

Using the law to address unfair systems



A case study of the Personal Independence Payments legal challenge

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The Baring Foundation

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Lankelly Chase works in partnerships with people across the UK to change the systems that perpetuate severe and multiple disadvantage.

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Executive summary

“What it came down to was that these are really difficult times to be living in. Really bleak and really frightening, and it feels important that people try to make things different. And it feels important that people know that there are people trying ... I thought, well even if we lose, actually trying is enough. Just so people know that they are seen and they are worth fighting for.”

Interview with claimant, RF

For organisations hoping to use the law to challenge unfair systems there are important lessons to be learned from previous experience. This executive summary highlights some of the key lessons learned from a case brought by claimant ‘RF’ and led by the Public Law Project (PLP) to challenge the Department of Work and Pensions (DWP’s) discriminatory changes to a disability benefit known as PIP (personal independence payments).

The report seeks to address the following research questions:

- Who was involved in the legal challenge and why?
- What characterises their collaboration?
- What systemic change can be described as arising from the case?

In this case study data gathering included compiling key documents associated with the case, semi-structured interviews with 14 research participants including some of those most closely involved in the case as well as individuals who were working to implement the judgment. It also included an analysis of media coverage of the case.

The objective of the report is to offer an in-depth exploration of the litigation process and to extrapolate key lessons about litigation as a means of addressing discrimination and disadvantage. We have directed these lessons at specific civil society, legal and grantmaking audiences below:

Key lessons

For civil society organisations

- **Linking policy work and legal case work:** The case study demonstrates that together organisations were able to act quickly and proactively respond to developments because of lobbying work that had already been done on welfare reform. Giving issues priority during the strategic planning and objective setting phases makes it easier to connect policy work to legal casework.
- **Respond to relevant consultations and play a proactive role in the legislative process (or work with those that do):** Witness statement evidence from six different organisations was highly persuasive and demonstrated to the court the unlawfulness of the consultation process as perceived by organisations advocating for those most adversely impacted by the policy change. Putting aside resource to properly research and respond to consultations, especially where there are potential equality and human rights impacts, ensures that organisations are engaged in the issue at an early stage.
- **Collaborate with other organisations working on or around the issue:** The organisations involved in the case brought different types of experience and expertise. This varied from campaign groups or service providers able to speak to grassroots impact of reform to those who had closely worked on policy development during the legislative phase. Communicating and collaborating across networks helps to identify issues and to gather evidence needed to support prospective challenges.
- **Proactively develop a media strategy (even if that means doing no or limited media) around the case and be prepared for unexpected surges of press attention:** Media analysis shows increased interest in the case around the time of the Government’s decision not to pursue an appeal. Analysis also illustrates the difference between the framing of messages by mainstream media and charity sector press. Finding new ways to frame messages may help to narrow this divide and reach wider audiences.

- **Disseminate the decision to the wider sector:** The disability and advice sectors were familiar with the decision in the case because of the way it was communicated through newsletters and other social media outlets. Communicating legal decisions in a way that is accessible and meaningful to those implementing them on the ground in the advice sector is key.
- **Anticipate how you will work with the Government to implement decisions and/or assist with draft guidance:** This will differ for organisations depending on their expertise, priorities and involvement in any given case. Communicating about possible approaches, including who should be involved and in what capacity will better facilitate both individual and collective ownership of this process.

For lawyers working with claimants experiencing discrimination and disadvantage

- **Put aside sufficient time and resources to properly support claimants through the various stages of the litigation process:** PLP's solicitor had experience of working with clients in challenging situations, including those with significant impairments. Counsel in the case went out of their way to appropriately communicate with the claimant in order to talk through the strengths and weaknesses of the case. If an organisation is not able to do this they should seek to collaborate with other organisations that might be able to take on this role.
 - **Be sensitive to what litigation demands of (but also offers) claimants who are at the heart of the case:** The lawyers and claimants we spoke with were acutely aware of the many potential downsides of litigation and the burden of taking a judicial review on behalf of a much wider cohort of people. Questions about the non-legal support a potential claimant might need through the litigation process need to be carefully considered and then revisited throughout the litigation.
- **Work with organisations who are best placed to give voice to those experiencing multiple and severe disadvantage:** It is challenging to take on a legal case and adequately capture or convey the lived experience of clients to the full range of relevant audiences: courts, the media, the public and government (particularly during the implementation phase). Working in a truly collaborative way with individuals with lived experience and their organisations can help to share the workload and allows those with most at stake in a case to speak for themselves.
 - **Reach widely across networks to gather submissions and expert evidence:** The claimant's lawyer at PLP played a pivotal role coordinating with other key organisations and gathering relevant evidence taking a proactive approach. An ability to establish and grow relationships in order to collaborate with a wide range of individuals and organisations across the sector is important to the success of drawing upon these networks.
 - **Ensure supporters of the case are accommodated in the court hearing:** A good legal team is not enough to support the claimant through the litigation process. Having wider support is important and the presence of such support at the hearing itself sends an important message to the court and in the public sphere. It can also provide an important signal of importance and reassurance to the claimant regardless of the outcome.

For funders

- **Civil society organisations require time and resource to respond to relevant government consultations and play a proactive role in the legislative process:** Thinking creatively about how resource might be allocated to properly research and respond to consultations and to undertake policy work, especially where there are potential equality and human rights impacts, ensures that organisations are engaged in the issue at an early stage and can maximise their contribution.

- **Lawyers working in civil society organisations have a distinct role to play:** Lawyers working at the intersection of policy and practice must be equipped with the knowledge and skills to develop effective networks to successfully pursue challenges. They must also be given support and training in order to develop the unique skills required for dealing with claimants experiencing multiple and severe disadvantage at the heart of strategic cases.
- **Accept there will be unexpected turns and endpoints in the litigation process:** we outline five possible explanations for why the Government did not appeal the decision. It is often difficult to predict the appellate journey of a case and being as responsive as possible will maximise impact amidst uncertainty.
- **Anticipate the funding required after the litigation phase in order to implement the decision:** We trace the impact of the judgment to the 'legacy' phase where PLP and others worked to implement the decision among key stakeholders and communicate it to relevant audiences including within government and across the advice sector. Giving organisations the time and resource to disseminate and embed decisions is important.
- **Litigation has the potential to empower individuals to drive systemic change:** the claimant expressed a strong desire to challenge power structures that discriminated against people with mental health conditions. The RF case allowed the claimant and her supporters to participate in the process of breaking otherwise discriminatory patterns of behaviour.

Introduction

In 2017, an individual known as RF brought legal action to challenge the DWP's discriminatory changes to a specific disability benefit. She was represented by a solicitor, Sara Lomri, employed by the legal charity Public Law Project (PLP). PLP had been working with organisations concerned about the impact changes would have on disabled individuals. By bringing their expertise to bear on the issue and facilitating access to justice for one individual, PLP was able to help shape the disability benefits landscape for thousands of individuals. This case study tells the story of how this was achieved.

The benefit system being challenged – Personal Independence Payments (PIPs) – was designed to help offset some of the costs of living with a disability. New guidelines introduced in March 2017 by the DWP stated that mental health claimants whose mobility is limited due to “psychological distress” were in effect barred from gaining the mobility component which is important in facilitating independence and inclusion. Being mobile enhances a person’s ability to interact with others, gain an education, earn a living and participate in the community. This change affected people with a range of conditions including learning disability, autism, schizophrenia, anxiety conditions, social phobias and early dementia.¹

In its judgment on 21 December 2017 in *RF v the Secretary of State for Work and Pensions*, the High Court ruled that the regulations introducing the March 2017 changes were unlawful because they “blatantly discriminate” against people with disabilities in breach of the Human Rights Act 1998. Delivering the decision, Mr Justice Mostyn also found that the Secretary of State did not have lawful power to make the regulations and should have consulted before making them.² The individual’s claim was supported through witness statements by The National Autistic Society, Inclusion London, Revolving Doors and Disability Rights UK. Mind and the Equality and Human Rights Commission (EHRC) intervened in the case as third-parties supporting RF’s claim. In January 2018 the newly appointed Secretary State of Work and Pensions, Esther McVey, announced that the government would not appeal the High Court’s judgment and that it would drop its appeal against the original Upper Tribunal decision (*MH v Secretary of State for Work and Pensions* [2016]) that had prompted the regulations under challenge.³

This constituted a major U-turn on the part of government and was an important legal victory for RF (the anonymous claimant) and PLP as well as the broader disability rights movement.

The aim of this report is to offer an in-depth exploration of the litigation process and to extrapolate key lessons about the effectiveness of strategic litigation as a way of addressing injustice and disadvantage. We highlight and evaluate the strategic decisions, activities and impact of the litigation process. The research also explores the relationships between different actors involved in this process. This case study will seek to shed light on the following issues:

- Who was involved in the legal challenge and who wasn’t and why?
- What were the key strategic decisions in pursuing this legal case?
- What forms of explicit and implicit collaboration emerged over the course of the legal intervention? What are the benefits and what are the risks of collaboration (whether implicit or explicit)? How can these risks be anticipated and managed?
- What, if any, systemic change can be described as arising from the case?

The case study will explore these questions by taking a process-approach. We will explore the pre-litigation stage including how the problem was identified by the claimants and by civil society organisations and the work undertaken in preparing a legal challenge. We will also discuss the hearing and the judgment and the ‘legacy’ phase of litigation after a case.⁴ This will focus in particular on issues related to collaboration, access to justice, resourcing litigation and the experience of the claimants.

The data gathering and analysis included a wide range of sources including:

- The legal documents associated with the case including, for example, the Court's judgment and the interveners' statement of case and evidence.
- Media data collected with the support of a research assistant on reporting of the RF case in both the mainstream and specialist media.
- Interview data from qualitative interviews with 14 respondents who were in some way involved with the case or the broader issue of discrimination on grounds of disability. This included those working on the issue within the Public Law Project, those working with other civil society organisations involved in this space, some of the lawyers involved in the case either acting for the claimant or acting for the intervener as well as "outsiders" working in civil society organisations who work in the disability and welfare benefits-policy space who are aware of the case. We also had the privilege of interviewing the two original anonymous claimants which provided us with unprecedented insight into the complex and multi-layered impacts of strategic litigation on those at the heart of the case.
- Several approaches were made to representatives of the DWP and to counsel for the Secretary of State for Work and Pensions but we did not receive a reply.
- Interview quotes have been anonymised. We have sought to bring in the voices of those involved in the process as much as possible in the analysis.

The report is structured as follows. The next section provides a picture of the legal and political landscape within which this legal challenge was situated. This is followed by the main body of the report which presents the findings of the study examining the various stages of the strategic litigation process. The report wraps up by highlighting the key lessons learned from this analysis.

Background

The Government launched a consultation in 2010 on the reform of Disability Living Allowance (DLA).⁵ A stated aim of the reform was to create a more “dynamic benefit” that would take account of individual circumstances and the impact of disabilities on people’s lives. PIP would rest on overall levels of functional impairment rather than basing assessments on a person’s condition or diagnosis. The Department for Work and Pensions (DWP) started to replace Disability Living Allowance (DLA) with Personal Independence Payment (PIP) from April 2013. PIP helps towards some of the extra costs arising from a long term ill-health condition or disability. It is not means-tested or subject to tax and it is payable to people who are both in and out of work.

Applicants are evaluated by health workers from the private firms Atos or Capita, who forward their assessments to a DWP decision-maker – who scores applicants on “daily living” and “mobility”.⁶ Each component can be paid at one of two rates, either the standard rate or the enhanced rate. If, after an assessment, the DWP decision-maker decides that an applicant’s ability to carry out the component is limited, she/he will get the standard rate. If it’s severely limited, the applicant will get the enhanced rate. To get the mobility component of PIP, the applicant must have a physical or mental condition that limits her/his ability to plan/follow journeys and to move around.

Since its introduction five years ago the PIP scheme has been subject to criticism.⁷ In 2017 a second independent review carried out by Social Security Advisory Committee chairman Paul Gray was critical of the assessment system, revealing that 65 per cent of those who appealed against rejected PIP claims saw the decision overturned by judges.⁸ According to DWP data, complaints about the PIP assessment process rose by almost 880 per cent between 2015/16 and 2016/17.⁹ The Committee noted their concern about the ability of contractors to conduct accurate assessments and that these might even be deliberately misrepresented in order to deny claimants benefits.

In March 2017 the DWP introduced regulations to reverse the effect of two Upper Tribunal judgments relating to the PIP eligibility criteria.¹⁰ The most significant change was to tighten the rules on access to the mobility component for people unable to undertake journeys due to “overwhelming psychological distress”. Disability and mental health organisations called on the Government not to proceed with the changes. Some questioned how the changes fit with the Government’s stated commitment to “parity of esteem” between physical and mental health issues.¹¹

All of this is situated within a broader context in which the UK government has faced criticism on a number of different fronts for its austerity and poverty-related policies. In August 2017 an inquiry by the UN committee on the Rights of Persons with Disabilities (the committee’s first ever inquiry) examined the government’s progress in becoming compliant with the UN Convention on the Rights of Persons with Disabilities (UNCPRD). The report found that the UK government is failing to uphold disabled people’s rights across a range of areas from education, work and housing to health, transport and social security.¹² These findings were further supported by the report of Philip Alston, the UN Special Rapporteur on extreme poverty and human rights in 2018.¹³

The legal case

The claimant in the case (RF) had been diagnosed (or 'labelled' according to those coming from a social model of disability) with severe mental health impairments. RF often cannot leave her home and when she does travel she experiences panic attacks and overwhelming distress. RF was denied the PIP mobility element and pursued a legal challenge by way of judicial review.¹⁴ This legal challenge needs to be understood as one part of a longer campaign by civil society organisations that had been working on the injustices underlying the PIP regulations as a policy issue. These organisations hit a wall in terms of their ability to lobby for change and turned to the possibility of litigation as a last resort. A hearing was scheduled for early December 2017. RF instructed Sara Lomri, solicitor and Deputy Legal Director of the Public Law Project to act on her behalf and, with the help of barristers Martin Westgate QC (at Doughty Street Chambers) and Alison Pickup (Legal Director of the Public Law Project), they argued in court that the regulations were discriminatory and violated the European Convention on Human Rights.¹⁵ They also argued that the Government did not have the power to make the regulations as they fell outside the scope of the legislation upon which they rested.¹⁶ Another argument, and an important consideration in the case, was that the Government had failed to consult on the regulations and that the new changes had not been fairly presented in the consultation process.

After arguing the issues in court over two days, Mr Justice Mostyn found strongly in favour of the claimant. He was highly critical of the consultation process saying there had been "no hint" that the government held the view that people with psychological distress had lesser needs than others in relation to mobility. PLP had obtained the views of organisations involved in the original consultation and development of PIP and filed detailed witness statements on their behalf in support of RF's claim. PLP had also been in communication with Mind who provided a persuasive witness statement as part of their wider intervention in the case.

On considering these submissions, Mr Justice Mostyn concluded that none of the organisations had been made aware of the intention to distinguish overwhelming psychological distress from other mental health issues when PIP was first consulted on and developed.¹⁷ To the contrary, Mind had been assured this was not the case. The involvement of these organisations at such an early stage in terms of identifying problems with the regulations, as well as their collaborative efforts in objecting to the proposed changes via RF's litigation, played a key role in persuading the court as to the unlawfulness of the consultation process.

The barrister for the Government, Sir James Eadie QC, had argued that the change to the regulations was not significant and that it supported the original intention of the legislation. Mr Justice Mostyn strongly disagreed finding that it was a "very big change to the criteria" and in effect the Government did not have the power to make it. Importantly, Mr Justice Mostyn also found that the desire to save money was not a reasonable foundation for introducing the regulations in the first place noting that, "plainly, if money was no object, the measure would not have been passed".¹⁸

Mr Justice Mostyn agreed with the submissions of RF's legal team that the regulations breached Article 14 of the ECHR because they discriminated against those with mental health conditions. The judge also considered expert medical evidence submitted by Mind that demonstrated that psychological distress is "an almost invariable feature of most mental illnesses" as well as submissions made by the EHRC on international obligations under the UN Convention on Rights of Persons with Disabilities.¹⁹ Governments are given wide discretion in matters of social security policy because of the macro-economic impact. It is therefore often difficult for ECHR challenges to be brought successfully in this area. The legal test applied in RF's case was whether the new regulations were manifestly without reasonable foundation, which is a difficult test for claimants to satisfy. However RF did succeed and the judge found that the regulations could in no way be objectively justified, and were manifestly without reasonable foundation.

The claimant succeeded on all three grounds.

Identifying the injustice

As part of our research we explored how the discrimination in the PIP assessment process was first identified and experienced by individuals and organisations and about how they each made decisions about the nature of their involvement. The aim of this section is to learn about how injustices are translated into legal grievances, how organisations collaborated in identifying the issue and some of the pathways to litigation.

Identifying the problem with the regulatory changes

For research participants that work in the mental health or disability sector the problems with the 2017 changes to PIP were obvious well before the regulations came into force. For some Deaf and Disabled People's Organisations (DDPOs) challenging negative developments in legislation has been a core part of their work over the last decade. For example, one research participant from a DDPO noted:

We've been working on PIP (...) well even before when government came up with this idea of DLA [Disability Living Allowance] reform. It was always part of our campaign priorities and we kept monitoring after the MH case [the Upper Tribunal case that government developed the new regulations in response to]. We then tried to follow what was going on with the regulations and obviously when we found out we started to complain about it. We sent different briefings, we tried to mobilise some support among MPs, we did lobbying in Parliament. Obviously government wanted to push it through quickly. (Interview 7)

Another research participant from a large mental health charity also said that being tapped into the welfare/benefits changes helped them to identify the issue early on.

There was a pretty instant recognition of what the effect of these regulations was going to be and some regular cobra-style meetings [with relevant people from within the organisation including a director, a lawyer, a policy/campaigns officer, a policy/campaigns manager and someone from the communications team] to see exactly what we could do about it. (Interview 6)

It didn't take long to understand from some of the documents the government released – the impact assessment – that this would have a huge impact on people with mental health problems specifically. (Interview 9)

Organisations also heard about the issues in a bottom-up way through their service-users and/or staff members who were facing this discrimination and exclusion in their own lives.

We have quite good links with mental health groups: National Survivor User Network, Mental Health Resistance Campaign. Some of our staff and trustees are mental health service users so we heard that this will be a problem. (Interview 7)

Another problem that was highlighted was that while DWP convened development groups which included representatives of civil society organisations there was a perceived failure of DWP to engage with civil society and welfare benefit organisations' representatives about the impact of policy changes on the ground:

In previous jobs I used to go to the PIP Stakeholders' Forums, and sadly no-one from the policy side attended the meetings. And you did feel quite despondent because you were trying to inform people from the DWP: this is not working. (Interview 1)

The changes were adopted by way of negative resolution in February 2017. This meant that there was little parliamentary scrutiny and the Secretary of State rushed them through the parliamentary process. The way in which the changes were adopted therefore meant that many research participants from disability and mental health organisations felt that there was little hope in terms of addressing issues at this stage. Groups mobilised and worked together through coalitions like the Disability Benefits Consortium but one of the challenges was trying to convey quite complex and technical information to MPs. In the middle of this process the 2017 election was announced which basically meant both MPs and organisations diverted their attention elsewhere.

There wasn't much hope in terms of the parliamentary process righting this wrong. (Interview 3)

It was pretty clear that it would be a very short amount of time to do anything from a campaigning perspective. (Interview 6)

Organisations tried a number of different avenues through which to raise the issue. When the UN Committee on the Rights of Disabled People did their inquiry on compliance with the UNCRPD in the UK in 2017 DDPOs raised the changes to PIP specifically as a significant problem. One research participant said:

[Last year] the UN Committee on the Rights of Disabled People looked at the UK's compliance. We raised these regulations with them and they made specific recommendations on these regulations ... Wherever there is a platform to criticize this [policy] or raise this as an issue we will. (Interview 7)

Civil society awareness of the issue

Throughout the pre-litigation stage PLP's existing networks played an important role in tapping them into an issue that was not at the centre of their expertise but was related in important ways to their work on access to justice and to using the law to address forms of severe and multiple disadvantage (Interview 5).

The research shows that because of PLP's strong networks the issue was put on their radar through three separate channels by different organisations: 1) Inclusion London's Disability Justice Project, 2) the Equality and Human Rights Commission and 3) the mental health charity Mind.

PLP had been in conversation with Inclusion London and specifically the Disability Justice Project ... we were having an ongoing dialogue with them and looking broadly at UK noncompliance with the UNCRPD [UN Convention on the Rights of People with Disabilities] ... at the same time I think the EHRC [Equality and Human Rights Commission] emailed somebody in our team and said, "Are you doing anything about this?" ... I definitely think that the existing relationship with the Inclusion London Disability Justice Project was pretty important. (Interview 3)

I basically pinged an email to Sara [at PLP] to say, "This is something that we've [at Mind] become aware of and it's setting off a bunch of alarm bells. This is what we're worried about, we are working behind the scenes to stop these regs coming into force and we're thinking about a possible challenge if they do. It will be useful to tie up if there's something PLP is similarly concerned about." And then Sara got back to me in March and said, "We're looking at this also" and it basically went from there. (Interview 6)

At this stage in the process, where it looks as if litigation is a last resort, stakeholder organisations need to weigh up different options and possibilities in terms of who might take a case and in what capacity, i.e. will they represent a client, act in their own name, act as a third party-intervener, provide a witness statement.

The EHRC were clear about their intention to act as interveners in the case from an early stage in view of their perception that the regulations created unfairness. They, like Mind and Inclusion London, highlighted their good working relationship with PLP (Interviews 6, 8, 10). The issue at the heart of the case clearly aligned with their strategic planning and corresponded with findings in their wider research.

We'd raised real concerns about the changes and the impact they would have. We had previously done a report called 'Being Disabled in Britain' which found that people with mental health conditions experienced some of the greatest barriers in society. (Interview 10)

We'd raised concerns about the proposed changes but the government went ahead with them and so the opportunity to take part in the case was one we couldn't miss. (Interview 10)

For those organisations that are collaboration-minded, part of this decision-making process involves establishing what other organisations acting in the same space are planning to do. That was apparent in this case where a research participant from PLP noted that there was a lack of clarity as to what other organisations who had a vested interest in the issue might be doing.

We had been speaking to Mind, who had indicated that they might bring the claim. They had an in-house legal team ... It wasn't clear what they were going to do, and I think that they then made it clear to us that they wouldn't be pursuing the litigation, but they might apply to intervene later. (Interview 3)

Yet the research also highlighted that establishing what other stakeholder organisations might be doing involves a number of different challenges. First, organisations of different size and dexterity have different capacities in which to consider taking or supporting a legal challenge and face different internal decision-making processes with varying timescales which can prove difficult.

What we did was we approached a barrister that was prepared to do some pro bono advice for us and got some pro bono advice on whether or not [charitable organisation] would be able to bring a challenge itself to get the regs struck down, and what the merits would be... at the same time we were putting some feelers out to see if anybody else was bringing a claim because we intervene in quite a few cases but bringing a case in our own name would have been a new thing for us and we're not particularly well set up for it.
(Interview 6)

Another factor that has been identified in previous research and was confirmed in this case study concerned misalignment between procedural timescales and organisational ones. On the one hand, there are very tight timelines for bringing a judicial review. The general rule is that a claim must be brought 'promptly' and in any event within three months of the decision being made. These time limits are strictly applied and present challenges for organisations with several different levels of internal decision-making, including approval from trustees who may only meet on a quarterly or biannual basis. On the other hand, the uncertainty around costs with taking a legal case in an organisation's own name are significantly different to those when pursuing a third-party intervention or representing a client. There are, as one interviewee noted "a lot of ducks to get in a row". As such, the governance processes of even large, professional organisations grapple with meeting procedural timelines. The interviewee further observed how important it is to have an organisation like PLP "whose bread and butter is litigation" working in the charity sector landscape in view of these constraints.

When this research participant was asked why they had considered taking the case in their own name on this occasion, they pointed to the centrality of the issue for them.

It's so high profile for us ... Some of the cases we get involved in have a mental health aspect to them, like universal credit now, whereas this, what was it the judgment says? It was "blatantly discriminatory". It was such core business for us that we thought the risk of nobody doing this is too high. It's worth us exploring. (Interview 6)

Yet the research participant went on to point out that it is likely that from an organisational perspective it will always be preferable to have an individual taking the case with the organisation playing a supporting role.

I think, really, with us if there was ever the need, if ever there was a case that we really wanted to bring, and we had standing to bring, and there was merit in us bringing I think we would be able to get it signed off as long as there wasn't the possibility of an individual doing it ... and us just supporting. It's really always going to be the more attractive option for the organisation.
(Interview 6)

For all charities, large and small, if a case is taken on in the organisation's own name, the charity takes on the liabilities for the case, including the opposing side's costs if they lose. For most organisations litigation is seen as prohibitively expensive from the outset. For others with more resources, the upfront costs can be budgeted for but uncertainty over the potential liability for the other side's costs constitutes an important barrier to litigation. All of this must be considered within the context of an organisation's broader programme of work and its responsibility to manage how donations and other financial resources are used. The financial implications of losing a case would mean an organisation is less able to do other things and could threaten its survival.

Among research participants there was a difference of views over what role various organisations should have played in this case. Notwithstanding the constraints highlighted above, where legal aid is unavailable charities are obviously insulated from costs risks in ways that most individual claimants are not. A quote from a research participant from a DDPO reflects longstanding tension in this area:

I think Mind should have set up and run this case ... They're claiming to be this charity that represents mental health service users, that stand up for their rights ... They have huge resources. They have an in-house legal team. They have, allegedly at least, access to quite huge numbers of mental health service users ... (Interview 7)

The claimants' path to PLP

PLP's networks again played an important role in identifying the two original claimants in the case, RF and SM. The two original claimants found their way to PLP via different routes: one claimant had seen and heard that Disabled People Against Cuts (DPAC) was interested in identifying those who would be affected by the changes, the other was in touch with staff at MIND. A research participant speaking to us for the pressure group DPAC noted that they had used legal challenges in their work before and worked closely with the investigative journalist who edits the Disability News Service.

Another research participant from a DDPO felt that this was exactly the right channel through which to find someone with lived experience of applying for PIP:

DPAC is a pressure group. People who are DPAC members are passionate about these things so it was the right audience. It was just the right cohort of people to reach. (Interview 7)

One claimant noted the broader conversations she had been having about the issue before deciding to take action.

We knew that the government was bringing in these regulations that cut people with mental health problems out of the top level of PIP for mobility and it's something we were talking about a lot, mostly in terms of despair really, like, "Oh, this is another thing the government are doing to us". And then I heard that DPAC were looking into whether this was something that was challengeable, and I got in contact with them. (Interview 8)

The other claimant noted the instinctive sense of unfairness in the changes.

I was applying for PIP and had just been turned down for mobility ... I thought the descriptor change was completely unjust ... and I thought somebody needed to stand up to them [DWP]. (Interview 2)

She also noted that:

They had to have somebody who was affected within the first month [of the changes being introduced] and I realized that this was very current and there would be very few people. So I knew it was the right place, right time, right connections. (Interview 2)

Challenges for would-be litigants

Yet taking a legal case is not without its difficulties. Both claimants wrestled with the decision about whether to pursue the legal challenge or not. Research participants identified a number of different reasons for not pursuing a legal case. First, a major barrier many people face in choosing whether to pursue litigation is the potential cost risk and that played an important role here. SM, one of the original claimants, was ineligible for legal aid. Ultimately SM felt she had no option but to withdraw from the litigation; an important factor in this decision was that the financial risk was too significant.

A second challenge several participants identified was awareness that "even if you win this battle you may lose the war". For example, one claimant told us:

One of my friends was putting me off on the case. He was like, "Even if you win, if you win on every point, they [DWP] will still find a way of not meeting that [need]. They'll just change the descriptor again in a different way". (Interview 2)

One of the lawyers in the case also included this, along with long time-scales, as a key reason why litigation is challenging for individuals.

The first conversation [I had with potential litigants addressed the fact] that litigation is stressful and that it is difficult, and that it would take a long time ... and that there were no guarantees of the outcome. (Interview 3)

The claimant talked about how the lawyer managed her expectations regarding the outcome.

Sara [at PLP] was always pretty clear from the start that it's hard to win a judicial review. And even if you win, it might not be a 'good win'. For example, if we'd won on failure to consult then they could go away and consult properly and do exactly the same thing. And she really drummed that into me all the way along. So I never really expected to win. And I suppose, at that point, I did have to think "Well, why am I doing this? This is a really big thing to do when I might not win, and if I do win, it might not mean anything anyway". (Interview 8)

A third reason identified by research participants was the enormous burden of taking on a public authority in a David and Goliath-type adversarial process which carries the risk of compounding the original harm. One participant noted:

I think it's actually quite traumatic for people. Obviously, I think they worry that they're going to be victimized by DWP if they fight back.
(Interview 4)

Another said:

[Litigation] compounds the wrong because the defendant's behaviour throughout litigation is usually pretty awful, and fairly sneaky at times.
(Interview 3)

One of the claimants also mentioned this dynamic:

There are big decisions to make and I'm the only person who could make them ... the difficult thing to get your head around really is I'm taking a government minister to court, like that's really big, but it also sort of isn't? I did most of it from my sofa. (Interview 8)

A fourth reason identified by research participants for not taking a case is that it can be an incredibly emotionally draining process. The claimants both observed this at several points over the course of the litigation process:

When I decided to take on the case, I knew that there were certain aspects of my mental health that would probably be impacted by it. And that felt like a fair exchange. That's a choice I made. But sometimes the way it was impacting was not expected. (Interview 8)

You've got absolutely no idea of the pressure it takes in this case, so other people who this is going to affect have no idea and very little gratitude of what [we] and what other claimants in other similar situations would go through, what that sacrifice was. (Interview 2)

Participants generally stressed the additional burden that litigation posed for those with mental health conditions:

I think law is not a very mad-friendly thing. There are deadlines, everything happens around a deadline in a very high-pressured way. And that can be quite difficult. I don't think that's something that lawyers can change, I think that's just the way that law works. (Interview 8)

We had a really good potential client whose facts were great. He and his wife were amazing... and he didn't feel able to cope with the stress of it because for lots of people subject to assessments, it's a living hell ... It's a really awful process by which they feel incredibly undermined. So they were just coping with round after round of assessments for various different benefits, and the day-to-day reality of having a disability. So although they stood to lose significantly ... they weren't able to step forward. (Interview 3)

My view of having done a lot of litigation is that it is such an embittering process for individuals ... I think that people should be reluctant to litigate ... And I can understand why, when there are very little or no other options, why litigation is the answer. But I definitely don't underestimate how emotionally draining it is, but also how much it drains your abilities to do anything else in your life. (Interview 3)

Support for the claimant was important in overcoming or mitigating some of these difficulties. The claimant found in particular that the newly developed friendship with the other claimant played a crucial role in allowing her to navigate some of the challenges.

[The other original claimant] was very committed to the case ... wasn't personally involved, but wanted to support me. I had good support from my friends, but sometimes ... she was the person I wanted to talk to because she understood some of the legal stuff in a way that other people didn't. (Interview 8)

In some ways these challenges are heightened in strategic public interest cases, where one or several individuals have to carry the burden of trying to address a wrong done to a much larger cohort of people. One of the lawyers involved in the case noted:

I was very conscious of the fact that this is a public interest case that would impact on the people that I was speaking to [who had experienced problems with their PIP]. But who wants to take that hit as it were? Who wants to be the person to take that case and carry that burden? ... One of my feelings about this case is why did it have to be RF [who took the case]?
(Interview 3)

It is clear that the barriers to taking a legal challenge as an individual in a public interest case are numerous. The claimant articulated what prompted her to first pursue, and then persevere with, the case despite the numerous challenges.

What it came down to was that these are really difficult times to be living in. Really bleak and really frightening, and it feels important that people try to make things different. And it feels important that people know that there are people trying, because I know for me there are times when there's nothing I can do. There's nothing useful I can do to make a difference to any of the really grim things that are going on. Last year happened to be a time when I could and I thought, well even if we lose, actually trying is enough. Just so people know that they are seen and they are worth fighting for. (Interview 8)

Preparing for a legal challenge

Taking a legal challenge requires expert analysis of the legal issues and questions at hand and these will differ from case to case. In this particular case, evidence of discrimination and a breach of human rights was key. Yet in other types of challenges a better strategy might be to keep the arguments crisp and not burden the court with too much evidence. It is crucial to work with a team that know how to strike this balance for the issue at hand. It is also crucial not to introduce legally irrelevant material even if it is highly relevant to individual or organisational concerns.

This section explores the planning work involved in preparing for litigation, including generating financial resources to support litigation and the surrounding campaign, evidence-gathering, networking with other organisations. In exploring all of this we also try to capture the experience of the claimants in the case.

The case involved a number of organisations in different capacities and a broad array of evidence.

Gathering evidence

The research shows that decisions about what kind of role a civil society organisation might play in a legal case and what kind of evidence-base to build for a case can be shaped by organisational priorities and dynamics. Building an evidence base for a case like this is easier if the issue is already a priority for the organisation and they have relevant expertise and evidence or research to hand. In this way the case felt like a natural fit for Mind.

What was different for us [at Mind] with the RF case, well different to the majority of cases we do, is that it's something that came internally. It was a priority internally rather than something we heard about externally. It was the organisation convincing the legal team it was something we wanted to do rather than the other way around. That had a number of benefits in that we already had the evidence ... our campaigners were already on board, we already had some insight of how this is going to affect people, and so it was much easier to put together the evidence when compared with cases that we're doing reactively. (Interview 6)

Organisational concerns can also help to prioritise what kind of role an organisation should take.

We [Inclusion London] were initially considering intervening but then we thought, "What will we bring to this? What extra ..." And because we did another intervention and we were threatened with costs, we thought that our trustees won't necessarily take it ... We just thought that we could provide evidence for witness statements. (Interview 7)

The claimant and the interveners used a range of different sources of evidence. PLP worked with Professor Chris Hanretty in interpreting some of the quantitative data that the defendant had filed.

We got somebody who understood about quantitative research ... He said he could do an expert report for us. It's really challenging to do that as a lawyer coming from our discipline to bend your head into a different discipline at speed, and to understand then what that then means for your client's case and work out whether it's helpful or not. It's really challenging. (Interview 3)

Organisation	Submission Type	Detail of Submission
Mind	Intervention	Policy background, discussion of expert psychiatric evidence, discussion of case studies, explanation of enhanced and basic rate PIP mobility component
	Case Studies	Six case studies of individuals known to Mind who experience significant psychological distress
	Witness statement	Ms Sophie Corlett, Director of External Relations, Mind, outlining experience of consultation process
	Expert Evidence	Dr Jed Boardman, Medical Expert (Psychiatrist)
EHRC	Intervention	Guidance on domestic and international equality and human rights obligations
Public Law Project	Witness Statement	First claimant, SM
	Witness Statements	Claimant (RF)
	Witness Statements	National Autistic Society, Inclusion London, Revolving Doors, Disability Rights
	Expert Report	Professor Chris Hanretty, expert evidence on testing the reliability and validity of the PIP assessment framework

A lawyer who was in the Court noted that the judge mentioned PLP's expert report specifically.

I can remember almost word for word what the judge said in court. He said, "I think I'm quite good at maths." Started off this judge, "I've read those reports and then I read them again and then I read [PLP's] expert report and then I understood them".... And in a way that's the point ... of expert evidence: it's so that the judge can make his decision assisted by an expert who explains the evidence to him... (Interview 5)

Mind's intervention drew on a variety of different types of evidence.

We got evidence from individuals through the case studies, we had expert evidence through Doctor Boardman [the psychiatrist], and we had a segment about the policy positions and the consultation. Those are the three things that we bring in an intervention. Expert evidence, individuals, some policy experience. To have all three of them in that case was pretty good. (Interview 6)

Meanwhile there was a consensus that the EHRC's intervention played an important role in persuading the Court.

The EHRC brought in the UNCRPD angle and that was really useful. They situated this within a wider context, which is exactly right. They are in exactly the right position to be saying that kind of thing. (Interview 3)

I think [the EHRC intervention] brought two things. One is there's a certain gravity to the EHRC intervening when your case is about discrimination. That's their role and if they get involved it shows there's a serious issue here ... And then I think their submissions were very focused on the UN convention and that was influential with the judge ... so it was helpful that they had put it there. It was in the mix and they'd had space to develop that. (Interview 5)

The EHRC highlighted to the court the seriousness of the issue and liaised closely with Mind to ensure their submissions did not overlap:

For the Commission, it's not about the facts of the case but it's about how we believe the law should be interpreted and what needs to be taken into account. We bring in international Conventions and relevant domestic law... We're very selective when we intervene so it's telling the court we think it's serious and there's been a breach of equality and human rights legislation. (Interview 10)

We were in touch with Mind pretty early on. We worked closely with them to make sure we weren't copying what they were saying. (Interview 10)

The evidence gathering put a strain on the claimant further highlighting some of the personal challenges of taking on a case like this.

There were things that were really difficult. I think we gave three different witness statements that were mostly about who I was and my mental health, and that's a really hard thing to talk to someone about. It's really rare that I will ever talk to anyone who doesn't have mental health problems, about my mental health ... There's something really fundamental that people without mental health problems just don't get ... The way law works and the way legal processes work, it was often very pressurized. Giving a statement in quite a pressurized way about something really intimate, and difficult. (Interview 8)

Funding

Funding strategic litigation is often a challenge both for organisations and for individual claimants. PLP devotes its own time and resources to build networks that allow them to have a view over potential injustices. In this particular case PLP had received some funding from the Oak Foundation which facilitated the network building that laid the foundation for this case. In terms of the legal challenge, initially, PLP had received some funding from the EHRC to seek advice about the likelihood for success. When the initial advice from counsel came back negative, particularly on Equality Act grounds, the EHRC declined to fund further work on the issue (Interview 3).

PLP did not consider the original advice right and sought a second opinion that was positive. This is a fairly unusual occurrence and speaks to the confidence and expertise of the solicitor and the team she works with at PLP. The claim was pursued and legal aid was granted. PLP kept the EHRC updated and when they saw it was proceeding, the EHRC saw this as an ideal opportunity to intervene (Interview 10).

One of the claimants was eligible for legal aid whereas the other was assessed to be ineligible. One of the claimants discussed the difficulty of applying for legal aid.

The other thing that's horrible, really horrible is applying for legal aid. That's really horrible. You have to give a stranger your bank statements for the past three months and explain anything they don't understand ... There's no one else who I would ever give my bank statement to. It's just a horrible thing to have to do. And particularly because you have to do it right at the start. You know at the start you're dealing with people you don't know. (Interview 8)

In the absence of legal aid, one of the claimants undertook some fundraising for themselves with a small group of supporters. Being well-networked in the disability and mental health civil society sector, the claimant was surprised when they approached larger disability organisations and were unable to find any financial support or even a willingness to spread the word about their campaign and crowdfunding efforts. A small national, user-led charity called WISH which works with women with mental health needs in prison, hospital and the community was an exception in this regard (Interview 2).

That was really surprising that somebody [the claimant] was willing to put their head above the parapet but wasn't going to be helped by national organisations. (Interview 2)

They used the crowdfunding platform Crowdfunder to raise money to help support the case but that this was not without its challenges.

We were having to navigate using them [Crowdfunder] for the first time and what that meant, and where does the money go if I don't take the case, and all of that as well, which again, thankfully I had friends to help me navigate. (Interview 2)

The hearing and the judgment

This section discusses some of the dynamics around the hearing and analyses media coverage of the case to gain a sense of the key messages being put out to the public about the case and the broader issue.

Representatives from DPAC, Winvisible and Inclusion London attended the court and held a vigil outside (Interview 3). The claimant emphasised the uplifting role that the litigation played and the value of support from others who were interested in the case.

While I was doing the case people were like, “Oh, it’s such a good thing you’re doing”. It made me feel good. And, you know, having them show up in court was really great. There were two benches that were full of people, and that was just really great, and it was just great knowing that people cared and that people wanted to support it because it’s quite a lonely thing to do really, and it’s quite a scary thing to do. (Interview 8)

I found the hearing really exciting ... I think up until that point I’d always believed Sara [at PLP] when she talked about how difficult it was to win and how we probably wouldn’t win, but it was just something about the way [the judge] was talking. It was just like, oh, no I don’t believe that. I think we’re doing okay here. (Interview 8)

But the claimant also pointed out that support is crucial throughout the process:

I would definitely urge anyone doing similar to get as much support as they can. A good legal team is not really enough, it wouldn’t have been enough for me. Lawyers do their lawyering. I needed people who could sit through the tangled web of fear and confusion and doubt I often had. And make me cups of tea. (Personal communication with claimant)

The successful outcome and the strong judgment that underpinned it was positively received by all those involved in the case who were against the regulatory changes:

[When asked about the outcome]: It was just amazing! We won on all grounds! I was really surprised and really happy ... I think before we went to court [to get the judgment], Sara started talking in terms of appeals and the Supreme Court and the Court of Human Rights... And I’m like, “No what no! I only signed up to this for a year!” (Interview 8)

The judgment was very, very strong, stronger than I personally hoped. Things like “blatantly discriminatory” [the language used in the judgment] that’s just great from a comms perspective ... A lot of the cases we work on you’ve got to tease something juicy out of an incredibly dry judgment to show what the Court actually said. To have it just on the face of it like that was great. (Interview 6)

One research participant was less persuaded by the strength of the case itself and, while conceding the approach taken was interesting because it expressly held the DWP to account, highlighted the potential uncertainty in relation to outcome:

I think they got the High Court on a wobbly day. On a different day it would have been a different judgment. (Interview 13)

Communications

A key facet of many broader strategic litigation campaigns is the media work done around a legal case. This was not a focus of PLP’s efforts during or after the case. Other organisations played a role here highlighting again some of the informal division of labour that can emerge in this type of process.

Mind in particular grasped the opportunity to speak publicly about the case at the earliest opportunity but sought to be careful about claims about their role in the case:

We're proud as punch with what we've done and we also have massive channels and a really large audience to be able to get the message out and say, "This is what's happened, this is a really important thing that's just happened." So we wanted to use all of our channels and we wanted to talk about it as much as we could while at the same time making sure all of our tweets and all of our blogs had [the claimant and PLP] front and centre, I think it was something like "MIND is very pleased to have supported..." We were really careful with the wording of all of our output.

(Interview 6)

For other organisations, gaining traction with the press was less straightforward. One research participant emphasised how much work goes into gathering potential case studies for the media and then the disappointment when the issue isn't covered or the proposed case studies don't get picked up.

Our decision was that we will not do much [comms work] around the hearing because of [a lack of] capacity, but I know other people did. Around the judgment we did quite a bit of PR ... The night before I had BBC, ITV ... had all the major companies calling me and saying, "We want to interview someone who is in a similar situation. Can you find us someone?" ... We had to spend hours trying to find people ... We had some people lined up and then on the day when we sent a press release and I tried to text and call and email some of these journalists they're like, "Oh, great." And that's it. (Interview 7)

In view of the number of organisations involved in the case, issues of ownership arose. It was perhaps difficult for some organisations to maintain their own voice on issues in an otherwise crowded press landscape:

We had this crazy day [in mid-January a few weeks after the judgment] where we [Inclusion London] got a call from Newsnight, they wanted to interview somebody. We had quite a few calls from different outlets saying, "Can you find us case studies?" They asked us to find case studies, which we did, and then they went for a comment to Mind ... We raised it [afterwards] with the BBC and we said, "We won't find you a case study next time if you're going to ..." (Interview 7)

Both of the original claimants applied for and were granted anonymity orders, in order to protect them. The existence of the anonymity orders made external communications around their stories challenging. One claimant articulated one of these difficulties:

Up until [we filed evidence and did a press release], it was this private project between me and PLP. And there's lots of things about that that were good but it also caused difficulties for me ... you'd see people talking on social media about how awful it was that they now couldn't get this [PIP enhanced rate for mobility], and I wanted to say, "Yeah, but you might be able to, just wait, just wait". And I couldn't say that.

(Interview 8)

Analysis of media coverage

The findings of the media analysis undertaken as part of this research highlight some interesting trends. Using broad search criteria that included mainstream media outlets, third sector press, charity press releases, blogs and discussion forums approximately 30 directly-related and accessible (i.e. not behind a paywall) articles were identified, with a further 10 items of loosely related content included in this analysis. Any interpretation therefore of this analysis is therefore subject to the usual limitations around relying on a small sample of content available.

Figure 1 shows that most coverage came on the back of the UK Government's post-judgment response in January 2018 with the announcement of the decision not to appeal the case. This is contrasted in particular with lower levels of coverage and discussion of the hearing and judgment itself in December 2017. While a variety of media outlets did report the High Court judgment, it cannot be said conclusively from the quantity of published articles that this was perceived to be a major decision until the government's decision not to appeal.

Fig. 1: RF case-related articles over time

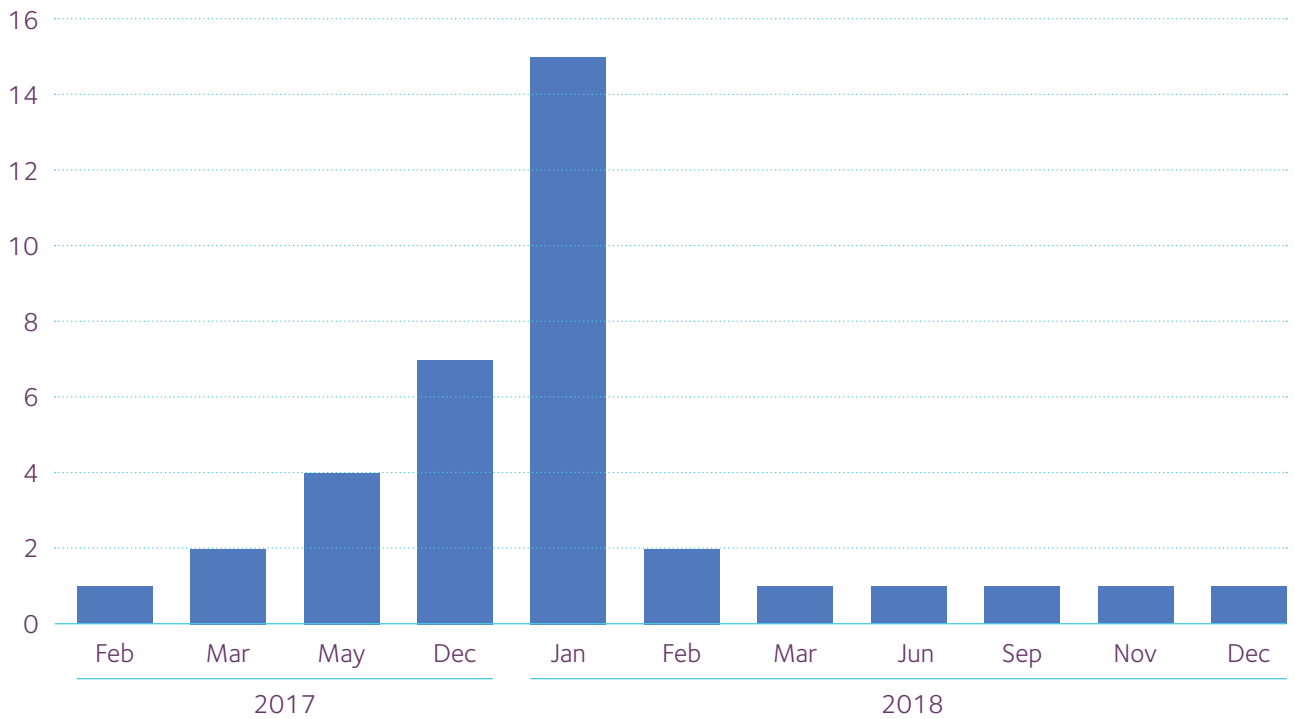


Fig. 2: RF case coverage by media type (2017/2018)

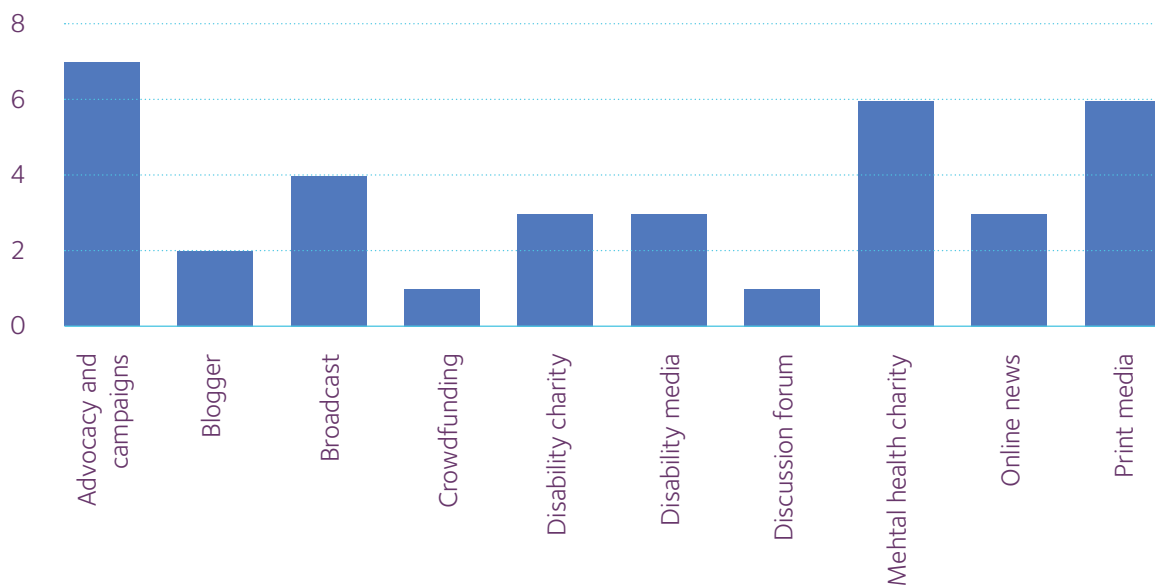


Fig. 3: Top ten keywords usage in mainstream media

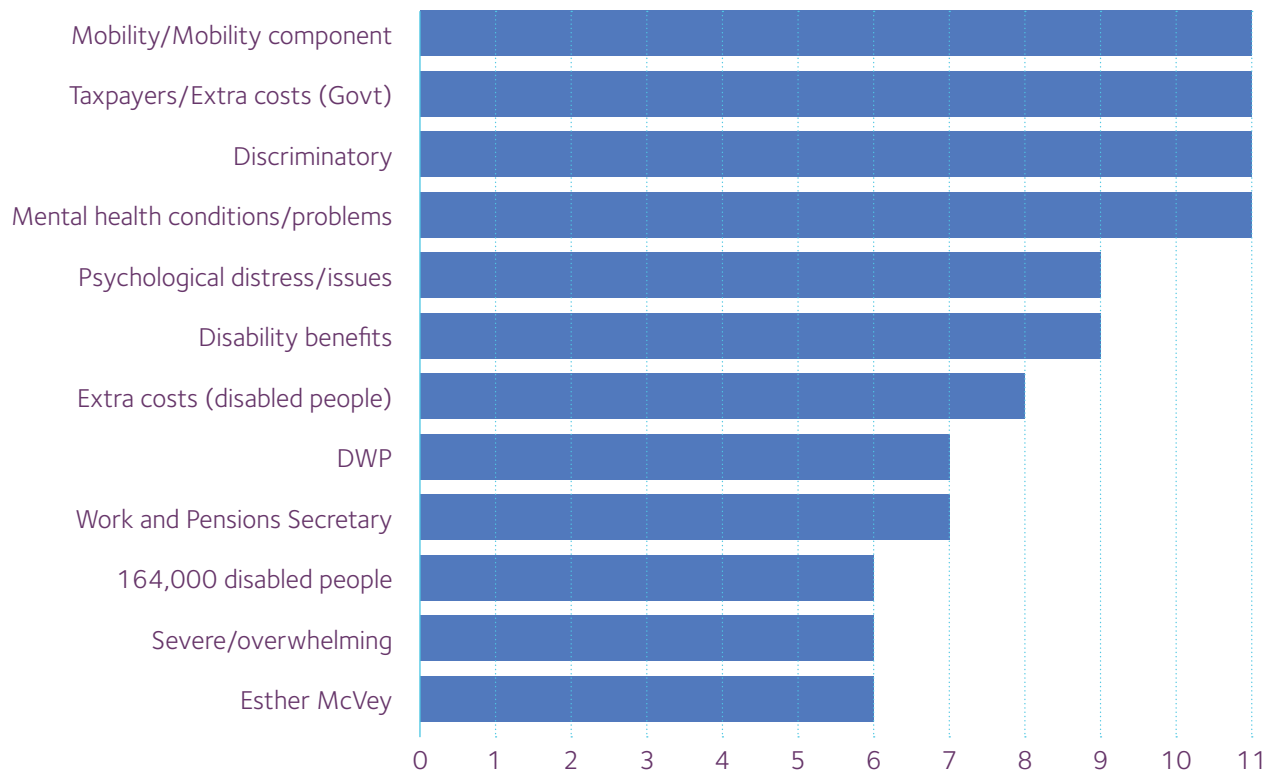


Fig. 4: Top ten keywords usage in charity sector media

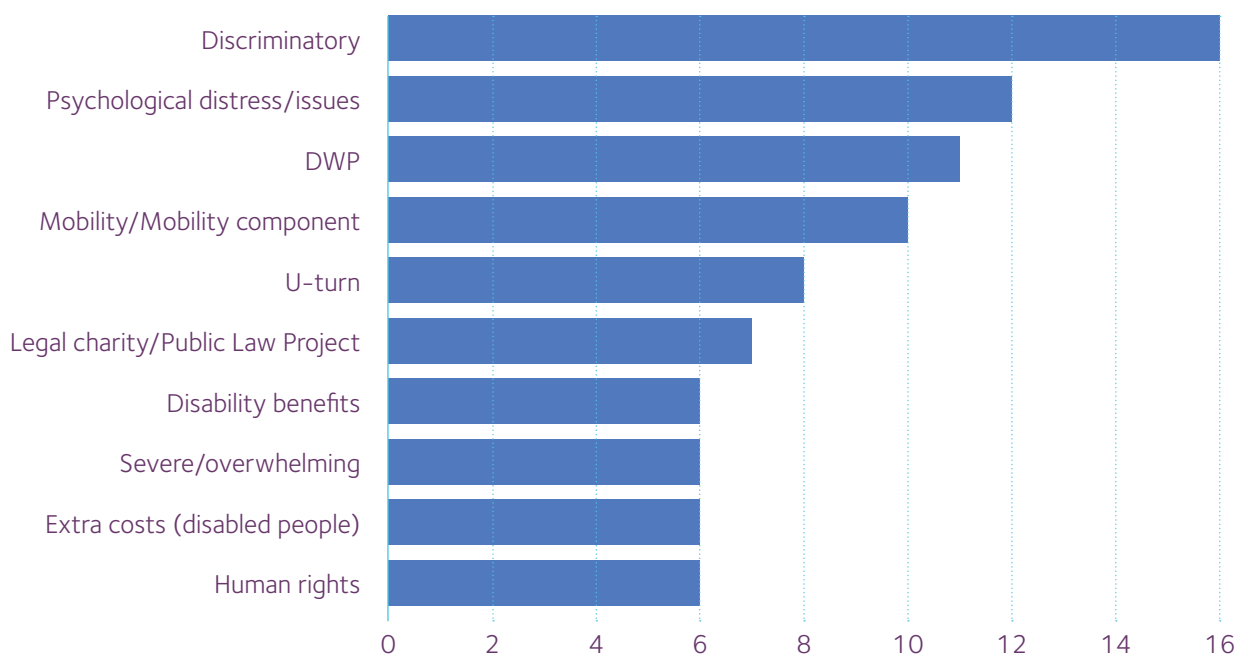
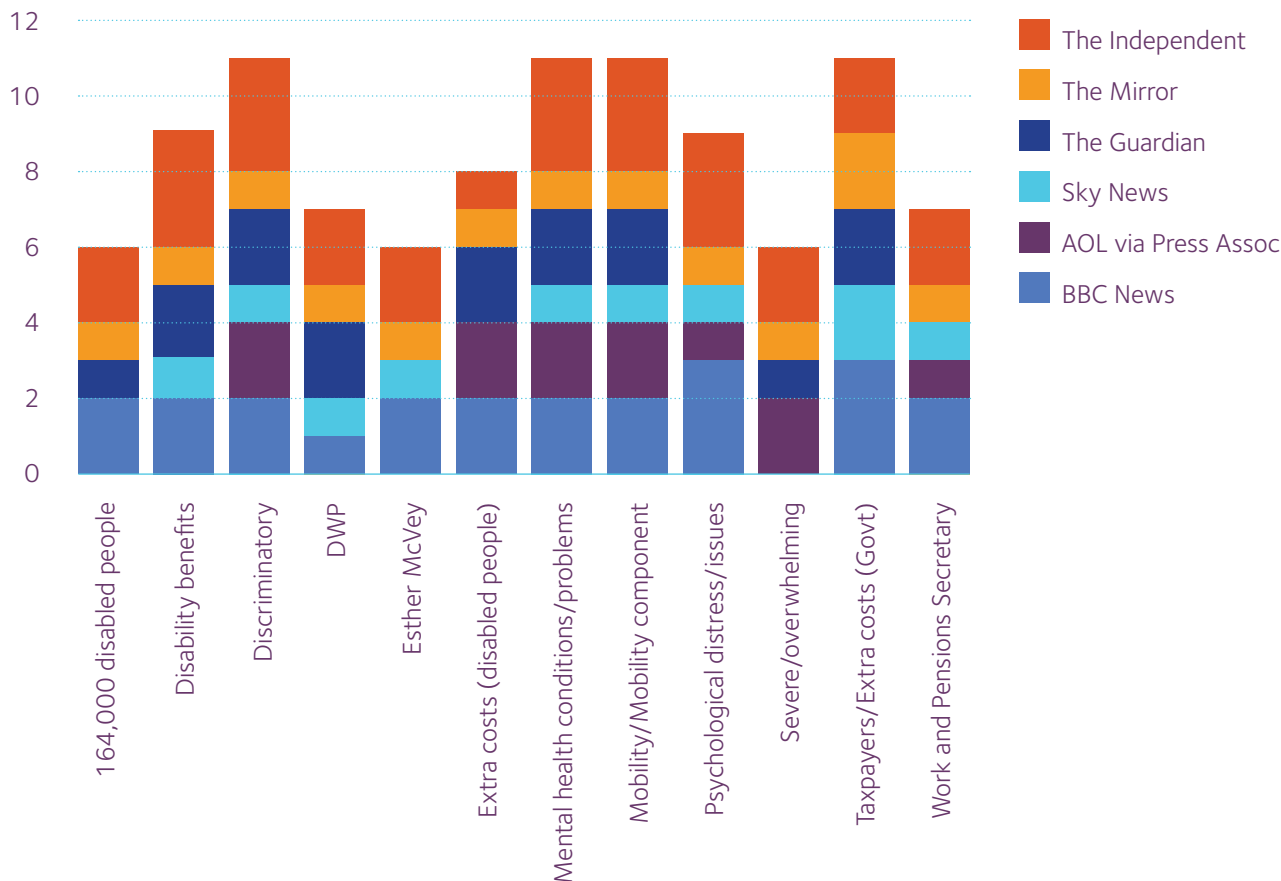


Fig. 5: Key words by mainstream media outlet



Several research participants noted the unhelpful nature of some of the coverage. One DDPO said they were flooded with enquiries about what this meant for individuals (Interview 8). Another noted how their organisation tried to manage this.

There were some quite unhelpful headlines at the time along the line of 1.6 million people are going to have their cases reviewed. So a first thing we did was to try to get a message out to reassure people that they wouldn't have to go through another assessment and there wasn't the prospect of people losing money. (Interview 9)

However, further analysis of content does suggest that despite limited mainstream coverage, the case and its judgement were treated as significant by civil society. Figure 2 shows that news of the case was disseminated by a greater breadth of civil society and charitable organisations compared to mainstream media.

Figures 3 and 4 also show that the focus was more crystalized in terms of discussion of the case and the issue in the charity sector press, with the charitable sector's coverage concentrated on a fewer keywords than major news channels which discussed a more even distribution of topics. Overall, a comparative observation indicates a difference in emphasis between the mainstream and the third sector media. Figure 5 shows how mainstream media outlets articulated and emphasized the political and legislative aspects. Figure 4 shows how the charitable sector emphasised the experiences of disabled people themselves. The analysis also shows that while human rights framing featured in the coverage of the case in the charity sector this did not feature in coverage in the mainstream media. Finally, the analysis also shows that PLP's instrumental role in the case was not widely reported in mainstream media, but there is evidence of PLP's involvement and profile in the charity and disability-focused outlets.

After litigation: the ‘legacy’ phase

It is often difficult to define an endpoint to a strategic litigation process. In addition to conclusion of the costs stage of the litigation, often further substantive work is required to ensure compliance with the overall strategic objective of the case or even to check compliance with the court order. Further substantive implementation work can include further litigation, work with government and other stakeholders to develop lawful policy, guidance or systems, training and/or communications work. This section presents our findings regarding the implementation work that was undertaken and how actors make decisions about what types of “legacy” activities are necessary as a minimum in order to ensure that a court victory “sticks”. We also present findings about awareness of the case and its implications among welfare benefits advisors.

The DWP sought permission from Mr Justice Mostyn to appeal to the Court of Appeal. Permission was denied, but when judgment was handed down the DWP indicated that they would pursue an appeal anyway. In January 2018, in a written statement, the Secretary of State for Work and Pensions said that her Department would not appeal but now “take all steps necessary to implement the judgment in MH in the best interests of our claimants, working closely with disabled people and key stakeholders over the coming months”.²⁰ i.e. they would look to develop PIP in a non-discriminatory way so that those with mental health impairments could get support with mobility. The government announced that a total of 1.6 million of the main disability benefit claims will be reviewed, with around 220,000 people expected to receive more money (this number has been revised several times).

A number of research participants said they had been taken by surprise by the government’s decision not to appeal. For example, PLP was already pursuing some awareness raising work about the interim effects of the judgment on PIP assessment processes before the announcement of the government’s decision not to appeal was made.

[One of the lawyers at PLP] went to speak to a group of welfare rights advisors in Manchester ... And it was really challenging because what they wanted to know is if the government appeals, what’s the effect of this judgment in the meantime. Which wasn’t a straight forward question to answer ... And so he spent ages preparing that talk and we were expecting the government to appeal it ... And while he was there talking to them ...they [DWP] told us [PLP] that they weren’t appealing. (Interview 5)

Interviewees proposed a number of different (albeit related) hypotheses as to why the government might have made this decision (we attempted to contact the DWP and Counsel to DWP for an interview but at the time of writing have not had a response).

- 1) Perhaps the most likely is that the government accepted that the judgment was a correct statement of the law. The DWP may have received legal advice from its in-house team, the Government Legal Service and/or counsel militating against an appeal. The judgment of the court was unequivocal, finding for the claimant on all three grounds. The DWP may simply have concluded that there would not be merit in an appeal.
- 2) Weighing up of financial and political costs: Another possible explanation is that in weighing up the financial and political costs of appealing versus not-appealing the DWP decided it might stand to lose too much taxpayers money or political capital from continuing to battle what is generally a sympathetic group of beneficiaries. As one interviewee put it:

It’s an unattractive fight to pick. (Interview 5)

However, another interviewee saw it differently

We just sort of presume that the DWP will appeal everything all the way up because the cost of litigation versus the cost of even a minor benefit change means that you might as well go all the way up even if the merits aren’t great. (Interview 6)

- 3) Change in DWP leadership: The change in leadership at DWP, with Esther McVey coming into the role of Secretary of State in early January 2018 a few weeks after the judgment was handed down, may be an important variable in accounting for the government's decision not to appeal. One participant also commented:

It was Iain Duncan Smith's baby so if he was still there he might have taken a different view. (Interview 13)

- 4) Public profile: One interviewee pointed to the fact that the case and the government's policy had already become a news story for the decision not to appeal (Interview 6).
- 5) Political context: Several participants identified the challenging political context as a factor in the Government's decision not to appeal. As one participant commented:

[They had] other things to concentrate their minds at that moment. (Interview 10)

Another research participant expressly noted the significance of Brexit:

That's the thing with Brexit, there's very little bandwidth for anything else. (Interview 13)

Work with government following the case

Organisations pursued a variety of different activities to encourage the government to make the relevant changes after the case.

Having clear guidance was obviously an importance factor in ensuring the implementation of the judgment. Mr Justice Mostyn had expressly noted his surprise in the judgment that DWP decision makers had previously been given 'no explicit guidance' by the DWP for those who might be disqualified if the cause of inability to plan or follow a journey was psychological distress.²¹

Several non-DDPO organisations were approached directly after the government's decision not to appeal to become involved in developing the guidance during the implementation phase of the legal decision. The involvement of so many organisations presented challenges in terms of determining where responsibility for implementation lay and in keeping all key stakeholders informed and involved.

We were trying throughout all our comms and media stuff to talk about RF, to talk about PLP ... Then as soon as [the government decides] not to appeal and they want to work with somebody to implement the judgment DWP then comes and wants to speak to us [Mind] about it rather than PLP. So then we're trying to make sure PLP is involved, and RF is involved and doesn't feel like she's won this judgment and then been excluded from the implementation. (Interview 6)

Several participants highlighted the importance of the claimant's involvement in the implementation phase:

We advised RF on [commenting on the draft regulations after the case], she had her own points but we had some extra ones to add. I have to say she was a really great client for a case like this, because she was so on it and engaged. Her comments and her feedback were always really useful and informative. You really felt like you had a client who really cared about the bigger issue. (Interview 5)

Another participant commented explicitly on this issue of ownership of the case and responsibility for being involved in the latter stages of the process.

It's really easy to build up this kind of change as being all about the legal case but actually it's all about what then happens. I think that there is a real hole there in terms of who does that work, who owns it, who has the best access? And in some ways, given that it's my client's judgment and that they know my client is litigious, I have good access ... But then equally, you could say EHRC have the same. They intervened, their intervention was referred to in the judgment. They are very well placed to then follow up that work. And likewise with MIND. They do provide a lot of support, and they do have a legal call centre and they have a legal team. (Interview 3)

A priority for the claimant for PLP after the decision was that DWP engage with DDPOs directly:

I engaged with drafting the guidance. And [the claimant] and Martin [the QC] fed into our comments on the guidance. And I specifically and repeatedly asked for the DWP to engage with DDPOs on it ... but they basically refused and I think that that's really regrettable. (Interview 3)

One research participant from a DDPO noted their concerns about engaging with DWP.

[The claimant] wanted DWP to engage with DDPOs. We always ask DWP to do that and they never do ... They have quite a cosy circle, they call them “stakeholders”, like policy officers from big charities ... In January there was this huge concern because what the DWP does is they say that they consulted with you, they cite you as their partner in designing a horrible policy, so we didn’t want that ... We said, “Instead we will write a statement about what the new regulations should look like, what should happen and we will publish it”. (Interview 7)

Another participant made a similar point.

There’s a “getting in bed with the enemy” problem. ... and we didn’t want our beneficiaries to then be used to create some guidance that actually we didn’t like ... we didn’t really agree with what the DWP was trying to do off the back of it [the judgment]. So then we had to pull out a bit and say, “No we’re not going to help you evidence this position that we don’t think is the lawful one anyway”. (Interview 6)

Though one interviewee noted that, in this case, engagement with Ministers and civil servants was productive:

I certainly think when we were looking at early drafts of guidance we didn’t think they were very good. We were able to have some productive conversations. I think they [DWP] showed willingness to actually talk to people with lived experience of PIP to understand why what they were coming up with wouldn’t work meant that there were some pretty good changes to that guidance... The caveat is that it is quite early on in this being implemented, so we want to see what happens and see what people tell us about their experiences of the review process. (Interview 9)

Awareness of the case

One facet of our research was to explore awareness of the case, specifically among welfare benefits advisors who work with individuals going through PIP assessments. Several welfare benefits advisors we interviewed when asked about how they knew about the case mentioned specific channels through which they had been made aware.

I subscribe to Rightsnet, so I get daily bulletins from them. And also bulletins from Child Poverty Action Group. So basically any changes or any judicial reviews, high court decisions – you get updated. (Interview 1)

I hear about things through newsletters – Rightsnet, CPAG, Disability Rights UK, Citizens Advice. (Interview 11)

They highlighted however the different approaches advisors might take. Our research shows that advisors tend not to talk about decisions in ‘legal’ terms but translate judgments like this into what it means in their general welfare advice practice:

It’s interesting to me how the different worlds collide and talk to each other...there’s almost different languages...[lawyers] talk about case names but not in the advice world so much... we’d be talking about descriptors and criteria. (Interview 11)

Several participants pointed to confusion in terms of implementing changes on the ground. One welfare benefits advisor who we interviewed in September 2018 noted that none of her clients had been contacted about having their PIP claim reviewed.

I haven’t actually had any clients who have been contacted by DWP to have their claim reassessed ... Hundreds of thousands of people affected are meant to be contacted, but as to how that happens, no-one really knows ... (Interview 1)

Another expressed the same sentiment and was concerned that the process for decisions on arrears and reassessment was not clear:

I'm curious about it, I haven't see people getting PIP decisions changes. I've seen arrears payments coming through with the backlog but not with PIP...I know nothing about the exercise and we could be flagging clients for that. I think at one point they [the DWP] said they were going to work with MIND to do that but I haven't seen anything. I don't know what the criteria or the process is. (Interview 11)

One participant highlighted the uncertainty for Tribunal judges using new regulations or implementing decisions:

It often still feels confusing because when balls are in play – what's happening in the Tribunals for example? What are the judges actually using at the point when things [changes] come out? That can sometimes be quite a messy ... (Interview 11)

A further participant also expressed this confusion but noted it was more to do with the difficulty in interpreting the regulations generally, picking up an issue which arose in the case:

I think it's unclear the extent of the difficulty that's needed to satisfy the descriptors ... The "following journeys" stuff is just really difficult. Its sits better with sensory problems but it's been widened into mental health problems. (Interview 13)²²

Others noted that the assessment process for new claims has not changed for people with mental health issues.

People with mental health conditions are still not getting any points or very few points, and then obviously, you have to appeal it. I think the appeal tribunal members obviously have to take that [the RF judgment] into account, so at least claimants have a chance at the tribunal. (Interview 1)

PIP is such a hard benefit to get for people with mental health issues because everything is so focused on aids and adaptations rather than experience ... the probing at health assessments just isn't there for being able to uncover mental health problems ... I think it's the assessment phase that it would be great to tackle the most. (Interview 11)

The empowering potential of using the law

Claimants can often find taking a legal challenge incredibly difficult and stressful (as has been highlighted throughout this report). However, research participants also underscored how use of the law can empower individuals. For example, when asked if the process had been empowering, the claimant responded:

Definitely, and that [empowerment] is a word I hate, just because if you use Mental Health Services, they use it in such terrible way, in such a patronizing ridiculous way. As if empowerment is this thing that you can give to someone, or force them to have. Whereas actually, I think going through a legal process like that is so empowering, in a proper way, in a real way. (Interview 8)

Another research participant also drew parallels to another case PLP had taken on behalf of an individual. In this example the case settled but also in a way that was empowering for the affected individual.

There's another example of a case that we've done over the last year, another vulnerable client with mental health problems, who took on benefit sanctions ... Eventually it settled and the client said at the end that she felt really empowered by the experience because it was the first time she felt she could argue back to the DWP. We'd hoped through the claim to bring about some changes in their systems and because we reached a financial compromise that hasn't happened. But still, for her it was actually overly stressful at times and I think if it had gone to trial it would have been even more stressful. (Interview 5)

Lessons learned

Here we summarise the main lessons learned through this case study. Many of these were suggested to us by research participants as useful insights to help shape the way in which individuals and organisations use the law to challenge unfair systems in the future.

Identifying the injustice

- **Put aside sufficient time and resources to properly support claimants through the various stages of the litigation process:** PLP's solicitor had experience of working with clients facing challenging situations and counsel in the case went out of their way to appropriately communicate with the claimant (via Skype) to talk through the strengths and weaknesses of the case. If an organisation is not able to do this they should seek to collaborate with other organisations that might be able to take on this role.
- **Linking policy work and legal case work:** The case study demonstrates that together organisations were able to act quickly and proactively respond to developments because of lobbying work that had already been done on welfare reform. Giving issues priority during the strategic planning and objective setting phases makes it easier to connect policy work to legal casework.
- **Respond to relevant consultations and play a proactive role in the legislative process (or work with those that do):** Witness statement evidence from six different organisations was highly persuasive and demonstrated to the court the unlawfulness of the consultation process as perceived by organisations advocating for those most adversely impacted by the policy change. Putting aside resource to properly research and respond to consultations, especially where there are potential equality and human rights impacts, ensures that organisations are engaged in the issue at an early stage.

Preparing for a legal challenge

- **Find legal experts:** Knowing how to develop a legal strategy, make assessments of what to argue and what evidence to offer is crucial. There is no substitute for working with experienced and confident lawyers.
- **Be sensitive to what litigation demands of (but also offers) claimants who are at the heart of the case:** The lawyers we spoke with were acutely aware of the many potential downsides of litigation and the burden of taking a judicial review on behalf of a much wider cohort of people. Questions about the support a potential claimant might need through the litigation process need to be carefully considered and then revisited throughout the litigation.
- **Reach widely across networks to inform submissions and expert evidence:** The claimant's lawyer played a pivotal role coordinating with other key organisations and gathering relevant evidence taking a proactive approach. An ability to establish and grow relationships in order to collaborate with a wide range of individuals and organisations across the sector is important to the success of drawing upon these networks.

Judgment and hearing

- **Ensure supporters of the case are accommodated in the court hearing:** A good legal team is not enough to support the claimant through the litigation process. Having wider support is important and the presence of such support at the hearing itself sends an important message to the court and can also provide an important signal of importance and reassurance to the claimant regardless of the outcome.
- **Accept there will be unexpected turns and endpoints in the litigation process:** there were five possible explanations for why the Government did not appeal the decision. It is often difficult to predict the appellate journey of a case and being as responsive as possible will maximise impact amidst uncertainty.

The 'legacy' phase

- **Disseminate the decision to the wider sector:** The disability and advice sectors were familiar with the decision because of the way it was communicated through newsletters and other social media outlets. Communicating legal decisions in a way that is accessible and meaningful to those implementing them on the ground in the advice sector is key.
- **Anticipate how you will work with the Government to implement decisions and/or assist with draft guidance:** This will differ for organisations depending on their expertise, priorities and involvement in the case. Communicating about possible approaches, including who should be involved and in what capacity, will better facilitate both individual and collective ownership of this process.
- **Proactively develop a media strategy (even if that means doing no or limited media) around the case and be prepared for unexpected surges of press attention:** Media analysis shows increased interest in the case around the time of the Government's decision not to pursue an appeal. Analysis also illustrates the difference between the framing of messages by mainstream media and charity sector press. Finding new ways to frame messages may help to narrow this divide and reach wider audiences.
- **Litigation has the potential to empower individuals to drive systemic change:** the claimant expressed a strong desire to challenge power structures that discriminated against people with mental health conditions. The RF case allowed the claimant and her supporters to participate in the process of breaking otherwise discriminatory patterns of behaviour

Methodological approach

Evaluating the success of legal cases is a notoriously difficult endeavour (Donald and Mottershaw 2009; Rosenberg 1994²³). The relationship between a strategic legal intervention and subsequent policy and practice outcomes is full of complexity and variation. This research took on this challenge by attempting to identify the factors that contributed to success according to the range of participants in the strategic litigation process. In order to develop the case study we relied on the following methodology and sources of data.

Data-gathering: The main source of data was interviews with a broad range of actors. We approached the following potential interviewees:

- Staff at Public Law Project involved in the case;
- The claimant in the case (being conscious of the strict ethical standard we needed to conform to in involving the claimant in the research – see ethics appendix below);
- Individuals with an interest in the outcome of the case who provided support or witness evidence;
- Barristers involved at various stages;
- Representatives from other organisations that intervened in the case or supported the case or were involved in some other way: e.g. the Equality and Human Rights Commission, Mind, the National Autistic Society, Inclusion London and Disability Rights UK;
- Representatives from the Department for Work and Pensions;
- Representatives from other relevant stakeholder organisations and/or others with relevant experience that were not involved in the case to act as “bell weathers” to consider the impacts of the legal case from an external perspective, e.g. we interviewed several welfare benefits advisors from different organisations working with disabled people.

Data analysis: We used the following methods to analyse and present the data captured from the interviews.

1. **Process tracing:** This involved developing a “thick description” of each stage of the litigation process to identify strategic considerations, engagement with other actors and critical junctures.
2. **Document analysis:** This involved analysis of the legal documents provided to us and an analysis of media coverage of the case.
3. **Counter-factual analysis:** This involved the identification of alternative pathways that were not followed. While caution needs to be exercised about the types of claims that can be made based on this analysis it was important to systematically think through the potential risks and benefits of different pathways.
4. **Case study justification:** From a methodological perspective we understand this case in many ways to be a “least likely” case in terms of the ability of people facing multiple disadvantage to effectively access justice and address unfair systems. We understand it as a “least likely” case for three main reasons. First, the report outlines the many pressures that taking a legal challenge places on (potential) claimants. These pressures were particularly acute in this case because the issue to be addressed concerned mental health conditions and therefore required individuals with lived experience to bear the brunt of the pressures involved in litigation. Second, compared to many other sectors the disability and mental health sector does not tend to have one organisation that takes the lead in using legal tactics. Therefore, greater collaboration is required in a case like this. There are many hurdles to collaboration and in order to achieve a positive result these had to be overcome. Third, the financial costs to the defendant in losing this case and ensuring that those individuals with mental health conditions be treated fairly were not negligible. Compared to cases where less is at stake financially this can be understood as an unlikely case in which the defendant would properly and fully implement the judgment.

APPENDIX 2

Ethical considerations

In undertaking this research there were particular ethical issues which we were conscious of at the outset. We developed the following outline ethics framework to guide the research process.

Informed consent and provision of information about the project to participants: Informed consent procedures applied to data gathered through interviews with participants.

We discussed the project and participants' role and rights before the outset of each interview. This discussion covered the following information:

- the aims, methods and implications of the research.
- the nature of the participation and any benefits, risks or discomfort that might ensue.
- an explicit statement that participation is voluntary and that anyone has the right to refuse to participate and to withdraw their participation or data at any time – without any consequences.

We informed participants that in any outputs from the research (publications, policy briefs, presentations) the interviewees' names will be kept anonymous. Participants were able to influence the format of the interview (e.g. suggesting locations and times convenient for them) and the conduct of the interview, (e.g. the pace and nature of the conversation) to ensure the interviews were conducted in a way that accommodates research participants' needs and preferences. In line with the sensibility of this project participants' consent will always be treated as ongoing throughout the research engagement and will be verified at various points.

Right to refuse to participate and right to withdraw from research: special attention will be paid to ensure that individuals are aware of their right to refuse to participate or withdraw from research and that this right is practicable given the socio-political environment within which they are situated.

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- ¹⁴ Another initial claimant in the case (SM) withdrew.
- ¹⁵ Article 14 ECHR when read in conjunction with Article 8 and/or Article 1 of the First Protocol.
- ¹⁶ Welfare Reform Act 2012, Part 4.
- ¹⁷ Paragraph [24]
- ¹⁸ Paragraph [44]
- ¹⁹ Paragraphs [39] and [61]
- ²⁰ House of Commons (2018) "Welfare: The Secretary of State for Work and Pensions". Hansard: Vol 634, 19 January 2018. Last accessed 7 December 2018 at <https://hansard.parliament.uk/commons/2018-01-19/debates/18011939000006/Welfare>
- ²¹ Paragraph [27]
- ²² The claimant relied on the expert evidence of Dr Boardman (submitted by Mind) to argue that there is no reason why the support required by someone experiencing impairment due to psychological distress might differ in intensity or complexity from the support of a person with cognitive or sensory impairments.
- ²³ Donald, A. and Mottershaw, E. (2009) Evaluating the Impact of Human Rights Litigation on Policy and Practice. *Journal of Human Rights Practice*, 1(3), 339-361; Rosenberg, G. N. (1991). *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago.

