Neutral Citation Number: [2015] EWHC 1607 (Admin)

Case No: CO/4922/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/06/2015

**Before**:

**THE HONOURABLE MRS JUSTICE PATTERSON DBE**

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**Between:**

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| **THE QUEEN**<br>**on the application of**<br>**(1) MS C**<br>**(2) MR W** | **Claimants** |
| **- and -** | |
| **SECRETARY OF STATE FOR WORK AND PENSIONS** | **Defendant** |
| **- and -** | |
| **ZACCHAEUS 2000 TRUST** | **Intervener** |

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**Lisa Giovannetti QC and Jonathan Auburn** (instructed by **Irwin Mitchell**) for the **Claimants**
**David Barr QC and Nicholas Moss** (instructed by **Government Legal Department**) for the **Defendant**
**Zoe Leventhal and Alistair Mills** (instructed by **Leigh Day**) for the **Intervener**

Hearing dates: 14-15 May 2015

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# Approved Judgment

**Mrs Justice Patterson:**

Introduction

1. This is a judicial review of the legality of the defendant's process of the two claimants' applications for Personal Independence Payments (PIP). It is said that the processing was unlawful as it:

   i) breached the duty on the part of the defendant to act within a reasonable time;

   ii) breached the Article 6 rights of the individual applicants;

   iii) breached Article 1 of the First Protocol to the European Convention of Human Rights (ECHR).

2. The claimants submit that this is a test case. Their experience, they contend, is typical of that of many other claimants. The defendant is presently planning to roll out PIP to some 1.5 million recipients of Disability Living Allowance (DLA) in October 2015. Yet there are thousands of PIP claimants who are still waiting for the outcome of their application for PIP. Some of those have been waiting for more than a year. The delays that have occurred are beyond what is reasonable.

3. Permission was refused on the papers by Lewis J but granted at an oral renewal hearing by Cox J, on 25 February 2015, who said:

> "The Claimants' claim is a challenge to the administration of the personal independence payment scheme and the lawfulness of the delays in that system. There is a statutory entitlement to PIP and PIP is also a gateway to other benefits. I consider this claim arguable. There is clearly a wider public interest. I have considered very carefully the Defendant's submissions regarding the academic nature of the Claimants and the availability of an alternative remedy. The Court's discretion to allow a claim where the Claimants' cases are academic is not to be exercised lightly. Although both Claimants claims of PIP have been determined, serious issues are raised in this case regarding systematic and widespread delays. The Courts should not be shut out of resolving such an issue, including consideration of declaratory relief. For all of these reasons, there is good reason to grant permission. The Defendant's submissions that alternative remedies are available do not suffice to shut out the claim. The evidence submitted raises questions raises the adequacy and availability of the complaints procedure. For all of these reasons, I grant permission to the Claimants. I also grant permission to Z2K to intervene limited to the basis of their application, including oral submissions."

The General Background

4. PIP was created under the Welfare Reform Act 2012. It is a non means tested benefit for people aged between 16 and 65. It is to help disabled people with the additional

costs of living with a disability. It is a benefit targeted to the individual needs of a claimant. There are two components, a mobility component and a daily living component. The benefit can be awarded if an applicant qualifies under either the daily living criteria or mobility criteria or both. If an award is made it is at a standard or enhanced rate depending on the assessment of the claimant against the various criteria.

5. The scheme is administered by the defendant which awards the claims. The necessary assessments required for each claimant, whether face to face, or on paper, prior to making an award are carried out by private sector contractors, Atos Healthcare (Atos) and Capita Health and Wellbeing (Capita). After its full introduction, currently planned from October 2015, PIP will replace DLA. It is part of a wider reform of the welfare system. As a benefit more targeted to support an individual's needs there is a more sophisticated system of assessment than for claims of DLA.

6. The statutory framework for the introduction of PIP and processing of claims is set out in Annex I at the end of this judgment.

7. The policy has been to implement PIP on a staged basis as follows:

   i) a phased geographical roll out for new PIP claims from 8 April 2013;

   ii) a limited transfer of a small number of DLA entitled persons to PIP, but only if there were satisfactory arrangements in place to assess entitlement and, either, there has been a change in circumstance, or the person turns sixteen years old or voluntarily chooses to transfer to PIP (phase two); and

   iii) a transfer to 1.5 million DLA entitled persons (phase three).

8. No new claims for PIP from DLA entitled persons were to be permitted before 7 October 2013. As from that date the defendant could invite DLA entitled persons living in Wales, East Midlands, West Midlands and East Anglia to apply. Those claims were invited if the defendant received information about a change in care or mobility needs, the claimant's fixed term award was due to expire, a child turned 16 or the claimant could choose to claim PIP instead of DLA. In fact, the date was put back to 27 October 2013 and then, subsequently, put back until "the relevant date" which is when the Secretary of State is satisfied that all satisfactory arrangements were in place to introduce the benefit. Special Rules are available for terminally ill claimants.

9. By October 2013 164,900 new claims for PIP had been made by those not claiming under the rules for the terminally ill[1]. 11,600 new claim decisions had been made. By December 2013 the respective figures were 220,300 and 34,200.

10. In February 2014 the National Audit Office (NAO) published a report on the early progress of the PIP scheme up until October 2013. Backlogs at each stage of the claimant process were identified. Fewer claims than expected had been processed. By 25 October 2013 the Department had made 16% of the number of decisions it had expected to make. Over 166,000 claimants had commenced new claims for PIP.

[1] There are special rules for that category. The judgment focuses upon people claiming under the normal rules.

92,000 claims had been transferred to an assessment provider but had not been returned to the Department: nearly three times the volume expected at that stage. Claimants were given backdated payments if they were awarded PIP but faced difficulties, uncertainty and additional costs whilst they waited. The difficulties could include paying for care, housing costs and other daily living costs.

11. The NAO found that the defendant had adopted a challenging timetable for introducing a large programme and had not fully assessed performance before starting national roll out of the new claims in June 2013. By August 2013 the defendant had identified growing backlogs but had not allowed sufficient time to resolve problems before the planned roll out of reassessment in October 2013. The defendant had identified that assessment providers were taking longer than expected to return assessments and, by August 2013, introduced measures to monitor directly whether assessment providers had the capacity and capability to undertake reassessments in October 2013. Part of the problem was the difference between what had been expected in various areas and what actually happened; the percentage of new claims that required additional work was significantly higher than has been expected (83% rather than 20%), time taken to complete a face to face assessment was longer, days taken to make a benefit decision were longer and calls made to the PIP enquiry line were significantly more in volume. At the time the expected average time to make a decision on a new PIP claim was 74 days[2].

12. On 20 of June 2014 the Public Accounts Committee published its report on PIP. The Chair, the Rt Hon Margaret Hodge MP, said:

> "The implementation of the Personal Independence Payment has been nothing short of a fiasco. The Department of Work and Pensions has let down some of the most vulnerable people in our society, many of whom have had to wait more than 6 months for their claims to be decided.
>
> The Department's failure to pilot the scheme meant that the most basic assumptions such as how long assessment would take and how many would require face to face consultations, had not been fully tested and proved to be wrong. This resulted in significant delays, a backlog of claims and unnecessary distress for claimants who have been unable to access the support they need to have, and in some cases work independently."

13. On the 10 September 2014 the Minister for Disabled People, Mark Harper MP, gave evidence to the Work and Pensions Select Committee on the progress with PIP implementation. The following exchanges took place. He was asked:

> "You have already stated that by the end of 2014 no one will be waiting longer than 16 weeks for a PIP assessment. Are you going to hit that target?

[2] DWP – Business Case May 2013 and interviews with departmental staff.

> Mr Harper: It is not going to slip too far because we have said that we are not going to do the very flexible autumn, because we have got the end of year commitment as well, so we have been very clear by the end of the year nobody will be waiting for longer than 16 weeks for an assessment. That is a very clear commitment that the Secretary of State has made, which I am happy to repeat today, and that we are working with the providers to ensure that we hit.
>
> Chair: '16 weeks is still four months. Do you think that it is an acceptable length of time for somebody who may have developed a disability and suddenly has a lot of costs associated with that disability – which is what PIP is all about –to wait four months before they get money to pay for adaptations they might need in order to live their life or in order to adjust for the disability?'
>
> Mr Harper: 'No. I would like us to be able to make decisions or make the whole process work faster than that, but there is no point in getting ahead of ourselves.'"

14. The latest statistical information, published in May 2015, is that from 1 April 2013 until 31 March 2015 742,800 new claims for PIP had been made under the new rules and 122,100 re-assessment claims made (both totals excluding claims made under the special rules for the terminally ill). Of those, 610,800 new claims and 94,000 reassessments had been dealt with. As at 31 March 2015, 51% of new claims made under the normal rules, excluding withdrawn claims, resulted in an award of PIP and 77% of DLA reassessments led to an award (again excluding claims made under the special rules for the terminally ill).

Claimants' Factual Background

15. The first claimant, C is 37 years old. She is single and lives alone. In 2009 she was diagnosed with myalgia and encephalopathy (ME) and high blood pressure. By 2012 she was no longer able to work. She claimed Employment Support Allowance (ESA). That has been her only income since that time. She suffers from severe vertigo, collapses, sharp pains, muscle aches, visual impairment and memory problems. She has a lowered immune system as a result of ME. She is physically exhausted. She is only able to leave the house once a week to go to the local supermarket. She is extremely isolated.

16. She struggles financially so that she is living a hand-to-mouth existence. She receives ESA and Housing Benefit but is still constantly overdrawn. She spends about £8 a week on food. Her landlord is selling the property in which she lives so that she will have to move house which she finds daunting.

17. The defendant's records show that she made an initial telephone call to claim PIP on 9 September 2013. The PIP part 2 form was issued on 18 September 2013. A reminder was issued on 7 October 2013 to her to return her PIP part 2 form. The first claimant had indicated she required additional support when she made her claim. The case was referred to Atos on 29 October 2013 despite the absence of a PIP2 form because the

first claimant was classified as a person requiring additional support. Her PIP2 form was received on 23 December 2013.

18. The first claimant made telephone calls to check the status of her PIP claim on 9 January, 26 February, 24 March and 5 July 2014. On 19 August 2014 a face to face consultation had been arranged. The consultation did not take place.

19. In late August 2014 the first claimant received a letter from Atos inviting her to attend a medical assessment on 16 September 2014 in Tunbridge Wells. Because of her healthcare difficulties she cancelled the appointment and requested a new one to take place at her home. She says that she was told that if she did not attend the assessment centre her PIP application would be abandoned entirely which caused her considerable stress and anxiety. On 17 September 2014 Atos notified the defendant that the first claimant had failed to attend the face to face consultation. On 24 September 2014 the defendant accepted that the claimant had had good cause not to attend and referred her case back to Atos.

20. On 2 October 2014 an Atos healthcare professional looked at the information available and considered that it was insufficient to carry out a paper based review. A further face to face consultation was required. On 3 October 2014 an automated letter inviting the first claimant to another face to face assessment on 24 October 2014 was issued. The first claimant made a formal complaint to the defendant. The complaint was allocated to the complaints team on 20 October 2014.

21. On 20 October 2014 the first claimant contacted Atos by phone in a distressed state about her inability to travel to the assessment centre to attend the face to face consultation scheduled for 24 October 2014. She was put through to a nurse who took further information from her. After that telephone call Atos considered the first claimant's case again and determined, on reconsideration, that there was enough information to make a paper based review. Their completed report was returned to the defendant on 22 October 2014.

22. The defendant made its decision on 24 October 2014 and awarded enhanced rates of both the daily living and mobility component of PIP. The award was backdated so that a sum of £7,976.29 was awarded to the first claimant.

23. The second claimant telephoned the defendant on 3 February 2014 to apply for PIP. On 5 February 2014 the PIP2 form was issued. On 28 February 2014 the defendant sent a letter chasing the return of the PIP2 form. The form was signed by the second claimant on 28 February 2014 and returned by recorded delivery on 3 March 2014.

24. The second claimant's application was referred to Atos on 6 March 2014. The second claimant made chasing telephone calls on 17 March and 22 April 2014. On 24 June 2014 Atos reviewed the case and referred it for face to face assessment on the basis of insufficient information within the second claimant's PIP2 form.

25. The second claimant says that he called again in October 2014 to enquire on the status of his PIP claim although the defendant has no record of that telephone call. On 3 November 2014 the second claimant received a letter saying that he could expect an assessment to take place within 26 weeks of making his application. That time expired some 11 weeks before he received the letter. On 10 November 2014 the

second claimant made another chasing telephone call to the defendant. On 11 November 2014 he posted a formal complaint to the defendant about the length of time he had been waiting for his PIP claim to be determined. On 2 December 2014 the face to face assessment was held.

26. On 3 December 2014 the Atos report from the assessment was submitted to the defendant which made its decision on 5 December 2014. The second claimant was awarded the standard rate of the daily living component of PIP. A sum of £1,927.84 representing backdated arrears was paid on 11 December 2014.

27. The second defendant had been a full time carpenter until he contracted ulcerative colitis in 2013. He was admitted to hospital. His colon was removed and he was fitted with a stoma bag. He was discharged on 28 January 2014. He suffered with pancreatitis and was hospitalised again in February 2014 to treat the pancreatitis. During his hospitalisation the second claimant put on weight which caused a hernia to form which may require further operative treatment.

28. He had not been able to return to work since his hospitalisation in January 2014. He is on daily medication and suffers from significant pain. He is single and is supported by his sister who lives close by. He now suffers from depression, which he never has before, and has been taking antidepressants for the last three months.

29. He has been struggling financially as, without PIP, his only income consists of ESA and housing benefit from which he has had to pay his rent, and all other expenses. He cannot afford to feed himself and so goes to his sister's home five nights a week to eat, he needs his car to assist with his mobility but cannot afford to pay for petrol. He is overdrawn.

The Intervener's Evidence

30. The Zacchaeus 2000 Trust is a London wide anti-poverty charity which provides a range of services to vulnerable people including welfare advice and casework services. Its casework teams have been heavily involved in advising and assisting many disabled people who have made applications for PIP, and who have suffered lengthy delays in obtaining benefit and severe hardship as a result.

31. The intervener produced evidence of delays in processing PIP claims and the impact that had on individual claimants. Six case studies were produced in which the shortest time for determination was seven months and one claimant was still waiting for determination after twelve months. The intervener makes the point that it is the impact on some of the most vulnerable people in society of the delay in processing the applications which has been devastating. For all new claims those who are waiting have been without access to a needs based benefit for an extended period of time and, on some occasions, without any benefit at all. That impact is not resolved by backdating the award because the claimants have undergone mental, physical and financial hardship which cannot be adequately remedied by a financial payment.

32. One case study involved LS, a single mother with three adult children (aged 18, 20 and 29 years), who was unable to work due to disability. She made her application for PIP in October 2013. No award was made until 31 October 2014. During the time of processing the PIP application, LS was subjected to the benefit cap and fell

into rent arrears of between £7,000-8,000. She was repeatedly threatened with homelessness which caused her depression and anxiety. Her physical health suffered. Her landlord refused to repair the property whilst she was in arrears and she was forced to use her ESA to fix her kitchen ceiling which had fallen in due to damp. She went without food and electricity and borrowed regularly from friends to pay her utility bills making informal repayment agreements which she has found stressful. She remains in an anxious state and has developed paranoia at being threatened with homelessness again. She has become increasingly dependant on her children.

33. I do not repeat the other case studies but record that I have read them all and taken them into account.

Ground One: Was the Delay on the Part of the Defendant in Processing the PIP Claims Unlawful?

34. It is uncontroversial between the parties that the PIP claims have to be determined within a reasonable period of time. What is a reasonable period will depend upon the context and taking all the material considerations into account.

Claimants' Submissions

35. The claimants submit that the following are relevant factors in the statutory context:

    i) Parliament took the view that people eligible for PIP should have it as of right. It was a legal entitlement; and

    ii) Parliament provided for a replacement scheme to DLA with more complex individualised assessment for claimants. What is reasonable will have to be determined by the nature of the assessment exercise.

36. In the NAO report headed 'Personal Independence Payment: Early Progress' it is of note that in May 2013 staff of the defendant were expecting an average time of 74 days within which to make a decision on a new claim.

37. By the time the Minister appeared before the Work and Pensions Committee to give oral evidence on the progress with PIP implementation in September 2014 he was saying that, by the end of that year, nobody would be waiting longer than 16 weeks for an assessment.

38. The committee reported in the following terms, at paragraph 48:

> "We agree with the Minister that the current level of service offered to PIP claimants and the length of time claimants are waiting for decisions on their PIP applications is not acceptable. People should not be forced to wait six months or more to find out whether they are entitled to financial support towards the additional costs of living with disabilities and health conditions. Urgent action is required. We recommend that DWP closely examine its own systems and that it work with the contracted providers to resolve the current dire situation…we also recommend that DWP clear the existing

> backlog of claims and reduce the average time taken to process new claims to the expected 74 days before it extends the natural reassessment of existing DLA claims to other parts of the country."

39. The defendant is dealing with financial support for the seriously disabled for whom prolonged delay could give rise to acute and irreparable hardship. It is not a means tested benefit and, for many, PIP is essential to enable them to function in their everyday lives and to meet additional costs arising from their disability.

40. The report of the Public Accounts Committee on PIP published on 20 June 2014 recorded the impact of PIP on claimants. The length of a journey to an assessment centre was considerably in excess of what had been expected and what was contained within the Atos tender document. As to delays paragraphs 16 and 17 of the report read:

> "16. The delays which claimants are suffering before receiving a decision on their claim are causing unacceptable pressures and stress on this vulnerable group, and their families and carers. Citizens Advice, Mencap and Disability Association Barking and Dagenham told us that some claimants had been forced to resort to loans, food banks and discretionary housing payments to cover additional costs. In some cases, family members or carers had stopped or reduced their working hours to help care for claimants, while they waited to receive Personal Independent Payment. We heard evidence of a claimant requiring hospital intervention as a result of the stress caused by the delays suffered, and another claimant who was unable to afford the specific diet required for diabetes and gastric problems, while waiting for a decision. The delays have also led to increased demands on wider public spending and on disability organisations which provide support to claimants.
>
> 17. Personal Independence Payment acts as a passport to wider benefits such as a carer's allowance, disability premiums and concessionary travel. It also exempts certain households from the benefit cap. Citizens Advice told us that delays in administering Personal Independence Payment have impacted on families' rights to these wider benefits. The Department assured us that passported social security benefits such as carer's allowance, would be backdated to the start of Personal Independence Payment if the benefit criteria had been met. Other passported schemes, such as the Blue Badge scheme, do not rely solely on an entitlement to Personal Independence Payment. Claimants can still claim these benefits through other means, such as an assessment of walking difficulty carried out by Local Authorities."

41. What is a reasonable period has to be informed by the impact on the claimants. In the instant case a reasonable period has to be fairly modest.

42. There is no good reason for delay. This is not a case where external factors have made it inevitable that the process of a claim would take in the order of nine months. From the statistics supplied by the defendant the waiting time for claims to be determined peaked in the summer of 2014 to about 40 weeks but about 50% of all claimants were waiting for a longer period. There is no information as to how much longer those 50% were waiting for as the defendant publishes a median figure.

43. By the end of January 2015 a total of 109,800 cases had been referred to an assessment provider. Of those, 63% had been waiting less than 20 weeks, 37% had been waiting more than 20 weeks, 24% had been waiting over 30 weeks, 13% had been waiting more than 40 weeks and 4% had been waiting over 52 weeks. That was at a time when the median waiting time had dropped significantly.

44. Even the most recent statistics in May 2015 show 16% of the claimants were waiting for more than 30 weeks for their claim to be determined.

45. There is no emergency or cause for delays to be so long. The volume of claims received is consistent with the departmental expectations.

46. An independent review of the PIP assessment was conducted by Paul Gray who published a report in December 2014. He recommended that, within the short term, actions that should be completed to address delays and backlogs before the start of managed reassessment.

47. The (NAO) concluded that there had been insufficient time to fully test the benefit process saying:

> "3.15. The Department did not leave enough time to assess the impact of increased volumes on the length of the claims process or to identify delays in assessments before inviting new claims from across the country in June 2013. It also had limited time to identify problems before introducing natural reassessment of Disability Living Allowance claims in October 2013. The Department identified delays in late August, leaving only two months to resolve problems before volumes would increase again to around 55,000 claims per month."

48. The Public Accounts Committee summarised its findings as follows:

> "The Department for Work and Pensions (the Department) rushed the introduction of Personal Independence Payment and did not pilot the benefit process. We are concerned that many disabled people have experienced long and unacceptable delays in their Personal Independence Payment being assessed and granted. The process has proved inaccessible and cumbersome for claimants, who are some of the most vulnerable people in society. The Department significantly misjudged the number of face-to-face assessments that providers would need to carry out, and the time there assessments would take. This has resulted in significant delays to benefit decisions and a growing backlog of claims. The unacceptable level of service provided

> has created uncertainty, stress and financial costs for claimants, and put additional financial and other pressures on disability organisations, and on other public services, that support claimants. The Department has yet to achieve the savings it intended to make and will have to seek compensatory savings elsewhere."

49. The NAO report concluded that the defendant had not exercised particular caution in letting the assessment contract, given the poor performance of Atos on work capability assessments. They were concerned that Atos appeared to include incorrect and potentially misleading information which was not challenged in its bid for the PIP contract.

50. Although both claimants now have their award of PIP there are still thousands of claimants waiting for determination of their claims. The case is important because the most challenging part of the implementation will be the roll out currently proposed for October 2015. It is important for the Court to give guidance as to what is or is not a reasonable time to wait.

51. The fact that PIP was introduced without proper systems in place has caused its implementation to be inefficient. The claimants accept that the PIP is a more complex system than DLA, which is a factor to be taken into account, but it is not correct to approach the issue of whether the defendant has acted within a reasonable time on the basis of whether the defendant has acted in an irrational or perverse manner as the defendant contends.

52. Further, the complaints system is not an alternative remedy in the circumstances of this case. The claimants are not exceptional in their circumstances but are typical claimants. The case is about systemic failings in the system and their correction.

The Intervener's Submissions

53. The intervener takes the same approach to the law on delay as the claimants. In particular, it submits that the Court should consider, in assessing whether a delay is reasonable:

    a) whether there is a statutory right or a legitimate expectation at stake;

    b) the extents of the impacts on the person affected by the delay and their vulnerability and the extent to which any interim provision/support is provided;

    c) whether the defendant accepts that the delays are unacceptable;

    d) how far the relevant delays exceed appropriate benchmarks or targets;

    e) the reasons why the delays have occurred – administrative failings, errors on the part of the defendant in individual cases or designing the scheme as a whole; and

    f) the resources of the defendant to remedy the problem and whether any improvements are being made to the systems in question.

54. The key factors here are:

    i) the statutory entitlement under section 77 of the Welfare Reform Act;

    ii) the department's own guidance for the period of determination, initially of 74 days, and then not beyond 16 weeks; and

    iii) the impact on the individual of the delay.

55. For new claimants, those waiting have been without access to any benefit. The problem is not resolved by back payment because the person with the disability has suffered mental, physical and financial hardship which cannot be adequately remedied by a backdated payment. The case studies which the intervener has produced paint a real picture of hardship suffered by individuals. Four areas are of particular relevance.

56. First, the benefit cap. On the face of the statutory scheme those entitled to PIP are exempt from the cap. The delay causes long term and wide ranging consequences which is contrary to the statutory intention that disabled people should not be affected.

57. Secondly, the impact is exacerbated because there has been no interim support despite the scale of the hardship, the length of the delays and the period over which the delays fell, from June 2013 until May 2015. Powers have been used in the award of other benefits, for example ESA, where a payment on account can be made whilst awaiting a determination. The defendant contends that is not the norm but a special payment scheme could be introduced.

58. Thirdly, transitional provisions could be amended or used. The Welfare Reform Act contains very broad and flexible powers which could be used to move certain claimants back to DLA for a period of time whilst the backlog of PIP was being resolved.

59. Further, a triage system could be adopted to identify and prioritise vulnerable candidates.

60. The intervener relies on the case of **R v Secretary of State for the Home Department ex parte Mersin** [2000] INLR 511 in which the Court granted a declaration that the respondent had delayed unlawfully in granting the claimant refugee status and indefinite leave to remain (a period of six months). The Court there rejected an argument that the defendant must be entitled to organise its work in such a manner that it thought administratively appropriate and, unless it did so in a wholly irrational way the Court should not interfere. Elias J (as he then was) determined that the question was "whether delay resulting (at least in part) from the way in which the administration of functions is organised can render the delays unlawful."

Defendant's Submissions

61. The defendant submits that neither the 2012 Act nor the regulations made under it specify the time within which a decision must be made on an application for PIP. The defendant accepts that there is an implied duty to determine an application within a

reasonable time. What is reasonable depends on the context and circumstances. A reasonable time is a flexible concept allowing (amongst other things) scope for variation depending on the volume of applications, available resources and the need to ensure fairness and consistency: **R (S) v Secretary of State for the Home Department)** [2007] Imm AR 781 at [51].

62. On the allocation of resources the Secretary of State's duty is to act reasonably: see **R v Social Services Secretary ex parte Child Poverty Action Group** [1990] 2 QB 540 at [554G-555D].

63. It is not for the Court to consider whether it could have dealt with matters differently or better. In a backlog situation the question is whether the manner in which the backlog is being dealt with is in all circumstances reasonable and fair: **R (FH & Others) v Secretary of State for the Home Department** [2007] EWHC 1571 (Admin). The circumstances to be taken into account include the adverse consequences to the individual of any adverse delay and any policy of the public body in relation to the timing: **R (Jawad) v Secretary of State for the Home Department** [2010] EWHC 1800 (Admin).

64. It is important to take into account the scale of the introduction of PIP. Because the test for DLA was insufficiently focussed it was felt to be an unsustainable benefit. The new test focuses on the functions of the claimant and, in particular, can better target those with mental disabilities. There were concerns also about a lack of proper review in the DLA system. There has been considerable planning involved in the PIP project which is massive in scale. It is easy to be wise with hindsight but the defendant has not taken an irrational approach.

65. There is a difference between Phase One claims and Phase Two. For the Phase Two roll out dealing with re-assessment of persons currently in receipt of DLA those claimants would continue to receive DLA until the completion of their assessment for PIP. Hardship considerations are, therefore, different.

66. The regulations that were made deferring the commencement date of Phase Two until 27 October 2013 were to enable the defendant to take into account the response to a voluntary consultation on the 20 metre walk requirement that was one of the factors for assessment. The introduction of the "relevant date" by when the Secretary of State could invite all categories of claimant to apply illustrates a considered and controlled approach to implementation of PIP.

67. It was clear that by the summer of 2013 delays were emerging and that the assessment providers lacked the capacity to meet the targets. The contractors needed more people and more assessment centres. The defendant also identified that:

    i) some internal processes including identity verification were taking longer than expected;

    ii) some PIP claimants were taking longer to return their PIP2 forms and a significant number did not return their forms at all. That contributed to a higher number of claimants requiring a face to face assessment;

iii) a higher proportion of claimants were failing to attend their face to face consultations so that the appointment could not be reallocated to another person and a further appointment had to be arranged unless there was a good reason for the claimant not to attend;

iv) analysis of the assessment showed that their writing up was taking longer than anticipated.

68. The defendant has not shied away from publically acknowledging the problems. The Secretary of State and the Minister have stated that the delays are unacceptable and that tackling them was their top priority. Parliament, through its scrutiny by the Work and Pensions Select Committee and the Public Accounts Committee, has expressed clear views. Steps have been taken and provide a rational way of addressing the backlog. Since January 2014 the number of healthcare professionals carrying out assessments has almost quadrupled, the number of assessment centres and rooms has significantly increased, space has been used more effectively and there has been a significant increase in the number of administrative staff to handle the volume of PIP claims.

69. The defendant has supported the improvements by:

i) revising guidance for health professionals to make it clearer what is expected from them during assessments;

ii) revising the audit criteria and guidance;

iii) revising the forms that providers need to complete;

iv) improving communications with claimants so that they are clear on what is expected in progressing a PIP claim.

70. The defendant has increased the number of staff by 800 from June 2014 working on the PIP process. Seniority of teams working on PIP has also been increased. There is now also a centre of excellence for PIP new claims and a dedicated team tasked with identifying ways to improve the PIP process and test and monitor the changes. In addition, the process of PIP claimants who fail to provide their PIP2 form has been streamlined and the number of assessments requiring a face to face consultation has decreased and is now in line with what was expected.

71. Amongst the outstanding PIP claims the oldest have been identified and additional resources have been invested in processing those claims first. New claims have also been prioritised over DLA reassessment claimants. Additionally, if a claimant makes a complaint and demonstrates hardship, which is accepted, then their claim will be prioritised. It has not been possible to assess which claimants are facing hardship when they have not filed a complaint. Action has also been taken in individual cases where legal action has been threatened.

72. As a result of the measures that the defendant has taken there has been a tangible improvement. There is now a rational way of ordering the queue of claimants, the complaints system is clearly set out on the defendant's website and a large amount of information about it has been sent out in hard copy.

73. The contractual management of the two assessment providers has been changed. They are now being actively managed. The defendant's response has been entirely reasonable and rational.

74. On the intervener's issues, the first question is what is permitted under the transitional regulations? Susan Moore, the senior responsible owner for the PIP programme at the defendant, says in her witness statement that she was advised that the powers under sections 90 to 93 of the Welfare Reform Act did not permit the Secretary of State to reinstate DLA for claimants for whom PIP had been rolled out. In any event, there would be considerable commercial considerations as large numbers of staff trained to process PIP claims would need to be retrained to assess DLA claims. The measures which have been implemented to improve PIP processing times were having the desired effect and the average PIP processing time had been cut by about a half.

75. Whilst it was open to the defendant to consider putting the PIP scheme into reverse it was not mandatory to do so. The issue of how to tackle the backlog involved tactical issues as well as consideration of the legal framework. It was a situation far removed from statutory material considerations. Even if reversal had been considered it would have made no material difference. First, reverting from PIP to DLA would have been a departure from the direction of travel and contrary to the statutory context of the Welfare Reform Act. Second, it would be detrimental to new claimants who would have benefitted under PIP, such as those with mental difficulties. Third, it would have forced a two stage process which would be bad both for the claimants and for the defendant. Fourth, there were significant commercial considerations because the providers were then under contract. Fifth, there were practical considerations of training and resources and waste of previous training.

76. It is significantly doubtful whether the Secretary of State had power to reverse Phase One at that time. The power to make transitional provisions could only be exercised before the substantive powers commenced. The transitional provisions were made before section 77 was in force. Regulation 22 included the abolition of DLA. From 10 June 2013 the entitlement to PIP was created nationwide. The two schemes were mutually exclusive. That position was reinforced by the fact that the purpose of the transitional provisions was to facilitate the change from one regime to another and not to effect reversion to the previous regime.

77. There was a legal problem in that by putting the transfer to PIP into reverse that would have invited a vires challenge.

78. There had been a commitment on the part of the defendant to address the backlog by taking various measures. The recent published data providing information up to March 2015 showed a vast improvement from how things were at the peak of the backlog. The median time for determination had fallen from 41 to 15 weeks. That has to be seen in the scale of the task of implementing PIP and the scale and degree of effort and success which had resulted from the steps which the defendant had taken. There had been a period of two years when matters were problematic but given the scale and prompt and remedial action even if it was legally appropriate for a Court to give guidance, which it is not, there is no need because the position has been transformed. The situation continues to improve. Capita are on course and Atos are improving but still have to meet the targets. Further improvement can, therefore, be anticipated.

79. The defendant accepts that hardship is a factor to be taken into account. Because of the character of the procedures involved in the new benefit it would always take time to bed in. Impact will vary from individual to individual as the exercise is highly fact sensitive.

80. The defendant has not been able to examine properly the case studies submitted by the intervener as they are anonymised. It is unable to agree to them as a consequence. It accepts that delay means that people are kept out of benefit and that hardship is a factor. However, back payment is fundamental and improves their situation. It is not a panacea but it is very important.

81. There is a special payment policy which enables the defendant to provide financial redress following personal injury, maladministration or similar events where something has gone wrong. The payments are exceptional and would be made only after careful consideration of the individual merits.

82. Interim or advance payments cannot be made as entitlement can only be determined after a thorough assessment. Consideration had been given as to whether to include PIP in the Social Security (Payment on Account of Benefit) Regulations 2013 but given the nature of the benefit it was decided that it could not be included. It is easier for other benefits such as Income Support and ESA where there is an element of means testing in the benefit. No advance payment is made to claimants of DLA.

83. The argument about the impact of the benefit cap regulations relies on the language of regulation 75F(1)(ea) of the Housing Benefit Regulations 2006/213 that provides an exemption from the cap to those receiving PIP. The Social Security (Personal Independence Payments) Amendment Regulations 2013 do not assist as the exercise required under them involves judgemental aspects.

84. The defendant takes issue with whether the claimants are standard claimants. The defendant contends that there is no such thing particularly dealing with disabilities as all are different. Hardship matters are fact sensitive and it is not suitable, therefore, for the claimants to be treated as test cases. The fact that the delays which have occurred are accepted as unacceptable is not the same as a breach of duty.

Discussion and Conclusions

85. Before considering whether the delay which occurred was unreasonable there are two prior questions:

    i) Is it appropriate to treat the claimants' cases as test cases?

    ii) What is the right approach as to whether the delay in the circumstances is unreasonable?

86. In any case involving disabilities there will be differences between claimants, their individual disabilities and circumstances and the impact of any changes upon them. No two cases will be identical in terms of either the disability or hardship. The intervener's case studies amply exemplify the difference between claimants. One is not dealing with a convenient and standard replication of disability and circumstance but with individuals with their own unique problems and circumstances. In any event,

other than by assertion, there is no evidence that the claimants are typical of other claimants at the material time. It follows that, although there may be similarities between the claimants' cases and others they are not of such a degree that it is appropriate, in my judgement, to treat the claimants' cases as test cases.

87. There is no statutory period within which the claims for PIP are to be determined. There is no dispute in domestic law that the Secretary of State is under a public law duty to determine the PIP applications within a reasonable time. The claimant relies upon **R v Secretary of State for the Home Department ex parte Phansopkar** [1976] 1 QB 606 in support of the claimants' entitlement to have the applications considered fairly and in a reasonable time.

88. Further, in **R (Mambakasa) v Secretary of State for the Home Department** [2003] EWHC 319 (Admin) Richards J considered there to have been an unlawful delay in the granting of refugee status. He referred to the case of **Mersin** (supra) where a delay of some seven months between final disposal of the claimant's successful appeal to a special adjudicator and the grant of refugee status was unlawful. In determining the case before him and holding that a delay of six months was unreasonable and did amount to a breach of duty on the part of the Secretary of State he was influenced by ten factors which he set out at [66]. Those related to the circumstance of that case.

89. The claimants submit that what is a reasonable time is for the Court to determine depending on the circumstances in the case.

90. The defendant submits that delay is a flexible concept and relies upon **R (S) v Secretary of State for the Home Department** [2007] EWCA Civ 546 at [51] and submits that delay is to be looked at through the lens of reasonableness and rationality: see **R (MK (Iran)) v Secretary of State for the Home Department** [2010] 1 WLR 2059 at [38].

91. The defendant relies upon **R (FH & Others) v Secretary of State for the Home Department** [2007] EWHC 1571 at [10] and [11]:

> "10. It follows in my view that a system of applying resources which is not unreasonable and which is applied fairly and consistently can be relied on to show that delays are not to be regarded as unreasonable or unlawful.
>
> 11. As was emphasised by Lord Bingham, the question was whether delay produced a breach of Article 6(1). Here the question is whether the delay was unlawful. It can only be regarded as unlawful if it fails the Wednesbury test and is shown to result from actions or inactions which can be regarded as irrational. Accordingly, I do not think that the approach should be different from that indicated as appropriate in considering an alleged breach of the reasonable time requirement in Article 6(1). What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been made within a reasonable time, but

> (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable. That does not mean that the court should determine for itself whether a different and perhaps better approach might have existed. That is not the court's function. But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible."

92. It seems to me that in considering whether the delays which are agreed to have occurred in the claimants' cases are unlawful I have to disregard what may be regarded as desirable to reach the best standards. I have to consider whether there has been a breach of duty on the part of the Secretary of State to act without unreasonable delay in determination of the claimants' claims for PIP in all of the circumstances.

93. In my judgment, the delay in claimant C's case from 9 September 2013 until the determination of her benefit on 24 October 2014 of some thirteen months and the delay in claimant W's case from 3 February 2014 until December 2014 of some ten months was not only unacceptable, as conceded by the defendant, but was unlawful.

94. I say that for the following reasons:

i) Both claimants' cases called for expeditious consideration. They each suffered from significant disabilities (as set out above). They were each properly to be regarded as amongst the most vulnerable in society.

ii) The first claimant was classified as a person requiring additional support early on in the process of her claim. Yet the system then in operation required her to travel some distance to a face to face assessment on two separate occasions when she had explained her difficulty in travelling. It took more than one year after she initially contacted DWP for sufficient details to be obtained over the telephone to enable her claim to be considered and determined.

iii) For the second claimant similar considerations, although less extreme, applied from the moment of claim until the determination some ten months later.

iv) The NAO report of February 2014 clearly identified backlogs at each stage of the claimant process. It found also that the defendant had adopted a challenging timetable and had not fully assessed the performance of its proposed systems for starting the national roll out of the claim in 2013. Insufficient time had been allowed to resolve the problems before extending the scheme in October 2013.

v) Assessment providers at that time were struggling with both capacity and capability to carry out the assessments. To require the first claimant to attend a face to face assessment on two separate occasions was both inappropriate, caused her considerable distress and was irrational in her circumstances.

vi) The Public Account Committee's findings in their report, of June 2014, were that the failure to pilot the scheme and assumptions made for the assessment process were both unsubstantiated and wrong.

vii) The Minister's evidence to the DWP Select Committee in September 2014 accepted that 16 weeks was not an acceptable length of time because, amongst other factors, of the impact it would have on someone who had developed a disability.

viii) The prejudice and distress of both claimants of having to wait for the protracted period of time to have their claims determined was considerable and unnecessary.

ix) The reasons for the delay are set out earlier and are contained in the reports of the Parliamentary Select Committees, the NAO and the report of the independent examiner, Mr Gray. Although the defendant uses the scale of the implementation that it had to grapple with as a point in its favour it overlooks the fact that the point also operates the other way as explained in (x) below. It was incumbent upon the defendant also to address failings identified by itself and by the Select Committees and the independent report.

x) The defendant did identify steps to be taken and has implemented procedures which appear to be reducing the backlog and making the system increasingly efficient and fit for purpose. I recognise that the Secretary of State has been dealing with hundreds of thousands of applications and will have to deal with some 1.5 million more applicants when the full system of PIP is rolled out. The scale of the project is a cogent factor in the defendant's favour but it has to be balanced against the fact that the PIP scheme is intended for the most vulnerable members of society and fit for purpose has to be construed with that service user in mind. It is important, therefore, that the system introduced and operated is accessible to its service users and efficient.

xi) Whilst the steps that the defendant has taken are a significant and weighty material consideration they cannot excuse, in my judgment, the handling of the claims of the two instant claimants when an effective system of operation of PIP benefit should have resulted in an award to each claimant significantly earlier in 2014. In acting as it did in their individual cases the defendant acted in a way that was unreasonable in the sense of being irrational.

xii) Back payments are an important step but do not provide a complete answer to the unnecessary stress that the prolonged delays that occurred in each of these two cases undoubtedly caused.

95. On the additional points raised by the intervener about the consequential impact of the situation on claimants and its exacerbation by:

i) no payment on account/advance payments;

ii) the effect on the benefit cap;

iii) transitional provisions;

iv) the inability to identify who were priority cases;

The absence of those factors as part of the defendants roll out of PIP increased the hardship for many claimants. However, the further steps taken by the defendant, as set out above, in all areas of the implementation of the scheme including the development of an electronic claiming channel, responding to the Gray review, working with the assessment providers to ensure they have the right numbers of people in the right places within the country, ensuring that the assessment centres are within more convenient travelling distance for claimants together with the review of whether there should be a triage system to identify hardship or other priority cases mean that earlier shortcomings have been or are in the process of being addressed. It cannot be said that there are now inherent systemic failings in the system. That means that the individual points made by the intervener, such as no interim payment on account, the effect of the benefit cap and the requirement to amend transitional provisions do not need to be the subject of this judgment.

96. If that is wrong, so far as the benefit cap is concerned, there is no evidence before the court that either of the claimants here were affected by the benefit cap.

97. Payment on account or the establishment of an ex gratia payment scheme to tide over PIP claimants was considered and was not thought appropriate in the circumstances of the new benefit. If, as appears to be the case, the delays are significantly reduced then the requirement for such a step is negated.

98. As to the amendment of the transitional provisions section 93 of the Welfare Reform Act 2012 is in broad terms. It says:

> "93. Transitional
>
> (1) Regulations may make such provision as the Secretary of State considers necessary or expedient in connection with the coming into force of any provision of this Part.
>
> (2) Schedule 10 (transitional provision for introduction of personal independence payment) has effect."

99. The simple and ordinary wording of the section enables the Secretary of State to make such regulations as he considers necessary or expedient in connection with the coming into force of any provision of that part. In my judgment, that could incorporate making amendments to the transitional provisions as to timing of the implementation or amendments to regulation 22 of the Personal Independence Payment (Transitional Provisions) Regulations 2013.

100. The defendant submits that he was not required to consider his legal power to make transitional provisions because that was not a mandatory consideration but, in any event, he has considered that power now and concluded that he does not have the

relevant vires because making such a provision would have been contrary to the statutory intention of section 93 and schedule 10 of the 2012 Act.

101. It is right that whilst the Secretary of State could take into account his power to make transitional provisions he was not obliged to. It was not a material consideration set out on the face of the statute. There is a very wide discretion given to the Secretary of State as to what he could take into account. In considering how to tackle a backlog practical issues are involved as well as the legal framework. The situation here is far removed from having to consider a statutory material consideration.

102. The defendant has also invested resources in identifying the oldest PIP claims and prioritised new PIP claims over DLA reassessment claims. It has responded, too, to claims where complaints have been made or legal action threatened. Those steps together with other measures that are in hand mean that there is some triage system in place. It may not be as the intervener would wish but that is entirely different from finding that the delays that have occurred in general are unlawful.

103. In relation to the individual claims of each of the two claimants I find that they succeed. Relief I deal with below. I turn now to deal with ground two.

Ground Two: Did the Defendant's Conduct Breach the Article 6 Rights of the Individual Claimants to a Determination within a Reasonable Time?

104. The claimant submits that the decision on whether the claimants were eligible for PIP was a determination of their civil rights. The eligibility criteria are defined in the regulations and do not involve significant administrative discretion. Accordingly, the claimants had a right to have their decisions about eligibility taken within a reasonable time.

105. A right to a benefit is a civil right for the purposes of Article 6: see **Salesi v Italy** (13023/87) at [19] where for non-contributory benefits it was said "today the general rule is that Article 6 para. 1 (art. 6-1) does apply in the field of social insurance."

106. The determination of whether a person is entitled to PIP is a determination of their civil right. It is not necessary for it to be determined by a judicial body, nor is it necessary for there to be a *lis* between the parties. What is required is that the decision determines the right in question. It would be contrary to the nature of the scheme in Article 6 if people who were refused benefits and then appealed could rely upon Article 6 because the administrative process was too slow but applicants who were successful at the first stage were not able to rely upon Article 6 because of the delay. The ECHR is intended to be practical and effective.

107. The defendant submits that Article 6 is not engaged. There is no dispute. A dispute first arises if a claim for PIP is determined by the defendant, refused and the applicant commences an appeal.

108. The defendant submits that the claimants' case which is that Article 6 applies even if there is no dispute as to eligibility of the benefit is not borne out in the jurisprudence. The defendant refers to **Bentham v The Netherlands** (1986) 8 EHRR 1 which at [32] sets out the principles to be adopted by the Court. In that case there was a dispute about a revoked statutory licence to operate an installation for the supply of liquid

petroleum to motor vehicles. All the cases relied upon by the claimants are about whether social security benefits as a species are capable of falling within Article 6. That is not the dispute in this case.

109. In **Tomlinson & Others v Birmingham City Council** [2010] UKSC 8 there was an appeal under section 204 of the Housing Act 1996. There were then judicial proceedings. There was plainly a dispute between the parties. In the case of **Salesi** (supra) there was a dispute about the entitlement to a disability allowance. Time ran from when the proceedings were instituted. In the case of **Zimmerman v Switzerland** (1984) 6 EHRR 17 the dispute was about compensation for noise and air pollution. The parties were unable to agree any compensation so that there was a dispute. At [29] the Court said:

> "29. The Court would point out in the first place that the Convention places a duty on the Contracting States to organise their legal systems so as to allow the courts to comply with the requirements of Article 6(1), including that of trial within a 'reasonable time'. Nonetheless, a temporary backlog of business does not involve liability on the part of the Contracting States provided that they take, with the requisite promptness, remedial action to deal with an exceptional situation of this kind.
>
> Methods which may fall to be considered, as a provisional expedient, admittedly include choosing to deal with cases in a particular order, based not just on the date when they were brought but on their degree of urgency and importance and, in particular, on what is at stake for the persons concerned. However, if a state of affairs of this kind is prolonged and becomes a matter of structural organisation, such methods are no longer sufficient and the State will not be able to postpone further the adoption of effective measures."

110. Here there is no dispute. What there has been is a temporary backlog which is not in breach of an Article 6 duty.

Discussion and Conclusions

111. Article 6 provides where relevant:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

112. The claimants submit that Article 6 is not limited to judicial bodies or evaluation of the Court's processes on appeal. It can also be used to evaluate administrative action. That includes the initial administrative decision so that administrative bodies have a duty to ensure that they make their determination within a reasonable period of time. In support the claimants refer to **R (Alconbury Developments Ltd) v Secretary of State for the Environment** [2003] 2 AC 295. In that case an application had been made for planning permission to develop the site as a national distribution centre which had been refused by the Local Planning Authority and the related applications had been refused by the Waste Disposal Authority. The developer appealed and the appeals were "recovered" by the Secretary of State for his determination. The other related applications for planning permission considered in **Alconbury Developments** concerned either where an executive agency had objected to the planning application or objections were made to a draft compulsory purchase order. In giving judgment Lord Clyde said:

> "147. In considering the scope of article 6(1) it is proper to take a broad approach to the language used and seek to give effect to the purpose of the provision. In Ringeisen v Austria (No.1) (1971) 1 EHRR 455, para 94 the phrase was taken to cover 'all proceedings the result of which is decisive for private rights and obligations.' …The distinction noticed by the Commission in X v United Kingdom (1998) 25 EHRR CD 88, 96 is not to be overlooked, that is the distinction between:
>
> > 'the acts of a body which is engaged in the resolution of a dispute ('contestation') and the acts of an administrative or other body purporting merely to exercise or apply a legal power vested in it and not to resolve a legal claim or dispute.'
>
> But at least from the time when a power has been exercised and objection is taken to that exercise the existence of a dispute for the purpose of article 6(1) can be identified.
>
> 148. The scope of article 6 accordingly extends to administrative determinations as well as judicial determinations. But, putting aside criminal proceedings with which we are not here concerned, the article also requires that the determination should be of a person's civil rights and obligations."

At [149] Lord Clyde continued:

> "…The dispute may relate to the existence of a right, and the scope or manner in which it may be exercised… But it must have a direct effect of deciding rights or obligations."

And at [150]:

> "150. It is thus clear that article 6(1) is engaged where the decision which is to be given is of an administrative character,

> that is to say one given in an exercise of a discretionary power, as well as a dispute in a court of law regarding the private rights of the citizen, provided that it directly affects civil rights and obligations and is of a genuine and serious nature. It applies then to the various exercises of discretion which are raised in the present appeals. But while the scope of the article extends to cover such discretionary decisions, the particular character of such decisions cannot be disregarded. And that particular factor has important consequences for the application of the article in such cases."

113. The situation was clear in **Alconbury Developments** because in each of the three cases there was either an actual dispute between the parties or objection by a party to what was proposed. In all of the cases cited by the defendant and claimant there was still a dispute. That is not the case here. An application was submitted which was in the process of determination. There was no dispute between the parties as in the decided cases.

114. I can see the force of the claimants' logic in relation to the wording of Article 6 and its extent prior to the determination of the right. However, considering the broad purpose of Article 6, in my judgment, it is not engaged in the circumstances here. The decision made by the defendant was a determination of the civil rights of the claimants but the complaint made in the judicial review is dealing with the time before that determination. Even on the determination there was no dispute between the parties as the claimants were successful in their claims. As to the time period leading up to the determination of the claims there was no dispute between the parties in relation to that period. The complaint is one of delay within the process of determination of the civil right.

115. It follows that I find that ground two fails.

Ground Three: Whether there was a Breach of Article 1 First Protocol?

116. The claimants amended their grounds on 16 April 2015 to rely upon Article 1 Protocol 1 (A1P1). They sought formal permission to do so at the hearing. That was on the basis that the defendant had been on notice of the amendment, it required only the further consideration of law, it was appropriate and proportionate to deal with A1P1 and it was in accordance with the overriding objective to deal with the issue now.

117. The claimants rely upon the first rule of A1P1. That is that the defendant has "interfered" with the peaceful enjoyment of their possessions and that a fair balance was not struck between their rights and the general interests of the community. They submit that entitlement to PIP is a possession, that the delay in determining and delivering PIP is an interference with the peaceful enjoyment of that possession and that the defendant cannot point to a general interest which justifies the protracted delays in the administration of the PIP scheme.

118. The claimants submit that entitlement to a statutory welfare benefit is a proprietary interest which attracts the protection of A1P1. In **Stec v UK** (2005) 41 EHRR SE 18 the Grand Chamber said at [53]:

> "In conclusion, therefore, if any distinction can still be said to exist in the case-law between contributory and non-contributory benefits for the purposes of the applicability of Article 1 of Protocol No. 1, there is no ground to justify the continued drawing of such a distinction."

119. The wording of the Welfare Reform Act is of entitlement throughout: see section 77(2), 77(3), 78 and 79. From statute the benefit is conferred as a right to those who meet the criteria.

120. Analogous benefits constitute possessions for the purposes of A1P1 where it is accepted that the mobility component of DLA was a possession.

121. The Social Security (Personal Independence Payment) Regulations 2013 create a clear objectively defined system for testing eligibility. If a claimant reaches a certain score judged against the table of different activities then the claimant is eligible for the benefit.

122. Here, the determination has been that the claimants had an entitlement because both claims were backdated. That points to PIP being a possession of the claimants throughout.

123. If the claim is a possession the question then is whether there has been an interference. The claimants accept the defendant's submission that there has been no case where delay has been held to be an interference but contend that a broad and flexible approach is to be applied. The claimants rely upon the quotation from Clayton & Tomlinson which was summarised with approval in the case of **Thomas v Bridgend County Borough Council** [2011] EWCA Civ 862 at [32]:

> "There have been relatively few cases under the first rule, nor is it easy to find a common theme. Clayton and Tomlinson: Law of Human Rights 2nd Ed (para 18.100) comment:
>
> > '... the court has recognised a type of interference with the peaceful enjoyment of possessions which is neither a deprivation nor a control of use. It has been described as a kind of catch-all category for any kind of interference which is hard to pin down. The court is increasingly using the concept of interference with the substance of property when it has difficulty classifying interferences.'
>
> This suggests that searching for an all-embracing test of the situations engaged by the first rule may be unproductive."

124. The substantial delays in processing the claimants' claims to PIP constitute an interference with their possession. The interference is analogous to a public authority's delay in implementing a binding judicial decision. Both are delays in delivering to a person that which they are legally entitled to receive. To confine the concept of interference to a withdrawal of a benefit which has already been received and to exclude a failure to deliver a benefit in the first place would weaken the protection extended by A1P1 and be inconsistent with the Court's reasons for

recognising the application of A1P1 to welfare benefits: see **Moskal v Poland** (2010) 50 EHRR 22 at [38] to [39].

125. The question of justification/fair balance has to be viewed with the spectrum of applying the principle of good governance. There is no reason why that principle should not apply to determination of benefit claims. There is a high duty on Local Authorities to act promptly, consistently and appropriately to recognise social welfare benefits.

126. There can be no public interest in delays such as was the case here.

127. The defendant contends that the claimants did not have a possession for A1P1 purposes at the material time: in other words before a decision was made that the claimants were entitled to PIP. A1P1 was not, therefore, engaged.

128. The present case was distinguishable from all those cited by the claimant because they were all where an entitlement had been conferred or where there was a dispute about whether or not to confer the entitlement. The cases provided no support for the proposition that someone who has applied for a benefit has a possession for the purposes of A1P1.

129. The claimant had placed reliance on the case of **Moskal** (supra) but that was distinguishable on its facts because the applicant there had been held to be entitled to a pension. Having been granted that she had given up her employment. Revoking her entitlement to the pension had been an interference with an A1P1 possession.

130. The Strasbourg case law has consistently emphasised that A1P1 applies only to a person's existing possessions and does not guarantee a right to acquire possessions. There is no right under A1P1 to receive a social security benefit unless national law provides for such an entitlement.

131. Here, national law requires that an assessment be carried out by qualified health professionals who look at a list of activities when considering whether the applicant meets the required needs to receive the benefit. Guidance has been issued to assessors as to how they should carry out a professional and critical appraisal of claimants. The statistics show that on average only about 50% of new claimants are eligible for the benefit. That predicates against A1P1 being engaged.

132. If the rights are engaged the question is whether they are infringed. That has to be considered in all of the circumstances of the case. As to justification there is a public interest in targeting a benefit fairly and consistently to those who most need it. It is for the Court to decide whether that public interest is balanced against the time taken in the case of each claimant here in a manner which struck a fair balance between the rights of the individual and the rights of the state. That is back to considering delay as a flexible concept.

Discussion and Conclusions

133. Article 1 Protocol 1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

134. The claimants, in my judgment, face a real problem with this ground. Although the language of the Welfare Reform Act 2012 is of entitlement until a determination has been made judged against the criteria set out in part 2 of the Social Security (Personal Independence Payments) Regulations 2013 and in accordance with the guidance issued to the providers there is no actual right of entitlement. As the most recent figures demonstrate, and as the defendant reminded the court, the success rate of new claimants for the benefit is in the region of 50%. All of the cases cited by the claimants concerned a situation where the right had been confirmed or there was a dispute about whether to confer the entitlement. They provide no support for the proposition that somebody who had applied for the benefit but had not had that application determined had a possession for the purposes of A1P1.

135. The case of **Moskal,** too, concerned a mother who, once the authorities had confirmed that she qualified for an early retirement pension, had resigned from her job which was necessary to trigger the pension payment. She had organised her family's life accordingly. The Court found that she could not have realised that her pension right had been granted by mistake and she was justified in thinking that unless there was a change in the condition of her child's health the decision would not lose its validity. The Court found that a property right had been generated by the decision to award her the early retirement pension: see [44] and [45].

136. The circumstances of the case are entirely different to the position here.

137. That being the case the delay in determining and delivering PIP could not be an interference with the peaceful enjoyment of that possession. Likewise, the issues of justification and fair balance do not come into play as the article is not engaged.

138. Even if A1P1 had been engaged and the time taken to determine the application constituted an interference the assessment process was in the public interest because it was required to ensure that PIP was targeted to those who were most in need of it and that public resources were spent fairly and efficiently.

139. No reason has been given as to why A1P1 was not included in the grounds either as originally drafted or was not included prior to the permission hearing which took place on 25 February 2015. In the circumstances I would have held that there was no reason why the ground could not have been included in the original claim and refused permission to amend. I have considered the position on the merits however and even if the ground had been included, it would have failed the test for permission.

Relief

140. In the circumstances, and having heard submissions as to the nature of relief, in my judgment, the most appropriate form is to grant a declaration of unlawfulness in relation to claimant C and claimant W.

141. It would be inappropriate to grant a declaration in wider terms because of the considerable variations in individual circumstances. I do not think it is the role of the Court to give guidance in a situation which has been evolving and with which the defendant now appears to be grappling in a way which is entirely appropriate. Further, as I have recognised above, the situation has changed and continues to change over time.

142. The claimants seek a notional monetary award for the distress that they have suffered as a result of the delay. As it is agreed that there is no private law right to damages for distress, which is the only ground upon which the claimants have succeeded, I do not think it is appropriate to express any view about what would have just satisfaction under grounds of claim which have failed. Although mandatory orders were sought initially by the claimants sensibly, those have not been pursued at the hearing.

143. In the circumstances the claim succeeds on ground one to the extent set out above. The claim fails on the other grounds.

## ANNEX I

Legal Framework

1. Personal Independence Payments (PIP) were created under the Welfare Reform Act 2012. Section 77 reads:

> "77. Personal independence payment
>
> (1) An allowance known as personal independence payment is payable in accordance with this Part.
>
> (2) A person's entitlement to personal independence payment may be an entitlement to—
>
> (a) the daily living component (see section 78);
>
> (b) the mobility component (see section 79); or
>
> (c) both those components.
>
> (3) A person is not entitled to personal independence payment unless the person meets prescribed conditions relating to residence and presence in Great Britain."

2. Section 78 deals with the daily living component. That reads:

> "78. Daily living component
>
> (1) A person is entitled to the daily living component at the standard rate if—
>
> (a) the person's ability to carry out daily living activities is limited by the person's physical or mental condition; and
>
> (b) the person meets the required period condition.
>
> (2) A person is entitled to the daily living component at the enhanced rate if—
>
> (a) the person's ability to carry out daily living activities is severely limited by the person's physical or mental condition; and
>
> (b) the person meets the required period condition.
>
> (3) In this section, in relation to the daily living component—
>
> (a) 'the standard rate' means such weekly rate as may be prescribed;
>
> (b) 'the enhanced rate' means such weekly rate as may be prescribed.

> (4) In this Part 'daily living activities' means such activities as may be prescribed for the purposes of this section.
>
> (5) See sections 80 and 81 for provision about determining—
>
> (a) whether the requirements of subsection (1)(a) or (2)(a) above are met;
>
> (b) whether a person meets 'the required period condition' for the purposes of subsection (1)(b) or (2)(b) above.
>
> (6) This section is subject to the provisions of this Part, or regulations under it, relating to entitlement to the daily living component (see in particular sections 82 (persons who are terminally ill) and 83 (persons of pensionable age))."

3. Section 79 deals with the mobility component which broadly mirrors section 78. Section 80 provides for the making of regulations to determine various questions in an assessment. The relevant parts read:

> "80. Ability to carry out daily living activities or mobility activities
>
> (1) For the purposes of this Part, the following questions are to be determined in accordance with regulations—
>
> (a) whether a person's ability to carry out daily living activities is limited by the person's physical or mental condition;
>
> (b) whether a person's ability to carry out daily living activities is severely limited by the person's physical or mental condition;
>
> (c) whether a person's ability to carry out mobility activities is limited by the person's physical or mental condition;
>
> (d) whether a person's ability to carry out mobility activities is severely limited by the person's physical or mental condition.
>
> (2) Regulations must make provision for determining, for the purposes of each of sections 78(1) and (2) and 79(1) and (2), whether a person meets 'the required period condition' (see further section 81).
>
> (3) Regulations under this section—
>
> (a) must provide for the questions mentioned in subsections (1) and (2) to be determined, except in prescribed circumstances, on the basis of an assessment (or repeated assessments) of the person;

> (b) must provide for the way in which an assessment is to be carried out;
>
> (c) may make provision about matters which are, or are not, to be taken into account in assessing a person."

Section 82 makes specific provision for the terminally ill.

4. Section 90 provides for the abolition of the Disability Living Allowance (DLA). It is not yet in force. It reads:

> "90. Abolition of disability living allowance
>
> Sections 71 to 76 of the Social Security Contributions and Benefits Act 1992 (disability living allowance) are repealed."

5. Sections 92, 93 and 94 convey powers to make regulations to deal with consequential supplementary or incidental matters which may amend, repeal or evoke any primary or secondary legislation, make regulations that the Secretary of State considers necessary or expedient in connection with the coming into force of any provision of the part of the Welfare Reform Act dealing with Personal Independence Payment.

6. Section 94 provides that regulations are to be made by statutory instrument (94(5)) and that statutory instruments are to be laid before and approved by a resolution of each House of Parliament.

7. Schedule 10 provides for transitional arrangements. Schedule 10(1) reads:

> "1(1) Regulations under section 93 may in particular make provision for the purposes of, or in connection with, replacing disability living allowance with personal independence payment.
>
> (2) In this Schedule 'the appointed day' means the day appointed for the coming into force of section 77."

Paragraph 4(1) provides:

> "4(1) The provision referred to in paragraph 1(1) includes—
>
> (a) provision for terminating an award of disability living allowance;
>
> (b) provision for making an award of personal independence payment, with or without application, to a person whose award of disability living allowance is terminated."

Paragraph 4(2)(a) provides:

> "4(2)The provision referred to in sub-paragraph (1)(b) includes—

> (a) provision imposing requirements as to the procedure to be followed, information to be supplied or assessments to be undergone in relation to an award by virtue of that sub-paragraph or an application for such an award;"

8. The Welfare Reform Act 2012 (Commencement No 8 and Savings and Transitional Provisions Order 2013) provided that the first phase of coming into force of the relevant provisions to implement PIP was 8 April 2013. That was for new claimants living in one of the postcodes listed in the schedule 3 to the Order. A second part of the first phase for new claimants was brought into effect on 10 June 2013.

9. The Social Security (Personal Independence Payment) Regulations 2013 SI 377 were made on 25 February 2013. Part 2 provides for PIP assessment. Under part 2 of schedule 1 daily living activities for the purpose of section 78(4) of the Act are set out. By way of example the first activity is 'Preparing food.' There are then six descriptors against which a claimant is adjudged and, to each, points are ascribed. The same format is followed for each of the listed activities. Part 3 provides the same structure in relation to mobility activities for the purposes of section 79.

10. Under the Personal Independence Payment (Transitional Provisions) Regulations 2013, SI 387, a person claiming DLA and whose claim was under consideration before 7 October 2013 was not allowed to claim PIP (regulation 6). At any time after the 6 October 2013 the Secretary of State may by written notification invite a DLA entitled person to make a claim for PIP. PIP is only available to persons aged between sixteen and sixty-five (Regulation 3). If a DLA entitled person had not been sent a notification under Regulation 3 they may make a claim for PIP from 7 October 2013 (regulation 4).

11. If no application was made for PIP before the end of the claim period that person's entitlement to DLA was suspended. The Secretary of State would then notify the person. If no application was made in response to the notification then, under regulation 11, a notice of termination of entitlement to DLA would be sent to them by the Secretary of State.

12. Under the Personal Independence Payment (Transitional Provisions) (Amendment) Regulations 2013, SI 2231 the date by which the Secretary of State was to invite a DLA entitled person to make a claim for PIP was pushed back from 7 October until 27 October 2013. Under paragraph 2(3) the date under regulation 4 which applied to DLA entitled persons who had not been sent a notification was pushed back also until 28 October 2013. The preamble recorded that the Secretary of State had not referred the proposals to the Social Security Advisory Committee because of the urgency of the matter.

13. Further amendment was made under the Personal Independence Payment (Transitional Provisions) (Amendment No. 2) Regulations 2013 SI 2689. Under Regulation 2(2)(a) "the relevant date" was redefined as "the date…from which the Secretary of State is satisfied that satisfactory arrangements will be in place to assess the entitlement to persons in that category of personal independence payment." Regulation 2(3) amended regulation 3 of the principal regulations so that the requirements on the Secretary of State to invite a DLA entitled person to claim PIP in certain circumstances do not apply unless the Secretary of State has specified a

relevant date which applies in that person's case and that date has been reached. Further amendments were made by regulation 2(4) which substituted regulation 4 of the principal regulations so that the option for a DLA entitled person to claim PIP in certain circumstances where they have not been invited to did not apply unless the Secretary of State has specified a relevant date which applied in that person's case and that date has been reached. Regulation 2(5) amended regulation 22 which was the extinguishment of the right to claim DLA to enable the Secretary of State to continue to issue notifications under that regulation on or after 28 October 2013. That has the effect of enabling certain DLA entitled persons with a fixed term award to continue in receipt of DLA.

14. Invitations to apply for PIP will, therefore, go out when the Secretary of State is satisfied that all satisfactory arrangements are in place.

15. Implementation of PIP is dealt with in the main judgment.