Neutral Citation Number: [2020] EWCA Civ 37

Case No: C1/2018/1576 & C1/2019/1208

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Lewis [2018] EWHC 1474 (Admin)
Mr Justice Swift [2019] EWHC 1116 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2020

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE SINGH
and
LADY JUSTICE ROSE

- -

Between:

The Queen (on the Application of TP, AR & SXC)	**Respondents**
- and -	
Secretary of State for Work and Pensions	**Appellant**
-and-	
Equality and Human Rights Commission	**Intervener**

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- -

Julian Milford and Jack Anderson (instructed by **Government Legal Department**) for the **Appellant**
Zoe Leventhal and Jessica Jones (instructed by **Leigh Day (TP and AR), and instructed by Central England Law Centre (SXC)**) for the **Respondents**
Christopher Buttler (instructed by the **Equality and Human Rights Commission**) for the **Intervener**

Hearing dates: 3-5 December 2019

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Approved Judgment

Sir Terence Etherton MR and Lord Justice Singh:

Introduction

1. These are two appeals by the Secretary of State concerning challenges to various aspects of regulations which were introduced to implement the Universal Credit (or "UC") scheme, which was enacted by Parliament in the Welfare Reform Act 2012. The first appeal ("*TP (No. 1)*") is against the decision of Lewis J given on 14 June 2018. The second appeal ("*TP (No. 2)*") is against the decision of Swift J given on 3 May 2019. In the first appeal the Respondents are TP and AR. In the second appeal the Respondents are again TP and AR but also SXC.

2. We should emphasise that in these appeals we are concerned only with the position of the Respondents and those in a similar position to them. These appeals do not concern the validity of the UC scheme as a whole.

3. Permission to appeal was granted in *TP (No. 1)* by David Richards LJ on 20 December 2018. Permission to appeal was granted in *TP (No. 2)* by Leggatt LJ on 18 September 2019. He also directed that the appeal should be heard with that in *TP (No. 1).*

4. In *TP (No. 1)* there were two grounds of challenge. The first ground was rejected by Lewis J: see paras. 63, 71-72 and 80-81. By that ground the challenge was to the new structure of entitlement under the Universal Credit scheme. There is no cross-appeal in relation to that ground. On the second ground, Lewis J found in favour of TP and AR in respect of the manner in which the scheme was implemented in the Universal Credit (Transitional Provisions) Regulations 2014 ("the Transitional Regulations"), in particular regulations 5 and 6. He found those to be discriminatory and in breach of Article 14 of the European Convention on Human Rights ("ECHR"), read with the right to peaceful enjoyment of possessions in Article 1 of the First Protocol ("A1P1"), which are among the Convention rights set out in Sch. 1 to the Human Rights Act 1998 ("HRA"). The essential basis on which Lewis J held that the provisions were discriminatory is that they treat less favourably a person who moves to another local authority. In those circumstances the Transitional Regulations do not permit a person to continue to claim Housing Benefit from a local authority. Rather an application must be made to the Department for Work and Pensions ("DWP") and not to the new local authority; and it must be for Universal Credit, which will include an element for housing costs. The amount overall payable as an award of UC is less than what the person concerned would have received under the previous social security scheme (referred to in these proceedings as a "legacy" benefit). Lewis J granted a declaration to the effect that the Article 14 rights of TP and AR had been breached: see para. 4 of his order dated 14 June 2018.

5. *TP (No. 2)*, which came before Swift J, concerned new regulations which were made in January 2019. In particular a new Regulation 4A was inserted into the Transitional Regulations by the Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019 ("the SDP Gateway Regulations"). The effect of these regulations was to prevent persons entitled to severe disability premium ("SDP") at that date (or in the previous month) from making a claim to Universal Credit. The Secretary of State also made the Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019 ("the Pilot Regulations"). These

introduced a new regulation 64 and Schedule 2 into the Transitional Regulations. They conferred power on the Secretary of State to begin the process of what was called "managed migration" from legacy benefits to Universal Credit by way of a pilot scheme. The Pilot Regulations permitted the Secretary of State to migrate up to 10,000 people under the pilot scheme by way of a "migration notice".

6. Amongst the measures which were introduced in this way was the introduction of a scheme of transitional payments for current claimants of Universal Credit who had been in receipt of legacy benefits and who are "severely disabled people". This measure was quashed by Swift J as being discriminatory and unlawful under Article 14 because it treated less favourably people who had "naturally" migrated to Universal Credit (whom Swift J called "the SDP natural migrant group"), who would receive fixed-rate transitional payments, than those who, as a result of Regulation 4A, were prevented from naturally migrating and would in due course receive transitional protection as "managed migrants" (whom Swift J referred to as "the Regulation 4A group").

7. In these appeals we have been assisted by submissions by Mr Julian Milford (leading Mr Jack Anderson, the skeleton argument having been written by Mr Edward Brown and Mr Anderson) for the Secretary of State, who is the Appellant in both cases; by Ms Zoe Leventhal (leading Ms Jessica Jones) for the Respondents; and by Mr Christopher Buttler for the Equality and Human Rights Commission, which is the Intervener. We are grateful to them all for the quality of their submissions.

The general context

Previous Disability Welfare Scheme

8. Disability premiums are additional amounts of money added to income support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance ("ESA") and Housing Benefit. There are three types of disability premium for adults: disability premium, severe disability premium ("SDP"), and enhanced disability premium ("EDP"). A person may receive more than one disability premium at a time. Each of the Respondents in these two appeals was previously in receipt of ESA with SDP and EDP.

9. Section 1 of the Welfare Reform Act 2007 ("the 2007 Act") provides for ESA to be paid to persons who meet certain criteria and have limited capability for work due to their physical or mental condition and the limitation is such that it is not reasonable to require them to work. On top of the basic ESA allowance, the disability premiums are intended to assist with the additional cost of living with a serious disability.

10. Persons are entitled to SDP under para. 6 of Sch. 4 to the Employment and Support Allowance Regulations 2008 ("the 2008 Regulations") if they qualify as severely disabled, defined by reference to their eligibility for other specific benefits, are single or live with a partner with a similar level of need, and do not benefit from the assistance of a person who claims Carer's Allowance. The weekly rate for claimants without partners, as at April 2018, was £64.30.

11. Under para. 7 of Sch. 4 to the 2008 Regulations, a person is eligible for EDP if they are entitled to the highest rate of the Disability Allowance Care Component, or the enhanced rate of the Daily Living Component of the Personal Independence Payment. The weekly rate for the Respondents as single persons was, as at April 2018, £16.40.

Universal Credit

12. In November 2010, the Government published a White Paper entitled 'Universal Credit: Welfare that Works'. It indicated that the Government intended to introduce radical reform of welfare provision by providing an integrated benefit for people in or out of work, which would consist of a basic personal amount, with additional amounts (as applicable) for disability, caring responsibilities, housing costs and children.

13. Universal Credit was created by section 1 of the Welfare Reform Act 2012 ("the 2012 Act"), which provides:

> "(1) A benefit known as universal credit is payable in accordance with this Part.
>
> (2) Universal credit may, subject as follows, be awarded to —
>
> (a) an individual who is not a member of a couple (a 'single person'), or
>
> (b) members of a couple jointly.
>
> (3) An award of universal credit is, subject as follows, calculated by reference to —
>
> (a) a standard allowance,
>
> (b) an amount for responsibility for children or young persons,
>
> (c) an amount for housing, and
>
> (d) amounts for other particular needs or circumstances."

14. Section 12 of the 2012 Act deals with the particular needs or circumstances referred to in section 1(3)(d), which include needs arising out of disability:

> "(1) The calculation of an award of universal credit is to include amounts in respect of such particular needs or circumstances of a claimant as may be prescribed.
>
> (2) The needs or circumstances prescribed under subsection (1) may include —

…

(b) the fact that a claimant has limited capability for work and work-related activity;

(c) the fact that a claimant has regular and substantial caring responsibilities for a severely disabled person.

(3) Regulations are to specify, or provide for the determination or calculation of, any amount to be included under subsection (1).

(4) Regulations may —

(a) provide for inclusion of an amount under this section in the calculation of an award of universal credit —

(i) to end at a prescribed time, or

(ii) not to start until a prescribed time;

(b) provide for the manner in which a claimant's needs or circumstances are to be determined."

15. Section 33 of the 2012 Act provides for the abolition of existing welfare benefits, including ESA under the 2007 Act. Section 36 of the 2012 Act provides for the migration to Universal Credit through the provisions of Sch. 6 to the 2012 Act.

16. Para. 1 of Sch. 6 provides a power to "make provision for the purposes of, or in connection with, replacing existing benefits with universal credit." Para. 4(1)(b) provides that the power in para. 1 includes "provision for making an award of universal credit, with or without application, to a person whose award of existing benefit is terminated." Para. 4(3)(a) provides that:

> "Provision […] may secure that where an award of universal credit is made by virtue of sub-paragraph (1)(b)—
>
> (i) the amount of the award is not less than the amount to which the person would have been entitled under the terminated award, or is not less than that amount by more than a prescribed amount"

17. The Secretary of State has introduced UC in phases, starting in April 2013.

18. The first relevant regulations were the Universal Credit Regulations 2013 ("the 2013 Regulations"), which governed the substance of UC. The first regulations that governed the transition from legacy benefits to UC were the 2014 Transitional Regulations.

The scheme under challenge in *TP (No. 1)*

19. The regulations at issue in *TP (No. 1)* were the Transitional Regulations. Regulation 5 of the Transitional Regulations excludes entitlement to certain benefits, including Income Support and Housing Benefit, in respect of any period when the claimant is entitled to UC. Regulation 6(3)(a) provides that "a universal credit claimant makes a claim for benefit mentioned in that paragraph if the claimant takes any action which results in a decision on a claim being required under the relevant Regulations".

20. If a person has been receiving Housing Benefit and moves house within the same local authority area, they may apply for continued payment of Housing Benefit and will continue to receive income-related support under the existing welfare regime, including ESA, SDP and EDP. In contrast, if a person moves house to a new local authority area, they must apply for UC and are ineligible for legacy benefits.

The scheme under challenge in *TP (No. 2)*

21. At the time of the challenge in *TP (No. 2)* there were two sets of regulations: the SDP Gateway Regulations and the Pilot Regulations.

22. In this context a distinction is drawn between "natural migrants" to UC, who migrate by virtue of a trigger event that requires them to move to UC, and "managed migrants", who move to UC as a result of a decision by the Secretary of State requiring them to do so.

23. The SDP Gateway Regulations introduced Regulation 4A into the Transitional Regulations. With effect from 16 January 2019, Regulation 4A prevented severely disabled persons from becoming natural migrants even if they experience a trigger event such as moving to a different local authority ("the Regulation 4A group").

> "4A. No claim may be made for universal credit on or after 16th January 2019 by a single claimant who, or joint claimants either of whom—
>
> (a) is, or has been within the past month, entitled to an award of an existing benefit that includes a severe disability premium; and
>
> (b) in a case where the award ended during that month, has continued to satisfy the conditions for eligibility for a severe disability premium."

24. The effect of the Pilot Regulations was to insert into the Transitional Regulations a new Schedule 2, setting out transitional payments in the sum of £80 per month for severely disabled persons, including the Respondents, who were already natural migrants to UC ("the SDP natural migrant group"). Those who migrated prior to 16 January 2019, the SDP natural migration group, received £80 per month in addition to UC payments; whereas the Regulation 4A group, the managed migrant group,

retained their legacy benefits at the higher previous levels, approximately £180.00 per month.

Evidence as to the policy background in *TP (No. 1)*

25. In *TP (No. 1)* there was filed in the High Court proceedings a witness statement by Ms Janina Young dated 6 April 2018. Ms Young holds the position at the Department for Work and Pensions ("DWP") of Universal Credit Policy Team Leader for UC claims made on the grounds of having a health condition and/or disability.

26. In her witness statement Ms Young includes extracts from debates which took place in Parliament during the consideration of the Welfare Reform Bill.

27. At para. 87 she refers to a debate which took place in the House of Lords on 14 December 2011. The relevant Minister, Lord Freud, made an announcement to discuss a tabled amendment to the Bill from Baroness Meacher. In that announcement he said:

> "My Lords, this amendment seeks to put an additional element into the amount of UC that is payable for those who are severely disabled and who have no one receiving either carer's allowance or a carer's premium for looking after them. In essence it seeks to recreate the current severe disability premium within UC. As such it would involve a significant increase in cost compared with the Government's plans. That increase stands at £400 million, unless there were other readjustments. However, let us just take it at face value. At face value, it is unaffordable.
>
> On Monday the House approved the Government's plans to simplify the disability-related additions. Instead of the seven different components within the current system of benefits and tax credits for adults, and two further rates in child tax credits for disabled children, UC will just have two rates for both adults and children. *By restructuring the rates in this way, we are not looking to make any savings. We are redistributing around £800 million of current spend without returning any savings at all to the Exchequer*. The full amount will be reinvested by increasing the higher rate for more severely disabled people." (Emphasis added)

28. At para. 93 of her witness statement Ms Young says that the replacement of six legacy benefits by UC is:

> "a large and complex undertaking. For this reason, it is being introduced in a controlled, phased manner, so as to build capacity safely using a 'test and learn' approach whilst reducing legacy benefit costs. It was decided that this gradual build of the UC caseload, with a commensurate scaling down of legacy benefit resourcing, would best be achieved by initially confining access to UC to fresh claimants and to existing claimants who presented a fresh claim by reason of

> change in circumstances. In due course, the entire population will 'migrate' onto UC and legacy benefits will cease to operate."

29. At para. 94 Ms Young says that the need for phased transition takes into account four matters:

    (1) the need to test rigorously the computer systems being operated (it being a matter of public record that the IT designed to support UC has been problematic);

    (2) the need to train very large numbers of decision-makers in different organisations;

    (3) the need to address and overcome problems that might arise;

    (4) the benefits of publicity as the system is gradually introduced.

30. Accordingly, she says, at para. 95, it was not administratively workable for UC to be introduced overnight.

31. At para. 97 she states that there were (at the time of her first witness statement) no managed migrants. The transitional measures which she therefore summarises in that statement refer only to natural migrants.

32. At para. 98 Ms Young states that:

> "It is the view of Government that there is a distinction between these cohorts (or that there will be when the status of managed migrant in fact comes into effect). Natural migrants are individuals who are, effectively, in the same position as new claimants. The change in circumstances triggers a fresh claim. They are easily recognisable and identifiable by virtue of that fact. Further, the whole process of entering claims by reference to legacy benefits is being phased out and it would make no sense to permit claimants bringing new claims (for whatever reason) to have that entitlement calculated by reference to legacy benefits rather than UC."

33. At para. 99 Ms Young states:

> "The Government's view, however, is that where there is no change in circumstances, these factors do not apply. If the claimant is being managed to UC by changes introduced by the DWP, it is the view of Government that there should be a degree of protection against a reduction in entitlement by reference to the transition."

34. At paras 100-104 of her witness statement Ms Young explains this in more detail as follows:

"100. This is set out in Government publications. The *Universal Credit Policy Briefing Note 6: Transitional Protection* (Pages 393-94, at para 2(a)) and the *Universal Credit Policy Briefing Note: Transitional Protection and Universal Credit* of 10 December 2012 (Pages 395-97) explained the principles behind transitional protection in UC as follows (Page 395):

> 'The cause of claimants moving to Universal Credit will determine whether Transitional Protection will apply. Once Universal Credit is launched, some people in receipt of current benefits will be moved over in a process wholly managed by DWP. Transitional Protection will be considered in these cases and will be applied, at the point of transition, where the total household Universal Credit entitlement would otherwise be lower than their total existing award of benefits and tax credits. Claimants who come onto Universal Credit as a result of a change in circumstances meaning they need to apply to Universal Credit instead will not be entitled to Transitional Protection'

101. Accordingly, the 'top up' commitment which is challenged in this claim does not arise on the facts of these cases (or indeed any case at present). The 'top up' commitment is that claimants whose circumstances have not changed would not be worse off in cash terms. This distinction was also explained in paragraph 13 of the Universal Credit Equality Impact Assessment of November 2011 (Pages 199-236) and highlighted in paragraph 13 of the White Paper (Page 145).

102. The requirement for new claims is itself set out in legislation. Moving between Local Authority areas is a clear example of this. In the case of Housing Benefit, section 134 of the Social Security Administration Act 1992 requires Housing Benefit to be funded and paid by the relevant Local Authority. It follows, therefore, that where an individual moves from one Local Authority are to another, they are obliged to make a new claim. This is classified as a change in circumstances for the purposes of natural migration to UC.

103. In general terms, individuals currently receiving SDP are, by definition, likely to have the severest disabilities and less likely to experience changes in circumstances – such as a large drop in their income or change in employment – than others. As many disabled individuals may also live in specially adapted housing, they may be less likely to move address than other cohorts. On that basis, those receiving SDP are less likely to be 'natural migrants' and more likely to be subject to managed migration to UC; thus being subject to transitional protection.

104. A Policy Submission dated the 25th October 2011 … specifically addressed the proposed definition of a 'natural migrant' to the then Minister for Welfare Reform, Lord Freud. In Annex A, at page 5, a change of address – thus necessitating a new claim for Housing Benefit – was listed as one of the 11 mechanisms by which Transitional Protection

> would not be provided. As such, the circumstances of these cases have been expressly excluded as being within any top-up commitment."

35. In that submission dated 25 October 2011 presented to the Minister for Welfare Reform, it was said, at para. 1:

> "The Universal Credit (UC) Policy Briefing Note, published 13 May 2011, laid out our approach to Transitional Protection (TP). We have said that TP will be awarded where the total amount of household benefit is less under UC than the current system and where the claimant is 'managed moved' to UC and where circumstances remain the same: no TP is available for 'natural' migrations."

36. In Annex A to that submission, which set out changes in the circumstances that could trigger a 'natural' migration to UC, at point 10, was mentioned a change of address for Housing Benefit claimants who change address across local authority boundaries.

37. In the light of the issues that arise on the appeal in *TP (No. 1)*, what is significant about the evidence of Ms Young in those proceedings is not so much what she says but what she does not say. As will become apparent, Lewis J considered that it was of crucial importance that there was no evidence placed before the High Court to explain what the objective justification was for the difference in treatment as between the affected group of which TP and AR were members (people with severe disability who moved from one local authority to another) and those who moved but remained within the same local authority area.

Evidence as to the policy background in *TP (No. 2)*

38. In *TP (No. 2)* there was filed in the High Court proceedings a further witness statement from Ms Young dated 6 February 2019. At paras. 37-44 Ms Young gives an overview of the approach taken by the Secretary of State to the question of transitional protection for those groups who received disability premiums before moving to UC. Ministers decided to introduce provision for this SDP group in recognition of their specific circumstances - they are living alone, or are treated as living alone, with no carer - and because they are more likely to experience a significantly less favourable financial outcome than other groups moving onto UC. She says that the options for providing additional support for this group were formally presented to Ministers in February 2018. She states that the approach to providing additional support for those claimants who had previously received SDP and had "naturally migrated" to UC, as well as introducing the SDP gateway, was agreed by Ministers in February 2018. The changes to policy were announced in a written Ministerial Statement dated 7 June 2018, which she quotes at para. 42 of her witness statement. At the hearing we were informed that the reason for that delay was the need to obtain approval from HM Treasury.

39. Initially draft regulations were laid on 5 November 2018 but these were withdrawn on 14 January 2019. On the same day, two separate statutory instruments were laid before Parliament. These were the SDP Gateway Regulations and the Pilot Regulations. Ms Young describes these more fully at paras. 45-53 of her witness statement.

40. She describes in more detail the provision made for the SDP group at paras. 54-63. In particular, at para. 60, she says that the intention was not to replicate disability premiums but to provide a level of targeted support that could be delivered in a straightforward and timely manner. She explains in particular, at para. 59, how the amount of a transitional SDP of £80 per month was arrived at.

41. At paras. 64-69 Ms Young addresses the question of whether transitional payments could have been precisely the same as previous payments. This was discounted on the basis that it would in effect provide full transitional protection that would be available for managed migration claimants. The view was taken that this would be contrary to the underlying policy of the move to UC. It would also be unacceptably complex to deliver. Calculating the value of any transitional protection payments would have to be performed clerically. The automated process for calculating transitional protection payments was unlikely to be ready until August 2019 at the earliest.

42. At para. 66, Ms Young makes the point that, unlike calculating transitional protection for managed migration cases, where the information on legacy benefit entitlements would be up to date and accessible, some former SDP recipients would already have moved across to UC and were likely to have done so some time earlier. In those circumstances it would make it very difficult to check retrospectively their entitlement to legacy benefits at the point of claiming UC and so calculate the value of any transitional protection accurately.

43. In addition, given that the managed migration process is a process controlled by the DWP, it will know in advance that a claimant will be migrating to UC and can therefore access the information needed to calculate legacy benefit entitlements in a timely manner and with as much automation as possible. By contrast, trying to make this sort of calculation retrospectively makes delivering an effective process unacceptably difficult. Claimants who have migrated to UC naturally have had some form of change of circumstances, which means that there is no direct comparison available between their circumstances before and after the claim for UC (unlike in managed migration cases).

44. At para. 68 Ms Young says that the consequences for the DWP would include additional expenditure on administration.

45. At paras. 70-76 of her witness statement Ms Young addresses the question of taking into account EDP. She states that Ministers decided not to include any additional payment in respect of the loss of EDP. First, this is because the Secretary of State did not wish to replicate in UC every aspect of the disability provision in legacy benefits.

46. In addition, at para. 71, she states that there is a variability in the EDP caseload in terms of whether they have a lower entitlement to UC. Those who were in the ESA support group and received EDP only are better off on UC owing to the more

generous provision of the "LCWRA" (limited capability for work and work-related activity) component.

47. At para. 72 Ms Young states that providing additional transitional payments for those with EDP would triple the caseload, which would increase the costs to Government. It is estimated that including the value of the EDP in the transitional SDP amount would cost up to £493 million for the period from 2018/19 to 2023/24. When compared to the costs of basing transitional payments on the value of the SDP, adding the EDP would increase costs by up to £161 million for the same period.

48. At para. 73 Ms Young states that the number of claimants on legacy benefits receiving EDP is approximately 1.4 million, which is almost three times the number receiving SDP (500,000). She also says that, as at February 2018, there were 11,000 former recipients of EDP now in receipt of UC.

49. At para. 74 Ms Young states that extending transitional payments to include those who had formerly received EDP as well as former SDP claimants would markedly increase the number of claimants requiring calculations for transitional payments.

50. At para. 75 she states that including the EDP would have increased the numbers of rates to be delivered from 3-6 and would have required full IT system automation, something which was ruled out at the outset because of other higher priority areas requiring UC system build time. The alternative would have been to delay introduction of the managed migration process.

51. One of the exhibits to Ms Young's witness statement in *TP (No. 2)* is the DWP Equality Analysis dated January 2019. At para. 75 of that document it was noted that the majority of EDP claimants would probably benefit from the increased disability rates under UC. At the hearing before us it was common ground that that figure is 96%.

52. In the same passage it was said that there were 950,000 claimants who received EDP but not SDP. Further, SDP claimants are the group who are the most vulnerable; who are severely disabled and live alone with no carer, and therefore protection (in the form of the SDP gateway) has been targeted at them.

<u>The Background relating to these individual Respondents</u>

53. TP is a 52 year old single man who has been diagnosed with terminal non-Hodgkin lymphoma. In 2015 TP and his then-partner moved to the London Borough of Hammersmith and Fulham. In early 2016, when they separated, TP was in receipt of Housing Benefit from the local authority and also the basic allowance of income-related support. In October 2016, when TP became seriously ill, he moved to his parents' home in Dorset and ceased to be in receipt of Housing Benefit but continued to receive the basic allowance. On 13 December 2016 he also became eligible for SDP and EDP and his monthly income was £809.90. In December 2016 TP returned to London to have access to a hospital providing specialist cancer care. As he moved across local authority boundaries, he had to apply for Universal Credit and as a

consequence he received £633.42 a month for non-housing related benefits, over £170 a month less than he would have received under the former system.

54. TP needs to use taxis to and from his health appointments because of the increased risk of infection owing to his chemotherapy treatment. He has difficulty cleaning, carrying shopping, and has particular dietary needs. These increased costs have been difficult to deal with on a reduced income and his financial worries have made him more isolated, depressed and tired.

55. AR is a single man aged 36. He suffers from mental health issues and was in receipt of welfare benefits including the basic allowance, SDP and EDP. He received Housing Benefit from the local authority but, as he was considered to be underusing his three bedroom house, he moved to a different local authority area in July 2017 in order to avoid reduction in his Housing Benefit. Before this he received £814.69. As a result of moving, he had to apply for UC and received £636.56, so he now receives £178.11 a month less. AR has struggled to buy suitable food, has had to use food banks, has not been able to afford to heat his home or to pay for travel to visit his family.

56. As we have mentioned, in addition to TP and AR, SXC was a claimant in *TP (No. 2)*. SXC is a 44 year old woman with non-psychotic personality disorder, chronic pancreatitis with associated pain spasms, gallbladder problems associated with alcohol abuse, anxiety and depression. She was also a victim of domestic violence by her ex-partner, which significantly contributed to her disabilities. In August 2018 she moved within a local authority. Although this was not a trigger event under regulations 5 and 6 of the Transitional Regulations, she was given advice to the contrary by the local authority's Benefit Service and by an Advice Agency and, acting on this advice, made a claim for UC. The Secretary of State has applied a policy of "no going back", so that SXC is now on UC and cannot claim legacy benefits. SXC's pre-migration benefit payment was £829.62, comprising ESA with EDP and SDP. After migration to UC, she received a reduction of £183.48 per month to £646.14.

Relevant provisions of the Human Rights Act/ECHR

57. Section 6 of the Human Rights Act 1998 ("HRA") makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. It is common ground that the Secretary of State is a public authority and that a relevant act can consist of the making of secondary legislation, such as the regulations under challenge in these cases.

58. The relevant Convention rights are set out in Sch. 1 to the HRA.

59. Article 1 of the First Protocol ("A1P1"), so far as material, provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law …"

60. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race … or other status."

The judgment of Lewis J in *TP (No. 1)*

First Ground: Challenge to the Regulations

61. Before Lewis J the Claimants contended that under the Universal Credit Regulations 2013 ("the 2013 Regulations") there was differential treatment between groups of similarly situated people on two grounds:

    (i) Presence of a Carer: Severely disabled people with a carer have their needs met by the standard allowance under Universal Credit, with respect to them, and their carer will receive a carer's allowance or payment of a carer's element as part of Universal Credit to reflect the responsibility of caring for a disabled person. Those severely disabled persons who do not have a carer with them under the pre-Universal Credit benefit system had their needs met by the payment of SDP or EDP on top of the basic allowance they received.

    (ii) Level of Disability: Under the previous system, there was differential treatment between those who had limited capability for work due to disability but were not eligible to receive SDP or EDP and those disabled persons whose greater needs were provided for by SDP or EDP. The former group is in the same, or a better position, under UC because the standard allowance is higher than the amount of the basic allowance formerly payable. The latter group no longer receives SDP or EDP and receives the same payment as other disabled people regardless of their level of disability, which the Claimants argued was discriminatory under Article 14 read with A1P1 because different cases were being treated in the same way, contrary to the principle in *Thlimmenos v Greece* (2000) 31 EHRR 15.

62. Lewis J noted that, where the state creates a system of welfare benefits, it must do so in a manner compatible with Article 14 ECHR and if there is differential treatment there must be objective justification: in this regard Lewis J referred to *Stec v United Kingdom* (2006) 43 EHRR 47. Lewis J said that the courts should give due regard to the choice of the legislature where the justification for differential treatment arises out of economic or social measures: see paras. 56-58 of his judgment.

63. Concerning the differential treatment between severely disabled people with carers and those without, Lewis J found that the policy to bring in UC and change the structure of benefits to achieve the aim of introducing a fairer and more affordable benefits system was not manifestly without reasonable foundation: see para. 66 of his judgment.

64. Lewis J then considered whether the similar treatment of people with different levels of need based on the severity of their disability was a violation of Article 14 in

conjunction with A1P1. He said that it was "not appropriate to say that any replacement benefit system must replicate features and definitions used in the former system and, if it does not do so, then to seek to argue that the new system includes differential treatment within the meaning of Article 14": see para. 71. The decision to pay a higher allowance to all persons with disability and not to pay additional premiums such as SDP and EDP was objectively justifiable as a decision of the legislature on a point of economic and social policy. Therefore, both grounds of challenge to the Regulations themselves failed.

Second Ground: The Implementation Arrangements

65. Lewis J observed that the alleged differential treatment here arises because, if a person in receipt of legacy benefits moves from one local authority area to another, the Transitional Regulations require them to apply for UC, which will replace their existing income related benefits including SDP and EDP. The two relevant groups are those with severe disabilities who move to UC and those with severe disabilities who continue to claim legacy benefits: see para. 77 of his judgment.

66. Lewis J stated that the Secretary of State accepted that the benefits fell within the ambit of A1P1 and also that there was differential treatment. The issues before the court were (i) whether the treatment was objectively justified and (ii) whether it was differential treatment on the grounds of an "other status" within the meaning of Article 14 ECHR.

(i) Objective justification: Lewis J held that there was nothing in the material before the court to indicate that the Secretary of State had addressed the consequences of implementation and what degree of protection would be appropriate for severely disabled people suffering a "cliff edge drop" in their benefits after moving local housing authority area. The need for transitional protection had been identified by the Government in the White Paper before the 2012 Bill was enacted. The decision to move severely disabled persons from legacy benefits to Universal Credit without transitional protection was manifestly without reasonable foundation: see para. 86 of the judgment.

(ii) Status: Lewis J was of the view that the differential treatment does not arise out of disability as such but arises out of the fact that one group of disabled people will move from one local authority to another and suffer the attendant disadvantage, while the second group of disabled people will not move and therefore not suffer the cliff edge drop in benefits. Lewis J held, at paras. 89-91, that this was an "other status" within Article 14, relying, by way of analogy, on the approach of the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250, at para. 22 (Lord Wilson JSC). He found that the defendant had failed to establish that this differential treatment was objectively justified and accordingly a declaration was granted that there was unlawful discrimination against the Respondents TP and AR: see para. 114 of the judgment.

Third Ground: Public Sector Equality Duty

67. Before Lewis J the Claimants argued that there was a breach of the Public Sector Equality Duty ("PSED") imposed by section 149 of the Equality Act 2010. Permission to bring a claim for judicial review on this ground was refused by Lang J by an order made on 26 January 2018. The Claimants renewed the application for permission to advance that ground before Lewis J but he also refused it on the grounds that the Secretary of State did have due regard to the PSED: see paras. 110-112 of his judgment.

68. There has been no cross-appeal on the first ground of challenge before Lewis J nor against his refusal of permission to advance the ground based on the PSED.

The judgment of Swift J in *TP (No. 2)*

69. Before Swift J the Claimants advanced two grounds of challenge to the regulations enacted in January 2019:

    (i) The difference in treatment between the SDP natural migrant group, who would receive fixed-rate, generic transitional payments, and the Regulation 4A group, who would receive transitional protection, constituted unlawful discrimination, contrary to Article 14 when read together with A1P1.

    (ii) The relief previously ordered by Lewis J required that regulations made by the Secretary of State should make provision for TP and AR to receive transitional payments equivalent to the difference between amounts previously paid under the legacy system and their current Universal Credit payments.

70. It was accepted by the Secretary of State before Swift J that the transitional protection payments fell within the ambit of A1P1 and that the difference between natural migrants and managed migrants was a difference in "status" for the purposes of Article 14. The dispute was as to whether the difference in treatment was objectively justified.

71. The Secretary of State argued that it was justified for three main reasons:

    (i) No relevant comparison can be drawn between the legacy welfare benefits and UC welfare benefits. Article 14 says nothing about the amounts that should be paid by way of transitional provision.

    (ii) The "no turning back principle" applied as the SDP natural migrant group had already migrated.

    (iii) There was a cost saving and also administrative convenience in maintaining a fixed-rate, generic transitional payment for the SDP natural migrant group.

72. Swift J concluded that the difference in treatment was not justified and therefore was unlawful. His reasons were as follows:

    (i) The claim was not directed to the difference in the level of SDP benefits paid under the two systems, nor was it directed to any general proposition that Article 14 required transitional provision to be paid at any particular level.

The claim concerned the much narrower point of justification of the difference in treatment between members of two groups, both of which met the eligibility requirements for SDP. The argument that Article 14 does not *per se* generate the need for specific transitional provision therefore loses its force, because the case was one where the Secretary of State had chosen to make transitional provision, but in different ways for the two groups: see paras. 48-49 of the judgment.

(ii) The "no turning back principle" was rooted in common sense; however, it failed to explain the distinction between the transitional arrangements. The trigger events which caused the natural migration of SDP claimants were not aligned to any material change of circumstances relevant to the needs of SDP claimants. Natural migration was not therefore any indication that the circumstances of the SDP natural migrant group were likely to be different from members of the Regulation 4A managed migrant group, or that there is a reason to treat the members of the two groups differently: see paras. 50-51 of the judgment.

(iii) Saving public expenditure can be a legitimate aim, but will not of itself justify differential treatment unless there is a reasonable relationship of proportionality between the aim sought to be achieved, and the means chosen to pursue it. Paying fixed-rate generic payments to members of the SDP natural migrant group would also be administratively more convenient; however, the convenience should not be overstated. The administrative efficiency argument failed to explain the difference in treatment between the SDP migrant group and the Regulation 4A group; natural migration alone was not a satisfactory ground of distinction and no other sufficient explanation for the difference in treatment was provided: see paras. 52-65 of the judgment.

73. The alternative ground advanced by the Claimants before Swift J was that the relief ordered previously by Lewis J required that regulations made by the Secretary of State must make provision for TP and AR to receive transitional payments, equivalent to the difference between amounts previously paid under the legacy system and their current UC payments. Lewis J had concluded that the distinction drawn in the Transitional Provisions Regulations constituted differential treatment based on status and was discriminatory. On 31 July 2018 Lewis J made an Order in terms agreed by the parties, namely that back-payments would be made to TP and AR to make up the shortfall suffered since their migration to UC, and for future periodic payments also to be paid, equivalent to the difference between the legacy benefits payments and the current UC payments. The Order stated that the periodic payments should continue "... until such time as the Universal Credit (Transitional Provisions) (Managed Migration) Regulations come into force ...".

74. Swift J rejected this second ground of challenge: see paras. 66-70 of the judgment. He found that the 31 July 2018 Order of Lewis J should be understood as referring to the Pilot Regulations, as those Regulations contain the provisions for transitional payments which were originally set out in the Universal Credit (Transitional Provisions) (Managed Migration) Regulations 2018. There has been no cross-appeal on this aspect of the case.

Issues in *TP (No. 1)*

75. The first issue in the appeal in *TP (No. 1)* is whether the appeal is academic in the light of the fact that the regulations which were considered by Lewis J have been amended in any event and indeed have been the subject of the proceedings before Swift J. This argument, which was raised by the Respondents in their skeleton argument, was not pursued by Ms Leventhal at the hearing before us. While that concession is not binding on this Court, we are satisfied that the issues are not academic and that, in any event, there is "good reason in the public interest" for them to be determined by this Court: see *R v Secretary of State for the Home Department, ex p. Salem* [1999] 1 AC 450, at 457 (Lord Slynn of Hadley).

76. In *TP (No. 1)* the Secretary of State advances four grounds of appeal.

77. The first ground of appeal is that there was no discriminatory treatment in light of the earlier conclusion by Lewis J where he had rejected the challenge to the 2013 Regulations.

78. The second ground is that there was no relevant "status" for the purpose of Article 14.

79. The third ground is that the measure was objectively justified and that Lewis J was wrong to hold that it was not.

80. The fourth and final ground is that there was an inconsistency between the declaration granted by Lewis J and the finding which he had made, which (it is submitted) was only that there had been an absence of consideration of whether to make transitional provision for the affected group.

81. In addition, in *TP (No. 1)* the Respondents' Notice raises an issue which they argued before Lewis J but which he did not need to decide fully because he had already decided in their favour on another ground. This is an argument based on the decision of the European Court of Human Rights in *Thlimmenos v Greece* (2001) 31 EHRR 15, and is to the effect that the Respondents were treated in the same way as people who have no disability and therefore there was a breach of the principle that different cases should be treated differently.

82. Finally, it will be necessary for this Court briefly to address an argument made on behalf of the Respondents that the Secretary of State failed in her duty of candour before Lewis J.

Analysis of the issues in *TP (No. 1)*

83. There is no dispute between the parties that the matter falls within the ambit of A1P1 and that therefore Article 14 is engaged.

The first ground of appeal

84. The first ground of appeal advanced by Mr Milford on behalf of the Secretary of State is that Lewis J was wrong to conclude that there was any appearance of discriminatory treatment against TP and AR.

85. Mr Milford submits that, although there was differential treatment between the intra-local authority and extra-local authority cohorts, there was no differential treatment as regards *transitional* protection, as at the relevant time neither cohort received transitional protection. He submits, further, that this part of Lewis J's reasoning was inconsistent with what he had already held when rejecting the first ground of challenge before him. In that part of his judgment Lewis J said that there was nothing unlawful in principle in introducing a new system of UC, with potentially lower benefit rates; nor that there was anything wrong in principle in requiring a person to claim UC on the occurrence of a number of "trigger events" because there was a change of circumstances.

86. Against that background, submits Mr Milford, it was inherent in the UC scheme, especially as it had to be introduced in stages, that there would be some "winners" and some "losers" at any given moment in time.

87. We do not accept those submissions, which would introduce an unduly technical approach to a question which should be viewed in a realistic way. In our view, there can be no realistic dispute that there *is* a difference of treatment between TP and AR on the one hand and, on the other hand, people in an analogous situation, who do not have to apply for Universal Credit and therefore do not suffer the financial loss (the "cliff edge") which they did. This is because, if a person is in receipt of Housing Benefit and moves address *within* a local authority area, this is not treated as a "trigger event" and therefore there is no need to make a claim for Universal Credit: the person concerned continues to receive Housing Benefit and other legacy benefits, and there is no reduction in the amount of the benefit.

88. We therefore reject the first ground of appeal.

The second ground of appeal

89. The second ground of appeal is that Lewis J was wrong to hold that the difference of treatment in these cases was on the ground of an "other status" for the purpose of Article 14. The status identified was a severely disabled person (i.e. a person who was in receipt of SDP and EDP) who moves to a different local authority area. Mr Milford submits that, as both comparator cohorts comprised similarly disabled persons, the differential treatment was not on the ground of their disability or the degree of disability.

90. Further, submits Mr Milford, being within one local authority instead of another is not a relevant status for the purpose of Article 14. He submits that a residential address alone cannot give rise to a status within Article 14.

91. We do not accept those submissions.

92. We take the view that there is a relevant "status" in the present cases. The fact of moving home across a local authority boundary can be regarded as analogous in principle with residence in a foreign state, which was recognised as being a status by the Grand Chamber of the European Court of Human Rights in *Carson v United Kingdom* (2010) 51 EHRR 13, at paras. 70-71.

93. Alternatively, and insofar as necessary, we would also take the view that the status can be said to be that of a severely disabled person who moves home across a local authority boundary. The reason why it is relevant to take into account the fact that they are a severely disabled person is that it is for that reason that they suffer the significant financial loss (the cliff edge). Further, as the facts of TP illustrate, the reasons for relocation by a severely disabled person are likely to be related directly or indirectly to their disability. If they were just any individual who has to claim Universal Credit by reason of the fact that they have crossed a local authority boundary, they would not suffer that significant financial loss.

94. The case of *Carson* concerned the status of being resident abroad. The claimant in that case was a British citizen who had spent most of her working life in England and had a full record of national insurance contributions. At the date of her retirement in 2001 she was resident in South Africa. Although that did not preclude her from receiving a state pension, it did have the consequence that she was not entitled (under regulations made by the Secretary of State) to an annual cost of living increase which was given to recipients of pensions in this country. Her pension was therefore fixed at the level at which it had been awarded in 2001. Her claim for judicial review of the regulations was unsuccessful and her eventual appeal to the House of Lords was dismissed: see *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173.

95. In *Carson*, at paras. 52-54, Lord Walker of Gestingthorpe applied the concept of "status" which is to be found in Strasbourg jurisprudence, in particular in the decision in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, at para. 56, where the Court referred to status as "a personal characteristic … by which persons or groups of persons are distinguishable from each other". Lord Walker observed that that concept had been applied by the House of Lords in *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39; [2004] 1 WLR 2196. In *Carson*, at para. 79, Lord Walker concluded that Mrs Carson was not in a situation sufficiently analogous to that of a pensioner resident in the UK or in a country which had the benefit of a bilateral agreement with the UK.

96. As we have mentioned, the case then proceeded to the European Court of Human Rights. The Grand Chamber held, by a majority, that there had been no violation of Article 14 taken in conjunction with A1P1. Nevertheless, and importantly for present purposes, at paras. 70-71 of its judgment, the Court concluded that place of residence does constitute an aspect of personal status for the purposes of Article 14. In reaching that conclusion it said that the words "other status" (and all the more the French text of Article 14, which refers to "*toute autre situation*") "have been given a wide meaning so as to include, in certain circumstances, a distinction drawn on the basis of a place of residence."

97. The reason why the Court ultimately concluded that there was no breach of Article 14 in *Carson* was that the applicant was not in a relevantly similar position to residents

of the UK or of countries which were party to bilateral agreements about pensions: see para. 90 of the judgment.

98. Before this Court Mr Milford sought to argue that the suggested status in the present case was more analogous to the case of *Magee v United Kingdom* (2001) 31 EHRR 35. That case concerned the right to a fair trial in Article 6 and, in particular, the right of access to a lawyer when a person is charged with a criminal offence. The Court concluded that there had been a violation of Article 6: see para. 46 of its judgment. The Court did not, however, find that there was a breach of Article 14: see para. 51. The applicant argued that suspects arrested and detained in England and Wales under prevention of terrorism legislation could have access to a lawyer immediately and argued that that was not the position for a person like him in Northern Ireland. At para. 50 of its judgment, the Court said:

> "The Court recalls that Article 14 of the Convention protects against a discriminatory difference in treatment of persons in analogous positions in the exercise of the rights and freedoms recognised by the Convention and its Protocols. It observes in this connection that in the constituent parts of the United Kingdom there is not always a uniform approach to legislation in particular areas. Whether or not an individual can assert a right derived from legislation may accordingly depend on the geographical reach of the legislation at issue and the individual's location at the time. For the Court, in so far as there exists a difference in treatment of detained suspects under the 1988 Order and the legislation of England and Wales on the matters referred to by the applicant, that difference is not to be explained in terms of personal characteristics, such as national origin or association with a national minority, but on the geographical location where the individual is arrested and detained. This permits legislation to take account of regional differences and characteristics of an objective and reasonable nature. In the present case, such a difference does not amount to discriminatory treatment within the meaning of Article 14 of the Convention."

99. In our view, the Court was not there saying that "geographical location" can never give rise to a "status" for the purpose of Article 14. It was certainly not saying that residence in one part of a country rather than another cannot be a status. Its analysis was not in terms based on the concept of status at all. Further, and in any event, it concluded that there were objective and reasonable justifications for the difference in treatment in that case. This, in our view, is readily explicable on the basis that there are different legal systems in the constituent parts of the UK. There are also federal systems in the Council of Europe, such as the Federal Republic of Germany. The Court was simply acknowledging the reality that there will be differences which exist in different legal systems within a state. It does not follow from that simple fact that there is discrimination which is not objectively justified under Article 14.

100. The second main argument which Mr Milford advances is that the distinction in the present case is analogous to the sort of distinction which was regarded as not being a breach of Article 14 in *Zammit and Attard Cassar v Malta* (judgment of 30 July 2015, Fifth Section), in particular at paras. 67-71. In that case the applicants complained

that they had been treated differently from other property owners who had only begun leasing their property after 1995, and who were therefore not subject to restrictions arising from an Ordinance. The Court concluded that there appeared to be no distinguishing criterion based on the personal status of the property owner: see para. 69. Furthermore, at para. 70, the Court said that no discrimination was disclosed as a result of a particular date being chosen for the commencement of a new legislative regime and that differential treatment arising out of a legislative change is not discriminatory where it has a reasonable and objective justification in the interests of the good administration of justice. The Court noted that the 1995 legislative amendments, which sought in effect to improve the situation of landowners in order to reach a balance between all the competing interests, by abolishing the regime which was in fact challenged by the applicants before the European Court, did not appear to be arbitrary or unreasonable in any way.

101. In our view, there is no analogy to be drawn with that case. It is readily understandable and inevitable that legislation has to be brought into force at some point in time. Some people will therefore not necessarily benefit or be caught by it, depending on the date when events occur in relation to them. Without more, it is not possible to complain of such a distinction in treatment under Article 14. Whether one analyses that as following from the fact that there is no relevant "status" or simply that there is a reasonable and objective justification for the difference in treatment created by the legislation is in the end immaterial. The fundamental point is that the distinction in the present case is not analogous to the one in cases such as *Zammit*, which concern simply the date on which legislation is brought into force.

102. We observe that that is how the European Court itself analysed its decision in *Zammit* in the later case of *Minter v United Kingdom* (judgment of 1 June 2017, First Section), at para. 67. There the Court noted that cases such as *Zammit* could be explained on the basis that they concern legislative measures which are brought into force prospectively or on a particular date. In the case of offenders, this will have the inevitable consequence that they may be subject to a different sentencing regime from others who have committed similar offences, depending on the date in question.

103. We also note that at para. 66 of its judgment in that case, the Court said that only differences in treatment based on an "identifiable characteristic", or "status", are capable of amounting to discrimination within the meaning of Article 14. In other words the Court has moved on from requiring a "personal characteristic" to "an identifiable characteristic".

104. The third main argument made by Mr Milford is that a characteristic cannot constitute a "status" unless it exists independently of the conduct complained of. He relies for that proposition on the decision of the House of Lords in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 AC 484, at para. 28 (Lord Bingham of Cornhill) and para. 45 (Lord Hope of Craighead).

105. In *Clift v United Kingdom* CE:ECHR:2010:0713JUD000720507 (judgment of 22 November 2010, Fourth Section), at para. 60, the Court was "not persuaded" that that proposition found "any clear support" in that Court's caselaw.

106. Despite what was said by the European Court, Mr Milford submits that this Court is bound by decisions of the House of Lords or Supreme Court and that the Supreme

Court has not to date departed from the decision of the House of Lords in *Clift*. Although the issue was considered in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59; [2018] 3 WLR 1831 it was unnecessary to resolve it because, on the facts of that case, the Supreme Court considered that there was a status which existed independently of the conduct complained of: see e.g. para. 75 (Lady Black JSC) and para. 236 (Lord Mance JSC).

107. Interesting though those submissions were, in our view, they have no relevance to the present case. This is because the ground on which TP and AR were treated differently from others in an analogous situation does indeed exist independently of the difference in treatment about which they complain. When a person moves across a local authority boundary, that is a physical fact, which exists in the real world. It does not arise from the terms of the legislation under challenge.

108. The fourth main argument made by Mr Milford arises from the fact that, in his reasoning, Lewis J drew an analogy with the Supreme Court's decision in *Mathieson*. Mr Milford submits that he was wrong to do so. In *Mathieson*, he submits, disability was a component part of the relevant status, rather than an additional characteristic.

109. In *Mathieson* the claimant suffered from severe medical conditions soon after he was born. He lived at home with his parents and his complex bodily needs were met by them. They received Disability Living Allowance ("DLA") at the highest rate. Subsequently he was admitted to hospital, where he remained for 13 months. During that time one or other of his parents was at the hospital at all times and they remained his primary care-givers. In due course and in accordance with relevant secondary legislation at the time, the Secretary of State suspended the payment of DLA. This was because the claimant had been an in-patient in a National Health Service hospital for more than 84 days. The claimant appealed against the suspension on the ground that it breached his right not to be discriminated against under Article 14. His appeal was allowed by the Supreme Court.

110. The main judgment was given by Lord Wilson JSC. Lord Wilson considered the question of "status" at paras. 19-23 of his judgment. He held that there was a relevant status. By reference to earlier authority, Lord Wilson observed, at para. 21, that a "status" had in the past concentrated on "personal characteristics which the complainant did not choose and either cannot or should not be expected to change." It had been observed in earlier authority that the prohibited grounds in Article 14 generally require concentration "on what somebody is, rather than what he is doing or what is being done to him." Nevertheless, Lord Wilson observed that, by its decision in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311, namely that the appellant's homelessness was a relevant status, the House of Lords had demonstrated that the prohibited grounds extend well beyond "innate characteristics". At para. 22, Lord Wilson observed that things had moved on still further since that decision, particularly as a result of the decision of the European Court of Human Rights in *Clift v United Kingdom.*

111. At para. 23 Lord Wilson said:

> "Decisions both in our Courts and in the Court of Human Rights therefore combine to lead me to the confident conclusion that, as a severely disabled child in need of lengthy in-patient hospital treatment,

> [the appellant] had a status within the grounds of discrimination prohibited by Article 14. Disability is a prohibited ground … Why should discrimination (if such it be) between disabled persons with different needs engage Article 14 any less than discrimination between a disabled person and an able-bodied person? …"

112. We see some force in Mr Milford's submission that there is no direct analogy to be drawn between the present context and that in *Mathieson*. Nevertheless, that does not detract from the fundamental point that, in our view, residence in a particular local authority area as opposed to another can constitute a relevant status.

113. Alternatively, and insofar as it is necessary to do so, as we have said, we would conclude that the severe disability of persons in the situation of TP and AR *is* a component part of the criterion which is the relevant status, that is to say the status can be said to be that of a severely disabled person who moves home across a local authority boundary. To that extent the analogy with *Mathieson* would then be apt.

114. We therefore reject the second ground of appeal.

The third ground of appeal

115. The third ground of appeal is that Lewis J was wrong to hold that the difference in treatment had no objective justification.

116. Under this ground Mr Milford submits, first, that, on any view, the ground of discrimination in this context cannot be regarded as being at the core of the values which Article 14 protects, in contrast to discrimination on grounds such as race, sex, sexual orientation or nationality. By reference to decisions such as *Carson* and *Mathieson* he submits that the present cases should be regarded as being at the outer periphery of what Article 14 protects and that therefore a wide latitude should be afforded to the executive when assessing the justification for the difference of treatment.

117. Further, submits Mr Milford, there is no principle that withdrawal of any benefit requires consideration of transitional protection. The fact that there were policy statements made about the desirability of transitional protection does not translate into a legal obligation.

118. He submits that the justification for removing legacy benefits, which was accepted by Lewis J when rejecting the first ground of challenge before him, also stands as justification for not making separate cash payments equivalent to those benefits. Amounts of benefits are changed frequently and with little notice. If there is to be "top up" protection for every claimant on an assumed basis that there is a need to avoid hardship that would defeat the underlying objective of phasing in UC in an incremental way. As we have mentioned earlier, Mr Milford emphasises that it was inherent in the introduction of the UC scheme that there would be some "winners" and some "losers" at any given moment in time.

119. It is common ground that, for present purposes, the role of this Court is to allow an appeal only where the decision of a lower court was "wrong": see CPR 52.21(3)(a). This Court's function is not simply to re-hear the case as if it were a court of first instance but is one of review of the decision below: see CPR 52.21(1).

120. The question of how an appellate court should approach the assessment of proportionality by a court of first instance has been considered by the Supreme Court on more than one occasion. The first relevant authority that was drawn to our attention was *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911, at paras. 88-93 (Lord Neuberger PSC). The most recent consideration of the issue which we were shown was in *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079, at paras. 53-65 (Lord Carnwath JSC).

121. Having considered earlier authorities, in particular *Re B,* Lord Carnwath summarised the position in the following way, at para. 64:

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle – whether of law, policy or practice – which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para. 34:
>
> > 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong …'"

122. Earlier, at para. 61, Lord Carnwath had stated that the Court of Appeal had applied too narrow a test, by asking simply whether the judge's reasoning disclosed any "significant error of principle". Nevertheless, as the passage at para. 64 makes clear, it is not the role of this Court simply to substitute its own assessment of proportionality for that of the High Court. Its function remains the traditional one of review, asking whether the decision of the court below was wrong.

123. Asking ourselves that question, we have come to the conclusion that the assessment by Lewis J of the question of proportionality in *TP (No. 1)* was not wrong.

124. The parties are agreed that the relevant test for the Court to apply is whether the difference in treatment was "manifestly without reasonable foundation". Lewis J

applied that test, at least in the alternative, and concluded that the difference of treatment was not objectively justified: see paras. 86 and 88 of his judgment.

125. At para. 86 Lewis J said:

> "Applying the approach to justification favoured by the defendant, the decision to move a group of persons previously eligible for SDP and EDP onto universal credit because they move to another local housing authority area, without considering the need for any element of transitional protection (particularly in the light of earlier Government statements that an element of protection may be needed and the circumstances in which it should continue needed to be defined) is *manifestly without reasonable foundation*." (Emphasis added)

126. At para. 88 Lewis J said:

> "In any event, the material before the court does not establish that the Transitional Regulations as they stand strike a fair balance between the interests of the individual and the interests of the community in bringing about a phased transition to universal credit. The impact on the individuals is clear. They were in receipt of certain cash payments (the basic allowance and SDP and EDP). They are now in receipt of cash payments which, overall, are significantly lower than the amount previously received. They are a potentially vulnerable group of persons as the Government in its own material recognises. On the material before me, there appears to have been no consideration of the desirability or justification for requiring the individual to assume the entirety of the difference between income related benefits under the former system and universal credit when their housing circumstances change and it is an appropriate moment to transfer them to universal credit. That is all the more striking given the Government's own statements over a number of years that such persons may need assistance and that there was a need to define with precision the circumstances in which they would not receive such assistance. In all the circumstances of this case, the operation of the implementation arrangements in the way they do is *manifestly without reasonable foundation* and fails to strike a fair balance." (Emphasis added)

127. The fundamental difficulty that the Secretary of State faces is that there was no evidence placed before Lewis J on her behalf to explain the difference in treatment between the comparator groups. On the evidence that was placed before him, there appeared to have been no consideration of this issue. The fact that he emphasised that point does not mean that he fell into the error of thinking that there was a "process" error by the Secretary of State: cf. decisions such as *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420, para. 44 (Lord Mance JSC). He was well aware that the issue under Article 14 is whether the outcome is lawful or

unlawful and is not simply a question about whether the decision-making process was carried out properly. The reality was that the Secretary of State had simply not placed evidence before Lewis J which would assist him in deciding that there was a reasonable foundation for the difference in treatment.

128. Furthermore, this Court now has before it additional material, which Lewis J did not have before him. In particular this Court is now aware, from the witness statement of Ms Young filed in *TP (No. 2)* that, in February 2018 (before the hearing before Lewis J), Ministers in the DWP had already decided to make a change to the Transitional Regulations precisely in order to accommodate the cliff edge problem which claimants in the position of TP and AR would suffer. This is not conclusive against the Secretary of State but it is relevant evidence and supports the finding by Lewis J that the difference in treatment was manifestly without reasonable foundation.

129. We therefore reject the third ground of appeal.

The fourth ground of appeal

130. As we have mentioned, Lewis J granted a declaration that TP and AR had suffered unlawful discrimination by reason of the difference in payments. Mr Milford submits, under the fourth ground of appeal, that, in view of Lewis J's finding that the Secretary of State had failed to consider the question of whether transitional protection should be provided to the affected group, the declaration should have been limited to one that there had been a failure to "consider" transitional payments. We are informed that the significance lies in relation to the Respondents' claims for damages under section 8 HRA.

131. In our view, the fourth ground of appeal fails for the simple reason that it is based on a misunderstanding of Lewis J's reasoning. As we have already said, in rejecting the third ground of appeal, he did not fall into the error of thinking that the question of justification turned on a failure of the decision-making process. He was well aware that the question is whether the outcome of that process is one which is objectively justified or not. He did not find only that the Secretary of State had failed to consider the question of whether there should be any transitional protection for the affected group. What he found was that, as a consequence of that failure, there was no evidence placed before him to demonstrate that there was an objective justification for the difference in treatment.

132. We therefore reject the fourth ground of appeal.

The Respondents' Notice

133. In advancing the alternative ground for upholding the decision of Lewis J in the Respondents' Notice, Ms Leventhal observes that Lewis J did not fully engage with the argument that under *Thlimmenos* "like cases should be treated alike and different cases treated differently". The specified comparator here is non-disabled natural

migrants to UC. Ms Leventhal submits that disabled natural migrants have been treated in the same way as non-disabled natural migrants when experiencing a trigger event despite the fact that their severe disabilities make them relevantly different. She submits that disabled natural migrants were worse off because they faced a greater cliff edge drop and they were less able to weather the sudden decrease in income than non-disabled natural migrants.

134. In seeking to meet the point made in the Respondent's Notice, Mr Milford relied on the judgment of Swift J in *R (Drexler) v Leicestershire County Council* [2019] EWHC 1934 (Admin). In that case Swift J rejected an argument based on the principle in *Thlimmenos*: see paras. 51-58 of his judgment.

135. In the circumstances which have arisen, in particular in the light of our conclusions on the earlier issues, we do not think it necessary or appropriate to address the merits of those rival submissions. We consider that the issues raised by the Respondents' Notice and the Secretary of State's submissions in response would be best addressed in a case in which it is necessary for this Court to decide them rather than in the present cases. We are also mindful of the fact that the decision in *Drexler* itself is under appeal to this Court, permission to appeal having been granted.

The duty of candour and co-operation

136. The relevant principles on the duty of candour and co-operation with the court, which falls upon public authorities in judicial review proceedings, were summarised by the Divisional Court in *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin), at paras. 8-24, and were incorporated by reference into the judgment of Singh LJ (with whom Hickinbottom and Asplin LJJ agreed) in *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812; [2018] 4 WLR 123, at paras. 105-106. As we understood it those principles were not in dispute before this Court; we need not set them out here in full.

137. Emphasis was placed by Ms Leventhal on behalf of the Respondents on the point made in *Citizens UK* at para. 106(5):

> "The duty of candour is a duty to disclose all material facts known to a party in judicial review proceedings. The duty not to mislead the Court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact."

138. Ms Leventhal submits that the evidence placed before Lewis J was incomplete and therefore misleading by omission. She submits that a "slide pack" in February 2018 and a decision that was taken by Ministers at the DWP in the same month demonstrate that the justification advanced before Lewis J in *TP (No. 1)*, that the SDP cohort did not require any protection from the detrimental impacts of natural migration to UC, was contrary to the position of the Secretary of State at that time.

139. What became clear in the witness statement filed by Ms Young in January 2019 in *TP (No. 2)* (at para. 41) was that, as early as February 2018, Ministers had in fact taken

the decision to make an exception for people in the position of these Claimants. Yet that was not drawn to the attention of Lewis J at all.

140. On the facts of the present cases, we consider that something to the effect of what was said at para. 41 of Ms Young's witness statement in *TP (No. 2)* should have been brought to the attention of Lewis J in *TP (No. 1)*. The witness statement from Ms Young in *TP (No. 1)* was made on 6 April 2018 and the hearing did not take place for some time thereafter (1-4 May 2018).

141. We accept that this omission was in good faith and we accept the point Mr Milford made that any spending commitments required the approval of the Treasury. We would also wish to avoid any suggestion that the duty of candour and co-operation requires a government department to disclose in court proceedings what may be simply early thinking about a possible policy, still less what is confidential advice given by civil servants to Ministers. In our view, this case is different. What had already happened by the time of Ms Young's witness statement in April 2018 was that a decision had been taken by Ministers at the DWP: it was more than simply thinking about a possible policy change and more than advice given in confidence by civil servants to Ministers.

Issues in *TP (No. 2)*

142. In *TP (No. 2)* the Secretary of State advances three grounds of appeal.

143. The first ground of appeal is that Swift J erred in his approach to the comparator cohort group because he compared an existing group with a future (speculative) group which did not yet exist.

144. The second ground is that Swift J erred in his approach to the issue of objective justification and, in particular, that he did not apply the test of whether the difference in treatment between the comparator groups was "manifestly without reasonable foundation".

145. The third ground is that there is an inconsistency between the judgment of Swift J and that of Lewis J in *TP (No. 1)*.

Analysis of the issues in *TP (No. 2)*

146. In *TP (No. 2)* there is no dispute between the parties on the issue of "status". It is accepted by the Secretary of State that there was a difference of treatment on the ground of a status.

The first ground of appeal

147. The first ground of appeal is that Swift J chose the wrong comparator group and speculated as to the future. In this context Mr Milford again emphasised that it was

inherent in the UC scheme that it would be introduced in stages and therefore it was inevitable that there would be some "winners" and some "losers" at any given moment in time. It is submitted that there are four cohorts of people with identical disability related needs:

(i) First-time UC claimants who receive UC entitlement calculated at a rate which would, for some, be lower than they would have received under legacy benefits ("Cohort 1").

(ii) Natural migrants with relevant disability needs, who received UC plus a transitional payment of £80 per month tapering down in due course ("Cohort 2"). This is the Respondents' cohort.

(iii) Managed migrants in the pilot scheme, who will receive UC and any transitional protection in respect of the entirety of the difference between their former and current entitlement ("Cohort 3").

(iv) Severely disabled claimants who have not migrated because they are subject to Regulation 4A and receive ongoing legacy benefits, which may be superior or inferior to UC entitlement ("Cohort 4").

148. Mr Milford complains in particular about what was said by Swift J at para. 43 of his judgment:

> "… In this respect the situation has moved on since the events which were in issue before May J in *TD*. Given the provision now made by the Managed Migration Pilot Regulations, the managed migrant group is no longer too speculative to form a proper comparator. … when those Regulations are considered in the context of events since February 2018, it is clear that for SDP claimants the managed migrant group will comprise all of the Regulation 4A Group."

149. For the Secretary of State it is submitted that this was erroneous because:

(i) managed migrants are only claimants in the pilot scheme;

(ii) the Regulation 4A group is not linked to the pilot scheme at all.

150. It is submitted that the managed migrants and Regulation 4A group are different cohorts, treated differently in law. The point of the pilot scheme is to review behavioural outcomes, delivery, cost, efficiency, and social policy gains generally: this is the rationale for making special provision for the pilot scheme.

151. It is submitted that Swift J compared the present with a possible future group by a process of speculation (that the pilot would become general). This is said to be wrong in principle. Reliance is placed on what was said by May J in *TD and AD v Secretary of State for Work and Pensions* [2019] EWHC 462 (Admin): "To seek to identify a

comparator group by reference to statutory provisions that have not yet been agreed by Parliament or brought into force is quite another matter".

152. In our view, the simple answer to this ground of appeal is that there was already on the face of the SDP Gateway Regulations and the Pilot Regulations a clear difference of treatment between the two comparator groups: the SDP group which included the Respondents and the Regulation 4A group. It was unnecessary for his judgment to go any further than that. Whether or not he should have gone on, to take into account the evidence before him which appeared to support his view as to what would happen in the future, is immaterial. The fundamental point is that there was a difference of treatment and that difference needed to be justified.

153. We therefore reject the first ground of appeal.

The second ground of appeal

154. Mr Milford submits that Swift J applied the wrong test, as set out by the Supreme Court in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289, by applying a conventional proportionality approach and not applying the "manifestly without reasonable foundation" test.

155. We do not accept that submission.

156. It is clear, in our view, that Swift J had the relevant test in mind: that the difference in treatment must be manifestly without reasonable foundation. He referred to that test at several places in his judgment. For example, at para. 23, he said that the parties were agreed "that the applicable standard for justification … was whether or not the decision taken was manifestly without reasonable foundation."

157. It is true that, at para. 44 of his judgment, Swift J set out the four-stage test in conventional proportionality cases and referred to the well-known decision of the Supreme Court in *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39; [2014] AC 700, which was a case about Article 6 and A1P1 and not Article 14; but, when his judgment is read fairly and as a whole, there can be no doubt that he did have in mind the correct legal test.

158. At para. 45 of his judgment Swift J rightly observed that, in an Article 14 case:

> "What must be justified is the difference in treatment."

There is the highest authority for that proposition in *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, at para. 68 (Lord Bingham of Cornhill):

> "… Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is *not the measure in issue but the difference in*

> *treatment* between one person or group and another. …" (Emphasis added)

159. Also at para. 45 Swift J expressly directed himself that he had to have "well in mind" that the choice made by the Secretary of State was "a choice on a matter of social and economic policy", and was "a choice about the allocation of public resources". He continued that:

> "decisions on such matters are primarily for the Executive. The degree of respect to be afforded by the court to decisions of this nature is substantial, and the question for the court is whether or not the decision is 'manifestly without reasonable foundation'."

160. It is clear therefore that he expressly applied the "manifestly without reasonable foundation" test.

161. Further, it is clear from para. 56 that Swift J was well aware that the burden of such justification can be, and is likely to be, less onerous than in a case where the differential treatment is, for example, on grounds of sex or race.

162. At para. 49, on a point which is also relevant to the third ground of appeal, Swift J said:

> "This claim is not directed to the difference in the level of benefits paid to severely disabled persons under the legacy benefit system and under the Universal Credit system."

As Swift J observed in the same paragraph, this was a situation in which the Secretary of State had already decided to make some transitional provision but had then chosen to do so in different ways for the different groups. It was that difference of treatment which needed to be justified.

163. As Swift J observed at para. 59, what needed to be justified in this case "extends to the difference in treatment between the SDP migrant group and the Regulation 4A group". He concluded, at para. 60, that:

> "No sufficient explanation for the difference in treatment has been provided. The Secretary of State's 'bright line'/administrative efficiency submission explains the treatment of the SDP natural migrant group on its own terms, but does not explain why that group is treated differently to the Regulation 4A group. Both groups comprise severely disabled persons; all of whom meet the criteria for payment of SDP (or would continue to meet those criteria but for natural migration). The simple fact of natural migration is not a satisfactory ground of distinction because the trigger conditions for natural migration are not indicative of any material change in the needs of the Claimants (or the other members of the SDP natural migration group), as severely disabled persons. The

> same point is sufficient to dispose of the further suggestion in Miss Young's witness statement that the Secretary of State considered the SDP natural migrants as being in materially the same position as new welfare benefits claimants (i.e. severely disabled persons presenting themselves to the welfare benefits system for the first time, after the implementation of Universal Credit). There is no logical foundation for that view; if there were a logical foundation for it, it would negate the rationale for regulation 4A of the Transitional Provisions Regulations."

164. At para. 64 Swift J said:

> "The requirement of justification brings with it the burden of explanation. Overall, I am not satisfied that the Secretary of State has identified any reason that explains the different treatment of the SDP natural migrant group from the Regulation 4A group. *The standard that the Claimants must meet for this purpose is the manifestly without reasonable foundation standard*. Even though that standard is low (so far as the burden it places on the Secretary of State), as I have explained, there is a mis-match between the reasons the Secretary of State relies on, and the difference in treatment that needs to be justified." (Emphasis added)

165. That passage again makes clear that Swift J was applying the manifestly without reasonable foundation test. It also rightly makes it clear that the burden was on the Secretary of State to adduce sufficient evidence to show that there was objective justification for the difference in treatment.

166. The question then becomes whether he was entitled on the evidence before him to make the finding which he did. In our view he was entitled to do so.

167. We remind ourselves again that we sit as an appellate court, to review the decision of the High Court, to ask whether it was "wrong" on the question of objective justification. We do not re-hear the case as if we were a court of first instance.

168. The justifications which were advanced before Swift J related, first, to the question of administrative difficulty; and, secondly, the question of cost.

169. We consider first the justification based on administrative difficulty. We have summarised the evidence as to the policy background which was filed on behalf of the Secretary of State above. In our view, it was not wrong in principle for the Secretary of State to consider that it would be difficult to calculate precisely the amount which needed to be given to an individual in the affected group of "natural migrants" to UC, because this would vary according to their particular circumstances. Furthermore, it might be very difficult to trace changes of circumstances retrospectively. That can be contrasted with the position of the "managed migrant" project, where the DWP would be operating the system prospectively and would therefore have knowledge of relevant circumstances. For that reason it was permissible, in our view, for the

Secretary of State to decide that an estimate should be made of the likely financial loss rather than to try to give complete transitional protection to each individual affected. Accordingly, taking a fixed figure like £80 per month was not inherently unreasonable.

170. We turn to the justification based on cost. It is well established that budgetary considerations alone cannot justify discrimination: see e.g. *Ministry of Justice v O'Brien* [2013] UKSC 6; [2013] 1 WLR 522, at para. 69 (Lord Hope DPSC and Lady Hale JSC). If cost alone could justify discrimination, then any discrimination could be justified by reason of the fact that to pay people equally will entail greater cost, for example where women are paid 75% of what men are paid.

171. In *R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449, at para. 64, Lord Reed JSC, after referring to that passage in *O'Brien*, said that:

> "… acceptance that savings in public expenditure can constitute a legitimate aim for the purposes of Article 14 does not entail that that aim will in itself constitute a justification for discriminatory treatment. … [T]he question whether a discriminatory measure is justifiable depends not only on its having a legitimate aim but also on there being a reasonable relationship of proportionality between the means employed and the aims sought to be realised."

172. In *R (Coll) v Secretary of State for Justice* [2017] UKSC 40; [2017] 1 WLR 2093, at para. 40, Lady Hale DPSC said that:

> "Saving cost is, of course, a legitimate objective of public policy. But, as the Court of Justice of the European Union emphasised in *O'Brien* … 'budgetary considerations cannot justify discrimination'. In other words, if a benefit is to be limited in order to save costs, it must be limited in a non-discriminatory way. …"

173. The passages which we have cited from *JS* and *Coll* were referred to by Swift J at para. 53 of his judgment. We did not understand there to be any dispute between the parties before us as to the relevant principles, which we have summarised above.

174. In the present case, the fundamental difficulty is not only that the £80 figure was significantly less than the true loss of SDP (£112 per month: cf. the table at para. 83 of the witness statement of Ms Young) but, more significantly, it was about £100 less than the transitional protection which would be given to someone in the managed migrant project. The reason for that significant difference was that no account was taken of the EDP element which someone would be losing. It appears to us from the witness statement of Ms Young, at paras. 72-73, that the sole reason for that was the increased cost that would otherwise be incurred.

175. There is one aspect of the submissions made by the Secretary of State under the second ground of appeal which we must now address. This arose in particular from the submissions made by Mr Milford in reply at the hearing before us.

176. Mr Milford accepts that it is true that many people (we were told at the hearing by Ms Leventhal that the figure is 96%) of those entitled to EDP only would in fact be better off under the Universal Credit system. Nevertheless, submits Mr Milford, there is a minority of 4%, which equates to something like 36,000 people, who would be worse off. He submits that it could therefore reasonably be said that those people would seek to "piggy-back" on the claims of those with SDP as well.

177. It appears from an email sent to us by Mr Milford dated 9 December 2019 (after the hearing at our invitation) that the way in which he has arrived at the figure of 36,000 is first to subtract 500,000 (SDP claimants) from 1.4 million EDP claimants, referred to at para. 73 of Ms Young's witness statement, which gives a figure of 900,000. Mr Milford then points out that 4% of 900,000 is 36,000.

178. We have to say that the way in which this point emerged is very unsatisfactory. It was not specifically raised in either the Grounds of Appeal, dated 24 May 2019, or in the Secretary of State's consolidated skeleton argument for the hearing before this Court, dated 31 October 2019, where there was simply a general reference to the "piggy-backing" issue at para. 91.4. The fact that it emerged in Mr Milford's reply at the hearing before us required further brief submissions to be invited in writing from each side after the hearing had finished. More importantly, the point was not the subject of any evidence before the High Court.

179. Swift J addressed the "piggy-backing" point in the following way, at paras. 62-63 of his judgment:

> "62. I expect that the concern that lies behind the point at paragraph 64 of Miss Young's statement (and see also, paragraph 6.1 of the submission to Ministers, set out above, at paragraph 35), is that if something that looks like Transitional Protection is extended to the SDP natural migrant group, other natural migrants who have the benefit of no transitional provision at all, would attempt to piggy-back on that to found their own claims. Thus, piece by piece, the Secretary of State's policy might be dismantled.
>
> 63. *Even were such a risk to exist I do not consider it would be capable of amounting to justification of the difference of treatment in issue in this case*. The premise for the argument would have to be that the piggy-back claims would be valid in law. I cannot see how it could be a defence to the claim of discrimination brought by the Claimants in this case, to say that it was necessary they be subjected to less favourable treatment to guard against the possibility that other, legally valid, claims might be made against the Secretary of State. *In any event*, I do not consider that any fear of piggy-back claims is realistic. Different treatment for both the SDP natural migrant group and the Regulation 4A group, as opposed to natural migrants generally, is explicable for the reasons highlighted by the House of Commons Select Committee. Those reasons are specific to the severely disabled who met the conditions for

> entitlement to SDP under the legacy benefits system. This was the position taken in the February 2018 Departmental presentation. *For the avoidance of doubt*, my reasoning in this judgment is directed solely to whether the distinction in treatment under the Transitional Provisions Regulations between (a) the SDP natural migrant group; and (b) the Regulation 4A group, is justified in law. No part of the reasoning in this judgment should be taken to suggest that if the Claimants' case succeeds, the distinction that otherwise exists under the Secretary of State's policy between natural migrants and managed migrants, is legally invalid." (Emphasis added)

180. It will be seen from the words we have emphasised in that passage that the reasoning of Swift J was carefully structured in the alternative. He concluded, first, that fear of piggy-back claims could not be a legally valid reason for discriminating against these Respondents. We agree with him about that. If others also had a legally valid claim, that would have to be considered on its own merits, but that cannot be a good reason why the legally valid claim for discrimination of these Respondents should fail. Further and in any event, Swift J did not consider that the fear of piggy-back claims was "realistic". He said that the different treatment for both the SDP natural migrant group and the Regulation 4A group, as opposed to natural migrants more generally, was explicable for the reasons highlighted by the House of Commons Select Committee of 24 January 2018 (referred to at para. 30 of his judgment). Swift J noted that those reasons were specific to the severely disabled people who met the conditions for entitlement to SDP under the previous benefits system. Finally, he made it clear, for the avoidance of doubt, that the reasoning in his judgment applied only to the difference in treatment between the two comparator groups that were before him and nothing else.

181. We note that the specific issue of piggy-backing in relation to those people in receipt of EDP only (the EDP only group) was not raised in the Secretary of State's skeleton argument in the High Court save as to the overall cost of up to £493 million: see para. 68.3 of that skeleton argument.

182. As we have mentioned, Annex H exhibited to Ms Young's witness statement was a DWP Equality Analysis of January 2019, which stated, at para. 75, that "the majority of EDP claimants would likely be benefitting from the increased disability rates under UC" and that 950,000 claimants (we presume of the 1.4 million mentioned by Ms Young) received EDP but not SDP.

183. As we have said, Swift J addressed piggy-backing generally at paras. 62-63 of his judgment but not specifically the EDP only group. This is unsurprising given the way in which the issue was addressed both in the Secretary of State's skeleton argument and in the witness statement of Ms Young, at paras. 72-73. There she referred to the cost of extending EDP generally but did not specify the proportion of the EDP only group who would be worse off. She said that the number of claimants on legacy benefits receiving EDP was "approximately 1.4 million". The costs of including the EDP in the transitional amount would be up to £493 million for the years 2018/19 to 2023/24. She also said that, as at February 2018, there were 11,000 "former

recipients of EDP" but she did not say how many, if any, of those were worse off under UC.

184. The position therefore appears to us to be as follows:

(1) As at February 2018 there were 11,000 former members of the EDP only group who had migrated to UC (presumably as natural migrants) but it is not known how many, if any, of those were worse off.

(2) There is a Regulation 4A gateway for SDP recipients, which does not include the EDP only group.

(3) Managed migration is limited to a pilot for 10,000 of those in receipt of legacy benefits, which may or may not include members of the EDP only group.

(4) Therefore, as matters stand, the only members of the EDP only group who will move to UC other than those within the 10,000 pilot will be those who are natural migrants.

(5) It is not known how many of the EDP only group within the pilot or who will be natural migrants will be worse off.

185. It is also clear, from the submissions made by email to this Court after the hearing, on 9-10 December 2019, that the figure of 96% of EDP claimants has only come from material which has arisen *since* the judgment of Swift J was given. We were informed that it is mentioned in the Secretary of State's response dated 15 August 2019 to a pre-action letter in another case called *TP (No 3)*, which is not before this Court.

186. The crucial point is that none of this was placed in evidence before Swift J; nor it seems was it the subject of submissions before him. In our view, therefore, Swift J cannot be criticised now for failing to deal with this. He did the best that he could on the basis of the material that was placed before him.

187. It is also important to emphasise in this context that ultimately the burden rests on the Secretary of State to show that there is objective justification for a difference of treatment under Article 14.

188. It seems to us that the evidence of Ms Young (in particular at paras. 72-73 of her witness statement in *TP (No. 2)*) only refers to cost in the sense that paying more people the equivalent of the EDP which they had lost would inevitably cost more: she calculates that figure as being £161 million. In our view, that reliance on cost is misplaced when one is seeking to find objective justification for the difference in treatment.

189. We therefore reject the second ground of appeal.

The third ground of appeal

190. The third ground of appeal is that the judgment of Swift J was inconsistent with the first part of the judgment of Lewis J, in which he had rejected the challenge to the 2013 Regulations.

191. Particular complaint is made about para. 51 in the judgment of Swift J, where he said that:

> "[T]he trigger events are not aligned to any material change of circumstances relevant to the needs of SDP claimants."

Complaint is made about similar passages at paragraphs 55, 60 and 65 of the judgment. It is submitted that the "trigger events" for migration from legacy benefits to UC are not intended to be aligned to "need". The relevance of a trigger event is that it is "an appropriate trigger to move a person from the existing benefit system to Universal Credit", as Lewis J had said in *TP (No 1)*, at para. 81. It follows that *TP (No 1)* has already established that the trigger events in question are lawful irrespective of the absence of connection to need.

192. We do not accept those submissions.

193. In our view, the passages about which complaint is made need to be read in their proper context. For example, at para. 51, what Swift J was saying was not a freestanding comment. He was simply examining whether there was sufficient objective justification for the differential treatment in the transitional arrangements applied to the SDP natural migrant group as compared with the Regulation 4A group. As he said, at para. 60, "no sufficient explanation for the difference in treatment has been provided."

194. In essence we accept the submission made by Ms Leventhal on behalf of the Respondents that the third ground of appeal confuses two different issues:

(1) whether the trigger events are appropriate identifiers for a move from legacy benefits to UC, in principle; and

(2) whether the use of the trigger events themselves amounts to sufficient justification for the differential treatment between the SDP natural migrants group and the Regulation 4A group.

195. It was only the latter question which was the subject of Swift J's decision. There is therefore no inconsistency between the judgment of Swift J and the judgment of Lewis J, which had dealt with the first issue.

196. We therefore reject the third ground of appeal.

Conclusion

197. For the reasons we have given we would dismiss both appeals.

198. We emphasise again that in these appeals we are concerned only with the position of the Respondents and those in a similar position to them. These appeals do not concern the validity of the UC scheme as a whole.

Lady Justice Rose:

199. I agree with the Master of the Rolls and Lord Justice Singh that these appeals must be dismissed, largely for the reasons they have given. I am grateful to them for their clear exposition of the facts and the law and I will adopt the same abbreviations as they have used. The issue that has caused me most difficulty is the second ground of appeal in *TP (No 1)*, that is whether Lewis J was right to hold that the difference in treatment experienced by the Respondents was on the grounds of an 'other status' for the purposes of Article 14. Lewis J stated at para. 89 that the differential treatment did not of itself arise out of disability because both the group of people who suffered the adverse financial consequences and the comparator group who did not were people who are severely disabled and meet the criteria for the SDP and EDP legacy benefits. The basis for the differential treatment was that the Respondents' cohort had moved from one local authority area to another and the other group had either not moved house at all or had moved house within the local authority area.

200. All the parties now accept the legitimacy of a phased transition from the existing benefit system to Universal Credit. Lewis J held that the aim of achieving a gradual or phased introduction of Universal Credit was a legitimate aim. The Transitional Regulations work as follows:

(i) regulation 6 provides that, with some exceptions, a "universal credit claimant" may not make a claim for income support, housing benefit or a tax credit;

(ii) a person is a "universal credit claimant" if he is entitled to Universal Credit and has made a claim for Universal Credit: regulation 6(2);

(iii) a Universal Credit claimant makes a claim for housing benefit if he "takes any action which results in a decision on a claim being required under the relevant Regulations", including the Housing Benefit Regulations 2006;

(iv) there are various exceptions set out in regulation 6(5) – (9) which specify circumstances in which a Universal Credit claimant is not precluded from making a claim for, amongst other things, housing benefit.

201. The kinds of action which result in a decision on a claim being required are therefore determined by the regulations which govern entitlement to that particular benefit. A briefing note dated 25 October 2011 exhibited to Ms Young's witness statement provided the Minister with a non-exhaustive list of changes in circumstances that could trigger a natural migration to Universal Credit. These included moving out of work because of sickness, the birth of a first child, an out-of-work lone parent becoming a couple parent or where an out-of-work couple parent with a child under five becomes a lone parent. In the case of the Respondents, the relevant action which resulted in a decision being made on a claim was their moving house across a local

authority boundary because section 134 of the Social Security Administration Act 1992 requires housing benefit to be funded and paid by the relevant local authority.

202. The phased implementation of any new scheme requires the Secretary of State to decide who is going to move to the new regime first. Where there are differences between the new scheme and the old, this is bound to result in winners and losers. For every person who benefits from being chosen to move across early there is likely to be a corresponding person in otherwise identical circumstances who is disadvantaged by not moving early; every person who is disadvantaged by moving early will be able to point to someone in otherwise identical circumstances who benefits from not moving. The wider question raised by the *TP (No 1)* appeal is how can the Secretary of State lawfully choose the early movers in a way that is compatible with the Article 14 rights both of those who are chosen and, in a case where the migrated person is better off, of those who have not been chosen.

203. The Secretary of State has, it now appears, decided to operate two different trigger mechanisms for choosing who will migrate early from legacy benefits to Universal Credit. The first is the mechanism adopted by the Transitional Regulations which provides that people who make a new claim will move early. The second is by the recent introduction of provisions for a managed migration pilot of 10,000 people in the Pilot Regulations. The Pilot Regulations introduced the new Part 4 into the Transitional Regulations, empowering the Secretary of State at any time to issue a migration notice to a person who is entitled to an award of an existing benefit. The migration notice informs that person that all awards of legacy benefits to which they are entitled will terminate on a given date and that they will need to make a claim for Universal Credit by a deadline day. Part 4 does not give any indication as to how the Secretary of State should choose which legacy benefit recipients will be the first 10,000 to receive a migration notice.

204. Mr Milford argues that the fact that the Respondents have moved across a local authority boundary only has relevance here because of the choice that the Secretary of State has made that people who make a fresh claim for a benefit have to make a claim for Universal Credit and not for a legacy benefit. Mr Milford argues that it cannot be right that simply being a person who fulfils the criterion for the conferring or withdrawing of a benefit is sufficient to confer a status for the purposes of Article 14, thereby imposing on the Secretary of State an obligation to provide an objective justification for the choice of criterion. It cannot be the case that every time a statute imposes a disadvantage on someone who meets specified criteria, that person would have an 'other status' for the purposes of Article 14 thus enabling them to assert that they are disadvantaged as compared with persons who did not meet the specified criteria. That would be inconsistent with the case law both in the Supreme Court and the Court of Human Rights which states that not every difference in treatment falls within Article 14.

205. Mr Milford relied on *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 AC 484 as authority for the proposition that in order to generate an 'other status', the criterion applied to differentiate between one group and another has to be something allied to the grounds of discrimination expressly included in Article 14. In that case the criterion which determined whether Mr Clift would have a right to be released on the recommendation of the Parole Board was whether he had been sentenced to a term of less than 15 years or life imprisonment on the one hand or

had been sentenced to some other determinate sentence on the other. Because he had been sentenced to 18 years' imprisonment, the Secretary of State was entitled to and did reject the Parole Board's recommendation in his case. The question for the House of Lords was whether his status as a prisoner who had been sentenced to a term of more than 15 years but less than life was an 'other status' for the purposes of Article 14. Lord Bingham of Cornhill noted that the language of Article 14 was not intended to cover differential treatment on any ground whatsoever. He considered that the question was whether Mr Clift's classification was a "personal characteristic": see para. 28. He regarded that as an elusive test and, not without hesitation, he resolved the question in favour of the Secretary of State. Lord Hope of Craighead said that the specific grounds of discrimination listed in Article 14 all exist independently of the treatment of which complaint is made. He accepted, as Lord Bingham had pointed out, that a personal characteristic cannot be defined by the differential treatment of which a person complains. He also recognised that the category of long-term prisoner into which Mr Clift's case fell would not have been recognised as a separate category if it had not been for the challenged legislative instrument which treated prisoners in his group differently from others. But, Lord Hope continued, Mr Clift had already acquired the status which his sentence gave him before the order was made that denied prisoners in his group the right to release on the recommendation of the Parole Board. Lord Hope therefore phrased the relevant question as "whether the distinguishing feature or characteristic which enables persons or a group of persons to be singled out for separate treatment must have been identified as a personal characteristic before it is used for this purpose by the discriminator": para 47. He held that a generous meaning should be given to the words "or other status" in Article 14, while recognising that the proscribed grounds are not unlimited. His view was that the protection of Article 14 ought not to be denied just because the distinguishing feature which enabled the discriminator to treat persons differently had not been previously recognised. The jurisprudence of the Court of Human Rights had, however, not yet addressed the question he posed and a measure of "self-restraint" was needed "lest we stretch our own jurisprudence beyond that which is shared by all the States parties to the Convention": para 49. He therefore resolved the issue in favour of the Secretary of State. Baroness Hale of Richmond arrived at the same conclusion although for a slightly different reason. She regarded the real reason for the distinction made between different kinds of prisoners as not referable to a personal characteristic of the offender but to what the offender had done.

206. Mr Clift pursued his case to the Court of Human Rights: *Clift v United Kingdom* CE:ECHR:2010:0713JUD000720507 (judgment of 22 November 2010, Fourth Section). The judgment records at para. 47 the argument relied on by the Government of the United Kingdom that, to the extent that Mr Clift sought to compare himself to prisoners serving determinate sentences of less than 15 years, that difference did not exist independently of the matter of which he complained. The length of the sentence as such had no relevance to the law that governed how a prisoner served his sentence. The Court recorded that the Government accepted that being a prisoner could constitute 'other status' for the purpose of Article 14. The Court described earlier cases in which a distinction which could not be said to be innate or inherent had created a status for the purposes of Article 14. The Court went on at para. 60 to say that it was "not persuaded" by the Government's argument that the treatment of which an applicant complains must exist independently of the 'other status' upon which it is based. That argument did not find any clear support in the case law. The Court

referred to *Paulik v Slovakia* (Appn 10699/05 judgment of 10 October 2006) where the distinction drawn was between a father whose paternity had been established by judicial determination and a putative father where paternity was legally presumed but not judicially determined. There was no suggestion there, the Court said in *Clift*, that the distinction relied on had any relevance outside the applicant's complaint. That had not prevented the Court in *Paulik* from finding a violation of article 14. The Court in *Clift* then said this about how to approach this issue:

> "60. … The question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusionary but rights that are practical and effective. … It should be recalled in this regard that the general purpose of Article 14 is to ensure that where a State provides for rights falling within the ambit of the Convention which go beyond the minimum guarantee set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified".

207. The Court held that Mr Clift did have an 'other status' for the purposes of Article 14. This does not appear to have been based on the idea that the length of sentence reflected the gravity of the offence committed; the Court observed that while sentence length bears some relationship to the perceived gravity of the offence, a number of other factors may also be relevant. Rather the justification for the finding of status was that:

> "Where an early release scheme applies differently to prisoners depending on the length of their sentences, there is a risk that, unless the difference in treatment is objectively justified, it will run counter to the very purpose of Article 5, namely to protect the individual from arbitrary detention."

208. Accordingly, the Court held, there was a need for careful scrutiny of differences of treatment in this field. The Court went on to find that there was no objective justification for the difference in treatment afforded to Mr Clift as compared with a prisoner with a shorter sentence.

209. I do not regard the decision of the House of Lords in *Clift* as inconsistent with what the Court of Human Rights subsequently decided as Mr Milford suggested. Lord Hope in particular was minded to regard it as not necessary that the length of Mr Clift's determinate sentence had had some significance, prior to it being the determinant of whether the Parole Board's recommendations had to be accepted. He regarded it as appropriate to exercise self-restraint so as not to go further than the case law of the Court of Human Rights had by that stage gone. The Court has now indicated in its judgment in *Clift* that the fact that the characteristic of the victim which gives rise to the difference in treatment does not have any significance outside the

context of the differential treatment does not prevent that characteristic from amounting to an 'other status' for the purpose of Article 14. The guidance from the Court in *Clift* is, therefore, that when determining whether a distinction which only has relevance because it is adopted as the criterion for conferring a benefit or imposing a burden thereby creates an 'other status', one must take into account all the circumstances, including whether, if it does not confer such status, it will run counter to the very purpose of the protection that the Convention article is intended to confer.

210. Mr Milford accepted during the course of argument that the legitimate aim of adopting a phased introduction of Universal Credit could not justify the choice of, for example, a particular ethnic group to be first to move onto Universal Credit. A choice of people living in a particular postcode area might also be objectionable if that area were predominantly populated by people of a particular ethnic group. Conversely, an example that was discussed during the course of argument was whether, if the trigger for natural migration under the Transitional Regulations had been that all those living in a street beginning with a letter between A and L in the alphabet would migrate first, it is unlikely that someone living in Appleby Road who suffered a loss of income as a result of naturally migrating could complain that he was being unlawfully discriminated against as compared with someone in otherwise identical circumstances who lived in nearby Rodborough Road. I doubt that the status of "being a person who lives in a street beginning with the letter A" is an 'other status' for the purpose of Article 14. That is so even though the fact that a person lives in Appleby Road is a fact that exists "independently" of such a transitional regime and pre-exists the legislative instrument which causes adverse consequences to flow from that fact where none flowed before.

211. One can see that the criterion relevant here, that the severely disabled person has moved house across a local authority boundary, falls somewhere between the two ends of that spectrum. With some hesitation I am satisfied that, applying the guidance in *Clift*, the Respondents do have an 'other status' within the meaning of Article 14. I start from the proposition that the 'very purpose' of A1P1 combined with Article 14 is to prevent people from being arbitrarily deprived of their possessions – in this case of their entitlement to the amount of benefit to which they were entitled under the legacy benefit regime – in a way which discriminates against them. The effect of the substantial drop in income on these severely disabled benefits recipients is particularly harsh because of their particular needs and vulnerabilities. As Ms Young acknowledged at paragraph 103 in her witness statement (quoted in para. 34 above), people with severe disabilities are less likely to move house than other people because they are less able to cope with the disruption that causes. I would add that they are less likely to move to live a considerable distance away from the familiar amenities and support networks they will have had in place in their former home. Their particular vulnerabilities mean that they are at a considerable disadvantage if it becomes necessary, as it became for TP and AR, for them to move to a new area. That disadvantage is exacerbated if the move is accompanied by a substantial drop in income. It is that characteristic of severely disabled people that, in my judgment, means that a severely disabled person who has moved across a local authority boundary has an 'other status' for the purpose of Article 14 as compared with a severely disabled person who has not. The Secretary of State's decision to include them in the cohort which moves first to Universal Credit without any transitional protection does therefore need to be objectively justified in order not to be unlawful.

212. I consider that that is a more appropriate analysis than reliance either on an analogy with the decision of the Court of Human Rights in *Carson* or with the Supreme Court's decision in *Mathieson*. The analogy with the status of residence in a foreign state in *Carson* is not apt in my view because the trigger here is not residence in any particular location but the action of moving from one location to another. The analogy with the status of a child who needs to spend more than 84 days in hospital in *Mathieson* is not apt because the length of stay in hospital was regarded, by Lord Wilson JSC at least, as an indicator of a difference in the degree or nature of disability and, as Lord Wilson put it, "Why should discrimination (if such it be) between disabled persons with different needs engage article 14 any less than discrimination between a disabled person and an able-bodied person?": para. 23. In the present case, the distinguishing characteristic between the Respondents' cohort and the comparator group is not a reflection of a difference in the degree or nature of their disability.

213. I agree with the Master of the Rolls and Lord Justice Singh that the Court of Human Rights' judgment in *Zammit and Attard Cassar v Malta* (judgment of 30 July 2015, Fifth Section) does not assist the Secretary of State. In that case, the Court upheld the applicants' complaint that legal restrictions on their rights as landlords to increase the rent charged for the letting of their commercial premises interfered with their rights under A1P1. An additional point was raised by the applicants based on the fact that subsequent legislation had lifted the impugned restrictions but only in respect of leases entered into after 1995. The applicants asserted that they had been treated differently from property owners who leased out their premises after 1995 and who were not subject to the same restrictions on rent increases. The Court of Human Rights rejected the claim under Article 14 in conjunction with A1P1, holding that no discrimination was disclosed as a result of a particular date being chosen for the commencement of a new legislative regime. That case did not, however, raise the issue that is raised by the present appeals because of the phased introduction of Universal Credit and the choice of the criteria for determining who is included in the early phases.

214. I would therefore hold that the 'other status' relied on by the Respondents and upheld by Lewis J does 'pass muster' to adopt Lord Wilson's phrase in *Mathieson*. I am fortified in this conclusion by the fact that the Secretary of State has conceded that the requirement for 'other status' is satisfied by the Respondents in *TP (No 2)* and also by the clearly discernible trend in the jurisprudence of the Court of Human Rights to extend the kinds of 'status' protected by Article 14.

215. I agree with the Master of the Rolls' and Lord Justice Singh's reasons for concluding that Lewis J was right to find that there had been discriminatory treatment; that there was no objective justification for the difference in treatment; and that there was no inconsistency between Lewis J's reasoning and the terms of his order. The first, third and fourth grounds of appeal in *TP (No 1)* must be rejected and I would therefore dismiss the appeal against that judgment.

216. I would also dismiss the appeal in *TP (No 2)* for the reasons given by the Master of the Rolls and Lord Justice Singh.