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Case No: CO/5108/2018 & CO/5115/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2019

Before:

MR. JUSTICE SWIFT

- -

Between:

The Queen on the Application of TP AR & SXC	**Claimant**
- and -	
Secretary of State for Work and Pensions	**Defendant**
-and-	
Equality and Human Rights Commission	**Intervener**

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CHRISTOPHER BUTTLER (instructed by the **EQUALITY AND HUMAN RIGHTS COMMISSION**) for the **Intervener** (by written submissions only)

Hearing dates: 12th & 13th March 2019

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Approved Judgment

Mr. Justice Swift

A. Introduction

1. This is a challenge to provisions contained in two sets of regulations: the Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019; and the Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019. I shall refer to them as the "SDP Gateway Regulations" and the "Managed Migration Pilot Regulations", respectively. The SDP Gateway Regulations came into effect on 16th January 2019. The Managed Migration Pilot Regulations were laid before Parliament on 14th January 2019; they are subject to the affirmative resolution procedure; and as at the time of the hearing before me they had yet to be debated before either House of Parliament. Between them, the two sets of Regulations will make provisions for the treatment of benefits claimants who either have or will transfer from being in receipt of Employment and Support Allowance ("ESA") together with either or both of Severe Disability Premium and Enhanced Disability Premium under the provisions of the Welfare Reform Act 2007 ("the 2007 Act") read with the provisions of the Employment and Support Allowance Regulations 2008 ("the 2008 Regulations"), to being in receipt of Universal Credit under the provisions of the Welfare Reform Act 2012, read with the Universal Credit Regulations 2013.

2. Each Claimant was in receipt of ESA, EDP and SDP. What I will refer to as the basic conditions for eligibility for ESA are listed at section 1(3) of the 2007 Act. One of the principal criteria is that the applicant for ESA has a limited capability for work. This is defined as meaning a limit arising either from a physical or a mental condition such that it is not reasonable to require the person to work. For present purposes, and so far as concerns income-related ESA (the means-tested form of the benefit), the benefit comprises the sums referred to in regulation 67 of the 2008 Regulations. The first is an amount in the sum prescribed in paragraph 1 of Schedule 4 to the 2008 Regulations. In addition, one or more premiums may be paid, subject to the claimant meeting the conditions for payment. These premiums are top-up payments intended to help with the additional costs associated with serious disability. The relevant premiums are set out in Parts 2 and 3 of Schedule 4 to the 2008 Regulations. Two of those premiums are material for the purpose of this case.

3. One premium is the Severe Disability Premium ("SDP"). SDP is paid to severely disabled adults who do not have a paid carer. The conditions for entitlement to SDP are complex. What follows will not do full justice to the detail set out in paragraph 6 of Schedule 4 to the 2008 Regulations. In general terms, SDP is paid to persons who are "severely disabled". The term "severely disabled" is defined by reference to whether the person is entitled to one or other of another of a number specified benefits. These include the middle or highest level of the Disability Living Allowance Care Component, and the Daily Living Component of Personal Independence Payments. In addition, the notion of "severely disable person" is limited to those who do not live with non-dependent adults, and who are not persons in respect of whom Carer's Allowance is paid. Put then in even more summary terms, a person will be entitled to SDP if he has a high degree of need arising from a physical or mental disability; lives alone, (or with a partner with a similar level of need); and does not benefit from the assistance of a person who claims Carer's Allowance. When payable SDP is paid at the rate specified

in Part 3 of Schedule 4 to the 2008 Regulations. For claimants without partners, the weekly rate, as of April 2018, was £64.30.

4. The other premium is Enhanced Disability Premium ("EDP"). The conditions for entitlement to EDP are set out at paragraph 7 of Schedule 4 to the 2008 Regulations. EDP is payable if the claimant is entitled to the highest rate of the Disability Allowance Care Component, or the enhanced rate of the Daily Living Component of Personal Independence Payment. The amount payable as EDP is also specified in Part 3 of Schedule 4 of the 2008 Regulations. The relevant rate for each of the Claimants in this case (as single persons) was £16.40 per week.

5. The welfare benefits scheme established under the 2007 Act is in the process of being replaced by Universal Credit, a new scheme of welfare benefits established by the Welfare Reform Act 2012 ("the 2012 Act"), and set out in further detail in the Universal Credit Regulations 2013 ("the 2013 Regulations"). It is well known that the transfer of claimants from the welfare benefits under the 2007 Act and 2008 Regulations, now referred to by the Secretary of State as "legacy benefits", to Universal Credit is a mammoth undertaking.

6. The process of transfer, referred to in the 2012 Act as "migration", is established by section 36 of the 2012 Act and Schedule 6 to that Act. Schedule 6 enables regulations to be made *"for the purposes of or in connection with replacing existing benefits with Universal Credit"*. By paragraph 4(3)(a) of Schedule 6, the regulation-making power includes the power to secure that when an award of Universal Credit is made to a person previously in receipt of a legacy benefit *"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"*.

7. Regulations providing for the transition from legacy benefits to Universal Credit were first made in 2013. The present arrangements are set out in the Universal Credit (Transitional Provisions) Regulations 2014 ("the Transitional Provisions Regulations"). Overall, the Secretary of State has chosen to pursue a phased introduction of Universal Credit. This was commenced with effect from April 2013 in consequence of the provisions of the Welfare Reform Act 2012 (Commencement No. 9 and Transitional and Transitory Provisions and Commencement No. 8 and Saving and Transitional Provisions (Amendment)) Order 2013/983.

8. For the most part (but not entirely) first-time benefits claimants now make claims for Universal Credit rather than for legacy benefits. For persons in receipt of legacy benefits the position is more complicated.

B. The Facts

9. Each Claimant in this litigation has, in the language of the 2012 Act, "migrated" to Universal Credit. In each instance this was the consequence of regulations 5 and 6 of the Transitional Provisions Regulations. The general effect of those provisions was an issue in earlier litigation commenced by TP and AR, *R(P and another) v Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin), [2019] PTSR 238. In his judgment in that case, Lewis J described the effect of regulations 5 and 6 as follows at paragraph 44 – 45 of his judgment.

> "44. The mechanism by which this is achieved is complex but is as follows. Regulation 5 of the Transitional Regulations provides that a claimant is not entitled to certain benefits, including Income Support and Housing Benefit. Regulation 6 provides that a person may not make a claim for Income Support or Housing Benefit except that is provided in that regulation. If the claimant is not in receipt of Housing Benefits and seeks assistance with housing costs, and is not within an exception, it appears that he must then make a claim Universal Credit (as he is prohibited from making a claim for Housing Benefits).
>
> 45. In terms of the person who moves within a Local Housing Authority Area, the position appears to be dealt with (all be it curiously) in Regulation 6(3) of the Transitional Regulations. That provides that a person makes an application for a benefit if he takes any action which results in a decision on a claim being taken under certain regulations. In other words Regulation 6(3) states what constitutes a (prohibited) application under Regulation 6(1) rather than, as Regulation 6(1) contemplates, defining what constitutes an exception to the prohibition on applying for Housing Benefit. Notifying a Local Housing Authority who is currently paying Housing Benefit of a change of circumstances – for example, that the person has moved house – does not, I was told, involve "a decision on a claim being required". Only a move to a new Local Housing Authority area and an application to that new Authority would result in a decision on a claim being required. The person who moves house within a Local Housing Authority area therefore may apply for the continued payment of Housing Benefits (rather than having to apply for Universal Credit) and continues to receive income – related support under the existing welfare regime, that is, he continues to receive the basic allowance, the SDP and the EDP."

10. Persons who migrate to Universal Credit under provisions such as regulations 5 and 6 of the Transitional Provisions Regulations are referred to by the Secretary of State as "natural migrants". The premise for membership of this class is that the person concerned has moved over to Universal Credit because of some relevant change of circumstances.

11. TP's personal circumstances are set out in the judgment of Lewis J at paragraphs 5 – 8, and I need not repeat those matters here. For TP the relevant change in circumstances was that he moved from Wiltshire to London in order to have access to a hospital which could provide specialist cancer care to him. In consequence, his then current claim for Housing Benefit terminated in Wiltshire, and he made a new claim for Housing Benefit in London. This was the trigger event that took him out of legacy benefits and into Universal Credit.

12. AR's personal circumstances are set out in paragraph 9 of Lewis J's judgment. For him too, the trigger event was when he moved house from one Local Authority area to another. He moved from a larger property to a smaller one to avoid reduction in his

entitlement to Housing Benefit. But because that move was across a local authority boundary it prompted his migration from legacy benefits to Universal Credit.

13. SXC's circumstances are slightly different. 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 a victim of domestic violence at the hands of her ex-partner which significantly contributed to her disabilities. In August 2018 she moved from one property to another but not from one local authority area to another. On a proper understanding of regulations 5 and 6 of the Transitional Provision Regulations, a move from one property to another within the boundary of a single local authority is not a trigger event. But SXC was advised to the contrary (both by the local authority's Benefit Service, and by an Advice Agency). Acting on that advice she made a claim for Universal Credit. Even though that claim was made in error she is unable to return to legacy benefits. One principle which the Secretary of State has applied to the migration process can be described as a principle of "no turning back". Once a legacy benefits claimant has migrated to Universal Credit there is no way back to legacy benefits for that person. This serves to ensure that the process of migration is progressive, and avoids the confusion and complication that no doubt could arise if legacy benefits claimants could move one way and then the other.

14. One point to note from the above is that although each of the Claimants is in the Secretary of State's terms a "natural migrant" to Universal Credit, the change of circumstances that caused that migration was vanishingly small, at least when set against the needs that each Claimant has by reason of their respective disabilities.

15. Under the provisions of the 2012 Act, Universal Credit comprises the sum of various different allowances: see generally sections 9 – 12 of the 2012 Act. Section 12 of the 2012 Act states that the calculation of an award of Universal Credit is to include amounts in respect of such particular needs and circumstances of a claimant as may be prescribed. The section goes on to state that what may be prescribed may include *"the fact that a claimant has limited capability for work and work-related activity"*. This phrase echoes the criteria for entitlement to ESA. This aspect of the section 12 power was given form in the 2013 Regulations, see in particular the regulations in Parts 4 and 5 of the 2013 Regulations. However, although Universal Credit includes an element that is specific to severely disabled claimants, referred to as the limited capacity for work and work-related activity element ("the LCWRA element"), and while the LCWRA element is greater than the previous ESA basic allowance, Universal Credit does not seek to replicate the amounts that were payable under premiums such as SDP and EDP within the legacy benefit system. Although the overall amount paid to Universal Credit claimants in receipt of the LCWRA element will, typically, be higher than the combined value of ESA and EDP, it will be less than the combined value of ESA, EDP and SDP.

16. The effect of this is demonstrated by what happened to each of the Claimants. Prior to natural migration, TP received a total monthly income from non-housing related benefits of £809.90. This included ESA basic allowance, SDP and EDP. Following migration his non-housing related benefits came to £633.42 per month a reduction of £176.48 per month. For AR the position prior to migration was a monthly benefits payment of £814.69. After migration the monthly payment was £636.58 a reduction of £178.11. For SXC her pre-migration benefit payment was £829.62 comprising ESA,

SDP and EDP. She now receives £646.14 per month in Universal Credit, a reduction of £183.48 per month.

17. This consequence of migration is not peculiar to these three Claimants. In the course of the hearing I asked whether the individual circumstances of the claimants were such that any of them could be described as an outlier for this purpose. The answer was no. The information before me was to the effect that even by November 2018, 13,400 persons previously entitled to SDP had naturally migrated to Universal Credit, and are therefore likely to be in the same or a similar position to the Claimants before me.

C. Other cases concerning treatment of severely disabled persons under the Universal Credit welfare system.

18. The consequence of the migration of persons entitled to ESA and either or both SDP and EDP to Universal Credit has been considered in two cases to date. The first was the judgment of Mr Justice Lewis on the previous claims bought by TP and AR (see above). Two complaints were made in that litigation, both based on ECHR Article 14. The first was that it was unlawful for Universal Credit not to contain an element equivalent to SDP and/or EDP. That claim failed. The second claim was directed to the effect of regulations 5 and 6 of the Transitional Provisions Regulations, and the distinction drawn in those provisions between claimants such as TP and AR who moved from one local authority area to another local authority area, and others in receipt of the same benefits who moved accommodation but stayed within the area of a single local authority. That challenge succeeded because of a lack of evidence explaining the reason for the distinction drawn: see generally per Lewis J at paragraphs 82 – 88.

19. The second judgment is that of Mrs Justice May in *R(TD and others) v Secretary of State for Work and Pensions* [2019] EWHC 462 (Admin). In that case each claimant had been in receipt of legacy benefits but payment of those benefits had been stopped. Each claimant then made a new claim and was required as a new benefits claimant to make a claim for Universal Credit. In the meantime, each appealed against the decisions to stop payment of legacy benefits. Those appeals succeeded, but only after the Universal Credit claims had been made. The no turning back principle that I have already referred to meant that none of the claimants in that case could then revert to the legacy benefits.

20. Three grounds of challenge were pursued in that claim (see the judgment at paragraph 40). For present purposes the relevant challenge was (once again) based on ECHR Article 14. It was to the effect that there was unlawful discrimination because no Transitional Protection was provided for the claimants in that case to bridge the gap between the payments they had received under the system of legacy benefits and the Universal Credit payments which they now received.

21. In this context, Transitional Protection is a term of art. The reasons for this have been explained at paragraphs 31-38 of Lewis J's judgment in the earlier claim brought by TP and AR. The Secretary of State's policy is to the effect that Transitional Protection means protection in cash terms so that a move to Universal Credit does not result in a reduction in welfare benefit payments received. Her policy is that this protection should only be given to those who are, in her terminology, "managed migrants" that is to say those who are not required to claim Universal Credit because of a change in

circumstances, but who are required to migrate by reason of a notice given by the Secretary of State.

22. May J dismissed the Article 14 claim. She concluded that no valid comparison could be drawn between natural migrants such as TD and managed migrants, because – at the time of events in issue – the managed migrant group was *"too speculative to form a proper comparator"* (see judgment at paragraph 50). Instead the comparison in that case was drawn between persons in the position of TD and the other claimants in that case, and persons *"in respect of whose legacy benefits no error has been made"*. May J dismissed the claim made on the basis of that comparison. As I see it, the critical part of her reasoning is at paragraph 80 of the judgment, and is as follows.

> "80. The SSWP's case is that she and her ministers have specifically considered the apparently arbitrary disadvantage visited on people like these Claimants – caring alone for a child with severe disabilities in the case of TD, and living alone with severe disabilities in the case of PR – resulting from an error in their benefits made by her Department. She has decided as a matter of policy to withhold Transitional Protection from claimants in respect of whom she has wrongly ceased legacy benefits notwithstanding an expressed commitment when UC was introduced to the effect that no one was to suffer hardship at the point of transition to the new system. It is the evidence of her Department's consideration and her policy decision that in my view obliges me to find that the test of justification is satisfied here."

23. Drawing these matters together, Lewis J's judgment is authority for the proposition that it is not unlawful if the absolute value of benefits payable under Universal Credit to persons previously entitled to ESA, SDP and EDP is lower than the value of those legacy benefits. His judgment is also authority for the proposition that the events that prompt natural migration, the so-called trigger events, are capable of giving rise to valid claims under Article 14 if the basis for the trigger is not capable of appropriate explanation. The relevant threshold for the Secretary of State in terms of explanation remains low. Given the nature of the decision, namely the circumstances in which phased movement from one social security system to its successor should occur, the decision is a decision on a matter of social and economic policy. The parties before Lewis J, and those before me, were in agreement that the applicable standard for justification (if justification comes to be in issue for the purposes of a claim under the Human Rights Act) was whether or not the decision taken was manifestly without reasonable foundation. That threshold is low but it must still be crossed. May J's judgment essentially concerned the same general point about trigger events. On the evidence before her she was satisfied that the distinction drawn in the case before her was justified.

D. The SDP Gateway Regulations and the Managed Migration Pilot Regulations

24. Taken together, the material parts of these Regulations will achieve the following. *First*, prospectively with effect from 16th January 2019, there will be no further natural migration of any benefits claimant in receipt of SDP. This is the effect of regulation 2(3) of the SDP Gateway Regulations which inserts a new regulation 4A into the Transitional Provisions Regulations. The new regulation 4A is in the following terms:

> **"4A. Restriction on claims for universal credit by persons entitled to a severe disability premium**
>
> 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."

25. *Second*, the framework for treatment of future managed migrants is established. Regulation 3 of the Managed Migration Pilot Regulations inserts a series of new provisions into the Transitional Provisions Regulations, namely new regulations 44 – 63. Taken together these regulations identify the class of persons who will be managed migrants (referred to in those regulations as "notified persons"), by enabling the Secretary of State to give Migration Notices to persons in receipt of legacy benefits, which informs them that their entitlement to legacy benefits will terminate, and gives them notice that they need to make a claim for Universal Credit.

26. The new regulations inserted by regulation 3 of the Managed Migration Pilot Regulations, then provide for Transitional Protection for such persons. In summary, that protection ensures that at the point of migration the managed migrant suffers no cash shortfall by reason of migration, and that thereafter, the same level of welfare benefit payment is maintained (all other circumstances remaining equal) until such time as the level of the relevant Universal Credit payment reaches the amount they previously received by way of legacy benefit. Thus, Transitional Protection comprises a tapering payment. These new regulations are generic in that the intention is that they should apply, in due course, to all managed migrants. The effect for regulation 4A is to ensure that the Transitional Protection provisions will apply to all SDP claimants who as at 16th January 2019, had not already naturally migrated to Universal Credit. If those SDP claimants are also in receipt of EDP, because regulation 4A prevents natural migration, it will also ensure that those SDP claimants continue to receive EDP.

27. *Third*, further amendments made to the Transitional Provisions Regulations by the Managed Migration Pilot Regulations make provision for "Transitional Payments" to natural migrants previously in receipt of SDP. The relevant new provisions in the Transitional Provisions Regulations are a new regulation 64 and new Schedule 2. This payment is referred to in those provisions as the "Transitional SDP amount". For single benefits claimants such as each of the Claimants in these proceedings, the amount specified is £80.00 per month if Universal Credit already payable includes the LCWRA

element, or £280.00 per month if the Universal Credit payable does not include that element.

28. Thus, the amendments made by the SDP Gateway Regulations and the Managed Migration Pilot Regulations establish differential treatment between: (a) persons such as the Claimants previously in receipt of SDP but who prior to the 16th January 2019 were natural migrants ("the SDP natural migrant group"); and (b) persons who as at the 16th January 2019 remained in receipt of SDP, and may or may not also have been in receipt of EDP ("the Regulation 4A group").

29. Although it is not stated in terms on the face of either set of Regulations, it is readily apparent from documents that evidenced the decision-making process that led to these Regulations, that it is intended that in due course the Regulation 4A group will become managed migrants and so will receive Transitional Protection under the Transitional Provisions Regulations. While the Regulation 4A group will receive protection akin to a full indemnity, the SDP natural migrant group will not. Each of the Claimants in these proceedings will be less favourably treated by reason of being a natural migrant. In each case the less favourable treatment will be in the amount of approximately £100.00 per month.

30. The starting point in the story behind the SDP Gateway Regulations and the Managed Migration Pilot Regulations was the appearance by Mr Alok Sharma MP, the Minister of State for Employment at the Department for Work and Pensions, and Neil Couling the Director General at the Department for Work and Pensions responsible for Universal Credit, before the House of Commons Work and Pensions Select Committee on the 24th January 2018. On that occasion members of the Select Committee quizzed the Minister on the rationale for excluding payments equivalent to SDP from Universal Credit. One point made by the Minister concerned the protection to be available to managed migrants. Mr. Couling then stated that he expected the majority of those claiming SDP to be managed migrants. At that stage however, Mr. Couling could not be sure how many SDP claimants might be natural migrants.

31. The next step in this narrative is a presentation made to Department for Work and Pensions Ministers in February 2018. I have seen a copy of the PowerPoint document prepared for that presentation. The first slide read as follows:

> "**What is the problem we are trying to solve?**
>
> - Claimants who are eligible for the severe disability premium in Legacy Benefits do not have this replicated in Universal Credit and will therefore see a loss when they move naturally to Universal Credit. This is already attracting negative publicity, which will only increase as UC continues to build volumes
>
> - The issue is resolved when we Manage Migrate as these customers will receive transitional protection.
>
> - You asked us to consider what could be done to address this issue and what the consequential impacts on the legislative timetable and delivery plan would be."

32. The presentation developed a distinction between SDP claimants who had (or before measures were put in place, would have) naturally migrated, and other SDP claimants. For the latter group the proposal was a so called "Hard Gateway". In truth this was not so much a gateway as a gate – a barrier to prevent that group of SDP claimants naturally migrating to Universal Credit. This approach to this group was ultimately adopted and given effect by the new regulation 4A of the Transitional Provision Regulations inserted by regulation 2 of the SDP Gateway Regulations.

33. For the latter group – referred to in the presentation as the *"SDP stock customers"* – the proposal was for a one-off payment in respect of the past, and then future monthly payments paid as Universal Credit. It is clear from the presentation that the proposal at this time was that these payments should be such as to offset the difference between welfare payments under the legacy benefits system and welfare payments under Universal Credit. As I understand the presentation, the intention was that the payments would mirror the Transitional Protection for SDP available to those who did not (and would not) naturally migrate (i.e., the Regulation 4A group).

34. The next document is a submission to Ministers dated 18th May 2018. This submission did not address what came to be the new regulation 4A. I assume that the decision to proceed in that way to prevent a future natural migration was taken elsewhere. The recommendation to Ministers contained in the submission was

> "… that we proceed with an option for stock cases based upon three broad rates of payment to the groups which are determined as to still need assistance at the point the relevant regulations come into force."

35. Thus, by May 2018 the Department's thinking had moved from payments to the "stock case" described in the February 2018 presentation to fixed-rate, generic payments. The submission proposed payments at the level later set out in the Managed Migration Pilot Regulations – i.e. for a single person £80.00 if the LCWRA element of Universal Credit was paid, and £280.00 if it was not. The explanation for the proposal for these generic payments is at paragraph 6 and 7 of the submission, and is as follows:

> "6. Further detail on the calculation of these rates is at Appendix B, but to note are
>
> 6.1 They deliberately represent rounded figures to reflect that the aim is not to provide a precisely – calculated payment which is and looks like a form of transitional protection. Rather, they are targeted amounts aimed at the group we are determining which would still need some kind of additional assistance prior to the managed migration regulations coming into force;
>
> 6.2 The lower rates for those getting UC LCWRA reflect that UC LCWRA element is considerably higher than the corresponding amount paid to those on the ESA Support Component, as this formed a key part of the design of the UC,

> deliberately recycling money to target the most severely disabled.
>
> 6.3 There is only one rate for the couples who got the higher rate of SDP in Legacy, as we consider it highly unlikely that in such cases, where both members of the couple were deemed as requiring assistance with care costs in legacy, that *neither partner* would be in the UC LCWRA group;
>
> 6.4 Should one member of the couple mentioned in paragraph 6.3 have acquired a carer since the natural migration, then they would be treated the same as a couple who go the lower rate SDP in Legacy.
>
> 7. The calculation methodology does not include amounts in respect of Enhanced Disability Premium (EDP). This is mainly because;
>
> 7.1 We do not want to set a precedent for inclusion of the whole of the EDP client group, outside of those who are also entitled to SDP; and
>
> 7.2 As Appendix A shows, inclusion of EDP would increase the cost of the protection considerably."

36. The Ministerial submission did not address the reason for this change, or (more importantly for the purposes of the challenge in these proceedings) the reason for the difference in terms of transitional provision that would, as a result of this approach come to exist between the SDP natural migrant group and the Regulation 4A group. The closest one gets is that a decision had been taken to provide natural migrants with *"some kind of additional assistance"*.

37. The later documents I have seen do not take matters further. On 7th June 2018 the Secretary of State made a statement in Parliament. The contents of that statement reflected the distinction drawn between those who were already (or would before the application of what is now regulation 4A become) natural migrants, and managed migrants. By June 2018 draft Regulations were in existence. At this time, they took the form of a single set of regulations which contained both that which is now in the SDP Gateway Regulations and the provisions now in the Managed Migration Pilot Regulations.

38. Between June and November 2018, the Secretary of State presented the draft regulations to the Social Security Advisory Committee, the committee established under the provisions of the Social Security Administration Act 1992 to give advice and guidance to the Secretary of State in relation to the exercise of her functions relating to social security matters. By section 172 of the 1992 Act, the Secretary of State is required to refer draft Regulations to the Committee and have regard to any recommendations made by it. In the Annex to its report, provided to the Secretary of State on 5th October 2018, the Committee noted that the provisions in the draft

regulations relating to SDP natural migrants fell short of providing sums equivalent to those to be provided to managed migrants. The Committee noted, though not by way of a formal recommendation, that there was a *"good case"* for looking again at the level of the transitional payments to be made to SDP natural migrants.

39. The Secretary of State provided her response to this report in November 2018. The point about the level of transitional payments was mentioned in the covering letter as follows

> "… the monthly SDP Transitional Provisional payment rates reflect the extra financial support that has been provided through the more generous limited capability for work and work related activity addition."

The letter also referred to the Transitional Protection to be provided to what became the Regulation 4A group. However, the letter did not set out reasons for the difference in treatment between these two groups of severely disabled persons.

40. In addition to the contemporaneous documents, the Secretary of State also provided a witness statement from Janina Young, the Policy Team Leader for Universal Credit. I have considered this statement carefully. It does provide some background to and add context for the decisions reflected in the contents of the SDP Gateway Regulations and the Managed Migrant Pilot Regulations. In addition, Miss Young's statement does suggest reasons why payments to SDP natural migrants differ from those made to the Regulation 4A Group, namely: (1) that the Secretary of State considered natural migrants to be more akin to new welfare benefits claimants and therefore in a materially different position to managed migrants; (2) that it would be administratively difficult to identify the amounts payable to SDP natural migrants in order to offset the difference between legacy benefits payments and Universal Credit payments; and (3) the additional cost of providing offset payments to SDP natural migrants over and above the flat rate payments available as transitional payments.

E. Decision

(1) Article 14

41. The Claimants' primary contention is that there is a difference in treatment between on the one hand, the SDP natural migrant group who will receive the fixed-rate, generic transitional payments, and on the other hand the Regulation 4A group who are for the present shielded against natural migration, and will in due course receive Transitional Protection as managed migrants. Subject to the tapering provision I have described, Transitional Protection will ensure no loss of income from welfare benefits payments, in cash terms. The Claimants contend this is unlawful treatment contrary to ECHR Article 14 when read together with Article 1 of Protocol 1 to the ECHR.

42. It is common ground that entitlement to payments by way of Transitional Protection falls within the ambit of the right to peaceful enjoyment of property and possessions protected by Article 1 of Protocol 1. Thus, the legal premise for the Claimants' claim is present.

43. On the facts of this case if there is unlawful differential treatment, it is on grounds of "other status". The Secretary of State accepts that the difference between natural

migrants and managed migrants is a difference in status for Article 14 purposes. 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. As I have explained above, 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.

44. The focus therefore turns to justification. There is no difference between the parties as to the approach required in law. Justification for the purposes of any claim under the Human Rights Act is structured by the now well-known four step test.

> (1) Whether there is a legitimate aim for the difference in treatment contained in the measure, sufficiently important to justify the limitation of a Convention right.
>
> (2) Whether the measure is rationally connected to the legitimate aim.
>
> (3) Whether a less intrusive measure could have been used.
>
> (4) Whether, bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, a fair balance has been struck between the rights of the individual and interests of the community.

This approach has been stated and restated in various decisions of the higher courts, for example in *Bank Mellat v HM Treasury* (No. 2) [2014] AC 700, per Lord Sumption at paragraphs 20 – 21, and per Lord Reed at paragraphs 68 – 76.

45. On an Article 14 claim the court decides for itself whether the distinction drawn is Article 14 compliant. What must be justified is the difference in treatment. Yet when applying the approach in the four-stage test, and in particular when applying the third and fourth stages, a court must afford a measure of latitude to the primary decision maker. The extent of that latitude will be appropriate to context. In this case, I must 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. The 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".

46. When considering the standard for justification it is also relevant to have in mind that the present case is an "other status" situation. The burden of justification in such a case can be, and is likely to be, less onerous than in a case where the differential treatment is, say, on grounds of sex or race.

47. In this case the Secretary of State of State relies on a number of points. She contends either individually or cumulatively these matters make good a sufficient explanation for the difference in treatment between the SDP natural migrant group (including the three Claimants) and the Regulation 4A group.

48. First, it is contended that no relevant comparison can be drawn between the legacy welfare benefits and Universal Credit welfare benefits. The consequence (so the submission goes) is that Article 14 says nothing in respect of the amounts that should be paid by way of transitional provision.

49. Both points are correct; but neither meets the matter in issue in this case. This claim is not directed to the difference in the level of benefits paid to severely disabled persons under the legacy benefits system and under the Universal Credit system. Nor is the claim directed to any general proposition that Article 14 requires transitional provision to be paid at any specific level. The claim does concern the arrangements for transitional provision, but it is directed only to one narrow matter – the justification of the difference in treatment between the members of two groups, the SDP natural migrant group and the Regulation 4A group, respectively. The members of each of these groups met, and had legacy benefits remained in place would have continued to meet the eligibility requirements for SDP. In this context, the argument that Article 14 does not *per se* generate the need for specific transitional provision loses its force, because the present case is one where the Secretary of State has decided to make transitional provision but has chosen to do so in different ways for the different groups.

50. The next matter relied on is the fact that the members of the SDP natural migrant group have already migrated. I accept that the no turning back principle is a principle rooted in common sense, avoiding the confusion and complexity that could arise if welfare benefits claimants bounced between legacy benefits and Universal Credit. The principle provides a sufficient explanation of why the application of Regulation 4A was not expanded by back-dating its application prior to the 16th January 2019, so as to include the members of the SDP natural migrant group.

51. But the no turning back principle does not itself explain or provide a reason for the distinction between the transitional arrangements applied to the SDP natural migrant group and those that apply to the Regulation 4A group. The reason why this is so, is underlined by the nature of the trigger events that caused natural migration of SDP claimants (prior to the application of regulation 4A). As demonstrated by the circumstances of TP and AR, the trigger events are not aligned to any material change of circumstances relevant to the needs of SDP claimants. Thus, natural migration is not any indication either that the circumstances of the members of the SDP natural migrant group are likely to be any different from those who are members of the Regulation 4A group, or that there is any particular reason to treat the members of the two groups differently.

52. Next, the Secretary of State relies on the cost saving and administrative convenience of generic, flat-rate transitional payments for the SDP natural migrant group, as opposed to transitional payments which matched, claimant by claimant, the actual difference between the former legacy benefits welfare payments and the welfare payments due under the Universal Credit system.

53. It is beyond argument that the payments that will be made to the SDP natural migrant group under regulation 64 of and Schedule 2 to the Transitional Provisions Regulations will cost less than payments equivalent to the monthly cash shortfall each member of the group suffers by reason of natural migration. Saving public expenditure can be a legitimate aim; but will not of itself provide justification for differential treatment unless there is, in the case in hand, a reasonable relationship of proportionality between

the aim sought to be achieved, and the means chosen to pursue it (i.e., the measure under challenge): see *R(JS) v Work and Pensions Secretary* [2015] 1 WLR 1449, per Lord Reed at §64; and *R(Coll) v Secretary of State for Justice* [2017] 1 WLR 2093 per Baroness Hale at §40. Put in terms of the facts of the present case, is it proportionate that the SDP natural migrant group bear the cost of the savings made by the arrangements for transitional payments, when regard is had to the provision of Transitional Protection to the Regulation 4A group?

54. I also accept that making fixed-rate generic payments to the members of the SDP natural migrant group will be administratively more convenient than claimant by claimant, having to identify the actual difference between the legacy benefits payments and the Universal Credit payments, in particular in respect of the period from point of migration to date. Yet the extent of this administrative convenience ought not to be overstated. Any form of transitional payment will require administrative effort. If any payments are to be made at all, the Secretary of State will as a minimum, have to identify each member of the SDP migrant group. The administrative convenience of then making fixed payments rather than payments representing the actual difference in payment to each member of the group could be marginal, since it is fair to assume that the Secretary of State will have available to her records of the amount of the monthly legacy benefit payment made to each member, prior to natural migration.

55. Nevertheless, it is clear that the arrangements made by regulation 64 of and Schedule 2 to the Transitional Provisions Regulations will result in some administrative gain: for example, the amounts payable will not need to be calculated and specified claimant by claimant. It was also contended by the Secretary of State that fixed-sum payments avoid any need to confirm whether, since the point of natural migration, there had been any material change in circumstances for any member of the SDP natural migrant group such as might have affected the level of entitlement to legacy benefits had natural migration not occurred. There may be something in this, although I would have thought that any such change of circumstances would have been picked up for the purposes of determining what should be paid by way of Universal Credit. As I have stated already, the simple fact that a trigger event occurred is not, of itself, proof of any material change in circumstances; a point readily apparent from the facts relating to each of the Claimants in these proceedings.

56. The Secretary of State's submission on this point was on the basis that the provisions of regulation 64 of and Schedule 2 to the Transitional Provisions Regulations comprised a justifiable "bright line rule". Any system of rules, as opposed to a system in which discretion is exercised case-by-case, will throw up hard cases. The common justifications for bright line rules include that they tend towards overall fairness, in particular in the context of areas such as the distribution of state benefits, because they promote legal certainty, which is preferable to the inconsistency which can arise if each case is weighed on its own merits: see for example, the reasoning of Lords Sumption and Reed in *R(Tigere) v Business, Innovation and Skills Secretary* [2015] 1 WLR 3820 at §§88 – 91. (That was the dissenting judgment in that case, but the difference of opinion between the members of the Supreme Court in that case was not on the substance of the principles in play, only their application to the facts in hand.) This is an iteration of the age-old debate over fairness as consistency versus fairness as individuation. In reality, fairness requires something of both – up to a point.

57. When assessing whether or not a bright line rule is justifiable, notwithstanding that it will create hard cases, a court must be careful to afford appropriate latitude to the decision-maker. Just because the court may be able to devise a different bright line rule which if applied to the facts before it would have avoided those facts falling into the box marked "hard cases", that may not determine that the rule chosen by the decision-maker is unjustified. The court-devised rule will also produce its own class of hard cases.

58. In the present case, had the provisions of regulation 64 of and Schedule 2 to the Transitional Provisions Regulations stood on their own, it would have been clear (to my mind at least), that the provisions in those rules were justified. Even though the members of the SDP natural migrant "lose out" in so far as the value of the transitional payment is less than the difference in value between their legacy benefits payments and the Universal Credit paid to them, that adverse impact is justified having regard to the legitimate aim of controlling public expenditure, and the overall benefits in terms of public administration of bright line provisions. The balance struck, having regard to these matters alone would not be one that was manifestly without reasonable foundation.

59. But that does not account for the whole of the picture in this case. What needs to be justified extends to the difference in treatment between the SDP migrant group and the Regulation 4A group. The need for some form of explanation for the difference in treatment is all the more striking given the circumstances which, at the beginning of 2018, prompted the Secretary of State to consider the position of severely disabled benefits claimants. This was the point raised by the members of the House of Commons Select Committee on Work and Pensions on the effect that migration to Universal Credit was having on those who had previously been in receipt of SDP, and it was the point considered in the subsequent Departmental presentation (see above, at paragraphs 30 to 33).

60. 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.

61. I suspect that the reason for the Secretary of State's decision to treat the SDP natural migrant group differently from the Regulation 4A group is the one explained by Miss Young at paragraph 64 of her statement. This is to the effect that the Secretary of State's policy is only to provide Transitional Protection to managed migrants. However, this

does not itself explain the difference in treatment between the SDP natural migrant group and the regulation 4A group. Regulation 4A is a form of derogation from the Secretary of State's policy on Transitional Protection since, for those in receipt of SDP as at 16 January 2019, it blocks the operation of regulations 5 and 6 of the Transitional Provisions Regulations, preventing natural migration that would otherwise occur. This step diluted the purity of the Secretary of State's policy position. That being so, explanation of the different treatment of the SDP natural migrant group is called for.

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.

64. 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.

65. Even if the matter is approached on the basis that by making fixed-rate generic payments to the SDP natural migrant group the administrative burdens on the Secretary of State are reduced, I am not satisfied that this strikes a fair balance between the interests of the SDP natural migrant group, and the general public interest. Although the "shortfall" to each member of the group (i.e., the cash difference in the monthly welfare benefits payments taking account of the transitional payments made under Schedule 2 to the Transitional Provisions Regulations) is small in absolute terms – in

the region of £100 per month for each of the Claimants – the difference in real terms for each member of the group will be very significant indeed. The members of the SDP natural migrant group are all severely disabled; the quality of their existence will in many instances, be attenuated. The Claimants' witness statements in this case explain the practical impact. It is very significant. Added to this is the fact that the trigger events which result in natural migration, as demonstrated by the circumstances of each of the Claimants, seem not to correlate to any material change of need. The fact that the line to be crossed to become a natural migrant is so finely drawn is relevant to whether the distinction drawn by the relevant provisions of the Transitional Provisions Regulations, represents a fair balance.

(2) *The alternative contention, premised on the relief ordered by Lewis J*

66. The alternative contention pursued by the Claimants – set out in the written submissions made by the Intervener, the Equality and Human Rights Commission – is that the relief ordered by Lewis J determines the issue in these proceedings, and requires the conclusion that regulations made by the Secretary of State must make provision for TP and AR to receive transitional payments equivalent to the difference between the amounts previously paid to them under the legacy welfare benefits system and the Universal Credit payments they now receive.

67. Lewis J concluded that the distinction drawn in the Transitional Provisions Regulations, which required legacy benefits claimants in receipt of Housing Benefit who moved from one local authority area to another to migrate to Universal Credit, but did not require the same of those moving within the area of a local authority, was differential treatment based on status, and was discriminatory: see his judgment at §§88 – 92, and the declaration in the Order dated 14 June 2018. When Lewis J handed down his judgment he gave directions for a further hearing to determine TP and AR's claim for damages. That hearing was listed for 30 July 2018. Shortly before, the parties agreed the terms of a further Order, which made provision for back-payment to TP and AR to make up the shortfall suffered since their migration to Universal Credit, and for future periodic payments to each, equivalent to the difference between the former legacy benefits payments and the present Universal Credit payments. On 31 July 2018, Lewis J made an Order in the terms the parties had agreed.

68. The submission made now is that the 31 July 2018 Order was a once and for all conclusion as to what was required as "just satisfaction" for the discrimination suffered by TP and AR on natural migration to Universal Credit; such that by making provision for TP and AR in future to receive lower payments, the Managed Migration Pilot Regulations go behind Lewis J's Order, and are unlawful.

69. Given the conclusions I have already reached on the Article 14 claim, I do not need to address this submission in detail. I disagree with it for the following reasons.

70. So far as the 31 July 2018 Order made provision for periodic payments it stated that they should continue *"... until such time as the Universal Credit (Transitional Provisions) (Managed Migration) Regulations come into force ..."*. This was the single set of draft regulations referred to above at paragraph 37. As I have explained, after July 2018 that set of regulations was split into two parts: the SDP Gateway Regulations, and the Managed Migration Pilot Regulations. I consider that the part of the 31 July 2018 Order to which I have referred, should be understood as referring to the Managed

Migration Pilot Regulations, since those Regulations contain the provisions for transitional payments originally set out in the Universal Credit (Transitional Provisions) (Managed Migration) Regulations, referred to in the Order. On this basis, once the Managed Migration Pilot Regulations come into force, no further payments will be due to either TP or AR under the 31 July 2018 Order. The Managed Migration Pilot Regulations do not subvert any provision in the 31 July 2018 Order; instead, the premise of the terms the parties agreed was that the periodic payments under that Order would cease when the Regulations came into force.

F. Conclusion

71. For the reasons set out above (paragraphs 41 – 65), the Claimants' case on Article 14 succeeds.

72. In terms of relief, subject to any submissions the parties may make, it seems to me that there should be a quashing order in respect of regulation 3(7) of the Managed Migration Pilot Regulations insofar as it inserts regulation 64 of the Transitional Provisions Regulations, and a further quashing order in respect of regulation 3(8) of the Managed Migration Pilot Regulations, which inserts Schedule 2 to the Transitional Provisions Regulations.

73. It will now be a matter for the Secretary of State to decide what should happen next. For example, whether to replace the quashed regulations, or whether to how (if at all) any of the other amendments made to the Transitional Provisions Regulations, either by the Managed Migration Pilot Regulations, or the SDP Gateway Regulations should be altered.