadsheet required the applicant to say whether they had notified their customer that they have applied for deductions from benefit. It was not entirely clear why the Secretary of State decided to ask for this piece of information if, as is claimed, the customer could say nothing relevant to the decision. No question on the new spreadsheet requires the utility supplier to tell the Secretary of State what, if anything, the customer had said when given this information.

45. On this state of the evidence it was clearly not perverse for the judge to approach the case on the basis that in almost all, if not actually all, cases the decision maker had only the information on the spreadsheet before them when making the decision.

46. It is appropriate to record that there is a licensing system under which utility suppliers operate and that since 2004 there has been a "Joint Statement of Intent on the DWP Third Party Deductions scheme in respect of fuel and water charges" ("Joint Statement of Intent") which regulates the expectations of the Secretary of State so that the information on the spreadsheet is to be understood by a decision maker against the understanding that these expectations have been met. The judge gives much fuller details of this material and it is not necessary to set those out here.

Ground 3

47. Ground 3 essentially raises a factual issue as to the meaning of the Guidance. I have described above how the judge read the Guidance.

48. The judge found that the Guidance allowed the decision-maker to make a TPD direction without seeking representations or information from the claimant. The Secretary of

State submits that this was a misreading of the Guidance because the Overview document "states in terms" that the decision maker should:-

> "Consider contacting the relevant Third Party [the utility company] or the consumer by telephone for any further information. When approaching the Third Party Creditor ask for:
>
> > Confirmation of the amount of the debt. The amount to cover current consumption costs (if applicable) and any other information needed to process the application."

49. This extract demonstrates that the judge was right in his reading of the Guidance.

Ground 2

50. I consider that it is helpful to deal with Ground 2 next. That is because it involves a review of the relevant law and the conclusions will be relevant to the evaluation of the suggested error which is the substance of Ground 1.

51. The Secretary of State submits that the judge misdirected himself by applying the law as stated by Lord Neuberger in *Bank Mellat* and the Court of Appeal in *Balajigari*, when he should have followed Lord Sumption and the majority in *Bank Mellat*. This submission requires an analysis of those decisions, and *Doody* which both cases accept as being the origin of the law in this area.

52. In *Bank Mellat* the Supreme Court considered a number of issues arising from the decision of HM Treasury to make an order under section 62 of and Schedule 7 to the Counter-Terrorism Act 2008 against a bank, prohibiting persons operating in the financial sector in the United Kingdom from doing business with it. This was done on the ground that HM Treasury wished to inhibit the development or production of nuclear weapons in Iran. The Supreme Court of nine Justices determined issues concerning the jurisdiction to hold closed material procedures in that court, and the proportionality of the order. The part of the decision which bears on the present appeal was the consideration of the scope of the common law duty to give advance notice and an opportunity to make representations to an individual against whom it was proposed to exercise a draconian statutory power. No notice had been given to the bank before the order was made. Lord Sumption JSC called this "The Bank's procedural grounds" and dealt with it at [28]-[49]. Baroness Hale of Richmond, Lord Kerr of Tonaghmore and Lord Clarke of Stone-cum-Ebony JJSC agreed with his judgment. Lord Dyson MR also agreed with Lord Sumption, see [196]. Lord Neuberger PSC dealt with it at [178]-[195]. He did not express any disagreement with Lord Sumption, although he used words of his own to describe the duty. Lords Hope of Craighead, Reed and Carnwath JJSC dissented on the procedural issue, but did not do so by expressing any disagreement as to the existence of a duty to give notice before a statutory power is exercised adversely to a subject which Lord Hope said was "deeply rooted in the common law", at [146]. Lord Reed at [53]-[55] expressed agreement with much of what Lord Sumption had said and parted company with him "on the application of the common law principles procedural fairness in the context of Schedule 7 to the 2008 Act." All of the dissent concerned the particular circumstances of the order which had been made and the significance of the fact that it was done by the making of delegated

legislation. None of the Justices expressed any disagreement with Lord Sumption's formulation of the common law duty, nor, in so far as it was different, with that of Lord Neuberger.

53. The judge at paragraphs [157]-[163] made it clear that he regarded Lord Neuberger's formulation of the common law duty as "helpful guidance" and noted that the Court of Appeal in *R (Balajigari) v. Secretary of State for the Home Department* had also relied on it. The issue is whether he was right to do so, or whether he should have held that the law as found in the speech of Lord Sumption is materially different. If so, he would be bound as a matter of precedent to follow that.

54. Lord Sumption cited the well-known passage from Lord Mustill's judgment in *Doody* at [1994] 1 AC 531, 560 at his paragraph [30]. He did not suggest that it required any adjustment, and he clearly cited it with approval. He did not attempt to explain what it means or to reformulate it. It reads as follows:

> "My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer."

55. Lord Sumption added this, before turning to the particular statutory power involved in that case:-

> "31. It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each directive is made."

56. Dealing with the question of whether a statutory right of recourse to the courts after the making of an order, which arose under section 63 of the 2008 Act, is sufficient on its own to meet the demands of fairness, Lord Sumption said this about the relevant legal principles:-

> 35. The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise. As Byles J observed in *Cooper v Wandsworth Board of Works* 14 CBNS 180, 194, "the justice of the common law will supply the omission of the legislature." In *Lloyd v McMahon* [1987] AC625, 702—703, Lord Bridge of Harwich regarded it as
>
> > "well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."
>
> Like Lord Bingham in *R (West) v Parole Board* [2005] 1 WLR 350, para 29, I find it hard to envisage cases in which the maxim *expressio unius exclusio alterius* could suffice to exclude so basic a right as that of fairness.
>
> 36. It does not of course follow that a duty of prior consultation will arise in every case. The basic principle was stated by Lord Reid 40 years ago in *Wiseman v Borneman* [1971] AC 297, 308, in terms which are consistent with the ordinary rules for the construction of statutes and remain good law:
>
> > "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation." Cf Lord Morris of Borth-y-Gest, at p 309B-C.

57. Lord Neuberger, in the corresponding passage in his judgment said this:-

> *The procedural ground of challenge*

> 178. As Lord Sumption JSC says in paras 29—30, where the executive intends to exercise a statutory power to a person's substantial detriment, it is well established that, in the absence of special facts, the common law imposes a duty on the executive to give notice to that person of its intention, and to give that person an opportunity to be heard before the power is so exercised. While this has been described as a "rule of universal application . . . founded on the plainest principles of justice" (per Willes J in *Cooper v Wandsworth Board of Works* 14 CBNS 180, 190), it has more recently been expressed in somewhat more measured terms. In *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill said that "fairness" will
>
> > "very often require that a person who may be adversely affected by the decision will have an opportunity to make representations . . . either before the decision is taken . . . or after it is taken, with a view to procuring its modification . . ."
>
> 179. In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute.

58. Lord Neuberger began his next paragraph with this sentence:-

> "For the reasons given by Lord Sumption JSC in paras 28-49 I consider that the Direction given in this case was invalid…"

59. He thereby adopted as part of his judgment the paragraphs which are now said to be inconsistent with it.

60. In *Balajigari* Underhill LJ, giving the judgment of the court, said this:-

> 59. In the first place, although sometimes the duty to act fairly may not require a fair process to be followed before a decision is reached (as was made clear by Lord Mustill in the passage in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531 which we have quoted earlier: see para 45), fairness will usually require that to be done where that is feasible for practical and other reasons. In *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, Lord Neuberger of Abbotsbury PSC

> (after having cited at para 178 the above passage from *Ex p Doody)* said, at para 179:
>
> [the court sets out paragraph [179], cited at [57] above]
>
> 60. This leads to the proposition that, unless the circumstances of a particular case make this impracticable, the ability to make representations only after a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come.

61. In my judgment, paragraph [179] of Lord Neuberger's judgment in *Bank Mellat* was an accurate attempt to summarise and reformulate the passage from Lord Mustill's judgment in *Doody* cited at [46] above. It is not inconsistent with anything which Lord Sumption said, because he did not attempt any such summary or reformulation. His observation on the effect of *Doody* was limited to saying that a general answer to the question could not be given and the answer would depend on the particular circumstances in which a directive was given. That is not inconsistent with the approach of Lord Neuberger. Neither is it inconsistent with paragraph [60] of Underhill LJ's judgment in *Balajigari.* In both *Bank Mellat* and *Balajigari* it was necessary to consider the relevance of opportunities for challenge after a decision is made to the issue of whether there should also be an opportunity to make representations before the decision. *Doody* had dealt with this in very general terms at point (5) of Lord Mustill's analysis. He said:-

> "Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both."

62. That passage offered three possible requirements of fairness in a decision- making process: an opportunity (1) before, or (2) after the decision, or (3) both. It obviously allowed the possibility that any of the three options may suffice, but did not explain how a court might decide what the requirements of fairness were in any given decision-making process. That is because the House in *Doody* was not faced with an argument that the existence of a means of post-decision review meant that fairness did not require an opportunity to make representations before the decision. At page 562-3, Lord Mustill recorded the position as follows:-

> "Starting with the first issue, we encounter no problems. It would be impossible nowadays to imagine that a prisoner has no right to address to the Home Secretary reasons why the penal term should be fixed at a lower rather than a higher level, and it is now accepted that the prisoner does have this right. Indeed, the Secretary of State has gone further, by very properly undertaking through counsel that a statement of this effect will be included in the next edition of *"Life Sentence: Your Questions Answered"* the excellent booklet issued to persons serving life sentences."

63. The House of Lords therefore said nothing about how such an argument might be resolved. The question did arise in *Bank Mellat* and I have quoted at [56] above what Lord Sumption said about it. He cited Lord Reid in *Wiseman v. Borneman* who said that the courts had a power to supplement procedure laid down in legislation where it was necessary to do so to ensure fairness. He limited the scope of that power, saying that before it could be exercised "it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation." The Court of Appeal in *Balajigari* was also faced with the argument and had to explain its approach to resolving it. To suggest that such reasoning is inconsistent with that in *Doody*, which was adopted with approval by Lord Sumption in *Bank Mellat*, ignores the fact that the issue did not arise in *Doody*.

64. Lord Sumption in *Bank Mellat* at [36], following *Wiseman v Borneman*, confirms that the court must consider whether the statutory procedure in the Regulations for making TPDs is "insufficient to achieve justice" and whether requiring the additional step of affording an opportunity to make representations before the TPD direction is given would frustrate the apparent purpose of the legislation. That is a very similar test which Lord Neuberger proposes in his paragraph [179] of *Bank Mellat*, with its two elements identified at (i) and (ii). It is in substance the test which Cavanagh J applied. I therefore conclude that the judge's decision of the fairness issue was not based on an error in law in following *dicta* of Lord Neuberger in *Bank Mellat* and Underhill LJ in *Balajigari*. These *dicta* are not, in my judgment inconsistent with *Doody* but represent an application of the principles in *Doody* to a situation which did not arise in that case. In my judgment there is no real difference between Lord Sumption and Lord Neuberger in *Bank Mellat* on this issue. This may be illustrated by the fact that the outcome is the same whichever formulation of the test is adopted.

65. Further, and separately, in my judgment the argument based on the construction of the Regulations leads to the same result. The limited nature of the power to make a TPD direction conferred by the Regulations provides strong support for the conclusion that, as a matter of law, fairness requires a claimant to be given an opportunity to make representations before that power is exercised. The terms of the provisions are set out at [3] and [4] above and they require that the Secretary of State must either form an "opinion" or be "satisfied" that the TPD would be "in the interests of the family". This makes it clear that the TPD is only available following a consideration of the interests of the claimant and, if there are any, other members of the claimant's family. I find it impossible to see how such a consideration can take place fairly without the claimant and other members of the family being able to say what they think is in their interests, and why. It may include matters which are uniquely within the knowledge of the claimant. Even in *Bank Mellat*, where the question concerned the national interest of

the United Kingdom, the Supreme Court held that a prior opportunity to make representations was required as a matter of fairness. The submission of the Secretary of State in response to both Grounds 1 and 2 comes down to the proposition that because only in very few cases can the personal circumstances of the claimant or their family make any difference, there is no point finding out what they are. This is very close to saying that the interests of the claimant are irrelevant, which is precisely the opposite of what the Regulations say. The Secretary of State can only make a TPD direction after forming an opinion or being satisfied about the interests of the particular claimant and family under consideration. The Regulations therefore require that their interests are assessed in the light of all relevant information which must include anything they wish to say on the subject. After forming that judgment the Secretary of State *may* make a TPD direction. That involves a discretion.

66. In my judgment, the Regulations, by framing the decision-making as they do, require a consideration of the interests of the individual claimant and their family. Under the Guidance, however, the decision-maker has the option of contacting them, or of investigating their benefit records, but the Guidance allows a decision to be made where the claimant or their family has been given no opportunity to supply information beyond what the utility company puts in the spreadsheet. This appears to me to be obviously unfair.

67. It is clear that the definition of what the interests of the claimant might be in a situation where if no TPD is made they will continue to receive water and electricity without having to pay for them presents some difficulties. The judge decided to determine what the proper approach might be to that question. However, for the narrow issue before us it is not necessary to address those difficulties. The mere fact that they exist illustrates why a claimant must be given the opportunity to make representations, which is the only issue the court is required to decide. How any particular representations are dealt with by the decision-maker is a matter for the Secretary of State, and any subsequent challenge. I consider that the judge's resolution of them went beyond what was necessary for the decision of the issue in this appeal.

Ground 1

68. Although the argument on Ground 1 is put differently from that on Ground 2, the issues are very similar. I have decided above that the judge applied the correct legal test to the fairness issue. Ground 1 specifically challenges his approach to the suggestion that representations before the decision could make a difference only in a very rare and exceptional cases. This is essentially a matter of assessment of evidence.

69. As explained above, the judge gave three examples of situations where he thought that representations might make a difference. I have already explained the limited purpose of this passage in the judgment. In Ground 1, the Secretary of State criticises these individually.

70. The first of the judge's examples was a case where there had been insufficient discussion between the claimant and the utility company. It is said that the Joint Statement of Intent and the terms of the licenses under which the companies operate require communication between the claimant and the utility company before a TPD is applied for and that there are mechanisms in place for ensuring this happens. The

provisions for review or appeal are relied upon as an adequate safeguard for cases where it has not.

71. The second example relates to a case where the claimant's financial circumstances were expected to change. The Secretary of State says that a claimant could draw this to the attention of the utility company in the course of the contact which is required, or on review to the Secretary of State.

72. The third example arises where a claimant offered to make arrangements to pay the debt. The suggested answer to this is that a payment plan is a basis for supersession of a TPD and this can take place on review or of the Secretary of State's own motion.

73. I have answered these complaints in dealing with Ground 2. The judge was entitled to find that a system whereby the claimant is invited to supply information and representations only after the TPD has been made is unfair. This is right as a matter of the common law and also of the construction of the relevant Regulations. The Secretary of State's answer to the first two examples is, in part, that sufficient contact to satisfy fairness takes place between the utility company and the claimant. However, the utility company is not required to offer the claimant an opportunity to make representations to the Secretary of State before the decision is made.

74. The Secretary of State also relies on the existence of opportunities to challenge a decision after it has been made. The statutory scheme includes post-decision machinery for review (referred to by the phrase "mandatory reconsideration") and appeal of TPD directions. This appears to me to imply an acceptance by Parliament that representations by claimants may affect decisions under the scheme. This implication is supported by direct evidence from the Secretary of State. Clare Waterman is a Policy Team Leader employed by the Department of Work and Pensions. She provided a witness statement dated 1 December 2021 and exhibited documents to it. She deals with the process by which the spreadsheet was amended after these proceedings had begun and produces two versions of a note produced by her on 5 November 2021 and 10 November 2021 respectively. I will quote from the second only, since it is said that the first was not correctly expressed. Among other things, the second document says:-

> "At present I do not believe that we gather enough information from the supplier in the excel spreadsheet. It is possible that we do not seek sufficient information from the supplier or possibly the claimant to enable us to make a judgement at this point. From my discussions so far with operational colleagues they appear to assume from the spreadsheet that the supplier has completed their actions without necessarily checking further with the supplier or claimant, or looking further than the spreadsheet, (although I am looking at this). If the excel spreadsheet is relied on by itself, I doubt we are gathering enough information to consider the interests of the family.
>
> ……
>
> "Process Improvement Required – update the spreadsheet/forms to comply with and align to the Suppliers Joint Statement of Intent by asking at least for a summary of the action they have

> taken or to stop using the excel and revert to the forms annexed to the JSI for water and fuel charges.
>
> Claimants need an opportunity to disagree or challenge this process at some point. At the moment there is that option at the point of [Mandatory Reconsideration]/Appeal. However, so far I am struggling to find records of this being done earlier although the DMG provides for this, and I am continuing to look at this to prepare my statement.
>
> I can see a strong operational case for giving claimants time to provide us with information, should they wish to before all decisions are made."

75. If that is all true, and if the post-decision machinery takes a substantial time (a median of 47 days and in ESA cases following an assessment of work capability for mandatory reconsideration of Employment Support Allowance applications, we were told), then it seems obvious that justice is achieved by allowing an opportunity to make those representations before the TPD comes into effect, reducing a small income still further. It is equally obvious that allowing this opportunity would not, on the evidence before the judge and properly before us, frustrate the apparent purpose of the legislation.

76. Ground 1 includes a separate challenge to the judge's finding that the system was also a breach of the *Tameside* duty. He held that no reasonable decision maker could conclude that they had enough information on which to take a rational decision about the interests of the claimant without asking her what she thought about her interests. Although this is a different legal route to an answer from the common law duty of fairness I find it hard to see how the judge could have come to a different conclusion on the two issues on the facts of this case. Since I would uphold him on common law fairness I would also agree with him on the *Tameside* duty claim. This is not to conflate the two duties. In this case they both lead to the same result.

Ground 6

77. The judge delivered a reasoned judgment on the question of costs which ran from paragraph [39]-[56] of his judgment on consequential issues. In it, he showed that he had fully understood the case being advanced by the Secretary of State which was that since Ms. Timson had succeeded in establishing that the Guidance was unlawful in only one respect, the order for costs in her favour should be for a proportion only of her costs of the claim. He cited a number of authorities and explained clearly why he did not accept this argument.

78. In my judgment the Secretary of State has failed to show that this exercise of discretion was arguably so flawed as to involve an error of law which could justify this court in interfering with it. This ground is not arguable.

79. Like the judge, I consider that the words of Jackson LJ in *Fox v Foundation Piling Limited* [2011] EWCA Civ 790, [2011] CP Rep 41, at [62], bear repeating:

> "There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from

> the starting point set out in rule [44.2(2)(a)] too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates..."

The Respondent's Notice

80. It is important to recall that the judge upheld the procedural challenge to the TPD decision-making process, and it is that decision which was the subject of this appeal. As part of the argument he was invited to consider whether a claimant may be able to make any representations or supply any information which could make a difference except in very rare cases.

81. This was a hypothetical exercise, because neither Ms. Timson, nor any other claimant as far as we know, had actually made any representations prior to a TPD direction being given. They had been given no opportunity to do so.

82. Consideration of the merits of a hypothetical decision which a decision-maker might have made about any hypothetical representations which might have been submitted is therefore a hypothetical exercise built on a hypothetical exercise. I would decline to entertain the Respondent's Notice because any decision we might make about the matters it seeks to raise would be unnecessary to the decision we have to make. The proper approach to the determination of the interests of the claimant or their family under the Regulations should await a case where it directly arises for decision, and where the Guidance to decision-makers was lawful.

Conclusion

83. In my judgment, therefore, this appeal should be dismissed.

Lord Justice Warby.

84. I agree.

Lord Justice Phillips.

85. I also agree.