



Neutral Citation Number: [2021] EWHC 102 (Admin)

Case No: CO/00165/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2021

Before :

MR JUSTICE CHAMBERLAIN

Between :

THE QUEEN
on the application of
NICHOLA SALVATO

Claimant

- and -

SECRETARY OF STATE
FOR WORK AND PENSIONS

Defendant

Chris Buttler and Jessica Jones (instructed by **Leigh Day Solicitors**) for the **Claimant**
Clair Dobbin (instructed by **Department Work and Pensions Legal Services**) for the
Defendant

Hearing dates: 10 and 11 November 2020

Approved Judgment

Mr Justice Chamberlain:

Introduction

- 1 Universal Credit (“UC”) was introduced by the Welfare Reform Act 2012 (“the 2012 Act”) to replace a range of existing benefits. One of its main aims was to incentivise and encourage recipients to work. An award of UC has a number of “elements”. Section 12 of the 2012 Act provides that the calculation of an award of UC is to include amounts in respect of “such particular needs and circumstances of a claimant as may be prescribed”. The Universal Credit Regulations 2013 (SI 2013/376: “the UC Regulations”) prescribe the needs and circumstances. One of these is “childcare costs”. The element of the UC payment referable to childcare costs is known as the “childcare costs element” or “CCE”. This case is about the mechanism for assessing and paying the CCE.
- 2 The mechanism uses monthly “assessment periods” and, in general, makes payments in arrears. The effect of the UC Regulations is that a claimant is entitled to be paid the CCE as part of her UC award only if she has already paid the charges, rather than merely incurred them. Claimants therefore have to find ways of paying the charges from their own funds. They will only be reimbursed several weeks afterwards. The Claimant calls this the “Proof of Payment Rule”.
- 3 There is no such rule in relation to another element of UC – the housing costs element (“HCE”). There, provision is made for payment of “an amount in respect of *any liability* of a claimant to make payments in respect of the accommodation they occupy as their home” (s. 11 of the 2012 Act and reg. 25ff of the UC Regulations). Guidance makes clear that housing costs can be paid in various different ways, depending on the needs of the claimant, including by direct payment to the landlord.
- 4 The Claimant is a single mother who wishes to work but would be unable to do so without help to cover childcare charges. She is in principle eligible to receive the CCE. She wants to work full-time, but says that, because of the Proof of Payment Rule, she cannot afford to pay the fluctuating costs of childcare and as a result has become indebted and ultimately had to reduce the number of hours she works. She contends that, by failing to provide for payment of childcare charges which have been incurred but not paid, the Secretary of State has:
 - (a) subjected her to unlawful indirect discrimination on grounds of sex, contrary to Article 14, read with Article 8 and/or Article 1 of the First Protocol (“A1P1”) to the ECHR (ground 1); and
 - (b) acted irrationally in the sense described by the Court of Appeal in *R (Johnson) v Secretary of State for Work and Pensions* [2020] PTSR 1872.
- 5 The Defendant contends that the Proof of Payment Rule is an integral part of the architecture of UC, resulting from deliberate policy decisions with which the court should not interfere. As respects the grounds of challenge, she submits that the Proof of Payment Rule:
 - (a) does not engage Article 14 at all because it: (i) has not been shown prejudicially to affect either the Claimant or women in general and (ii) does not fall within the

ambit of Article 8 or A1P1; alternatively, and in any event, is not “manifestly without reasonable foundation” and so is justified; and

(b) is not irrational.

- 6 Permission to apply for judicial review was granted by Mostyn J on 25 February 2020. I heard oral submissions at a remote hearing using video-conferencing over two days from Chris Buttler (leading Jessica Jones) for the Claimant and from Clair Dobbin for the Defendant.

How the UC Regulations work

The regulation-making power

- 7 The UC Regulations were made under powers conferred by the 2012 Act. By s. 43 of that Act, the statutory instrument containing the first regulations made under specified provisions (including those at issue here) are subject to what is now known as the “draft affirmative” procedure, i.e. they may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament. Subsequent regulations are subject to the “made negative” procedure, i.e. they come into force before any Parliamentary scrutiny takes place, but are subject to annulment in pursuance of a resolution of either House of Parliament.

The CCE

- 8 By reg. 31 of the UC Regulations, an award of UC is to include an amount for childcare costs in respect of an assessment period in which the claimant meets both (a) the work condition and (b) the childcare costs condition.
- 9 The work condition is set out in reg. 32. In broad terms, it is that the claimant is in paid work or has an offer of paid work due to start before the end of the next assessment period and, if she is in a couple, the other member is in paid work or is unable to provide childcare. This claim is about one particular aspect of the childcare costs condition, which is set out in reg. 33.
- 10 In its original version, reg. 33(1) provided in material part as follows:
- “The childcare costs condition is met in respect of an assessment period if—
- (a) the claimant *pays* charges in that period for relevant childcare.”
- 11 This part of reg. 33(1) was amended by the Universal Credit (Digital Service) Amendment Regulations 2014 (SI 2014/2887) with effect from 26 November 2014. The amending instrument was subject to the made negative procedure. The regulation as amended now provides in material part as follows:
- “The childcare costs condition is met in respect of an assessment period if
- (za) the claimant has paid charges for relevant childcare that are attributable to that assessment period (see regulation 34A)...”

- 12 Regulation 34(1) caps the amount of the CCE for an assessment period at “85% of the charges paid for relevant childcare that are attributable to that assessment period”. The amount varies up to this cap depending on the claimant’s earnings in the relevant assessment period.
- 13 Regulation 34A(1) (also inserted by SI 2014/2887) provides as follows:

“Charges paid for relevant childcare are attributable to an assessment period where—

 - (a) those charges are paid in that assessment period for relevant childcare in respect of that assessment period; or
 - (b) those charges are paid in that assessment period for relevant childcare in respect of a previous assessment period; or
 - (c) those charges were paid in either of the two previous assessment periods for relevant childcare in respect of that assessment period.”
- 14 Regulation 34A(2) contains the formula for working out, in a case where a claimant pays for relevant childcare in advance, the amount paid in respect of any assessment period.
- 15 “Relevant childcare” is defined in reg. 35. It includes care provided in England by a person registered under Part 3 of the Childcare Act 2006, by the proprietor of a school out of school hours or where the child has not reached compulsory school age or by a domiciliary care provider registered under the Health and Social Care Act 2008. There are similar provisions in relation to childcare provided in Wales and Scotland, which make reference to the regulatory regimes applicable there.
- 16 The UC Regulations have to be read with the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380: “the Claims and Payments Regulations”), reg. 47(1) of which provides as follows:

“Universal credit is payable monthly in arrears in respect of each assessment period unless in any case or class of case the Secretary of State arranges otherwise.”
- 17 The default mechanism of payment monthly in arrears was explained in the Explanatory Memorandum which accompanied the original version of the UC Regulations, at para. 7.9, as follows:

“At present, existing income-related benefits are assessed weekly and paid weekly, fortnightly or four weekly. A key difference with Universal Credit is that it will be assessed and paid monthly. This approach is intended to reflect the world of work where around 75% of people receive their wages monthly. Paying in this manner will encourage and support claimants to budget on a monthly basis, which will help smooth the transition into monthly paid work. The monthly approach, together with the collection of earnings details via the new Real Time Information system being implemented by Her Majesty’s Revenue and Customs, will help ensure that

benefit assessments are accurate and reflect the current needs of the household.”

The housing costs element

- 18 The HCE is governed by reg. 25 of the UC Regulations. Regulation 25(1) provides for an award of UC to include “an amount in respect of any *liability* of a claimant to make payments in respect of the accommodation they occupy as their home” (emphasis added). Thus, the HCE – unlike the CCE – compensates for amounts which claimants are *liable* to pay, rather than amounts they have actually paid.
- 19 Under reg. 25(2)(a), “payments in respect of accommodation” which are covered include “rent payments” as defined in para. 2 of Sch. 1. These include, among other things: (a) payments of rent; (b) payments for a licence or other permission to occupy accommodation; (c) mooring charges payable for a houseboat; (d) in relation to accommodation which is a caravan or mobile home, payments in respect of the site on which the accommodation stands. Mr Buttler makes the point that some of these costs may well fluctuate from month to month, as childcare costs do.
- 20 Under reg. 25(2)(b), “payments in respect of accommodation” also include “service charge payments” as defined in para. 7 of Sch. 1. These may also fluctuate from month to month.
- 21 Regulation 26 and Schedules 4 and 5 provide for the amount of the HCE in respect of each assessment period. These provisions are complex. In a note produced after the hearing, Ms Dobbin summarised them as follows:

“Housing is treated differently insofar as there is no requirement to demonstrate that the liability has been discharged before receiving the UC payment (for all of the reasons referred to about the distinct nature of housing) but that does not alter the fundamental position that housing is paid in arrears (and upon the housing having been provided). There are no prospective payments under Universal Credit.”

In this context, it appears that “prospective payments” means payments in respect of accommodation or services not yet received.

- 22 The Secretary of State has produced guidance entitled “Alternative payment arrangements” (“APA”), which allows for managed payments to landlords (“MPTL”) where a claimant has fallen into arrears. It also allows for fortnightly or weekly payments where these are needed to safeguard the claimant’s home. The guidance provides at §1.1 that:

“APA will be considered on a case-by-case basis. A claimant can have one or more APA based on their individual circumstances.

Universal Credit staff make the decision whether to award an APA taking account of numerous factors and using the tier 1 and tier 2 guidance as set out in Annex A. These are used as an indicator to decide if these arrangements are appropriate to an individual.

For example:

- is the claimant managing to pay their bills on time, particularly their rent, and have they fallen into arrears in the past, or are they currently in arrears?
- do they think they will be able to manage a monthly budget, taking account of their income and outgoings over a calendar month?
- if the claimant is part of a couple, are they used to managing their money together and do they think they will be able to manage the single Universal Credit payment to the household?
- is the claimant vulnerable (maybe they have addiction problems or are previously homeless)?

The APA factors include the following:

- addiction problems
- rent arrears
- mental health issues
- learning difficulties
- previously homeless.”

23 The guidance outlines at §2.1 the circumstances in which a MPTL (i.e. a direct payment of rent and/or service charges to the landlord) will be appropriate:

“A MPTL can be made when:

- a claimant is in arrears with their rent for an amount equal to, or more than, 2 months of their rent
- a claimant has continually underpaid their rent over more than 2 months, and they have accrued arrears of an amount equal to or more than one month’s rent
- any of the other Tier 1 and Tier 2 APA factors apply
- a claimant was previously in receipt of Housing Benefit and it was paid to their landlord, a MPTL can be considered providing the claimant continues to meet the Tier 1 or Tier 2 APA factors.”

The effect of regs 33(1)(za) and 34A

24 During the hearing it became clear that there was a dispute about the effect of regs 33(1)(za) and 34A of the UC Regulations, which was not apparent from the pleadings or skeleton arguments. Mr Buttler pointed to the fact that regs 33 and 34 refer to “charges

for relevant childcare that *are* attributable to that assessment period” (emphasis added). On this basis, he submitted that it is the *charges* (plural), and not the relevant childcare, that must be attributable to the assessment period. This is correct as far as it goes. But reg. 34A explains when charges paid for relevant childcare are attributable to an assessment period. The effect of this provision is that the CCE can only cover charges where (i) the charges have been paid by the claimant (ii) for childcare in respect of a past complete assessment period. The words “in respect of” mean that it is not necessary that the childcare has been provided. So, for example, a claim could be made for charges that a claimant has paid in advance for childcare that was not taken up (e.g. because the child was ill or self-isolating), but the charges must relate to childcare that was due to be provided in a past complete assessment period.

- 25 At my invitation, the parties filed notes on this point after the hearing. They differed as to its significance. Ms Dobbin submits that it shows that, even if the CCE covered costs which the claimant was liable to pay (but had not paid), this would “make no material difference to when a claimant receives the CCE in their UC award. Regardless of when an invoice is raised, payment will still, as part of the fundamental design of Universal Credit, be in arrears”. Thus, a rule based upon an invoice (rather than a receipt) would require that the childcare provider be prepared to wait for payment.
- 26 Mr Buttler submitted that the rule that payment can only be made for childcare in respect of a past complete assessment period is not to be found in the original version of the Regulations. Moreover, the purpose of reg. 34A was to allow “some flexibility for claimants whose childcare costs award is apportioned over more than one assessment period”: see para. 7.2 of the Explanatory Note to SI 2014/2887. It cannot, therefore, be regarded as “a significant part of the scheme” that childcare is in respect of a particular assessment period. Still less could this be considered “part of the architecture of the scheme”. Mr Buttler notes that the requirement is that the charges are for childcare “in respect of” a past complete period (which is not the same as saying the childcare must have actually been provided). In any event, even if the relationship between childcare and particular assessment periods could somehow be said to be part of the architecture of the scheme, that architecture is not inviolable, because reg. 47(1) of the Claims and Payments Regulations permits the Secretary of State to deviate from the general rule that UC is payable monthly in arrears in respect of each assessment period.
- 27 I have approached this issue as follows:
- (a) The decision challenged in the Claim Form is “the Secretary of State’s ongoing refusal to amend/disapply [reg. 33 of the UC Regulations] which continues to frustrate the Claimant’s ability to obtain childcare and increase her working hours”. There has been no application to amend the claim to challenge any other part of the Regulations, including in particular reg. 34A.
 - (b) From the start, the thrust of the Claimant’s case has been that the Proof of Payment Rule is problematic because most childcare providers require payment in advance and many claimants cannot afford these upfront payments. However, it has also been an important part of the Claimant’s case that the rules governing payment of the CCE contrast with those governing the HCE: the CCE is payable only in respect of charges which the claimant has *paid*, whereas the HCE is payable in respect of amounts which the claimant is *liable* to pay, though only in respect of accommodation which has actually been provided.

- (c) This shows that it is conceptually possible to have a system based on liability to pay (rather than actual payment) which is consistent with the principle of payment in arrears. Childcare providers might be more willing to wait for payment if the CCE could cover charges incurred but not paid, because that would provide a greater assurance that the charges would be paid.
- (d) In any event, until Ms Dobbin’s post-hearing note was filed, it had been no part of the Secretary of State’s case that the claim should fail simply because a challenge to the Proof of Payment Rule would make no difference, given that reg. 34A precludes payment for childcare other than in respect of a past complete assessment period.
- (e) The Secretary of State is entitled to point to reg. 34A in support of her argument that the principle of payment in arrears is part of the “architecture” of the scheme. However, it would be an enormous waste of everyone’s time if the court were unable, because of this point, to consider the substance of this carefully prepared and defended challenge. I therefore intend to consider and determine the pleaded grounds of challenge.
- (f) If either or both of those grounds succeed, it will be for the Secretary of State – and not for this Court – to decide how to remedy the unlawfulness. Devising the remedy will no doubt involve careful consideration within and outside the Department. It may well involve consideration of evidence going beyond that currently before the court. The remedy chosen might in principle involve amendments to more than just reg. 33(1)(za) – and could involve an amendment to reg. 34A. That will be a matter for the Secretary of State.

Evidence and authority about the aims of the UC system

The White Paper

- 28 The 2012 Act was preceded by a White Paper – *Universal Credit: welfare that works* (Cm 7957). In the Foreword, the then Secretary of State, the Rt Hon. Iain Duncan-Smith MP, said this:

“Universal Credit will mean that people will be consistently and transparently better off for each hour they work and every pound they earn. It will cut through the complexity of the existing benefit system to make it easier for people to get the help they need, when they need it. By utilising tried and proven information technology, we will streamline the system to reduce administration costs and minimise opportunities for error or fraud.

Our reforms put work, whether full time, part time or just a few hours per week, at the centre of our welfare system. As such it extends a ladder of opportunity to those who have previously been excluded or marginalised from the world of work.”

- 29 At para. 41, the White Paper explained as follows:

“Ensuring that parents continue to receive financial support with the costs of childcare is crucial if they are to have an incentive to work.”

30 The White Paper continued:

“44. As a minimum, it would be feasible to pay an additional element for childcare on top of the basic Universal Credit award, at similar rates to those currently offered, but to simplify the way costs are calculated and support is paid. If information about costs was collected through a self-service process this could improve the timeliness of support and reduce the scope for under and overpayments.

45. But there may be better approaches. For example:

- providing support for childcare through a voucher or discount system, rather than as part of the Universal Credit award;
- recognising childcare through an additional earnings disregard rather than an additional payment.”

The assessments accompanying the Bill which became the 2012 Act

31 The Bill which became the 2012 Act was accompanied by an Equality Impact Assessment (“EIA”). At paras 65-67, it included this:

“65. The majority of lone parents are women and the employment rate for lone parents, at 57 per cent, is 13 percentage points lower than the average. Of those not working, many cite the reason for this as problems with finding work that offers them the hours and flexibility to meet their childcare needs, others highlight a preference for caring for their children themselves, and others are concerned with the costs of formal childcare. Of all lone parents, around 80 per cent are either in employment, looking for a job, or would like to work. Universal Credit presents an opportunity to promote equality with respect to employment and narrow the employment gap.

66. The new system is expected to be particularly beneficial to lone parents, including those who wish to work a small number of hours as the Government will now pay support for childcare for those working under 16 hours per week. Evidence suggests that most lone parents looking for work want to fit this in with their children’s schooling, so are looking predominantly for work that is part-time and preferably within school hours.

67. Incorporating childcare support into Universal Credit and its taper will protect work incentives and ensure that help with childcare costs is targeted towards low earning families. Once the increase in the take-up of benefits due to greater simplicity of the system is considered, changes to the structure of childcare will provide increased financial support for families. Extending childcare support also presents an opportunity to promote gender equality through helping parents take up employment.”

32 There was also an Impact Assessment. To the question “What are the policy objectives and the intended effects?”, the answer was this:

“The policy will restructure the benefit system, to create one single income-replacement benefit for working-age adults which unifies the current system of means-tested out of work benefits, tax credits and support for housing. It will improve work incentives by allowing individuals to keep more of their income as they move into work, and by introducing a smoother and more transparent reduction of benefits when they increase their earnings. It will reduce the number of benefits and the number of agencies that people have to interact with and smooth the transition into work. This will make it easier for claimants to understand their entitlements and easier to administer the system, thus leaving less scope for fraud and error. It will ensure that appropriate conditions of entitlement are applied to claimants. The effects of the policy will be to reduce the number of workless households by always ensuring that work pays.”

33 At paras 6-7, the Impact Assessment said:

“6. The Universal Credit system will improve work incentives in three ways:

- ensuring that support is reduced at a consistent and predictable rate, and that people generally keep a higher proportion of their earnings;
- ensuring that any work pays and, in particular, low-hours work; and
- reducing the complexity of the system, and removing the distinction between in-work and out-of-work support, thus making clear the potential gains to work and reducing the risks associated with moves into employment.

7. In addition, the simpler system will reduce the scope for fraud, error and overpayments thus ensuring that the right benefit is paid to the right people at the right time.”

The Explanatory Memorandum to the UC Regulations

34 The Explanatory Memorandum to the UC Regulations says this about the CCE:

“For many parents, childcare is essential to support their return to work and their progression in work. Within Universal Credit, support for childcare is provided in the form of an additional childcare element. The element is to be available to all lone parents and couples where both members are in work (with certain exceptions), and is not dependent on a claimant working a specific number of hours.”

Authorities

35 In *R (Parkin) v Secretary of State for Work and Pensions* [2019] EWHC 2356 (Admin), the claimant challenged reg. 62 of the UC Regulations, which imposes a “minimum income floor”, as discriminatory against self-employed persons. Elisabeth Laing J said this about the aims of the scheme (drawing on evidence from the same Ms Parker as has given evidence here):

“44. UC was designed to cause significant changes in behaviour, to provide incentives for work, to increase earnings, to encourage self-sufficiency and to simplify the system and make it fairer. It was also designed to remove perverse incentives. Those aims are described in greater detail in paragraph 18 of Ms Parker’s first witness statement. UC was not designed to ‘provide an indemnity against all costs arising from need. It represents, instead, a judgment by Parliament about how much money should be paid in particular circumstances, having regard to the different needs of different types of claimant and the amount of money available’. There is no flat rate; the amount of UC depends on a number of factors which will vary from case to case.

45. Monthly assessment and payment are cornerstones of the policy, because that pattern mimics working life: most people in work are paid monthly. The same approach applies whether a claimant is working or not. A claimant who is not in work therefore has to budget in the same way as a claimant who is in work. This means that UC can be calculated and paid in the same way whether a person is in or out of work, or moves between the two, and whether his earnings are from employment, self-employment or a mixture.”

- 36 In *Johnson*, Underhill LJ noted at [100] that it was common ground that the legislative policy behind UC was “to encourage work by being responsive to changes in earned income and making work pay to the fullest possible extent”.

The Claimant’s evidence about the effects of the Proof of Payment Rule

The Claimant

- 37 The Claimant is a single parent with an 11-year old daughter. She would like to work full-time because this would give her a higher income and more independence. In order to do that, she would have to find childcare for her daughter outside school hours.
- 38 In September 2018, she began working as a welfare rights adviser for a housing association. She was contracted to work 37 hours per week, from 9am to 5pm, though there was a little flexibility in the hours. It took her 45 minutes to travel by car from her workplace to her daughter’s school. She needed to arrange for childcare before and after school for around 3 to 3 ½ hours per day. She enrolled her daughter in breakfast and after-school clubs which operated at her daughter’s school.
- 39 When she started work at the housing association, the Claimant’s net monthly take-home pay was approximately £1,900. The cost of childcare in the first assessment period (September-October 2018) was £377.40. She could not afford to make this payment. The difficulties with meeting childcare costs continued in every subsequent assessment period because she never had the money she needed to pay for childcare upfront. This gave rise to a “cycle of debt where I was constantly owing childcare as well as loan providers and struggling to find the money to cover payments”. By January 2019, she was “becoming overwhelmed with the juggle of work, childcare, parenting and ongoing poverty”. She took as much time off as she could to minimise childcare costs. She was constantly stressed and worried and wondered if she would have to hand in her notice. She started to suffer from anxiety.

- 40 After the Christmas holidays, she tried to drop her daughter off at school slightly later, though still before the start of the school day, so as to avoid paying for the breakfast club. The school emailed to say that she could not do this without paying. As a result, she felt forced to reduce her working hours to 32 hours per week. This entailed a reduction in annual salary to £27,000, which meant a monthly take-home salary of approximately £1,700.
- 41 There were additional childcare costs in the summer holidays. The Claimant did not have the money to pay these additional costs. She therefore had to reduce her working hours again to 25½ hours per week, which further reduced her net monthly income to about £1,500. She says this:

“Although the decision to reduce my hours in the summer brought an enormous relief because I no longer worried about childcare costs on a daily basis, it is also very frustrating because I want the opportunity to further my career and to increase my earnings and ultimately I would be less reliant on the welfare state if only I could get support for childcare costs in advance. My UC award now is higher than it would have been, had I been able to continue working more hours. The outcome of this claim matters to me because, if the rule which prevents the payment to childcare costs upfront is set aside, I will be able to increase my working hours and decrease my dependence on benefits.”

Gemma Widdowfield

- 42 Gemma Widdowfield is a working single mother with a two-year old daughter. She works as a senior investigations officer for a local authority. She is contracted to work 28 hours per week. She makes up these hours by working Monday, Tuesday and Wednesday 8.30am to 5pm (including lunch breaks) and Friday 8.30am to 12.30pm. She engaged a childminder to look after her daughter Mondays to Wednesdays 8am to 5.30 pm and Fridays 8am to 3pm. (She often has to stay at work longer than her contracted hours to make up time she has taken off due to her own and her daughter’s illness.) The monthly cost of childcare is often in the region of £800-£850 and can be as much as £902.50.
- 43 Ms Widdowfield has to pay childcare costs in advance. She receives an invoice from her childminder on the 27th of each month for services to be provided during the following month. On the 2nd of each month she is paid UC, which includes a childcare element covering childcare costs paid during the previous month. The consequence of this is that “I am constantly on the back foot with childcare payments. It also leaves me extremely financially vulnerable to any unexpected bills, such as car repairs, which I now have to mainly finance by the use of loan facilities which attract interest.” She explains the impact of the system on her as follows:

“As a result of the fact that I had to use my savings to pay for the first month of childcare fees, as well as the problem of fluctuating childcare fees, I have no financial buffer against any unexpected bills... [D]ue to my very limited disposable income, I am finding it extremely difficult to pay back my loans, and even to be in a position to pay bills that are expected. I keep thinking to myself that I will have to pay off my debts when my daughter goes to school (and thus when I will be paying less, or no, childcare fees), but I know that

the interest will have increased the loan amount considerably by that time. This is such a stressful situation to be in, and the stress is making me very depressed. I have recently started taking antidepressants, in part because I worry so much about my financial situation.”

CS

44 CS has been permitted to give evidence anonymously. She is the mother of two children aged 10 and 3 and a qualified social worker. She is married to the father of her children, but he is a foreign national living abroad and is not able to join them because they cannot afford the fee required to apply for leave to enter.

45 CS was offered a job in social work with a youth offending service. The job was due to start on 5 September 2019. It was a full-time position: 9am to 5pm. CS needed full-time childcare for her 3-year old and before and after school childcare for her 10-year old. She would not have been able to pay the upfront costs for the first month (£1,176) without help from the Flexible Support Fund (“FSF”), which made a direct payment to the childcare providers. She also received a Budgeting Advance of £300, which she was told could be used for items required for work, work clothes and a bus pass. This, however, was a loan, which would have to be paid back.

46 After the first month, CS had to pay the childcare fees for October upfront. By this time, she had received her first pay cheque and had just about enough money to pay the fees (£996), which she did on 1 October. That did not leave enough to meet her other expenses and outgoings. On 18 October, she received £304.92 by way of UC for childcare costs provided during the previous assessment period. Because her assessment period ran from 12th of one month to 11th of the next, she had to wait until 18 November to receive the remainder of her entitlement in respect of the costs paid on 1 October. The pattern was replicated every month, meaning a lag of nearly 7 weeks between payment and reimbursement. In addition, CS says that she was consistently underpaid for childcare costs and the underpayment would often take many weeks to resolve.

47 CS describes the impact of this payment system as follows:

“18. The requirement to pay the childcare costs upfront (which is then exacerbated by the delay and fragmentation in repayment) was extremely problematic for my cash flow. I desperately needed the money I was paying to my childcare providers to be able to pay my other bills and not fall behind. I was supporting two children on my own, I have nobody else who could help me with my fixed outgoings, such as my rent and bills.

19. To say that it was a stressful time is an understatement. Between October 2019 - March 2020 (when I finally resigned from my job), I was in a constant state of worry and panic about my finances and how on earth I was going to pay the various bills that I needed to pay. Indeed, I had to enter into repayment plans with my landlord and for my electricity and gas bills. It was so upsetting and humiliating. I had studied for so long and had been so excited to embark on a new journey. However, I found that I couldn’t concentrate on my job because I couldn’t understand how I could possibly afford to pay for childcare in this way: paying the entire cost myself and then waiting for UC support with it, even though the upfront cost was such a

substantial part of my income that it prevented me from meeting my other costs in the meantime.”

Kayte Lawton

48 Kayte Lawton is Head of UK Policy and Acting Director of UK Policy, Advocacy and Campaigns at Save the Children UK, which has been working to improve the childcare element of UC since 2017 as part of its campaign to improve access to affordable, high quality childcare for low-income parents.

49 Ms Lawton explains that, through its campaigning work, Save the Children has been able to interact with a range of parents affected by the Proof of Payment Rule. Through these interactions and its own analysis of the policy, it has concluded that the Proof of Payment Rule is a key design flaw of the childcare element of UC. She explains:

“17. Parents on low incomes do not have the savings to pay for childcare costs upfront, and even where they are able to cover the first month out of their own savings, this leaves them with no funds left to cover other unexpected bills or emergencies. We have witnessed families quickly incurring debt, either to family and friends or through other means such as loans, which pushes them into ongoing hardship due to the need to keep up with debt repayments.

18. Following the first month of childcare costs, parents then repeatedly encounter problems with paying for childcare at any point at which costs fluctuate, which they frequently do. The childcare element of Universal Credit appears to be designed with the intention that, once the first month is covered, parents can then use the previous month’s childcare element to pay for the following month’s costs. This may work in cases where costs remain the same on a month-to-month basis, but our research has found that, in contrast to rent or other bills, childcare costs are highly volatile and subject to regular fluctuations... This is primarily due to costs during the holidays, both for children of school age and pre-school children using three hours entitlements, as these entitlements are only available during term time. Most low income parents with a child aged two and above therefore find that their childcare costs increase every six weeks, before decreasing again in term time, causing them to have to repeatedly find extra money for childcare and wait to be reimbursed. Additionally, parents need to find money for increased costs when they increase their working hours, change their childcare arrangements or have to pay for more childcare than the previous month due to differing lengths of months.”

50 Ms Lawton explains that DWP figures show that, as at August 2019, 50,269 households were receiving the childcare element of UC. Of these, the vast majority (41,928) were single parents. Of these, the vast majority (40,690 or 97%) were women. This means that, overall, 81% of those receiving the childcare element of UC were single mothers.

51 Ms Lawton says that many providers have made efforts to be flexible with parents to enable them to pay their bills – allowing them to be paid in arrears or in instalments. But many providers find this difficult. It is particularly so for childminders, who are usually self-employed and therefore rely on the income from parents to meet their own costs.

Because of this, Ms Lawton says, “some providers have told us that they have resorted to providing receipts for bills in advance which have not yet been paid, to assist parents to claim the money back, which also puts providers at significant risk if parents fail to pay their bills”.

- 52 Ms Lawton suggests four solutions which the government should explore in the medium term: allowing parents to submit invoices at the end of the assessment period instead of receipts, to permit reimbursement for costs incurred, but not paid, in that assessment period; allowing parents to submit invoices for childcare which will be used in the following assessment period in cases where they are required by their provider to pay on a monthly basis upfront; expanding the scope of the Flexible Support Fund to cover all parents claiming the childcare element of UC and not just those moving into work; and introducing direct payments to childcare providers, along the lines of the existing system of managed payments to landlords for rent.
- 53 Ms Lawton exhibits a report by Save the Children entitled *Making Childcare Work: Fixing upfront childcare costs for families on Universal Credit*. This includes analyses of data from the Family and Childcare Trust and from Citizens Advice, showing the high average cost of childcare. A second Save the Children report, *It’s just constant debt*, gives further details of average childcare costs and presents data showing substantial increases in average childcare costs at half-term, during the Easter and Christmas holidays and, especially, during the summer holidays. The fluctuation in childcare costs is presented graphically. It is very significant.

Laura Dewar

- 54 Laura Dewar is a Policy Officer at Gingerbread, a leading charity working with single parent families. Gingerbread campaigns against poverty, disadvantage and stigma to promote fair and equal treatment and opportunity for single parents and their families.
- 55 Ms Dewar says that Gingerbread’s research shows that parents in London pay more for childcare than in any other UK region, with families in inner London spending an average of £8000 every year on a part-time nursery place. Maternal employment is at its lowest in London, with 40% of unemployed mothers pointing to child care as a key barrier to getting a job. The Department for Education’s Childcare and Early Years Survey of Parents shows that, among single parents working part-time, if there were no barriers, 34% would increase their hours and 26% would work full-time.
- 56 Ms Dewar notes that Gingerbread’s research indicates that 20.2% of single parents receiving the housing element of UC have this paid directly to their landlord.
- 57 Ms Dewar relies on a Gingerbread report *Held back: single parents and in-work progression in London*, which presents data showing that the median hourly pay of single mothers (both in the UK as a whole and in London) is substantially less than that of mothers in couples, single fathers or fathers in couples.

Jonathan Broadbery

- 58 Jonathan Broadbery is Head of Policy and External Relations for the National Day Nurseries Association (“NDNA”). He explains that nurseries need to know in advance how many children will be taking up places, so that they can plan the provision of care

and manage the costs of it. Staff to children ratio requirements and staffing levels have to be set according to the number of children attending. This may mean taking on additional staff according to demand or increasing the contracted hours of existing staff.

59 Mr Broadbery explains:

“Any delays in childcare payments to nurseries could potentially be catastrophic for the business, their staff and all the children at that setting if, for example, it cannot pay staff, meet its other necessary liabilities, and if ultimately it is forced to close... [D]ata from the Department for Education shows that 54% of private providers and 74% of voluntary providers were either making a loss or just breaking even.”

60 Mr Broadbery notes that NDNA has not been able to conduct comprehensive research into the experience of members in relation to the impact of UC due to the comparatively low number of families now receiving the benefit and other challenges facing nurseries. However, it does collect reports from nurseries seeking support. At least a dozen of its nursery members have reported difficulties with parents in receipt of UC. Examples have included delays with payments due to difficulties with making payments upfront. Some parents have got into hundreds of pounds of debt with the nursery as a result. This causes difficulties for the nursery in terms of cash flow and covering payments.

61 Mr Broadbery says that NDNA has proposed a “childcare passport” under which any support parents receive for childcare – whether through “funded hours”, UC or Tax-Free Childcare – would be administered under one account alongside any contributions from the parents themselves. Any payment would then go directly to the provider or providers, as currently occurs under the Tax-Free Childcare system.

Liz Bayram

62 Liz Bayram is Chief Executive of the Professional Association for Childcare and Early Years. She reports “anecdotal evidence” from the association’s child care provider members who work with parents in receipt of UC. On the basis of this evidence, she says that most childcare providers require a deposit and advance payment in respect of the first month’s fees in order to agree to guarantee a space. The association’s advice to its members is not to agree a contract without deposit and one month’s payment in advance. Ms Bayram anticipates that this will become more of an issue for the association’s members as more parents move to the UC system and are unable to meet their advance payment obligations.

63 In her second statement, Ms Bayram describes the results of a survey of childcare providers conducted in the summer of 2020. Of the 209 anonymous responses received, 120 members confirmed that they had children from families relying on UC payments. (Ms Bayram notes that many families have still not migrated from legacy benefits to UC and considers that the use of childcare by parents on UC is likely to be suppressed because some families are unable to meet the deposit requirements.) 78 of the providers with children from families reliant on UC encountered problems receiving payments from such families with “parents not being able to afford upfront payment” being given as the main reason for these problems. Ms Bayram continued:

“Some providers even suggested in their response that the only way around these problems was for them to provide ‘receipts’ to parents at the stage when they became contractually liable to make payments, but before the care is provided or payment was made, in order to enable parents to claim childcare costs through UC upfront. For example, one child care setting said about parents reliant on UC ‘they require a receipt saying I’ve been paid to get the payment [from UC] so I have to say they’ve paid when they’ve not’.”

The Work and Pensions Select Committee

64 In the Statement of Facts and Grounds and the Claimant’s Skeleton Argument, reliance was placed on a report by the House of Commons Work and Pensions Select Committee entitled *Universal credit: childcare* (HC 1771), published on 23 December 2018, and on the evidence presented to the Committee and the Government’s response to it. In advance of the hearing, I invited the parties to make submissions on the admissibility of these materials in the light of the decision of Stanley Burnton J in *Office of Government Commerce v Information Commissioner* [2010] QB 98. Having considered that decision, and subsequent case law affirming it, Mr Buttler indicated at the start of the hearing that he would not seek to rely on the report, or the evidence presented to the Committee. Ms Dobbin did not herself seek to rely on the Government’s response to the Committee’s report. It has not, therefore, been necessary to decide whether any part of the materials placed before or emanating from the Committee could have been admitted without infringing Article IX of the Bill of Rights or the wider principle of Parliamentary privilege.

The Defendant’s evidence

65 The Defendant’s evidence was given by Niamh Parker, who is the UC Policy Team Leader with responsibility for UC in-work policy at the Department for Work and Pensions.

66 Ms Parker explains that UC has been a central platform of the Government’s social policy reform agenda since 2010 and is “the most significant welfare reform in the past 70 years”. It was designed to replace several “legacy” benefits (Child Tax Credit, Housing Benefit, Income Support, Income-based Jobseeker’s Allowance, Income-related Employment and Support Allowance and Working Tax Credit) with a single payment. It is designed to be wholly distinct from the legacy system with its complicated rules and multiple, overlapping payments. But, like the legacy benefits, UC is not intended to provide an indemnity against all costs arising out of need. Rather, it represents the judgment of the legislature as to the amount of money that should be paid in particular circumstances, having regard to the different needs of different cohorts of claimants and the amount of state resources available. UC is a highly variable payment which takes into account different aspects of an individual’s personal circumstances, such as earnings, and is intended to adjust to changes in their circumstances.

67 One of the flaws inherent in the legacy Tax Credits system was the annual assessment and treatment of earnings. To compensate for fluctuations in earnings over a year, tax credits have built into the policy and design an ‘income change disregard’, which means that in-year changes in income and earnings up to a defined threshold do not affect entitlement. Where earnings and income are outside of these disregard limits, however, where they are reported incorrectly, claimants can be faced with significant over and

underpayment issues. UC was designed to address these inherent flaws by applying actual earnings on a monthly basis, ensuring that over and underpayment issues do not arise.

- 68 Ms Parker explains that another aim and objective of the 2012 Act and UC Regulations is the reduction of fraud and error. She notes that the White Paper had identified fraud and error overpayments in the benefits and tax credits system estimated at £5.2 billion per year accounting for 3% of total welfare spending. To address this, UC entitlement is calculated on a calendar monthly assessed basis and paid in arrears. This approach “reflects the world of work and the frequency with which most people are paid earnings, and therefore supports the transition from benefits to wages”. Its aim is “to encourage claimants to take personal responsibility for their finances and to budget on a monthly basis”.
- 69 To this end, claimants are allocated a monthly assessment period which determines the date when payment is made. Ms Parker explains that “[t]he whole of the policy has been developed with the monthly assessment period at the heart, with payment in arrears, meaning that any change in this core design principle would have very significant impact on associated cost”.
- 70 Ms Parker explains that the childcare element in Working Tax Credits is determined by reference to the average weekly cost of the claimant’s relevant childcare. The claimant had to submit an average of their care costs on an annual basis. Customers are expected to notify HMRC within a month if their personal circumstances change. The use of averages and an annual declaration led to a significant amount of incorrect payments due to fraud and error.
- 71 To inform the design and delivery of childcare support in UC, a study known as the CAP09 Actual Costs Pilot was undertaken. Its results were shared internally within the department on 5 May 2011. Its purpose was to test the impact of a different system of reporting and payment of the childcare element of working tax credit. The new system involves reporting childcare costs every four weeks and receiving childcare payments in arrears. Using the results of the study it was estimated that in 2008-9 incorrect reporting of childcare costs and errors related to children contributed £715 million to error and fraud. A quarter of all monies paid out in respect of childcare was attributable to error and fraud.
- 72 The CCE of UC was intended to remove the susceptibility of the legacy system to fraud, error and uncertainty as well as to ensure that parents were compensated for the bulk of the actual childcare costs, thereby addressing a key barrier to work. Unlike WTC, the CCE was to form a part of the claimant’s overall monthly UC payment.
- 73 As to the mechanism of payment, Ms Parker explains:
- “45. Monthly reporting of paid out costs is simple to submit to UC. Information is simply provided through their journal and, where evidence is required, it can be submitted by a smart phone or a laptop if the claimant can’t get to a Jobcentre or prefers not to use the post.
46. Entitlement is calculated monthly and payments are more accurate than under the legacy system, ensuring that support is provided when needed. It

is designed to give certainty about what and when payment will be received, with the aim of giving confidence and independence to budget on a monthly basis.

...

50. In terms of tackling fraud and error, the CCE in UC is based on the reporting of a claimant's actual childcare costs. This is the key feature of the system which ensures its accuracy. Unlike in WTC, this removes the risk of a parent, unknowingly (in error) or otherwise (fraudulently), wrongly projecting or calculating their 'average' costs as well as mis-reporting for not reporting changes in those costs throughout the year...

...

52. Payment of childcare costs in advance could potentially lead to precisely the same problems of claimants receiving over or under payments for childcare or simply estimating costs incorrectly. Not only would this increase risk of error and fraud, but it would also result in overpayment being recouped from the subsequent month's UC award. This would affect the claimant's ability to budget and undermine the predictability and simplicity of UC.

53. Further to this, the structure of UC means that certain elements cannot be ring fenced or separated from the monthly award and paid before the end of the assessment period. As UC is paid monthly in arrears, entitlement is decided at the end of each assessment period. With regard to childcare costs specifically, attempting to extract or ring fence individual components from the calculation would ignore the interaction between the different stages of the calculation and would not correctly reflect how UC is designed in the legislation and how it operates in practice."

- 74 Ms Parker exhibits to her statement the key documents recording the formation and development of the policy and explains what she says can be drawn from these documents.
- 75 On 6 December 2010, there was a submission to the Minister for Welfare Reform, which put forward four options: first, to offset actual childcare costs against earnings and apply a disregard to earnings net of childcare costs; second, to apply a fixed disregard; third, to apply an "addition", but with much more regular assessments; fourth, to pay a set amount to all parents with childcare needs. It can be seen from this document that the thinking at this stage was at a high level of generality. It did not descend to the mechanics of the payment system.
- 76 On 12 January 2011, there was a submission to the Secretary of State noting that there had been two meetings with stakeholders at which the options had been considered. This submission went on to consider two main options: a "childcare disregard" and a "childcare element". Under the heading "Payment mechanism", it was noted that officials were exploring the feasibility of alternative methods of payment that could make childcare payments more transparent. These included payment to the parent responsible

for the childcare cost (if not the UC payee), direct payment to third party providers and payment by electronic voucher.

- 77 On 9 February 2011, there was a further submission, this time to the Minister for Welfare Reform and the Minister for Disabled People. This recommended that the Ministers confirm that, at second reading of the Bill which became the 2012 Act, support for childcare costs would be provided for an additional element rather than a disregard, would be primarily paid with the UC award rather than direct to providers or with vouchers and would be simpler, based on a more regular assessment of actual costs. Under the heading “Simplification – assessment periods”, the submission included the following:

“We may also be asked during Second Reading about what we are planning to do to simplify the way we provide support. A key source of error and fraud currently is the requirement for customers to estimate average cost over the year. Basing the award in UC on actual costs – either reported each month, or whenever costs change – would be much simpler.”

- 78 Annex A, headed “Payment mechanism options”, included the following:

“Payment direct to provider

Pros

The main advantage of this option is that it will guarantee payment to providers. This would help protect against fraud and could potentially reduce the extent to which providers require up-front costs (which can cause problems for parents moving into work).

Cons

We believe that payment to providers could also introduce more complexity, with customers having to inform us each time they change their provider, and providers having to explain the amount of payment outstanding to parents (which would become particularly complicated when there was more than one childcare provider being used). It also undermines moves to bolster the personal responsibility and capability of individual recipients.

Stakeholders have said that they would favour payment to individuals on the basis it would give them control over their finances.

Vouchers

We would expect that this would be administered by one of the existing providers that issue voucher payments for employers.

Pros

This option could in theory protect against fraud by ensuring the payment could not be used for other purposes, whilst removing some of the problems

with paying direct to providers as the claimant would still be in control of the payment.

It could also make support more transparent for customers - a recent HM Revenue & Customs research report found ‘a lack of transparency about how much money the CCE would cover’. This could potentially have impacts on work incentives although there was no indication that making support clearer would actually change existing claimants’ behaviour.

Cons

HMRC analysis suggests that fraud is a very small proportion of overall CCE error and fraud. Any reductions in fraud may not translate into savings if the vouchers simply encourage parents to use the childcare they sign up to.

There would be administrative costs - we have provisionally estimated that a voucher system could cost in the region of £10-20 million a year.

Separating out the payment for childcare would go against the principles of Universal Credit, requiring us to specify how much of the net award is for childcare.

It would require the customer to liaise with two organisations for childcare support, and HMRC evidence has found that the existing voucher scheme is seen ‘to be complicated by those who were not receiving it, especially compared to the relative simplicity of receiving tax credits’.”

- 79 On 28 February 2011, there was a further submission to the Secretary of State and other Ministers. This did not address the payment mechanism but did note, in Annex D, that “[t]he presence of children has a dramatic effect on the position of men and women in the labour market. With children present in the household, 64 per cent of mothers are in work, compared with 89 per cent of fathers”. The document continued: “the most commonly reported factor enabling mothers to go to work was having reliable childcare available to them, reported by half of lone mothers (50%) and slightly fewer partnered mothers (46%)”.
- 80 On 29 June 2011, there was a further submission to the Secretary of State. The recommendation was that childcare support be paid as part of the UC payment to the claimant, not under a voucher system. It was pointed out that it would be possible to reduce childcare-related error and fraud in UC through the design process, without vouchers.
- 81 On 18 October 2011, there was a workshop attended by Ministers. In the note of this meeting, under the heading “Delivery design proposal”, this was said:
- “Claimants will be asked to report childcare costs that they have **paid** out during the UC assessment period, they will have to report costs online monthly, and childcare costs reported will be linked to cash paid and therefore may not fully reflect childcare usage during the UC assessment period.” (Emphasis in original.)

There is, however, no indication that any specific consideration was given to the question whether eligibility to receive the childcare element should be dependent on proof of payment of childcare costs.

82 On 31 October 2011, there was a stakeholder meeting on UC and childcare delivery design. The meeting was attended by civil servants, but not by Ministers. A note containing a “read-out” of that meeting records a representative of one of the participant stakeholders, the London Early Years Foundation, asking: “Why doing cash paid rather than invoiced?” The response was: “needed to fit in with everyone’s billing types, and didn’t want to have to do any reconciliation”. Ms Parker says that similar concerns about upfront costs were raised at the same meeting by the Child Poverty Action Group, Gingerbread and the Resolution Foundation.

83 The meeting and other engagement with stakeholders was summarised in a note for Ministers. It included the following:

“Although stakeholders were pleased with our intention to allow parents to claim upfront childcare costs, they did raise a concern about the work incentive implications of parents have to pay that initial amount out of their own money.

Action: to consider interaction with other support available to help parents pay upfront costs – i.e. budgeting loans within universal credit and support via the JCP Flexible Fund.”

84 Ms Parker explains that the FSF is a non-recoverable discretionary fund that jobcentre staff can use to supplement mainstream services. It can be used to pay upfront childcare costs. The FSF is locally managed. The national budget for it was set at £40 million in 2019-20. FSF payments are not part of the UC system and payments are made directly to providers. DWP data shows that £403,000 was spent on childcare support from the FSF in the second half of the financial year 2019-20.

85 Ms Parker expresses the view that the reforms to the system for reimbursing childcare costs have been successful. She says this:

“73. Throughout the formation of the policy, a forefront consideration in [childcare costs element] is that it mostly affects women, and its availability having a direct effect on their participation in the labour market... There has been consideration of lone parents as an individual group as well. This is to ensure they receive sufficient assistance, and do not lose out in comparison to couples...

74. As a result of this, and the other changes implemented as part of these reforms, more lead carers, including lone parents, returned to work and were more likely to be in work than ever before. The lone parent employment rate was 69.0% in October to December 2019, up 1.1% on the year and up 12.9% since October to December 2010.

75. In addition to this... in the current system there are no indications of significant fraud or error. In comparison to 25% of all childcare payments in WTC, the steps taken have achieved their goal.”

86 Ms Parker explains that departmental officials, and the Minister for Welfare Delivery, have continued to meet key stakeholders, such as Save the Children, to discuss the UC childcare offer, including perceived challenges to the way in which childcare costs are delivered. Alternative payment mechanisms have been considered. The childcare deposit guarantee paid directly to the childcare provider, as suggested by Gingerbread, “has in many ways already been delivered” in the form of the FSF. Direct payments were considered and rejected by ministers on 20 January 2011. Vouchers were considered in detail from the outset with the pros and cons specifically set out in the submission on 29 June 2011. Ms Parker adds:

“81. As noted, paying every set of a claimant’s childcare costs directly to childcare providers, by vouchers or other means, would require removing it from the UC award. Not only is this directly contrary to policy intent but, as described elsewhere, this would require an enormous investment and resources to be diverted from other areas of the department’s delivery. Equally, as addressed earlier in the statement, key stakeholders themselves advised against paying directly to childcare providers.

82. While there are suggestions that this could be done in a manner comparable to housing, the fluctuations in CCE, seasonal and otherwise, would make this impossible to do with any consistency, it would require CCE to be paid on estimates because payments would have to be made upfront. Housing costs are fixed. They are not comparable schemes.

83. Finally, implementing a discretionary basis on which payments could be made upfront would create a level of administrative complexity that the current system is deliberately made to avoid. Not only would it increase the rate of fraud and error, as opposed to repayment of actual cost paid, it would also require a complex set of rules and UC Regulations which decision-makers would have to administer and take into account (increasing the risk of human error), and which would also require an appeal system. The Secretary of State has determined that the public funds in this area are best used by putting money into the hands of claimants, rather than a more complex and time-consuming administrative system.”

87 Ms Parker explains that UC policy was extensively debated in both Houses of Parliament during the passage of the bill which became the 2012 Act and in the debate on the UC Regulations; and the Social Security Advisory Committee (“SSAC”) scrutinised and consulted upon the UC Regulations and provided recommendations throughout. She confirms, however, that there was “no substantive debate in either house of Parliament on the UC CCE, and SSAC made no substantive comments, recommendations, or criticisms of payments in arrears to claimants”.

The Claimant’s submissions

88 Mr Buttler submits that there are three questions for the court to consider under ground 1:

- (a) Does the Proof of Payment Rule disproportionately and prejudicially affect a particular group? (Or, is the Proof of Payment Rule indirectly discriminatory?)

- (b) Is the discrimination within the ambit of Article 8 or A1P1?
- (c) Is the Proof of Payment Rule justified?

Ground 2 raises a separate question:

- (d) Is the Proof of Payment Rule irrational?

(a) Is the Proof of Payment Rule indirectly discriminatory?

89 In *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, the Supreme Court had to consider a challenge to a cap imposed on housing benefit by reference to the net median earnings of working households. The challenge was brought on Article 14 grounds. In his judgment for the majority, Lord Reed explained at [5]-[15] the general principles applicable to Article 14 challenges in this area.

90 At [2], Lord Reed explained how the discrimination claim was put:

“The discrimination arises indirectly. The cap affects all non-working households which would otherwise receive benefits in excess of the cap. Those are predominantly households with several children, living in high cost areas of housing. The heads of such households are entitled, in the absence of the cap, the relatively high amount of child benefit, which is payable in direct proportion to the number of children. They are also entitled, in the absence of the cap, to relatively high amount of housing benefit, which reflects the rental cost of the accommodation in which the household lives, and tend therefore to reflect to some extent the size of the household and, more particularly, the level of rental values in the area. In practice, this means that nonworking household with several children, living in London, are most likely to be affected. The majority of nonworking households of children with children are single-parent households, and the vast majority of single parents are women (92% in 2011). A statistically higher number of women than men are therefore affected by the cap. The great majority of single-parent nonworking households are however unaffected by the cap.”

91 At [8], Lord Reed explained that “[a] violation of Article 14 will arise where there is: (1) a difference in treatment, (2) of persons in relevantly similar positions, (3) if it does not pursue a legitimate aim, or (4) if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised”. But, as he made clear at [12]-[14], this is not the only kind of discrimination prohibited by Article 14. There is also failure, without an objective and reasonable justification, to treat differently person whose situations are significantly different. This kind of discrimination is often referred to as *Thlimmenos* discrimination, after the decision of the European Court of Human Rights (“the Strasbourg Court”) in *Thlimmenos v Greece* (2000) 31 EHRR 411.

92 Separately, and more importantly for present purposes, there is the species of discrimination identified in *DH v Czech Republic* (2007) 47 EHRR 59, where the Strasbourg Court said this at [175]:

“The court has established in its case law that discrimination means treating differently without an objective and reasonable justification persons in

relevantly similar situations... The court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.”

93 In such a case, Lord Reed explained at [13] of his judgment in *SG*, “it will again be necessary to consider whether the difference in treatment has an objective and reasonable justification, in the light of the aim of the measure and its proportionality as a means of achieving that aim”. The benefit cap at issue there affected a higher number of women than men because of differences in the extent to which the sexes take responsibility for the care of children following the breakup of relationships. Whether that differential effect had an objective and reasonable justification depended on whether the legislation which brought about that differential effect had a legitimate aim and was a proportionate means of realising that aim: [14].

94 Lord Reed’s analysis of the “differential treatment” question begins at [61]. He noted that the point was conceded on behalf of the Secretary of State, but added this:

“Given the statistics as to the proportion of those affected who are single women as compared with the proportion who are single men, a concession is understandable. It is indeed almost inevitable that a measure capping the benefits received by non-working households will mainly affect households with children, since they comprise the great majority of households receiving the highest level of benefits. It follows inexorably that such a measure will have a greater impact on women than men, since the majority of non-working households with children are single-parent households, and the great majority of single parents are women. That consequence could be avoided only by defining ‘welfare benefits’ so as to exclude benefits which are directly or indirectly linked to responsibility for children, a possibility to which it would be necessary to return.”

95 A similar analysis appears at [180]-[182] in the judgment of Lady Hale, who dissented on the question of justification but whose reasoning aligned with that of the majority in other respects:

“180. The prejudicial effect of the cap is obvious and stark. It breaks the link between benefit and need. Claimants affected by the cap will, by definition, not receive the sums of money which the state deems necessary for them adequately to house, feed, clothe and warm themselves and their children. Furthermore, the greater the need, the greater the adverse effect. The more children there are in a family, the less each of them will have to live on. Ms SG, for example, will receive no more benefit if her 12-year-old son rejoins the family, even though a court (either here or in Belgium) has decided that it is in his best interests to do so. This prejudicial effect has a disproportionate impact on lone parents, the great majority of whom are women, and is also said to have such an impact on victims of domestic violence, most of whom are also women.

181. The disproportionate impact on lone parents is relatively straightforward to explain. The relevant comparison is between those housing benefit claimants who are, and those who are not, affected by the benefit cap. Lone

parents constitute around 24 % of all claimants for housing benefit, but have so far constituted between 59% and 74% of those affected by the cap. This is more than double their proportion in the housing benefit population as a whole. Overall some 92% of lone parents are women. Hence it is not surprising that the Government predicted, in its first Equality Impact Assessment of the Benefit Cap (March 2011, para 27), that single women, mostly lone parents, would constitute 60% of those affected.

182. The reasons for this are fairly obvious. It is much more difficult for lone parents to move into paid employment, even for the 16 hours which would take them out of the cap. It is more difficult for them to do so, the more children they have, because of the problems of delivering and collecting children from different schools or day care placements, the problems of making appropriate day care arrangements for very young children and for all children during the school holidays, the problems of responding to their children's illnesses, accidents and to casual school closures. The more children they have, the harder it will be for them to move into work; and the more children they have, the harsher will be the effects of the cap. These problems arise irrespective of the ages of the children, but are obviously more acute when any or all of them are under school age."

96 Mr Buttler says the Proof of Payment Rule is indirectly discriminatory in the sense described in *SG*. He puts his case in three ways:

- (a) Women are disproportionately dependent on state-funded childcare to access the labour market. The Proof of Payment Rule is a barrier to accessing state-funded childcare. Given that women disproportionately require this to access the labour market, the Proof of Payment Rule adversely affects them as a group. As a matter of statistics, 80% of those claiming the CCE are women.
- (b) UC is a single indivisible benefit whose overarching aim is to support people into work. One of the rules governing eligibility for the benefit is the Proof of Payment Rule. The group whose labour market access is adversely affected by the rule is disproportionately composed of women.
- (c) The Proof of Payment Rule makes eligibility for the CCE dependent on being able to pay the upfront costs of childcare. It therefore favours those with resources to pay those upfront costs. As can be seen from the data presented in the Gingerbread report, the median earnings of single mothers is substantially less than the median earnings of single fathers. So, women are disproportionately affected by the rule.

97 I interpose at this stage that (a) and (b) both rely on the fact that the group who need help with childcare costs in order to access the labour market consists disproportionately of women. The argument in (c) is different. It focuses more particularly on the group who are in principle eligible for the CCE and would be available even if the same number of men as women were members of that group. The point made in (c) is that women in general, and women who are lone parents in particular, are less able than men to pay upfront costs, because they tend to earn less. Thus, it is said that the Proof of Payment Rule makes it more difficult for women (as a group) than men (as a group) to access the CCE.

(b) Is the discrimination within the ambit of Article 8 and/or A1P1?

98 Mr Buttler relies on the judgment of the Court of Appeal in *R (C) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615, [2019] 1 WLR 5687. In that case, the claimants sought declarations of incompatibility in respect of provisions of primary legislation imposing a two-child limit on claims for child tax credit. The limit was said to be contrary to Articles 8, 12 and 14 of the Convention. Under Article 14 it was alleged that the limit discriminated against households with more than two children, an “other status”. The judge at first instance held that the limit did not engage Articles 8, 12 or 14. In his analysis of the latter, he held that the discrimination did not engage Article 8 or 12 and did not fall within the ambit of Article 8 or A1P1 for the purposes of Article 14.

99 The leading judgment of the Court of Appeal was given by Leggatt LJ. He agreed that Articles 8 and 12 were not engaged. As to Article 14, he said this at [43]:

“Unlike, for example, the equal protection clause of the Fourteenth Amendment to the United States Constitution or section 15 of the Canadian Charter, article 14 of the Convention is not a freestanding guarantee of equal treatment, but applies only in the context of securing the Convention rights.”

100 At [44], he noted that the European Court of Human Rights has interpreted Article 14 as applying not only where there is an interference with a Convention right, but wherever “discrimination has occurred within the general subject area or ‘ambit’, of such a right”. He continued as follows:

“This approach treats each of the convention rights as surrounded by a penumbra area in which, although the right itself is not engaged, action by the state must not violate article 14.”

101 Leggatt LJ considered first, at [47], whether the two-child limit fell within the ambit of A1P1. He noted that the Grand Chamber of the Strasbourg Court had held in *Stec v United Kingdom* (2005) 41 EHRR SE18 that:

“although A1P1 places no restriction on a state’s freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme, where a contracting state has in force legislation providing for the payment as of right of a welfare benefit, then ‘that legislation must be regarded as generating a proprietary interest falling within the ambit of [A1P1] for persons to satisfy its requirements’ (para 53)”.

The test was that formulated by the Grand Chamber at [54] of its judgment in *Stec* and reiterated in the cases cited at [48] of Leggatt LJ’s judgment: “whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question”.

102 The first instance judge had held that this test was not satisfied because no existing benefit entitlement has been removed: there had simply been a change in the law affecting future entitlements. At [50], Leggatt LJ explained that this analysis was wrong:

“The relevant benefit is the individual element of child tax credit payable in respect of the child and the condition of entitlement about which the claimants complain is the requirement that the person claiming the benefit is not claiming it in respect of more than one child. Accordingly, applying the test of whether, but for that condition, SC and CB would have had a right, enforceable under domestic law, to receive the benefit in question, the answer is plainly ‘yes’.”

- 103 It was no good, Leggatt LJ held at [51], to characterise the two-child limit as “merely an alteration of the manner in which the amount of child tax credit is calculated and thus a rule which prevents anyone from having any entitlement or possession in relation to any sum above the limit”. He explained:

“Unlike an overall cap on the amount of the benefits, which is capable of being characterised in that way, the two-child limit is structured so as to deny to persons caught by the provision a discrete individual element of benefit which is otherwise payable in respect of each child for whom the person claiming the benefit is responsible.”

This meant that the limit fell “squarely within the principle established by the *Stec* case and therefore within the ambit of Article 14”.

- 104 Mr Buttler submits that the same analysis applies here. The CCE is an entitlement, not a discretionary benefit. On the Claimant’s case, the Proof of Payment Rule operates as a barrier to the ability of some claimants to access that entitlement. Applying the analysis in *C*’s case, the Proof of Payment Rule therefore also falls within the ambit of A1P1.
- 105 As to Article 8, Leggatt LJ held at [53]-[57] of his judgment in *C*’s case that the judge below had been wrong to focus on the question whether the refusal of the benefit had a “direct and real” effect on family life. Adopting the formulation in *Petrovic v Austria* (2001) 33 EHRR 14, at [28], the question was whether “the subject matter of the disadvantage... constitutes one of the modalities of the exercise of a right guaranteed”. In *Petrovic*, the Strasbourg Court had found that a parental leave allowance was “intended to promote family life” because it was intended to enable a parent to stay at home and look after children. It came within the ambit of Article 8 because, by granting it, “states are able to demonstrate their respect for family life within the meaning of article 8 of the Convention”.
- 106 Similarly, in *Okpysz v Germany* (2005) 42 EHRR 32 and *Niedzwiecki v Germany* (2005) 42 EHRR 33, discriminatory conditions for the payment of child benefits were held to fall within the ambit of Article 8 without the need to examine “what actual effect, if any, the denial of child benefit had had, or could be expected to have, on the organisation of the applicant’s family life”. Rather, what was important was “the nature and purpose of the benefit in question, which was in each case specifically aimed at providing financial assistance for the care of children and could therefore be seen as a means by which the state expressed its support for family life”.
- 107 Finally, in *In re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250, discrimination in the eligibility conditions for widowed parent’s allowance fell within the ambit of Article 8, not because the denial of the benefit had any direct or real impact on the claimant’s family life, but because the allowance was a “modality of the exercise of the right’

guaranteed by article 8, because it is a way in which the state shows respect for children and the life of the family of which they are a part in circumstances where securing the family life of children is among the principal values protected by article 8”.

- 108 On the facts of *C*'s case, Leggatt LJ held at [58]-[59] that the two-child limit for child tax credit fell within the ambit of Article 8. Child tax credit was “payable only to a person who is responsible for a child and its purpose is to provide financial support for families with children”. That being so, the benefit represented “a measure by which the state shows respect for children and for family life”. Indeed, as a means-tested benefit, it had a more important role and a closer connection with the value of securing the life of children in the family than widowed parent's allowance.
- 109 Mr Buttler submits that the CCE in UC is, by the same token, intended to provide support to families with children. It is intended to break the cycle of worklessness and to increase the proportion of children who grow up in working households, thereby increasing their opportunities. It is therefore intended to promote the particular form of family life favoured by the Government and thus represents a measure by which the state manifests its respect for family life. Applying the reasoning in *C*'s case, the benefit in question therefore falls within the ambit of Article 8.

(c) Is the Proof of Payment Rule justified?

- 110 Mr Buttler submitted, relying on Lady Hale's judgment in *SG* at [189], that, in an indirect discrimination case, what has to be justified is not the discriminatory effect of the measure under challenge, but the measure itself. As to intensity of review, he drew attention to the recent judgment of the Court of Appeal in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, [2020] HLR 30. At [113], Hickinbottom LJ referred to Lord Reed's four-stage test for justification in *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39, [2014] AC 700, at [74]. The four questions are:

“(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;

(2) whether the measure is rationally connected to the objective;

(3) whether less intrusive measure could have been used without an unacceptably compromising the achievement of the objective; and

(4) whether, balancing the severity of the measures effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measurable contribute to its achievement, the former outweighs the latter.”

- 111 Mr Buttler accepts that the correct test – at each of these stages – is whether the measure is “manifestly without reasonable foundation”. It has been well established for some time that that test applies in the field of welfare benefits, that being “an area of policy in which both the economic and social considerations feature very large”: see Hickinbottom LJ in *JCWI* at [133(iv)]. It is now clear that the same test also applies “when the impugned measure is, not welfare benefits, but another area of socio-economic policy”: *ibid.*, [135]; see also *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502, [51]-[75].

112 Nonetheless, Mr Buttler relies on Hickinbottom LJ’s analysis in *JCWI* at [136]-[141] for the propositions that, in applying the “manifestly without reasonable foundation” test, the breadth of the “area of judgment” to be accorded depends on:

- (a) the nature of the ground on which the difference in treatment is based. If it is based on (e.g.) race, nationality, gender, religion or sexual orientation, then the reviewing court will look with especial intensity, or will require particularly convincing and weighty reasons to justify that treatment;
- (b) whether the measure falls into an area in which democratically elected or accountable branches of government are better placed than the court to determine whether something is in the public interest and if so the weight to be according to that factor in the public interest;
- (c) the branch of government involved (and, if it is the executive the extent to which Parliament had control over the measure by e.g. the positive or negative resolution procedure); and
- (d) the aims of the measure and the extent to which the branch of government had those aims in mind at the time the measure was introduced.

113 Mr Buttler relies also on Leggatt LJ’s observations in *C*’s case about the intensity of review. At [90], he noted, relying on *Kennedy v Information Commissioner* [2014] UKSC 20, that, in assessing proportionality, the intensity with which the court will scrutinise a policy justification for a difference in treatment will depend on the circumstances. Three factors were considered important at [91]-[93]: the ground of discrimination (differences in treatment based on race, nationality, gender, religion, sexual orientation and certain other grounds require particularly convincing and weighty reasons to justify them); whether the measure resulting in different treatment had been approved by Parliament and if so with what degree of scrutiny; and whether or to what extent the values and interests relevant to the assessment of proportionality were actually considered when the policy choice was made. On this third point, Leggatt LJ said this at [93]:

“it is clear that, where a public authority has addressed the particular issue before the court and has taken account of the relevant human rights considerations in making its decision, a court will be slower to upset the balance which was struck. Conversely, where there is no indication that this has been done, ‘the court’s scrutiny is bound to be closer and the court may have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on facts he or it did consider’: see *Belfast City Council v Miss Behavin’ Ltd* [2007] 1 WLR 1420, para 47 per Lord Mance...”

114 One of the other cases cited for this last proposition was *In re Brewster* [2017] UKSC 8, [2017] 1 WLR 519, [50]-[52]. The material parts are as follows:

“50... the margin of discretion may, of course, take on a rather different hue when, as here, it becomes clear that a particular measure is sought to be defended (at least in part) on grounds that were not present to the mind of the decision-maker at the time the decision was taken.

...

52... Obviously, if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made, this will call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when a particular scheme was devised. Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made *bona fide*.”

- 115 Applying these principles to the measure under challenge (a nomination condition applicable to unmarried partners governing entitlement to a survivor’s pension), Lord Kerr said this at [65]:

“A suggestion that any matter which comes within the realm of social or economic policy should *on that account alone* being immune from review by the courts cannot be accepted. It must be shown that a real policy choice was at stake. While it is not essential that the policy options were clearly in play at the time the choice was made, obviously, when they were, the cause for reluctance by courts to intervene is enhanced. In the present case, however, for the reasons earlier given, not only were socio-economic factors not at the forefront of the decision-making process at the time that the decision to include the nomination procedure was made, but the attempt to justify retention of the procedure on those grounds was characterised by general claims, unsupported by concrete evidence and disassociated from the particular circumstances of the claimant’s case. I do not consider therefore this is a factor of any significance in this instance.”

- 116 Mr Buttler says that these words apply with equal force to the evidence of Ms Parker that abandoning or modifying the Proof of Payment Rule would be administratively complex and costly. He submits that this case can be distinguished from those in which Parliament had given full consideration to the discriminatory effects of the rule of policy under challenge and had made a political judgement, weighing those effects against the legitimate purposes which the rule or policy promotes. Here, there was little or no consideration given to the adverse consequences of the Proof of Payment Rule and no recognition of the disproportionate adverse impact which that rule would have on women’s ability to access the labour market. The Secretary of State’s evidence consisted of *post hoc* reasoning of a general nature, unsupported by concrete evidence. Applying the principles derived from the authorities, this was not a case in which the court should accord a broad area of judgment to the decision-maker.

- 117 Mr Buttler submitted that it was important when assessing proportionality to bear in mind the aims of the measure. Here, the overarching aim was to promote work and facilitate access to the labour market. A related but subsidiary aim was to make the scheme more straightforward, thereby reducing error and fraud. The Proof of Payment Rule was the mechanism chosen to give effect to those aims. The problem with this mechanism was that it impaired the overarching aim of the scheme by erecting an unnecessary barrier to the labour market. The adverse effects were serious. They were felt disproportionately by women, not only as a matter of “cold economics” but also in terms of self-fulfilment. There were other ways of giving effect to the subsidiary aim which would not give rise

to these adverse effects. That being so, the Proof of Payment Rule was manifestly without reasonable foundation and so contrary to Article 14.

- 118 The final authority to which Mr Buttler drew attention was *R (Langford) v Secretary of State for Defence* [2019] EWCA Civ 1271, [2020] 1 WLR 537. There, the Court of Appeal was considering a challenge by a woman who was the partner of an officer in the Royal Air Force. She was denied survivor's benefits under the Armed Forces Pension Scheme because, although she had been estranged from her former partner for many years, she remained married to him. McCombe LJ considered the authorities – and in particular *Brewster*. He concluded at [54] that the proper approach was that of Lord Wilson in *DA* [2019] UKSC 21, [2019] 1 WLR 3289, at [66]:

“How does the criterion of whether the adverse treatment was manifestly without reasonable foundation fit together with the burden on the state to establish justification...? For the phraseology of the criterion demonstrates that it is something for the complainant, rather than for the state, to establish. The rationalisation has to be that, when the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable.”

- 119 McCombe LJ went on to apply that approach to the rules in issue in that case. At [61] of his judgment in *Langford*, he noted that – although the Secretary of State relied on three legitimate aims – there was no evidence that two of them (avoidance of double recovery and administrative convenience/cost) played any part in the formulation of the rule in the first place. He then examined each of the purported aims. As to administrative convenience and cost, he noted at [66] that there was a lack of evidence and, therefore, “nothing by which to judge the potential additional administrative costs”. Applying the “proactive” examination to which Lord Wilson had referred, he concluded at [67]:

“I do not find that the foundation for the clear discrimination in this case is reasonable and, in such circumstances, it appears to me to be indeed ‘fanciful’ to find that Mrs Langford’s claim should fail because the discrimination, although unreasonable, is not manifestly so.”

- 120 Mr Buttler submits that the evidence here is equally as unimpressive and the same result should follow.

(d) Is the Proof of Payment Rule irrational?

- 121 So far as rationality is concerned, Mr Buttler relied heavily on the recent judgment of the Court of Appeal in *Johnson*. That case was also about a particular aspect of the payment mechanism for UC. As Rose LJ explained at [2], “the system for identifying the income earned by the claimant in a particular assessment period does not accommodate the fact that people who are usually paid their salary on a particular day each month, such as on the last day of the month, will in fact be paid on a different day if their usual payment

date falls on a weekend or bank holiday”. This meant (see [3]) that in some assessment periods two monthly salary payments would be taken into account and in other assessment periods none. This, in turn, led to difficulty in budgeting and also to claimants losing the “work allowance” (the amount of salary a claimant can earn before their award is reduced) for the assessment periods in which they appeared to have an income of nil.

- 122 As can be seen from [47], the claimants said that it was irrational to decline to fix the problem. The Secretary of State argued that other factors outweighed the desirability of finding an answer to the problem. It was this judgment that was challenged as irrational. At [49], Rose LJ cited a passage from *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, at [113]:

“A policy-maker may reasonably decide that the disadvantages of a finely tuned solution to a problem outweigh its advantages and that a broader measure is preferable, even if the broader measure is both over- and under-inclusive in that it catches some cases in which there is no or no significant problems and fails to catch some cases in which the problem occurs”.

- 123 Rose LJ continued at [50]:

“That, I believe, provides a helpful framework for how to approach irrationality in this case too. We need to consider what are the disadvantages of deciding not to ‘fine-tune’ the Regulations thereby allowing the non-banking day salary shift problem to persist unresolved; what are the disadvantages of adopting a solution to the non-banking day salary shift problem; would a solution be consistent or inconsistent with the nature of the universal credit regime; and has a reasonable balance been struck by the SSWP – or rather is it possible to say that no reasonable Secretary of State would have struck the balance in the way the SSWP has done in this case?”

- 124 The Secretary of State adduced detailed evidence of the cost which “fixing” the problem would entail (at least £7.35m, not including the lost savings from delayed implementation of UC): see e.g. at [78]. Rose LJ approached that evidence critically, saying this at [82]:

“82. Devising a computer program capable of recognising and responding to the huge number of factors covering every aspect of a claimant’s family and financial circumstances – their earned income and unearned income, their receipt of other state benefits or compensation payments that may need to be taken into account or disregarded, their responsibility for children or other caring responsibilities, their own disability or that of a household member, their housing situation and so forth must be an exercise of mind-boggling complexity. Taking full account of all the SSWP’s evidence and bearing in mind [counsel for the Secretary of State’s] warning, I cannot accept that the program cannot be modified to ensure that the computer can recognise that the end date of a particular claimant’s assessment period coincides with their salary pay date so that if the latter date falls on a nonbanking day the receipt of two roughly equal payments is likely to be the result of the salary payment being made a day early and the second payment should be moved into the next assessment period. It may not solve the problem in every instance but it would go a long way towards doing so.

83. Regulation 21A, which I described earlier, is one of many provisions of the regulations that has “A” added to the regulation or paragraph number, denoting that it has been inserted at a later stage. Each of these reflects a refinement of the system in response either to a problem that became apparent or to an amendment or other enactment which affected the operation of the universal credit scheme. All these changes seem to have been accommodated without fatally upsetting the computer. Further, as has been discussed in other cases in this court, the rollout of universal credit involves the implementation of a managed migration pilot now provided for in the Universal Credit (Managed Migration Pilot and Miscellaneous Amendments Regulations 2019 (SI 2019/1152)). It is in the nature of a pilot scheme that it is intended to throw up problems so that they can be sorted out before the new scheme is implemented across the whole of the country. It must be the case that the computer program is sophisticated enough to enable that to happen. If this problem had emerged for the first time as a result of the experience of some of the first migrated cohort of 10,000, I cannot accept that the department would have responded by saying that it was now too late to modify the scheme and that nothing could be done to resolve it without throwing away all the money so far spent.”

125 Rose LJ went on to address the extent to which the issue had been considered by Ministers. At [84], she noted that the Detailed Grounds of Resistance referred to “deliberate choices” and “system design decisions” that had been made by the Secretary of State. However:

“Much of that discussion focuses on different issues such as the choice of a monthly rather than weekly length of assessment period, the decision to disengage the assessment period from the calendar month so that it runs for a month from the date of claim rather than corresponding to the calendar month and the decision that earnings are not averaged.”

126 At [85], Rose LJ found “very little evidence as to whether this particular problem... was recognised at the time”. There is then a detailed analysis at [85]-[90] of the Secretary of State’s evidence about the process of policy formation. At [91], Rose LJ drew the following conclusions as to the contemporaneous documents:

“First they contain nothing to show that the problem of advance payment of salary was highlighted to the minister and a decision taken to do nothing about it. Secondly, they show that where the Minister had concerns that manipulation of the system might lead to much higher income in some assessment periods and low or zero income in other assessment periods he was assured that the computer might be programmed to recognise unexpected and significant fluctuations so that they could be investigated. I recognise that ultimately that was not incorporated in the scheme but the Minister was not told that there was nothing that could be done about such issues without compromising the automated nature of the calculation process.”

127 At [106], Rose LJ said that this was not a case within the *Padfield* jurisdiction of the court. (By that, she meant that it could not be said that the Secretary of State had acted for a purpose outside those for which the power was conferred in the sense outlined by the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC

997.) Nonetheless, the fact that the challenged rule operated in a way which was “antithetical to one of the underlying principles of the overall scheme” was an important factor when considering the rationality of the Secretary of State’s choices. At [107], Rose LJ noted that the threshold for establishing irrationality was “very high, but... not insuperable”. This was “one of the rare instances where the [Secretary of State’s] refusal to put in place a solution to this very specific problem is so irrational that I have concluded the threshold is met”.

128 Underhill LJ, concurring in the result, added this at [115]:

“I am inclined to agree with Rose LJ that the relevant form of unlawfulness is best characterised as irrationality, though I also agree it has echoes of the *Padfield* principle. But ultimately these various characterisations are simply aspects of the fundamental question of whether Parliament can have intended the rule making power to be exercised in a way which produces so arbitrary an harmful and impact on the respondents and the very many other claimants who are in the same position. I do not believe that it can.”

129 Mr Buttler submits that the *Johnson* analysis applies here too. As in *Johnson*: there is no evidence that ministers ever gave serious consideration to the Proof of Payment Rule; the Secretary of State’s evidence about the cost and administrative difficulty of amending it is vague and unparticularised; the rule affects a large number of claimants and is liable to subvert the overarching aim of the scheme – incentivising work.

The Secretary of State’s submissions

(a) Is the Proof of Payment Rule indirectly discriminatory?

130 Ms Dobbin did not accept that the Claimant’s evidence demonstrates that any difficulties she experienced in paying for childcare were attributable to the Proof of Payment Rule, as opposed to her financial position more generally (for example, the fact that her salary was paid in arrears). She did not accept, therefore, that the Claimant has shown that the Proof of Payment Rule disadvantages her.

131 As to the Claimant’s evidence on the broader effect of the Proof of Payment Rule, Ms Dobbin relied on the observations of the Grand Chamber of the Strasbourg Court in *Carson v United Kingdom* (2010) 51 EHRR 369, [62] (cited with approval in *R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289, [15]):

“Much is made in the applicant’s submissions and in those of the third-party intervener of the extreme financial hardship which may result from the policy... However, the court is not in a position to make an assessment of the effects, if any, on the many thousands in the same position as the applicants and nor should it try to do so. Any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need... The court’s role is to determine the question of principle, namely whether the legislation as such unlawfully discriminates between persons who are in an analogous situation.”

132 Ms Dobbin noted that this claim is not concerned with non-entitlement to a benefit, the capping of a benefit or a reduction in entitlement to benefit. The effect of these is plain.

Here, however, the challenge was to a payment mechanism for a benefit – the CCE – which is “advantageous to women; largely taken up by women and designed to assist them into work by (for example) having no minimum threshold of hours which have to be worked”. That being so, the basis upon which the Claimant asserted discrimination on grounds of sex was vague and appeared to be no more than a broad claim that women have greater recourse to the CCE than men. This was not sufficient. Insofar as there was any quantitative evidence before the court, it showed that more lone carers including lone parents were likely to be in work than ever before. The lone parent employment rate had steadily increased over the course of a decade. It was 69% in October to December 2019, an increase of 12.9% since October to December 2010. There was no statistical basis on which to conclude that fewer women are moving into work.

- 133 Ms Dobbin submitted that the analysis in *SG* does not assist the Claimant. Unlike the benefit cap at issue in *SG*, the CCE is a benefit which is conferred disproportionately on women. It does not result in differential treatment because payment in arrears is a universal feature of how the workforce is paid. To the extent that a proportion of childcare providers require payment in advance, this applies to all.
- 134 Nor did *DH v Czech Republic* assist. It was premised on the vastly disproportionate number of Roma children being educated in special schools. The measure complained of was one that consigned one group of children to an inferior education as compared to others. There, however, the court was prepared to rely on “statistics which appear on critical examination to be reliable and significant”, whilst also noting that this did not mean that indirect discrimination could not be proved without statistical evidence: [188]. There was no sound statistical basis for the claim here. Moreover, if the benefit was generally operating to assist women into work, it could not be said that the requirement to pre-pay childcare costs at the same time discriminates against women.

(b) Is the discrimination within the ambit of Article 8 or A1P1?

- 135 Ms Dobbin submitted that the Proof of Payment Rule did not fall within the ambit of Article 8. She relied on *DA*, in which the Supreme Court considered the compatibility of a cap on housing benefit with Article 14. At [35], Lord Wilson cited Lord Nicholls’ observation in *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 that “the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily it will be regarded as within the ambit of that article”. As Ms Dobbin pointed out, Lord Nicholls had emphasised earlier in the same paragraph that “the Strasbourg jurisprudence lends no support to the suggestion that any link, however tenuous, will suffice”. Lord Walker, in the same case at [87], held that it was not enough that the legislation was intended, “in a general sort of way, to be a positive measure promoting family life (or, it might be more accurate to say, limiting the damage inevitably caused by the breakdown of relationships between couples who have had children)”. This established no more than a “tenuous link” with the values underlying Article 8.
- 136 Ms Dobbin notes that, in *DA*, the reason why the benefit in question fell within the ambit of Article 8 was that the cap might require a mother to go to work to escape it (in which case her children would have to be cared for in some other way), to move to cheaper accommodation, to build up rent arrears and risk eviction or to forgo basic necessities. Thus, it was said at [37]: “Whatever their individual effects, provisions for a reduction

of benefits to well below the poverty line will strike at family life”. Ms Dobbin said that there was no evidence that the rule challenged here would have that kind of effect.

- 137 Ms Dobbin submitted that the Proof of Payment Rule also fell outside the ambit of A1P1, for two reasons. First, even if the Claimant was entitled in principle to receive the CCE, she had no proprietary right to receive payment in advance. Second, and in any event, the Proof of Payment Rule does not operate to preclude her entitlement (as a benefit cap does), but merely determines the time at which the award is paid.

(c) Is the Proof of Payment Rule justified?

- 138 As to justification, Ms Dobbin pointed to the broad approach to the question whether a measure in this field has a “legitimate aim” in [63] of Lord Reed’s judgment in *SG*. She emphasised that the CCE was intended for claimants in receipt of a salary. As to the appropriate intensity of review, she drew attention to [92]-[96] of the same judgment. At [96], Lord Reed said this:

“The fact that they affect a greater number of women than men has been shown to have an objective and reasonable justification. No one has been able to suggest an alternative which would have avoided that differential impact without compromising the achievement of the Government’s legitimate aims. Put shortly, it was inevitable that measures aimed at limiting public expenditure on welfare benefits, addressing the perception that some of the out-of-work were receiving benefits which were excessive when compared with the earnings of those in work, and incentivising the out-of-work to end employment, would have a differential impact on women as compared with men. That followed from the fact that women formed the majority of those who were out of work and receiving high levels of benefit. The Government’s considered view, endorsed by Parliament, that the achievement of those aims was sufficiently important to justify the making of the Regulations, notwithstanding their differential impact on men and women, was not manifestly without reasonable foundation. I would accordingly dismiss the appeals.”

- 139 Ms Dobbin relied also on similar reasoning in the judgments of Lord Hughes at [155]. She submitted that the same analysis applies here, *a fortiori*. The CCE is intended to assist a group of claimants who are predominantly women. If women are the primary beneficiaries, then any adjustment to the architecture of the scheme is bound to affect them disproportionately. That fact must be relevant to the question of justification.
- 140 Ms Dobbin relied on the fact that the Proof of Payment Rule was given effect by the Regulations, which were subject to the “draft affirmative” procedure and were approved by both Houses of Parliament. The significance of that fact can be seen from [94] of Lord Reed’s judgment in *SG*, citing Lord Sumption in *Bank Mellat*, at [44]:

“When a statutory instrument has been reviewed by Parliament, respect for Parliament’s constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament review. This applies with special force to legislative instruments founded on considerations of general policy.”

- 141 This principle applied, Ms Dobbin submitted, despite there being nothing to suggest that the Proof of Payment Rule had itself been considered by the legislature. Even so, it reflected broader policy choices which had been endorsed by Parliament.
- 142 The proper approach to the assessment of the aims of a measure such as this, Ms Dobbin submitted, was to be found in the passage quoted above from [44]-[45] of *Parkin*. This shows that a policy can have more than one legitimate purpose. Here, an important part of the purpose was to simplify the rules for claiming the benefit, thereby reducing error and fraud.
- 143 In para. 21 of her Summary Grounds of Resistance (which stand as Detailed Grounds pursuant to Mostyn J's order for permission), the Secretary of State made clear that she does not rely on mitigating measures (such as the FSF) as overcoming the difficulties faced by those struggling with the upfront costs of childcare. These mitigating measures were, on the Secretary of State's pleaded case, "irrelevant to the question of whether the requirement that childcare costs be paid before UC is paid, due to concerns about fraud and error, was manifestly without reasonable foundation".

(d) Is the Proof of Payment Rule irrational?

- 144 As to the rationality challenge, Ms Dobbin submitted that the Proof of Payment Rule is very different from the rule considered in *Johnson*. There, the challenged rule was arbitrary and caused actual loss to the individual affected by it; and it operated contrary to the overarching aim of the scheme. Here, the rule was part of the deliberate design of the policy; and given the evidence that the proportion of lone parents entering the workplace is increasing, there was no basis on which the court could say that the rule frustrates the overall aim of the scheme.

Discussion

(a) Is the Proof of Payment Rule indirectly discriminatory?

- 145 The concept of indirect discrimination in Article 14 of the Convention is considerably less well developed than the equivalent concepts in domestic and EU equality law. The main reason is that, unlike in domestic and EU equality law, the grounds on which Article 14 prohibits discrimination are not closed. They include "other status". The case law of the Strasbourg Court has interpreted that term broadly. This means that it is often possible to identify a group, defined by reference to an "other status", against which a challenged measure discriminates directly.
- 146 *DH* is generally cited as the first express recognition by the Strasbourg Court that Article 14 prohibits indirect as well as direct discrimination, though the discussion there makes clear that there were previous decisions of that Court which, in retrospect, can be understood as cases of indirect discrimination: see at [137]. Lord Reed's judgment in *SG* recognises this development at [13]-[14].
- 147 The test for indirect discrimination used by the Strasbourg Court at [175] of its judgment in *DH* is whether the challenged measure has "disproportionately prejudicial effects on a particular group". The application of this test to the Proof of Payment Rule is disputed in two respects. First, Ms Dobbin says that the evidence does not establish that the rule has a prejudicial effect either on the Claimant or on others. Second, Ms Dobbin argues

that any prejudicial effects fall equally on all claimants, rather than disproportionately on women.

- 148 As to the effect on the Claimant, Ms Dobbin undertook a detailed analysis of the Claimant's witness statement and exhibits. The purpose of this analysis was to make good the submission that the Claimant cannot show her current financial difficulties to be causatively linked to the Proof of Payment Rule. The evidence shows, Ms Dobbin submits, that a number of other factors generated the financial difficulties which the Claimant describes in her statement. These include the fact that her daughter's father does not contribute financially and does not provide childcare. Moreover, given that the Claimant was on her own account given latitude in relation to some of the advance payments, "it is difficult to see how this Claimant can attribute her difficulties solely to the need to pay before being reimbursed by Universal Credit".
- 149 This submission is, in my judgment, not well founded. The question is not whether the Claimant's difficulties are attributable *solely* to the Proof of Payment Rule, but whether that Rule has had "prejudicial effects" on her. That question has to be answered by comparing her actual position to the position she would have been in if the CCE had been payable on proof of liability to pay childcare charges. Her evidence establishes that the Proof of Payment Rule was *one of* the operative reasons why she had to find other sources from which to pay childcare costs to the extent that the providers were unwilling to offer latitude. In this case, these other sources sometimes included interest-bearing loans. This means that the Proof of Payment Rule contributed materially to making her financially worse off than she would have been had advance payment of the CCE been available; and that it contributed materially to the "cycle of debt" and the associated psychological effects she describes. Her evidence, the veracity of which was not challenged, also establishes that the need to pay for childcare in the summer holidays had a significant effect on her decision to reduce the number of hours she worked. I have no doubt that there were other causes too. It might conceivably be necessary to identify which of these causes predominated if she were to pursue a claim for damages. For present purposes, however, it is enough that the Proof of Payment Rule contributed to making the Claimant materially worse off – financially, psychologically and ultimately in terms of her ability to realise her ambition to work full-time – than she would have been if the CCE had been payable on proof of liability to pay childcare charges. These were "prejudicial effects".
- 150 As to the Proof of Payment Rule's effect on others, I bear in mind the caution urged by the Grand Chamber of the Strasbourg Court in *Carson v UK* (and reiterated by the Supreme Court in *DA*) about drawing conclusions as to the general effects of a policy. I accept that there is a lack of robust, quantitative evidence as to the numbers materially affected by the Proof of Payment Rule and as to the extent of the effects. But the Claimant's evidence in this case comes from a broader range of informed sources than is seen in some other challenges of this kind. Even though judicial review proceedings do not ordinarily and did not in this case involve oral testing of evidence, the process has afforded the Secretary of State the opportunity to challenge any aspects of the Claimant's evidence which she considers unfounded or inaccurate by adducing contrary evidence of her own.
- 151 In my judgment, it is possible to draw the following conclusions from aspects of the Claimant's evidence derived from Government data or from research to which there is no substantial challenge:

- (a) As at August 2019, 50,269 households were receiving the CCE. Of these, 41,928 were single parents, of which 40,690 were women. This means that, overall, 81% of those receiving the CCE were single mothers: see para 26 of Ms Lawton's statement, based on DWP data.
- (b) The median hourly pay of single mothers (both in the UK as a whole and in London) is very substantially less than that of mothers in couples, single fathers or fathers in couples: see Gingerbread's report *Held back: single parents and in-work progression in London*, exhibited to Ms Dewar's statement, at p. 9, reporting an analysis of data from the Labour Force Survey, conducted under the aegis of the Office for National Statistics. The Secretary of State did not challenge the conclusions drawn from the analysis.
- (c) In contrast to other regular outgoings, childcare costs, both for school age and for pre-school-age children, are "highly volatile and subject to regular fluctuations" with substantial increases during the school holidays: see para. 18 of Ms Lawton's statement, reflecting research by Save the Children.
- (d) Although there is evidence of some childcare providers affording latitude to UC claimants in paying childcare costs (see para. 29 of Ms Lawton's statement and the Claimant's own evidence), there is also evidence that a large proportion of childcare providers are in a financially precarious position: see para. 16 of Mr Broadbery's statement, based on Department for Education data.
- (e) There are no quantitative data showing the proportion of childcare providers which require payment and/or deposits upfront. There is, however, good qualitative evidence showing that a significant proportion do. Not only is this the experience of the individuals who have given evidence in this case; it is confirmed by NDNA (see para. 17 of Mr Broadbery's statement) and PACEY, which advises its members not to agree a contract without a deposit and one month's payment in advance: see para. 8 of Ms Bayram's first statement.
- (f) The Proof of Payment Rule contributes to problems with paying for childcare, leading to UC customers getting into debt, in a sufficient number of cases for the issue to have come to the attention of Save the Children and Gingerbread (organisations which work with UC claimants) and, separately, NDNA and PACEY (organisations which represent childcare providers). This is consistent with the evidence given by Child Poverty Action Group to the Work and Pensions Select Committee in September 2018, which described the Proof of Payment Rule as the most common issue raised in connection with childcare costs in universal credit on its Early Warning System (a system which gathers cases from advisors working with families and social security recipients around the country and analyses these to identify emerging issues related to social security reforms). The evidence before the Court does not enable any findings as to the number or percentage of cases in which such problems occur. It is, however, not likely that the issue would have been identified independently by these separate organisations if the number were not significant in real and percentage terms.
- (g) There is anecdotal evidence from more than one source of providers seeking to get around the Proof of Payment Rule by providing receipts instead of invoices to customers who have not in fact paid: see para. 29 of Ms Lawton's statement, based

on Save the Children's experience of engagement with parents; and, separately, para. 11 of Ms Bayram's second statement, based on its survey of childcare providers.

- 152 Taken together, this evidence demonstrates that the Proof of Payment Rule has material adverse (and therefore "prejudicial") effects on a significant number of those entitled to the CCE. Whether it has *disproportionately* prejudicial effects on women as a group is a different question. The word "disproportionately" assumes a comparison between (i) the proportion of those prejudicially affected by the measure who are members of the protected group and (ii) the proportion of a comparator pool who are members of the protected group. If there is a significant difference between these two proportions, then it may be said that the measure has "disproportionately prejudicial effects" on the protected group.
- 153 The case law on indirect discrimination in domestic law (under the Equality Act 2010 and its predecessors) shows that it is not always easy to identify the appropriate comparator pool: see e.g. *Secretary of State for Trade and Industry v Rutherford (No. 2)* [2006] ICR 785, [73] (Lady Hale). The difficulty is acute in the present case, because the CCE (unlike some other elements of UC) is a benefit that is targeted at a group whose members are mostly women. The Proof of Payment Rule in principle applies to all who are entitled to the CCE, so – in common with every other rule affecting the mechanism for assessing or paying the CCE – it affects a group whose members are mostly women. If the appropriate comparator pool is UC claimants as a whole, there is no doubt that the rule "disproportionately" affects women, by virtue of the fact that the CCE itself disproportionately benefits women. The effect of Ms Dobbin's submission, although not put in quite this way, is that the appropriate comparator pool is neither the population as a whole, nor UC claimants as a whole, but those in principle entitled to the CCE. Within *that* group, the Proof of Payment Rule affects all equally, or at least there is no evidence that a woman is more likely to be affected by it than a man.
- 154 I do not accept Mr Buttler's submission that *SG* directly resolves this issue in the Claimant's favour. Although the point went by way of concession, Lady Hale explained at [181] of her judgment in *SG* why the benefit cap at issue there was indirectly discriminatory. The key part of her reasoning was that "[l]one parents constitute around 24% of all claimants for housing benefit, but have so far constituted between 59% and 74% of those affected by the cap. This is more than double their proportion in the housing benefit population as a whole. Overall some 92% of lone parents are women". This suggests that the appropriate comparator pool was the group in principle entitled to the benefit. The cap was indirectly discriminatory because, *within that group*, it was more likely to impact adversely on women than on men.
- 155 The fact that a benefit is disproportionately claimed by a particular group is not enough to make every adverse rule which applies to that benefit indirectly discriminatory against the group in question. If it were, it would be possible to challenge a failure to increase the level of the benefit as indirectly discriminatory. It is not: see e.g. *R (Adiatu) v HM Treasury* [2020] EWHC 1554 (Admin), [146] (Bean LJ and Cavanagh J).
- 156 There is, however, a feature of the present case which was not present in *SG* or *Adiatu*. On the Secretary of State's own case, the Proof of Payment Rule flows from the basic architecture of the UC scheme, but it is plain from an examination of the rules for payment of the HCE that there is no fundamental objection to payment on the basis of

liability. The Secretary of State has decided to make eligibility dependent on liability to pay in the case of housing costs, but not childcare costs. What is really under challenge here is the decision to make an exception for one group of claimants (those claiming the HCE) but not another (those claiming the CCE). There is no evidence and no reason to suppose that there is any substantial disparity in the gender profile of the first group. The second group, however, is overwhelmingly female. In my judgment, this means that the decision has a disproportionate effect on women. The point may be illustrated in this way. Imagine an employer with one office where there is no marked gender disparity among staff and another where substantially more of the staff are women. An employer who decides to give more favourable terms to staff in the first office would be guilty of indirect discrimination, because his decision would put them at a particular disadvantage vis-à-vis men.

- 157 In any event, even if the focus of the analysis is more narrowly trained on those who are in principle eligible for the CCE, Gingerbread's evidence, however, shows – using data from the Labour Force Survey for 2017-18 – that the median hourly earnings of single mothers in the UK are substantially lower than those of mothers in couples, single fathers or fathers in couples. The disparity between the figure for single mothers (just over £8 per hour) and single fathers (just over £13 per hour) is very marked. I bear in mind that these figures relate to the population as a whole and are not specific to UC claimants. But the size of the disparity over the whole population means that even among UC claimants in principle eligible for CCE, the median woman is bound to be earning significantly less per hour than the median man. The effect of the Proof of Payment Rule is to make access to the CCE conditional of being able to pay childcare costs in advance of receiving the CCE. This is bound to have a greater impact on lower-earning CCE claimants. This means that, even within the cohort of those in principle eligible for the CCE, women are likely to be more adversely affected by the Proof of Payment Rule than men.
- 158 In this respect, the Proof of Payment Rule operates in the same way as a rule that eligibility for some benefit (or job) depends on being at least 5ft 9in tall – which is often cited as the paradigm of an indirectly discriminatory rule. Like the height requirement, the Proof of Payment Rule is properly characterised as an eligibility rule for CCE: if you cannot afford to pay childcare charges in advance of being reimbursed, you will not be eligible for the CCE. Like the height requirement, the Proof of Payment Rule does not rule out *all* women and does not rule in *all* men, but the proportion of women who can comply with it is bound to be substantially lower than the proportion of men who can.
- 159 I therefore conclude that the decision to apply the Proof of Payment Rule has disproportionately prejudicial effects on women in two ways:
- (a) First, the decision to make eligibility for the CCE – but not the HCE – dependent on proof of payment adversely affects all those in principle entitled to the CCE, of whom more than 80% are women.
 - (b) Second, within the group who are in principle eligible for the CCE, the Proof of Payment rule is bound to have a greater adverse effect on women than on men, because women as a group earn substantially less than men as a group. It follows that women are substantially more likely than men to be denied access to the CCE because they do not have enough money to pay childcare charges out of their own funds before being reimbursed.

- 160 It is no answer to these points to say, as the Secretary of State does, that the CCE is “advantageous to women”. That is true only in a narrow and irrelevant respect: it makes the members of the (disproportionately female) eligible group better off than they would be without it. But the members of that group start off at a *disadvantage* vis-à-vis those who are not eligible for the CCE, because they are responsible for the care of children. Rather than describing the CCE as “advantageous to women”, it would be more accurate to say that it goes some way towards addressing a significant structural inequality: that women account for the great majority of the group whose access to the labour market depends on being able to pay for childcare.
- 161 By the same token, it does not assist the Secretary of State to point to the fact that the lone parent employment rate has steadily increased over the course of a decade. I have no way of knowing to what extent that increase is attributable to the CCE. But, if the CCE is responsible for a significant part of the increase, that only serves to emphasise its importance to lone parents seeking to access the labour market and, by extension, the likely impact of any rule which operates as a barrier to accessing it.

(b) Is the discrimination with the ambit of Article 8 and/or A1P1?

- 162 Beginning with Article 8, if the matter were free from authority, it might be said that the CCE is designed to allow women to spend less, rather than more, time with their children and so is concerned with promoting work rather than promoting family life. But the most up-to-date law in this area is to be found in the judgment of the Court of Appeal in *C’s* case. Applying the *ratio* of that case, the test is not whether the denial of the benefit has a direct and real effect on family life, but whether the benefit is a “modality of the exercise of the right guaranteed by article 8”. That in turn depends on whether it is “a way in which the state shows respect for children and the life of the family of which they are a part in circumstances where securing the family life of children is among the principal values protected by article 8”: see [57] (Leggatt LJ).
- 163 In my judgment, the CCE is indeed a way in which the state shows respect for children and the life of the family of which they are a part. To make this point good, it is not necessary to look beyond the Executive Summary of the White Paper which preceded the 2012 Act. Having described the system which UC was to replace as one in which many claimants “remain trapped on benefits for many years”, it continued:
- “This has consequences for us all, not just those trapped on benefits who no longer see work as the best route out of poverty. The social and economic costs of the current system’s failures are borne by society as a whole, since worklessness blights the life chances of parents and children and diminishes the country’s productive potential. The UK has one of the highest rates of children growing up in homes where no one works and this pattern repeats itself through the generations...”
- 164 This passage illustrates why it is too simplistic to regard the CCE as serving only economic interests. The purpose of the benefit is to break the cycle of worklessness, which blights the life chances of children, as well as their parents. Part of the philosophy underlying the benefit is that having a parent in work changes the way children view work. The benefit enables parents and children to have a *different* family life – one in which the parent contributes to society by working and the children have a role model who lives a productive adult life that they will come to regard as normal and aspire to for

themselves. In those circumstances, applying the reasoning in *C*'s case, the benefit is, in my judgment, clearly a measure by which the state shows respect for family life. Discrimination in the way the benefit is paid is, therefore, discrimination within the ambit of Article 8 ECHR.

165 As to A1P1, the position is – if anything – even clearer. The test is again stated by Leggatt LJ in *C*'s case, this time at [48]: whether but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the CCE. The condition of entitlement complained of is the Proof of Payment Rule. The question, therefore, is not whether the Claimant had a right to receive the CCE in advance of making payment herself. The fact that she had no such right is precisely what she is complaining about. The question is whether, *but for the Proof of Payment Rule*, domestic law would have given the Claimant an enforceable right to receive the CCE. The answer to that question is “Yes”. Unlike some other benefits, which depend to a greater or lesser extent on the exercise of discretion, both eligibility for the CCE and the amount of benefit payable are fixed by law by reference to the cost of the childcare, the number of children and the earnings of the claimant. Domestic law confers on the Claimant an *entitlement* to receive the benefit, subject to the Proof of Payment Rule. If, as I have found, the Proof of Payment Rule is discriminatory, the discrimination is, therefore, within the ambit of A1P1.

166 Thus, the Proof of Payment Rule discriminates indirectly against women in the enjoyment of their Article 8 and A1P1 rights. In these respects, it engages the prohibition in Article 14. It is therefore necessary to consider whether the Rule is objectively justified.

(c) Is the Proof of Payment Rule objectively justified?

167 In the light of the authorities, the proper approach to objective justification is as follows:

- (a) In a case where a measure has a differential effect as between protected groups, the question of objective justification depends on whether *the measure which brings about the differential effect* (i) has a legitimate aim and (ii) is a proportionate means of achieving that aim: *SG*, [14] (Lord Reed). Thus, in a case of indirect discrimination, what has to be justified is not the discriminatory effect of the measure, but the measure itself: see *SG*, [189] (Lady Hale). In this case, the measure in question is the Proof of Payment Rule – or, more accurately, the decision to apply it to the CCE without exceptions.
- (b) Assessing proportionality involves answering the four questions posed by Lord Reed at [74] of his judgment in *Bank Mellat*: (i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether less intrusive measures could have been used without unacceptably compromising the achievement of the objective; and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter: see *JCWI*, [113].
- (c) In the field of welfare benefits, as in other areas turning on judgments of socio-economic policy, the test to be applied is whether the measure is “manifestly

- without reasonable foundation”: *C*, [89]; *JCWI*, [133(iv)]-[134]; *Drexler*, [51]-[75].
- (d) “When the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable”: *DA*, [66]; *Langford*, [54].
- (e) Where the “manifestly without reasonable foundation” standard applies, the intensity with which the court will review the asserted justification for the measure depends on the context: *C*, [90], citing *Kennedy*, [51]-[55]; *JCWI*, [140].
- (f) The following factors are relevant in determining the appropriate intensity of review:
- (i) the nature of the ground on which the allegation of differential treatment is made – differential treatment of “suspect” groups defined by reference to race, nationality, gender, sexual orientation, religion or sex will require “convincing and weighty reasons” by way of justification: *C*, [91]; *JCWI*, [136], [140];
 - (ii) whether and to what extent the matter involved a real socio-economic policy choice present to the mind of the decision-maker – the discretionary area of judgment to be accorded to the decision-maker will be wider if the measure under challenge was squarely considered: *Brewster*, [50], [52] & [65]; *JCWI*, [140];
 - (iii) whether and to what extent the measure under challenge has been approved by Parliament – if the measure has been approved in primary legislation, particular weight should be given to the considered assessment of the legislature (*SG*, [96]); but measures contained in statutory instruments may also attract a broad discretionary area of judgment within which the court will be slow to intervene, depending on the degree of scrutiny involved in the particular Parliamentary procedure to which the instrument is subject: *SG*, [94]; *C*, [92].
- (g) In a case where the particular rule under challenge was not considered at the time it was made, it will still be open to the decision-maker to show that the rule is objectively justified by reference to *ex post facto* evidence. “Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made *bona fide*”: *Brewster*, [52].
- (h) But such evidence must be properly particularised: “general claims, unsupported by concrete evidence and disassociated from the particular circumstances of the claimant’s case” will not suffice: *Brewster*, [65]; *Langford*, [65]-[66].

- 168 Applying that analytic framework, the Proof of Payment Rule had the aim of making UC simpler than the various benefits it replaced, with a view to reducing fraud and error, which had previously been significant problems. That was plainly a legitimate aim. Reducing fraud and error in the benefits system is not only legitimate. It is sufficiently important to justify the limitation of a protected right. The reason is obvious. Any system of welfare benefits involves the redistribution of income through taxation. A substantial proportion of the working population are net contributors. They are, in general, prepared to accept the redistribution which the system involves provided that the benefits go to those who qualify for them under the law. In a democracy, the sustainability of the system depends on these net contributors retaining confidence that that is happening in a high proportion of cases. Their confidence is liable to be eroded if payments are significantly affected by fraud or error.
- 169 This means that the answer to the first of the *Bank Mellat* questions is “Yes”. The other questions can be conveniently considered together. Before doing that, it is necessary to consider the factors relevant to the proper intensity of review: see [167(f)] above. In the first place, although this is a case of indirect discrimination, the group which is subject to disproportionately prejudicial effects is defined by reference to gender. This means that more convincing and weighty reasons will be needed than if the discrimination were on another, non-suspect ground.
- 170 As to the second of the “intensity” factors (see [167(f)(ii)] above), Ms Dobbin says that the Proof of Payment Rule involved a deliberate policy choice by the legislator (i.e. the Secretary of State). Assessing that submission requires a close analysis of the documents dealing with this issue when it was first considered and thereafter. This demonstrates as follows:
- (a) The submission of 12 January 2011 shows that consideration was given to two options for the structure of the system: a “childcare disregard” and a “childcare element”. The following submissions show a deliberate decision, by Ministers, to adopt the latter.
 - (b) The submission to Ministers on 9 February 2011 includes this: “A key source of error and fraud currently is the requirement for customers to estimate average cost over the year. Basing the award in UC on actual costs – either reported each month, or whenever costs change – would be much simpler”. This shows that the focus was on the need to move from *estimated* to *actual* costs. In the light of all of the submissions to Ministers, there is no doubt that a deliberate decision was made to do this, in order to reduce error and fraud.
 - (c) Annex A to the same submission shows that the pros and cons of a system of direct payment to the childcare providers were specifically considered. Such a system would in fact have *assisted* in reducing fraud, but there were other factors against it, in particular that it would be more complex and out of step with the basic architecture of the scheme. Direct payment to childcare providers was, therefore, specifically considered by Ministers and specifically excluded. The submission of 29 June 2011 shows a recommendation, which was accepted, that childcare support be paid to the claimant as part of the UC payment, and not through a voucher system. That too was, therefore, deliberately excluded.

- (d) The note of the workshop on 18 October 2011 (attended by Ministers) makes clear that by that time it had been proposed that claimants “will be asked to report childcare costs that they have **paid** out during the UC assessment period” (emphasis in original). This shows that by this time *someone* had formulated the Proof of Payment Rule, at least as part of a proposal. But there is nothing to indicate that Ministers’ attention had been drawn to the difference between a system which reimbursed payments made by claimants and one which provided an award for charges incurred, but not yet paid. There was no submission which set out the arguments for and against a system of the latter kind, or even drew attention to the possibility of such a system. There is, therefore, no evidence to show that there was ever any deliberate decision by Ministers to reject it.
- (e) The one reference in the papers before the court to the possibility of a system which paid for childcare costs incurred but not paid was in the note of the stakeholder meeting on 31 October 2011 (attended by officials, but not Ministers), where one of the participants asked: “Why doing cash paid rather than invoiced?” Ms Parker’s evidence that similar concerns were raised by the Child Poverty Action Group, Gingerbread and the Resolution Foundation shows that the issue had been clearly identified by at least four expert consultees. The response given by an official (“needed to fit in with everyone’s billing types, and didn’t want to have to do any reconciliation”) suggests that *officials* had considered the point and had reasons for not wanting to relax the Proof of Payment Rule.
- (f) The note summarising this stakeholder meeting for Ministers properly flagged up stakeholders’ concerns about the Proof of Payment Rule, but did not advance any reasons for preferring that rule over a system that paid childcare costs when incurred. Ministers were not advised that such a system should be rejected because of the need to fit in with different billing types, nor because it would require reconciliation. Instead, they were told that the “[a]ction” which was being taken to address the concern expressed by stakeholders was “to consider interaction with other support available to help parents pay upfront costs – i.e. budgeting loans within universal credit and support via the JCP Flexible Fund”.
- (g) There is no evidence to show what this consideration yielded or what view Ministers took about the adequacy of this other support as a means of addressing the problems identified by stakeholders with the Proof of Payment Rule. What is clear is that the other support – the only matter presented to Ministers as capable of addressing the problems identified – is, on the Secretary of State’s pleaded case in these proceedings, “irrelevant to the question of whether the requirement that childcare costs be paid before UC is paid, due to concerns about fraud and error, was manifestly without reasonable foundation”. In the light of that, neither side addressed arguments to me about the adequacy or otherwise of the FSF or any other support mechanism.
- (h) There was no evidence explaining what consideration, if any, was given to the Proof of Payment Rule when SI 2014/2887 was made, amending the UC Regulations with effect from November 2014.
- (i) Nothing in the Secretary of State’s evidence indicates that the question whether to amend the Proof of Payment Rule has been considered since by Ministers. No reliance was placed, for example, on the Government’s Response to the Select

Committee's report. Without commenting on the detail of that response it may be noted, without infringing Article IX of the Bill of Rights or the wider principle of Parliamentary privilege (see [64] above), that it relies heavily on the FSF, which the Secretary of State does not claim to be relevant to the issues in this case.

- 171 The third factor which bears on the breadth of the discretionary area of judgment is the type and degree of Parliamentary scrutiny which the measure under challenge has received. The Proof of Payment Rule is not set out in primary legislation. The UC Regulations, as originally made, contained a version of the Proof of Payment Rule, which included the key feature now under challenge – the requirement that the charges had to have been paid, and not just incurred. That version was subject to the draft affirmative procedure, which in principle involves the fullest kind of Parliamentary scrutiny to which a statutory instrument can be subject. As Ms Parker's evidence confirms, the CCE was not in fact the subject of substantive debate in either House of Parliament and was not the subject of any relevant comment by the SSAC. The current version of the Proof of Payment Rule, as given effect by SI 2014/2887, was subject to the made negative procedure, which in principle involves less scrutiny, unless the instrument is prayed against – which happens very rarely indeed and did not happen here. Nonetheless, the fact that Proof of Payment Rule was included in an instrument approved by both Houses of Parliament, and that in its amended version it was laid before Parliament, means that a greater discretionary area of judgment is appropriate here than would apply if, for example, it were simply a matter of executive policy.
- 172 Drawing the threads together, the decision not to deliver the CCE by direct payment to the childcare provider was made by Ministers. By contrast, there is no evidence that the decision to make payment of the CCE dependent on proof of payment (rather than proof that the charges have been incurred) was ever directly considered by Ministers. In considering whether that decision was manifestly without reasonable foundation, it is therefore not appropriate to apply a particularly wide discretionary area of judgment. However, the fact that the decision was given effect in an instrument approved by Parliament, and the amended version was laid before Parliament, must be recognised when applying the test.
- 173 With that in mind, I turn to the evidence of the Secretary of State in these proceedings. The following points can be made about Ms Parker's evidence:
- (a) The “key feature of the system which ensures its accuracy”, and so addresses the problems of fraud and error in the benefits which UC replaced, is that it is based on actual (rather than estimated) costs: see para. 50 of Ms Parker's statement. But none of the alternative mechanisms proposed by the various stakeholders consulted in the formulation of the policy involved a return to estimated costs. As Annex A to the submission of 9 February 2011 shows, a system of direct payment to childcare providers would have been even more effective in tackling fraud and error, but was excluded for other reasons. The submission of 29 June 2011 shows that the same is true of vouchers.
 - (b) Direct payment to claimants or payment via vouchers would involve taking childcare costs outside the UC award, which the Secretary of State says “would require an enormous investment and resource to be diverted from other areas of the department's delivery”: see para. 81 of Ms Parker's statement. But no particulars of the investment are given. As in *Brewster*, at [65], these were “general claims,

unsupported by concrete evidence”. As in *Langford*, at [66], the Secretary of State’s evidence contains “nothing by which to judge the potential additional administrative costs”. There is no indication of what is meant by “enormous”. This means that there is no way of weighing these costs against any savings that might be made if claimants were enabled to work for more hours as a result. It also means there is no way of weighing any net costs of a move to direct payment or vouchers against the discriminatory effects of the application of the Proof of Payment Rule to the CCE. There is also no explanation as to how these costs would be generated, so no way of judging whether they are unavoidable. The consequence is that the claimed administrative costs associated with direct payment or with a voucher system do not constitute a reasonable foundation for the Proof of Payment Rule.

- (c) The reasons given in the submissions to Ministers for rejecting a system of direct payment or vouchers were, in fact, not cost-related. They were to do with simplicity and with direct payments being out of step with the basic “architecture” of the scheme. There is nothing wrong with this metaphor. One of the problems with the hotchpotch of individual overlapping benefits which UC replaced was precisely that they had no overarching principles, no coherent architecture. Because one of the key objectives of UC was to incentivise and encourage work, it was designed to be paid in the way a salary would generally be paid – in a single sum, monthly. Ministers were, in my judgment, entitled to regard this feature of the structure (or “architecture”) of the scheme as important. The consequence of this, as Elisabeth Laing J said in *Parkin* at [45], is that:

“A claimant who is not in work... has to budget in the same way as a claimant who is in work. This means that UC can be calculated and paid in the same way whether a person is in or out of work, or moves between the two, and whether his earnings are from employment, self-employment or a mixture.”

- (d) These considerations provide a reasonable foundation for the conclusion, reached by Ministers after consideration of the views of stakeholders and reviewing the pros and cons, that childcare costs should not be met by direct payment to the provider or by a voucher system. The decision to favour a simpler system, with a single monthly payment, so as to minimise deviations from the architecture of the scheme, is the kind of socio-economic choice on which democratic decision-makers are entitled to a relatively broad discretionary area of judgment. It is not the kind of decision this Court can properly stigmatise as lacking a reasonable foundation.
- (e) But direct payments to providers and vouchers were not the only possible alternatives to the Proof of Payment Rule. The key focus of the argument in these proceedings has been on the difference between proof of payment (on the one hand) and proof of liability to pay (on the other). The Secretary of State’s justification for selecting the former as the basis for entitlement for the CCE invokes another aspect of the “architecture” of the scheme: the principle that payment under UC is made “in arrears”. Thus, it is said that payment of childcare costs “in advance” could lead to the same problems as had arisen with the previous benefits: claimants receiving over or under payments for childcare or simply estimating costs incorrectly. This, in turn, would increase the risk of error or fraud and result in overpayment being

recouped from the next month's award, undermining the predictability and simplicity of UC: see para. 52 of Ms Parker's statement.

- (f) The arrangement being discussed in this part of Ms Parker's evidence seems to be one in which childcare costs are paid before the UC claimant has become contractually bound to pay them. If, on the other hand, the CCE covered costs which the claimant has become *liable* to pay, though has not yet paid – as with rent and service charges in the HCE – there could be no question of those costs being paid on the basis of an “estimate”. Indeed, it is not obvious why a system of awards based on liability to pay (evidenced by an invoice) would be any more likely to result in error or fraud than a system based on actual payment (evidenced by a receipt). In both cases, the claimant has incurred a contractual liability to pay. In both cases, the amount of that liability is fixed. The only difference is that, in the former case, the liability has not been discharged.
- (g) There is no evidence that Ministers (as distinct from officials) ever directed their minds to the distinction between a system in which entitlement was based on actual payment and one in which entitlement was based on liability to pay. Neither Ms Parker in her evidence nor Ms Dobbin in her submissions explained satisfactorily why an invoice from a registered childcare provider representing the sums which the parent is contractually liable to pay would be inherently less reliable, or more likely to be subject to change, than a receipt from the same registered childcare provider.
- (h) Ms Dobbin argued that it was important to remember that UC had to cater for a wide variety of different kinds of childcare provider. Some might be large corporate entities with elaborate contracts and well-organised billing systems. Others might be individual child-minders operating more informal arrangements under which liability depended on what childcare was actually provided. The Secretary of State was, she argued, entitled to favour a simple system in which there was one, easily understandable rule applicable to every situation. As I have indicated, I accept that simplicity is a virtue in a benefits system. It can reduce administrative costs and promote easy understanding among claimants, promoting budgeting skills and reducing the scope for error and fraud. Ms Parker's evidence explains why a system based on “estimates” of future childcare costs would be administratively complex and difficult for claimants to understand and use. It also explains why a system of direct payment to provider or vouchers would deviate from the basic architecture of the system, in which a single payment is made every month. Although the point is not specifically covered in evidence, I am prepared to accept that a system with different rules for different kinds of providers might also be administratively complex and undesirable for that reason. But it is not obvious that a system which made entitlement to the CCE depend on the claimant showing that she is liable to pay charges, rather than proof of payment of those charges, would involve different rules for different kinds of provider. Payment would depend on proof of liability to pay charges. If a particular claimant was not in fact liable to pay charges at a particular point in time, or could not provide proof that she was so liable, she would (presumably) not be entitled to the CCE. That would (presumably) be so for all claimants, irrespective of the type of provider used.

- (i) Ms Dobbin rightly submitted that the mechanism for assessing and paying the HCE, which bases entitlement on liability to pay, rather than actual payment, is *not* an exception to the principle of payment in arrears – and therefore does not constitute a deviation from the basic architecture of the scheme. This is because, in the context of the HCE, “payment in arrears” just means payment after the accommodation has been provided. By the same token, making the CCE available based on liability to pay would also not (or not necessarily) involve an exception to the principle of “payment in arrears”. It is possible to conceive of a regime in which the CCE was payable upon proof of liability, but the charges must still relate to childcare provided in a past complete assessment period. Whether such a system would be capable of addressing the difficulties to which the present system gives rise would depend on whether providers were willing to wait for payment. They might be willing to do so if they knew the CCE would cover their invoices. If so, a system in which entitlement is based on proof of liability to pay would prevent claimants having to incur debt in order to pay childcare charges.
- (j) Ms Parker rejects the analogy between the CCE and the HCE, because childcare costs fluctuate, particularly with the school holidays, whereas “housing costs are fixed”: see para. 82 of Ms Parker’s statement. Whilst it may be true that there is less variation in housing costs than in childcare costs, an analysis of the UC Regulations shows that the HCE covers costs such as service charges, which may well fluctuate. In any event, the (relatively) fixed nature of housing costs is relied upon as showing why *direct* payments are appropriate in that context – and would be inappropriate in the context of the CCE. They do not explain why a system of entitlement based on liability to pay (rather than actual payment) would be inappropriate. There is nothing in Ms Parker’s statement which explains why such a system would be any less able to deal with the fluctuating costs of childcare than the current system where entitlement is based on proof of payment; and there is no *a priori* reason to suppose that it is.

174 For these reasons, having proactively examined the asserted justification for the Proof of Payment Rule, and according the Secretary of State the discretionary area of judgment that is appropriate in the circumstances, I conclude that, insofar as the Proof of Payment Rule lacks a reasonable foundation and is therefore not objectively justified, it is therefore incompatible with Article 14.

(d) Is the Proof of Payment Rule irrational?

175 The approach adopted by the authorities when considering whether a discriminatory measure is objectively justified has much in common with the approach to considering whether a measure is rational. As Leggatt LJ noted in *C’s* case at [90], the intensity of review applicable in a common law rationality challenge also varies depending on context. This point was made by Lord Mance in *Kennedy*, at [50]-[55]. The main contextual feature mentioned there was the impact of the matter under challenge on the fundamental rights of the claimant, but *Johnson* is clear authority that the intensity of review will be greater (and the discretionary area of judgment open to the decision-maker correspondingly narrower) if the matter under challenge was not specifically considered by the decision-maker. Ultimately, as Rose LJ said at [50] of her judgment in *Johnson*, the key question is very similar to that which arises when considering objective justification: “has a reasonable balance been struck by the SSWP – or rather is it possible

to say that no reasonable Secretary of State would have struck the balance in the way the SSWP has done in this case?”

- 176 For the same reasons as I have concluded that the Secretary of State’s considered and deliberate decision to reject direct payment or voucher mechanisms had a reasonable foundation, that decision was also, in my judgment, rational.
- 177 However, the decision to make entitlement dependent on proof of payment, rather than proof of liability to pay, has striking parallels to the decision under challenge in *Johnson*:
- (a) As in *Johnson* (see at [84]), the Secretary of State’s evidence showed that “deliberate choices” and “system design decisions” had been made. However, as in *Johnson*, much of that evidence focussed on issues other than the key question of liability/payment – in particular, the decision to move from a system of estimated costs to a system of actual costs; and the decision to reject direct payments and vouchers.
 - (b) As in *Johnson* (see at [91]), there was no evidence to show that a deliberate decision had been taken by Ministers to do nothing about the difficulty, highlighted by stakeholders, with a system in which payment was based on payment rather than liability to pay. The particular matters now relied upon (the difficulty of catering for different billing practices, the administrative problems associated with reconciliation) were not presented to Ministers. The action which Ministers were told was being taken (increasing funding for the FSF and other support mechanisms) is now not relied upon as part of the justification for the Proof of Payment Rule.
 - (c) The evidence about the administrative costs said to be associated with any move from the Proof of Payment Rule is considerably *less* well particularised than the equivalent evidence in *Johnson*, which Rose LJ in any event rejected at [82]-[83]. In any event, as I have said, these costs appear to relate to the introduction of a system of direct payment or vouchers, not to a move from proof of payment to proof of liability as the trigger for entitlement.
 - (d) There is evidence that the feature under challenge has effects that are antithetical to one of the underlying principles of the overall scheme. It establishes that the Proof of Payment Rule can force claimants to reduce the number of hours they work because they are unable to pay the costs of the childcare that would be needed to work the hours they would wish to work, ultimately making them more dependent on benefits.
 - (e) For the reasons set out in [173] above, the justifications now put forward for maintaining the Proof of Payment Rule do not adequately explain the need for entitlement to be based on proof of payment, rather than proof of liability. In those circumstances, although officials appear to have given some consideration to it when the policy was being formulated, the maintenance of the Rule can properly be said to be irrational in the sense in which that term is used in *Johnson* at [107] (Rose LJ) and [115] (Underhill LJ).
- 178 For these, reasons, I conclude that the maintenance of the Proof of Payment rule, insofar as it precludes a system where eligibility is based on liability to pay, is irrational.

Conclusion

179 This claim therefore succeeds. I shall invite further submissions before determining the form of order which is appropriate in the light of my findings.