

BETWEEN:

THE QUEEN (on the application of)  
ALISON TURNER

Claimant

AND

SECRETARY OF STATE FOR WORK AND PENSIONS

Defendant

AND

EQUALITY AND HUMAN RIGHTS COMMISSION

Intervener

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EQUALITY AND HUMAN RIGHTS COMMISSION'S SKELETON ARGUMENT

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**A. INTRODUCTION**

1. This skeleton argument is filed by the Equality and Human Rights Commission (“**the Commission**”), the statutory body responsible for promoting the awareness, understanding and protection of human rights<sup>1</sup> and enforcing the *Equality Act 2010*<sup>2</sup>. It intervenes in these proceedings by permission of Bourne J dated 17 November 2020.
2. These proceedings raise important questions about the proper construction of the Employment and Support Allowance Regulations 2008 (“**the 2008 Regulations**”) and the lawfulness of the Defendant’s policy for withdrawing an individual’s Employment Support Allowance (“**the Policy**”).
3. The Commission has carefully considered and agrees with the submissions advanced in the Claimant’s skeleton argument. The Commission does not intend to repeat those arguments and confines itself to making two additional points in relation to substantive Challenge Ground B:

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<sup>1</sup> Section 9 of the *Equality Act 2006*.

<sup>2</sup> Section 8 of the *Equality Act 2006*.

3.1. First, even if the Defendant has determined that a claimant falls to be treated as not having limited capability for work pursuant to regulations 22-24 of the 2008 Regulations (*i.e.* for want of good cause for failing to comply with requests for information), that is subject to the additional safety net of regulation 29 of the 2008 Regulations (“*Exceptional circumstances*”). The effect of regulation 29 is that, before withdrawing the benefit, the Defendant must assess whether, by reason of disease or disablement, treating the claimant as not having limited capability for work would pose a substantial risk to his or her mental or physical health. The Policy fails to identify this requirement.

3.2. Second, the duties of inquiry imposed by regulation 24 (“*Matters to be taken into account in determining good cause...*”) and regulation 29 (“*Exceptional circumstances*”) are an important part of securing the Defendant’s compliance with her obligations under Article 3 of the European Convention on Human Rights (“**ECHR**”) and the right of disabled persons to an adequate standard of living (pursuant to Article 28 of the UN Convention on the Rights of Persons with Disabilities).

4. This document will address those points in turn.

## **B. THE REGULATION 29 SAFETY NET**

5. Regulation 22(1) provides, so far as material: “*Where a claimant fails without good cause to comply with the request referred to in regulation 21(1)(b) [sc. information requested in the form of a questionnaire], that claimant is ...to be treated as not having limited capability for work*”.

6. Regulation 23(2) provides, so far as material: “*...where a claimant fails without good cause to attend for or to submit to an [medical] examination [to which he or she has been called], the claimant is to be treated as not having limited capability for work*”.

7. Regulation 24 provides:

*“The matters to be taken into account in determining whether a claimant has good cause under regulations 22 (failure to provide information in relation to limited capability for work) or 23 (failure to attend a medical examination to determine limited capability for work) include—*

- (a) whether the claimant was outside Great Britain at the relevant time;*
- (b) the claimant's state of health at the relevant time; and*
- (c) the nature of any disability the claimant has.”*

8. The argument between the principal parties focusses on the scope of the duty of inquiry into the question of good cause, under the 2008 Regulations read together with s.149 of the *Equality Act 2010*. In particular: does a claimant bear the onus of proving good cause? And to what extent must the Defendant proactively inquire into whether the claimant may have good cause? The Commission agrees with the Claimant’s analysis of those issues and does not add to it here.
9. However, the Commission advances a further point. The Commission submits that where the Defendant has (lawfully) determined that a claimant does not have good cause, such that regulation 22(1) or 23(2) provides for him or her to be treated as not having limited capability for work, that decision nevertheless remains subject to the safety net of regulation 29.
10. Regulation 29, entitled “*Exceptional circumstances*”, provides:

*“(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.*

*(2) Subject to paragraph (3) this paragraph applies if—*

- (a) the claimant is suffering from a life threatening disease in relation to which—*
  - (i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and*
  - (ii) in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure; or*
- (b) the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.*

*(3) Paragraph (2)(b) does not apply where the risk could be reduced by a significant amount by—*

- (a) reasonable adjustments being made in the claimant's workplace; or*

*(b) the claimant taking medication to manage the claimant's condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant.*

*(4) In this regulation “medical evidence” means—*

*(a) evidence from a health care professional approved by the Secretary of State; and  
(b) evidence (if any) from any health care professional or a hospital or similar institution, or such part of such evidence as constitutes the most reliable evidence available in the circumstances.”*

11. The Commission submits that a claimant falls within the first part of regulation 29(1) (*i.e.* he or she is “A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment”) if the Secretary of State has determined pursuant to regulation 22(1) or 23(2) that the claimant does not have limited capability for work. A determination that an individual does not have limited capability for work on the grounds that he or she has not shown good cause for not returning a questionnaire is part and parcel of a “*limited capability for work assessment*”. Were it otherwise, an individual could be penalised for absence of good cause through the withdrawal of ESA even if the Secretary of State were satisfied that this would expose the claimant to substantial risk of harm to physical or mental health.
12. This means that whenever the Secretary of State determines that an individual does not have limited capability for work on account of a failure to cooperate without good cause, she must go on to ask the questions posed by regulation 29(2) and must make reasonable enquiries to obtain the information needed to answer those questions.
13. This provides an important safety net. In particular, it requires the Defendant to determine, in every case caught by regulations 22(1) or 23(2), whether withholding the benefit would pose “*a substantial risk to the mental or physical health of any person*”.
14. The Commission makes the following observations about this duty:
  - 14.1. First, it entails a proactive duty of inquiry. There is no suggestion in the words of regulation 29 that there is any onus on the claimant to prove the risk to his or her mental or physical health.

- 14.2. Second, the enquiry must be into the risks that would result from the withdrawal of the benefit. Risk is a product of the magnitude of the adverse outcome and the probability of that outcome eventuating.
- 14.3. Third, the concept of “*substantial risk to mental or physical health*” affords more focussed protection for vulnerable claimants than the concept of “*good cause*” for not cooperating in an assessment. A claimant may not have had good cause for failing to cooperate, but it may nevertheless be inappropriate to withdraw benefits on which the claimant’s health and wellbeing depend.
- 14.4. Fourth, the duty of enquiry requires what is reasonable in the circumstances and that will vary according to the facts of an individual case. Particularly careful inquiry is likely to be required where it has previously been determined that treating the claimant as not having limited capability for work would expose him or her to a substantial risk to mental or physical health. That was the position in Errol Graham’s case, as set out at paras.9 and 13 of the Claimant’s skeleton argument. Although non-engagement might in principle be capable of establishing that withdrawing the benefit would pose no “*substantial risk to mental or physical health*”, the previous identification of such a risk would call for the exercise of considerable caution.
- 14.5. Fifth, construed in this way, regulation 29 constitutes a vital part of the framework by which the Secretary of State secures compliance with her obligations to a vulnerable class of individuals under Articles 2 and 3 ECHR (as to which, see section C below).
15. The Secretary of State’s Policy does not draw the attention of decision-makers to these requirements and it therefore appears that decision-makers are failing in practice to give effect to this important protective element of the legislative scheme.

### **C. ARTICLE 3 ECHR & UNCRPD**

16. Article 3 ECHR imposes three duties on public bodies that are relevant to the proper construction of regulation 24 and 29 of the 2008 Regulations:

- 16.1. First, a negative obligation not to treat anyone in an inhuman or degrading way (see *R (Limbuella) v Secretary of State for the Home Department* [2006] 1 AC 396).
  - 16.2. Second, a positive operational duty (also called a protection duty) to take reasonable steps to protect those for whom the state has assumed responsibility and knows or ought to know of a real and immediate risk of inhuman or degrading treatment (see *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72<sup>3</sup>).
  - 16.3. Third, a positive obligation “*to establish a framework of laws, precautions and means of enforcement which will, to the greatest extent reasonably practicable, protect life [or, in the article 3 context, protect individuals from inhuman or degrading treatment]*” (*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para.2, *per* Lord Bingham, cited in *Rabone*, para.117, *per* Lord Mance).
17. The Commission submits that those obligations apply to the Secretary of State as follows:
- 17.1. First, in *Limbuella*, the House of Lords held that a decision to withdraw support was an intentionally inflicted act which engaged the negative obligation under Article 3 ECHR (para.56, *per* Lord Hope). That analysis must also apply to a decision to withdraw ESA on the grounds of non-cooperation with the re-assessment process. It follows that – if it is foreseeable that a withdrawal decision will quickly lead to a claimant suffering harm which reaches the threshold of inhuman or degrading treatment - the withdrawal decision would breach the Secretary of State’s negative duty under Article 3. By requiring a decision-maker to assess, so far as reasonably possible, whether withdrawing ESA would cause a substantial risk to mental or physical health, regulation 29 provides an important means of ensuring that the Secretary of State does not commit breaches of the negative obligation under Article 3 ECHR.

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<sup>3</sup> *Rabone* was an Article 2 case, but as Baroness Hale explained at para.104: “*the operational duties under both article 2 and article 3 are similar if not identical*”.

17.2. Second, if the Secretary of State has previously determined that a claimant should be treated as having limited capability for work in order to avoid a “*substantial risk to mental or physical health*”, then she may be taken to have assumed responsibility in a way that engages the protection duty under Article 3 ECHR. In those circumstances, if the Secretary of State ought to know of a real and immediate risk to the claimant of Article 3-level treatment (real meaning not “*remote or fanciful*” and immediate meaning “*present and continuing*” – *Rabone*, paras.38-39, *per* Lord Dyson), then she must take all reasonable steps to protect the claimant from that treatment. Again, by requiring the decision-maker to assess, so far as reasonably possible, whether withdrawing support would cause a substantial risk to mental or physical health, regulation 29 provides an important means of ensuring that the Secretary of State complies with the protection duty under Article 3 ECHR.

17.3. Third, the Commission submits that regulation 29 forms an integral part of the legislative framework for protecting a vulnerable group of individuals from inhuman or degrading treatment.

18. Regulation 29 of the 2008 Regulations – as construed at section B above – also helps secure compliance with the UN Convention on the Rights of Persons with Disabilities (“*UNCRPD*”), to which the UK is a signatory. Article 28(1) provides: “*States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability*”. Article 28(2) provides: “*States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability...*”.

19. In 2016, the UN Committee on the Rights of Persons with Disabilities carried out an Inquiry<sup>4</sup> into the cumulative impact of legislation, policies and measures relating to social security schemes, work and employment, directed to persons with disabilities, having

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<sup>4</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/326/14/PDF/G1732614.pdf?OpenElement>

regard (inter alia) to article 28 UNCRPD. The Committee's findings included the following:

- 19.1. The pre-implementation assumption of the *Welfare Act 2012* reforms was that following work capability assessments a significant percentage of disabled people would no longer rely on social allowances.
- 19.2. Government statements linked the reforms to “*reducing benefit fraud*” but “*The inquiry ...found no substantiation of the alleged benefit fraud by persons with disabilities*” [Paragraph 85].
- 19.3. The Committee found that the introduction of the *Welfare Reform Act 2012* was not thoroughly compliant with the PSED and that “*Although the State party asserted that a cumulative impact assessment of the various policy measures affecting persons with disabilities was not technically feasible or practicable, the evidence collected by the inquiry indicates that a cumulative impact assessment could have been conducted with the data and information available in the State party*” [Paragraphs 86 and 87].
- 19.4. The Committee noted that it had “*collected evidence indicating that the information, advice and counselling provided to persons with disabilities on the different steps in the assessment processes and decisions on their entitlements were limited, non-existent or not provided in accessible formats and languages. That was coupled with uncertainty about the outcomes of those processes, triggering anxiety, psychological strain and financial hardship. The Committee also collected evidence about persons with disabilities whose mental health condition had severely deteriorated as a result of the factors mentioned above*” [Paragraph 91].
- 19.5. The Committee stated that “*Evidence was produced about mitigating measures put in place by central authorities to support persons with disabilities in coping with the curtailing of their social security benefits. Evidence was also produced indicating that those mitigating measures were of a temporary nature for individuals concerned by the measures, not regularly offered or known by claimants affected by decisions*

*and not sustainable enough to outweigh the financial impact of the reduction or suppression of income-maintenance benefits.*”[Paragraph 94]

20. Overall, the Committee found that there was overwhelming evidence from an extensive range of sources that aspects of welfare reform are linked to significant adverse impacts on disabled people. The UK Government rejected all of the Committee’s findings and recommendations. The UN Committee made subsequent recommendations in August 2017<sup>5</sup>. The Committee stated that they were concerned about “*the detrimental impact of the Employment and Support Allowance conditionality and sanctions on persons with disabilities and the limited access to reconsideration and appeal procedures*” (para.58(d)) and recommended that the UK Government carry out a cumulative impact assessment and “*conduct a review of the conditionality and sanction regimes concerning the Employment and Support Allowance, and tackle the negative consequences on the mental health and situation of persons with disabilities*” (para.59(e)).

21. The Commission submits that the proper construction and application of regulation 29 of the 2008 Regulations would go some way to mitigating the problems identified by the UN Committee.

## **E. CONCLUSION**

22. The Commission respectfully endorses the Claimant’s submissions on the Secretary of State’s duty of inquiry pursuant to regulation 24 of the 2008 Regulations and/or s.149 of the *Equality Act 2010*. In addition, for the reasons set out above, the Commission submits that regulation 29 of the 2008 Regulations also imposes a (further-reaching) duty of inquiry which – properly construed – promotes the discharge of the Secretary of State’s obligations under Article 3 ECHR and the UNCRPD.

**CHRIS BUTTLER**  
**MATRIX**

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**ANGHARAD PRICE  
EQUALITY AND HUMAN RIGHTS COMMISSION**

**14 DECEMBER 2020**