Neutral Citation Number: [2019] EWHC 462 (Admin)

Case No: CO/590/2018 & CO/4542/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2019

**Before**:

**MRS JUSTICE MAY**

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**Between:**

| | |
|---|---|
| **(1) TD**<br>**(2) AD (A child, by her litigation friend TD)**<br>**(3) Ms Patricia Reynolds (‘PR’)** | **Claimants** |
| **- and -** | |
| **The Secretary of State for Work and Pensions** | **Defendant** |
| **The Commissioners for HM Revenue and Customs** | **Interested Party** |

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**Tom Royston, Counsel** (instructed by **The Child Poverty Action Group**) for the **Claimants**
**Edward Brown & Jack Anderson, Counsel** (instructed by **Government Legal Department**) for the **Defendant**
**No attendance by or on behalf of the Interested Party**

Hearing dates: 23 & 24 January 2019

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# Approved Judgment

## Mrs Justice May:

### Introduction

1. These claims seek to challenge the implementation of aspects of the new system of welfare benefit known as Universal Credit ("UC").

2. UC was created by the Welfare Reform Act 2012 as a replacement for multiple means tested "legacy" benefits.

3. In March 2017 the Claimants ("TD/AD" and "PR") were each subject to adverse decisions made by the Defendant ("SSWP") ceasing their entitlement to certain legacy benefits. Following those decisions, the Claimants were obliged to claim UC. Their entitlements under UC were less than their legacy benefit entitlement as a result of which each household received lower monthly welfare payments than formerly. The adverse decisions concerning the legacy entitlements were later revised, but the effect of the legislation implementing UC was that TD/AD and PR were obliged to remain on UC, receiving less per month than they would have (continued to) receive under their legacy entitlement. Although the legislation in 2012 introducing UC provided a power to afford transitional protection to those who moved from legacy benefits to UC (see [16] below), no such protection has as yet been enacted. Accordingly, neither of these Claimants received any transitional support following their transfer to UC in 2017.

4. TD and AD, together with PR, seek a declaration that the implementation of UC has in their cases resulted in unlawful discrimination contrary to Article 14 read with Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"), and/or with Article 8.

5. It is said on behalf of the Claimants that this is a test case: an analysis of Government statistics undertaken by Carla Clarke, solicitor with the Child Poverty Act Group, suggests that in the year September 2016 to August 2017, an estimated 57,000-61,000 persons in receipt of Employment Support Allowance ("ESA") had their benefit stopped by decisions that were later revised. A proportion of these claimants will be in the same position as TD/AD and PR, having had to transfer irrevocably to UC, where their benefit entitlement is lower than it was before. In her evidence, Ms Clarke identified a number of similar cases known to her.

6. Permission was given for TD/AD's claim by Simler J on 2 August 2018. An order giving permission to PR, and joining the claims, was made by Murray J on 10 December 2018. I should like to record here my gratitude to both counsel for their interesting and helpful arguments on this application.

## The Legislative Framework

*An overview of welfare provision*

7. What follows is taken very largely from the judgment of Lewis J in *R (TP and AR) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2018] EWHC 1474. I am indebted to him for the clarity with which he reviewed and set out the state of welfare provision in England and Wales.

*Legacy benefits*

8. Employment and Support Allowance ("ESA") has its origins in the Welfare Reform Act 2007 ("the 2007 Act").

9. The 2007 Act provided in section 1 ESA to be paid to persons who met certain criteria, including having a limited capability for work by reason of a physical or mental condition. Paragraphs 6 and 7 of Schedule 4 to the Employment and Support Allowance Regulations 2008 ("the 2008 Regulations") provided for the supplementary payment of a severe disability premium (SDP) and an additional payment (EDP) respectively to persons with severe disabilities.

10. In addition to income related support, other legacy benefits include child tax credit and housing benefit.

*Universal Credit*

11. A White Paper entitled *"Universal Credit: Welfare that Works"* Cm 7957 was presented to Parliament in November 2010. The paper identified problems with the existing welfare system. It noted that there were over 30 different benefits and many more combinations of benefits. It considered that the system provided poor incentives to work and the complexity led to difficulties for people in identifying what benefits and tax credits they would be eligible to receive. It noted that the complexity led to administrative costs. Chapter 2 of the White Paper indicated an intention to create a new system in the following terms:

> *"Universal Credit is a radical new approach to welfare*
>
> *• It will bring together different forms of income-related support and provide a simple, integrated benefit for people in or out of work*
>
> *• It will consist of a basic personal amount (similar to the current Jobseeker's Allowance) with additional amounts for disability, caring responsibilities, housing costs and children.*
>
> *• As earnings rise, we expect Universal Credit to be withdrawn at a constant rate of around 65 pence for each pound of net earnings. Higher earnings disregards will also reinforce work incentives for selected groups.*
>
> *When introduced, Universal Credit will initially apply to new clams. It will be phased in for existing benefit and Tax Credit recipients. <u>There will be no cash losers at the point of change, ensuring that no will see their benefits reduced when Universal Credit is introduced.</u>"* (emphasis added)

12. There were further passages in the White Paper dealing with the anticipated impact of the proposed scheme on existing benefits. It was noted that *"in most cases Universal Credit will provide a similar or higher level of support than the current system"* (paragraph 12 of chapter 2). The same paragraph recorded the government's intention

that no one would lose as a direct result of the reform and gave a commitment to provide additional cash sums to anyone who would receive less under the new system than they were receiving under the existing system.

*Introduction of Universal Credit*

13. The legislative provisions providing for the creation of UC are contained in the Welfare Reform Act 2012 ("the 2012 Act"). Section 1 provides as follows:

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

14. Regulations under section 12 of the 2012 Act were to be made by statutory instrument; the first regulations made under the relevant statutory provisions were subject to the affirmative resolution procedure: see section 43 of the 2012 Act.

15. Section 36 of the 2012 Act provided for what was described as "migration to universal credit", being the process of replacing existing legacy benefits with UC. Detailed provision was made in Schedule 6 to the 2012 Act where paragraph 1 of Schedule 6 provided a power to make regulations *"for the purpose of or in connection with replacing existing benefits with universal credit"*. Paragraph 4 of Schedule 6 to the 2012 Act provided for the termination of an award of an existing benefit and included a power to make provision for additional payments to ensure that the amount of the new benefit was not less than the amount of benefits previously obtained, stating as follows (at paragraph 4(3)(a) of Schedule 6):

> *"Provision ...may secure that where an award of universal credit is made .....*

*(a) the amount of the award is not less than the amount to which the person would have been entitled under the terminated award, or is not less than that amount by more than a prescribed amount".*

*Regulations made regarding UC*

16. The first set of regulations made under section 12 of the 2012 Act were the Universal Credit Regulations 2013 ("the 2013 Regulations").

17. The 2013 Regulations provide for an award of UC to include an element reflecting the fact that a claimant has a limited capability for work and work-related activity. The amount payable in respect of that element of UC is intended to be higher than the amount paid to persons who, under the existing welfare system, fell within what is known as the support group (that is, those who currently receive the basic allowance by reference to the fact that they have a limited capacity for work and work-related activity). The 2013 Regulations did not, however, include any additional disability premiums such as SDP or EDP. The result of this change was that a person who had previously been in receipt of SDP/EDP would receive less money overall. Under UC they would receive a higher basic allowance but no additional premiums.

*Transfer to UC - cessation of legacy benefits*

18. The provisions which resulted in these Claimants' entitlement to legacy benefits ceasing are regulations 8 and 13 of the Universal Credit (Transitional Provisions) Regulations 2014 (SI 2014/1230) ("the 2014 Regulations"). The 2014 Regulations were laid before Parliament on 14 May 2014 and came into force on 16 June 2014.

19. Regulation 8 (at the relevant time) provided as follows:

*"**8. – Termination of awards of certain existing benefits: other claimants***

*(1) This regulation applies where—*

*(a) a claim for universal credit (other than a claim which is treated, in accordance with regulation 9(8) of the Claims and Payments Regulations, as having been made) is made; and*

*(b) the Secretary of State is satisfied that the claimant meets the basic conditions specified in section 4(1)(a) to (d) of the Act (other than any of those conditions which the claimant is not required to meet by virtue of regulations under section 4(2) of the Act).*

*(2) Subject to paragraph (3), where this regulation applies, all awards of income support, housing benefit or a tax credit to which the claimant (or, in the case of joint claimants, either of them) is entitled on the date on which the claim is made are to terminate, by virtue of this regulation—*

*(a) on the day before the first date on which the claimant is entitled to universal credit in connection with the claim; or*

*(b) if the claimant is not entitled to universal credit, on the day before the first date on which he or she would have been so entitled, if all of the basic and financial conditions applicable to the claimant had been met.*

*(3) An award of housing benefit to which a claimant is entitled in respect of [specified accommodation] does not terminate by virtue of this regulation.*

*(4) Where this regulation applies and the claimant (or, in the case of joint claimants, either of them) is treated by regulation 11 as being entitled to a tax credit—*

*(a) the claimant (or, as the case may be, the relevant claimant) is to be treated, for the purposes of the 2002 Act and this regulation, as having made a claim for the tax credit in question for the current tax year; and*

*(b) if the claimant (or the relevant claimant) is entitled on the date on which the claim for universal credit was made to an award of a tax credit which is made in respect of a claim which is treated as having been made by virtue of sub-paragraph (a), that award is to terminate, by virtue of this regulation—*

*(i) on the day before the first date on which the claimant is entitled to universal credit; or*

*(ii) if the claimant is not entitled to universal credit, on the day before the first date on which he or she would have been so entitled, if all of the basic and financial conditions applicable to the claimant had been met.*

*(5) Where an award terminates by virtue of this regulation, any legislative provision under which the award terminates on a later date does not apply."*

20. Regulation 13 provided as follows:

***"13. – Appeals etc relating to certain existing benefits***

*(1) This regulation applies where, after an award of universal credit has been made to a claimant—*

*(a) an appeal against a decision relating to the entitlement of the claimant to income support, housing benefit or a tax credit (a "relevant benefit") is finally determined;*

*(b) a decision relating to the claimant's entitlement to income support is revised under section 9 of the Social Security Act 1998 ("the 1998 Act") or superseded under section 10 of that Act;*

*(c) a decision relating to the claimant's entitlement to housing benefit is revised or superseded under Schedule 7 to the Child Support, Pensions and Social Security Act 2000; or*

*(d) a decision relating to the claimant's entitlement to a tax credit is revised under section 19 or 20 of the 2002 Act, or regulations made under section 21 of that Act, or is varied or cancelled under section 21A of that Act.*

*(2) Where the claimant is a new claimant partner and, as a result of determination of the appeal or, as the case may be, revision or supersession of the decision the claimant would (were it not for the effect of these Regulations) be entitled to income support or housing benefit during the relevant period mentioned in regulation 7(3), awards of those benefits are to terminate in accordance with regulation 7.*

*(3) Where the claimant is not a new claimant partner and, as a result of determination of the appeal or, as the case may be, revision, supersession, variation or cancellation of the decision, the claimant would (were it not for the effect of these Regulations) be entitled to a relevant benefit on the date on which the claim for universal credit was made, awards of relevant benefits are to terminate in accordance with regulation 8.*

*(4) The Secretary of State is to consider whether it is appropriate to revise under section 9 of the 1998 Act the decision in relation to entitlement to universal credit or, if that decision has been superseded under section 10 of that Act, the decision as so superseded (in either case, "the UC decision").*

*(5) Where it appears to the Secretary of State to be appropriate to revise the UC decision, it is to be revised in such manner as appears to the Secretary of State to be necessary to take account of—*

*(a) the decision of the First-tier Tribunal, Upper Tribunal or court, or, as the case may be, the decision relating to entitlement to a relevant benefit, as revised, superseded, varied or cancelled; and*

*(b) any finding of fact by the First-tier Tribunal, Upper Tribunal or court."*

21. The Claimants came within the provisions of regulation 13 as

(a) each of TD/AD and PR made a successful claim for UC,

(b) they succeeded in an appeal or on an application for a revision against decisions regarding a "relevant benefit",

(c) neither was a "new claimant partner", accordingly regulation 8 applied,

(d) the effect of regulation 8 was to terminate their entitlement to a "relevant benefit",

(e) it was not appropriate to revise the UC decision under regulation 13(5) as the UC decision itself was correct.

22. It can be seen, therefore, that in each case the effect of Regulations 8 and 13 together was to preclude the Claimants from re-claiming their previous legacy benefits and receiving payments at the level to which they were formerly entitled. This is known, colloquially, as "the lobster pot" principle: once in, there is no way back. As Dr Fannon, Universal Credit Policy team leader, made clear in her evidence, the "lobster-pot" principle is a cornerstone of UC policy.

## Transitional Protection

23. The Government and Parliament gave initial consideration to the provision of transitional protection for claimants transferring to UC from their former legacy provision. This can be seen in documents which include:

(i) The 2010 White Paper on UC, referred to above, recording:

> "*The Government is committed to ensuring that no-one loses as a direct result of these reforms. We have ensured that no-one will experience a reduction in the benefit they receive as a result of the introduction of Universal Credit*"

(ii) A Briefing Note dated 11 September 2011 stating:

> "*Transitional protection will protect the existing entitlements of people already receiving the various premiums in the current system. In an individual case the need for transitional protection will depend on how the overall benefit entitlement is affected by the move to Universal Credit. The groups who may need some transitional protection as a result of the changes described in this paper include:*
>
> *Families who receive the disabled child element of Child Tax credit (or the disabled child premium in income support) for a child but not the severely disabled child element*[1]

[1] TD would be an example of someone falling with this group

> *People who have been awarded the severe disability premium in the existing out of work benefits*[2]"
>
> …

(iii) A further Briefing Note dated 10 December 2012 stating:

> "*The principle of offering Transitional Protection which avoids cash loss at the point of change and which erodes over time is an established one….*
>
> ..
>
> *To ensure there will be no cash losers directly as a result of the migration to Universal Credit where circumstances remain the same, the Government will provide cash protection to claimants whose Universal Credit award would be less than under the old system, in the form of an extra amount to make up the difference between the old and the new. The maximum amount will be fixed at the point of change and cash protection will continue to be paid until the value of the award under the new system overtakes the levels of the pre-Universal Credit entitlement.."*

(iv) The Government response to the House of Commons Work and Pensions Select Committee's third report of Session 2012-13 dated February 2013 containing the following, at para 65:

> "*65. Our reforms will create a simpler and fairer system with aligned levels of support for adults and children. More importantly, no-one, whose circumstances remain the same, will lose out in cash terms as a result of the move to Universal Credit. Where the total household Universal Credit entitlement would be lower than the household's total existing receipt of benefit and tax credits, Transitional Protection will be applied as a cash top-up to make up the difference. Over time, Transitional Protection will be eroded as claimants' circumstances change, allowing households time to adjust to the move to Universal Credit.*"

24. These initial statements of policy suggested that all claimants transferring to UC whose total benefits were lower than they had been prior to transfer would receive transitional protection. However, by June 2018 the policy had developed further. There emerged a distinction between two groups of persons claiming benefit, as highlighted by Dr Fannon in her first witness statement:

> "*(1) Claimants with a change of circumstances and who present fresh claims for payment ("known as 'natural migrants'); and"*

[2] PR would be an example of someone falling within this group

> *(2) Claimants who have no change of circumstances and whose entitlement is recalculated by the state (known as 'managed migrants')*"

Dr Fannon went on to say:

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

25. The separation of legacy claimants into two groups – those who 'naturally' transfer to UC and those who are 'managed migrated' – has implications, at least in current policy, for whether or not transitional protection is to be afforded to them. In her second witness statement Dr Fannon explained that:

> "*The SSWP has given active and careful consideration to transitional protection for those groups who have lost disability premiums as a consequence of moving to UC in any circumstance. The social policy decision as to what transitional protection should be made available and to whom is manifested in the Draft Regulations, which the Government laid on 5 November 2018.*" (para 34, emphasis added)

26. The draft regulations to which Dr Fannon refers in this passage were The Universal Credit (Managed Migration) Draft Regulations 2018, now replaced by The Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Draft Regulations 2019. The draft MM Regs provide for a "transitional element" to be paid to all "managed migrated" claimants whose total entitlement is lower on UC than it was under their legacy benefits.

27. There is a specific provision in the draft MM Regs for all those who were in receipt of the Severe Disability Premium (SDP) prior to their transfer to UC: if, by the time the draft MM Regs come into force, such persons have already moved to UC then it is intended that they will receive some transitional payment (albeit, for many, not up to the level which would fully bridge the gap between the entitlement under UC and their former entitlements under the legacy system)[3].

28. Other than this, there is no current actual or draft provision for persons who have "naturally" migrated to UC to obtain transitional protection of any kind.

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[3] PR is an example of a claimant who would qualify for some additional payment if the draft MM Regs were to come into force in this form

29. To complete the picture, there has very recently been enacted the Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019. The effect of this piece of legislation is to prevent those claimants who are currently in receipt of SDP from transferring to UC "naturally" ie after a change of circumstances which might otherwise trigger a claim for UC. As Dr Fannon explained at para 39 of her second statement:

> "*Claimants [currently receiving SDP] will, at some point in the future, receive a migration notice and will have to claim UC. This will be through the managed migration process. Upon managed migration, if the total amount of legacy benefit entitlement exceeds the amount of UC entitlement that difference will become a transitional element in their UC award.*"

30. The present position, therefore, is that, apart from benefit claimants who were, or are at present, in receipt of SDP there is no current provision (nor any intention on the part of the Government to provide one) to compensate claimants for a drop in benefit entitlement incurred on a "natural" transfer to UC, even where that "natural" transfer has occurred as a result of what is later found to have been an erroneous decision on the part of the SSWP. Moreover, as at the present date, the provision of some form of transitional payment to claimants (like PR) who were in receipt of SDP but who have already transferred to UC is in draft form only and has not yet been approved by Parliament.

## The Claimants

*TD and AD*

31. TD is a single parent. She used to work as a laboratory research chemist until she gave up work in 2015 to look after her daughter, AD. AD has sickle cell anaemia and epilepsy. She requires monthly blood transfusions and needs to attend other regular medical appointments. At the beginning of 2017, TD was entitled to income support, carer's allowance and child tax credit, with a disability element. Her total entitlement (excluding housing benefit) was £1005.45 per month. She also received disability living allowance, on behalf of AD, of £333.23 per month.

32. From 25 March 2017 the SSWP stopped TD's award of income support. Her Job Centre advised her that she should claim UC, which was awarded to her from 27 April 2017. TD later successfully challenged the decision to stop her income support but the application of Regulations 8 and 13 described above, precluded her from receiving or claiming any legacy benefit after 27 April 2017.

33. TD was awarded UC of £872.90 per month, which was £136.99 per month less than the amount to which she had been entitled under the legacy system. The loss of entitlement on transfer to UC was because of the less generous treatment of some children with disabilities under UC compared with legacy benefits.

34. Subsequently, on 18 August 2018, the SSWP revised the level of AD's disability living allowance (DLA) upwards. This revision had consequences for TD's UC entitlement, entitling her to the highest rate of the disabled child element of child tax credit up to 27

April 2017 and thereafter at the highest rate of the disabled child element of UC. The effect of this has been that the household's combined entitlement is now at the same level under UC as it would have been had TD continued to receive her legacy benefits. Notwithstanding this increase in her UC payments, TD contends that her claim is not academic as she and AD continue to seek a declaration and damages for the distress caused to them resulting from the drop in income at the time of transfer; the declaration sought would also benefit others in the same position as TD/AD but who remain on a lower entitlement under UC.

*PR*

35. PR lives on her own. She is severely affected with rheumatoid arthritis, spondylitis, depression and panic attacks, the effect of which caused her to give up work in 2015.

36. In March 2017 PR was receiving ESA, with SDP and support component, and was also entitled to a personal independence payment.

37. On 17 March 2017, the SSWP stopped PR's ESA. PR challenged that decision; in the meantime she claimed UC on 17 April 2017 as that was the only income replacement benefit available to her pending determination of her challenge to the ESA decision. The ESA decision was reversed on 7 August 2017 but the operation of Regulations 8 and 13 described above precluded PR from receiving or claiming any legacy benefits after 16 April 2017.

38. At the time of her transfer to UC, PR's legacy benefits entitled her to receive £814.67 per month. She was awarded UC of £636.58 per month, which is £178.09 less than she had formerly been receiving. The lower UC entitlement is attributable to the less generous treatment of some adults with disabilities in UC than under the legacy system.

## Issues arising

39. Mr Royston, for the Claimants, says that this state of affairs gives rise to unlawful discrimination under Article 14. He contends that the differential treatment of his clients as against other groups (three separate comparators are proposed) is unjustified.

40. The grounds for which TD/AD and PR have been given permission are three-fold:

(1) that the treatment of the Claimants amounts to unlawful discrimination contrary to Article 14 read with Article 1 of the First Protocol to the European Convention on Human Rights; in the case of TD/AD, it is said that their Article 8 rights are also engaged.

(2) that the decision of the SSWP to prevent persons in the position of these Claimants from returning to the legacy system, without providing for transitional protection, was irrational.

(3) that the SSWP has failed to comply with her Public Sector Equality Duty (PSED).

## (1) Unlawful discrimination

41. Article 14 of the ECHR provides that:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"*

42. Article 1 of the First Protocol to the ECHR (A1P1) protects property rights, subject to certain exceptions. It does not require that the state provides subsistence benefits to its citizens, but where a state does make such provision then it must do so in a manner compatible with Article 14: see *Stec v. United Kingdom (2006) 43 EHRR 47* at [53].

43. In arriving at a decision as to whether there is a breach of Article 14/A1P1 in this case it is necessary to address the following:

(i) whether there is differential treatment

(ii) on grounds of other status

(iii) in relation to a matter failing within the scope, or ambit, of Article 14, which

(iv) the defendant cannot show is objectively justified.

44. In the case of TD and AD, Mr Royston submitted that the provision of benefits to them was also within the ambit of Article 8, inasmuch as the sudden drop in income upon transfer to UC impacted their family life. He referred me in this respect to the evidence of TD dealing with the effect on her and her daughter that the reduced payments had had.

*Decision of Lewis J in TP and AR*

45. The case of *TP and AR*, referred to above, is of particular relevance here. TP and AR were benefit claimants with severe disabilities in receipt of housing benefit. When they moved to another area covered by a different local authority they had to make a fresh claim. The legislation implementing UC required new claims for housing assistance to be made under UC, which includes assistance with housing costs. By contrast, persons who moved within the same local authority area did not have to make a fresh claim for housing assistance and accordingly remained in receipt of their legacy benefits. Like the Claimants in the present case, the level of welfare benefit which TP and AR received under UC was lower than the total of their former legacy benefit entitlement.

46. TP and AR were further disadvantaged by reason of the fact that their benefits under UC, living alone, were lower than for persons with equivalently severe disabilities who had a carer living with them.

47. TP and AR sought to challenge as unlawfully discriminatory (i) the 2013 Regulations insofar as they gave rise to a discrepancy in provision between those living with a carer

and those living alone, and (ii) the implementation provisions in the 2014 Regulations requiring persons moving into a new local authority area to transfer to UC.

48. Lewis J dismissed the challenge to the 2013 Regulations on the basis that they unfairly discriminated between persons with severe disabilities who had a carer receiving a carer's allowance and persons with severe disabilities living alone. Lewis J explained his decision as follows:

> "62. The purpose, or aim, underlying the 2012 Act and the 2013 Regulations was to restructure the benefit system by introducing a simpler system which would replace the existing system of overlapping benefits with a single benefit. That was seen to be a means of ensuring the system was fairer, more affordable and better able to address poverty and worklessness. One of the things that was considered in making the 2013 regulations was the appropriate allocation of resources to those with disabilities. The view was taken that there should be a level of support for those with disabilities which was higher than the basic allowance previously paid to the support group but that there should not be additional components in universal credit equivalent to the former SDP and EDP.
>
> …
>
> 64…the 2013 regulations pursue a legitimate aim, namely the proper allocation of resources and the appropriate method of structuring a welfare benefits system to provide, amongst other things, assistance to those with disabilities. The conclusion reached on how to achieve those aims was not manifestly without reasonable foundation. It is correct that where disabled persons have carers those carers will receive a cash payment in respect of the care provided to the disabled person. That reflects the view of the decision-maker that it is desirable to encourage people to act as carers and to provide them with a financial incentive to do so. Those without carers will not receive, as they formerly did, additional disability premiums in the form of SDP or EDP which they could have used, if they had wished, to purchase care. That, however, reflects the view that such disability premiums were not an appropriate mechanism for targeting support to those with such disabilities.
>
> …
>
> 66. In all the circumstances it cannot be said that the decision to structure universal credit in the way that was done was manifestly without reasonable foundation. Consequently, applying that approach, it cannot be said that the differential treatment between those persons with disabilities who have carers, and those who do not, is not objectively justified."

49. The second issue which Lewis J considered concerned the effect of the implementation provisions on persons who, like TP and AR, had moved to a different housing area. He found that the effect of the provisions in their case did give rise to unlawful discrimination contrary to Article 14 read with A1P1. It is necessary to set out, at some length, Lewis J's reasoning in arriving at this decision:

> "81. All parties accept the legitimacy of a phased transition from the existing benefits system to universal credit. I agree that the aim of achieving a gradual, or phased, introduction of universal credit is a legitimate aim. I further agree that it is legitimate to identify the fact that one aspect of the assistance needed, such as assistance with housing costs, is an appropriate trigger to move a person from the existing benefit system to universal credit.
>
> 82. The difficulty that arises in the present case, however, is the way in which the Transitional Regulations achieve that for the present group of claimants. The trigger is moving local housing authority area. Such a move however, has far-reaching consequences in relation to the income related benefits that the person receives. In particular, those who were in receipt of income related benefits in the form of the basic allowance and the SDP and EDP cease to be able to continue receiving those, and move to universal credit, and consequently suffer a considerable loss of income – but without any consideration, apparently, being given as to whether or not an element of transitional protection is appropriate for persons in this position. There is nothing in the contemporaneous material before this court to indicate that the decision-maker addressed the consequences of this method of implementation or whether, and if so what, element of protection might be appropriate.
>
> 83. Such a situation arises in a context where the Government has previously indicated that there may be groups (including severely disabled persons who were in receipt of additional disability premiums) who may need an element of transitional protection and where the Government has indicated that it needed to identify the groups for whom, and the circumstances in which, such transitional protection should be made available. That material indicates that the Government considered that this issue needed, at least, to be addressed and an element of protection may need to be provided at least in some circumstances to some groups. It is not a policy aim created or imposed by the courts. It is a potential need apparently recognised by the Government.
>
> 84. That potential need was recognised in the White Paper Cm 7957 presented to Parliament before the Bill which became the 2012 Act was enacted. It was referred to by the minister in Parliament in the debates upon the 2013 Regulations. It was referred to by the minister in correspondence in December 2012.

The Briefing Notes issued in 2011 and 2012 refer to the issue and, indeed, appear to reflect the thinking of the then Government that an element of transitional protection for this group should be provided and that a change of circumstances arising out of changes in the need for housing assistance would not justify the ending of transitional protection for income related benefits.

85. Despite that, there is nothing in the material before me to indicate that the issue had been considered before the making of the Transitional Regulations either by the Government or by Parliament when the draft regulations were laid before it. There is no material indicating why the Transitional Regulations do not include any element of protection and why it is considered that the financial burden arising out of the differences between amounts received in respect of income related benefits for those with severe disabilities under the former system and payable universal credit should now fall on those who have moved from one local housing authority area to another. A change in housing circumstances may provide an explanation as to why it was appropriate to require them at that point to switch to universal credit. It does not explain why they should do so without any apparent consideration of whether any element of transitional protection should be provided in those circumstances in relation to the income related element of universal credit.

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

87. Applying the approach to justification favoured by the claimants and the Commission, the Transitional Regulations seek to pursue a legitimate aim, the phased transition to universal credit, and are rationally connected to that aim. In the absence of any evidence about the connection between that aim and the absence of any element of transitional protection, it is not easy to determine whether or not any less intrusive measure could have been adopted.

88. In any event, the material before court does not establish that the Transitional Regulations as they stand strike a fair balance between the interests of the individual and the interests of the community in bringing about a phased transition to universal credit. The impact on the individuals is clear. They were in receipt of certain cash payments (the basic allowance and SDP

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

50. There is an obvious parallel between the position of the claimants in *TP and AR* and that of the Claimants here. I was told that there is an appeal pending.

*Analysis*

*Proposed comparators - status and ambit*

51. The Claimants rely on two alternative comparator groups, or "statuses" for the purpose of Article 14:

   (i) Individuals in respect of whose legacy benefits no error has been made, and/or

   (ii) "managed migrants", being existing claimants whom it is proposed will, in due course, be moved to UC in a phased manner.

   (iii) disability.

52. Mr Brown, for the SSWP, accepted that (i) above was a proper status for the purposes of Article 14 but argued that the breadth of the comparator group had important implications for justification (see further below). It was not right, he argued, to use the "managed migrant" group in (ii) above as a comparator, since the legislation identifying and constituting such a group was still only in draft form; the group was as yet unformed, speculative. As regards (iii) Mr Brown contended that a disparate impact had not been demonstrated: it would be necessary to show, he said, a disparately greater effect of erroneous decisions amongst disabled and non-disabled claimants. The statistical analysis in Ms Clarke's witness statement did not demonstrate that persons with disabilities were more likely to have errors made in their legacy claims.

53. Since Mr Brown accepted (i) as a legitimate status, arguments in relation to (ii) and (iii) assumed a lesser importance, although as both counsel pointed out, the character of different comparable groups may bear upon the court's enquiry into justification. The

link between comparators and justification is well-recognised: see for instance *AL (Serbia) v. Secretary of State for the Home Department* [2008] UKHL 42.

54. In relation to (ii) Mr Royston referred me to the case of *DH v. Czech Republic (2008)* 47 EHRR 3, where the European Court made a comparison with an hypothetical "other" ethnic group in making a finding of discriminatory treatment. However, as Mr Brown pointed out, this was an hypothetical constructed by reference to an easily identifiable protected characteristic (race/ethnicity). To seek to identify a comparator group by reference to statutory provisions that have not yet been agreed by Parliament or brought into force is quite another matter.

55. I agree that the "managed migrant" group is too speculative to form a proper comparator; it may well yet change, taking into account the extent of debate and revision to which UC has been subjected since 2010.

56. As regards (iii) above, Mr Royston relied on the evidence of Ms Clarke as establishing that (a) most contentious benefits decisions relate to disability issues and (b) almost all of the reductions upon transferring to UC from legacy benefits are to disability benefits. He submitted that in these circumstances the effect of moving persons to UC irrevocably ("lobster pot") without transitional protection indirectly discriminates against people with disabilities (relying on *Secretary of State for Work and Pensions v. Bobezes* [2005] EWCA Civ 111, per Lord Slynn at [34]-[45]).

57. I think a different analysis is required. It is clear that, on Ms Clarke's evidence, persons with disabilities, as a group, are more likely to claim benefits and are more likely (because of the structure of benefits under UC) to receive less under UC when it is claimed following an adverse decision. But the UC system is not itself unlawful (see *TP and AR*); the adverse impact on the Claimants in this case results from an erroneous benefits decision being made. Unless it can be shown that the group of persons with disabilities is more likely to have an adverse decision made in their case than a group of persons without disabilities then a disparate impact based on disability has not been established. Ms Clarke's statistical analysis does not go that far. On this analysis disability is not a proper comparator.

58. I was not addressed in any detail at the hearing in relation to Article 8 and whether or not it could properly be said to be engaged for the purposes of the operation of Article 14 in the context of social policy decisions about welfare payments. It is apparent from the lengthy consideration of relevant case law undertaken by Ouseley J in the *SC* case (referred to below) that this is as yet an unsettled area of law. Happily, counsel were agreed that matters relating to Article 8 (if engaged) added little to the key issue for me in these proceedings, namely justification. It is that issue to which I now turn.

*Justification*

59. The parties' skeleton arguments suggested differences in their approaches to the matter of justification, of the kind referred to by Lewis J in *TP and AR* case at [59]-[61]. By the time of the hearing before me, however, such differences appeared to have been resolved. Counsel were agreed that the proper approach to justification in circumstances such as the present is that approved by the Supreme Court in *R (Carmichael and others)* [2016] UKSC 58, namely whether the specific treatment is "manifestly without reasonable foundation".

60. It is the discriminatory impact of a policy, rather than the policy itself, that must be shown to be manifestly without reasonable foundation: *R (SG & Ors) v Secretary of State for Work and Pensions* [2015] UKSC 16 at [188].

61. The way Mr Royston put it on behalf of his clients was that the combination of the "lobster pot" principle, taken together with the absence of transitional protection, had a discriminatory impact on his clients that was unjustified and consequently unlawful.

62. Mr Brown emphasised first that the provision of welfare in general, and the consideration of transitional protection in particular, are quintessentially matters of social policy for consideration by Parliament and the Executive. Since 2010, he pointed out, there has been extensive debate around UC, which is acknowledged by all to be an important welfare reform. Insofar as there have been statements made about the intention to provide transitional protection to cushion the effect of transfer, Mr Brown pointed out that there is no applicable principle of legitimate expectation such as to give rise to any justiciable claim.

63. Mr Brown also stressed that welfare provision, by its very nature, involves setting arbitrary rules and that determining entitlement to benefits necessarily discriminates between different groups of citizens. He referred me to the following observations made recently by Ouseley J in *SC and others v SSWP and others* [2018] EWHC 864 (Admin):

> "Welfare benefits are inherently discriminatory in the obvious sense that they are not made available to all regardless of circumstance. Groups are defined by characteristics which policy or legislation consider appropriate for various forms of state assistance: child benefit, state pensions, disability benefits, housing benefit and CTC/UC and so on through the whole catalogue. Necessarily some fall outside those categories, whether on a blanket or bright or arbitrary line approach."

64. I was taken also to the observations of Lord Mance in *Mathieson* at [51], citing Lord Bingham:

> "Courts should not be over-ready to criticise legislation in the area of social benefits which depends necessarily on lines drawn broadly between situations which can be distinguished relatively easily and objectively. I would emphasise this as an important principle in terms rather more forceful than I think para 27 of Lord Wilson JSC's judgment conveys. In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] AC 1312, Lord Bingham's speech on this point read more fully at para 33 as follows:
>
> "Thirdly, legislation cannot be framed so as to address particular cases. It must lay down general rules…A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be

> held to invalidate the rule if, judged in the round, it is beneficial.""

65. Whilst acknowledging the wide latitude afforded to decision-makers, Mr Royston made the point that the test for justification is not untrammelled; he drew my attention to observations of the Court of Appeal in *Humphreys v HM Revenue & Customs* [2012] UKSC 18 to the effect that the court should give "careful scrutiny" to the reasons advanced, and submitted that this was particularly so where the executive has failed to consider a particular matter: *In re Brewster* [2017] 1 WLR 519 per Lord Kerr at [64].

> "64. Where a conscious, deliberate decision by a government department is taken on the distribution of finite resources, the need for restraint on the part of a reviewing court is both obvious and principled. Decisions on social and economic policy are par excellence the stuff of government. But where the question of the impact of a particular measure on social and economic matters has not been addressed by the government department responsible for a particular policy choice, the imperative for reticence on the part of a court tasked with the duty of reviewing the decision is diminished. In this case, DENI was not concerned about socio-economic choices when it decided to mimic the nomination requirement that was in place in England and Wales. It was motivated solely by the desire to maintain consistency between the two schemes. Of course, after the appellant's challenge materialised, the department addressed possible advantages that might accrue if the nomination requirement was maintained and, as I have said, these are not to be dismissed solely because they are the product of hindsight — nor even because they have been put forward *post hoc* as a possible justification for discrimination in reaction to the appellant's claim. But the level of scrutiny of the validity of the claims must intensify to take account of the fact that the claims are made *ex post facto* and the claimed immunity from review on account of the decision falling within the socio- economic sphere must be more critically examined."

66. In *TP and AR*, Lewis J approached his consideration of the "manifestly without reasonable foundation" test as it applied to the differential effect of the UC implementation provisions by looking at the extent to which the SSWP had considered the specific impact of those provisions upon persons who moved to another local authority area.

67. In *TP and AR* there were no alternative contenders for the comparator group, which consisted of persons with disabilities who had moved home within the same housing area. In the present case, as indicated above, Mr Royston proposed 3 separate groups by comparison with which the Claimants are said to have been unlawfully disadvantaged.

68. The identity of the comparator group has the potential to affect justification in this sense: Mr Brown contended that a group consisting of persons in respect of whom no adverse decision on legacy benefits has been made is so wide and so varied in terms of

its constituents' individual circumstances as to fall in the very outer rings of the concentric circles of personal characteristics described by Lord Walker in *R (RJM) v. Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) [2009] AC 311*. This is significant, Mr Brown pointed out, given what Lord Walker went on to say, at para 5 of *RJM*:

> "The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify"

69. Thus although Mr Brown was prepared to concede the status of the first of Mr Royston's proposed groups, he submitted that the breadth of that group effectively lowered the justification hurdle for the SSWP here.

70. A further critical distinction between *TP and AR* and the present case, Mr Brown argued, related to the evidence available to Lewis J last year and the evidence put before me at this hearing. Lewis J arrived at his conclusion regarding (the absence of) justification on the basis that, on the material he had seen:

> "there appears to have been no consideration of the desirability or justification for requiring the individual to assume the entirety of the difference between income related benefits under the former system and universal credit when their housing circumstances change and it is an appropriate moment to transfer them to universal credit." (*TP and AR* at [88]) .

71. Mr Brown submitted that there was ample material before me at this hearing to show that proper consideration had been given to persons in the position of the Claimants, such that the test was met. He relied, in particular, on the following:

(i) the evidence of Dr Fannon, at para 41 of her first statement: *"[t]he specific circumstances of claimants (such as TD and AD) whose challenge to legacy decision succeeds after their migration to UC has been specifically highlighted and considered by the Department and Ministers."*

(ii) the contents of a written submission made to Lord Freud, Minister for Welfare Reform, dated 25 March 2015 entitled "*UC Claimants who were previously on ESA/IB and who successfully dispute an ESA Work Capability Assessment decision"* ("the March 2015 submission"), setting out matters of background, identifying and discussing possible solutions to the issue of protecting the financial position of such claimants, amongst other things whether they could be returned to the legacy system. Having set out various passages from this document in her witness statement Dr Fannon goes on to say (at para. 45):

> "*The 25 March 2015 submission made clear to Ministers that the situation had arisen as a consequence of a number of inter-related Ministerial decisions – to separate natural migration policy from managed moves policy and to proceed with a phased approach to roll out – which were necessary to ensure the safe and orderly roll out of Universal Credit and which resulted in the inability to provide transitional protection to appeals claimants and that such claimants may be worse off as a result*"

Dr Fannon in her evidence went on to set out the "pros" and "cons" debated in the March 2015 submission before noting the recommendation made to Lord Freud that no action be taken.

(iii) a further submission made to the Minister dated 17 November 2015 entitled *UC Claimants who were previously on ESA/IB and who successfully dispute a Work Capability Assessment decision* ("the November 2015 submission"), looking at whether claimants could receive redress by way of special payments. Amongst other things, the submission set out and discussed a potential definition of "maladministration" as a basis for making special payments but went on to recommend no action, noting an existing scheme operated by the DWP allowing financial redress in special cases. Dr Fannon concluded as follows (at para 53):

> "*The March and November 2015 submissions together demonstrate that the Department explored a number of avenues related to UC Claimants who successfully dispute a legacy appeal and that these and the difficulties related to the options – both returning claimants to legacy benefits and paying some form of transitional protection – were fully considered by Ministers and that a conscious policy decision was made to retain the policy of keeping all claimants, including those who have successfully appealed a benefit decision on UC. The Ministers also considered that there would be situations where claimants would be worse off, with particular emphasis placed on the policy decisions not to replicate legacy disability premiums in UC.*"

(iv) Dr Fannon's evidence in her second witness statement at [25]-[26] above, together with the contents of the draft MM Regs and the recent enactment of provisions affecting claimants in receipt of SDP. It could readily be inferred from these, suggested Mr Brown, that the position of all benefit claimants with adverse decisions that were subsequently revised had been fully considered.

72. Mr Royston contended that Dr Fannon's evidence amounted to no more than bare assertion, unsupported by any relevant documentary material. The only two documents that had been produced, he said, fell far short of demonstrating that proper and specific consideration had been given prior to the implementation of the relevant provisions. The March 2015 submission failed to establish any reasonable foundation for the failure to award transitional protection in the case of his clients, because

(a) it post-dated the implementation of the 2014 Regulations,

(b) it only recognised and analysed a very small subset of potentially affected claimants, namely those claiming ESA/IB in respect of whom a work capability assessment was later corrected.

(c) the position of children was not mentioned.

(d) Annex A to the submission showed that the discussion and recommendations were predicated on the basis that only a very small number of benefit claimants would be affected.

(e) the submission assumed (in 2015) that all benefit claimants would be moved very quickly (via managed migration) to UC, via a route which would involve transitional protection being made available to them.

73. Mr Royston argued that the material produced by the SSWP had not succeeded in establishing that it would be more complex or onerous to put in place a process for making transitional protection available to persons in the position of the Claimants than it would be to implement and operate one for the "managed migrated" cohort, as the SSWP has committed to doing. Mr Royston pointed to the proposal under the draft MM regs for transitional payments to be made to persons who had been receiving SDP prior to transfer (referred to at [28] above) arguing that this demonstrated the practicability of giving transitional protection to all "natural" migrants in the position of his clients. The core question as to whether it was more difficult to provide transitional protection to his clients than providing protection to claimants who are to be moved in a planned way in the future had simply not been addressed, he submitted.

74. At the heart of the claim, Mr Royston said, were claimants who had lost money as a result of something that the SSWP had got wrong; it was hard to see, he suggested, why this group should be less deserving than the normal run of "migrated moved" claimants. In the words of PR, in her witness statement:

> "*I fail to understand why, because DWP got it wrong…I should be the one who has to pay the price.*"

75. Mr Royston drew my attention also to what he described as the ill-fitting descriptor "natural migrant" applied by the SSWP to persons in the position of his clients, whose circumstances had not changed and whose only reasons for moving to UC was because their legacy benefits had been wrongly removed. If "natural migrants" were persons who moved to UC on a change of circumstance, as Dr Fannon in her evidence characterised them, then the Claimants fell more naturally into the other group, to whom transitional protection was being made available. Mr Royston pointed out that there was nothing in the material produced by the SSWP which had addressed this important distinguishing feature.

76. Mr Brown responded that the SSWP did not need to show that it was more difficult to provide transitional protection to persons who had transferred following a decision that was later corrected. The SSWP needed to do no more, he pointed out, than to demonstrate that proper consideration had been given to persons in the position of the Claimants.

*Conclusion on the issue of justification*

77. I have reluctantly reached the conclusion that Mr Brown is right and that, on the evidence in this case, it cannot be said that the differential treatment of these Claimants, as a result of which there was no transitional protection available to cushion their transfer to UC in 2017, lacked consideration so as to render it manifestly without reasonable foundation. That is my conclusion from the perspective of each of the proposed comparator groups, even if my conclusions on comparability/status in [55]-[57] above are wrong.

78. Mr Royston's criticisms relating to the narrowness of the March 15 submission and the omissions from it of specific reference to other categories of claimant are powerful, but the evidence of Dr Fannon goes much wider than the March or November 2015 submissions and sufficiently establishes, in my judgment, that consideration was given to the position of all claimants who transferred to UC as the result of a decision ceasing legacy benefits which was later revised. I accept Mr Brown's submission based on Dr Fannon's evidence that the March and November 2015 submissions were simply illustrations of the consideration given to the group of claimants in respect of whom legacy benefit decisions are later reversed. The fact that these submissions post-dated the coming into force of the 2014 Regulations does not undermine Dr Fannon's evidence that the matters had been under consideration before that time; indeed the "Background" section in the May 2015 submission shows that the issues raised had been under consideration for some time.

79. I have borne in mind also the need to place and assess the evidence in the context of the constitutional and social policy considerations discussed in the cases drawn to my attention by Mr Brown referred to above. The implementation of UC involves political decisions on matters of social policy where difficult choices must be made concerning the allocation of finite resources. The role of the courts is to evaluate the legality, not the morality, of such political decisions.

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

*(2) Irrationality*

81. Mr Royston's next ground was that the SSWP had acted irrationally in implementing the "lobster pot" principle without also making provision for transitional protection.

82. In my view Mr Royston's case on irrationality amounted to a re-packaging of his points on justification, above, and my conclusion is the same. The SSWP's manner of implementing UC cannot be said to be irrational if her treatment of these claimants was justified by sufficient consideration of their position.

*(3) PSED*

83. Section 149 of the Equality Act 2010 provides as follows:

> *"149 Public sector equality duty*
>
> *(1) A public authority must, in the exercise of its functions, have due regard to the need to—*

> *(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
>
> *(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
>
> *...*
>
> *(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*
>
> *...*
>
> *(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
>
> *...*"

84. The principles governing the proper exercise of the duty were summarised by McCombe LJ in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [25]. The Claimants' case is that the SSWP has produced no evidence that she has discharged her duty under s.149 in relation to any matter material to this case.

85. Mr Royston submitted that what had happened to the Claimants in this case was a good example of what can go wrong when things change over time. The equality impact assessments (EIAs) relied upon by the SSWP here were conducted in November 2011 and December 2012, Mr Royston pointed out, at a time when the (then) SSWP was committed to making transitional protection available. The EIAs relied on dated from a time before implementation under the 2014 regulations combined the "lobster pot" principle with an absence of transitional protection. There had been no fresh EIA addressing that set of circumstances, Mr Royston submitted. He argued that the March and November 2015 submissions were manifestly unsuitable for considering the full range of persons with disabilities.

86. In response Mr Brown pointed out that the case for a failure to make sufficient assessment of the impact of UC on persons with a disability had been considered and rejected in *TP and AR*. He reminded me that PSED is a process obligation requiring only that "due regard" be had to the relevant protected characteristic (here, disability). Mr Brown submitted that the relevant impact for these purposes was the lower payments being made to certain classes of disability under UC; but contended that even if it encompassed the impact on claimants in the position of TD/AD and PR then that had been considered.

87. In my view the question of whether the SSWP has sufficiently complied with the PSED was decided by Lewis J in *TP and AR*. His decision on that aspect is not the subject of any appeal. In any event, I agree with Lewis J that the issues raised by a challenge founded on PSED join with those raised by justification, namely the extent to which proper consideration has been given to the impact of a measure on these claimants. Accordingly if there is a narrower duty under s.149 as contended for by Mr Royston then in my view the SSWP has complied with her obligation to have due regard to persons in the position of these claimants notwithstanding the absence from the material of a documented EIA contemporaneous with, or post-dating the 2014 regulations.

## Conclusion

88. For the reasons given above, the claims made by TD/AD and PR each fail and must be dismissed.