OUTER HOUSE, COURT OF SESSION

[2025] CSOH 50

P867/24

OPINION OF LADY HOOD

In the Petition of

PETER JOHN FANNING AND FLORENCE AGNES FANNING

Petitioners

for

Judicial Review of the decisions by the Secretary of State for Work and Pensions and the Scottish Ministers to cut the Winter Fuel Payment

Petitioners: Cherry KC, Dailly; Drummond Miller LLP
First respondent: Webster KC, Maciver, Dewart; Office of the Advocate General for Scotland
Second respondents: Mure KC, Welsh; Scottish Ministers (SGLD)

13 June 2025

Introduction and parties

[1] This case revolves around the change made to the eligibility for financial assistance with winter heating costs in the UK for winter 2024/25. The petitioners are Scottish residents, who lost their entitlement to such assistance. Because they both suffer from medical conditions exacerbated by cold weather, the petitioners were worried about their ability to afford their heating costs. The first respondent is the Minister within the UK Government who was responsible for their policy decision on financial assistance with winter heating costs. The second respondents are the Scottish Ministers (ie, the Scottish Government) as responsible for their policy decision on this matter. In any democracy, the

decisions of government on issues like this will give rise to public discussion and debate. This case is not a verdict, nor even an expression of opinion, on the merits or demerits of government policy as debated in the public arena. Instead, the current proceedings were brought by the petitioners to test a much narrower question: namely, whether the policy decisions of each of the respondents (and the legislation which brought those policies into effect) are unlawful, and so liable to be struck down by the courts.

Orders sought by the petitioners

[2] In the current petition, the petitioners seek:

(i) declarator that the first respondent failed to exercise her duties under section 149 of the Equality Act 2010 before making the policy decision with regard to the Winter Fuel Payment ("WFP") and failed to carry out an equality impact assessment ("EQIA") in accordance with her duties under the 2010 Act *et separatim* failed to consult with persons of pensionable age at common law;

(ii) declarator that the second respondents failed to exercise their duties under section 149 of the Equality Act 2010 before making their policy decision with regard to the Pension Age Winter Heating Payment ("PAWHP") and failed to carry out and publish an EQIA which satisfied the requirements of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 *et separatim* failed to consult with persons of pensionable age at common law;

(iii) declarator that the respondents' policy decisions, the Social Fund Winter Fuel Payment Regulations 2024 and the Winter Heating Assistance (Pension Age) (Scotland) Regulations 2024 were irrational and Wednesbury unreasonable;

(iv) declarator that the respondents' policy decisions, the 2024 Regulations and the Scottish 2024 Regulations were unlawful in terms of section 6 of the Human Rights Act 1998, having regard to the petitioners' rights under Articles 2 and 8 of the European Convention on Human Rights;

(v) reduction of the first respondent's policy decision and the 2024 Regulations as unlawful;

(vi) reduction of the second respondents' policy decision and the Scottish 2024 Regulations as unlawful;

(vii) an order under section 45(b) of the Court of Session Act 1988 for specific performance of the first respondent's duty to undertake an EQIA in compliance with the Equality Act 2010 in relation to her decision regarding WFP;

(viii) an order under section 45(b) of the Court of Session Act 1988 for specific performance of the second respondents' duty to undertake an EQIA in compliance with the Equality Act 2010 and the 2012 Regulations, in relation to their decision regarding WFP (*sic*);

(ix) the expenses of the petition; and

(x) such other orders as may seem to the court to be just and reasonable.

Relevant procedural history

[3] The procedural hearing and its continuations took place on 4 December 2024, 15 January 2025, and 24 January 2025. These hearings were much taken up with whether the petitioners ought to be allowed to introduce new grounds of challenge: ultimately, they were permitted to do so. The substantive hearing took place over 13, 14 and 25 March 2025. Senior counsel for each of the parties adopted the Note of Argument which had been lodged

in advance of that hearing, and expanded upon this with clear and thorough oral submissions. After describing the factual and legislative background to the case, I will summarise each of the parties' legal submissions. Parties were agreed that submissions on the availability and appropriateness of the specific remedies sought by the petitioners might best be reserved until a decision was reached on the merits of the petition.

Factual and legislative background

[4] The factual background to the petitioners' challenge, and the legislative history of financial assistance with winter heating costs, are intertwined. Much of it was uncontentious. The following summary is drawn from affidavits lodged by the various parties, which I accepted as providing credible and reliable evidence of these matters.

[5] Section 138 of the Social Security Contributions and Benefits Act 1992 allowed the first respondent to make payments out of the Social Fund to meet heating expenses which appeared to the first respondent to have been, or to be likely to be, incurred in cold weather. The Social Fund Winter Fuel Payment Regulations 2000 (SI 2000/729) were accordingly made, and were amended from time to time. The payment made in terms of those Regulations is commonly referred to as the Winter Fuel Payment ("WFP"). It is an annual, tax free, lump sum payment, paid to those who have attained qualifying age and meet certain other requirements. Eligibility for the payment in respect of a particular winter is assessed as at the qualifying week, which is the week beginning on the third Monday of September.

[6] Section 23 of the Scotland Act 2016 made some alteration to the areas devolved by virtue of the Scotland Act 1998, and in particular brought within devolved competence, the provision of financial or other assistance for the purposes of meeting or reducing expenses

for heating in cold weather. That section also amended section 138 of the 1992 Act: references to the first respondent were to be read as if they were references to the Scottish Ministers, and references to payments out of the Social Fund, as if they were references to payments made by the Scottish Ministers. These provisions came fully into effect from 1 April 2024. There was no dispute as between the respondents that the first respondent could not now make payments of WFP in respect of Scotland under the previous statutory system: this was subject, of course, to the continued power of the United Kingdom Parliament to legislate for Scotland in terms of section 28(7) of the Scotland Act 1998. The first respondent retained the power to make payments of WFP to persons ordinarily resident in England and Wales.

[7] Section 30 of the Social Security (Scotland) Act 2018 allows the second respondent to make Regulations for the provision of winter heating assistance. Social Security Scotland is the executive agency of the Scottish Government that delivers devolved social security payments. Since 2018, there has been a staged introduction of the social security benefits devolved to Scotland by the implementation of the Smith Agreement. The 2018 Act also provided for the establishment of the Scottish Commission on Social Security ("SCOSS"), a body independent of the second respondents, which provides independent analysis and scrutiny of the Scottish social security system. In autumn 2023, the second respondents undertook a consultation regarding a proposed new benefit, Pension Age Winter Heating Payment ("PAWHP"). It was the stated intention of the second respondents, subject to considerations of affordability and deliverability, that PAWHP would be a universal, and not a means-tested, payment. It was intended that those persons who had been eligible for WFP, would also be eligible for PAWHP. It was, however, expressly noted that the relevant funding would be through adjustment to the Block Grant, and that if the UK Government

were to restrict eligibility for WFP, that would result in a lower Block Grant Adjustment transfer and a consequent pressure for the second respondents. A draft version of an EQIA was incorporated in the consultation document. Once the consultation closed, the responses were analysed by the second respondents, who published their response in May 2024. On 29 April 2024, the second respondents had shared with SCOSS, and published, draft regulations reflecting the intention that PAWHP would be paid on the basis of universal eligibility. A further version of the EQIA had accompanied the draft regulations shared with SCOSS. SCOSS provided comments upon the draft regulations. In terms of the number of beneficiaries, and the dataset, PAWHP was to be the most significant of the devolved social security benefits to be launched to date - with a consequent operational challenge.

[8] Before going further, it is also important to understand a little more as to the source of the second respondents' funding. In terms of the current version of the Fiscal Framework between the UK Government and the second respondents, the latter receive a Block Grant which is determined by reference to the "Barnett Formula". The transfer of responsibility for certain welfare payments from the first respondent to the second respondents results in a saving to the UK Treasury, and an adjustment is made to the amount of the Block Grant which is made to the second respondents. This adjustment reflects what was spent by the first respondent in the year prior to the devolution of the power in question. If the UK Government reduces entitlement to a welfare benefit in England and Wales, which benefit is devolved to Scotland, the Block Grant Adjustment is reduced. If there is to be a reduction in the Block Grant Adjustment, the impact of this can be deferred to the next financial year (when its impact would then be felt, along with other reductions to the Block Grant Adjustment in that financial year). The Block Grant itself is not hypothecated or ring-fenced,

by which is meant that the second respondents have the power to allocate the monies without being constrained to spend certain elements of the Block Grant on particular areas. The Block Grant is the core source of the second respondents' funding. The second respondents also have revenue-raising powers, and certain powers to borrow money.

[9] The first respondent is part of the UK Government that took office following upon the General Election of July 2024. The new Chancellor of the Exchequer was advised by officials of a projected overspend. The first respondent was asked by the Chancellor whether changes might be made in the payment of WFP which would contribute to reduction of the identified deficit. In particular, it was identified that a financial saving could be made by the UK Government if WFP were to be payable only to those persons in receipt of Pension Credit. This essentially meant that payment of WFP would now be means-tested, rather than on a universal basis. Mr Andrew Latto was a civil servant who (together with colleagues) was responsible for a number of submissions to the first respondent between 24 July 2024 and 29 July 2024. The first submission (dated 23 July 2024) noted *inter alia* the impact of means-testing WFP on pensioner poverty, and on the devolved nations of Scotland and Northern Ireland, as well as the need for consideration to be given to the public sector equality duty ("PSED"). The submission to the first respondent dated 24 July 2024 continued to acknowledge that a decision on means-testing WFP would have implications within the devolution framework. On 26 July 2024, the first respondent was provided with a table setting out options for her consideration. After discussion, she refined that to two potential courses of action. The submission to the first respondent dated 27 July 2024 considered different methods of assessing eligibility, if WFP were no longer to be paid on a universal basis. It acknowledged the potential for an increase in poverty and of effects for vulnerable groups, and suggested a means of mitigating this by increasing the take-up of

Pension Credit. The submission was frank as to the practical implications for Scotland and Northern Ireland, and the potential for criticism by the devolved nations. Finally, the submission to the first respondent dated 29 July 2024 sought her decision on the options for means-testing the payment of WFP. The first respondent was provided with GB-wide data. The impact of the first respondent's decision on the devolved nations was explained (including the impact on deliverability of payment of the proposed new benefit by the second respondents). The first respondent was expressly reminded of the need to take the PSED into account, and a High Level Equality Analysis was provided (also described within the body of that document as an EQIA). It was also noted that further analysis ought to be carried out as the policy developed. An updated High Level Equality Analysis was produced later that day, in response to the first respondent's request that further work be done. On 29 July 2024, the Chancellor announced in the House of Commons that, from winter 2024/25 onwards, those not in receipt of Pension Credit or certain other means-tested benefits would no longer receive WFP. This is the first respondent's policy decision of 29 July 2024, which is challenged by the petitioners. On 22 August 2024, the UK Government duly promulgated the Social Fund Winter Fuel Payment Regulations 2024 (SI 2024/869) ("the 2024 Regulations"), which gave effect to the policy change to eligibility for WFP. On 12 September 2024, during the course of a radio interview, the Secretary of State for Health in the UK Government said that no report had been carried out on the potential health impact of the change in eligibility for WFP, but that the Chancellor would publish an impact assessment for her fiscal decisions at the budget and the spending review. On 13 September 2024, the Prime Minister said that an assessment into the impact of the change in eligibility had not been carried out. The 2024 Regulations came into force on 16 September 2024. They revoked the regulations which had been made under the 2000 Act.

The provisions of the 2024 Regulations on payment of WFP extend to England and Wales only. These regulations giving effect to the policy decision under challenge, are also challenged by the petitioners. Between the policy decision of 29 July 2024 and the promulgation of the 2024 Regulations, the first respondent was provided with a note detailing activities undertaken to increase the uptake of Pension Credit by those eligible.

[10] At the time of the Chancellor making her announcement on 29 July 2024, there had been no prior consultation or discussion of that announcement with the second respondents, other than a brief telephone call some 90 minutes before the announcement, giving intimation to the Cabinet Secretary for Finance and Local Government that it would include an announcement regarding WFP. It was estimated at that point in time that the result of the first respondent's policy decision was that the Block Grant Adjustment to the second respondents would be reduced by the sum of £160 million (the final figure, clarified at the time of the October 2024 budget statement, would be confirmed to be £147 million). The second respondents had already considered themselves subject to significant budgetary pressures. Regulations for payment of PAWHP required to be laid and approved by the Scottish Parliament, with the 'qualifying date' for identifying those eligible for PAWHP for winter 2024/25 being the week of the third Monday of September 2024. A change to PAWHP mid-summer posed additional operational challenges. If the benefit was to be delivered in some form in time for winter 2024/25, then a decision had to be taken as to what form PAWHP should take. Against this backdrop, the second respondents decided it was no longer affordable for PAWHP to be paid on a universal basis for winter 2024/25. They considered that they had no option but to replicate the decision of the first respondent that WFP would be means-tested. On 14 August 2024, the second respondents' Cabinet Secretary for Social Justice announced this decision (by way of a written answer to a

question in the Scottish Parliament). This is the second respondents' policy decision which is challenged by the petitioners. The second respondents duly published revised regulations in September 2024, namely the Winter Heating Assistance (Pension Age) (Scotland) Regulations 2024 (SSI 2024/351) ("the Scottish 2024 Regulations"). A revised EQIA accompanied these regulations. The Scottish 2024 Regulations were approved by the Scottish Parliament on 13 November 2024: none of the MSPs present voted against their approval, although many abstained. In terms of the Scottish 2024 Regulations, an individual is entitled to payment of PAWHP if (s)he has reached pensionable age, and meets both the benefit and the residence condition. The residence condition is that the individual is ordinarily resident in Scotland (or is habitually resident in certain other countries and further conditions are met). An individual is not entitled to PAWHP if (s)he has been awarded WFP under the 2024 Regulations, or a payment under the Social Fund Winter Fuel Payment Regulations (Northern Ireland) 2024. An agency arrangement was entered into, whereby the DWP would make the payments of PAWHP on an agency basis on behalf of the second respondents. Payments of PAWHP were accordingly made under the Scottish 2024 Regulations in December 2024 and January 2025. The Scottish 2024 Regulations, giving effect to the second respondents' policy decision, are also challenged by the petitioners. In March 2025, the second respondents published draft legislation which would amend the Scottish 2024 Regulations, to provide that in winter 2025/26 a payment of £100 will be made to persons of pensionable age on a universal basis, with payments of higher amounts made to those in receipt of a relevant qualifying benefit such as Pension Credit.

[11] The petitioners are married, and live in Scotland. They are both of pensionable age: the first petitioner is 74 years of age, and the second petitioner is 73 years of age. The petitioners experience a number of health conditions which are exacerbated by cold weather.

The petitioners' financial position is as outlined in their affidavits. Neither qualifies for Pension Credit. In 2023, the petitioners received WFP. However, they were not eligible for payment of PAWHP over winter 2024/25. They were concerned as to affording their heating bills over the winter.

The law

[12] Section 149 of the Equality Act 2010 provides as follows (so far as relevant):

"149 *Public sector equality duty*

(1) 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.

…

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:-
   (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
   (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
   (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

…

(7) The relevant protected characteristics are –
age;
disability;
gender reassignment;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.
…"

[13] Regulation 5 of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 provides as follows:

> *"5.— Duty to assess and review policies and practices*
>
> (1) A listed authority must, where and to the extent necessary to fulfil the equality duty, assess the impact of applying a proposed new or revised policy or practice against the needs mentioned in section 149(1) of the Act.
> (2) In making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant protected characteristic (including any received from those persons).
> (3) A listed authority must, in developing a policy or practice, take account of the results of any assessment made by it under paragraph (1) in respect of that policy or practice.
> (4) A listed authority must publish, within a reasonable period, the results of any assessment made by it under paragraph (1) in respect of a policy or practice that it decides to apply.
> (5) A listed authority must make such arrangements as it considers appropriate to review and, where necessary, revise any policy or practice that it applies in the exercise of its functions to ensure that, in exercising those functions, it complies with the equality duty.
> (6) For the purposes of this regulation, any consideration by a listed authority as to whether or not it is necessary to assess the impact of applying a proposed new or revised policy or practice under paragraph (1) is not to be treated as an assessment of its impact."

[14] In terms of section 6 of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Article 2 of the Convention provides:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Submissions for the petitioners

[15] The petitioners invited the court to allow the petition, with their first to twelfth pleas-in-law being sustained, and the respondents' pleas-in-law repelled.

Parliamentary privilege

[16] The petitioners sought to rely upon the proceedings in the UK Parliament referred to in their pleadings, simply as a means of establishing what was said or done by Parliament as a matter of historical fact. This was permissible, with reference to the classic statement of the law found in *R (Heathrow Hub)* v *Secretary of State for Transport* [2020] EWCA Civ 213 at para [158]. The petitioners were not seeking to prove the truth of what had been said in the UK Parliament: the case of *Kimathi* v *Foreign and Commonwealth Office* [2018] 4 WLR 48 could therefore be distinguished. Specifically, with regard to the proceedings of the House of Lords committee, the averments in that regard did not relate to what was said by the committee, and the case of *Prebble* v *Television New Zealand Ltd* [1995] 1 AC 321 could accordingly be distinguished.

Standing

[17] The petitioners' standing to bring their challenge had been questioned only in so far as it related to the acts of the first respondent. The petitioners' position was that Scots law has historically taken a liberal approach to the question of what constitutes sufficient interest. Standing has been seen as based on interests rather than rights, with consideration of whether a petitioner has been directly affected by the subject-matter of an application: *AXA General Insurance Co Ltd* v *Lord Advocate* 2012 SC (UKSC) 122. That approach now

found expression in the requirement in section 27B(2)(a) of the Court of Session Act 1988 that the petitioners have a sufficient interest in the subject matter of the application. In this case, the first respondent's statistical analysis of the proposed change to the basis of the payment of WFP was undertaken on a GB-wide basis, and the first respondent's decision was made in order to effect UK-wide financial savings. The first respondent's decision resulted in a reduction in the expected Block Grant funding to the second respondents. The material produced on behalf of the first respondent regarding the options under consideration in the days leading up to the policy decision of 29 July 2024, demonstrated that her advisers considered that the financial constraints and issues of timing consequent on the first respondent's decision, would mean that it was very likely that the second respondents would feel constrained to mirror the first respondent's policy decision. The second respondents' own position is that the first respondent's policy decision led to a reduction in Block Grant funding, such that the second respondents were unable to identify the additional funding necessary to mitigate the first respondent's policy decision. But for the first respondent's policy decision to means-test WFP (implemented by the 2024 Regulations), the second respondents would not have made their policy decision to means-test PAWHP (implemented by the Scottish 2024 Regulations). The second respondents' policy decision was not unforeseeable, and hence was not in the nature of a *novus actus interveniens*. The first respondent's policy decision of 29 July 2024 directly affected the petitioners. On this basis, the petitioners had sufficient interest in the first respondent's policy decision and the 2024 Regulations to mount the challenge which they did: they were directly affected by the policy decision and implementing legislation.

Public sector equality duty

[18] The first respondent was bound to comply with the PSED contained in section 149 of the Equality Act 2010 when taking her policy decision to restrict eligibility for WFP. The protected characteristics of age and disability in the 2010 Act were relevant here. Adverse impacts of the respondents' decisions included an increase in excess winter deaths, injury to health, well-being and quality of life, and vulnerable pensioners being placed into absolute or relative poverty. A comprehensive EQIA is a method of demonstrating compliance with the PSED, although it was accepted that an EQIA was not mandated by the 2010 Act if the public authority could show that the PSED had been complied with in substance. With regard to what was required under the 2010 Act, reliance was placed on *Bracking and others* v *Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 (approved by the UK Supreme Court in *Hotak* v *Southwark London Borough Council* [2016] AC 811, and endorsed and applied in Scotland in *McHattie* v *South Ayrshire Council* 2020 SLT 399). The PSED lies upon the minister or decision-maker personally: *R (National Association of Health Stores)* v *Department of Health* [2005] EWCA Civ 154. In this case, the comments made outwith Parliament by the Prime Minister and the Secretary of State for Health, and the Explanatory Note to the 2024 Regulations, all confirmed a full impact assessment had not been carried out. The High Level Equality Analysis of July 2024 did not bear to be an EQIA, and was inadequate for these purposes. It contained no assessment of the ways in which adverse impacts and risk to those with protected characteristics such as age and disability could be eliminated or mitigated before the first respondent laid the 2024 Regulations. The material produced by the first respondent was largely focussed on the policy decision to make financial savings by means-testing the payment of WFP, rather than on the duties under section 149 of the 2010 Act. There was no consideration of mitigation of the impact of the decision for the

majority of pensioners who, like the petitioners, were not eligible for Pension Credit. No consultation had been carried out. There was insufficient information for the first respondent to take the decision which she did. In any event, the information available to the court related only to the documents proffered to the first respondent by her officials: there was no evidence of what was actually taken into account by the first respondent, of the steps which she had taken to meet the statutory criteria, or of her assessment of risk (or the extent of its impact, and the ways in which that risk might be eliminated). It was suggested on the petitioners' behalf that the lateness with which some of the material had been tendered to the court, could raise issues as to the credibility and reliability of the affidavit's deponent, and was in any event redolent of the type of "rearguard action" after a concluded decision which was warned against in the case law: *Bracking*. There was no credible documentary evidence that the PSED had been complied with by the first respondent. There was no evidence of the necessary rigour, and conscious approach to the statutory criteria. It was notable that in its letter of 13 September 2024, the EHRC had expressed concerns that the PSED had not been complied with. The Social Security Advisory Committee, in its letter of 20 September 2024 to the first respondent, had also expressed disappointment that no assessment of impact had been tendered along with the regulations. In her response to the Work and Pensions Select Committee, the first respondent referred to possible mitigation by way of the pre-existing Pension Credit scheme: but this did not discuss mitigation for those not in receipt of Pension Credit. The first respondent had not discharged the PSED. This tainted both the policy decision and the implementing regulations, which accordingly both fell to be reduced.

[19] With regard to the second respondents, they were subject not only to the PSED under section 149 of the 2010 Act, but to an additional duty under Regulation 5 of the Equality

Act 2010 (Specific Duties) (Scotland) Regulations 2012 which obliged the publication of an assessment in respect of any proposed new or revised policy. The second respondents' decision of 14 August 2024 was, properly understood, a revision of the previous policy to pay PAWHP on a universal basis. With regard to the content of the statutory duty which the second respondents were under, reliance was again placed on *Bracking* (the application of which to Scotland could also be seen in *AB* v *Scottish Borders Council* [2022] CSOH 68), and on *R (National Association of Health Stores)*. The duty of due regard required that a public authority be properly informed before taking a decision: if the relevant material was not available, there was a duty to acquire it. Section 149(3) of the 2010 Act imposed active duties to address mitigations: *Bracking*. It was unimportant that the second respondents' policy decision of 14 August 2024 may have flowed from financial constraints. That decision was taken by the second respondents very quickly. Although the second respondents had previously made efforts to comply with the PSED in the development of the original policy on PAWHP, that was all set aside in taking their policy decision of 14 August 2024. Given the significant alteration to the original policy, the second respondents' statutory duties were not satisfied by way of reference to the EQIA which accompanied the original draft regulations, nor by repetition of parts thereof in the EQIA which accompanied the Scottish 2024 Regulations. The adverse impact of means-testing the payment of PAWHP, and potential mitigation, were not considered in the latter document. No fresh data had been gathered, despite SCOSS recommending that further relevant data should be collected to inform longer-term development of PAWHP. The revised EQIA of September 2024 was simply a "rearguard action": in truth, at the time when the policy decision was taken on 14 August 2024, financial considerations had trumped everything else, including the second

respondents' duties under section 149 of the 2010 Act. There was no conscious approach to the statutory criteria. The PSED had not been fulfilled by the second respondents.

Duty to consult

[20] There was a legitimate expectation of consultation on the respective policy decisions of both respondents: *R (Moseley)* v *Haringey London Borough Council* [2014] 1 WLR 3947 (as applied in Scotland in *AB* v *Scottish Borders Council*). This legitimate expectation arose in one of two ways. Firstly, there was a prior practice of consultation. On the first respondent's part, this arose from previous consultations on social security matters carried out by the DWP. On the second respondents' part, it arose from their previous consultation on PAWHP. Secondly, and in any event, there was a legitimate expectation of consultation due to the importance of the subject-matter to the petitioners, and to persons of pensionable age in the UK in general: *R (United Company Rusal PLC)* v *The London Metal Exchange* [2014] EWCA Civ 1271; *R* v *Brent London Borough Council ex p Gunning* (1985) 84 LGR 168. A public consultation would be the conventional way of fulfilling the duty to consult which both respondents were under. No such consultation had been carried out in this case. Furthermore, as could be seen from *Bracking*, the duty to have due regard in terms of section 149 of the 2010 Act involved a duty of inquiry and the ingathering of information where the relevant material was not available. This might result in the need for consultation, although the petitioners did not go so far as to say that a duty to consult arose in almost every case to which section 149 of the 2010 Act applied.

Irrationality / Wednesbury unreasonableness

[21] The petitioners referred to the traditional two-limb test in *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223, namely that (i) the decision-maker had taken into account matters (s)he ought not to, or neglected to take into account matters which (s)he ought; or (ii) the decision-maker had come to a conclusion so unreasonable that no reasonable decision-maker could have come to it. Each of the respondents failed both limbs of this test. There had been a failure to prepare an EQIA and take into account relevant factors. There had been no consideration of mitigation for those not in receipt of Pension Credit. The respondents' policy decisions were taken in the knowledge that they would cause excess winter deaths, jeopardise the health and lives of vulnerable pensioners, and increase the number of pensioners in poverty. The respondents failed to take account of the contemporaneous increase in energy costs. Standing the empirical evidence, no reasonable Minister could have come to the conclusion that payment of WFP and PAWHP ought to be on a means-tested basis. The court was not being asked to substitute its own decision for that of the executive and legislature. It was accepted that in matters of socio-economic policy (which included social security benefits), the judgment of public authorities was in general entitled to a high level of respect, and that the test of irrationality had to be applied with considerable care and caution: *R (Pantellerisco)* v *Secretary of State for Work and Pensions* [2021] PTSR 1922 at para [57]; *R (SC)* v *Secretary of State for Work and Pensions* [2022] AC 223 at para [146]. However, whilst the threshold might be high, it was not insuperable: *Secretary of State for Work and Pensions* v *Johnson & Ors* [2020] PTSR 1872 at para [107]. Where they were in conflict, the decisions of the appellate courts in *Johnson,* and *R (SC)* v *Secretary of State for Work and Pensions*, ought to be preferred to the first instance decision in the case of *R (Gurung)* v *Secretary of State for Defence* [2008] EWHC 1496 (Admin). WFP was a

straightforward universal benefit paid to all, which could therefore be distinguished from complex systems, such as those under consideration in the cases of *Johnson*, and *Pantellerisco*. Elderly people suffering from disabilities rendering them vulnerable to cold temperatures, such as the petitioners, constitute a particularly vulnerable group in society that has suffered considerable discrimination in the past: closer scrutiny is therefore demanded of decisions applying to such groups (*R (SC)* v *Secretary of State for Work and Pensions*, at paras [144] - [145]). The significant failures to consult and comply with the PSED in this case had such egregious consequences that the irrationality threshold is met in this case, with respect to both respondents.

Convention rights

[22] The respondents' policy decisions and the implementing regulations were unlawful in terms of section 6 of the Human Rights Act 1998. The petitioners sought to rely upon Articles 2 and 8 of the European Convention on Human Rights, as contained in schedule 1 to the 1998 Act. The petitioners were vulnerable due to their age and ill-health. They had a right to effective protection and mitigation by the respondents from the serious adverse effects on their lives, health, well-being and quality of life, of cold household temperatures during the winter. Each of the respondents was in breach of their duty. The petitioners were sufficiently personally affected by the respondents' action or inaction to claim victim status under Article 34 of the Convention.

[23] Article 2 of the Convention was engaged as the respondents had failed to prevent the lives of vulnerable pensioners, such as the petitioners, from being avoidably put at risk by withdrawal of WFP and PAWHP, when the respondents knew that doing so would put lives at risk over the winter months: *Osman* v *the United Kingdom* (28 October 1998,

Reports 1998-VIII); *Fernandes* v *Portugal* (2017) 66 EHRR 28. That an interpretation of Article 2 or Article 8 might extend into the sphere of social and economic rights is not a decisive factor against such an interpretation: *Budina* v *Russia* (App No 45603/05). The duty to protect the petitioners' right to life under Article 2 includes the setting up of an appropriate legal and regulatory framework, and its effective implementation. The case of *Verein KlimaSeniorinnen Schweiz* v *Switzerland* (2024) 79 EHRR 1 represented a development of the case law, not an innovation, in its confirmation that this duty also extended to environmental threats and harms: it related to the risk to health which was posed by hot weather, just as the petitioners in this case were at risk due to cold weather.

[24] There is a direct and immediate link between the respondents' decisions and the implementing regulations, and the petitioners' private lives, such as also to engage Article 8 of the Convention. Article 8 could extend to socio-economic rights: *Budina*; *Beeler* v *Switzerland* (2023) 76 EHRR 33. Nor was this confined to cases where Articles 8 and 14 were being relied upon in combination: *Jivan* v *Romania* (2023) 76 EHRR 9. In the current case, the aim of WFP/PAWHP, its prior (or intended) universality of payment, the length of time the petitioners had been in receipt of WFP, and the practical repercussions of the withdrawal of such assistance on how they organised key aspects of their daily life, meant that Article 8 was engaged. The petitioners' case was analogous to the case of *Jivan*, since the petitioners were dependent upon their state pensions, and have disabilities. The case of *X* v *Ireland*, Case 23851/20, could be distinguished, since there the claimants were not losing child benefit which they had previously received. The case of *Verein KlimaSeniorinnen Schweiz* confirmed that the right under Article 8 to private and family life includes the right to the enjoyment of health and well-being free from environmental threats, which would encompass risks from cold weather. Just as the State in that case had assumed the obligation to deal with the

effects of climate, here the State had assumed responsibility by its long-standing assistance with cold weather costs. In any event, the Social Security (Scotland) Act 2018 classified social security as a human right, and this must be a reference to Convention rights. The petitioners accordingly have a right to effective protection and mitigation from the serious adverse effects of cold household temperatures during the winter on their lives, health, well-being and quality of life, and the respondents were in breach of their duty. The interference with the petitioners' Article 8 rights was not in accordance with the law, given each of the respondents' failure to comply with the PSED, and the irrationality of their decisions. Nor was it proportionate, given the lack of consultation, failure to comply with the PSED, and the irrationality of the decision. The *dicta* of Lord Reed in the case of *Bank Mellat* v *HM Treasury (No 2)* [2014] AC 700 regarding proportionality, must be read subject to his subsequent *dicta* in the case of *R (SC)* v *Secretary of State for Work and Pensions*. Nor were the respondents' actions in pursuit of a legitimate aim, because financial constraints had been elevated above the other factors which the respondents had to take into account. The petitioners were part of a group which had been considerably discriminated against in the past, with the result that the State's margin of appreciation was substantially narrower, and thus weighty reasons were needed to restrict their Convention rights: *R (SC)* v *Secretary of State for Work and Pensions*.

Submissions for the first respondent

[25] The first respondent sought that her first plea-in-law be upheld, and the petition (in so far as directed against the first respondent) be dismissed as irrelevant and lacking in specification. The first respondent's fourth plea-in-law should also be sustained, by excising certain of the petitioners' averments referring to parliamentary proceedings. The main focus

of the first respondent's submissions was the argument that the petitioners lacked standing. Arguments as to the substance of the petitioners' challenge were a fall-back position: in that regard, the first respondent sought that her seventh plea-in-law be upheld, and the orders sought (in so far as directed against the first respondent) be refused.

Parliamentary privilege

[26] The first respondent had drawn the attention of the Speaker's Counsel to the petitioners' inclusion in their pleadings of references to parliamentary proceedings. Correspondence from the Speaker's Counsel raising concerns had been lodged with the court. The legal position was as set out in Article IX of the Bill of Rights (accepted to be part of the law of Scotland: see *Coulson* v *HMA* [2015] HCJAC 49). Parliamentary material is inadmissible as evidence if it would place the court in a position of having to rule upon the truthfulness or accuracy of the material in order to determine whether what is asserted had been proven: *Kimathi*. It was impermissible for the court to be asked to draw an inference from what was said in Parliament. Reference to parliamentary proceedings was not challenged by the first respondent in so far as these were a matter of historical record: *R (Heathrow Hub)* v *Secretary of State for Transport*. The petitioners' reference to the Chancellor's announcement of 29 July 2024 fell into this category, although the position in respect of the subsequent comment made by the Chancellor on the same date was less clear cut. The petitioners' reference to the parliamentary proceedings on 10 and 11 September 2024 was either irrelevant to the case, or an impermissible attempt to draw an inference from the absence of a response by the first respondent or the Prime Minister. Similarly, it was hard to see how the report by the House of Lords Committee could be relevant, unless the petitioners were seeking to draw an inference from it, by suggesting that this constituted

proof of deficiencies identified in the report. The petitioners were seeking to refer to these parliamentary proceedings in constructing their legal argument. They were inviting the court to question or impeach what had been said in Parliament. The references in the petitioners' pleadings to parliamentary proceedings should therefore be deleted save in so far as they are a means of establishing what was said or done as a matter of historical fact.

Standing

[27] In the period prior to July 2024, legislative and executive competence with regard to assistance with heating expenses had been transferred to the Scottish institutions. In so far as the 2000 Regulations had been relevant to the payment of WFP to persons of pensionable age in Scotland, that provision was impliedly revoked by the revocation of the enabling power. As a result, from the beginning of 2024 the petitioners had no entitlement to WFP, and the first respondent had no power to make payments from the Social Fund to persons, such as the petitioners, resident in Scotland. This was made express by the 2024 Regulations, with their revocation of prior regulations which had already ceased to apply in Scotland. Otherwise, the 2024 Regulations extended only to England and Wales. The first respondent now lacked competence to make provision for Scotland.

[28] The second respondents, exercising the powers at their disposal, had resolved to make available a distinctively Scottish benefit which would be known as PAWHP, rather than WFP. As a result of the first respondent's policy decision of 29 July 2024, the second respondents reviewed their position, and elected to proceed differently with regard to the circumstances in which PAWHP would be paid, and the amount which would be paid. This was the second respondents' choice as to how to utilise the resources available to them, in furtherance of their devolved powers. It would have been open to the second respondents

to proceed as they had initially intended, as they in fact did for winter 2024/25, or as they propose to do for winter 2025/26. The Northern Irish authorities chose to take a different course. The devolution settlement includes a fiscal framework which recognises that there may be adjustment of the Block Grant, and permits deferral of the Block Grant Adjustment to the following year. The second respondents may also raise taxes, sell assets, or suspend certain expenditure and redirect those resources elsewhere. The reduction in Block Grant funding as a consequence of the first respondent's policy decision of 29 July 2024 was 0.37% of the resource excluding depreciation Department Expenditure Limit Block Grant funding allocated by the UK Government to the second respondents in 2024-25. Finances provided from the UK Government are only a part of the resources available to the second respondents: around half of the second respondents' financial resource derives from its own revenue-raising. The second respondents have a discretion in how they allocate their resources, and this political decision is one over which the first respondent has no influence. There is no hypothecation of the Block Grant, such that the second respondents require to spend certain elements of the grant on particular fields. In truth, this was not about the second respondents lacking resources, but about their spending priorities. There was no necessary or inevitable link between the first respondent's policy decision of 29 July 2024, and the second respondents' policy decision of 14 August 2024. The first respondent's decision did not have the direct effect upon the petitioners which would be necessary for the petitioners to have standing to challenge the first respondent's policy decision and the implementing legislation: *AXA General Insurance Co Ltd*. It was the second respondents' ability to take a different course, rather than the course which they actually took, which was important. The fact that the UK Government, acting on an agency basis, made the PAWHP payments for winter 2024/25 had no impact on the legal situation.

[29] Furthermore, the Scottish courts lacked jurisdiction to pronounce a declarator that legislation was unlawful, or to reduce legislation, which was applicable only to England and Wales. There are ongoing legal proceedings in England and Wales, where the 2024 Regulations are under challenge, and those courts were better placed to determine the matter. The courts in England and Wales would not be bound to recognise a Scottish judgment purporting to strike down legislation applicable to England and Wales. Absent any power in this court to reduce the 2024 Regulations, the petition was valueless. Even if this court did have jurisdiction to reduce the 2024 Regulations, that did not mean that the Scottish 2024 Regulations would fall - and without the reduction of the latter, the petitioners would obtain no advantage. Nor was it the case that setting aside the 2024 Regulations and the Scottish 2024 Regulations would result in more beneficial provision for the petitioners. It would be open to the court to decide that even if both sets of regulations were capable of reduction on the grounds of a procedural flaw, it should only initially pronounce a declarator, thus allowing for reflection by the respondents before the court finally determined whether reduction was appropriate. All of this underscored the lack of a direct connection between the first respondent's policy decision of 29 July 2024 and the petitioners. The petitioners lacked standing, and the petition was accordingly irrelevant with regard to the first respondent.

Public sector equality duty

[30] There was a lack of clarity as to whether the petitioners contended that no EQIA was carried out, or that the assessment carried out had been inadequate. The PSED in terms of section 149 of the 2010 Act obliged the first respondent to have due regard to certain factors when taking decisions, but there was no prescription as to how this was done: it does not

require the drawing up of a particular document. In assessing whether the PSED had been complied with, it was necessary not simply to look at the ultimate decision taken, but at the information which had been placed before the decision-maker. This would vary dependent upon the type of decision being made: more granular detail would be expected in a decision on a specific matter, as opposed to a high level decision on entitlement to benefits. In assessing whether the first respondent had complied with the PSED, it was necessary to look at all of the material before her in the period leading up to the taking of the policy decision on 29 July 2024 and the passing of the implementing 2024 Regulations. Civil servants had provided information to the first respondent on 24 July 2024, and the further material submitted to her on 26 July 2024 had set out eight possible reform options. On 27 July 2024, further advice was tendered to the first respondent on two of the policy options which she had expressed an interest in pursuing. Further material was then submitted to her on 29 July 2024, accompanied by a High Level Equality Analysis which was succinct and focussed, and was a valid means of giving effect to the requirements of section 149 of the 2010 Act. This analysis recorded the obvious equality impacts of the decision, and its use of disability benefits was a sensible proxy for disability in this case. All of these documents demonstrated an awareness (appropriate to the time available for the decision) of the impact of the first respondent's policy decision on those with protected characteristics. It was reasonable to assume that the Minister responsible for the social security system would have an understanding of the impact of the policy decision on persons in poverty. There had been engagement with a means of ameliorating the consequences of the policy, by increasing the take-up of Pension Credit and including other means-tested benefits and tax credits as qualifying benefits: these were appropriate and reasonable mitigating steps in response to the equality impacts arising from the policy decision. There was also ongoing consideration

of such matters, with a revised High Level Equality Analysis being prepared after the Chancellor's announcement on 29 July 2024. Further information as to increasing the take-up of Pension Credit was provided to the first respondent prior to the promulgation of the implementing 2024 Regulations.

Duty to consult

[31] At common law there was no general duty to consult persons who may be affected by a measure, prior to its adoption: *Moseley*. The underlying rationale was explained in *R (BAPIO Action Ltd)* v *Secretary of State for the Home Department* [2007] EWCA Civ 1139. The examples given in *Moseley* of instances where a duty to consult had arisen, were granular decisions affecting a narrow range of people. They were very far removed from a fiscally-driven policy decision affecting millions of people such as was under challenge here. Central government has a wide discretion to formulate such policy without prior public consultation. In this case the first respondent's decision fell squarely within the sphere of policy formulation and re-formulation. It was not a decision which the courts are well-equipped to evaluate. In any event, the second respondents' freedom to consider how to respond to the first respondent's decision introduced further uncertainties as to how any purported duty of consultation could be fulfilled. The petitioners were unable to demonstrate a prior practice of consulting by the first respondent such as to give rise to a legitimate expectation in the present case: the list of DWP consultations produced by the petitioners provided no detail as to the circumstances or nature of those consultations. Accordingly, in this case there was neither a statutory duty to consult, nor a promise to consult, nor an established practice of consultation, and nor was it an exceptional case where

there would be conspicuous unfairness in failing to consult: *R (Plantagenet Alliance Ltd)* v *Secretary of State for Justice* [2015] 3 All ER 261.

Irrationality / Wednesbury unreasonableness

[32] The petitioners faced two high bars in their challenge on this ground. Firstly, the test for establishing unlawfulness by way of irrationality is particularly high where the challenge is to secondary legislation embodying a decision on the allocation of public resources: *R (Gurung)* v *Secretary of State for Defence*, at paras [55] - [61]. This was precisely the scenario raised by the 2024 Regulations, which were laid before Parliament subject to the negative resolution procedure. Secondly, the administrative law test of unreasonableness is generally applied with considerable care and caution in the context of governmental decisions in the field of social and economic policy, which covers social security benefits: *R (SC)* v *Secretary of State for Work and Pensions,* at para [57]. For example, the complexity of designing a system such as universal credit, and that the courts were not equipped to carry out the practical and political assessments involved, was acknowledged in *Johnson* at para [113]. To succeed in an irrationality challenge to a decision taken under a power involving the formulation and implementation of national economic policy, and which can only take effect with the approval of parliament, the petitioners would require to demonstrate bad faith, improper motive or manifest absurdity: *R (SC)* v *Secretary of State for Work and Pensions,* at para [146]. They could not do so.

Convention rights

[33] Article 2 was not engaged where inadequate pension provision was alleged: *Budina*. The provision of social security benefits such as WFP was similarly outside the ambit of Article 2. Article 2 was not engaged in the petitioners' case.

[34] Socio-economic rights were not guaranteed by the Convention: *Pancenko* v *Latvia* (2000) 29 EHRR CD227; *Anufrijeva* v *Southwark LBC* [2004] QB 1124. Such rights did not engage Article 8 save when in combination with Article 14: that is to say, where a State chooses to make provision, it must do so on a non-discriminatory basis (*Beeler*). The case of *Verein KlimaSeniorinnen Schweiz*, was concerned with the State's environmental obligations in terms of international and domestic law, and is far removed from the petitioners' case. For the same reasons that the petitioners did not have standing, they were also unable to show the necessary direct and immediate link between the first respondent's policy decision and the petitioners' private life, in order to engage Article 8: *R (McDonald)* v *Kensington and Chelsea RLBC* [2011] PTSR 1266 at para [15]. Article 8 was accordingly not engaged in the petitioners' case. Even if it were, any interference with the petitioners' rights was not disproportionate, having regard to the test as explained in *Bank Mellat* v *HM Treasury (No 2)*. In conducting a proportionality review, respect must be given to the wide margin of appreciation afforded to the State in the allocation of limited state resources. The decision to restrict WFP to pensioners in England and Wales on the lowest incomes was well within the margin of appreciation: *R (McDonald)* v *Kensington and Chelsea RLBC*.

Submissions for the second respondent

[35] The second respondents invited the court to repel the petitioners' pleas-in-law, and either (i) sustain the second respondent's second *et separatim* third pleas-in-law, and refuse

the decrees of declarator and reduction sought by the petitioners; or (ii) sustain the second respondents' fourth plea-in-law, and refuse decree of reduction on the ground that it would not be equitable to reduce the second respondents' decision.

Public sector equality duty

[36] The PSED applied to the second respondents by virtue of section 149 of the 2010 Act and Regulation 5 of the 2012 Regulations. Its purpose is to ensure that a decision-maker has relevant information, and the duty imposed is to have regard to that information. There is no prescribed process as to how a public authority complies with the duty. It is for the decision-maker to determine the appropriate level of investigation in the circumstances, and the court could only review that determination on irrationality grounds: *R (on the application of Plantagenet Alliance Ltd)*. While the collation and consideration of information provided the context for a decision, there is no express statutory obligation to put in place mitigation of a decision.

[37] As a consequence of the first respondent's decision on WFP, the second respondents' intended policy as to universal payment of PAWHP (as contained in the draft regulations) was no longer affordable and could not be implemented. The second respondents' decision that it had no option other than to abandon its policy on affordability grounds, was a political one in relation to which they are afforded a broad margin of appreciation. This abandonment of a policy is not the application of a new or revised policy, and therefore does not come within the scope of Regulation 5(1) of the 2012 Regulations. Accordingly, no EQIA was required prior to that decision.

[38] The second respondents required to formulate a replacement scheme at speed, in order to ensure payments could be made in winter 2024/25. The policy decision was taken

to provide PAWHP on a means-tested basis. The Scottish 2024 Regulations implementing this are the application of a new or revised policy or practice, and thus subject to the duty under Regulation 5(1) of the 2012 Regulations. The second respondents had collated a considerable body of evidence in the draft impact assessments, thus satisfying the terms of Regulation 5(2). Publication in terms of Regulation 5(4) had also been complied with, with an impact assessment having been published in draft terms (in October 2023, and spring 2024), and then in final form in September 2024. The documentation produced demonstrated that both respondents were well aware of their continuing duty under the 2010 Act, as decisions were taken in the development of their respective policies. It demonstrated that the second respondents were aware of data relevant to the PSED, and the monetary impact on the budget of the various options which were open. The final version of the EQIA which was produced in September 2024 involved revision to earlier drafts. The second respondents had engaged with SCOSS comments. The final version of the EQIA properly identified and assessed the impact of the policy (as affordable at that point in 2024) on persons having relevant protected characteristics. It was not irrational, unreasonable or unlawful. The Scottish Parliament considered the EQIA which accompanied the Scottish 2024 Regulations, and voted to approve those regulations.

[39] Even if the second respondents had not complied with the PSED, there was no rule that any consequent decision fell to be reduced: *Aldwyck Housing Group Ltd* v *Forward* [2020] 1 WLR 584; and the decision at first instance in *R (BAPIO Action Ltd)* v *Secretary of State for the Home Department* [2007] EWHC 199. The PSED is important in ensuring that decision-makers have available relevant information when making decisions, but does not dictate the eventual substantive decision. Payments have already been made under the Scottish 2024 Regulations. Reduction of those regulations will not increase the persons to

whom payments of PAWHP would be made, but would only remove the legal basis for payments which have already been made.

Duty to consult

[40] The general principles are set out in *R (on the application of Plantagenet Alliance Ltd)* v *Secretary of State for Justice*. The instant case was not one where there was a statutory duty to consult, and there is no general duty to consult at common law. For there to be a legitimate expectation of consultation, there would need to be a clear, unambiguous and unqualified undertaking to act in a particular manner from which the second respondents should not be allowed to depart: *Redcroft Care Homes* v *Edinburgh City Council* 2025 SLT 22 at para [36]. There had been no such promise. The type of decision under challenge, is not one which can give rise to a legitimate expectation to be consulted: *BB* v *Glasgow City Council* 2020 SLT 667. In *Moseley*, there was a statutory duty to consult, so the court was providing guidance as to how that duty should be discharged. Similarly, in the case of *AB* v *Scottish Borders Council*, there had been no dispute that the service-users had a legitimate expectation of consultation, and the question was simply whether the duty was discharged. Where the legislature had conferred a rule-making power on a Minister without including an express duty to consult, but subject to a parliamentary control mechanism, the courts should not generally superimpose additional procedural safeguards: see the appellate decision in *R (BAPIO Action Ltd)* v *Secretary of State for the Home Department*. Here, the second respondents had been required to seek, and had obtained, the approval of the Scottish Parliament.

[41] In any event, the second respondents had previously carried out a consultation on PAWHP: the responses had been analysed, and informed the preparation of the draft regulations. The second respondents' policy decision of 14 August 2024 was a judgment on

affordability in respect of a new Scottish benefit still in development. Financial reasons and considerations of deliverability meant that decision had to be taken quickly: there would, for example, have been no time for the standard 12-week consultation which had been undertaken in 2023. It was hard to see what such a consultation exercise could have achieved, when budgetary decisions such as this were quintessentially ones on which the second respondents would have the best information.

Irrationality / Wednesbury unreasonableness

[42] Properly analysed, the petitioners' argument concerned policy choices, not law. A very high hurdle had to be overcome to succeed in an irrationality challenge in circumstances such as the present case, and the petitioners had failed to do so. The court cannot substitute its decision for that of the government in questions of the allocation of limited resources: *BBC* v *Scottish Child Abuse Inquiry Chair* 2022 SC 184 at para [48]. Courts should be slow to enter into the review of essentially political decisions: *Pantellerisco*. Awareness and knowledge of the impact of cold weather on different cohorts of the population did not render irrational a spending decision based on the allocation of resources. The weight to be afforded to any particular (relevant) factor is categorically a matter for the decision-maker: *City of Edinburgh Council* v *Secretary of State for Scotland* 1998 SC (HL) 33 at 44. It was for the second respondents to determine what was affordable. It was, however, unfair to characterise the second respondents' decision as one where financial considerations had trumped all other factors. The second respondents had been well aware of, for example, the pressures faced by some energy consumers. The petitioners' challenge on irrationality grounds was largely tied to an alleged failure to comply with the PSED. They had not made out a case that the petitioners fell within a cohort which had been

discriminated against in the sense intended by Lord Reed in *R (SC)* v *Secretary of State for Work and Pensions*. The Scottish 2024 Regulations consequent upon the second respondents' policy decision had been approved by the legislature.

Convention rights

[43] In its protection of the right to life, Article 2 of the Convention does not guarantee an absolute level of security in all activities. The State's positive obligation is to have in place a regulatory regime which operates effectively in order to reduce the risk to the lives of individuals: *Keenan* v *United Kingdom* (2001) 33 EHRR 38. Scotland, and the UK as a whole, has in place a social security system which operates to reduce the risk to the lives of individuals. In circumstances where a State is obliged to take positive measures, it has a wide margin in determining what those should be, and how citizens are supported: *Budayeva* v *Russia* (2014) 59 EHRR 2. Cases such as *Osman*, *Keenan*, and *Fernandes*, differed from the present case, because they concerned individuals in the State's care. The Convention does not guarantee socio-economic rights, such as a right to claim financial assistance: *Pancenko*. Article 2 is not engaged in the present case.

[44] The current case also falls outwith the scope of Article 8. Entitlement to social security benefits not directly related to the exercising of the promotion of private and family life does not fall within that Article's scope: *Beeler*; *X* v *Ireland*. *Beeler* concerned discrimination in the payment of benefits to widowed persons, and Article 8 was only engaged in combination with Article 14. In any event, the direct impact of that benefit on the organisation of family life can be distinguished from a case such as the present, where there was payment of an annual cash sum rather than, for example, provision of a voucher exchangeable only for heating or fuel. This was confirmed by *X* v *Ireland*, where the

payment of child benefit did not fall within Article 8. The case of *Verein KlimaSeniorinnen Schweiz* was not in point. It concerned activities by the State within its borders, over which it had jurisdiction and control, such as pollution and the treatment of waste: where the State had undertaken international and domestic obligations to mitigate this, the question was whether it had done enough. In any event, an impossible or disproportionate burden was not placed on the State by the Convention with regard to the choices which had to be made in terms of priorities and resources. It was for the State to judge how it reacted to naturally occurring conditions.

[45] Even if Article 8 were engaged, the second respondents ensuring the proper and appropriate allocation of public funds is a legitimate aim, and one in which the second respondents enjoy a considerable margin of appreciation. All four elements of the method of assessing proportionality (*Bank Mellat* v *HM Treasury (No 2)*) were satisfied: the alleged interference was not disproportionate. The State was afforded a wide margin in socio-economic policy matters: *Jivan*. The reference to elderly dependent persons in *Jivan* was to persons dependent on medical care in a manner such as to effectively be in the care of the State: the petitioners, and pensioners more broadly, did not fall within that definition so as to be a group who had been considerably discriminated against in the past.

Decision

Parliamentary privilege

[46] Article IX of the Bill of Rights of 1689 provides that freedom of speech and debates or proceedings in Parliament should not be impeached or questioned in the courts. Parliamentary privilege thus precludes the courts from considering a challenge to the accuracy of something said in parliament: *Kimathi*. A party therefore cannot seek to rely

upon parliamentary proceedings in order to prove the truth of facts which had occurred outside Parliament, but were mentioned in Parliament (nor even the subjective belief of the Member of Parliament in the truth of those facts): *Kimathi* at para [20]. The courts simply cannot be drawn into ruling on the accuracy or truthfulness of what was said in Parliament. However, the case of *R* (*Heathrow Hub)* v *Secretary of State for Transport* (at para [158]), does record a concession by the Speaker of the House of Commons that there are circumstances in which reference can properly be made to proceedings in the UK Parliament. One of these is that the courts may admit evidence of parliamentary proceedings "to prove what was said or done in Parliament as a matter of historical fact where this is uncontentious".

[47] The debate in this case was focussed on the petitioners' averments regarding: (i) statements made by the Chancellor of the Exchequer in the House of Commons on 29 July 2024; (ii) a debate on 10 September 2024 on an opposition motion to annul the 2024 Regulations, and perhaps speeches by the first respondent on this topic more generally; (iii) a question and answer exchange at Prime Minister's Questions on 11 September 2024; and (iv) a report by the House of Lords Secondary Legislation Scrutiny Committee. The averments regarding (i) have two elements. It is accepted that the petitioners' averments at p 23C-D of the Record simply recount the terms of the Chancellor's announcement on 29 July 2024 as a matter of historical fact, and hence are unobjectionable. The averments between p 23E and p 24A-B of the Record are rather more problematic. These recount the Chancellor's statement that the second respondents had (outwith Parliament) been briefed about the decision, and her opinion that the first respondent's policy decision was necessary and beneficial to the Scottish people. The opening part of this remark could not be relied upon to prove the truth of the fact of the briefing, and the second part is either of doubtful relevancy in law, or draws the courts into an assessment of the accuracy of the Chancellor's

opinion as to whether, and how, the policy decision of 29 July 2024 impacted on Scotland. Reliance could not therefore be placed upon the matters averred between p 23E and p 24A-B of the Record. The petitioners' averments regarding (ii) and (iii) may be dealt with together. They are found between p 49C to p 50A of the Record, and relate to proceedings in the UK Parliament on Tuesday 10 September 2024 and Wednesday 11 September 2024 (and perhaps parliamentary speeches by the first respondent on this topic more generally). If these averments are relevant, it would have to be as an attempt by the petitioners to lay the groundwork for an inference that no EQIA was prepared by the first respondent. Accordingly, these also fall foul of Article IX, as they would draw the court into ruling on the accuracy or truthfulness of what was said in Parliament. In relation to the averments regarding (iv), the parts of the House of Lords Secondary Legislation Scrutiny Committee report referred to by the petitioners in Statement 12, might be thought to be critical of the first respondent's policy decision, and how it was given effect. Again, this draws the court into an assessment of the accuracy of these opinions, and is also struck at by Article IX. I will accordingly excise the prohibited averments from the petitioners' pleadings, upholding the first respondent's fourth plea-in-law to that extent. In any event, however, none of the questioned averments are crucial to the decision on the other issues in this case: that is to say, had it been possible to have regard to the matters averred, the decision on the remaining issues in this case would have been no different.

Standing

[48] Section 27B(2)(a) of the Court of Session Act 1988 requires that the applicant in a petition for judicial review demonstrate a sufficient interest in the subject-matter of the application, that is, that the petitioner has standing. In *AXA General Insurance Co Ltd*, the

Supreme Court had explained that the test for standing is focussed on interests, rather than rights. To have standing is to be "directly affected" by, and have a reasonable concern in, the issues raised by the petition. One could contrast that with a mere busybody. The question of whether a particular petitioner has demonstrated the requisite interest is necessarily a contextual one.

[49] In this case the petitioners admittedly have no right to a payment of WFP from the department for which the first respondent is responsible, due to the devolution of responsibility for financial assistance with cold weather heating costs. In a very narrow sense, it could therefore be said that the petitioners are unaffected by the first respondent's decision that WFP should in future only be paid to those in receipt of certain other payments or benefits. But the petitioners are not mere busybodies, seeking to interfere in decisions taken in another jurisdiction which do not affect them at all. The effects of the first respondent's decision rippled out beyond England and Wales, to the other parts of the UK - including Scotland, where the petitioners reside. Regardless of where the first respondent's decision was taken, the petitioners were affected by it. The result of the first respondent's decision was to reduce expenditure in, or as regards, all parts of the UK. Although the second respondents had originally intended that PAWHP would be paid on a universal basis, it was made clear at the outset of their consultation that this was subject to considerations of affordability and deliverability. When the first respondent had begun to consider whether the payment of WFP ought in future to be means-tested, she was well aware this had financial and deliverability implications for Scotland and Northern Ireland. Indeed, the submissions made to her in the days leading up to her policy decision of 29 July 2024, made it plain that such a decision on her part would require the second respondents and the relevant Northern Irish authorities either to follow suit, or at least consider whether

or not to follow suit. She was also expressly warned, for example, of a potential reputational risk, should the second respondents find themselves unable to make payments because of late changes made to WFP by the UK Government in England and Wales. The first respondent's position is that her decision was one which had to be taken at pace, given the need for the appropriate legislative and operational framework to be in place for delivery of WFP in winter 2024/25. However, as a result of the first respondent's decision, the second respondents found themselves similarly time-pressured in determining how to react to the unexpected reduction in the Block Grant Adjustment figure. The second respondents' position is that their policy decision of 14 August 2024 flowed directly from the first respondent's policy decision of 29 July 2024. The first respondent argued that other options had been available to the second respondents. By October 2024, the actual Block Grant Adjustment figure was confirmed, and ultimately the second respondents have determined that a slightly different approach to PAWHP (incorporating a universal element) can be taken in winter 2025/26. However, as at August 2024, mindful of the September 'qualifying date' for assessing eligibility for PAWHP, and faced with the need to make suitable arrangements for the forthcoming winter, the second respondents considered themselves to have no real option but to mirror the first respondent's policy decision regarding payment of WFP. Had the first respondent not taken the policy decision which she did on 29 July 2024, there is no suggestion that the second respondents would independently have chosen to make PAWHP payable on a means-tested, rather than a universal, basis for winter 2024/25. The funding consequences of the first respondent's policy decision of 29 July 2024 were plainly a highly significant factor in the second respondents' policy decision of 14 August 2024. That was both foreseeable, and foreseen. Even if the second respondents' policy decision of 14 August 2024 had been quashed at that point, the options open to them in

retaking the decision would, in practice, have continued to suffer the same limitations because of the funding consequences of the first respondent's decision of 29 July 2024 (as they were then understood). In all of these circumstances, there is a material interrelationship between the first respondent's policy decision of 29 July 2024, and the second respondents' policy decision of 14 August 2024. The petitioners' case is that both of these policy decisions were flawed on broadly the same grounds. In all of the circumstances, it would have been artificial to permit the petitioners to challenge only the policy decision of the second respondents, but not that of the first respondent in so far as it affected Scotland. It was argued on behalf of the first respondent that her decision would be more appropriately challenged in the courts of England and Wales in proceedings brought there by other persons of pensionable age. However, it was not said that the petitioners were party to such proceedings in England and Wales, nor that it was open to them to bring a challenge to the first respondent in those courts. It was also suggested by the first respondent that to permit the petitioners' challenge to proceed against the first respondent's decision and acts, was to ignore the existence of the devolution settlement. It does not do so; it merely recognises the reality of the devolution settlement, namely the interplay between the different levels of government in the UK, which finds its expression not only in the devolution legislation itself, but also in the funding arrangements and intergovernmental arrangements which are in place to allow the system to operate. In the particular circumstances of this case, the petitioners do accordingly have standing to challenge the decision and actions of the first respondent in so far as they affect Scotland, and the first respondent's second plea-in-law therefore falls to be repelled. This is not, however, to foreclose the questions of which remedies the court has the power to grant, or whether it would be appropriate to grant all the remedies sought by the petitioners. Other

considerations may arise at that point. No other points as to relevancy or specification having been insisted upon by the respondents, the first plea-in-law of each respondent also falls to be repelled.

Public sector equality duty

[50] The PSED applies both to the devising of a policy, as well as to its application to an individual case: *Pieretti* v *Enfield London Borough Council* [2010] EWCA 1104. The first respondent accepted that the PSED applied to the policy decision of 29 July 2024 and the implementing regulations. The second respondents accepted that they were not only under a duty in terms of section 149 of the 2010 Act, but also the specific duty in terms of Regulation 5 of the 2012 Regulations to publish the EQIA where those regulations are engaged. A preliminary issue arose as to whether the second respondents' policy decision of 14 August 2024 represented a "proposed new or revised policy" in terms of Regulation 5 of the 2012 Regulations or, alternatively, the abandonment of a policy. It may be a matter of degree in the particular circumstances of a case whether a policy has simply been abandoned, or has been revised. In this case, the second respondents had consulted upon the introduction of PAWHP, with a stated intention of this being paid on a universal basis, but recognising the importance of affordability in shaping PAWHP. The documentation relating to the second respondents' reasoning for their policy decision of 14 August 2024 placed that decision in its context. It cast the first respondent's decision to restrict eligibility for WFP as being the key driver in the second respondents' decision to similarly restrict eligibility for PAWHP for winter 2024/25. In the whole circumstances, the second respondents' policy decision of 14 August 2024 was not the abandonment of an old policy and the simultaneous introduction of a new proposal. Rather, it represented a proposed

revision of an existing policy, or at least a stage in the revision of a policy which would find its final expression in the Scottish 2024 Regulations and accompanying revised EQIA. Accordingly, in terms of the statutory provisions, the second respondents were obliged not only to carry out an assessment in terms of section 149 of the 2010 Act, but to publish the EQIA under Regulation 5 of the 2012 Regulations.

[51] A good starting-point in understanding what the PSED requires is *Bracking* (endorsed and applied in Scotland in the cases of *McHattie* v *South Ayrshire Council*; and *AB* v *Scottish Borders Council*) where principles identified in previous cases were summarised by McCombe LJ. It is worth repeating the key part of the judgment in full (paragraph 25):

> "(1) As stated by Arden LJ in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
>
> (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.
>
> (4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a 'rearguard action', following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin) at [23 – 24].
>
> (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), as follows:
>
> i) The public authority decision maker must be aware of the duty to have 'due regard' to the relevant matters;
>
> ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
>
> iii) The duty must be 'exercised in substance, with rigour, and with an open mind'. It is not a question of 'ticking boxes'; while there is no duty to

make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) '[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.' (per Davis J (as he then was) in R (Meany) v Harlow DC[2009] EWHC 559 (Admin) at [84], approved in this court in R (Bailey) v Brent LBC [2011] EWCA Civ 1586 at [74–75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be 'rigorous in both enquiring and reporting to them': R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941 at [79] per Sedley LJ."

McCombe LJ also recalled the explanation by Elias LJ in *R (Hurley & Moore)* v *Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) at para [89], that the PSED involves a duty of inquiry, to the extent that "[i]f the relevant material is not available, there will be a duty to acquire it and this will frequently mean than (*sic*) some further consultation with appropriate groups is required". However, McCombe LJ endorsed the warning by Elias LJ at paras [77] - [78] that it is not for the courts to determine whether appropriate weight has been given to the PSED:

> "Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.
>
> [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

All of this must be borne in mind, in determining whether the PSED was complied with as regards the respondents' policy decisions and the implementing legislation. It is convenient to deal with each of the respondents in turn, not least because their statutory obligations were not identical.

[52] With regard to the first respondent, the affidavits of Mr Latto (and the accompanying material) are primarily focussed, not on Mr Latto's own thoughts and knowledge, but on the information which he or his colleagues placed before the first respondent. In assessing whether the first respondent complied with the PSED, there is therefore sufficient evidence available to the court as to the material which was before the first respondent (and thus the knowledge which she had) in taking the policy decision of 29 July 2024. It is clear from this material that the first respondent was aware of the PSED, and its application to the decision which she had to make: she was expressly told of its relevance by her officials, and a High Level Equality Analysis was prepared for her consideration. The first respondent's engagement with the iterative decision-making process leading up to 29 July 2024, can for example be seen from the refinement of a range of options down to a smaller number of preferred options, at her behest. The entirety of the material before the first respondent sets the policy decision in its context - namely, the stated concern of the UK Government that public finances were under pressure, necessitating the makings of savings - and it was against that backdrop that the first respondent considered whether WFP ought to continue to be paid on a universal basis, or ought to be targeted only at those pensioners on lower incomes. However, the material produced to the court demonstrates that the first respondent had information before her giving her insight on the potential impact of such a decision. The High Level Equality Analysis produced at the time of the policy decision demonstrated an awareness of the groups of persons who shared certain protected

characteristics, who could be impacted. Since the first respondent's policy decision related to a payment made to all those of pensionable age, a move away from universality would necessarily impact not all persons of a particular age, but a subset of that cohort. A proxy was selected to allow consideration of the proposed policy's impact on those who were disabled. There was also consideration of the impact on different genders and those in different types of relationships. There had, too, been consideration of how that impact might be mitigated: primarily by increasing the take-up of Pension Credit by those pensioners eligible but not currently claiming. The first respondent accordingly did have due regard to the relevant matters in terms of the 2010 Act, before and at the time of making the policy decision of 29 July 2024: there is, for example, no suggestion of documentation simply being prepared after the event to attempt to justify a decision by reference to the requirements of the 2010 Act. The material produced also demonstrates that the PSED was complied with in substance, and with the necessary rigour. The first respondent's officials were candid in their advice to her, and did not simply tell her what they thought she wished to hear. There was specific regard to the criteria as relevant to the particular decision which the first respondent was considering. There was sufficient information for the first respondent to be properly informed so as to take that decision. However, thereafter, it was for the first respondent as decision-maker to decide how much weight ought to be given to the PSED, not for the courts. Since there has been the necessary appreciation on the first respondent's part of the potential equality implications of the policy decision and the desirability of promoting them, it is not for the courts to interfere in the actual decision taken on the ground that more weight might have been given to the equality implications of the policy decision. The first respondent did not fail to comply with the duty to which she was subject in terms of section 149 of the 2010 Act in taking the policy decision of 29 July 2024.

The material produced also spoke to a continuing consideration of the PSED in the period thereafter. In all the circumstances, there was no failure to comply with the PSED with regard to the 2024 Regulations.

[53] The second respondents were under a duty not only in terms of section 149 of the 2010 Act, but also the specific duty in terms of Regulation 5 of the 2012 Regulations to publish its EQIA where those Regulations are engaged. The preparation of the draft EQIA as early as the consultation stage, and its revisal as matters developed, spoke to the second respondents' keen awareness of the PSED, and of the necessity of complying with this, at key stages of the development of PAWHP. There was sufficient evidence produced to the court of what was within the knowledge of the decision-maker. When originally consulting on the introduction of PAWHP, although the second respondents' stated intention was that it would be paid on a universal basis, there was already recognition of the importance of affordability in shaping PAWHP. The EQIA published by the second respondents in September 2024 no doubt built upon the draft EQIA earlier prepared when it was anticipated that payment of PAWHP would be made on a universal basis. However, it had been revised to take account of the significant change now proposed to the eligibility criteria for PAWHP. The EQIA explained not only the affordability and deliverability concerns which had led the second respondents to seek to introduce a payment which targeted assistance at a much more restricted cohort, but also demonstrated a recognition of the impact which this might have on groups of persons sharing each of the protected characteristics set out in the 2010 Act. There was discussion of potential mitigation, which included urging the UK Government to operate certain levers which were under their control. It is plain that the second respondents' officials had started compiling, analysing and sharing information on the possible impact of means-testing almost immediately after

the first respondent's policy decision of 29 July 2024 was made. When the material produced by the second respondents is considered in its entirety, it demonstrates due regard being had to the relevant matters in terms of the 2010 Act throughout the process of developing PAWHP, including the period before, and at the time of making, the policy decision of 14 August 2024, as well as at the time of the Scottish 2024 Regulations. It also demonstrates that the PSED was complied with in substance, and with the necessary rigour. Relevant information was gathered by officials. The EQIA was frank and sufficiently detailed in its terms. There was sufficient information for the second respondents to be properly informed so as to take the decision before them. There was a conscious approach to the criteria in the 2010 Act, specific to the decision which would be given effect to in the Scottish 2024 Regulations. However, again, ultimately the decision as to how much weight ought to be given to the PSED was one for the second respondents, not for the courts. Since there has been the necessary appreciation on the second respondents' part of the potential equality implications of the policy decision and the desirability of promoting them, it is not for the courts to interfere in the decision ultimately taken by the second respondents after they had placed the equality implications in the balance and weighed up all the relevant factors. The second respondents did not fail to comply with the duty to which they were subject in terms of section 149 of the 2010 Act. Nor was there any failure to comply with the additional duty to which the second respondents were subject in terms of Regulation 5 of the 2012 Regulations. An EQIA which meets the statutory requirements, relating to the introduction of PAWHP in a means-tested form for winter 2024/25, was prepared. It was published within a reasonable period of the second respondents' policy decision of 14 August 2024 and the implementing regulations.

Duty to consult

[54] A statute may create a duty to consult: *R (on the application of Plantagenet Alliance Ltd*. However, the terms of section 149 of the 2010 Act do not go beyond a requirement to ingather material where appropriate in order to comply with the PSED, to set up a statutory duty to consult in all cases to which the 2010 Act applies. Furthermore, there is no general duty at common law to consult persons who may be affected by a measure, prior to its adoption, unless there is a legitimate expectation of consultation. That legitimate expectation can spring from a promise to consult, an established practice of consultation, or an interest sufficient to found a legitimate expectation of consultation (see *Moseley*; *R (on the application of Plantagenet Alliance Ltd)*; and the adoption of this approach in Scotland in *AB* v *Scottish Borders Council*). The third category is made up of exceptional cases, where there would be conspicuous unfairness in not consulting: *R (on the application of Plantagenet Alliance Ltd).* The reasoning behind this approach is well captured by Sedley LJ at paras [43] - [45] of the appellate decision in *R (BAPIO Action Ltd)* v *Secretary of State for the Home Department*:

> "43. The real obstacle which I think stands in the appellants' way is the difficulty of propounding a principle which reconciles fairness to an adversely affected class with the principles of public administration that are also part of the common law. These are not based on administrative convenience or potential embarrassment. They arise from the separation of powers and the entitlement of executive government to formulate and reformulate policy, albeit subject to such constraints as the law places upon the process and the product. One set of such constraints in modern public law are the doctrines of legitimate expectation, both procedural and substantive. Some have been touched on above – for example the requirements of candour and open-mindedness where either law or established practice calls for consultation. The duty to give reasons is another area in which there has been marked growth. It is not unthinkable that the common law could recognise a general duty of consultation in relation to proposed measures which are going to adversely affect an identifiable interest group or sector of society.
> 44. But what are its implications? The appellants have not been able to propose any limit to the generality of the duty. Their case must hold good for all such measures, of which the state at national and local level introduces certainly

> hundreds, possibly thousands, every year. If made good, such a duty would bring a host of litigable issues in its train: is the measure one which is actually going to injure particular interests sufficiently for fairness to require consultation? If so, who is entitled to be consulted? Are there interests which ought not to be consulted? How is the exercise to be publicised and conducted? Are the questions fairly framed? Have the responses been conscientiously taken into account? The consequent industry of legal challenges would generate in its turn defensive forms of public administration. All of this, I accept, will have to be lived with if the obligation exists; but it is at least a reason for being cautious.
>
> 45. The proposed duty is, as I have said, not unthinkable – indeed many people might consider it very desirable - but thinking about it makes it rapidly plain that if it is to be introduced it should be by Parliament and not by the courts. Parliament has the option, which the courts do not have, of extending and configuring an obligation to consult function by function. It can also abandon or modify obligations to consult which experience shows to be unnecessary or unworkable and extend those which seem to work well. The courts, which act on larger principles, can do none of these things."

[55] The starting-point must therefore be that neither of the respondents were subject to a statutory duty, or any general duty at common law, to consult those persons who would no longer be entitled to WFP, or would not be entitled to PAWHP, as a result of the restricted eligibility criteria which each respondent proposed should be adopted for winter 2024/25. In the whole circumstances, this was not a case where there was a legitimate expectation of consultation. Neither the first respondent nor the second respondents had made an express promise to consult. The information available as to past consultation exercises undertaken by the DWP is too limited (in terms of the rationale for, and scope of, such consultations, and the frequency with which such consultations were carried out) for the court to be satisfied that there was an established practice of consultation before policy decisions such as the one which was taken by the first respondent on 29 July 2024. With regard to the second respondents, the fact that a consultation was carried out on the introduction of PAWHP in its originally intended form, is not in itself sufficient to constitute an established practice of consultation before a decision to revise the eligibility criteria for PAWHP. Nor is this a case where there would be conspicuous unfairness in either of the respondents not

consulting prior to reaching their respective policy decisions. The case law suggests that this will tend to be established with regard to granular decisions affecting a relatively narrow range of persons. However, the nature of the high level policy decisions being taken by the respondents in this case were such that they had the potential to impact large numbers of those of pensionable age in the UK. It was therefore factually more akin to the decision in *BB* v *Glasgow City Council* (where a change was being made to the local authority policy of charging for services provided, and no legitimate expectation of consultation was established) than to a case such as *AB* v *Scottish Borders Council* (where the local authority accepted there was a legitimate expectation of consultation in respect of ending a service provided at a day-care centre). To find a duty of consultation implied in circumstances such as the present, would come too close to imposing a general duty on government to consult before taking high level policy decisions. The conclusion that neither respondent was under a duty to consult is reinforced by the consideration that the rule-making power conferred on each of the respondents was subject to a parliamentary control mechanism, which does tend to militate against the court imposing additional procedural safeguards: *R (BAPIO Action Ltd)* v *Secretary of State for the Home Department*, per Maurice Kay LJ at para [58].

Irrationality / Wednesbury unreasonableness

[56] The petitioners' challenge to the respective policy decisions (and implementing legislation) of each of the respondents on the grounds of irrationality (often referred to as *Wednesbury* unreasonableness) took two forms; one narrow in scope, and the other a broader attack. The first may be dealt with shortly. In so far as the petitioners' challenge on the grounds of irrationality was tethered to their submission that the respondents had each failed to comply with the PSED or were in breach of a duty to consult, then the rejection of

those arguments results in this narrow ground of challenge on the basis of irrationality also fails.

[57] However, the petitioners sought to mount a more broadly-based attack on the respondents' policy decisions as being irrational in the legal sense. It must be borne in mind that many policy decisions are taken by government. In doing so, government will be influenced and guided by many different considerations, which may be ideological, pragmatic, or a combination of both. Policy decisions may reflect broad or specific manifesto commitments which have been the subject of public vote in an election. They may be the result of research, consultation, and internal legal advice. They will be shaped too, by the government's own information as to the financial resources available, and the other calls upon those resources. It is not the function of the courts to purport to pass judgment on such policy decisions. Rather, the function of the courts is to ensure that the government acts legally, which will usually bear on the procedure followed, but more exceptionally may bear on the substance of the decision. Concomitantly, the courts would be ill-equipped to purport to take such policy decisions, without all of the information needed to do so. Thus the tools available to the courts are directed simply towards fulfilling the court's role of policing the boundaries within which government can legitimately act. As Lord Reed explained in the case of *R (SC)* v *Work and Pensions Secretary*, at para [144]:

> "… domestic courts have to respect the separation of powers between the judiciary and the elected branches of government. They therefore have to accord appropriate respect to the choices made in the field of social and economic policy by the Government and Parliament, while at the same time providing a safeguard against unjustifiable discrimination. As Lord Neuberger of Abbotsbury observed in *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311, para 57, 'there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable'."

[58] The threshold for establishing irrationality, while not insuperable, is therefore very high: *Johnson.* The greater the policy content of a decision, and the more remote the subject-matter from normal judicial decision-making, the more hesitant the court should be to hold the decision to be irrational: *R (Gurung)* v *Secretary of State for Defence.* In the context of economic policy and social policy, the test of unreasonableness is generally applied with considerable care and caution: *R (SC)* v *Work and Pensions Secretary*. Designing a system of social security benefits necessarily involves a range of practical and political assessments of a kind that the courts are ill-equipped to judge; there may need to be bright-line rules, and the courts should not find a feature of the system irrational simply because it can lead to a hard result in a particular case: *Johnson.* The fact that a Minister's decision is subsequently embodied in secondary legislation reinforces the need for caution in holding a decision irrational: *R (Gurung)* v *Secretary of State for Defence; R (SC)* v *Work and Pensions Secretary.* In this case, the decision which each respondent faced as to whether the payment of WFP, or PAWHP, should be made on a universal or means-tested basis fell within the field of socio-economic policy. It was a policy decision involving questions of the allocation of resources, and practical and political assessments that this court would not be well-placed to judge. That the policy decisions could result in hardship for those falling on one side of a bright-line rule, is not enough to render it irrational in the legal sense. In addition, if the court is being asked in essence to find irrational a decision to only make WFP or PAWHP available on a means-tested basis, it may be questioned whether the petitioners are, in truth, asking the court to substitute its own decision on a binary issue of means-testing as against universality? In any event, with regard to each of the respondents, their policy decision was made the subject of parliamentary consideration when the implementing legislation was passed. In the whole circumstances, the petitioners are therefore unable to surmount the

high hurdle which they faced in seeking to succeed in their argument that the decisions of the respondents were irrational in the legal sense. One further matter must be dealt with. In the case of *R (SC)* v *Secretary of State for Work and Pensions*, at para [145], Lord Reed noted that the respect for the judgment of the executive and legislature will be balanced with the need for closer scrutiny if there has been "discrimination on a ground such as sex or race, rather than a difference in treatment on less sensitive grounds, especially if it is simply a by-product of a legitimate policy". The petitioners asserted that elderly people suffering from disabilities rendering them vulnerable to cold temperatures constituted a group in our society which has suffered considerable discrimination in the past, such that any decision applying to such a group required the closer scrutiny referred to by Lord Reed. However, mere assertion is not enough to bring a group within that definition, and the petitioners did not sufficiently demonstrate to the court that this cohort of the population did do so.

Convention rights

[59] In terms of section 6 of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Articles 2 and 8 of the Convention were the particular Convention rights in issue between the parties.

[60] As the cases of *Osman* v *the United Kingdom,* and *Keenan* v *United Kingdom*, made plain, Article 2 obliges the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is there explained that the primary duty is to put in place effective criminal law provisions to deter the commission of offences, backed up by law enforcement machinery, but that in certain well-defined circumstances there may be a positive obligation on authorities to take preventive operational measures to protect an individual whose life is

at risk from the criminal acts of another. In the context of dangerous activities, where the Convention obliges States to take positive measures, the choice as to appropriate measures is one which falls within the State's margin of appreciation. The Convention is not to be interpreted so as to impose an impossible or disproportionate burden, as it is necessary to be mindful of the operational choices the State must make in the context of its priorities and resources: *Budayeva.*

[61] It has been acknowledged that there is no neat division between civil and political rights on the one hand, and socio-economic rights on the other: *Budina*. However, the Convention does not, as such, guarantee socio-economic rights, including the right to claim financial assistance from the State to maintain a certain level of living: *Pancenko*. The Convention was not, for example, engaged by a complaint of inadequate pension provision in *Budina.* Accordingly, Article 2 of the Convention is not engaged by the question of whether a lump sum payment intended to provide financial assistance with winter heating costs, ought to be provided on a universal basis. The very different factual circumstances of *Verein KlimaSeniorinnen Schweiz*, do not assist in demonstrating that Article 2 can be extended to cover the questions at issue in the current case. In any event, where a State is obliged by Article 2 to take positive measures, the wide margin of appreciation it is afforded in identifying appropriate measures would encompass a decision as to whether WFP or PAWHP is paid on a universal, or means-tested, basis.

[62] Article 8 of the Convention includes both a positive duty to take action to ensure the effective protection of the right, and a negative duty to abstain from interference in the right. Where a positive obligation arises under Article 8, it may require the introduction of a legislative or administrative scheme to protect that Convention right, and that such a scheme be operated competently to achieve its aim. However, there is no general obligation

on the State to provide welfare support, although it is possible that it may be required in some cases: *Anufrijeva* v *Southwark LBC*. In particular, there might be an obligation to provide support or community care where there is a direct and immediate link between the measures sought and an individual's private life, and a special link between the situation complained of and the particular needs of the individual's private life: *R (McDonald)* v *Kensington and Chelsea RLBC.* However, the circumstances of this case are not sufficiently analogous to such exceptional cases.

[63] It is true that the ambit of Article 8 can be extended to the payment of welfare benefits, where it operates in conjunction with Article 14: *Beeler.* Even then, it is not the case that every payment of a welfare benefit will fall within Article 8 for these purposes: one can contrast the results brought about by the application of the relevant principles in the cases of *Beeler* and *X* v *Ireland.* In any event, in the current case, the petitioners do not seek to rely upon Articles 8 and 14 together. The case of *Jivan* did concern the application of Article 8 alone, not in conjunction with Article 14, in respect of a disability assessment. However, that case confirmed that Article 8 is not engaged by every disruption of everyday life, and it is perhaps best understood in the context of those exceptional cases where the individual can prove a special link between the situation complained of and the particular needs of that individual's private life. As already explained, the petitioners' case does not fall within that category. The petitioners also sought to rely on the case of *Verein KlimaSeniorinnen Schweiz.* However, that case relates to the application of Article 8 to environmental issues; an area where it was suggested that the principles developed with regard to Article 2 would be to a large degree applied. It is too tied to the factual matrix of the control of pollution by States which are subject to domestic and international obligations, for it to provide a solid foundation for the extension of the ambit of Article 8 to a case such as the petitioners.

Reference was also made by the petitioners to section 1 of the Social Security (Scotland) Act 2018, which sets out certain Scottish social security principles, including that "social security is itself a human right and essential to the realisation of other human rights". But section 1 of the 2018 Act cannot, by implication, extend the ambit of Article 8 of the Convention as given effect to in the UK in terms of the Human Rights Act 1998. In all of these circumstances, Article 8 is not engaged by the facts of this case.

[64] Even had Article 8 been engaged, the respondents would not have been in breach. States are afforded a wide margin of appreciation in issues of general policy, including social, economic and healthcare policies – especially where it involves an assessment of priorities in the context of the allocation of limited state resources: *Jivan*; *R (McDonald)* v *Kensington and Chelsea RLBC.* Lord Reed's warning that a high level of respect must be afforded to the judgment of public authorities on socio-economic issues in order to preserve the separation of powers is apposite (see the *dicta* from *R (SC)* v *Work and Pensions Secretary* cited above). It was confirmed in *Jivan* that where a restriction on fundamental rights applies to a particularly vulnerable societal group which has been considerably discriminated against in the past (such as persons with disabilities or elderly dependent people), then the margin is substantially narrower, with very weighty reasons required for the restrictions in question. However, the examples of such groups given in *Jivan*, are of discrimination against a physically disabled child, and significant restrictions of the rights of persons with mental health issues. In the absence of any evidence of past widespread discrimination against elderly persons by the government having been put before the court by the petitioners, the categorisation could not be applied to elderly people as a cohort on the basis of mere assertion in the pleadings. Had Article 8 been engaged, therefore, the respondents' actions would have fallen to be assessed against the normal yardstick, with a

wide margin of appreciation being afforded to the respondents. In respect of each of the respondents, the rules as to eligibility for payments of WFP and PAWHP were set out in terms of the legislation implementing the respective respondents' policy decisions. In these circumstances, and standing the decision reached above on the PSED and the issue of consultation, the schemes are in accordance with law. They are in pursuit of a legitimate aim. Assessed in light of the accepted approach as to proportionality set down by Lord Reed in *Bank Mellat* v *HM Treasury (No 2)*, at para [74], the policy decisions of each of the respondents are not disproportionate. Thus, even if Article 8 were engaged, the actions of the respondents would not place them in breach of the Article.

Disposal

[65] I shall therefore repel the petitioners' first to eighth pleas-in-law, and refuse the petition. The question of the appropriate remedies, had I found in the petitioners' favour therefore does not arise. I shall reserve all questions of expenses.