Neutral Citation Number: [2012] EWHC 201 (Admin)

Case No: CO/2532/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2012

Before :

LORD JUSTICE ELIAS
MR JUSTICE KING

- -

Between :

The Queen on the Application of HURLEY AND MOORE	**Claimants**
- and -	
SECRETARY OF STATE FOR BUSINESS INNOVATION & SKILLS	**Defendant**

- -
- -

Ms Helen Mountfield QC and **Professor Aileen McColgan** (instructed by **Public Interest Lawyers**) for the **Claimants**
Mr Jonathan Swift QC and **Miss Joanne Clement** (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 1 and 2 November 2011

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Approved Judgment

Lord Justice Elias :

1. The claimants are students in the lower sixth form who wish to go to University. They seek by way of judicial review to challenge the decision to allow institutes of higher education (hereinafter "universities") to increase fees up to £9000 per year. The increases were effected by two regulations, the Higher Education (Basic Amount) Regulations 2010 (SI 2010/3021), and the Higher Education (Higher Amount) Regulations 2010 (SI 2010/3020) (collectively referred to as "the 2010 Regulations"). The claimants seek to have these regulations quashed.

2. The 2010 Regulations were made pursuant to the power under section 24 of the Higher Education Act 2004 ("the 2004 Act"). In accordance with the requirements of sections 26 and 47 of that Act, the regulations were approved by an affirmative resolution of each House of Parliament. The Regulations will come into force on 1 September 2012.

3. Section 24 of the 2004 Act permits the Secretary of State to make regulations which set the "basic amount" and the "higher amount" of fees which the University may charge for a qualifying course. The difference between the two is that in order to charge above the basic amount a University must have in place a plan made pursuant to section 33 of the 2004 Act, which is approved by the Director of Fair Access to Higher Education. The 2010 Regulations set the maximum chargeable under the basic amount at £6,000, and the maximum under the higher amount at £9,000. These are significant increases from the current rates which fix the basic amount at £1,310, and the higher amount at £3,290.

The grounds of challenge.

4. The claimants contend that the 2010 Regulations are unlawful on each of the following grounds:

   (1) The decision to increase the permitted limit for the basic and higher amounts is contrary to the right to education conferred by Article 2 of Protocol 1 of the European Convention on Human Rights ("A2/P1"); alternatively is contrary to that provision when read with Article 14 of the Convention. The thrust of the argument is that the new rules will have a chilling effect on the ability of those from disadvantaged social backgrounds to take up university places.

   (2) The decision was made in breach of the requirements of the public sector equality duties ("the PSEDs") imposed by the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995.

5. The Secretary of State resists this challenge. He contends that the decision to charge fees was combined with a range of associated measures which, taken together, ensure that there is a real and effective right of access to higher education. These measures also ensure that those from socially disadvantaged backgrounds will not be discouraged from taking advantage of university education or otherwise disproportionately affected by the changes.

6. As to the contention that the Secretary of State infringed the PSED, the Secretary of State submits that in fact the analysis was substantial, rigorous and open-minded. It followed a year-long independent review of higher education funding and student funding by Lord Browne of Madingley ("the Browne Review") who had focused intensively on ways to ensure that those from socially disadvantaged backgrounds (a proxy for prospective students from minority ethnic groups and the disabled) would be encouraged to go to University notwithstanding the increase in fees.

The background.

7. The funding of higher education has posed problems for successive governments, certainly since the 1960s. Participation in higher education has increased dramatically during this period, rising from around 100,000 full-time equivalent students in the 1960s to just under 2 million in 2007. The United Kingdom has moved from a system under which the entire bill for higher education was funded from general taxation to one in which part of the cost - and in some cases a very significant part - is borne directly by persons who have received higher education.

8. This change has been reflected not only in relation to payment for tuition, but also in relation to the costs of maintaining students at university. As to the latter, maintenance grants were reduced substantially in 1998 and were replaced by maintenance loans in 1999. Maintenance grants were then reintroduced for the poorest students in 2004, and were significantly increased in 2006.

9. Tuition fees for degree courses were introduced for the first time by the Teaching and Higher Education Act 1998. Fees payable were means-tested on the basis of parental income, and were in any event capped (at £1,000 per annum). They were payable in advance.

10. The system currently in place, and which will apply until the 2010 Regulations take effect, was introduced by Part 3 of the 2004 Act. This modified the system of tuition fees with effect from 2006. As I have said, it provides for the imposition of maximum higher and basic fees with the former chargeable only if a plan approved by the Director of Fair Access is in place.

11. However, payment of tuition fees is not up-front; it is deferred until studies are completed and repayment is then made by instalments once a student obtains employment. There is no obligation to repay anything until the salary is at least £15,000. The fees rise with inflation. Since 1 September 2010 the basic amount has been £1,310, and the higher amount has been £3,290: see Student Fees (Amounts) (England) Regulations 2004, as amended.

12. A significant element of the approved plan is that it imposes an obligation on Universities to take steps to widen access. The plan must include such provisions promoting equality of opportunity in connection with access to higher education as are specified in regulations made by the Secretary of State; and it may include other provisions promoting equality of opportunity in connection with access to higher education: see section 33(2) of the 2004 Act. Section 33(5) then identifies the matters which may be included in the regulations made by the Secretary of State.

13. The current regulations governing approved plans are the Student Fees (Approved Plans) Regulations 2004 (SI 2004/2473). These include the following provisions:

> "3. A plan must include provisions requiring the governing body of the institution to do the following–
>
> (a) to take, or secure the taking of, the measures set out in the plan in order to attract an increased number of applications from prospective students who are members of groups which, at the time when the plan is approved, are under-represented in higher education;
>
> (b) to provide, or secure the provision of, bursaries and other forms of financial assistance set out in the plan to students undertaking a course at the institution;

> (c) to make the arrangements set out in the plan to make available to students undertaking a course at the institution and prospective students wishing to undertake such a course information about financial assistance available to them from any source;
>
> (d) to make the arrangements set out in the plan to inform any prospective student before he commits himself to undertake a course at the institution of the aggregate amount of fees that the institution will charge for the completion of the course;
>
> (e) to monitor in the manner set out in the plan its compliance with the provisions of the plan and its progress in achieving its objectives set out in the plan by virtue of regulation 4; and
>
> (f) to provide the Director with such information as he may reasonably require from time to time.
>
> 4. A plan must set out the objectives of the institution, determined by its governing body, relating to the promotion of equality of opportunity."

The review conducted by Lord Browne.

14. In November 2009 the then Labour Government (with cross-party support) asked an independent panel, chaired by Lord Browne of Madingley, to undertake a review of the funding of higher education, and to make recommendations as to the steps required to ensure (a) sustainable financing of teaching consistent with maintaining high quality teaching; and (b) that the institutions of higher education remained accessible to persons with the talent to succeed.

15. In assessing options, the Review was expected to take into account (a) the goal of widening participation to ensure that the benefits of higher education are open to all who have the talent and motivation to succeed, to avoid the creation of barriers to wider access and to promote fair access to all institutions; (b) affordability for students and their families during their studies and afterwards, and the impact on public finances including affordability, sustainability and value for money for the taxpayer; and (c) the desirability of simplification of the system of support.

16. The panel consulted widely taking written and oral evidence from a broad range of bodies including students, prospective students, teachers, academics, employers and regulators. The Review Panel was supported in its work by an Advisory Forum, made up of 24 groups representing the interests of students, school leavers, graduate recruiters, institutions, academics and business. The Panel consulted a wide range of people with an interest in higher education, and public hearings were held. The Review received 80 submissions on the strengths and weaknesses of the current system of higher education teaching funding and student finance, and 65 submissions in response to its call for proposals for change.

17. As part of its work, the Browne Review drew on a wide range of research. These included various assessments of the effect which the 2006 changes, which had first introduced tuition fees, had had on participation rates from the more socially deprived students. These research papers have figured significantly in the argument before the court and we will briefly summarise their conclusions:

    (1) A research paper entitled *"Assessing the Impact of the New Student Support Arrangements"* was produced by the Institute for Employment Studies. It assessed the impact of the introduction of the 2006 student support arrangements (including

variable fees). The Report stated that there is little evidence to suggest the arrangements had any impact on the demand for higher education and "that demand of students from different backgrounds, including those from targeted widening participation and under-represented groups, remains steady". It was recognised, however, that the pressures arising from the recession might have masked the negative impact of these changes on those from lower socio-economic backgrounds.

(2) A second report was headed *"Are there changes in Characteristics of UK Higher Education around the time of the 2006 Reforms"*. This comprised an analysis of Higher Education Statistics Agency data from 2002/3 to 2007/8, and was undertaken by the Centre for Employment Research on trends in higher education between these dates. One of its observations was that the expansion of the higher education sector goes hand in hand with widening participation, and that a system where the state pays for the majority of students puts a break on the increased participation of under-represented groups.

(3) *"The Impact of Higher Education Finance on University Participation in the UK"* was an analysis by the Institute of Fiscal Studies on the separate impacts of upfront fees, grants and maintenance loans on UK higher education participation during the period 1992-2007. The report concluded that there was no overall change in participation of different groups after the 2006 reforms:

> "For the low income group, the large increase in grants and fee loans was sufficient to outweigh the impact of the £3,000 deferred fee introduction, so that the net result was no significant change in participation."

A further relevant finding was that a £1,000 increase in up-front tuition fees would reduce the degree of participation by 4.4% points, while a £1,000 increase in loans increases participation by 3.2% and an increase in maintenance grants also increases participation by 2.1%. These results were said to be broadly in line with similar studies carried out in America.

(4) Finally a further report headed "*The Impact of the 2006-2007 Higher Education Finance Reforms on Higher Education Participation"* was an analysis prepared by the Centre for the Economics of Education and the Institution of Fiscal Studies. It concluded that there was no evidence that the 2006-07 reforms had resulted in a sustained fall in higher education participation after their introduction. It also noted that participation amongst pupils from ethnic minorities showed virtually no change.

18. The Browne Review identified a number of difficulties in the current system. It noted that there were insufficient numbers of student places, limited progress on widening participation to students from lower economic backgrounds, inadequate funding notwithstanding the introduction of fees in 2006, and no resilience against future cuts in public funding. It concluded that the case for reform was based on increasing participation, improving quality, and creating a sustainable solution for funding.

19. The Report, which was entitled '*Securing a Sustainable Future for Higher Education: An Independent Review of Higher Education Funding & Student Finance*' was published on 12 October 2010. The report concluded that everyone who had the potential should have the opportunity to benefit from higher education. It also recommended putting the higher education system on a more sustainable footing by seeking higher contributions from those

who benefit from tertiary education. However, payments should not have to be made until the student was earning, and when made they should be affordable.

20. The central recommendations were as follows:

    (1) The current limit on fees of £3,290 per annum (i.e., the current higher amount) should be removed, and no cap should be applied.
    (2) A tapered levy should be imposed on institutions charging more than £6,000 per annum to ensure that those which charge the most contribute more to supporting the poorest students. Universities that wish to charge more than £6,000 per annum should be required to demonstrate improved standards of teaching and fair admission.
    (3) A new system in respect of funding/repayment of tuition fees referred to as the Student Finance Plan should be adopted. Finance under this plan was to be available to all students in higher education, and would be available on equal terms to students undertaking part-time study. Under this system fees would not be repaid until after the student had graduated and obtained work, and thereafter repayments would commence once the former student had annual earnings in excess of £21,000 (rather than the £15,000 threshold currently in place).

21. The report considered and rejected, for various reasons, a number of alternative proposals for reforming the higher education funding and student finance system. These included a graduate tax, an increased role for business in funding higher education, and financing student loans from the private sector.

The decision to make the 2010 Regulations.

22. The 2010 Regulations were formulated in the light of the Browne Review. Most of the Browne recommendations were adopted. The main changes from the Browne proposals were first, that the government believed that an upper limit on fees was desirable and they rejected the suggestion that there should be no cap; and second, additional measures were introduced to provide greater assistance to students from low income backgrounds.

23. The 2010 Regulations were also made in the context of public expenditure cuts undertaken from June 2010 by the present Coalition government. The Government considered that if public finances were to be restored to a sustainable position, there was an urgent need significantly to reduce departmental budgets and State expenditure. This included a significant reduction in the funds available for Higher Education. Excluding research funding, the plan is that it should be reduced from an annual budget of £7.1 billion to £4.2 billion by 2014/15.

24. Following debate both within and outside Parliament, the Secretary of State has adopted a package of measures. The principal elements are as follows:

    (1) With effect from 6 April 2016, tuition fees will, subject to Parliamentary approval, be repayable only where the former student's income reaches £21,000. The £21,000 threshold will thereafter be increased annually to reflect earnings.

    (2) Repayment will be at the rate of 9% on income above £21,000.

    (3) All sums outstanding 30 years after the Statutory Repayment Due Date (SRDD) will be written off. (The SRDD is, broadly, the date when, if earning above £21,000, borrowers start to repay their loans.)

    (4) From the SRDD, interest on outstanding amounts will be no more than the change in RPI for former students earning less than £21,000; for former students earning

between £21,000 and £41,000 it will be on a sliding scale between the change in RPI and RPI + 3%; for former students earning more than £41,000 the rate will be RPI + 3% .

(5) Part-time students in higher education will, subject to Parliamentary approval, for the first time have the benefit of equivalent arrangements in respect of repayment of tuition fees, provided that the part-time course is at least "25% intensity" of the equivalent full-time course (i.e. if the equivalent full time course is a 1 year course, the part-time course must be completed in no more than 4 years).

(6) A national scholarships programme is to be established which will receive Government contributions to scholarship funds of £50 million in financial year 2012/13, £100 million in 2013/14 and £150 million per annum from 2014/15. The scholarships will be targeted by each university at persons from disadvantaged backgrounds who wish to participate in higher education.

(7) There will be consultation with student organisations and university organisations with a view to imposing conditions on grant funding that require universities wishing to charge fees higher than the basic amount to provide scholarships to students from poor backgrounds.

(8) A requirement that any university wishing to charge tuition fees of more than the basic amount must gain the approval of the Director of Fair Access to new annually agreed access plans specific to the university to improve access to higher education to persons from groups traditionally under-represented. The university will be required to devote a proportion of its fee income to steps aimed at widening access.

(9) The arrangements for maintenance grants will be altered. The non-repayable grant payable to students from families with incomes of up to £25,000 will increase from £2,900 to £3,250. Partial grants will be payable to students from families with incomes up to £42,000. The sums available as maintenance loans to those from families with incomes between £42,000 and £60,000 will be increased. Higher maintenance loans will continue to be available to students in higher education in London.

Proposals (6) to (9) in particular are directed to assisting students from lower socio – economic backgrounds.

25. Based on the information available to him, the Secretary of State concluded that the arrangements made by him were such that around a quarter of graduates are expected over their lifetimes to repay less under the new arrangements than they would do under the present arrangements.

The grounds of challenge.

26. The first ground of complaint is that the Secretary of State has acted in breach of section 6 of the Human Rights Act by adopting a decision which contravenes Article 2 of Protocol 1(A2P1), alternatively A2P1 read with Article 14 of the Convention.

27. A2P1 is as follows:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of

> persons to ensure such education and teaching in conformity with their own religious and political convictions."

28. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

29. Mr Swift accepts that the phrase "or other status" in Article 14 would include persons from the lower socio-economic groups.

30. It is established in the jurisprudence of the court that although A2P1 does not oblige a state to provide institutions of higher education, if it chooses to do so then it must provide "an effective right of access to them": *Sahin v Turkey* (2005) 41 EHRR 8, para 137. As the Court noted in that case (para 136):

> ".. it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".

31. It follows that it will be a breach of Article 14 to discriminate unlawfully in the way in which the benefit is conferred. *Ponomaryov* v *Bulgaria* (Application No 5335/05); (Judgment 21 June 2011, rectified 30 June 2011) is a case where the ECtHR found that Article 14 read with A2P1 had been infringed in circumstances where Bulgaria had discriminated against Russian nationals by requiring them to pay for secondary education.

32. However, where the state provides higher education, it is not a breach of A2P1 to charge the student. As the court noted in *Ponomaryov* there is a difference in this respect between primary and secondary education on the one hand, and higher education on the other. Whilst primary education must be free, it is permissible, and indeed common amongst Convention states, to charge for higher education. The court said this (para.56):

> ".. the State's margin of appreciation in this domain increases with the level of education in inverse proportion to the importance of that education for those concerned and for society at large. Thus, at the University level, which so far remains optional for many people, higher fees for aliens – and indeed fees in general –seem to be commonplace and can, in the present circumstances, be considered fully justified."

33. Ms Mountfield QC, counsel for the claimants, does not seek to question that principle. Her case is that the effect of the particular arrangements adopted here is to impose an unjustified restriction on the right of access to higher education so as to constitute a breach of the Protocol. She submits that for many poorer students, the right is rendered theoretical and illusory. In this context she relies on the following principle enunciated by the ECtHR in *Ashingdane v UK* (1985) 7 EHRR 527 in which the court said this, with respect to the right of access to the court under Article 6:

> "The limitations must not restrict or reduce the access left to an individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

34. This decision appears to lay down two quite distinct ways in which restrictions in the exercise of a right conferred by the Convention can constitute a breach of the right. Ms Mountfield did not in her oral submissions seek to sustain an argument that the essence of the right itself is denied by the new funding arrangements. She was right not to do so: it is fanciful to contend that the essence of the right itself is impaired in circumstances where anyone with the appropriate qualifications can attend university if he or she is willing to take out the Government loan.

35. Rather Ms Mountfield advances the alternative ground, namely that there is a limitation which is not justified by the aim sought. Although she accepts that an obligation to pay fees is not of itself incompatible with the right of access to higher education, nevertheless the almost threefold increase in the level of fees under these arrangements is so high that it imposes in practice a very significant barrier to access. She relies in particular on a study in 2007 conducted by two researchers, Callender and Jackson, to the effect that students from lower socio-economic classes are more debt averse than the more privileged students and therefore will be more likely to be deterred from going to University if this involves taking out loans. This is a *de facto* barrier excluding from higher education many who would choose to take advantage of it were it free or at least substantially cheaper than it is.

36. She reinforces this submission by relying upon Article 13(2)(c) of the International Covenant on Economic Social and Cultural Rights ("ICESCR") which provides that:

> "Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education."

37. She submits that the court must have regard to this specialist international instrument which has been ratified by the UK and indeed all EU member states. She points out that the ECtHR has on a number of occasions stated that it is not merely entitled but obliged when interpreting provisions of the Convention to take into account more specialised international instruments and their interpretation by the competent organs: see e.g. *Demir & Baykara v Turkey* (2009) 48 EHRR 54 at [85] and *Opuz v Turkey* (2010) 50 EHRR 28 at [185]. The court ought at the very least to have regard to the fact that the Secretary of State has adopted a regressive measure which is incompatible with the UK's obligations under Article 13(2)(c).

38. Moreover, the Committee on Economic, Social and Cultural Rights, the body charged with monitoring and enforcing the obligations under the Covenant, has emphasised that the obligation progressively to realise the objectives in Article 13 is not merely aspirational, and it has noted with concern that the introduction of tuition fees and student loans in the UK, which appears to be inconsistent with the obligations imposed under that Article, has tended to worsen the position of students from more disadvantaged backgrounds. The CESCR has stated that there is a strong presumption that retrogressive measures are impermissible and

the onus is on the state to show that they have been introduced only after a careful consideration of the alternatives and after making available the maximum available resources: see General Comment 3. In addition it has held that states must taking concrete and targeted measures to ensure that discrimination in the exercise of the right to education is eliminated: see General Comment 20.

39. I would accept that there is evidence that some students at least will be discouraged from applying to institutions of higher education because of the fee increases, even having regard to the availability of loans and grants. Common experience would also suggest that this will be the case. There must inevitably be students who feel for one reason or another - perhaps even a deep psychological antipathy to going into debt - that the economic or other benefits to be derived from higher education are not worth the long-term debt that they will necessarily incur in pursuing it.

40. Is the imposition of fees properly characterised as a restriction on the right? Since the State has no obligation to set up institutions of higher education in the first place, if it sets up a system which requires payment of fees from the beneficiaries, it seems somewhat artificial to treat the obligation to pay as a restriction on the right as opposed to an element or condition in the constitution of the right. However, I accept that the jurisprudence of the ECtHR suggests that it should be treated as a restriction.

41. In *Sahin v Turkey* (2005) 41 EHRR 8, ECtHR at [134]-[137], a woman was denied the right to graduate from University because, contrary to the established rules, she insisted on wearing an Islamic headscarf. One of the grounds of challenge was that this was an unjustified or disproportionate interference with her right to education under A2P1. The court held that the argument was in principle sustainable, notwithstanding that it was a condition of her taking the course that she should not wear the headscarf, although on the facts the restriction was held to be justified. The court held that there was a legitimate objective in refusing to allow headscarves to be worn which were well known to the applicant. Furthermore, having concluded that there was no disproportionate interference, the court added that:

> "Consequently the restriction in question did not impair the very essence of the right to education."

This suggests that the two formulations of the restriction principle laid down in *Ashingdane* are in reality closely interrelated and that a restriction will be disproportionate only if it does in fact deny an applicant the essence of the right in issue.

42. However, assuming that there are two separate principles in play, the question is whether the restrictions imposed here are a proportionate means of achieving a legitimate objective. For reasons I develop further when considering the Article 14 claim, I have no doubt that they are. In this context I bear in mind the observation in *Ponomaryov* that the imposition of fees in general can be considered "fully justified". It will, in my view, take a very exceptional case indeed before it can be said that the charging of fees of itself, absent discrimination, deprives the right of its effectiveness at least where loans are made available to those who need them. The fact that someone may be temperamentally or psychologically disinclined to accept a student loan and enter into debt does not justify the conclusion that the right to higher education of such a person has been effectively denied or unjustifiably restricted.

43. Nor do I think that Article 13(2)(c) materially advances the claimant's case. I accept that the Convention jurisprudence shows that the ICESCR can - indeed must - in an appropriate case be taken into consideration by the court. The Covenant is a specialised international instrument in the field of education which in principle may inform the decision of the ECHR in this field. Indeed it did so in *Ponomaryov* where the court referred to the Covenant in order to support the proposition that a state's approach to higher education can legitimately be different to its approach to primary or secondary education. I do not accept that this means that the ECtHR would or properly could treat as binding the specific provision in Article 13(2)(c). There is a fundamental difference between having regard to an international instrument in order to construe the terms of the Convention and directly giving effect to rights conferred in the international instrument itself. The claimants' submission seeks to effect the latter.

44. In any event, the progressive introduction of education is not an absolute obligation; it must depend on the resources available and that in turn will depend upon the choice of how large to make the tertiary sector. Article 2 of the ICESCR provides in terms that a state should take steps fully to realise the rights recognised in the Covenant "to the maximum of its available resources". In view of that, there must be a serious question whether the UK is in breach of the provision.

45. Moreover, if this argument were right, it would mean that the ECtHR would be giving two different meanings to A2P1: if a state had always charged for higher education, the imposition of fees would be lawful, whereas if a similarly situated state had introduced the very same fees for the first time having previously provided free higher education, it would not. I doubt whether this is a legitimate approach to the interpretation of the Convention.

Article 14.

46. The further argument under this head is that the Secretary of State has infringed Article 14 read with A2P1. This rests on the premise that the effect of the new funding arrangements is indirectly to discriminate against those from lower socio-economic groups. It is well established that Article 14 includes indirect as well as direct discrimination: *DH v Czech Republic (2008)* 47 EHRR 3. The court in that case said that:

> "a measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group."

It is for the claimant to establish that the policy has a disparate impact but once that is established, the onus switches to the defendant to justify the discrimination.

47. There is a dispute between the parties as to whether the regulations will have a disproportionate impact upon students from poorer families. Ms Mountfield relies upon a number of pieces of research to justify her contention that it will. First, she places significant weight on the 2007 report to which I have already made reference to the effect that poorer students are more debt averse than others. Second, they are more likely to go to less prestigious universities, and thereafter obtain lower grade and less well paid jobs so that their subsequent earnings will be less than more privileged students who go to the better universities. This means that the benefit of university education in financial terms at least will be less valuable because it will cost them a higher proportion of their income. For this reason too students from the lower income households are more likely to be discouraged from taking advantage of the loan system. Third, there is evidence that the drop out rate from

the less prestigious universities is relatively high providing a further discouragement from taking out a loan. She also relies on the conclusion in the Institute of Fiscal Studies Report (para 17(3) above) that an increase in fees reduces the level of participation by more than the availability of either loans or grants increases it.

48. For all these reasons she claims that it is clear that persons from lower socio-economic backgrounds will be particularly disadvantaged by these changes. She is dismissive of the four research papers which suggested that there was no adverse impact following the changes in 2005-2006 on the grounds that they were based on limited evidence (as some of the papers accepted) and in any event were concerned with much smaller fees than will in future be imposed pursuant to the 2010 regulations.

49. Mr Swift strongly disputes this analysis. He says that it is necessary to take account of the whole range of policies which have been adopted in order to improve access to poorer students. Quite apart from the availability of loans, high levels of maintenance support are available to such students, scholarships are being targeted at them, and universities charging higher fees are obliged to use some of their resources to take active steps to encourage their participation in higher education.

50. He notes that the evidence indicates that graduates in the bottom two deciles will be better off under the new system than under the old. Moreover, the research available to the Browne Panel suggested that the introduction of fees in 2006 had not adversely impacted upon poorer students. With the availability of loans and the package of safeguards in place to encourage them to go to universities, there was no reason to suppose that the position would be any different with the increase in fees. Even if the introduction of fees leads to a reduction in university applications overall, it is not possible to infer from the evidence that it will disproportionately impact on students from the lower socio-economic groups.

51. I accept Mr Swift's submission that it is necessary to look at the policies in the round and not simply focus on the increase in fees set down in the regulations. There can be no doubt that a steep increase in fees alone would discourage many from going to university and would in particular be likely to have a disproportionate impact on the poorer sections of the community.

52. However, the availability of loans mitigates that effect. Further, given the existence of the various measures which are directed specifically at increasing university access to poorer students, I do not think that at this stage it is sufficiently clear that as a group they will be disadvantaged under the new scheme.

53. Ms Mountfield correctly submits that it is not necessary for a claimant to demonstrate disparate impact by statistics. As the ECtHR said in the *DH* case, "proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact." However, the onus lies on the claimant to show disparate impact, and I am not satisfied that it has been discharged here. The debate before us has consisted of each side marshalling arguments directed largely to predicting what the cumulative outcome of the various measures will be.

54. In my judgment, at this stage it is all too uncertain and it would be wrong for the court to find disparate impact where that is neither an obvious nor even a strong inference from the facts. In time the facts may prove Ms Mountfield right, but I am not sure about that. Accordingly,

the clear adverse impact which the claimants have to establish in order for this limb of the argument to get off the ground has not been shown to my satisfaction.

55. Even if I am wrong about that, and even if there is a disparate impact, the issue is whether the policies can be justified notwithstanding the discriminatory effect. Ms Mountfield submitted that they could not be justified here. She reminded us that it is for the court to determine whether justification has been established; the issue is not simply whether the Secretary of State believed that it was justified: see *Misbehavin Ltd v Belfast* City *Council* [2007] UK HL 19; [2007] 1 WLR 1420, at para 15.

56. The test for determining whether the policies are justified was described by Lord Bingham in the House of Lords as follows in *Huang v Secretary of State for the Home Department* [2007] UK HL 11, [2007] 2 AC 167 para.19. This has been followed in numerous cases since, and indeed in *R(E) v Governing Body of JFS* [2009] UKSC15; [2010] 2 AC 728, it was applied in the context of a measure which had an indirectly discriminatory effect on a person's right to education. The test requires the decision maker to show that it has an aim or objective which corresponds to a real need, that the means used are rationally connected to the objective, and that they are appropriate and go no further than is necessary to achieve it.

57. Ms Mountfield's first submission was that the Secretary of State was not able to establish justification because he had not equipped himself with enough information to make the proper assessment in accordance with the principles established in *Huang.* She then identified the objective of the policies to be twofold; first, there was the ideological commitment that those receiving the benefit should pay for it; second, there was the aim of saving money because of the state of the government's finances. The first was contrary to the obligation under the Covenant progressively to make education free; the second would not be achieved because in the early years in particular the payment of loans would be likely to exceed the fees raised.

58. Ms Mountfield further submitted that given the critical importance of education, not only to the individuals but to society at large, it was not appropriate to give undue deference to the views of the Secretary of State. She contended that *Ponomaryov* case supported that proposition.

59. The Secretary of State contended that Ms Mountfield has misunderstood and falsely described the government's objective. The objective derives from the Browne analysis: it is to achieve the sustainable funding of high quality higher education and to secure that that education is open to students who have the talent and motivation to succeed. The objective was not to save money and the fact that the objective had to be achieved within a specific economic context did not alter the objective itself.

60. Mr Swift submitted that a policy taken after a detailed independent review of higher education which had considered a range of possible options to achieve these objectives could not conceivably be said to lack justification. Furthermore, contrary to the submissions of the claimants, this is an area where the Secretary of State should be afforded wide latitude. This is plain from the decision of the ECtHR in *Ponomaryov*. The court stated in terms that the margin of appreciation increases with the level of education. Moreover, the court should always be slow to interfere with decisions in which the public body has particular expertise and is accountable to Parliament.

61. I accept that submission. First, I wholly reject Ms Mountfield's contention that this was a decision taken without proper consultation or analysis. That seems to me to be a travesty of the true position which simply ignores the Browne Report and the extensive debate which took place inside and outside Parliament, both during the period when that investigation was being undertaken and subsequently when modifications to the Browne proposals were under consideration. Moreover, a central focus of the debate was on how those from disadvantaged backgrounds could be encouraged to enter higher education. If this decision could be challenged on the grounds that it was short on analysis, very few decisions could withstand scrutiny.

62. Nor do I accept her contention that the object was motivated solely by ideological beliefs and a desire to save money. The concerns about funding and maintaining the quality of a large tertiary sector in education led to the previous Labour government setting up the Browne review. In my view these were plainly the factors which caused the new policies to be adopted.

63. As to the reasons advanced for justifying the policies, I pay particular regard to the fact that this is an area of macro-economic judgment, where decisions have to be taken about prioritising public resources. If charging fees of this magnitude is unlawful, public resources will have to be provided, at the expense of other competing and pressing interests. Moreover, there is an inevitable tension between widening higher education so as to catch everyone who can benefit from it whilst maintaining the highest standards, and funding that increase. In my judgment, significant leeway must be given to the democratically accountable Secretary of State as to how the objective of providing sustainable and quality higher education can be best secured.

64. I do not accept the claimants' submission that the *Ponomaryov* case suggests that the normal deference that might be shown to resource decisions ought not to apply to higher education. The court did observe that the basic knowledge and skills learnt from primary education was increasingly inadequate for personal and professional development and that the ever increasing importance of secondary education militated in favour of a stricter scrutiny of decisions interfering with the right to secondary education than would otherwise be the case. It follows that there will be a narrower scope for the margin of appreciation in such cases. However, the court contrasted the position of secondary education with higher education where, as I have said, it observed that the charging of fees was in principle fully justified. Ms Mountfield submitted that these were simply obiter observations. That may be so, but there is no contrary jurisprudence from the court, and I do not think that the comments can be dismissed so lightly.

65. In my judgment, the objective was a legitimate one and the means of achieving that objective were justified. The Secretary of State considered that in order to provide the secure funding for the expanding sector of higher education, fees would need to be charged. He had regard to the potential impact on the poorer households and took a series of steps actively to address that problem. Various other proposals were considered and cogent reasons were given for rejecting them. I do not think that in those circumstances the court could properly find that the decision was unjustified.

Breach of the Public Sector Equality Duty.

66. I turn to the second ground, which is the contention that the decisions were reached in breach of the PSEDs. A number of statutory provisions provide that when a public authority is carrying out its functions it must, to put the matter very broadly, have due regard to the need to promote equality of opportunity for certain groups ("protected groups"). In the context of this case the most significant duty is found in section 71 of the Race Relations Act which provides, so far as is material, that:

> "Every body or other person specified in Schedule 1A or a description falling within the Schedule shall, in carrying out its functions, have due regard to:
>
> (a) the need to eliminate unlawful racial discrimination, and
>
> (b) to promote equality of opportunity and good relations between persons of different racial groups."

67. There is a similar provision found in section 49(1) of the Disability Discrimination Act 1995, although it is cast in wider terms. It is as follows:

> "(1) Every public authority shall in carrying out its functions have due regard to:
>
> (a) the need to eliminate discrimination that is unlawful under this Act;
>
> (b) the need to eliminate harassment of disabled people that is related to their disabilities;
>
> (c) the need to promote equality of opportunity between disabled persons and other persons.
>
> (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating the disabled person more favourably than other persons;
>
> (e) the need to promote positive attitudes towards disabled people; and
>
> (f) the need to encourage participation by disabled persons in public life."

68. Section 76(a) of the Sex Discrimination Act provides a similar duty in relation to sex discrimination, but in the event it has not really figured in argument in this case. There is no basis for saying that the proposals adversely affect women, and indeed, the equal treatment of part-time students improves their position.

69. These duties have now been replaced by a singled duty framed in section 149 of the Equality Act 2010, which in fact applies to other protected grounds also, but that was not in force at the material time. (I also observe that there is an issue whether the duty as regards sex and disability discrimination apply in this case where the regulations have to be approved by both Houses of Parliament: see the discussion of the Divisional Court in *The Staff Side of the*

Police Negotiating Board v Secretary of State for Work and Pensions [2011] EWCH (Admin) 3175 paras 85ff. However, no argument that they were inapplicable was advanced before us. In any event it is clear that the duty under section 71 of the Race Relations Act, the duty primarily relied on in this case, would apply.)

70. The aim of these duties is to bring equality issues into the mainstream of policy consideration. The courts have on a number of occasions emphasised the importance of full compliance with these PSEDs as an essential preliminary to public decision making. For example, in *R (Elias) v Secretary of State for the Home Department* [2006] 1 WLR 321 Lady Justice Arden said this (para 274):

> "It is a clear purpose of section 71 to require public bodies to whom the provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement and this provision must be seen as an integral and important part of the mechanism for ensuring the fulfilment of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter. In the context of the wider objectives of anti-discrimination legislation, section 71 has a significant role to play."

71. There are other statements in the authorities to similar effect: see e.g *R (C) v Secretary of State for the Home Department* [2008] EWCA Civ 882, para 49, per Buxton LJ and *R (BAPIO) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, paras 2-3, per Sedley LJ.

72. More recently, in *Bailey & Ors, R (on the application of) v London Borough of Brent Council & Ors* [2011] EWCA Civ 1586 Pill LJ, with whose judgment Richards and Davis LJJ agreed, approved an observation of Davis J (as he was) in the case of *R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin), when he said (para 74) that the duty required a "conscious directing of the mind to the obligations."

73. The courts have emphasised that the exercise is not satisfied merely by ticking boxes; it is a matter of substance and must be undertaken with rigour: see *R (Baker & Ors) v Secretary of State for the London Borough of Bromley* [2008] EWCA 141, para 37, per Dyson LJ. His Lordship added that although it was not necessary in terms to refer to the relevant sections in order to demonstrate that the duty had been considered, nonetheless it was good practice to do so, and also to refer to any relevant Code of Practice or circular. This would increase the likelihood that relevant factors were taken into account.

74. Similarly, there is no obligation in law to provide an equality impact assessment, although as Aikens LJ pointed out in *R (Brown) v Secretary of State for Work and Pensions* [2009] PTSR 1506, para.96:

> "proper record keeping encourages transparency and will discipline those carrying out the relevant function to undertake their…duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled a [statutory] duty."

75. At the same time, plainly the existence of an equality impact assessment does not of itself demonstrate compliance. Moses LJ noted in *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 at paras 25-27 that it may be a "mere exercise in formulaic machinery". Moreover, as Wyn Williams J observed in *R (EHRC) v Secretary of State for Justice* [2010] EWHC 147 (Admin) paras 49 -53, an assessment might highlight deficiencies in the approach, and inadequacies in the contemporary material cannot readily be explained away. I would add that where there is an equality impact assessment, one would expect it to indicate with some particularity how the PSEDs were discharged.

76. However, as Dyson LJ also emphasised in the *Baker* case, the duty is not a duty to achieve a particular result; it is a duty to have due regard to the need to achieve the goals set out in the sections. Dyson LJ then said this (para 31):

> "What is *due* regard? In my view it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing."

77. Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para 34) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

78, The concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.

The evidence of compliance.

79. In this case the Secretary of State relies as evidence of compliance on two documents in particular. The first is what was termed an Interim Equality Impact Assessment ("the EIA") entitled "Urgent Reforms to Higher Education and Funding Finance" dated 29 November 2010 and the second was another document of the same date which is referred to as an Interim Impact Assessment ("IA"). In a witness statement sworn in these proceedings, Mr Martin Williams, the Director of Higher Education Policy in the Department of Business, Innovation and Skills, confirmed that the Secretary of State had specifically considered these reports. He stated that although described as interim, these documents provided in fact a full assessment of the draft regulations laid before Parliament as well as the package of urgent reforms to finance and student funding. Both reports were described as "interim" simply

because the intention was that they would be followed by a wider set of reforms to be published in a White Paper in 2011. There was in fact a later equality impact assessment produced in July 2011 but it is common ground that this, being after the event, cannot be relied upon as evidence of compliance in relation to the decision to adopt the 2010 regulations.

80. The EIA focused on the new duty imposed by the Equality Act 2010, although it is conceded that these provisions were not in place at the material time. Nothing turns on that, however. The assessment concluded that taking the whole of the reforms together, they ought not adversely to affect individuals from the lower socio-economic backgrounds disproportionately. The report also stated that ethnic minorities were more likely to benefit from the more generous maintenance support packages; that disabled students should not be adversely affected, noting that existing financial support for them would be continued; that 25% of graduates would be likely to pay less under the new system when compared with the old, and these were more likely to be female, the disabled and ethnic minority students; but that there was a possible negative impact on some Muslim students because on some interpretations of Shariah law on interest, some students would have concerns about making the interest payments on the loans.

81. The EIA set out the evidence for reaching these conclusions, relying in large part upon the material referred to earlier in the judgment drawn principally from the Browne review. Indeed, the Annex to the report, which sets out the organisations consulted, lists those consulted by Lord Browne. The report claimed that many of those consulted had an interest in equality matters. The IA also emphasised the importance of the package as a whole to attract the brightest talent from wherever they came.

82. Mr Swift accepts that there is no separate and distinct consideration of the position of racial or ethnic minorities, or the disabled independently of the fact that they are disproportionately represented in the lower socio-economic groups. He also accepts that the material relied on is almost exclusively that which was considered in the course of the Browne review. His case is that the focus on the lower socio-economic groups is in effect a surrogate for those to whom the statutory duty is owed. A decision maker has a certain leeway about how he will perform the equality duties, and this was a legitimate approach for the Secretary of State to adopt. It is quite fanciful, says Mr Swift, to say that there has been no proper attempt to understand the likely effect of these policies on protected groups.

83. Ms Mountfield conducted a root and branch attack on the Secretary of State's approach. She contended that neither the EIA nor the IA, even when read against the background of the Browne proposals, begin to demonstrate anything like the rigour of analysis necessary to ensure compliance with the duties. It was not enough simply to be satisfied that there was no adverse discrimination. As Lord Justice Dyson pointed out in the *Baker* case, the obligation goes well beyond merely avoiding formal non-discrimination:

> "the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination."

In any event, there was no proper analysis of the relevant material.

84. I found a number of her criticisms wholly unpersuasive. First, she contended that the Secretary of State had not even properly or adequately analysed the effect of the proposed policies on the poorer sections in the community. He had merely asserted that there would be no disproportionate adverse effect on lower socio-economic groups. Moreover, she repeated the arguments advanced in relation to the first ground that the conclusion - or perhaps more accurately the prediction - that there would be no disproportionate adverse impact on those groups was unsustainable. She cited the failure to mention in terms in the equality impact assessment the Callender and Jackson research about aversion to debt, to which I have already made reference.

85. I agree with Mr Swift that this wholly misrepresents the position. The Secretary of State has made a judgment as to the potential effect of these policies in the light of available evidence. It is made in good faith and is not irrational. He has recognised that it may be wrong; he has accepted that the impact of these measures must be kept under review.

86. Furthermore, it is fanciful to suggest that there was no analysis of the relevant evidence. That is a travesty of the position given the fact that a central feature of the Browne report was to focus on ways in which the socially disadvantaged could be encouraged to participate in higher education.

87. Moreover, in my view it is quite hopeless to say that the duty has not been complied with because it is possible to point to one or other piece of evidence which might be considered relevant which was not specifically identified in the EIA. I suspect that virtually every decision could be challenged on that basis. (In fact the IA did in terms refer to the need to provide grants to low income households to mitigate risk aversion. In addition Mr Williams dealt with this in his witness statement and pointed out that there was no robust evidence that this affected their behaviour.) In this context I respectfully endorse certain observations of Davis LJ in the *Bailey* case when he said, in connection with a decision to close certain public libraries (para 102):

> "Councils cannot be expected …to apply, indeed they are to be discouraged from applying, the degree of forensic analysis for the purpose of an EIA and of consideration of their duties under s.149 which a QC might deploy in court."

88. Ms Mountfield also criticised the fact that so much material is drawn from the Browne Review. That is not of itself a legitimate point of criticism. There is no virtue in reinventing the wheel, and the Browne review was the basis on which the policy was adopted. Of course the duty lies on the decision maker to carry out the assessment, but Mr Williams in his witness statement says in terms that he did, and there is no basis to gainsay that.

89. It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Employment v Tameside Metropolitan Borough Council* [1977] A.C.1044 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para 85):

> " .. the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration."

90. I respectfully agree. But none of this is necessary if the public body properly considers that it can exercise its duty with the material it has. Moreover, it seems to me misleading to say that there was no consultation or inquiry in this case. There was very extensive consultation by the Browne panel and this engaged closely with the position of the poorer students, many of whom will be from ethnic minorities and disabled students. This was not legislation passed in a vacuum with no appreciation of the likely effects on protected groups. If the question were whether there had been adequate consultation about the effects of the proposals on the lower socio-economic groups, the only conceivable answer in my view would be that there had been.

91. Ms Mountfield is in my view on stronger ground when she contends that there is no evidence of any structured attempt to focus on the details of the equality duties. I agree that the unstated assumption lying behind the EIA is that the potential equality implications relate only to individuals from protected groups who fall within the lower socio-economic groups. There is no evidence at all that there has been the conscious consideration of the full range of the statutory criteria which the law requires. Whilst there is a significant correlation between the socially disadvantaged and those from disabled households or from ethnic minorities, clearly they are not the same thing. Indeed, the fact that specific and different issues need to be considered with respect to each protected characteristic of itself suggests that, in general at least, it cannot be enough to treat the protected groups in a homogenous way. That will not bring out such issues as are unique to a particular protected characteristic.

92. Having said that, in my view it is important to bear in mind the nature of the policy under consideration in this case and the particular relief sought. The decision is essentially a financial one; substantially to increase fees, whilst at the same time making available loans and other benefits. The particular challenge in these proceedings focuses on the fee increase rather than the other elements in the package. The claimants seek to quash the regulations increasing the fees.

93. In my view, it is necessary to consider what impact that particular aspect of the policies will have. There is no basis whatsoever to suggest that the imposition of fees at the proposed level will discriminate directly against any of the protected groups. The effect, if there be any, will be indirect. The obvious reason why minority protected groups might be adversely affected - and indeed, apart from the interest problem for some Islamic students, in all likelihood the only way - is because they are disproportionately economically disadvantaged. If they are not disadvantaged in that way, there is no reason to suppose that they will be disproportionately affected at all. Indeed, I do not understand the claimants to be saying otherwise. One of the matters on which they have placed considerable emphasis is the research that potential students from lower socio-economic groups will be more likely to be risk averse, but that only adversely impacts on the protected groups because there is some correlation between the two groups.

94. The Secretary of State engaged fully with the implications for the economically disadvantaged and therefore with the adverse impact on minority groups. His conclusion was

that they would be disproportionately affected if they were simply subjected to fees without the safeguards of the loans and the other ameliorative measures I have discussed. It is for that reason that various measures have been adopted to assist them. To that extent it is wrong for the claimants to say that the Secretary of State did not focus on steps designed to promote equality of opportunities.

95. The complaint is that this insufficiently focuses on the full range of the PSEDs. There can in my view be no doubt that there will be a number of features of the equality duties that will simply not be engaged at all by the policies. For example, nothing in these particular policies raises any concerns about harassment of the disabled, nor does it relate to attitudes towards them. It cannot be the case that whenever any legislation is passed, attention necessarily has to focus on these matters. It will always be possible to tag onto any legislation a provision, for example, giving greater grants to disabled students. But possibilities of that kind do not have to be canvassed in order to satisfy the equality duty. There must be some reason to think that the exercise of the functions might in some way relate to a particular aspect of the duty under consideration. As Aikens LJ pointed out in *Brown* (para 89), a public body might decide not to have an equality impact assessment on (in that case) the effect of a policy on the disabled precisely because it is not thought that it will have any impact on them at all. I made a similar observation in *R (Elias) v Secretary of State for Defence* [2005] EWHC 1435 (Admin); [2005] IRLR 488, para 96:

> "No doubt in some cases it will be plain even after a cursory consideration that section 71 is not engaged, or at least is not relevant. There is no need to enter into time consuming and potentially expensive consultation exercises or monitoring when discrimination issues are plainly not in point."

For these reasons, in my judgment there has on any view been very substantial compliance with these equality duties.

96. However, I accept that if there is any doubt about whether a particular statutory objective is engaged, the issue needs to be explored before any conclusion can be safely reached that it is not. In so far as the EIA purported to focus on the full package of reforms then under consideration and not merely the decision to increase fees, I cannot be sure that this has been done. I cannot discount the possibility that a more precise focus on the specific statutory duties might have led to the conclusion that some other requirements were potentially engaged and merited consideration. I recognise that it was envisaged that there would be a further assessment, but it was never explained, if it be the case, that certain matters were not thought relevant for the initial so-called interim assessment on the grounds that they would be addressed in a later one.

97. I therefore conclude that the Secretary of State did not carry out the rigorous attention to the PSEDs which he was obliged to do. Having said that, I am satisfied that he did give proper consideration to those particular aspects of the duty which related to the principle of levying fees and the amounts of those fees, and by seeking a quashing of the regulations, the claimants have focused on that aspect of the policy.

98. Furthermore, there was another EIA in June 2011 when more specific consideration was given to the impact of further proposed changes detailed in a White Paper on ethnic minorities, women and the disabled. That EIA specifically stated – in a way in which the earlier EIA did not – that the assessment would be limited to certain aspects of the White

Paper only "because there are not specific equality impacts arising from those other proposals or because equality impact assessments have already been undertaken on existing proposals." This assessment includes extensive information about the degree of participation of various ethnic groups in higher education and demonstrates significant success in attracting minority groups into that sector. It also notes that there remain degree attainment gaps between white students and those from ethnic minorities (who fare less well); and that a greater proportion of the disabled are participating in higher education but are disproportionately dissatisfied with the experience. It makes the point that a new scholarship scheme directed to families with an annual income of under £25,000 will help disadvantaged groups in so far as they are disproportionately represented in those families. Plainly this later EIA has no direct bearing on the question whether the Secretary of State complied with his duty prior to introducing the regulations, but the fact that there is on-going consideration of the equality impact of the overall package does in my view have some bearing on the appropriate relief in these circumstances.

99. In my view, taking into account all these considerations, I do not consider that it would be a proportionate remedy to quash the regulations themselves. Whilst I have come to the conclusion that the Secretary of State did not give the rigorous attention required to the package of measures overall, and to that extent the breach is not simply technical, I am satisfied that the particular decision to fix the fees at the level reflected in the regulations was the subject of an appropriate analysis. Moreover, all the parties affected by these decisions – Government, universities and students – have been making plans on the assumption that the fees would be charged. It would cause administrative chaos, and would inevitably have significant economic implications, if the regulations were now to be quashed. I emphasise that those considerations would not of themselves begin to justify a refusal to quash the orders if the breach was sufficiently significant. It will be a very rare case, I suspect, where a substantial breach of the PSEDs would not lead to a quashing of the relevant decision, however inconvenient that might be. But in circumstances where, for reasons I have given, there has been very substantial compliance in fact, and an adequate analysis of implications on protected groups of the fee structure itself, these considerations reinforce my very clear conclusion that quashing the orders would not be appropriate.

Disposal.

100. I would grant a declaration to the effect that the Secretary of State failed fully to carry out his PSEDs before implementing the 2010 regulations under challenge. I would not, however, quash the regulations.

Mr Justice King:

101. I agree. The challenge to the 2010 regulations based on the alleged breach of the right to education conferred by the European Convention on Human Rights must fail for the reasons given by Elias L. J.

102. I also agree, for the reasons given by His Lordship that there has here been very substantial compliance with the equality duties. In particular, the Secretary of State, prior to introducing the regulations, patently did have due regard to the statutory objective of promoting equality of opportunity which on any view was the statutory objective engaged by the fee structure to be introduced by the regulations. The only failure which has been made out relates only to a lack of express focus on other aspects of the statutory objectives, potentially engaged, (for example the duty to promote good relations between different racial groups), when

consideration was being given to the overall package of measures to be put in place alongside but outside the regulations themselves. I agree that it is difficult to see how such failure can impinge upon the particular decision reflected in the regulations, namely to introduce a fee structure with fees at a particular level.

103. I agree that that it would not be a proportionate remedy in these circumstances to quash the regulations themselves. I too, however, would grant a declaration to the effect that the Secretary of State failed fully to carry out his PSEDs before implementing the 2010 regulations under challenge.