IN THE UPPER TRIBUNAL **Appeal No: CDLA/1461/2014**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal dismisses the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Southend on 25 February 2013 under reference SC919/11//05547 did not involve any error on a material point of law and therefore the decision is not set aside. The First-tier Tribunal correctly concluded on the facts and as matter of law that on her application for supersession of 25 March 2011 the appellant was not entitled to the higher rate of the mobility component of Disability Living Allowance because she was then aged 71 years old and so exceeded the maximum age at which entitlement to that component could first be awarded.

This decision is made under section 12(1) and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

Representation: Mr Isaac Maka of counsel for the appellant.

Mr Tim Buley of counsel for the Secretary of State.

REASONS FOR DECISION

Introduction

1. This appeal begins and ends with remedy, or at least the lack of one that may avail the appellant on the case as argued before me. Before coming to that issue however I must first explain what the case is about and address some of the other arguments made before me.

2. None of the other arguments (upon which remedy, if available, would depend if the appeal was to be successful) were pursued before me with any great rigour at either hearing by the appellant, and were in fact entirely absent from the appellant's counsel's oral submissions to me at the second hearing of the appeal, where the focus was entirely on what useful remedy, if any, could be provided to the appellant even assuming all the other arguments fell in her favour. However, those other arguments were addressed in some detail in the parties written submissions on the appeal and I therefore seek to address them in that context below, subject to the caveat that they were not developed in argument before me and to the further caveats set out in the two paragraphs immediately below.

3. The Secretary of State, mindful of the result that obtained in the litigation which ended in the Court of Session's decision in *SSWP –v- Robertson* [2015] CSIH 82[1], argued, in effect, that the same result would obtain in this appeal, particularly in relation to the argument made under section 149 of the Equality Act 2010, because no remedy could be afforded to the appellant. The concern he expressed was that the Upper Tribunal should avoid making findings as to whether section

[1] It was held in *Robertson* that the Secretary of State's further appeal to the Court of Session was incompetent because he had succeeded before the Upper tribunal, even though in the course of its decision the Upper Tribunal (*SSWP –v- YR* [2014] UKUT 80 (AAC) had found that the regulation conferring entitlement for those with severe visual impairment was *ultra vires*. The Secretary of State had succeeded before the Upper Tribunal because the Upper Tribunal had accepted notwithstanding its *ultra vires* holdings that the regulation could not be read any other way but disapplying it would not benefit the claimant (because her argument was that the regulation did not go far enough as its effect was only to confer entitlement on some severely visually impaired claimants).

149 of the Equality Act 2010 had been breached, or the regulations in issue offended against the Human Rights Act 1998, if in the result the appeal had to be dismissed because no remedy could be afforded to the appellant.

4. The Secretary of State also deployed a further argument, distinctive to the Equality Act 2010, which was against the Upper Tribunal in its appellate function under section 14(3) of the Social Security Act 1998 and section 11 of the Tribunals, Courts and Enforcement Act 2007 having even the jurisdiction to rule on arguments alleging breach of any provision of the Equality Act 2010. This argument is founded on section 113 of the Equality Act 2010 and, for the reasons given below, it may be well made, even though it has not seemingly been taken as a point in previous Upper Tribunal appeals.

5. I have borne all of these considerations in mind and can see the force in them. However I do not consider that they should lead me not to even comment or give a view on the many and varied issues that arise in this case, even though the appellant effectively conceded in the end that there was no remedy that could be afforded to her on this appeal. This decision can at least be a useful vehicle in which to address the various jurisdiction arguments. Moreover, it might provide some assistance by explaining the various flaws in the appellant's arguments: see to like effect *PL –v- SSWP* (JSA) [2016] UKUT 0177 (AAC). And the effect of the Secretary of State's 'jurisdictional bar' arguments, if I may call them that, varies between the Human Right Act 1998 and the Equality Act 2010.

6. Further, if I may say so, it seems to me that the Secretary of State's *Robertson* concern may be overstated and misplaced. I say this because arguably the *Robertson* litigation can best be viewed as an instance where the Upper Tribunal's conclusion that, per section 12(1) of the Tribunals, Courts and Enforcement Act 2007, "the making of the [First-tier Tribunal's] decision concerned involved the making of an error on a point of law", was limited to the Upper Tribunal holding that the First-tier

Tribunal had erred in law by *acceding* to the claimant's argument that the severe visual impairment regulation conferred entitlement on her when on its terms it did not. In other words, the Upper Tribunal's conclusion on remedy meant that it had not been necessary for it to consider whether the regulation was *ultra vires* and therefore the Secretary of State was wrong to consider himself obliged to follow that *ultra vires* holding.

The issue on this appeal

7. This appeal concerns the same severe visual impairment regulation as was in issue in *Robertson*. This regulation was a change introduced to the social security benefit called Disability Living Allowance ("DLA") by section 14 of the Welfare Reform Act 2009. For present purposes it suffices to say that that change conferred for the first time entitlement to the higher rate of the mobility component ("hrmc") of DLA under section 73 of the Social Security Contributions and Benefits Act 1992 ("SSCBA") on people with "such severe visual impairment as may be prescribed": per section 73(1AB)(a) SSCBA. It is not disputed that that test would have conferred entitlement to the hrmc on the appellant if it could have applied to her given her very significant sight problems. The regulations made under section 73(1AB) had effect in terms of benefit entitlement from 11 April 2011.

8. In short, the issues on the appeal are (a) whether the statutory scheme lawfully prevented the appellant from becoming entitled to the hrmc under section 73(1AB)(a) of the SSCBA because she was over the age of 65 at the time that subsection came into effect, and (b) even if the appellant can establish it was not lawful for the scheme to act in this way, whether there is any effective remedy available to the appellant. The appellant's grounds for arguing the scheme is unlawful are based on age discrimination contrary, it is argued, to the Human Rights Act 1998 and the Equality Act 2010.

9. It is important to emphasise at the outset that the complaint made is of *age* discrimination. This is important because it is only under the Equality Act 2010 that 'age' is identified as a "protected characteristic": see sections 4 and 5 of that Act. None of the predecessor Acts of Parliament identified 'age' as a protected characteristic or as a specific basis for outlawing discrimination on the ground of a person's age. Outwith the Human Rights Act 1998, the appellant's case therefore has to stand (or fall) on the application of the Equality Act 2010 and remedies available under it.

Relevant background

10. The appellant has had an award of the lower rate of the mobility component ("lrmc") and middle rate of the care component ("mrcc") of DLA from and including 21 April 1994. The award of both components was founded in essence on her sight problems: the lrmc on her need for guidance or supervision from another person when walking outdoors in unfamiliar surroundings (per section 73(1)(d) SSCBA). With a view to the introduction of entitlement to the hrmc of DLA based on severe visual impairment alone with effect from 11 April 2011, on 25 March 2011 the appellant applied to have that part of the decision awarding her the lrmc changed by way of supersession under section 10 of the Social Security Act 1998 ("SSA") to the hrmc based on her severe visual impairment.

11. By a decision dated 13 June 2011 the Secretary of State refused to supersede the awarding decision and kept it in place at the rate of the lrmc and the mrcc. His refusal was based not on the application for supersession having been made before the change to the law came into effect (the change had come into effect by the date of his decision and so could be taken into account – see section 8(2)(b) SSA), but the more fundamental point that at the date of the application for supersession the appellant was aged 71 and so could not because of her age qualify

for the hrmc of DLA. The Secretary of State relied on section 75(1) of the SSCBA. This provides that:

> "Except to the extent to which regulations provide otherwise, no person shall be entitled to either component of disability living allowance for any period after he attains [the age of 65] otherwise then by virtue of an award made before [she] attains that age".

12. Exceptions are made to this general rule in regulation 3 and Schedule 1 to the Social Security (Disability Living Allowance) Regulations 1991 ("the DLA Regs"). The former provided at the material time as follows:

> "3.—(1) A person shall not be precluded from entitlement to either component of disability living allowance by reason only that he has attained the age of 65 years, if he is a person to whom paragraphs (2) and (3) apply.
> (2) Paragraph (3) applies to a person who–
> (a) made a claim for disability living allowance before he attained the age of 65, which was not determined before he attained that age, and
> (b) did not at the time he made the claim have an award of disability living allowance for a period ending on or after the day he attained the age of 65.
> (3) In determining the claim of a person to whom this paragraph applies, where the person otherwise satisfies the conditions of entitlement to either or both components of disability living allowance for a period commencing before his
> 65th birthday (other than the requirements of section 72(2)(a), or, as the case may be, section 73(9)(a) of the Act (3 months qualifying period)), the determination shall be made without regard to the fact that he is aged 65 or over at the time the claim is determined.
> (3A) A person shall not be precluded from entitlement to the care component of disability living allowance by reason only that he has attained the age of 65 years if the claim is treated as made on 18th October 2007 in accordance with regulation 6(35) of the Social Security (Claims and Payments) Regulations 1987 (date of claim).
> (4) Schedule 1, which makes further provision for persons aged 65 or over shall have effect."

It is not disputed that regulation 3 to the DLA Regs cannot assist the appellant.

13. The two most relevant paragraphs of Schedule 1 to the DLA Regs provided at the relevant time as follows:

> **Age 65 or over and entitled to mobility component**

> **5.**—(1) This paragraph applies where a person on or after attaining the age of 65 is entitled to the mobility component payable at the higher rate specified in regulation 4(2)(a), and–
> (a) an adjudicating authority is satisfied that the decision giving effect to that entitlement ought to be revised under 9 of the 1998 Act or superseded under section 10 of that Act, or
> (b) the person makes a renewal claim for disability living allowance.
> (2) A person to whom this paragraph applies shall not be precluded, solely by reason of the fact that he has attained the age of 65, from entitlement to the mobility component by virtue of having satisfied or being likely to satisfy one or other of the conditions mentioned in subsection (1)(a), (b) or (c) of section 73 of the Act…..
>
> **Aged 65 or over and award of lower rate mobility component**
> **6.**—(1) This paragraph applies where a person on or after attaining the age of 65 is entitled to the mobility component payable at the lower rate specified in regulation 4(2) and–
> (a) an adjudicating authority is satisfied that the decision giving effect to that entitlement ought to be revised under section 9 of the 1998 Act or superseded under section 10 of that Act, or
> (b) the person makes a renewal claim for disability living allowance.
> (2) A person to whom this paragraph applies shall not be precluded, solely by reason of the fact that he has attained the age of 65, from entitlement to the mobility component, but in determining the person's entitlement to that component section 73(11) of [the SSCBA] shall have effect in his case as if paragraph (a), and the words "in any other case" in paragraph (b), were omitted."

Paragraph 5 does not apply because the appellant was not entitled to the hrmc of DLA on or after attaining the age of 65. Further, the effect of the closing words in paragraph 6, with its modifications to section 73(11) of the SSCBA, is concerned solely with continuing entitlement to the lower rate mobility component after the age of 65.

14. The First-tier Tribunal rejected the appellant's appeal against this refusal to supersede decision. It reasons were, insofar as relevant, as follows.

> "There is no dispute that the appellant meets the disability test and the sole issue…was a question of law. [The appellant's] argument [is] that the bar to a person over 65 receiving the higher rate of the mobility component was discriminatory and breached her Human Rights.
>
> Section 75 of the Contributions and Benefits Act 1992 imposes a clear and indisputable bar to people over 65 receiving higher rate mobility. Although Tribunals may disapply regulations to give effect to the spirit of the Human Rights legislation they have no power to disapply statutory provisions. Further…. *R(DLA)1/09* ruled that although

> section 75 is discriminatory on age grounds….the DWP had demonstrated that there was a rational and proportionate justification for the discrimination.
>
> In consequence given the clear words of the statute, the absence of power to disapply a statute and binding case law that Section 75 is sound law the Tribunal had no alternative but to dismiss this appeal."

15. The appellant then sought permission to appeal against the First-tier Tribunal's decision. Her reasons were, inter alia, "I am qualified to receive this Benefit, [and] just because the regulations were changed after I was 65 years old, that should not stop me from receiving this benefit. Blind people who are awarded this benefit before the age of 65 are allowed to receive it after age of 65 which means there is a clear case of discrimination between those of us who are over the age of 65". The argument, as I have already said, was based on the Human Rights Act 1998 and the Equality Act 2010.

16. Despite my concern as to the difficulties in the way of the appellant, I gave her permission to appeal. In doing so I said the following:

> "I am <u>not</u> giving permission appeal on the basis that it is arguable with a realistic prospect of success that the First-tier Tribunal erred in law in the decision it made, but rather because the important point this appeal raises merits the attention of the Upper Tribunal.
>
> Caselaw such as *R(DLA)1/09*……is likely to present very significant hurdles for [the appellant] to overcome in order for her appeal to succeed. Moreover, it is not immediately apparent that the Equality Act 2010 has any bearing on the passing of section 14 of the Welfare Reform Act 2009, nor is it clear on what basis Parliament or the Secretary of State acted unlawfully in human rights terms in not amending section 75 of the Social Security Contributions and Benefits Act 1992 or schedule 1 to the Social Security (Disability Living Allowance) Regulations 1991 when enacting section 14 of the Welfare Reform Act 2009.
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> [The appellant] may wish to seek advice from a Law Centre or other specialist lawyer on the legal issues arising in this case."

17. The appeal has since then been the subject of two oral hearings. At and prior to the first of those hearings the appellant had not obtained representation, legal or otherwise. At the first hearing, and after it, I raised with the parties whether the Secretary of State had any evidence

of the regard he had had - per section 149 of the Equality Act 2010 – to not extending the reach of the Social Security (Disability Living Allowance) (Amendment) Regulations 2010 ("the amendment regulations") to those aged 65 or over on 11 April 2011. The amendment regulations are the regulations which brought entitlement to the hrmc of DLA by reason of severe visual impairment alone into effect. The Secretary of State's representative said there was such evidence and referred me to some of it at the hearing, but asked for further time to put in the detail of this evidence. The directions I made after the hearing set this out and then said:

> "This [is] all on the assumption that the Upper Tribunal in its statutory appellate function has jurisdiction to rule on whether regulations are *ultra vires* on the basis of failure by the Secretary of State to meet the public sector equality duty in section 149 of the Equality Act 2010. Time is needed for the Secretary of State to supply this information, and [the appellant] then to respond to it…
>
> …it would also assist if the parties file written submissions addressing whether the Upper Tribunal in exercising its statutory appellate function has jurisdiction to address *vires* arguments (that is, whether the Secretary of State acted lawfully and within his legal powers when making the Social Security (Disability Living Allowance) (Amendment) Regulations 2010) based on section 149 of the Equality Act 2010. Judge White's decision in *CDLA/2798/2012* (pages 29-33) may suggest the answer is "No". On the other hand, Judge Agnew of Lochnaw Bt QC in *SSWP –v- YR* [2014] UKUT 80 (AAC) (*CSDLA/235/2013*), would seem to have proceeded on an agreed basis (see paragraph 4), that he had such jurisdiction. But does the fact that that appeal was concerned with section 49A of the Disability Discrimination Act 1995 make a material difference? (Judge Levenson proceeded in *LS –v-SSWP* (SF) [2014] UKUT 0298 (AAC) on the basis that he had jurisdiction to hold regulations invalid (i.e. ultra vires) if the Secretary of State had not complied with the public sector equality duty, but that arose under the Race Relations Act 1976. Again, does that make a difference?)
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> Section 156 of the Equality Act 2010 states that a failure in respect of performance of the section 149 public sector equality duty does not confer a cause of action at private law. Are these appeal proceedings private law proceedings? Moreover, do the terms of sections 113(3)(a) and 114 of the Equality Act 2010, when read with sections 149 and 156 of the same Act, oust the jurisdiction of the Upper Tribunal on appeal? Or is the position as per Judge Levenson in *VL –v- SSWP* [2011] UKUT 227 (AAC); [2012] AACR 10, that in determining whether the decision under appeal to the Upper Tribunal is erroneous "in point of law" under section 11 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal is able, indeed obliged (per *Foster* [1993] AC

> 754), to decide whether the Secretary of State acted within his legal powers when making the Social Security (Disability Living Allowance) (Amendment) Regulations 2010 by determining whether he complied with the section 149 Equality Act 2010 public sector equality duty in making those regulations?
>
> It may be that the short answer will be that determination of this jurisdictional issue need not arise if the evidence referred to above shows the Secretary of State had due regard to the effect on blind people aged 65 or over of not extending the said 2010 regulations to cover them. However, the issue of jurisdiction is an important one and may usefully be ruled on here."

18. The appeal was then subject of a second hearing by which time the appellant had secured the services of, and was represented by, Mr Maka of counsel, and the Secretary of State was represented by Mr Buley of counsel. Prior to the hearing both counsel had provided detailed written arguments, and in the Secretary of State's case evidence, on the issues relevant to the appeal. I will take those issues in turn, starting with the Equality Act 2010.

Equality Act 2010

19. In response to the above directions the Secretary of State through a witness statement of Philip Joseph set out what consideration had been given to extending the severe visual impairment route of entitlement to the hrmc of DLA to those aged 65 and over. Mr Joseph statement said that he was a civil servant employed in the Department for Work and Pensions, where he had worked as a policy officer specialising in the field of social security benefits and, more recently, "extra costs" benefits for people with long-term health conditions and disabilities.

20. The first point Mr Joseph's witness statement made, however, was that section 149 of the Equality Act 2010 was not in force at the date the amendment regulations were made on 22 June 2010. Section 149 was brought into force on 5 April 2011 by article 2(a) of the Equality Act (Commencement No.6) Order 2011 (SI/2011/1066). Section 149(1) imposes a requirement that:

> "a public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

This is commonly referred to as a "public sector equality duty". The Secretary of State for Work and Pensions is a public authority for these purposes: see section 150 and Part 1 of Schedule 19 to the Equality Act 2010.

21. This point gives rise to potentially difficult issues of whether (i) the section 149(1) duty can apply to the exercise of a function by a public authority that occurred before that duty existed in law; and (ii) the same duty can be said to have continuing effect in terms of legislation made before that duty existed in law where the disputed legislation continues to apply after the section 149(1) duty came into effect.

22. It seems to me very difficult to see how the Secretary of State in making the amendment regulations could as a matter of law have fallen under the section 149(1) duty at the time he made those regulations. The Secretary of State made the amendment regulations on 22 June 2010, and they included within them (i.e. when they were made) the dates on which they would come into effect. On the face of it, it was the act of making the regulations which was the relevant exercise of the Secretary of State's functions, to use the language of section 149(1) of the Equality Act 2010. However in June 2010 that exercise of his regulation making functions imposed no requirement under the law on the Secretary of State to have due regard to the factors listed in section 149(1). That is simply because that duty or requirement did not exist in the law at that time. (See to similar effect paragraph 8 of *MB –v- SSWP* [2013] UKUT

290 (AAC) (not the subject of any argument in the further appeals to the Court of Appeal and Supreme Court).)

23. In my view, the analysis here differs from the situation where a challenge to regulations is made on the basis that they are *ultra vires* (that is, outwith the powers provided for in) the enabling Act of Parliament. In that situation the regulations will have been made *after* the relevant Act of Parliament, and the legal issue will be whether they were properly made under that Act. If that issue arises on an appeal against an entitlement decision made even years after the regulations were made and came into effect, it remains for that issue to be decided as part of the exercise of statutory appeal tribunals deciding whether the awarding decision was lawfully made: per *Foster –v- Chief Adjudication Officer* [1993] A.C. 754; *R(IS)22/93* and *Howker –v- SSWP* [2002] EWCA Civ 1623; *R(IB)3/03* (at paragraphs 32-34, 42 and 51-52.).

24. By contrast, in terms of an argument that the regulations were wrongly made, section 149(1) of the Equality Act 2010 focuses attention on the exercise of, here, the regulation making function of the Secretary of State; but at the time of the amendment regulations he fell under no statutory duty to have the "due regard" section 149(1) imposed from 5 April 2011 and so, axiomatically, he cannot have been in breach of any such duty when the amendment regulations were made. And there is nothing in section 149, the rest of the Equality Act 2010 or the commencement order bringing that section into effect to suggest any intention that it was to be retrospective in its effect. In fact, paragraph 15 of the Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 (SI 2010 No. 2317) would seem to stand firmly against the Act having any retrospective effect as its terms exempt the Act from having any effect in respect of acts that occurred wholly before 1 October 2010.

25. To meet this problem, the appellant argued that the relevant date for considering whether the Secretary of State complied with the section 149(1) duty was the date the amendment regulations came into force, on 11 April 2011. I will assume for the purposes of this argument that this is the correct date notwithstanding that the amendment regulations by regulation 1(2)(a) of those regulations provide an earlier coming into force date of 15 October 2010 "for the purposes of assessing claims and making decisions on eligibility".

26. The difficulty with this argument in my judgment is the lack of any exercise of a public function in which the Secretary of State was engaged at the date the amendment regulations came into force. In so far as he was exercising his functions as to the setting of that date, it was on the Secretary of State's making of the regulations on 22 June 2010 on which this occurred. Further, the effect of section 176(3) of the SSCBA when read with section 176(1) of that Act, means that whether the amendment regulations came into force was the responsibility of either House Parliament exercising the negative resolution procedure so as to annul them. In other words, the power on or before 11 April 2011 to control the amendment regulations coming into force vested in Parliament. However, as far as I can see, though I should stress that I did not have argument on this point, paragraph 4 of Schedule 18 to the Equality Act 2010 ousts the public sector equality duty found in section 149(1) from having any application to functions exercised in connection with proceedings in either of the Houses of Parliament. That would seem to remove the possibility of the section 149(1) duty biting in respect of when the amendment regulations came into force.

27. An alternative argument based upon the Secretary of State instead being in breach of some general *continuing* section 149(1) duty, not connected with any decision made on a claim for, or an award of, DLA, seems to me also to be problematic. The analysis comes back to the focus of section 149(1): it is on the *exercise* by the Secretary of State of his (public) functions. As noted above, he exercised those functions when making the amendment regulations in June 2010. I find it

difficult to see on what basis the Secretary of State on or after 5 April 2011 ought as a result of his statutory duties and powers to have reconsidered on some general, unprompted basis the validity of the amendment regulations after they were made, either in the 6 days before they came into effect or after they had come into effect, particularly where he had not been asked to change the amending regulations[2]. Moreover, if due regard had in fact been had to extending the amending regulations to cover those aged 65 and over at the time the amending regulations were being considered and made, even though any such regard did not then flow from section 149(1) of the Equality Act 2010, I find it difficult to see what between 5 and 11 April 2011 ought to have led to further regard being had to whether the amending regulations met the requirements of section 149(1) of the Equality Act 2010: see to similar effect *R(Brown) –v- SSWP and others* [2008] EWHC 3158 (Admin) at paragraph [152] in particular.

28. Nor does it seem to me that the caselaw relied on by the appellant for this argument supports it. Neither of the two cases cited by the appellant – *R(Brown) –v- SSWP and others* [2008] EWHC 3158 (Admin) and *R(Watkins-Singh) –v- Governing Body of Aberdare Girls' High School and another* [2008] EWHC 1865 (Admin; [2008] ELR 561 - were concerned with section 149 of the Equality Act 2010; the first was based on claims of disability discrimination under the Disability Discrimination Act 1995, the second on race discrimination contrary to the Race Relations Act 1976. This, it seems to me, presents an immediate difficulty for the appellant because her discrimination claim is founded on age discrimination and that could only be made under the Equality Act 2010, no predecessor Act having addressed age discrimination or prohibited discrimination on the basis of age[3].

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[2] The section 149(1) public sector equality duty not containing any requirement to have due regard to the need *to take steps to take account of* persons' ages: contrast section 49A(1)(d) of the Disability Discrimination Act 1995 as explained in paragraphs [8] and [31]-[34] of *Pierretti –v- LB Enfield* [2010] EWCA Civ 1104.

[3] The predecessor Equality Act 2006 was concerned with the setting up of the Equality and Human Rights Commission and addressing discrimination on the grounds of religion or belief and discrimination on the grounds of sexual orientation. The Sex Discrimination Act 1975,

29. Moreover, consideration of *Brown* and *Watkins-Singh* provides no support for the argument that in challenges to regulations made by a Minister of the Crown the critical moment is not their making but when they come into effect.

30. There is a further and obvious consideration which counts against the appellant's argument succeeding under the Equality Act 2010 in respect of the amendment regulations. This is that the amendment regulations in and of themselves say nothing about the severe visual impairment test for the hrmc of DLA being restricted to claimants under a certain age. On their face, the amendment regulations are age neutral so cannot be said to discriminate on the grounds of age. Nor does section 73(1AB) of the SSCBA contain or introduce any upper age requirement for entitlement to the mobility component DLA. In fact, save for its being subject to section 75 of the same Act, section 73 of the SSCBA contains no upper age requirement for entitlement to the mobility component of DLA.

31. Where the appellant's age and her being over 65 counts against her benefitting from the widening of the entitlement conditions for the hrmc introduced by the amendment regulations is in section 75(1) of the SSCBA and regulation 3 and Schedule 1 to the DLA Regs.. However both section 75 and regulation 3 and Schedule 1 were made *and* came into effect long before section 149(1) of the Equality Act 2010 had any legislative effect. (Regulation 3 and Schedule 1 of the DLA Regs have been in materially identical terms at least since October 1999.) The above reasons for dismissing the appellant's arguments about the reach of section 149 in respect of the amendments regulation are if anything on an even surer footing regarding regulation 3 and Schedule 1 of the DLA Regs in terms of when those provisions were made and came into effect.

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the Race Relations Act 1976 and the Disability Discrimination Act 1995 (as their titles imply), did not address age discrimination either.

32. The real vice of which the appellant in truth needs to complain is the combined effect of the amendment regulations and regulation 3 and Schedule 1 of the DLA Regs from 11 April 2011, and the failure of the latter provisions in the DLA Regs to extend the effect of the amendment regulations to those over the age of 65 on that date who were in receipt of an award of DLA but not one including the hrmc. But so combining these legislative provisions does nothing to remove the difficulties in mounting a section 149(1) duty argument in respect of when they in combination were made or came into effect.

33. I have considered whether another argument may be made in terms of the application of section 149(1) of the Equality Act 2010. This argument is that the relevant section 149(1) function was the exercise by the Secretary of State on 13 June 2011 of his decision making function under section 11 of the SSA 1998, when he refused to supersede the appellant's award of DLA so as to award her the hrmc. By that point in time section 14991) of the Equality Act 2010 was fully in force. I should emphasise, however, that this argument was not one which was made at all, or at least with any great clarity, by the appellant.

34. This argument might find support in the view of Lord Justice Wilson (as he then was) in paragraph 26 of *Pieretti -v- LB Enfield* [2010] EWCA 1104, where he said, albeit in respect of the disability equality duty found in section 49A of the Disability Discrimination Act 1995 in respect of a local authority's discharge of its functions in respect of the homeless under Part VII of the Housing Act 1996, that:

> "'The duty in s.49A applies both when the local authority is drawing up its criteria and when it applies them in an individual case, both of those being an aspect of carrying out its functions': per Black J in *R (JL) v. Islington LBC* [2009] EWHC 458 (Admin), [2009] 2 FLR 515, at [114]. There is no scope for depriving the word "functions" of much of its normal meaning. There would, for example, be no need for s.49C(3)(a) of the Act of 1995 to exclude the application of s.49A(1)(d) from acts done in connection with recruitment to the armed forces if the section did not apply in principle to individual decisions."

However, *Pieretti* was not concerned with subordinate legislation made before the relevant public sector equality duty had any legislative effect, and there seems to have been no issue in that case that the relevant public sector equality applied both at the time Enfield formulated its policies and when it made its decision under Part VII of the Housing Act 1986 in respect of Mr Pieretti. Moreover, the discharge of duties and exercise of powers in respect of homeless persons by local authorities under Part VII of the Housing Act 1996 may provide a greater of coincidence between the formulation of policies and their application in individual decisions.

35. Subject to the important point made below about section 113 of the Equality Act 2010 ousting the Upper Tribunal's appellate jurisdiction in matters relating to alleged contraventions of the that Act, I would in theory agree with the view of Upper Tribunal Judge Levenson in *LS –v- SSWP* [2014] UKUT 0298 (AAC) that as matter of jurisdiction the Upper Tribunal may rule on whether regulations within the social security legislation are *ultra vires* the 'public sector equality duty', here in section 149(1) of the Equality Act 2010, if in the <u>making</u> of those regulations the Secretary of State could be shown to have been in breach of that duty. On the authority of the *Howker* authority cited above, but again subject to what is said below about section 113, it would not matter that the regulations were made by the Secretary of State long before they were applied in a decision on an individual claimant's case, as long as at the time the regulations were made section 149(1) was in effect. I note, moreover, that although *LS* was concerned with the public sector equality duty under the amended section 71 of the Race Relations Act 1976, the focus of enquiry was still upon "whether or not the Secretary of State complied with the public sector equality duty in drafting, making and promoting the relevant amendments to the Social Fund Maternity and Funeral [Expenses] (General) Regulations 2005" (*LS* at [23]).

36. The more difficult issue, however, is the one that could arise on this case, or any like case, namely where, for the reasons I have given above, the regulations at the time they were promoted and made by the Secretary of State were not, and could not as a matter of law have been, subject to any public sector equality duty in respect of age, but where that duty had legislative effect at the time the regulations came to be applied in a decision under either sections 8 or 11 of the SSA 1998.

37. I have not been able to identify any legal authority on this issue. *LS* is not such a case for the reasons given above. The decision in *CDLA/2798/2012* was not concerned with a challenge to subordinate legislation at all. In that case the complaint was of disability discrimination in respect of alleged defects in the arrangements for making online claims for DLA. An unsuccessful attempt had been made by the claimant to make such claim in November 2009 and she had only in fact been able to make her claim in August 2010. Upper Tribunal Judge White rejected the Equality Act 2010 as having any application because what was complained of had occurred before that Act came into effect. He also rejected the Disability Discrimination Act 1995 as having any relevance to the appeal because based on section 25(3) of that Act he said he had no jurisdiction to consider a complaint of discrimination under Part III of that Act. Section 25(3) of the Disability Discrimination Act 1995 provided that "Proceedings in England and Wales shall be brought only in the county court". This is similar, but not identical, to section 113 of the Equality Act 2010. The difference is that section 113 covers the whole of Act in which it appears whereas section 25 of the Disability Discrimination Act 1995 is concerned only with proceedings for contravention of the part of that Act in which section 25 is located (Part III), and so does not cover the disability public sector equality duty found in section 49A (which is found in Part 5A of that Act).

38. The Upper Tribunal's decision in the *Robertson* litigation referred to in paragraph 3 above (*YR*) may seem closer in point. However, it was founded on disability, not age, discrimination, apparently under the Equality Act 2006 but also under section 49A of the Disability Discrimination Act 1995, both of which Acts were in effect at the time the amendment regulations were made. Moreover, as paragraph 12 of *YR* shows, the parties in that case agreed that there was no jurisdictional bar to the Upper Tribunal ruling on whether the amendment regulations were made contrary to what was termed the Secretary of State's "equality duty". And this issue of jurisdiction did not feature at all when *Robertson* reached the Court of Session.

39. The nearest Upper Tribunal decision I have been able to identify is *JT-v- FtT and CICA* [2015] UKUT 0478 (AAC). That was a case which involved a challenge under a number of grounds to what is referred to as the "same roof rule". This rule prevented the applicant *JT* from recovering compensation under the 2012 Criminal Injuries Compensation Scheme ("the 2012 Scheme") because the criminal injury which she had suffered was sustained before 1 October 1979 and at the time of the injury the applicant and her assailant were living together as members of the same family.

40. One of the grounds of challenge on which *JT* relied was that the Minister had been breach of the public sector equality duty under section 149(1) of the Equality Act 2010 when making the 2012 Scheme. However simply stating that ground reveals why the decision in *JT* is not an exact fit with this case. This is because there was on the face of it no issue about the 2012 Scheme having been made before section 149 had any legislative effect.

41. That said, the analysis in *JT* by Upper Tribunal Judge Turnbull as to the scope of the Upper Tribunal's powers of remedy in respect of a challenge to subordinate legislation under section 149(1) is detailed, not without difficulty, but may nonetheless inform the issue with which this decision is concerned at this stage.

42. To clear one point out of the way immediately, section 113 of the Equality Act 2010 was not relevant to the Upper Tribunal's stated lack of jurisdiction in *JT*. This is because section 113 allows proceedings relating to the contravention of that Act to be brought by way of a claim for judicial review (see section 113(3)(a)), and the challenge in *JT* was brought by judicial review.

43. The detail of Judge Turnbull's section 149(1) remedy analysis is at paragraphs 69-82 of *JT*. The crux of that analysis is at paragraphs 69-73 and paragraph 82, where Judge Turnbull said (paragraph 19 of the 2012 Scheme is the one which contains the "same roof" rule):

> "69. However, even if it could be shown that [the Minister] did not have due regard to the need to eliminate discrimination, what would the consequence be, and in particular would it require or enable either CICA or the FTT (or the Upper Tribunal on judicial review of the FTT's decision) to disapply para. 19?
>
> 70. It cannot in my judgment be argued that CICA and/or the FTT were themselves under a direct s.149(2) duty, when applying para. 19 of the 2012 Scheme, to have due regard to the need to eliminate discrimination. That is because by para. 3 of Schedule 18 to the 2010 Act s.149 does not apply to the exercise of a judicial function.
>
> 71. However, that alone would not prevent the Applicant from arguing before the FTT or the Upper Tribunal that, in making the 2012 Scheme, and in particular in enacting para. 19, the Minister had failed to comply with s.149. However, in my judgment no such contention can be entertained by either the FTT on appeal from a decision by CICA, or by the Upper Tribunal on judicial review of the FTT's decision, because a breach by the Minister of his duty to "have due regard to" the need to eliminate discrimination could not of itself lead to the conclusion that the Applicant was entitled to criminal injuries compensation as if para. 19 had not been enacted. The FTT's only jurisdiction is to decide whether CICA's decision refusing compensation was correct.
>
> 72. If it could be demonstrated that the Minister failed, when enacting the 2012 Scheme, to have "due regard to" the need to eliminate discrimination, the Administrative Court could give relief to an individual claimant in exercise of its judicial review jurisdiction. Such relief would most obviously consist of a declaration and/or an order requiring the Minister to perform the duty and consider amending the Scheme. It could also consist of an order quashing the 2012 Scheme, or quashing para. 19 of the Scheme. It would be a matter for the discretion of the Court to decide what relief would be appropriate in the particular circumstances. But it would clearly not be possible for the FTT, on appeal against a decision by CICA on a

particular claim, or the Upper Tribunal by way of judicial review of the FTT's decision on such an appeal, to give such relief to an individual claimant.

73. Nor, in my judgment, could the FTT allow an appeal on the basis of disapplying para. 19, because a breach of s.149 cannot of itself lead to any particular conclusion as regards an individual's entitlement under the Scheme. As I have noted, the relief which the Administrative Court might consider it appropriate to grant might or might not include quashing of para. 19. Further, it is not possible to say what the outcome would be if the Minister were to perform his s.149 duty and reconsider. In the present case, for example, it would be impossible to say what the outcome would be if (on the hypothesis that he has not yet done so) the Minister were to reconsider whether to retain or re-enact para. 19, in the light of the s.149 duty. The Minister might consider that there is no discrimination because there is justification for it. Or he might consider that, even though it gives rise to indirect discrimination by reference to age or sex, there are countervailing factors which mean that it would be appropriate to retain (or re-enact) para. 19. Even if he were to conclude that some amendment of the scheme is needed, it may be that discrimination could be removed or lessened in other ways than by removing para. 19. I do not therefore see how it could be argued that a breach of the s.149 duty, if established, would make it appropriate for the FTT, or Upper Tribunal on judicial review of the FTT's decision, to award compensation as if para. 19 had not been enacted.

82. It does not appear from the terms of Judge Levenson's decision [in *LS –v- SSWP* – see paragraph 35 above] whether it was argued on behalf of the Secretary of State that the Upper Tribunal had no jurisdiction to decide whether the public sector equality duty had been complied with. It does not appear that it was, because Judge Levenson does not refer to any such contention. In my judgment the Upper Tribunal did not have jurisdiction to consider the contention of the claimant in *LS v SSWP* based on breach of the public sector equality duty, because even if such a breach had been established it would not in my judgment have followed that the claimant's claim for sure start maternity provision ought to be allowed. It might or might not have been considered appropriate to quash the amending regulation, had action been taken in the Administrative Court, but even if it had been, the Minister might have come to the same conclusion on properly carrying out the s.149 duty. The situation was in my view entirely different from one where (as in *Foster*) the relevant regulations had sought to impose an additional condition on entitlement to benefit which (as the Social Security Commissioner had held) was simply invalid as outside the enabling power and was severable from the remainder of conditions of entitlement. It was also different from a case in which an amending regulation imposes a condition which is *ultra vires* because it conflicts with some other requirement of primary legislation (as was the contention in [VL –v- SSWP [2011] UKUT 227 (AAC)]).”

44. I have to say that I have some trouble with this analysis, particularly the criticisms of the decision in *LS*. Assuming for the moment that there was no equivalent in the Race Relations Act 1976 to section 113 of the Equality Act 2010, I do not follow why if the Minister had not had due regard to the relevant public sector equality duty when he made the amendment regulations in issue in *LS*, the Upper Tribunal, following *Foster*, could not have held the amendments to the regulations to have been *wrongly* made to the time they were made and not give those amendments any effect in deciding what the claimant's entitlement was to the sure start maternity grant. The objection to *LS* in *JT* does not appear to be whether there was an effective remedy available in that case (as was the issue in *Robertson* and is the key decisive issue in this appeal).

45. On the basis of *Pieretti*, paragraph [69] of *Bracking –v- SSWP* [2013] EWCA Civ 1345 and *R(Hottak) and another –v- Secretary of State for Foreign and Commonwealth Affairs and another* [2016] EWCA Civ 438; [2016] 1 WLR 3791 at paragraphs [93]-[106] (and the *R(C (A Minor) –v- Secretary of State for Justice* [2008] EWCA Civ 882; [2009] QB 657 case referred to therein), no material distinction appears to exist in the *ultra vires* rule between regulations outwith the four corners of the enabling power in the Act and regulations made contrary to section 149 of the Equality Act 2010. In both cases the regulations were wrongly made and thus unlawful.

46. Judge Turnbull appeared to be concerned that even if the offending provision before him had been quashed in judicial review proceedings in the High Court, or in *LS* disapplied following *Foster*, the Minister might have come to the same conclusion having properly applied his mind under section 149(1). Speaking for myself however, I do not see that this makes any difference as the provision or regulation will still have been wrongly made at the time it was originally made. Where that concern might sound, as it did in *Hottak*, in a judicial review context would be in refusing as a matter of discretion to quash the offending

provision or regulation (as in *Hottak* where a full section 149(1) consideration had been carried out by the time any question of remedy by the High Court arose – see paragraph [110] *Hottak*). For the reasons given in *Howker*, however, that discretionary let-out would not apply in a statutory appeal, such as *LS*.

47. Further, with respect, I do not accept that the conclusion reached in *JT* on section 149(1) follows from what is said about the nature of the section 149(1) duty in paragraph 74 of *JT*. The premise of the argument on section 149(1) in *JT* is that at the time of the decision to make the 2012 Scheme the Minister had not properly carried out that duty. The fact that he may subsequently meet his section 149(1) obligations and come to the same conclusion does not alter the fact that he had not done so when he first made his decision.

48. On analysis, therefore, *JT* in my judgment is wrong in what it says about *LS* and the Upper Tribunal's appellate jurisdiction, but in any event it does not really assist with the issue of whether section 149(1) may be relied on at the time of the application of regulations in decision making on an individual claimant's case where at the time the regulations were made it had no application.

49. The only other authority on this particular issue is the *Brown* case referred to above. By way of very short summary, the case involved challenges by Mrs Brown, who was disabled, to proposals by the Government in 2007 to close Post Offices. One challenge concerned the removal by the Secretary of State for Work and Pensions by way of amendment regulations made in 2007 of the "Royal Mail Group" from the list of public authorities on which specific duties in relation to disability had been imposed in regulations made in 2005 pursuant to section 49A(1) and 49D of the (amended) Disability Discrimination Act 1995. One such duty had been the duty to publish a "Disability Equality Scheme" in which the public authority concerned was to show how it intended to fulfil its duties to disabled people under s.49A(1). The particular challenge was to the legality of the part of the 2007

regulations removing the "Royal Mail Group" as a public authority, which had the effect of removing it from being subject to such a duty.

50. The relevant 2007 regulations were made by the Secretary of State on 28 February 2007. It was argued that the making of the relevant part of the 2007 regulations breached the Secretary of State's own obligations under section 49A(1). That section only came into force on 4 December 2006. The Secretary of State argued that the relevant exercise of Minister's function was his approval of the making of the 2007 amendment regulations, that approval was given on 22 November, therefore the decision to make the 2007 regulations was made before section 49A(1) came into force and for this reason alone this part of the claimant's challenge had to fail. The Divisional Court in *Brown* provided its answer to this argument as follows (at paragraphs [150]-[153]):

> "Mr Clift has stated in evidence that the key consideration in giving advice to the SSWP to recommend that the "Royal Mail Group" be taken off the list in Part 1 of Schedule 1 to the 2005 regulations was that the DWP was "the part of government with policy responsibility for disability and the disability equality duty [and] the potential impact on disabled people of removal of Royal Mail Group…". Also in evidence is the memorandum prepared by Mr Clift for ministers dated 15 November 2006. That made the recommendation to remove "Royal Mail Group", as well as adding other public authorities to the existing lists in the Schedule to the 2005 regulations.
>
> There is no specific statement in the 15 November 2006 memorandum that Mr Clift had borne in mind the duty imposed on the DWP by section 49A(1) of the DDA whilst considering which public authorities should be added to the existing list or whether "Royal Mail Group" should be removed from it. We are quite satisfied, however, given the statements in Mr Clift's witness statements, the tenor of the whole of the memorandum of 15 November 2006, its reference to the DDA and to the 2004 consultation paper "*Delivering Equality for disabled people*", that the SSWP did have due, i.e. proper, appropriate, regard to the "needs" set out in paragraphs (a) to (f) of section 49A(1) of the DDA when formulating his recommendation to the Secretary of State.
>
> As we have noted, the approval of the relevant minister was obtained on 22 November 2006. We accept Mr Swift's submission that, in practical terms, the policy of removing "Royal Mail Group" from the list was established on that date. At the time of the memorandum to ministers, section 49A(1) had not yet come into force. The general duties under section 49A(1) and the specific duties under the 2005 regulations only came into force on 4 December 2006. It would have

> been both impractical and unreasonable for Mr Clift to have written further memoranda to remind ministers that these provisions had come into force and of their duties under them. There was, in our view, no need to do so, given the tenor of the memorandum and what we know of the discussions that had taken place in the department before it was produced.
>
> We are therefore satisfied that the Secretary of State accepted this recommendation having due regard to the matters in section 49A(1)(a) to (f) of the DDA."

51. The Divisional Court's reasoning does not therefore answer the issue I am concerned with here. Through a combination of the Secretary of State in fact having had the section 49A(1) due regard just before he came under the legal obligation to do so and the court's acceptance that in practical terms the decision to make the amendment regulations had been taken on 22 November 2006, the court did not need to address whether if the due regard had then been lacking the Secretary of State could be said to have acted unlawfully when he was not under any legal obligation to so act. It may important that section 49A (1) had been on the statute book since 7 April 2005 and so what was to shortly come into effect on 4 December 2006 was known to the Secretary of State on 22 November 2006 and thus guided his actions. It still may be thought a little odd, however, to say that the Secretary of State had met a statutory duty which was not in effect as a duty.

52. It is also instructive to note that the focus in *Brown* in terms of the exercise by the Minister of his public functions was not on when the regulations were in fact made, in the sense of them being put before Parliament, but the earlier date of when the Minister gave his or her approval to them being so made. If that test applies in this appeal then it takes the relevant date(s) even further before when section 149(1) had any legislative effect.

53. However, all of this means that the issue raised in paragraph 33 above still requires an answer. One route might be to take the *Brown* approach and consider what regard the Secretary of State had in fact

had when formulating the amendment regulations to extending their reach to those aged over 65. I will return to give that consideration, albeit somewhat briefly, once I have addressed the section 113 point about my not having the appellate jurisdiction to entertain any arguments about breach of the Equality Act 2010. Before doing either of these, however, I will seek to provide an answer to the issue raised, mindful though I am of its lack of real relevance to the issues before me and the lack of argument I have had on it. What I say may, however, be of some relevance to other cases.

54. I note at the outset that an arguable issue might arise whether section 149(1)(a) can apply, whatever application section 149(1) may or may not have to the supersession decision made by the Secretary of State on 13 June 2011. I say this because section 149(1)(a) requires due regard to be had to the need to "eliminate discrimination [etc] that is prohibited by or under this Act" (my underlining added for emphasis). However, the effect of section 29(6) of the Equality Act 2010 when read with paragraph 2(3)(a) of Schedule 3 and paragraph 1(1) of Schedule 22 to the same Act may be that the making of the amendment regulations on an allegedly discriminatory basis is not *prohibited* by the Act (para. 2(3)a) of Sch. 3) nor is applying those regulations (para. 1(1) of Sch. 22, read with section 212 of the same Act). And the same may be true of the requirements in regulation 3 and Schedule 1 to the DLA Regs.

55. Even if this is correct, however, it still leaves section 149(1)(b) and (c) potentially in play; though advancing equality of opportunity and fostering good relations, or more accurately having due regard to the need to do both or either, may arguably not have the same force as eliminating discrimination, particularly in the context of challenges to legislation.

56. I come back to the issue raised in paragraph 33. Although I can see the basis for the argument that the Secretary of State, in the guise of the decision maker exercising the function of deciding the supersession application in June 2011, might have needed to have due regard to the

need to advance equality of opportunity, foster good relations and, perhaps, eliminate discrimination prohibited under the Act, that regard would still, it seems to me, have to take account of the fact that at the time regulation 3 and Schedule 1 to the DLA Regs were made and the amendment regulations were made it was entirely lawful for those regulations to discriminate on the basis of age. This is perhaps identified most forcefully by paragraph 15 of the Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 and its language that:

> "The 2010 Act does not apply where the act complained of occurs wholly before 1st October 2010 so that—
> (a) nothing in the 2010 Act affects—
> (i) the operation of a previous enactment or anything duly done or suffered under a previous enactment…"

57. Although this is savings provision, it makes crystal clear that which would otherwise be presumed as a canon of statutory construction, namely that the Act is not retrospective in effect. It draws, in effect, a legislative line in the sand of 1 October 2010 in respect of age discrimination. The acts of making the amendment regulations and making regulation 3 and Schedule 1 of the DLA Regs occurred unquestionably before 1 October 2010. There is a clear statutory intendment that the 2010 Act, and section 149(1) within it, cannot therefore apply to call into question the making of those regulations. But if this is correct then I struggle to see the basis on which section 149(1) could inhibit the Secretary of State when making the supersession decision from giving full effect to regulations that were lawfully made.

58. I would therefore also rule against the appellant on the argument that the Secretary of State could have been in breach of section 149(1) when he applied the terms of the statutory scheme to the appellant in the refusal to supersede decision of 13 June 2011. Section 149(1) simply can have no effective bite against the validity, or the application, of the

amendment regulations and regulation 3 and Schedule 1 to the DLA Regs.

59. Mr Buley for the Secretary of State argues, however, that all of the above considerations about the Equality Act 2010 are simply not matters for the Upper Tribunal exercising its appellate jurisdiction, and so are not for me on this appeal. He founds for this proposition on section 113 of the Equality Act 2010. This is not an argument that has been made to the Upper Tribunal before as far as I can identify, though it has some parallels with the decision of Judge White in *CDLA/2798/2012*. It also at first blush appears a somewhat startling proposition because, if correct, it means in effect that the Upper Tribunal exercising its *Foster* appellate jurisdiction as to whether an awarding decision was "erroneous in law" would have to turn a blind eye to what might in theory be regulations that were unlawfully made due to a manifest failure on the part of the Secretary of State to have the section 149(1) "due regard" when making those regulations.

60. However I am satisfied that the proposition is correct and that the Upper Tribunal in the exercise of its statutory appellate jurisdiction (but not its judicial review jurisdiction) cannot rule on whether the Equality Act 2010 has been breached. This follows in my judgment from consideration of Part 9 of the Act and the wording of section 113 within that Part. Section 113 provides:

> "113 (1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part.
>
> (2) Subsection (1) does not apply to proceedings under Part 1 of the Equality Act 2006.
>
> (3)Subsection (1) does not prevent—
>
> (a)a claim for judicial review;
>
> (b)proceedings under the Immigration Acts;
>
> (c)proceedings under the Special Immigration Appeals Commission Act 1997;

> (d)in Scotland, an application to the supervisory jurisdiction of the Court of Session.
>
> (4)This section is subject to any express provision of this Act conferring jurisdiction on a court or tribunal.
>
> (5)The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
>
> (6)Chapters 2 and 3 do not apply to proceedings relating to an equality clause or rule except in so far as Chapter 4 provides for that.
>
> (7)This section does not apply to—
>
> (a)proceedings for an offence under this Act;
>
> (b)proceedings relating to a penalty under Part 12 (disabled persons: transport)."

61. A number of points deserve emphasis. First, section 113 covers the whole of the Act, and so covers section 149(1). Second, it has a wide application covering proceedings *relating to* a contravention of the Act. On the face of it, that covers this appeal as the appellant is arguing that the superession decision and the regulations it applied were contrary to section 149(1) of the Act. Third, there is nothing anywhere else in the Act that confers jurisdiction on the Upper Tribunal exercising its statutory appellate jurisdiction. Fourth, however, section 113(3)(a) does allow the Upper Tribunal to address alleged contraventions of the Equality Act 2010 under its judicial review jurisdiction. This appeal, however, does not fall into that category.

62. This is a clear result of the statutory language, if perhaps an odd one. In *Hamnet –v- Essex County Council* [2017] EWCA Civ 6; [2017] 1 WLR 155, it led the Court of Appeal to conclude that the High Court no longer had the jurisdiction to rule on challenges to traffic regulation orders if the grounds of challenge rested on alleged breaches of section 29 of the Equality Act (though it would have retained jurisdiction to rule on challenges based on section 149 of that Act, as a judicial review court). So the effect of section is far-reaching. It also arguably introduces somewhat cumbersome procedural issues. For example, if an appeal is brought before the Upper Tribunal in which a section

149(1) argument is made, that part of the appellant's case would need to be taken by the appellant to the High Court to institute judicial review proceedings. Although those proceedings could then be transferred back to the Upper Tribunal for them to run alongside what may remain of the appeal, the whole process may give rise to issues of whether the judicial review claim has been brought late. And splitting such challenges may be thought to have been something *Foster* and *Howker* had removed. However, we are where we are, and in my judgment the plain wording of section 113 ousts the Upper Tribunal's appellate jurisdiction.

63. Given this, it might be thought best to stop here on the Equality Act aspects of this appeal and dismiss the appeal under this head for this reason alone. However, on the possibility (slight in my view) that what I have said so far about the appellant's section 149(1) case lacking any merit may be wrong and section 113 not having the effect I plainly consider it to do have, I consider I should go on, however briefly, to address the evidence put forward by Mr Joseph.

64. In his witness statement Mr Joseph sought to provide the detail of where the Secretary of State had given consideration to extending the scope of the amendment regulations, and thus entitlement to the hrmc by virtue of severe visual impairment, to those aged 65 and over. Mr Joseph referred to the fact that he had made submissions to Ministers in 2009 about the 'pros and cons' of making exceptions to the general age 65 cut-off for DLA entitlement in section 75 of the SSCBA, including a suggestion from the Royal National Institute for the Blind ("RNIB") of allowing a "year of grace" to enable severely visually impaired claimants to seek entitlement to the hrmc before they reached the age of 66. On the basis of the *Brown* case referred to above, that evidence may remain relevant. It is also to be remembered that the severe visual impairment route of entitlement to the hrmc of DLA arose under the Welfare Reform Act 2009, which was being promoted in 2009.

65. The gist of the accepted reasons for not making any exceptions were:

(i) to do so would create a precedent for others to argue for other exceptions. For example, if an exception was made for those aged 65 or over on 11 April 2011 who were severely visually impaired as at that date, those of the same age but whose sight deteriorated such that they became severely visually impaired, or who otherwise would qualify for the hrmc, after 11 April 2011 could argue that denying their circumstances was unfair;

(ii) the difficulties in retrospectively adjudicating upon entitlement from the start of the 'year of grace' if the claim was only made at the end of year;

(iii) whilst people aged 65 and over were more likely to be, or become, severely sight impaired, DLA was intended to recognise the additional financial pressures faced by those who became disabled early, or relatively early, in life and who were more likely to experience limited opportunities to work, earn and save; and

(iv) to retain parity with what had occurred with the introduction of DLA in 1992, when those then aged 65 or over could not access entitlement to the newly introduced lower rate of the mobility component and lowest rate of the care component of DLA (neither of which had existed in the predecessor statutory schemes), even if they could, absent the upper age condition, have met the substantive conditions of entitlement to those new rates of benefit at that time.

66. Mr Joseph also referred in his evidence to the Department for Work Pension's *Explanatory Memorandum to the Social Security Committee* in respect of the amendment regulations. This Memorandum referred to the Impact Assessment which had been published alongside the

Welfare Reform Bill that then became the Welfare Reform Act 2009, and provided relevant extracts from that Impact Assessment. That assessment included an "**Equality Impact Assessment**", within which "Age" was addressed as follows:

> "439. This measure will maintain the normal entitlement rules for DLA [hrmc], which is that it will be available to those people who have the most severe sight impairment and claim DLA between the ages of 3 and 64.
>
> 440. Whilst people aged 65 and over are more likely to be registered as severely sight impaired, the aim of DLA is to provide additional help with the extra costs of people who have the very considerable disadvantage of being severely disabled early, or relatively early, in life. As a result, they face limited opportunities to work, earn and save compared with non-disabled persons."

Prior to this, but although under the head "Disability" still relevant to age, the assessment had said:

> "429. As of 2008, there were approximately 182,000 people in the UK of all ages who were registered as severely sight impaired.....The vast majority of people with sight problems are over 65.
>
> 430. As of August 2008, 40,500 people with blindness as their main disabling condition, aged under 5, were in receipt of the DLA lower rate mobility component; and 2,470 were in receipt of the [hrmc]."

67. Mr Joseph argued that all of this evidence showed that:

> "the attention of Ministers was drawn to the problems of extending the new provisions on "severe visual impairment" to persons over the statutory age limit of 65 for entitlement to DLA. In planning the new measures, ministers clearly had due regard to the needs of persons both under and over the age 65; but in the end they decided that the arguments in favour of maintaining the general rule in [section 75 SSCBA] outweighed the arguments for making an exception to it with respect to persons with "severe visual impairment" who had reached the age of 65 before the date (11. April 2011) of commencement of the new measures."

68. There is much authority on how the "due regard" test under section 149(1) is to be applied. These were usefully summarised in the *LS* case at paragraph 11 as follows:

- Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
- An important evidential element in the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements.
- The relevant duty is on the Minister or other decision maker personally, who cannot be taken to know what his or her officials know or what may have been in their minds.
- A Minister must assess the risk and extent of any adverse impact and the ways in which such a risk may be eliminated before the adoption of a proposed policy and not merely as a rearguard action following a concluded decision.
- The duty to have due regard to the relevant matters must be fulfilled before and at the time when a particular policy is being considered and is a continuing and non-delegable duty
- Provided that there has been a rigorous consideration of the duty and a proper appreciation of the potential impact of the decision on equality objectives, it is for the decision maker to decide how much weight should be given to the various factors informing the decision. 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.
- Public authorities must be properly informed before taking a decision and 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.

69. On the assumption, contrary to all that I have considered before, that the Minister in making the amendment regulations had to have due regard to the need to (a) (possibly) eliminate age discrimination, (b) advance equality of opportunity between people aged above and below 65, and (c) foster good relations between people aged above and below 65, I am satisfied that the evidence shows that the Minister had this "due regard". It is important to emphasise, and realise (as I fear a number of the appellant's submissions did not), that the test does not

impose a duty on the Minister to achieve a particular result, in the sense of, here, eliminating age discrimination in the entitlement rules for the hrmc part of DLA scheme. It is instead:

> "…a duty to *have due regard to the need* to achieve [the goals identified under section 149(1)]. The distinction is vital……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 of life of the members of the disadvantaged [age] 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." per Dyson LJ at paragraph 31 of *R(Baker) -v- Secretary of State for Communities and Local Government* [2008] EWCA Civ 141.

70. In my judgment the evidence from Mr Joseph shows that the Minister in fact had regard that was appropriate in all the circumstances to extending the severe visual impairment route of entitlement to the hrmc for those aged 65 but who had no current award of the hrmc. This included, albeit perhaps not explicitly, people in the situation of the appellant herself; that is, people who had been severely sight impaired since before they were aged 65. However entitling such groups was outweighed by the countervailing factors referred to in Mr Joseph's evidence (e.g. the future coherence of the scheme and the age 65 cut-off).

71. The appellant argues that the Equality Impact Assessment which accompanied the Bill that became the Welfare Reform Act 2009 was historic. However, she offers no convincing and contrary more up-to date evidence, and as paragraph 12 of *LS* says "Lord Justice Elias pointed out in *R(Hurley and Moore) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin) that steps to gather further information are not necessary if the public body properly considers that it can exercise its duty with the material it has (paragraph 90)". Moreover, beyond this she offers no detailed critique of Mr Joseph's evidence or why it would still not be applicable in 2011.

72. The appellant also seeks to turn in her favour the fact that "there was no [public sector equality duty] in relation to age at the time of the Welfare Reform Act 2009". That is true, but for the reasons given above it counts against section 149(1) having any application. Furthermore, the argument she makes that as a consequence of this it was "therefore inherently unlikely that any equality impact assessment done in relation to that legislation would be sufficient": (i) is flatly contrary to the Equality Act 2010 not having retrospective effect; and (ii) ignores the Equality Impact Assessment which was in the Impact Assessment published alongside the Welfare Reform Bill.

73. The only other criticisms the appellant made though Mr Maka of the evidence are also in my judgment of no merit. The first criticism was that the Impact Assessment done in relation to the Welfare Reform Bill that became 2009 Act was done "after the event". I simply, do not understand this: the Bill was the measure by which the severe visual impairment route of entitlement to the hrmc of DLA was first introduced.

74. The second criticism was that the amendment regulations were made without a full impact assessment and no ECHR compliance statement was made. The last point is both irrelevant and wrong. The "compliance" rule in respect of the Human Rights Act 1998 only applies in respect of Bills put before Parliament: see section 19 of that Act. The first point elevates form over substance. There is no statutory requirement in England and Wales to carry out an equality impact assessment (contrast regulation 5(1) of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012). The important point is whether the evidence shows compliance with the section 149(1) duty at the time the relevant decision is made, not what that evidence is called.

75. It is for all these reasons that the appellant's Equality Act 2010 argument cannot succeed.

Human Rights Act 1998

76. The other discrimination argument the appellant made was under the Human Rights Act 1998. I can take this much more shortly. The argument is that "the implementation of the [amendment regulations] amounts to direct discrimination on grounds of age contrary to… Article 1 Protocol 1 read with Article 14 of the European Convention on Human Rights".

77. As I have noted earlier, the amendment regulations in and of themselves do not discriminate on the ground of age. It is the effect of regulation 3 and Schedule 1 to the DLA Regs, made under section 75 of the SSCBA, which impose the age 65 cut-off. However, a challenge to those provisions and that age cut-off was rejected in *R(DLA) 1/09* (*NT –v- SSWP* [2009] UKUT 37 (AAC). I can identify no good basis for not following, or distinguishing, that decision. The appellant accepts that the age 65 cut-off policy "is, on a fundamental, level, rational". In other words, to use the Article 14 language, she accepts that that policy was not "manifestly without reasonable foundation": per *R (Carmichael and Rourke) (formerly known as MA and others) v SSWP* [2016] UKSC 58; [2016] 1 WLR 4550 at paragraphs [28]-[38]. However she argues that her case has a narrower focus than allowing all people aged 65 in receipt of DLA an entitlement to the hrmc, the burden on the state would be correspondingly smaller, and it was therefore disproportionate to discriminate against her in this case.

78. I agree with the Secretary of State that this argument is not a good one. To start with, the aim of only allowing those entitled to the hrmc before they reached the age of 65 to continue to be entitled to it after they reach that age is plainly a legitimate one. Nor is anything in the means by which that aim is sought to be achieved under the statutory scheme disproportionate in a general sense. A focus on the appellant's particular group, that is of people who were severely sight impaired before they reached the age of 65 **and** who were already over the age of

65 when the regulations were introduced, as a particularly vulnerable group does not in my judgement assist. All persons claiming DLA have a particular vulnerability as opposed to non-disabled persons. Where the line is drawn as to whether any further exception ought to be made to the age 65 cut-off based on "particular vulnerability" is classically a matter that ought to vest in the Minister who is responsible for the intricacies of the social security scheme, and Parliament. An important feature of that scheme is that the benefit position for those aged 65 and over (that is, those of non-working age), differs in kind from what is available under the social security scheme to those aged under 65: see paragraphs 35-36 of *R(DLA)1/09*.

Remedy

79. I come lastly to the point this decision started on. This is that, assuming in favour of the appellant on all the arguments I have in fact found against her on, and assuming that the failure of the DLA statutory scheme - to allow claimants with awards of DLA made before they reached the age of 65 who were also severely visually impaired before that age and before 11 April 2011 to be entitled to the hrmc of DLA on the ground of severe visual impairment - unjustifiably discriminated such people because of their age, what legal remedy could the Upper Tribunal provide to put this wrong right?

80. Given the result in *Robertson*, I raised this point with the appellant and her counsel, Mr Maka, at the start of the second hearing before me. Put bluntly, I asked "If you are right on everything else, what remedy do you ask me to provide?". The answers when they came was either to disapply the Act or disapply the regulations.

81. Disapplication of an Act of Parliament is not open to any court or tribunal under either the Equality Act 2010 or the Human Rights Act 1998. The latter, but not the former, allows courts and tribunals to read Acts "so far as it is possible to do so" to avoid any breach of the European Convention on Human Rights, but no such argument was

being made to that effect here. And for good reason in respect of section 73(1AB) of the SSCBA as it is a beneficial provision which has provided for the first time entitlement to the hrmc on the basis of severe visual impairment. As for the age 65 cut-off in section 75(1) of the SCCBA, it admits of prescribed exceptions but other than that I cannot see any way of reading it other than drawing a clear legislative line at the age of 65.

82. The disapplication of the regulations equally can bring no benefit to the appellant. If the amendment regulations are disapplied then that brings no benefit to the appellant and would remove the entitlement to the hrmc from all severely visually impaired claimants who can only qualify by that route. The age cut-off rules in regulation 3 and Schedule 1 to the DLA Regs may be a more obvious target, however their disapplication would leave section 75(1) alone in place and a general rule with no exceptions that "no person shall be entitled to either component of a disability living allowance for any period after [she] attains the age of 65 otherwise than by an award made before [she] attains that age". Manifestly, that does not assist the appellant either.

83. The moral of this appeal may be that thought needs to be given at the outset to the remedy that is being sought and whether the Upper Tribunal can provide it. In truth what the appellant seeks is the extension of an already beneficial scheme, not its removal. For that, the remedy is more likely to lie in Parliament.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 13th October 2017