**IN THE HIGH COURT OF JUSTICE** **CO/ /2020**

**QUEEN'S BENCH DIVISION**

**ADMINISTRATIVE COURT**

**BETWEEN**

**R on the application of**

**ASSOCIATION OF LOCAL AUTHORITY CHIEF EXECUTIVES AND SENIOR MANAGERS (1)**

**LAWYERS IN LOCAL GOVERNMENT (2)**

**JANET WAGGOTT(3)**

**Claimants**

**and**

**THE CHANCELLOR OF THE EXCHEQUER AND SECOND**

**LORD OF THE TREASURY (1)**

**THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT (2)**

**Defendants**

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# STATEMENT OF FACTS AND GROUNDS

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## INTRODUCTION

1. This claim for judicial review concerns a new legislative regime governing what are called "public sector exit payments", i.e. payments made by public sector employers at the time of termination of their workers' employment. It is likely to affect thousands of people. Although the legislative regime has been characterised as being aimed at excessive payments to higher earners, the reality is that the approach being taken by the Government, especially in relation to the relationship between a cap on exit payments and the cost of pension provision, will cause it to have a serious impact upon many much more modestly remunerated individuals, and to take away with retrospective effect the pension rights which they have earned through their previous service.

2. Primary legislation has been in place since 2016 which allows regulations to be made placing a cap upon such payments, but it is only now that such regulations have been made. These are the Restriction of Public Sector Exit Payments Regulations 2020 (SI 2020/1122 - "**the Exit Regulations**"). There are a number of issues about both the effect and the legality of the Exit Regulations. The Claimants (further described below) are particularly concerned with the regulations as they affect local government. An especially important issue which arises in the local government context, although not the only issue raised in this claim, is how the regulations which have recently been made impact upon the operation of the Local Government Pension Scheme ("**the LGPS**"). This is currently the subject of much confusion and debate in the sector nationally, which is disrupting the efforts of local authorities and individuals to plan for and effect departures from local government employment, voluntary or otherwise.

3. A good deal of that confusion stems from the fact that the Government has brought the Exit Regulations into force, imposing a general cap, whilst it is still consulting separately upon a different set of proposed regulations, under different primary legislation, which would seek to make specific provision for the relationship between the exit payments cap on the one hand, and the LGPS on the other. It has also emerged in the course of pre-action correspondence that there is a fundamental difference of opinion between the Government on the one hand, and on the other hand the Claimants and other interested persons, as to what the legal effect on pension rights of the Exit Regulations, which have already come into force, actually is.

4. Additionally, there is a critical issue as to the extent to which the retrospective nature of both the existing and the proposed regulations takes them outside the powers conferred by the relevant primary legislation. These issues of interpretation and retrospectivity interrelate with questions as to whether the regulations are such as to infringe rights under the European Convention on Human Rights ("**ECHR**"), as incorporated into the Human Rights Act 1998 ("**HRA**").

5. This claim seeks both quashing and, in the alternative, declaratory relief in relation to the Exit Regulations which have already been made (as well as associated directions and guidance). It is necessary first to establish what the Exit Regulations actually mean, and then to decide in the light of that whether they are lawful in their own right, and whether it was in any case lawful for the First Defendant (referred to below as "**the Treasury**") to bring them into force whilst the Second Defendant (referred to below as

"**MHCLG**") was still consulting on the proposed related regulations concerning the LGPS.

6. The claim also seeks declaratory relief in relation to the draft regulations on the LGPS which are the subject of the current MHCLG consultation. Precisely because those regulations remain in draft, MHCLG's legal representatives have asserted in pre-action correspondence that any claim for judicial review would be premature, and have refused to engage with the substance of the points raised by the Claimants. This is, with respect, wrong and even irresponsible: it is already evident at this stage that there is a fundamental dispute between the parties as to whether the proposed MHCLG regulations would make retrospective provision. This is of vital importance: the relevant primary legislation does authorise retrospective provision, but that is expressly made subject to the consent of affected workers or their representatives (which has not been sought or forthcoming). This dispute about retrospectivity has sufficiently crystallised to be adjudicated, and it needs to be resolved urgently if yet further confusion and chaos is to be avoided. Further, there is such a close relationship between the issues concerning the existing Exit Regulations, and those concerning the proposed MHCLG regulations, that it would be a nonsense for those issues not to be brought forward and adjudicated in a single claim.

7. The Claimants learned on 15 October 2020 that the Exit Regulations had been signed into law by the Treasury the previous day and were therefore due to come into force (in accordance with reg. 1(2)) on 4 November 2020. On 23 October 2020 the Claimants sent the Defendants a pre-action protocol letter raising a number of concerns about the Exit Regulations, including the problems caused by their coming into force in advance of the completion of the consultation process on the draft LGPS Regulations, and seeking clarification of a number of features of the Regulations. In subsequent correspondence, the Claimants raised other material points, and also invited the Defendants to agree to a stay of the operation of the Exit Regulations pending the resolution of this claim, an invitation which has been rejected. The Claimants are seeking expedition of this claim: see further paragraphs 178-183 below, and also the Form N463 accompanying the claim. At present the Claimants do not make an application for interim relief, but have reserved their position in that respect - whether such an application will become necessary will depend in part upon what degree of expedition can be achieved, and in part upon the developing situation as to how local authorities in practice respond to the Exit Regulations.

8. The Claimants are aware that a number of the major public sector trade unions have also sent pre-action correspondence to one or both Defendants, and believe that at least some of those trade unions are planning to issue their own claims for judicial review in the near future, although the Claimants are not aware that any have yet done so. The Court should also be aware that a challenge to the Exit Regulations has been made by the British Medical Association in claim no CO/3322/2020 ("**the BMA claim**"): this was issued in September 2020, whilst the Exit Regulations remained in draft, and permission was dealt with on the papers by Johnson J on 3 November 2020. The Judge refused permission on two grounds, and granted it on a third ground (which he did not consider by itself merited expedition): the Claimants understand that the BMA has renewed its application on the grounds which were refused, but that no oral hearing has yet been listed. To the extent that there is overlap of issues between the BMA claim and the present claim, this is dealt with at the appropriate points below. However, because the BMA claim is not concerned with the local government context, and because the BMA's members are not, at least typically, members of the LGPS (which is, as explained below, the only major public service pension scheme which is a so-called "funded" scheme), the focus of the BMA claim is materially different. In particular, no issues have been raised in that claim as to the impact of the Exit Regulations upon pensions, and nor is there any parallel to the key issue in the present claim concerning the relationship between the making of the Exit Regulations and a still continuing consultation on pension scheme regulations. Nonetheless, the Claimants anticipate that the Court may wish to consider whether this claim should be considered in conjunction with the BMA claim for case management purposes; and also that it will almost certainly be appropriate for this claim to be heard alongside any related claims brought by the public sector trade unions.

9. The remainder of these Grounds is structured as follows:

    (i) Paragraphs 10 to 13 below explain the nature of the Claimants.

    (ii) Paragraphs 14 to 58 address the framework and history of the relevant legislation, which is to be found in a number of different statutes and statutory instruments. This section also introduces the directions and guidance issued by the Treasury in conjunction with the Exit Regulations.

    (iii) Paragraphs 59 to 70 summarise the Claimants' seven grounds of challenge.

(iv) The grounds of challenge are then elaborated at paragraphs 71 to 90 (Ground 1); paragraphs 91 to 93 (Ground 2); paragraphs 94 to 116 (Ground 3); paragraphs 117 to 145 (Ground 4); paragraphs 146 to 157 (Ground 5); paragraphs 158 to 165 (Ground 6); and paragraphs 166 to 178 (Ground 7).

(v) Paragraphs 179 to 185 deal with the urgency of the claim, and with the relief sought.

**THE CLAIMANTS**

10. The First Claimant ("**ALACE**") is a registered trade union whose members comprise the heads of paid service and other senior managers in local authorities throughout the UK, and the chief executives of other agencies associated with local government.

11. The Second Claimant ("**LLG**") represents the interests of its members who are legal or governance officers working within local government.

12. The members of ALACE and LLG, in common with other public sector workers, will be affected by the introduction of legislation which prohibits public sector employers from making payments to employees on termination of their employment which exceed £95,000.

13. The Third Claimant is a member of ALACE. She is employed by a local authority as its chief executive and she is a member of the LGPS. Although there is no immediate question of her employment coming to an end, she is at risk of being affected in future by the legislative changes at issue in this claim. She has agreed to join these proceedings as a claimant, simply in order to ensure that there is no issue as to the ability of the Claimants to rely upon the relevant Convention rights (since the property rights of ALACE and LLG themselves are not in issue).

**LEGISLATIVE FRAMEWORK AND HISTORY**

14. There are three items of primary legislation which are relevant here. The first relevant statute is the Small Business, Enterprise and Employment Act 2015 ("**the 2015 Act**"), which was amended by the second relevant statute, the Enterprise Act 2016 **("the 2016 Act")**, so as to insert the provisions which deal with the capping of public sector exit payments. The Exit Regulations were made, or purportedly made, under the powers contained in the 2015 Act. The third relevant statute is the Public Service

Pensions Act 2013 ("**the 2013 Act").** The 2013 Act is the legislation under which the regulations establishing the LGPS are deemed to have been made (they were actually made under an earlier Act), and which governs the circumstances in which such "scheme regulations" may be amended. The regulations upon which MHCLG is currently consulting would be made under the 2013 Act.

15. The relevant sections (153A to 153C) were inserted into the 2015 Act by section 41 of the 2016 Act, and came into force on 1 February 2017.

16. The Government consulted on the exit pay cap provision which was subsequently introduced by the Enterprise Bill in July and August 2015 and produced its final response in September 2015. Draft Regulations were published on 3 November 2015 and further updated on 7 March 2016, after the consultation had closed but during Parliamentary proceedings on the Enterprise Bill. There was then a lengthy hiatus. Between April and July 2019 the Government consulted on regulations in a different form, which were closer to the Exit Regulations as made. It published its response to the consultation on 21 July 2020. The First and Second Claimants responded to the consultations: see the witness statements of Ian Miller and Deborah Evans.

17. Regulations made by the Treasury under s. 153A(1) are subject to the affirmative procedure. Accordingly, once a draft has received the necessary approval, it is then a matter for the Treasury as to when the regulations should actually be made, by way of the relevant Ministers signing the draft into law. It is this act of making the regulations which is the subject of the judicial review challenge to the Exit Regulations.

18. The Exit Regulations were laid in draft before Parliament on 21 July 2020. Following affirmative resolutions of each House, they were made by the Treasury on 14 October 2020. This meant that, in accordance with regulation 1(2), the Exit Regulations came into force 21 days later, on 4 November 2020.

**Sections 153A-C of the Small Business, Enterprise and Employment Act 2015**

19. Section 153A of the 2015 Act provides so far as is relevant that:

> "(1) Regulations may make provision to secure that the total amount of exit payments made to a person in respect of a relevant public sector exit does not exceed £95,000.

[…]

(3) An exit payment is in respect of a relevant public sector exit if it is made –

(a) to an employee of a prescribed public sector authority in consequence of the employee leaving employment […]

(4) An exit payment is a payment of a prescribed description.

(5) The descriptions of payment which may be prescribed include—

(a) any payment on account of dismissal by reason of redundancy (read in accordance with section 139 of the Employment Rights Act 1996);

(b) any payment on voluntary exit;

(c) any payment to reduce or eliminate an actuarial reduction to a pension on early retirement or in respect of the cost to a pension scheme of such a reduction not being made;

(d) any severance payment or other ex gratia payment;

(e) any payment in respect of an outstanding entitlement;

(f) any payment of compensation under the terms of a contract;

(g) any payment in lieu of notice;

(h) any payment in the form of shares or share options.

(6) In this section a reference to a payment made to a person includes a reference to a payment made in respect of that person to another person.

[…]

(8) Regulations may include—

(a) provision which exempts from any provision made under subsection (1) exit payments, or exit payments of a prescribed description, made in prescribed circumstances;

(b) provision which, in consequence of provision made under subsection (1), amends a relevant public sector scheme so as to make any duty or power under the scheme to make exit payments subject to any restriction imposed by regulations under subsection (1) (taking account of any relaxation of such a restriction which may be made under section 153C);

(c) provision which makes an amendment of any provision made by or under an enactment (whenever passed or made) which is necessary or expedient in consequence of any provision made by or under this section.

[…]

20. The concept of a "relevant public sector scheme", as mentioned by s.153A(8)(b), is defined in s. 153A(11) to include a scheme made under s. 7 of the Superannuation Act 1972 or s. 1 of the Public Service Pensions Act 2013, which are the provisions relevant to the LGPS.

21. Section 153B(1) provides that the power to make Regulations under s. 153A is exercisable by the Treasury.[1] It is subject to the affirmative resolution procedure: s 153B(4).

22. Section 153C(1) then confers power on a Minister of the Crown to relax any restriction imposed by Regulations made under s. 153A(1). Requirements may be relaxed in respect of a particular employee, a description of employees, or in relation to the whole or part of an exit payment or description of exit payments: s 153C(4). Regulations made by the Treasury may delegate power to relax restrictions to a person specified in the Regulations, and may specify that exit payments may only be relaxed with the consent of the Treasury or following compliance with any directions given by the Treasury: s. 153C(5).

**The Exit Regulations**

23. Regulation 3(a) of the Exit Regulations provides:

> "Subject to regulations 5, 6 and 7 – (a) a relevant authority must not make an exit payment to a person which exceeds the exit payment cap in respect of a relevant public sector exit."

24. Regulation 5(1) provides that "in this regulation a reference to an exit payment made to a person includes a reference to an exit payment made in respect of that person to another person". "Exit payments" are defined in reg. 5(2). The list is similar to that contained in s.153A(5), set out above, although it is differently ordered, and instead of containing the general s.153A(5)(e) reference to payments "in respect of an outstanding entitlement", it contains specific references to payments made to extinguish liabilities under fixed term contracts and to:

> "(i) any other payment, whether under a contract of employment or otherwise, in consequence of termination of employment or loss of office."

25. Reg 5(2)(b) follows the enabling legislation in referring to payments made to reduce or eliminate actuarial reductions to pensions on early retirement, or in respect of the cost to a pension scheme of such a reduction not being made.

[1] Separate powers are conferred on the Scottish and Welsh devolved administrations. The remainder of what is said in these Grounds relates specifically to the position in England.

26. Regulation 6 excludes certain payments from the restriction under reg 3(a). In particular, reg. 6(f) excludes “any payment in compliance with an order of a court or tribunal”, and reg. 6(g) includes “any payment in lieu of notice due under a contract of employment that does not exceed one quarter of a relevant person’s salary”. Regulation 7 makes provision for statutory redundancy payments; they count towards the exit payment cap but are protected and must not be reduced if they exceed the cap.

27. Regulation 8 provides:

> “(1) Where these Regulations prevent a relevant authority from making an exit payment of the type described in regulation 5(2)(b) which exceeds the exit payment cap in respect of a person, the relevant authority must, as an alternative, make to that person or in respect of that person to another person, a payment of an amount not exceeding the amount of that exit payment.
>
> (2) This regulation is subject to regulation 3(a).”

This is a provision whose drafting is somewhat obscure. As appears at paragraph 87 et seq below, the Government appears to be claiming for it an effect which cannot be reconciled with what it in fact says.

28. Regulation 10 provides for the exercise of the power of “relaxation” of the cap restriction. In particular, reg 10(b) provides that the power to relax the restriction under s. 153C(1) may be exercised by the full council of a local authority. Reg 11 provides that the power to relax restrictions must not, unless exercised with the consent of the Treasury, be exercised without compliance with Directions made by the Treasury.

29. Whilst the Exit Regulations introduce a prohibition on relevant authorities making payments which exceed the cap, they do not make any express provision for amending employees’ terms and conditions of employment. Nor do they contain any provision which purports to amend the rules of any public sector pension scheme.

**October 2020 Treasury Directions and Guidance**

30. On 29 October 2020 the Treasury issued Directions under s. 153C of the 2015 Act ("**the Treasury Directions**"). Paragraphs 1.4 to 1.8 of these Directions make provision for three situations in which relaxation of the cap is purportedly made mandatory.

31. Paragraph 1.9 then makes provision for discretionary relaxation of the cap in three cases, namely where the person exercising the power of relaxation is satisfied that the case falls into one of the following categories: (i) to avoid “undue hardship”, (ii) where non-relaxation would “significantly inhibit workforce reform” and (iii) in cases where there is a written agreement to exit entered into and intended to lead to exit before the Regulations came into force, and delay to the date of exit is not attributable to the employee.

32. Nonetheless, paragraph 1.10 then goes on to provide that the full council of a local authority must obtain consent from the Treasury before it may exercise the power to relax the cap. Further, paragraph 1.11 states that the relaxation power *"must only be exercised to the extent necessary to give effect to one or more of the criteria set out in these Directions"*.

33. The intended effect of paragraphs 1.9, 1.10 and 1.11 of the Treasury Directions, when read together, appears to be that (apart from the mandatory cases) relaxation is only permissible where the case falls into one of the three specified categories, and Treasury consent has also been obtained. On this reading, the Directions purport to foreclose the possibility of discretionary relaxation in any case falling outside the three categories.

34. Also on 29 October 2020, guidance on the Exit Regulations was published by the Treasury (**“the Guidance”)**. The Guidance is non-statutory, and therefore is not legally binding, but it is obviously intended to influence the behaviour of public sector bodies falling within the scope of the Exit Regulations. On normal principles, therefore, it is amenable to judicial review (see *Gillick v West Norfolk & Wisbech AHA* [1986] AC 112, as applied in e.g. *R (Letts) v Lord Chancellor* [2015] 1 WLR 4497).

35. The Guidance is referred to further below where relevant. In relation to the specific point addressed at paragraph 33 above, it should be noted that the Guidance does not appear to be fully internally consistent. Paragraph 5.12 suggests that, exceptionally, relaxation might occur (with Treasury consent) outside the circumstances referred to in the Treasury Directions (and the Annex A proforma for seeking Treasury consent does refer, without further elaboration, to a category marked "Other"). However, paragraph 5.36 appears to be saying that discretionary relaxation is limited to the three specified categories. Additionally, the first sentence of paragraph 5.19 appears to

introduce an overriding requirement of exceptionality to be found neither in the legislation nor the Treasury Directions:

> "*Relaxation is expected to be granted only in exceptional circumstances that meet the criteria in this guidance."*

36. Finally, reference will also be made below to a letter circular letter dated 28 October 2020 and sent by Luke Hall MP, Minister for Regional Growth and Local Government at MHCLG, to chief executives of councils and LGPS administering authorities, ("**the Hall Letter**").

**Public Service Pensions Act 2013**

37. Section 1 of the 2013 Act provides for regulations ("scheme regulations") to be made establishing schemes for the payment of pensions and other benefits to various categories of public sector employees, including local government workers. The detailed provisions of the Act setting out what may be contained in scheme regulations are mostly irrelevant here but it should be noted that whilst s.3(3)(b) expressly permits scheme regulations to make retrospective provision, this is specifically made subject to s 23 (see below).

38. The 2013 Act, and the various new scheme regulations made under or in anticipation of its provisions, effected very substantial change to public service pension schemes in the United Kingdom, following the Hutton Report. Many of those changes were designed to control the costs of such schemes. What was done at that time was intended to represented a long-term settlement. It is unsurprising, therefore, that it contained important protective provisions so that the "relevant authorities" with responsibility for scheme regulations (MHCLG, in the case of the LGPS) could not in future alter that settlement simply at will. The nature of the protection varies according to the step proposed to be taken, and ranges from a general obligation to consult before making any scheme regulations (s.21), through an enhanced consultation and reporting obligation which applies before certain "protected elements" are changed even going forwards (s.22), and also in relation to retrospective changes of a second order of importance (s.23(2)), and ultimately to the provision set out in the next paragraph, which means that certain changes simply cannot be made without the requisite consent (or, of course, further primary legislation). This protective scheme should be borne in mind when the Court comes to consider the Defendants' suggestion

that the Exit Regulations have already been effective to remove important pension rights, not merely without any of the 2013 Act procedures having been followed, but simply as a matter of "implied repeal" and without even stating an express intention to effect such a removal.

39. Most importantly for present purposes, section 23(1) of the 2013 Act provides:

> "Where the responsible authority proposes to make scheme regulations containing retrospective provision which appears to the authority to have significant adverse effects in relation to the pension payable to or in respect of members of the scheme, the authority must first obtain the consent of the persons referred to in subsection (3)."

The persons referred to in sub-section (3) are "the persons (or representatives of persons) who appear to the responsible authority to be likely to be affected by the provision if it were made." The impact of s.23(1) in this case is addressed under Ground 7 below.

## The Local Government Pension Scheme Regulations 2013

40. The Local Government Pension Scheme Regulations 2013 (SI 2013/2356 as amended - "**the 2013 LGPS Regulations**") are the principal instrument now constituting and governing the LGPS. They were originally made under s. 7 of the Superannuation Act 1972.[2]

41. There have been successive iterations of such regulations since the 1970s, dealing with matters such as eligibility for membership of the LGPS or its predecessors, the benefits payable under the scheme, the contributions due from employers and from employees, and the administration of the scheme. The regulations have been frequently amended in matters of detail, but more far-reaching changes are generally characterised as amounting to the creation of a new pension scheme, and are accompanied by detailed transitional provision.

[2] The 2013 LGPS Regulations were made under section 7 of the Superannuation Act 1972 but in anticipation of the superseding of the powers under that Act by the powers contained in the Public Service Pensions Act 2013 which received Royal Assent on 25 April 2013 but was not yet completely in force. Section 28 of the 2013 Act provides for regulations made under section 7 of the 1972 Act in respect of a person's service on or after 1 April 2014, and which could have been made under the powers contained in the 2013 Act, to have effect as if they were scheme regulations under the 2013 Act.

42. Three features of the scheme regulations governing the LGPS are of particular importance to the present claim.

43. First, the LGPS is a defined benefit pension scheme. That is to say, the benefits payable to a member are defined by a set of rules based upon matters including age at retirement, length of pensionable service, salary (originally final salary, and more recently a career average formula), rather than by reference to the investment performance of the contributions attributed to that member (as in a defined contribution scheme). Because the LGPS changes over time, different rules about benefits may have been in place during different periods of a member's service. It has always been recognised that pension rights accrue with service, even though no right actually to receive a pension will arise unless and until the member retires or dies in circumstances triggering payment of a scheme pension. This reflects the well-established principle (see the cases cited at 44 and 109 below) that pension rights are to be regarded as a form of deferred pay. Accordingly, the transitional provision made when new LGPS schemes have been adopted has generally been careful to ensure that the benefits payable in respect of service to date have continued to be governed by the rules applicable when that service was performed, or rules which are no less favourable. So when an individual eventually retires and receives a pension, that will be paid as a single periodic amount, but its calculation may include different elements relating to different periods of service. This approach is reflected in the Claimants' submission, developed below, that a change to the rules governing the receipt of a pension (including any rule as to whether that pension is to be paid on an unreduced basis when an individual is made redundant or retired on grounds of business efficiency, or whether it is to be actuarially reduced) is a retrospective change insofar as it is applied to the element of the pension accrued in respect of service already performed.

44. Secondly, and unlike most or all of the other major public service pension schemes, the LGPS is a funded scheme (the other schemes are of the type known as "pay as you go" schemes, where contributions go towards, and pensions are paid out of, general public funds, even though they are operated in a way which seeks to keep contributions generally aligned with benefits). That is to say, in the case of the LGPS, the contributions made by employers and by members are paid into a distinct fund which is held, invested and administered by an administering authority, and pension benefits are paid out of that fund by the administering authority. There are currently about 90 separate LGPS funds in England and Wales, and each scheme member will

be allocated to a particular fund depending (essentially) upon the identity of his or her employer. Although most LGPS members are employed by local authorities, there are a range of other public sector employers whose employees are eligible for membership, and many private sector employers are also LGPS scheme employers, typically whilst they are performing services under contract with a local authority. Although the administering authority will itself be a local authority and a scheme employer in the vast majority of cases, it holds and administers the fund in a distinct capacity, and is subject to fiduciary duties in doing so. Accordingly, whilst an LGPS fund is not strictly speaking a trust fund, the Supreme Court has recently had occasion to remind the Government in other litigation that:

> *"The contributions of the employees into the scheme are deducted from their income. The contributions of the employers are made in consideration of the work done by their employees and so represent another element of their overall remuneration. The fund represents their money."*

(per Lord Wilson in *R (Palestine Solidarity Campaign) v Secretary of State for Housing, Communities and Local Government* [2020] 1 WLR 1774 at [30]). This too is relevant to the issues which arise in this claim concerning both retrospectivity, and interference with possessions such as to engage Article 1 of the 1st Protocol to the ECHR ("**A1P1**").

45. A further relevant consequence of the LGPS being a funded scheme, which is directly relevant to the present claim, is that if a pension comes into payment earlier than at normal retirement age, then that *prima facie* results in an extra cost to the fund. But if the pension is actuarially reduced so as to take account of the early payment, then the early retirement will be treated as cost neutral. This is why action by a scheme employer which triggers payment of an early, *unreduced* pension is regarded as imposing a cost upon the fund. In principle, that cost could be borne by the fund generally; or it could be reflected in the general adjustment made to the employer's contributions when those are next adjusted, usually at the time of the triennial actuarial valuation of the fund's assets and liabilities; or it could be made the subject of a specific payment by the employer at the time when it takes the triggering action in an individual case. A payment of the latter kind is known as a pension strain payment. As further discussed at paragraph 50 below, the 2013 LGPS Regulations currently confer upon administering authorities a discretion to require employers to make pension strain payments in certain circumstances, but do not oblige administering authorities to follow that course of action. To foreshadow the key issue arising here about what effect the Exit Regulations have actually had, it will be apparent that prohibiting an <u>employer</u> from

making a pension strain payment to the administering authority has no impact at all upon the pension rights of the individual member. It may possibly, by necessary implication (and if there is power to make such a change otherwise than through scheme regulations under the 2013 Act), mean that the administering authority cannot exercise its discretion so as to require the employer to make a payment that it cannot lawfully make - but so far as the individual member is concerned, that is neither here nor there (or, if one prefers the Latin, it is *res inter alios acta*) - rights to unreduced early pensions either exist under the 2013 LGPS Regulations or they do not; and if they do exist, they are not contingent upon whether the administering authority can or does exercise its discretion to require a strain payment to be made.

46. Thirdly, it is a long-standing feature of the LGPS that where an individual is made redundant or their employment terminates on grounds of "business efficiency" (the meaning of the latter concept was addressed in *Ascham Homes Ltd v Auguste* [2016] ICR 359 - essentially, it connotes a reason which is not primarily that of personal performance), and that individual has reached a certain age, then he or she is entitled to receive an immediate pension on an unreduced basis (i.e. not actuarially reduced to reflect the fact that it is coming into payment prior to normal pension age).

47. Returning to the specific provisions of the 2013 LGPS Regulations, regulation 30 is the principal relevant provision which currently governs members' rights to retirement benefits. Reg. 30(7) provides:

> "Where an active member who has attained the age of 55 or over is dismissed from an employment by reason of redundancy or business efficiency, or whose employment is terminated by mutual consent on grounds of business efficiency, that member is entitled to, and must take immediate payment of — […]
>
> (b) any other retirement pension relating to that active member's pension account payable under these Regulations, without reduction." [emphasis added]

48. It will be noted that, whilst this provision applies in cases of termination by mutual consent on efficiency grounds, it also applies where the employee is involuntarily dismissed on redundancy or efficiency grounds, a situation in which the individual personally will by definition not be at fault. Further, the member is not only permitted but actually required to take an immediate pension. That is hardly problematic if, as reg.30(7) provides, the pension will be paid in full. But it is clearly another matter if (as the Defendants contend) the Exit Regulations now operate to require actuarial

reduction of the pension if the cap prevents the appropriate strain payment from being made.

49. Reg. 30(5) is also relevant. It provides that a member aged 55 or over (who is no longer an employee) may elect to take an immediate reduced pension. But reg. 30(8) confers a discretion on employers to waive the reduction required by reg. 30(5). Similar provision applies in relation to what is called "flexible retirement" under reg.30(6).

50. Reg. 68(2) is the provision which deals with strain payments. It provides:

> "An administering authority may require the Scheme employer concerned to make additional payments to the appropriate fund in respect of any extra charge on the fund resulting from retirements benefits becoming immediately payable to a member under regulation 30(6) . . . or regulation 30(7) . . ., including the cost as calculated by an actuary . . . as a result of a waiver of any reduction under regulation 30(8)."

**The Draft LGPS Regulations**

51. As explained above (see in particular paragraphs 5 and 6) the draft LGPS Regulations are ones which MHCLG currently proposes to make under the 2013 Act, and upon which it is currently consulting. The draft of the proposed regulations has been issued as part of the consultation process. The draft LGPS Regulations would make a number of amendments to provisions concerning the rights of members under the 2013 LGPS Regulations (although some of those amendments relate to a different issue, namely the making of discretionary compensation payments by a local authority).

52. The point of greatest relevance for present purposes is that, under draft reg. 5(3)(a), reg. 30(7) of the 2013 LGPS Regulations would be made subject to reg 10 of the draft LGPS Regulations, and the whole of reg 30 would be made subject to reg 4.

53. Draft reg. 10 would apply to terminations for redundancy and business efficiency (that is to say, the cases in which, for those aged over 55, there is currently both a right to receive, and an obligation to accept, an early unreduced pension). Its sub-paragraph (2)(b) would provide that a member “may” decide to take immediate payment of early pension without reduction, subject to reg 10(3). Sub-paragraph (3) then states:

> “(3) Where the payment made by the employing authority has been reduced in accordance with the limits set out in regulation 3 of the [Exit Regulations] –

(a) regulation 8 of the [Exit Regulations]  does not apply;

(b)  the relevant Scheme member's benefits must be adjusted in line with actuarial guidance issued by the Secretary of State."

54. Sub-paragraph (4) amends reg. 68(2) of the 2013 LGPS Regulations, so that it would read in substance (amendments in bold):

> "(2) An administering authority **must** require the Scheme employer concerned to make additional payments to the appropriate fund in respect of any extra charge on the fund resulting from retirements benefits becoming immediately payable to a member under …  regulation 30(7) (early leavers on grounds of redundancy or business efficiency), **or reg. 10 of the [draft LGPS Regulations]** …"

55. So the proposed effect of the draft LGPS Regulations may be summarised, in terms of its central features, as follows.  The present administering authority discretion to require the employer to make a strain payment would become a duty.   Where the cap under the Exit Regulations prevented that strain payment from being made, or being made in full, the member's pension would to that extent have to be actuarially reduced if paid early, unless and to the extent that the shortfall was made good by the member himself or herself.  The member would also be given the option not to take the pension early in such cases (i.e. to wait until normal retirement date and receive the pension in full).

56. Whilst the Claimants would, for the reasons set out in their consultation responses, strongly disagree with the policy underlying these proposals (and would also challenge their legality to the extent that they have retrospective effect, for the reasons set out in these Grounds, in particular in Grounds 4 and 7), it will be apparent that, when taken with the Exit Regulations, the draft  LGPS Regulations could at least be described as having a coherent effect.  Put at its shortest, to the extent that the public sector exit payment cap prevented the employer from making a strain payment in relation to an early unreduced pension, and the employee was unable or unwilling to make up the shortfall, any early pension would have to be reduced, and it would be up to the employee whether to take that pension early or not.

57. By contrast, if the Exit Regulations are allowed to take effect without any amendments to the 2013 Regulations, which is what the Treasury has in fact done, the resulting legal position is left without any such coherence.  Either the ability to make a strain payment is removed where it would exceed the cap, but without any impact on the individual's pension (which is what the Claimants say the Exit Regulations mean, but

which would make a nonsense of the Government's stated policy intentions); or, if the Defendants are right about the meaning and effect of the Exit Regulations, employees who are dismissed on redundancy or efficiency grounds will be forced to accept a reduced pension, whether they like it or not, and (so far as the Claimants can see) without there being any facility under the 2013 LGPS Regulations either for the employer to make a part-payment up to the level permitted by the cap, or for employees themselves to make any mitigating payments to the pension fund - an outcome which the Government apparently does not wish to bring about, and which it has made no attempt to defend or justify in policy terms.

58. Finally, it should be noted that, at the same time as the 2016 Act amended the 2015 Act to provide for regulations capping public sector exit payments, it also provided in its Schedule 6 both for a general power (in paragraph 4) to make certain amendments to public sector pension schemes (although no power to do so with retrospective effect), and in paragraph 5 for a specific amendment to the 2013 LGPS Regulations, namely the introduction of a new regulation 68A. The drafting of reg 68A recognised, rightly, that any impact which regulations under the 2015 Act would have would be merely on strain payments, and not on pension entitlements as such; and it made provision for reg 30(7)(b) of the 2013 LGPS Regulations to be amended in cap cases, and for the reg 30(8) waiver provision not to apply in such cases. However, whilst this provision evidently reflected a recognition in 2016 that pension strain payments could not sensibly be brought within the scope of the exit payment cap without also amending the 2013 LGPS Regulations, regulation 68A has never in fact been commenced. It seems apparent that it has been realised that reg 68A is not in fact satisfactory in policy terms (apart from anything else, it would still be mandatory for the employee to accept an early, reduced pension where a strain payment could not be made). Presumably, this is precisely why MHCLG is consulting on the draft LGPS Regulations.

## SUMMARY OF GROUNDS OF REVIEW

59. Against this background, the Claimants' challenge may be summarised as follows. It falls under three broad heads, giving rise between them to seven grounds of review. The relief sought is set out at paragraph 185 below.

60. The <u>first</u> head of challenge is concerned both with what effect the Exit Regulations, which have already been made, actually have; and, in the light of the answer given to that question, whether the Exit Regulations have been lawfully made. The dispute

about the meaning of the Exit Regulations finds expression in claims for declaratory relief that the approach taken by the Treasury in published guidance about the Exit Regulations, and by the MHCLG in a letter promulgated to administering authorities, is wrong in law. The dispute about the lawfulness of the making of the Exit Regulations finds expression in a claim for a quashing order.

61. The second head of challenge is based upon certain discrete issues which arise concerning the lawfulness of the Treasury Directions issued in conjunction with the Exit Regulations (and it therefore assumes, contrary to the Claimants' primary case, the lawfulness in principle of the Exit Regulations).

62. The third head of challenge concerns the draft LGPS Regulations upon which the MHCLG is currently consulting. Other grounds might arise, depending upon the form in which such scheme regulations were eventually made, but at this point the focus of the claim is upon an issue in relation to which there is a clearly crystallised dispute, namely whether the proposed draft Regulations make retrospective provision of a kind which cannot be made under the 2013 Act without consent.

63. The seven specific grounds of challenge are as follows.

*First head: effect and legality of the Exit Regulations*

64. **Ground 1** - contrary to the position taken by the Defendants in the Guidance, in pre-action correspondence, and in the letter from the MHCLG to administering authorities, the Exit Regulations do not when properly construed remove or restrict any right of an individual to receive an unreduced pension.

65. **Ground 2** - the Exit Regulations are unlawful because the decision to make them was based on a misdirection of law as to their effect.

66. **Ground 3** - the Exit Regulations are *ultra vires* -

(a) To the extent that they purport to have retrospective effect by removing accrued pension rights, and/or the right to receive payments pursuant to legal obligations undertaken before the Exit Regulations came into force; and also

(b) To the extent that they purport to apply to contractual payments which are not consequent on leaving employment.

67. **Ground 4** - to the extent that the Exit Regulations do impair individual pension rights and/or existing contractual rights, they infringe Article 1 of Protocol 1, alone or read with Article 14 of the European Convention on Human Rights ("the ECHR").

68. **Ground 5** - in any event, it was irrational and unlawful for the Treasury to make Exit Regulations dealing with pension strain payments under the LGPS prior to completion of the consultation on amendment of the 2013 LGPS Regulations, including associated equality impact assessment, and prior to the making of such amendment to the 2013 LGPS Regulations as was lawful and appropriate.

*Second head: legality of the Treasury Directions*

69. **Ground 6** - The Treasury Directions as drafted are in part *ultra vires* and/or purport unlawfully to fetter the exercise of statutory discretion.

*Third head: legality of the draft LGPS Regulations*

70. **Ground 7** - The proposed amendments contained in the draft LGPS Regulations contain retrospective provision of a kind which it would be unlawful to make without the necessary consent of members or their representatives pursuant to s. 23 of the 2013 Act. Further or alternatively, the making of such provision would infringe Article 1 of Protocol 1 alone or together with Article 14 ECHR.

**GROUND 1 - THE EFFECT OF THE EXIT REGULATIONS**

71. As foreshadowed at paragraph 45 above, and further developed below, there is a very stark difference of view between the Claimants and the Government as to what effect the Exit Regulations actually have, assuming for the purposes of this stage of the argument that they have indeed been lawfully made, and also leaving aside any issue as to whether (even if the basic effect of the Exit Regulations is as the Government asserts) they need to be interpreted as applying only to pension rights accrued in respect of future service.

72. Fundamentally, the dispute is whether the Exit Regulations curently have any impact on the pension rights of individuals at all, or whether they merely restrict the ability of LGPS administering authorities to call for strain payments from employers, where the making of such payments would cause the exit payment cap to be exceeded. This is a dispute about interpretation which needs to be resolved by the Court, both because

it is of critical importance in its own right to all those administering authorities, public sector LGPS employers and individuals who may be involved in redundancy and early retirement situations in the coming months, and because it is the logical precursor to considering the grounds upon which the Claimants challenge the validity of the Exit Regulations.

73. Most obviously, if the Treasury misunderstood the legal effect which the Exit Regulations would have, if they were brought into force prior to any amendment of the 2013 LGPS Regulations, that must have been a misdirection in law such as to invalidate the decision to sign the Exit Regulations into law and thereby, by virtue of reg. 1(2), to bring them into force 3 weeks later.

74. Conversely, if the Exit Regulations do have the effect claimed by the Government, then the challenges made by the Claimants concerning retrospective removal of rights, A1P1 and other issues, will come into play in relation to the Exit Regulations - whereas if the Exit Regulations do not impact upon individual pension rights, then such challenges may only be relevant to the Draft LGPS Regulations (if they are made).

75. It follows from the provisions discussed above that the current position on the face of the Exit Regulations and the 2013 LGPS Regulations is as follows:

(a) A qualifying member has a right and obligation to take an immediate unreduced pension if their employment is terminated by reason of redundancy or business efficiency: see reg 30(7)(b) of the 2013 LGPS Regulations. There is also a right to an immediate unreduced pension in other cases where the member has attained the age of 55 and the employer waives the requirement for actuarial reduction; and

(b) The administering authority of the fund may (but need not) require the employer to make a pension strain payment to meet the cost of paying the pension without reduction: see reg 68(2) of those Regulations; but

(c) Reg. 3(a) and reg 5(2)(b) of the Exit Regulations prohibit the employer from making a pension strain payment to the fund if to do so would exceed the aggregate total permitted exit payment of £95,000.

76. The Defendants' position in these circumstances appears to be that, in cases where the cap applies, the Exit Payment Regulations must be taken, as from the date they come into force, as <u>impliedly</u> repealing both the right to immediate unreduced pension

under reg. 30 of the 2013 LGPS Regulations, and the correlative obligation to take such a pension. It has made this position clear both in the Treasury Guidance at paragraphs 4.3 and 4.4, and in the Hall Letter. The Treasury has reiterated this position in its pre-action protocol reply to the Claimants dated 6 November 2011.

77. The Hall Letter states as follows (with emphasis supplied):

> *"The [Exit Regulations] make it clear that public sector bodies must not make payments in relation to individual exits in excess of £95k. That* ***includes local government employers and Local Government Pension Scheme administering authorities****.*
>
> *Previously, the Local Government Pension Scheme Regulations 2013 …* ***allowed*** *for some individuals to receive benefits which would be in excess of the cap now set in the 2020 Regulations. […]*
>
> *This Department has published a policy consultation and issued* ***draft regulations that will remove any remaining ambiguity in the legal position once they come into effect****. Subject to consideration of views received through consultation, effect will be given to those proposals as soon as parliamentary time allows.*
>
> ***In the meantime, the recommended course of action for an administering authority to act consistently with its legal duties is that the provisions of Regulation 30(7) are subject to the cap and so the provisions of Regulation 8 of the 2020 Regulations and Regulation 30(5) of the LGPS 2013 Regulations should be engaged. The Government's view is that LGPS members in that position should be able to elect to receive an immediate but fully reduced pension or, if they do not so elect, a deferred pension plus a lump sum equal to the capped strain cost****."*

78. The Hall Letter might be said to display a degree of confusion between what the law actually is at present, and what the Government might like it to be as a matter of policy. It is also lacking in any legal analysis of how the Exit Regulations can be read as having the effect upon administering authorities' legal duties which it asserts in its final paragraph.

79. The Government Legal Department in its PAP response dated 6 November 2020 on behalf of the Treasury does attempt such an analysis. It asserts, so far as the effect of the Exit Regulations on pension strain payments is concerned, that the Exit Regulations do not alter or remove the entitlement to immediate unreduced pension under reg. 30(7) "*except in so far as is necessary to give effect to the [Exit Regulations]*" and that where there is conflict between s. 153A of the 2015 Act/the Exit Regulations, and the 2013 LGPS Regulations, the former "*take precedence on grounds of implied repeal*".

80. The Claimants contend that the Defendants are wrong in their interpretation of the Exit Regulations. Any such approach would go far beyond any legitimate exercise in interpretation, and would in fact mean rewriting the regulations to make a major change which is simply not to be found on their face. For example, if the Treasury's construction were to work, it would require implied amendments to be made to reg. 68(2) (which confers power on administering authorities to <u>require</u> pension strain payments) and an extension of the scope of reg. 30(5) (power of members to elect to take immediate unreduced pension). Such wholesale changes to the rights of members and duties of administering authorities under the LGPS Regulations would require express wording wholly lacking from the Exit Regulations. Further, the alleged implication simply does not pass the stringent test of necessity.

81. As to the suggestion that the Exit Regulations must be taken to have modified the right to pension under reg. 30 by implied repeal: "*in modern times, when standards of parliamentary draftsmanship are high, the presumption against implied repeal is strong*": see *BH v Lord Advocate* [2012] UKSC 24 at [30] per Lord Hope. For the doctrine to operate, there must be a clear inconsistency between the two provisions. But there is no necessary inconsistency, as such, between the right to unreduced pension, and a prohibition on employers making strain payments to meet the cost of such pensions. As set out above, it is perfectly possible to make the operation of the Exit Regulations consistent with that of the 2013 LGPS Regulations, simply by interpreting the former as operating only upon the making of strain payments by the employer to the administering authority, thus leaving members' pension rights untouched. That may not have been the result which the Government subjectively intended, but that is of course immaterial. It may even be an irrational result given the purpose of the capping legislation, but that is not itself any reason to construe the Exit Regulations otherwise than in accordance with their natural meaning - the irrationality would lie in the Treasury's decision to sign the Exit Regulations into law without waiting for the 2013 LGPS Regulations to be amended, not in the terms of the Exit Regulations as such.

82. It is also highly relevant that the statutory right to receive an immediate unreduced pension in specified future circumstances is a vested right of property. The fact that the right may remain a contingent one, where the employment has yet to terminate, is irrelevant (as demonstrated by the caselaw discussed at paragraphs 109-111 below). Even leaving aside the relevance of the HRA and ECHR, well established domestic

principles of statutory construction dictate that legislation should not be construed so as to impair existing rights, or to deprive persons of property without compensation, without clear and unambiguous wording, or unless such a construction is "unavoidable". See for example *R v Secretary of State for the Environment ex p Spath Holme Ltd* [2001] 2 AC, where Lord Bingham said that there was a presumption that:

> "*Parliament does not intend to take away or prevent the exercise of any property right without compensation unless clear and unambiguous words are used.*"

Further:

> "*Clear and unambiguous words should be used if the citizen is to be deprived of his property without compensation and any reasonable doubt should be resolved in his favour.*" (ibid)

83. The Claimants also rely upon the fact that pension rights of the kind in issue here are protected by A1P1 (see the further discussion at paragraph 121 below).

84. In determining the proper meaning of the Exit Regulations in this respect, regard must also be had to fairness, in circumstances in which the effect which the Defendants allege them to have would be a retrospective one (a proposition made good elsewhere in these Grounds): see *Granada UK Rental v Pensions Regulator* [2019] EWCA Civ 1032 at [57]. In the present case, the implied retrospective provision contended for by the Defendants involves the abrogation, without consent, of a right to immediate unreduced pension upon dismissal in a redundancy or efficiency case. That would result in an individual who is affected, in circumstances likely to be beyond their own control, and by definition at an age (55+) when alternative employment may be hard to find, receiving a reduced pension for the rest of their life - even though that individual may have rendered many years of past service on the footing that in such a situation he or she could count on receiving an unreduced pension if made redundant in the closing years of a career. That is conspicuously unfair. It is all the more unfair where it is clearly envisaged even by the Defendants themselves that a fair approach (assuming that the Defendants regard what MHCLG is currently proposing as being fair) would at any rate have to involve allowing such employees to elect to take a partially reduced pension, something which they apparently concede is not possible under the existing provisions.

85. So the Defendants' construction of the Exit Regulations is one which could only be upheld if the Court were driven to that conclusion by clear wording. In fact, the natural

meaning of the Exit Regulations is to the opposite effect, and there is certainly no such clear or unambiguous wording upon which the Defendants can rely. Indeed, MHCLG has itself effectively acknowledged, in the Hall Letter quoted above, that there is at any rate ambiguity in the existing legal provisions: see its assertion that the coming into force of regulations amending the 2013 Regulations will "*remove any remaining ambiguity in the legal position*".

86. As will be seen from the account of the draft LGPS Regulations given above, the Defendants' asserted interpretation of the Exit Regulations also makes no sense in the light of the fact that the Government is currently consulting on its own proposal to do, through amended scheme regulations, the very things which it is now suggested that the Exit Regulations have already done (albeit accompanied by other changes). The same point also appears clearly from the Explanatory Memorandum to the Exit Regulations at §§7.3 which states (with emphasis supplied):

> "7.3 *These Regulations will result in some public service pension scheme provisions <u>needing amendment</u> due to the cap applying to employer-funded early access to pension arrangements to allow for early retirement.*

See to similar effect the Treasury's response to consultation on the draft Exit Regulations at §3.22. The existence of the draft LGPS Regulations, subject to consultation, which would effect such amendments, is consistent with this approach. The contention that the Exit Regulations must be read, as the Treasury and the Secretary of State contend, as <u>already</u> having effected such amendments to reg. 30(7), 68(2) and 30(5) of the 2013 LGPS Regulations, is wholly inconsistent with it.

87. Finally, it is apparent that, in seeking to avoid these difficulties, the Government is seeking to place some reliance upon reg 8 of the Exit Regulations, set out at paragraph 27 above. which they say requires scheme employers to make a part-payment to the employee or the fund in cases where reg. 3(a) of the Exit Regulations prohibits the employer from making a full strain payment to the fund.

88. The difficulty with this argument is twofold. First, reg 8 is at best an obscurely worded provision with a secondary role in the scheme of the Exit Regulations. It certainly does not purport itself to abrogate or modify any individual rights to pension. It cannot possibly be treated as providing the necessary clear language to sustain a conclusion that the right to an immediate unreduced pension under reg. 30 has been abrogated.

89. Secondly, reg 8 is, by virtue of reg 8(2) itself, expressly made subject to reg 3(a), which is the provision imposing the cap. So it does not in any circumstances permit the total cap to be exceeded. The most that it can mean is that where a full pension strain payment would breach the cap, the employer should make a payment of such proportion of the full payment as would take it up to the capping level. However, that does not help with the individual's pension where, as in the case of the LGPS (and pending any amendment to the 2013 LGPS Regulations), there is no facility for the administering authority to accept a part payment and to scale up the pension accordingly. In such cases, the individual will still be forced, in a reg.30(7)(b) case, to take an immediate pension. That pension will be reduced for life. It is most unlikely that the lump sum paid to the individual will enable him or her to purchase pension rights elsewhere that are equivalent to the lost pension. The tax implications of receiving such a lump sum may also very well be much less favourable for the individual than the receipt of an immediate pension in full.

90. In short, reg 8 cannot be a basis for treating the Exit Regulations as if they had made amendments to the 2013 LGPS Regulations which they have not in fact made. Nor does it come close to addressing the fundamentally unfair impact upon individuals which the Defendants' construction of the Exit Regulations would have.

**GROUND 2 - MISDIRECTION AS TO THE EFFECT OF THE EXIT REGULATIONS**

91. For the reasons given under Ground 1 above, the Claimants submit that the Defendants' interpretation of the Exit Regulations and their effect on members' pension rights under reg. 30 is wrong in law.

92. If that is so, then it must be the case that when the Treasury Ministers decided to sign the Exit Regulations into law, and to do so without waiting to see what, if any, amendments to the 2013 LGPS Regulations would appear necessary, appropriate or permissible following consultation, they acted under a misdirection of law. Further, the misdirection will have been one of central significance, going to the very heart of what bringing the Exit Regulations into force would actually do.

93. The Claimants have, in pre-action correspondence, asked the Treasury to disclose the ministerial submissions upon which the decision to sign the Exit Regulations into law on 14 October 2020 was based. The Treasury has not responded to this request. The submissions are centrally relevant documents, both to this ground of challenge and to

Ground 5 below; the request for these documents was an extremely limited and focused one; and it is obvious that they should have been shared under §3 of the judicial review pre-action protocol, quite apart from the Defendants' duty of candour. The only inference that can be drawn is that the Treasury did indeed either misdirect itself in law as to the effect which making the Exit Regulations would have, or (possibly - and even worse) that the decision was taken without considering or taking advice upon that issue at all.

## GROUND 3 - *VIRES* OF THE EXIT REGULATIONS

*Issues arising*

94. For the purposes of this Ground, it is necessary to distinguish between those aspects of the Exit Payments Regulations which relate to pension strain payments as a form of public sector exit payment, and those aspects which relate to payments made directly to the exiting employee.

95. In relation both to pension strain payments and to other payments, one issue which arises is whether the Exit Regulations purport to have a retrospective effect on individuals' entitlements which would exceed the powers conferred by the 2015 Act. The analysis is somewhat different in the two cases:

(i) So far as pension strain payments are concerned, this point obviously only arises if the Claimants fail on Ground 1 above - if Ground 1 succeeds, then it will follow that the Exit Regulations in fact have no impact at all upon individual entitlements (and, if or to the extent that such an impact would be *ultra vires* because of its retrospective nature, then that is a further reason for the Exit Regulations to be construed so as to avoid such a consequence).

(ii) In relation to other forms of payment, then -

(a) It may be that the 2015 Act contemplates the restriction of such payments where any immediate or contingent legal entitlement to such payment, or the discretionary decision to make such a payment on an *ex gratia* basis, only arises after the date when the implementing regulations have come into force. It is arguable that, to the extent that

any such provision is properly regarded as "retrospective" at all, it is a form of retrospectivity which the 2015 Act authorises by its (to this extent) explicit language - for example, the reference in s 153A(5)(e) to "outstanding entitlements".

(b) However, the Claimants submit that the 2015 Act does not authorise regulations whose effect would be to defeat legal entitlements which existed even before the regulations came into effect. That would amount to fully-fledged retrospectivity, of a potentially very objectionable kind, and there is nothing in the wording of the powers conferred by the 2015 Act which contains the clear language required before the making of such retrospective provision by secondary legislation will be held to be authorised (see the caselaw cited at paragraphs 100-103 below). Putting the point another way, when the legislation speaks of "outstanding entitlements", it evidently means entitlements which are outstanding at the date of exit. There is no warrant for reading this as a provision which overrides entitlements whose legal basis (whether that lies in contract, in statute, in trust, or in tort) predates the Regulations themselves.

96. It should be noted that in the ***BMA*** judicial review claim, the claimant did not draw the distinction set out in the preceding paragraph. Rather, it sought to contend (as the present Claimants understand the argument in that case, and in particular Ground 1 of the challenge there) that there was nothing in the legislation which could operate so as to modify the underlying contractual conditions and entitlements of employees, regardless of whether the relevant contractual agreement was concluded before or after the Exit Regulations came into force. Johnson J refused permission on this ground, regarding it as unarguably the case that the 2015 Act authorised legislation having such an effect, and that the Exit Regulations made such provision. The learned Judge in that case was not asked to, and did not, focus upon the narrower and more specific complaint made by the Claimants in this case. Regardless, therefore, of what occurs when the renewed application for permission on the refused grounds is heard in the ***BMA*** case, it will not impinge upon the present claim.

97. Returning to pension strain payments (if Ground 1 fails so that they need to be considered in this context), the point made in paragraph 95(ii)(b) above applies with just as much force as it does to other forms of payment - perhaps still more so, when one notes the striking contrast between the 2013 Act and the 2015 Act. Unlike the

2015 Act, which contains no hint of any intention to confer a power to remove legal entitlements pre-dating the implementing regulations, the 2013 Act contains express provision for regulations to amend public sector pension schemes with retrospective effect. Critically, however, this power in the 2013 Act has been conferred subject only to specific statutory safeguards as to its use, in particular in section 23 (as set out below, it is the fact that the draft LGPS Regulations would breach those safeguards which gives rise to Ground 7 of this claim). It cannot be right that the 2015 Act should be construed as permitting, by mere implication, the making of regulations which would override or circumvent the very detailed and explicit safeguards in the 2013 Act. Again, it should be noted that no issue concerning pension strain payments was relied upon in the ***BMA*** claim (and, given the different nature of the NHS pension scheme, it may be that no such issue would arise).

98. In relation to non-pension payments, another point arises (additional to the retrospectivity point), namely whether all of the payments to which the Exit Regulations purportedly apply are in fact exit payments as defined by the primary legislation.

*Retrospectivity*

99. The Defendants' position in relation to retrospectivity and the *vires* of the Exit Regulations appears to be based upon two legal errors. The first is that the 2015 Act authorises the retrospective cancellation of legal rights and obligations already conferred or incurred, as opposed to merely authorising interference with legal entitlements conferred or purportedly incurred after the implementing regulations take effect, but in advance of the employee's exit. The second error lies in the Defendants' failure to recognise the retrospective nature of a provision which impacts upon pension entitlement in a case in which the pension has yet to become payable, but the entitlement relates to a period of service which has already occurred.

*The Defendants' first error: absence of provision in the 2015 Act authorising interference with existing legal entitlements (immediate or contingent/prospective)*

100. As to the Defendants' first error, the relevant principle of statutory construction was set out in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (PC) at 558 per Lord Brightman:

> "*Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result*

> *is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past."*

101. The presumption against retrospective effect is particularly strong in relation to statutory provisions which delegate legislative powers. See *Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28, in which Moses LJ explained at [43] that:

> "*Absent a clear provision conferring power to make retrospective delegated legislation, the assumption of such a power offends the legality principle*" §43

102. These presumptions are even further reinforced where the nature of the potentially retrospective provision under consideration is such that it would interfere with property rights, particularly without compensation.

103. The general principle discussed in *Yew Bon Tew* and other cases is based on principles of fairness: the greater the unfairness any alleged retrospective effect would entail, the clearer the language required to rebut the presumption: see *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 CA per Staughton LJ at 724; *L'Office Cherifien de Phosphates v Yamashita Shinnihon Steamship Co Ltd* [1994] 1 C 486 HL, per Lord Mustill at 524-525; and *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, per Lord Hope at [98] and Lord Rodger at [195 to 196]. See also Bennion on Statutory Interpretation 7th ed. (2017) at 5.12. In *Yamashita* Lord Mustill identified the factors relevant to determining whether a statute should be construed as having a retrospective effect, including: (a) the degree of retrospectivity entailed; (b) the value of the rights which the statute affects; (c) the extent to which that value is diminished/extinguished; (d) the unfairness of adversely affecting rights; (e) the clarity of the language used by Parliament; and (f) any light shed on the statutory language by consideration of circumstances in which the legislation was enacted.

104. Accordingly, there is a strong starting presumption that the 2015 Act was not intended to authorise regulations which impacted upon legal rights existing before those regulations came into force. There is then nothing in the language of the 2015 Act which is anything like sufficiently explicit to rebut that presumption. Everything which appears in section 153A is entirely consistent with the more limited effect explained in paragraph 95 above.

105. Further, if s. 153A does not upon its objectively correct construction confer such retrospective power, it makes no difference that the Treasury may have intended or stated that the Exit Regulations were to be retrospective. See *Secretary of State for Energy and Climate Change v Friends of the Earth*, above, per Moses LJ at [49]: "*The Secretary of State cannot arrogate to himself the power to introduce delegated legislation with retrospective effect merely by announcing an intention to introduce such legislation. Either there is statutory authority or there is not. The warning makes no difference*."

106. The Treasury Guidance states:

> *"1.2 … During the relevant s 153A Parliamentary debates, it was made clear that the cap applies to existing contractual terms from when the Regulations come into force (4 November 2020). It is envisioned such existing contractual terms will, by implication, be unenforceable to the extent they contravene the relevant legislative provisions.*
>
> *1.3 The Regulations take precedence over existing contractual agreements in addition to earlier regulations and other exit schemes which make more generous provisions when compared to the Regulations, unless these arrangements are exempt as a result of the Regulations*. […]

107. It is apparent, therefore, that the Treasury accepts (indeed, asserts) that the Exit Regulations have a retrospective effect upon existing contractual entitlements (and, presumably, other legal entitlements). It is notable that, both here and in the response to the pre-action correspondence, the Treasury has preferred to place reliance upon unspecified statements made during the passage of the Bill in 2016, rather than pointing to anything in the language or the logic of the legislation which would point to such a consequence, still less attempting to defend the fairness of the result. General references to "six-figure payouts" to the highly paid will hardly suffice in that respect, not least because it is apparent that the inclusion (in particular) of pension strain payments within the cap will cause it to apply to many individuals who are not "highly paid" in any generally understood sense of the term. Indeed, a strain payment is not a "payout" to an employee at all. The Claimants will make submissions about statements in Hansard if and when the Defendants seek to point to some specific provision in the legislation which is ambiguous on the *Pepper v Hart* test, and to a Hansard statement about the specific meaning of that provision which is admissible on applying that test.

108. That neither s. 153A nor the Exit Regulations, when properly construed, override contractual rights which are vested as at the coming into force date of the Exit

Regulations is supported by considerations of fairness (for the relevance of which see paragraph 103 above). Employees will have entered into contracts of employment in good faith, often long before the exit payment cap provisions became law, and indeed in some cases before such a cap was even mentioned as a policy proposal. They will have accepted the terms and conditions of their employment as a package. The right to termination payments (including notice periods, or provisions for payment in lieu of notice) may have had a significant effect on their decision to accept employment, and the salary they were willing to accept. The effect of the cap, if it applies to their contractual rights, could be to deprive them, without compensation, of very important benefits. The amount that may be lost is likely to vary widely between employees and will frequently depend on a number of factors, not just salary levels, which may be entirely outside the control of the employee.

*The Defendants' second error: changing future pension entitlement accrued in respect of past service is a form of retrospective provision*

109. It is well established that pension benefits are to be regarded as a form of deferred pay: see for example per Lawrence Collins J, as he then was, in *AMP (UK) plc v Barker* [2001] Pens LR 77 at [73-76], and the cases there cited, as well as *Palestine Solidarity Campaign*, above. Although actual payment of early unreduced pension under reg. 30(7)(b) is contingent upon dismissal in circumstances of redundancy or efficiency, that payment in fact relates to years of service already rendered as at the date of the termination of employment. It is, therefore, an accrued right. Accordingly, whilst there would be no objection, on grounds of retrospectivity at least, to regulations which laid down different rules for that portion of an employee's pensionable service which postdated the coming into force of the regulations, taking away a right to early unreduced pension in respect of any employee's entire service plainly is a form of retrospective provision, including in the case of individuals whose employment is still continuing at the date of the regulations.

110. This analysis is strongly confirmed by two cases. The first is *R (PCSU) v Minister for the Civil Service (no 1)* [2010] EWHC 1027 (Admin), [2010] ICR 1198. In that case the issue was whether a right to certain pension benefits payable on redundancy under the Civil Service Compensation Scheme could be considered an accrued right which could not be amended without the consent of members under what was then s. 2(3) of the Superannuation Act 1972. The Court (Sales J. as he then was) held that it was such a right, notwithstanding that payment of early pension benefits on redundancy under the Scheme was a matter of administrative practice, rather than a legal right.

The position is *a fortiori* with respect to the statutory right and obligation under reg. 30(7)(b).

111. The second case is the judgment of the Court of Appeal in *Nicholls v Greenwich LBC* [2003] EWCA Civ 46, [2003] ICR 1020 (CA). That case concerned the Local Government (Discretionary Payments) Regulations 1996, which applied a statutory cap to the amount a local authority could pay by way of gratuity. The enabling legislation was s. 7 of the Superannuation Act 1972. The appellant had a contractual right to a gratuity payment on retirement which pre-dated the Regulations and exceeded the cap. The Court of Appeal stated that:

> "*[37] The Superannuation Act 1972 should not, unless the statutory language makes that result unavoidable, be construed as conferring power on the Secretary of State to make regulations prohibiting or disabling local authorities from honouring contracts, which have been validly entered into, and depriving employees of their vested contractual rights. It would be unusual for such a far reaching power to be delegated by Parliament.* […]
>
> *[38] At the date when regulations were first made under section 7 of the Superannuation Act 1972 Mrs Nicholls already had a vested contractual right to be paid a gratuity at a future date i.e. on her retirement. If, correctly construed, the regulations prohibited or disabled the employer (be it ILEA or the council) from making the promised payment, that would give the regulations a retrospective effect within the principle stated by Lord Brightman in Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553, 558*
>
> *[. . .]*
>
> *[40] In my judgment, the council's arguments do not begin to meet the crucial point that, as a matter of construction, the 1996 Regulations are not framed so as to operate retrospectively and to deprive Mrs Nicholls of her vested contractual right to be paid what was validly agreed in her contract of employment 14 years earlier. The regulations made under section 7 of the 1972 Act are capable of applying to contracts entered into after the regulations came into force; but I can find nothing in the language of the regulations clearly applying the new statutory cap retrospectively to a pre-existing entitlement which falls for payment after the regulations were made.".*

*Purported application to payments not amounting to exit payments*

112. Section 153A of the 2015 Act provides for a cap to apply to "exit payments". Such payments are those made "in consequence of an employee leaving employment". Reg 5(2) of the Exit Regulations purports to apply, however, to certain payments which may well be payable not in consequence of the employee leaving employment, but for some other reason, e.g. because they are sums due as a result of events which occurred during employment. To that extent, the Exit Regulations are *ultra vires*.

113. Thus, regulation 5(2)(c) includes in the definition of "exit payment" "*any payment pursuant to an aware of compensation under the ACAS arbitration scheme or a settlement or conciliation agreement*". Such agreements may, however, relate to matters which arise not in consequence of the employee leaving employment, but by virtue of matters arising during the course of the employment, for example, deductions from wages, or equal pay claims. Accordingly, it is clear that regulation 5(2) is, to that extent, *ultra vires* the enabling power in s.153A(1) of the 2015 Act.

114. Although the point is a short one, it may in some circumstances be an issue of great significance. An outstanding claim for equal pay may be a prime example of that: such claims may extend back for many years, not least because of the time and complexity often involved in establishing a right to equal pay, and the underpayment may be such as to leave even a less well paid employee with a considerable entitlement to arrears, having nothing to do with the termination of employment or its circumstances. It is wholly unclear what the justification would be for permitting the exit payment cap to extinguish or reduce such an entitlement, simply because the employment terminated before the arrears had been paid, nor what there is in the language of the 2015 Act which could legitimately found the conclusion that it was *intra vires* for the Exit Regulations to make such provision.

115. It is right to make clear that this latter aspect of *vires* is similar to the argument advanced as Ground 2 in the ***BMA*** claim, for which Johnson J refused permission. In this instance, it is respectfully submitted that the learned Judge was simply wrong to do so. The reason which he gave was that the "dichotomy" between payments made in consequence of an employee leaving employment, and payments in respect of a legal liability in relation to matters occurring during employment was a "false" one - "*The fact that a payment is made in respect of a legal liability in relation to matters which occurred during employment does not prevent it also from being made in consequence of an employee leaving employment.*" However, whilst it is possible to conceive of a legal liability which both arises in consequence of leaving employment, and relates to matters occurring during employment (e.g. a liability to compensate for constructive dismissal), that will not be the norm. Indeed, it cannot be *intra vires* for the Exit Regulations to catch *any* payments which do not fall within the definition in the primary legislation.

116. Johnson J also referred to the fact that the Treasury Directions provide for relaxations in some cases, presumably meaning the mandatory relaxation for certain complaints

within the jurisdiction of an employment tribunal. But a relaxation by directions of a prohibition contained in delegated legislation cannot logically justify a prohibition which is *ultra vires* in the first place; and in any event, paragraph 1.6 applies only to a small and narrow category of cases, as reflected in its heading (health and safety, whistleblowing and discrimination).

**GROUND 4 - THE EXIT REGULATIONS BREACH CONVENTION RIGHTS**

117. Alternatively, if ordinary domestic rules of construction were to lead to the conclusion that the effect of the Exit Regulations was to remove the right to unreduced pension under reg. 30, and/or vested contractual rights or other entitlements, then the Exit Regulations would infringe the right to property under A1P1.

118. On this basis, by virtue of s. 3 HRA, the Exit Regulations must be "read down" so that the relevant right is not infringed. The Claimants submit that the Exit Regulations certainly can (for the reasons already set out) and therefore must be interpreted so that they do not impair: (a) the existing right to unreduced pension under reg. 30(7) of the 2013 Regulations at all, or (b) contractual and other rights vested as at the date the Exit Regulations came into force.

119. Alternatively, if such a reading is not possible, the correct remedy is to quash the Exit Regulations.

120. A1P1 provides:

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

121. It is well established that pension rights are "possessions" for the purposes of A1P1. The Grand Chamber of the ECtHR has held: "*when a State chooses to set up a pension scheme, the individual rights and interests deriving from it fall within the ambit of [A1P1], irrespective of the payment of contributions and the means by which the pension scheme is funded*" *Andrejeva v Latvia* (App. 55707/00) 18 February 2009

(GC) at [76]. The authorities cited at paragraphs 109 to 111 above, dealing with the status of pension rights accrued through past service, are also relevant here.

122. Equally, other statutory and contractual rights to severance pay are also possessions for the purposes of A1P1. In *NKM v Hungary* (App. No. 66529/11, 14 May 2013 a tax of 98% had been introduced on severance payments paid to civil servants where they exceeded a stipulated amount. The ECtHR held that such a tax infringed the applicant's rights under A1P1. In reasoning which echoes strongly in the present case, the ECtHR emphasised (see §§36 to 41) the importance of the property rights in such a case:

> *"statutorily stipulated severance represents a long-term expectation on the side of the civil servant and a commitment on the side of the State as employer. For the Court, such long-term expectations, reinforced by many years of unchanged statutory guarantees, cannot be lightly disregarded."* […]
>
> "*severance cannot be simply regarded as a pecuniary asset; given its social function, the entitlement to severance allowance must be rather seen as a socially important measure intended for workers who have been made redundant and who wish to remain in the labour market*."

123. The same may be true even where the relevant benefits are not payable as a matter of strict legal right: see *PCSU (no 1)*, cited above, and also *R (PCSU) v Minister for the Civil Service (no 1)* [2010] EWHC 1027 (Admin), [2011] 1 All ER 985. This is relevant, in particular, to the extent that the Exit Regulations interfere not only with the unqualified right to an immediate, unreduced pension which arises in certain circumstances under reg 30(7) of the 2013 LGPS Regulations, but also with the individual employee's ability to seek from his or her employer a waiver of actuarial reduction upon early retirement under reg 30.

124. In the present case, the Exit Regulations clearly interfere with the right to property under A1P1. If they have the effect for which the Defendants contend, they deprive employees of pension benefits, sums due under contracts of employment, and other existing entitlements and expectations (including entitlements to be compensated for past legal wrongs), without compensation (even if reg. 8 of the Exit Regulations operates to enable a lump sum to be paid to employees deprived of immediate unreduced pension on retirement, as to which see paragraph 89 above, that lump sum will not represent full compensation, and in some cases it will fall very far short of that).

125. The issue, therefore, is whether in providing for such deprivation of property, the Exit Regulations are compliant with A1P1. In *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016 (HL) ("*Welsh Asbestos")* Lord Mance at [45] summarised the approach to be adopted when determining if legislation is compliant with Convention rights into four stages: (i) whether there is a legitimate aim which could justify a restriction of the relevant protected right; (ii) whether the measure adopted is rationally connected to that aim; (iii) whether the aim could have been achieved by a less intrusive measure; and (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.

126. The Claimants accept that preventing the use of public funds to make inappropriately generous severance payments to employees is capable in principle of being a legitimate aim. However, it is submitted that the exit payments cap as currently formulated in the legislation does not constitute a proportionate measure in pursuit of that aim. The second, third and fourth stages of the analysis suggested by Lord Mance in the *Welsh Asbestos* case are all relevant here, and some of the points made by the Claimants will relate to more than one of those stages. The Claimants also reply upon, without repeating in full here, the analysis and examples given in the consultation response documents produced by ALACE and LLG and others, and in the witness statements of Mr Miller and Ms Evans in support of this claim.

127. Essentially, however, there are three problems with the system put in place by the Exit Regulations (they are further elaborated below):

    (i) First, the cap is a crude and undifferentiated measure. It makes no, or almost no attempt to draw any distinction according to the nature and basis of the payment being counted towards the cap.

    (ii) Secondly, the cap does not strike a fair balance between the legitimate public interests in play on the one hand, and the impact upon individuals on the other hand, and the individuals who will suffer severe personal loss extend beyond those at whom the cap is ostensibly aimed.

    (iii) Thirdly, the design and operation of the cap leads to arbitrary distinctions for which there is no justification (which is relevant both to the issue of proportionality under A1P1, and to the application of the A14 non-discrimination provision).

128. The first two of the three problems identified are greatly exacerbated by the failure of the Treasury to exercise the statutory power to increase the level at which the cap was set in 2016, and by the decision to bring pension strain payments within the ambit of the Exit Regulations (which is not a step that the Treasury was obliged to take, and which has notably not been taken by the Scottish devolved administration, the issue currently remaining under consideration by the Welsh devolved administration). These two matters of course compound with each other. The problem with the level of the cap is further compounded by the fact, to which the Claimants have drawn attention in consultation responses and in pre-action correspondence, that the Treasury has failed to make any adjustment to take account of the impact of the National Insurance Contributions (Termination Awards and Sporting Testimonials) Act 2019, which has come into force since the level of the cap was originally set. This appears to mean that the cost of Class 1A national insurance contributions on what that legislation calls "termination awards" in excess of £30,000 will have to be counted towards the cap, so eroding further the original real value of the cap, even though such contributions go back into the public purse and do not fund any increase in the value of the exit payment which an individual receives.

129. It will be important to see (when the Defendants disclose relevant documents pursuant to their duty of candour) what consideration was given to increasing the level of the cap in ministerial submissions and other internal analyses. However, on present information there is a strong sense that the Government's position in this respect has been driven not by evidence-based judgments or a desire for proportionality, but rather by a totemistic desire to keep the level of the cap as a 5-figure rather than a 6-figure sum.

130. In applying the proportionality test in this case, it is especially important to bear in mind the retrospective nature of the cap as imposed by the Exit Regulations - certainly in relation to payments pursuant to existing legal liabilities of various kinds, and (if the Defendants' construction of the Exit Regulations is correct) also in relation to the removal or interference with pension rights. There is much ECHR caselaw which stresses that particular justification is required for measures which involve deprivation of property without compensation, and in cases of retrospective effect. The position was summarised by Lord Mance in the in the *Welsh Asbestos* case at [53]:

> "*In the case of confiscation, it will normally be disproportionate not to afford reasonable compensation, and a total lack of compensation will only be justifiable in 'exceptional circumstances'. In the case of retrospective legislation, 'special justification' will be required before the court will accept that a fair balance has been struck*."

131. Returning to the first of the three basic problems set out at paragraph 127 above, it must be borne in mind that the supposed aim and justification for the cap does not and cannot lie in an absolute need to reduce cost to the public purse. In the context of overall public expenditure, or even overall public expenditure on workforce costs, the amounts which will be saved by applying the cap are in relative terms very small indeed. Rather, the justification must be based upon the proposition (which the Claimants in principle accept) that in times of economic difficulty which place particular pressures upon public services, it is wrong for public resources to be used to make excessive payments to particular individuals, especially those who are already at the higher end of the salary scales.

132. But if that is the legitimate aim, then what is properly to be considered "excessive" cannot be based upon a crude lumping together of payments of any and every kind. It is absurd, for example, to draw no distinction between arrears of salary pursuant to an accrued equal pay claim, and a true severance payment. It is equally indefensible to draw no distinction between a specific contractual notice pay entitlement negotiated as part of an overall package of terms and conditions, potentially at a time when the cap was not even a policy proposal, and a purely *ex gratia* pay-off. It should be borne in mind that, in the local government sector at least, terms and conditions of service which have been lawfully set or agreed are *ex hypothesi* reasonable ones: see s.112 of the Local Government Act 1972.

133. Nor is the conclusion of pension strain payments rationally connected to such an aim, or a proportionate measure in pursuit of it. For the reasons already set out above, a person's accrued pension rights represent monies already earned - "deferred pay". As the 2013 LGPS Regulations stand, both the termination of the individual's employment, and the payment of an early pension when that occurs, may well be matters over which the individual has no control. There is no coherent justification for treating the amortised future cost of making good on existing pension rights as if it was no different to the free negotiation at termination of a severance payment to which there was no prior entitlement, and which goes straight into the individual's pocket.

134. Indeed, the Government has previously stated that the exit payment cap would not affect accrued pension rights. In its pre-action response to the Claimants dated 6 November 2020, the Treasury attached a ministerial letter dated 2016 which states "*Please do be assured that the cap will have no impact on any pension that has been earned through years of service.*" If the Treasury believes that this is not what the Exit Regulations (on its construction of them) in fact do, then that belief is based upon a misapprehension as to the nature of accrued pension rights.

135. Further, as the Treasury has already acknowledged in the impact assessment which it has prepared, the cap applies to reduce the pension benefits of public sector workers who earn moderate salaries but have long service. Such consequences cannot on any view be treated as serving the cap's legitimate aim - they amount, in effect, to penalising public sector workers for their long service.

136. As to the failure to strike a fair balance, the essential feature of the cap is that it shifts a financial burden from overall public resources (where the costs are in relative terms insignificant) to the shoulders of particular individuals. This is not intrinsically objectionable, but it does call for careful assessment of whether those individuals, and the financial costs in question, do truly fall within the legitimate aims of the measure, and whether the individual is being made to bear substantial costs which it would not, from the public perspective, be "excessive" to meet out of the resources of the public body concerned.

137. See in this respect, the doubts expressed by the ECtHR in *R.Sz v Hungary* App No 41838/11, 2 July 2013 as to whether the public interest was made out in relation to a taxation measure on severance payments which the state sought to justify by reference to saving taxpayer money and fairness:

> *"serious doubts remain as to the relevance of these considerations in regard to the applicant who only received a contractually stipulated compensation and could not have been made responsible for the fiscal problems the State intended to remedy. While the Court recognises that the impugned measure was intended to protect the public purse against excessive severance payments, it is not convinced that this goal was primarily served by taxation. … there was a possibility to change severance rules and reduce the amounts which were contrary to the public interest, but the authorities did not opt for this course of action."*

138. Whether a fair balance has been struck is a matter for the Court. As Lord Mance stated in *Welsh Asbestos* at [52]*:*

*"That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker."*

139. The points already made above about the retrospective impact upon legal entitlements are relevant here also. In relation to early retirement pension benefits under the LGPS, it is also particularly relevant to note that those benefits have in effect already been assessed as being proportionate and fair to the taxpayer, having been included in the package of benefits agreed between Government and member representatives pursuant to the major public sector pension reforms introduced in 2013 (see the witness statement of Mr Miller).

140. The Claimants submit that:

(i) The cap as imposed by the Exit Regulations adversely affects some public sector employees and not others; whether it does so or not will depend on a range of factors, most of which are outside the control of the employee, including pre-existing contractual terms, salary, length of service, age, reason for dismissal/termination and date of dismissal.

(ii) Any savings to the public purse will fall not in a uniform or fair manner amongst public sector workers as a whole, but unequally and arbitrarily on a smaller number of individuals.

(iii) In some cases the cap will operate to deprive an employee of only a small sum, in others, it will be very significant, amounting to months of ordinary pay, and it may include a reduction in pension for life.

(iv) There is no good evidence that the payments which will be subject to the cap are disproportionate, in the sense that they exceed what other employees in similar positions in the private or public sector would receive.

(v) Employees will have entered into contractual agreements, and provided service, in good faith and on the basis of a legitimate expectation that they would be paid on the promised basis.

(vi) Apart from the very narrow and limited provision made in paragraph 1.9(c) of the Treasury Directions, there are no transitional provisions to make savings for existing rights or to allow employees to adjust to the new rules.

141. The Claimants' case in this respect is strongly supported by the reasoning of the ECtHR in *NKM v Hungary* (above) especially at [65-76]. In that case the taxation provision in issue (a tax of 98% on severance payments paid to civil servants which exceeded a stipulated amount) had the same effect in practice as the cap in the present case. The State asserted that the tax measure "*pursued the legitimate aims of satisfying society's sense of justice and of protecting the public purse*." (see judgment, §26) THe ECtHR held that it infringed A1P1:

> "71. *… the applicant, together with a group of dismissed civil servants, was made to bear an excessive and disproportionate burden, while other civil servants with comparable statutory and other benefits were apparently not required to contribute to a comparable extent to the public burden. … Moreover, the Court observes that the legislature did not afford the applicant a transitional period within which to adjust herself to the new scheme […]*
>
> "72. *Against this background, the Court finds that the measure complained of entailed an excessive and individual burden on the applicant's side. This is all the more evident when considering the fact that the measure targeted only a certain group of individuals, who were apparently singled out by the public administration in its capacity as employer. Assuming that the impugned measure served the interest of the State budget at a time of economic hardship, the Court notes that the majority of citizens were not obliged to contribute, to a comparable extent, to the public burden. […]*
>
> *75. The Court concludes that the specific measure in question, as applied to the applicant, even if meant to serve social justice, cannot be justified by the legitimate public interest relied on by the Government. It affected the applicant (and other dismissed civil servants in a similar situation) being in good-faith standing and deprived her of the larger part of a statutorily guaranteed, acquired right serving the special social interest of reintegration. In the Court's opinion, those who act in good faith on the basis of law should not be frustrated in their statute-based expectations without specific and compelling reasons. Therefore the measure cannot be held reasonably proportionate to the aim sought to be realised.*
>
> *76. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 1 of Protocol No. 1."*

142. This absence of fair balance in the present case is not altered by the fact that relaxation of the cap may be permitted in particular cases under reg. 10 of the Exit Regulations. As set out above, and further discussed under Ground 5 below, the Treasury Directions and Guidance indicate that the circumstances in which relaxations may be made are limited to particular cases. Further, apart from the very limited "mandatory" cases, any such relaxation is dependent upon the exercise of discretion not only by the employing body itself, but also upon Treasury consent, on the basis of a formal procedure which appears calculated to discourage applications for consent in the generality of cases

(and which it may in practice be difficult to follow in time in the exigencies of a redundancy situation or similar). This is compounded by the indication in the Guidance that the power of relaxation is only to be exercised in exceptional circumstances.

143. As to the arbitrary distinctions to which the cap leads, the Claimants rely upon the following points, which go both to the application of the proportionality test for the purposes of A1P1, and to whether the challenged measures entailed unjustified discrimination pursuant to ECHR Article 14:

(i) For the reasons set out at paragraphs 44 and 45 above, the issue of strain payments falling to be made at the point of the employee's exit and, on the Defendants' approach, counted against the cap, is one which arises in the context of the LGPS because it is a funded scheme. The other main public sector schemes are "pay as you go" schemes. Although the Claimants are not closely familiar with these other sectors, it is unclear whether strain payments would actually fall to be made in the case of such other schemes, even where the employee may be taking an early, unreduced pension at exactly the same cost to the scheme as in the case of the LGPS. If that is correct, then the inclusion of pension strain payments within the scope of the cap discriminates against local government employees in a wholly arbitrary and unjustified way, having nothing to do with any legitimate aim of the cap.

(ii) In the context of the LGPS itself, many private contractors, typically those who have taken on former local authority staff pursuant to TUPE, are LGPS employers pursuant to admission agreements. Such employers are of course not directly subject to the cap. However, there are often "passing-on" arrangements contained in the contracts between such employers and the local authorities to whom they provide services, under which the authority agrees to meet all or part of the employer's pension costs (and which will be reflected in the tendered price for the service). However, it appears that the exit of an employee of such an employer is not a public sector exit, so that an employee in such a case will not be affected by the cap, even though his or her terms of employment, age and length of LGPS membership are all identical to an LGPS member employed directly by a local authority who is so affected; and that this is so even though the local authority may be meeting the costs of that exit in the same way as for an employee of its own.

144. In refusing permission for certain of the grounds of challenge in the ***BMA*** case, Johnson J placed some reliance upon s.6(2) of the HRA, which provides that it is not unlawful for a public authority to act incompatibly with a Convention right if the authority is acting so as to give effect to provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with Convention rights. Without making any submission as to whether this was or was not a correct conclusion in relation to the grounds of challenge as they were formulated in that case, it is of no relevance here. It would have been perfectly consistent with the 2015 Act for the Treasury to make regulations which applied only to entitlements arising after the regulations came into force; which did not exceed the notion of an exit payment as defined by the primary legislation; and which either did not extend to LGPS pension strain payments, or refrained from doing so until the MHCLG consultation had been completed. It would also have been consistent with the 2015 Act to exercise the power in s.153A(9), if necessary, so as to increase the amount of the cap; or to make different provision for relaxation of the cap.

145. For completeness, whilst dealing with the ***BMA*** claim, these Claimants do not dissent from the aspect of that claim for which permission was granted, but it would add nothing to the BMA's existing challenge for that discrete issue to be repeated in the present claim.

**GROUND 5 - THE UNLAWFULNESS OF MAKING THE EXIT REGULATIONS WHILST STILL CONSULTING UPON THE DRAFT LGPS REGULATIONS**

146. The draft LGPS Regulations are currently subject to consultation. The consultation was not due to close even on issues of policy until 9 November 2020 (and is not due to close with respect to issues relating to the drafting of the Regulations until 18 December 2020). Also, MHCLG has undertaken in the consultation document to carry out a scheme-specific equality impact assessment on completion of the consultation.

147. It is irrational to bring the Exit Regulations into force in relation to pension strain payments when necessary concomitant amendments to the 2013 LGPS Regulations (assuming that such amendments are permissible - as to which see Ground 7 below) have not been made. It is irrational and unfair to do so where proposed amendments are still subject to consultation and assessment of their impact.

148. The Exit Regulations are delegated legislation and are subject to ordinary principles of judicial review, notwithstanding that they have been subject to the affirmative resolution procedure: *R (Javed) v Secretary of State for the Home Department* [2002] QB 129 (CA) at [51] and *Bank Mellat v HM Treasury (No. 2)* [2014] AC at [43] per Lord Sumption JSC:

> *"a statutory instrument is the instrument of the minister (or other decision-maker) who is empowered by the enabling Act to make it. The fact that it requires the approval of Parliament does not alter that. The focus of the court is therefore on his decision to make it, and not on Parliament's decision to approve it."*

149. In any event, the Claimants have seen nothing to suggest that in resolving to affirm the Exit Regulations, applicable as they are to nearly all public sector employers, and having effects well beyond pension strain payments under the LGPS, Parliament should be taken to have appreciated and endorsed any irrational incoherence as between the Exit Regulations and the LGPS regime. It may have been assumed, for example, that some very general ministerial consent would be given under s.153C of the 2015 Act, so as to allow the LGPS to continue to operate as normal, unless and until appropriate amendments to scheme regulations were made under the 2013 Act.

150. As it is, it was irrational and unlawful to sign into law Exit Regulations which contained a provision prohibiting employers from making pension strain payments:

(i) Without making concomitant and necessary amendments to the 2013 LGPS Regulations, in particular reg. 30(7) and reg. 68(2);

(ii) In circumstances where there is an on-going consultation on amendment of those regulations; and

(iii) Before the equality impact assessment promised in light of the consultation was completed.

151. As to point (i), if the effect of the Exit Regulations is to prohibit pension strain payments but not to repeal or modify the right and obligation to take immediate unreduced pension under reg. 30 (the correct interpretation, as the Claimants submit under Ground 1 above), it creates a situation where the exit cap provisions are only half-implemented so far as the LGPS is concerned. In a "cap" case, the employee concerned will still be entitled to an immediate, unreduced pension. The scheme

employer will not, however, be able to make a strain payment to meet the cost. The effect must therefore be that the relevant cost will fall on the fund instead. This is a perverse result, given the purpose of the enabling power, s. 153A of the 2015 Act. Not only will the cost of relevant exits not be reduced in this respect, but greater burdens will be placed on the pension fund than before. Either the resulting burden will in the long run be recovered from the same employer through future rates and adjustment certificates (in which case the whole process is simply circular and pointless), or else it will fall instead upon other scheme employers having nothing to do with the termination in question, or potentially upon scheme members through cost capping mechanisms.

152. On the other hand, if the Defendants are right to contend, in effect, that the Exit Regulations implicitly (although not expressly) remove the member's pension entitlement in a cap case, in favour of a right by virtue of reg. 8 of the Exit Regulations and reg. 30(5) of the 2013 LGPS Regulations "*to elect to receive an immediate but fully reduced pension or, if they do not so elect, a deferred pension plus a lump sum equal to the capped strain cost*", then it must be irrational to make such far-reaching changes in such circumstances: that is, where there is a current proposal to introduce express amendments which would have a similar effect, but in a more coherent manner; and *a fortiori*, where those proposed amendments are still the subject of on-going consultation. As to point (ii) above, where consultation is embarked upon, it must be carried out properly. In particular, that means that "*the product of the consultation must be conscientiously taken into account in finalising any statutory proposals.*": see *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 (CA) at [108], endorsed in *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56, per Lord Wilson at [25].

153. In its 6 November 2020 response to the Claimants' pre-action letter, the Government Legal Department on behalf of the Treasury stated, in response to this issue of timing, merely that the outcome of the MHCLG consultation "*cannot affect the date of the coming into force of the 2020 Regulations*". This appears to amount to no more than a wilful evasion of the serious points which the Claimants have made. Of course the outcome of the consultation, which has yet to occur, will not affect the coming into force of the Exit Regulations, which has already occurred. That is not the issue. The issue is whether it was lawful and rational for the Treasury to make the Exit Regulations on 14 October 2020, knowing that this would cause them to come into force whilst the MHCLG consultation was still in progress, and intending them to have a significant

impact upon the operation of the LGPS (which was the very subject-matter of the consultation), without waiting for the outcome of that consultation. The Defendants have offered no answer to that.

154. The pre-action response on behalf of the Treasury did also state, albeit in the context of the Treasury Directions and Guidance, that delay until after the MHCLG consultation was inappropriate "*because the Regulations apply to hundreds of other bodies beyond those affected by changes to the LGPS"*. However, whatever the position may be in relation to other public sector employment to which the LGPS is irrelevant (the Claimants cannot say whether similar consequential issues arise in other sectors or not), this is again no answer. If the Government was not ready to deal coherently, following proper consultation and necessary consideration of equalities impacts, with consequential changes to the LGPS, then there were a number of rational courses for it to adopt. One would have been to defer the making of the Exit Regulations altogether. Another would have been to draft the Exit Regulations in a form which either excluded their application to local government employment, or else excluded pension strain payments from their scope, in either case making a later amendment to bring that sector or those payments within scope, if that was appropriate following consultation. A yet further, though less satisfactory, alternative would have been to give a general relaxation consent so that the Exit Regulations did not in practice bite on matters to which the MHCLG consultation was relevant, until that had been completed. The Defendants chose to adopt none of these rational courses of action, for reasons which they have been unwilling or unable to explain.

155. Certainly the Defendants cannot in this respect contend that there was an urgent need to make the Exit Regulations and apply them to local government, bearing in mind that the relevant enabling power was introduced approximately 4 years ago, and the Government has displayed no sense of urgency about the matter since then.

156. As to point (iii) above, it is submitted that to make such changes in advance of an equality impact assessment which MHCLG has itself recognised should be carried out, is both irrational, and evidences a breach of the public sector equality duty ("**PSED**") contained in section 149 of the Equality Act 2010. It is axiomatic that compliance with the PSED requires the necessary "due regard" to be paid to the impact of a decision upon groups with protected characteristics at the time when decision-making is still in progress, and not merely by way of *ex post facto* justification. Although there is no inflexible requirement for an equality impact assessment to be carried out, it is

necessary for the decision-maker to take proper steps to inform itself about the likely impact of its proposals, and in cases of any complexity something in the nature of an impact assessment is likely to be required.

157. In the present case, the Treasury's own analysis, the Restriction of Public Sector Exit Payments: Equalities Impact Assessment dated October 2020, shows that the exit cap will disproportionately affect men (§2.13), older workers (§2.16) and workers with longer service (§2.3). The Treasury's analysis asserts, however, that such discrimination is justified by policy objectives, namely: "*achieving value for money by the efficient and responsible use of public money in funding public sector exit payments and achieving fairness to the taxpayer.*" (see EIA at §2.13). However, before any such conclusion can properly be reached, it is necessary to consider the extent of the impact, and the MHCLG consultation has recognised in terms that, so far as the impact of the cap in relation to the LGPS is concerned, further specific assessment of the impact is required. To make the Exit Regulations at this stage, if they do indeed impact upon individual rights as the Defendants assert, is to pre-empt that process in a manner which, it is submitted, is indefensible.

**GROUND 6 - UNLAWFULNESS OF THE TREASURY DIRECTIONS**

158. Section 153C confers power on a Minister of the Crown to relax any restriction imposed by the regulations. S. 153C(5) provides that regulations may provide for that power to be exercisable by (a) a person specified in the regulations, and (b) may make relaxation subject to (i) consent of the Treasury or (ii) compliance with directions by the Treasury.

159. Reg. 10 of the Exit Regulations provides that the power in s. 153C(1) is exercisable, inter alia, by the full council of a local authority. Reg. 11 provides that the power to relax may not be exercised (save with the consent of the Treasury), without compliance with directions given by the Treasury. In this respect, it broadly follows s.153C(5), although the phrase actually used in the primary legislation is "following compliance", which more clearly brings out the procedural nature of what such directions may properly require.

160. The relevant content of the Treasury Directions has been summarised at paragraphs 30 to 33 above.

161. There are three respects in which the Treasury Directions are unlawful. These legal issues arise against the background that Parliament has created a discretion to relax the cap requirement in general terms, and the Exit Regulations have then (in accordance with the primary legislation) conferred the relevant statutory discretion upon, in this case, the full council of a local authority. Once those steps have been taken, the legitimate role of the Treasury under the statutory scheme is confined to two matters: (a) making directions which set out what steps have to be taken before a relaxation is effected; and (b) giving or withholding its consent in cases in which the authority wishes to effect a relaxation without taking those steps. Any attempt by the Treasury to use Directions so as to extend its role beyond that will be *ultra vires*, and/or will amount to an unlawful usurpation of fettering of the discretion which the 2015 Act and the Exit Regulations have together conferred upon another body.

162. The three respects in which the Treasury Directions are unlawful in the light of this analysis are as follows.

163. First, they purport to make relaxation of the cap mandatory in certain cases. There is nothing in the legislation to permit such mandatory relaxation, and it is a plain usurpation of the discretion conferred upon other bodies. The Claimants are of course concerned by this not because they positively wish to see the cap enforced in such cases, but only to the extent that it creates unfair distinctions between some individuals and others.

164. Secondly, the Directions are apparently intended to limit substantively the categories of case in which a relaxation may be effected. There is no power to do so, and again any attempt to do so is in any case an unlawful fettering of a discretion which Parliament has conferred in wholly general terms.

165. Thirdly, the Directions purport to require Treasury consent in all discretionary cases, and not simply those in which there is a proposed non-compliance with the preconditions laid down by the Directions (whether those preconditions are themselves lawful or not).

## GROUND 7 - UNLAWFULNESS OF THE DRAFT LGPS REGULATIONS

166. This is an extremely important issue, but it can be dealt with shortly, because most of the relevant law has already been set out above.

167. In particular, the Claimants refer to and repeat paragraphs 109-111 above, which explain, by reference to well established caselaw, why legislation removing a right to an unreduced pension amounts to retrospective provision, unless that removal is limited to that element of the final pension entitlement which accrues in respect of service rendered after that legislation comes into effect.

168. The draft LGPS Regulations would be made under the 2013 Act, which is wholly explicit on two critical points:

(i) It authorises regulations which make retrospective provision: see s 3(3)(b).

(ii) However, by s 23 (as set out at paragraph 39 above), in the case of regulations which appear to the responsible authority (here, MHCLG) to have significant adverse effects in relation to the pension payable to or in respect of members of the scheme, the authority must first obtain the consent of those persons or their representatives.

169. In this case, it is obvious that the removal of the right to immediate unreduced pension would have significant adverse effects on affected individuals, and that MHCLG could not rationally conclude otherwise. There does not appear to be any dispute about this.

170. Nor is there any suggestion that the requisite consent has been obtained, or that there is any intention to seek it. Nor is there any sensible prospect that such consent would be forthcoming to proposals in their present form.

171. Finally, the draft LGPS Regulations do not seek to distinguish (in terms of the required strain payment and its absence, to the extent that the cap prevents it from being made) between pension payments which relate to service already accrued, and those which relate to future service.

172. Accordingly, the draft LGPS Regulations propose to make retrospective provision, which would be *ultra vires* because the necessary consent would be lacking.

173. MHCLG has declined to engage with pre-action correspondence on this issue, claiming that, because the proposed regulations remain in draft and subject to consultation, any challenge would be premature.

174. However, there is no rigid rule to the effect that proposed draft regulations cannot be challenged by way of a claim for declaratory relief in judicial review. It is always a

matter for the discretion of the Court whether there is a dispute which has sufficiently crystallised to be the subject of adjudication, and whether to grant permission or to make a declaration would be an academic exercise, or would serve the public interest by enabling those concerned to know sooner rather than later whether what is proposed would be lawful.

175. In this case, there is no doubt whatsoever that a real and important dispute has crystallised, turning in substance upon a narrow point of law. The Exit Regulations are not a hypothetical possibility: they already exist, and they apply the exit cap to pension strain payments, albeit that the resulting effect (if any) upon individual pension entitlements is in dispute (Ground 1 above). The Treasury and MHCLG have already taken the position that early retirement benefits are affected by the Exit Regulations, and that the rules of the LGPS should be amended to reflect that. If the Exit Regulations as they stand in fact have the effect contended for by the Claimants, the Defendants would presumably see a still more pressing need to amend the LGPS Regulations, and if it were to be held that this could not lawfully be done in the manner contemplated, there would surely be an imperative need to reconsider the future of the Exit Regulations altogether.

176. Further, the Explanatory Memorandum to the Exit Regulations states at §7.3:

> *"7.3 These Regulations will result in some public service pension scheme provisions needing amendment due to the cap applying to employer-funded early access to pension arrangements to allow for early retirement. In this scenario, the pension scheme member receives an actuarially reduced pension from the scheme to reflect the early receipt of pension benefits with the employer funding the amount of reduction through arrangements between the employer and pension scheme. This increases the member's pension rights and enables the scheme members to have early access to their pension benefits without any actuarial reduction, ahead of their normal pension age.*
>
> *74. **These benefits do not represent pension an individual has accrued through years of service."***

177. The Claimants submit that the statement that benefits do not represent accrued pension is wrong in law. The issue is one which is already affecting many local authorities and individuals. Related issues are before the Court in this claim on any view. In these circumstances, it is plainly appropriate and convenient for the Court to decide this issue now.

**URGENCY**

178. The Honorary Secretary of ALACE, Ian Miller explains in his witness statement the need for urgency in resolving the claim. The coming into force of the Exit Regulations, together with the publication of the October Guidance and the Letter of Luke Hall MP, have caused acute concern amongst public sector employers, LGPS administering authorities, public sector employees and members of the LGPS.

179. In summary, there is conflicting advice concerning the effect of the Exit Regulations. The Government's position is that the right and obligation to early pension under reg. 30 of the LGPS Regulations has been impliedly modified. However, not only is that disputed by the Claimants and other representatives bodies and trade unions, it is also contrary to the advice from leading counsel obtained and published by the LGPS Scheme Advisory Board. The Scheme Advisory Board has commented that:

> "*Unfortunately, there does not appear to be any course of action which does not result in the risk of challenge and as such, clarity may only be achieved once a challenge has been resolved through the courts."*

The Local Government Association, which is the representative organisation for local authorities, has for its part advised that:

> "*employers may consider the most prudent course of action is to delay any redundancies until the amendments to the LGPS Regulations have been made and/or the legal position is settled. We recognise that in many cases that may not be possible*."

180. It is clear that employers and employees have been placed in an invidious position of having to take decisions concerning redundancy options whilst pension entitlements on redundancy for those aged over 55 are ambiguous and uncertain. This is a significant problem throughout England. As Mr Miller further explains, for example, there are many hundreds of redundancies currently being planned, for example, by Croydon Council, Leeds City Council and in Northamptonshire, where the county and district councils are to be abolished and replaced by two unitary councils from 1 April 2021.

181. The Claimants' pre-action correspondence invited the Defendants to agree to a stay or interim declaration pending resolution of the issues by the Court. However, the Defendants have refused to contemplate any such step.

182. In all these circumstances, the Claimants submit that there is an urgent need for the proper construction of the Exit Regulations, as well as the other issues arising in this claim to be resolved by the Court. If appropriate expedition can be achieved, it may be possible to manage without interim relief. However, if the Defendants continue to drag their feet, then the Claimants reserve the right to apply for interim relief.

183. The Claimants have submitted an application for urgent consideration which makes a number of proposals designed to ensure a substantive hearing of this claim by the earlier part of February 2021 which, it is submitted, is the very latest that resolution of the issues should be deferred. Should the Defendants, or the Court itself, consider that an earlier hearing is achievable and appropriate, the Claimants will co-operate fully to that end.

**RELIEF**

184. The Claimants seek the following relief:

(1) An order to quash the Exit Regulations, in whole or in part.

(2) Declarations that:

(a) the Exit Regulations (if not quashed) upon their true construction:

(i) do not remove or modify any entitlement of an individual to receive pension benefits under the 2013 LGPS Regulations; alternatively

(ii) do not remove or modify any such entitlement so far as it relates to service accrued prior to 4 November 2020; and

(b) the Treasury Guidance and the Hall Letter are unlawful so far as they state or suggest otherwise.

(3) An order to quash the Treasury Directions, in whole or in part.

(4) A declaration that it would not be lawful for the Second Defendant to make regulations in the form of the Draft LGPS Regulations without obtaining consent pursuant to section 23 of the Public Service Pension Schemes Act 2013.

(5) Such further declaratory or other relief as may be necessary to give effect to the Court's conclusion upon the issues raised by this claim.

**19 November 2020**

**NIGEL GIFFIN QC**
**CECILIA IVIMY**

**11KBW**