Neutral Citation Number: [2021] EWHC 309 (Admin)

Case No: CO24442020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2021

Before :

Mrs Justice Whipple

- -

Between :

The Queen **On the application of** **(1) The Motherhood Plan** **(2) Ms Kerry Chamberlain**	**Claimants**
- and - **Her Majesty's Treasury**	**Defendant**
Her Majesty's Revenue and Customs	**Interested Party**

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Jude Bunting, Clare Duffy and Donnchadh Greene (instructed by **Leigh Day and Co**) for the Claimants
Julian Milford QC, Rupert Paines and Zoe Gannon (instructed by the Government Legal Department) for the Defendant and Interested Party

Hearing date: 21 January 2021

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Approved Judgment

Mrs Justice Whipple:

Introduction

1. On 30 April 2020, HM Treasury, the Defendant to this claim, introduced the Self Employment Income Support Scheme (the "Scheme", or "SEISS") by way of a direction under sections 71 and 76 of the Coronavirus Act 2020. The Scheme provided for payments to those who carried on a business, which business had been adversely affected by the coronavirus emergency. With some exceptions, payments under the Scheme were to be based on average trading profits ("ATP") of the individual's business over the preceding three full tax years (ie 2016/17, 2017/18, 2018/19).

2. The First Claimant is a registered charity which aims to end discrimination faced by pregnant women and mothers by campaigning for changes to legislation, raising awareness of these issues in the media and working with employers to change business practice and culture. It is also known as "Pregnant then Screwed". The Second Claimant is a self-employed energy analyst. She has three young children. Her second child was born in 2017 and her third was born in 2018. She took maternity leave of 39 weeks after each of those children was born. As a result of that, her business income reduced significantly in the tax years 2017/18, and 2018/19.

3. The Claimants challenge the Scheme on two main grounds:

    i) Because it unlawfully discriminates against self-employed women who have taken a period of leave relating to maternity or pregnancy in the three preceding tax years, contrary to Article 14 read with Article 1 of Protocol 1 of the Human Rights Convention. This ground is advanced on the basis that the discrimination takes one of two forms, either "conventional" indirect discrimination or discrimination of the *Thlimmenos* type, in either case, resulting in unjustified disadvantage to this group of women.

    ii) The Defendant breached the Public Sector Equality Duty in section 149 of the Equality Act 2010.

4. The Defendant and Interested Party resist this application for judicial review on the basis that there is no discrimination at all, of either sort; but in any event, were the Court to find that discrimination existed, such discrimination and the measure which caused that discrimination are justified. The Defendant takes issue on the facts to deny that there was any breach of the PSED.

5. Permission was granted on the papers by Henshaw J on 22 September 2020. He directed an expedited hearing and imposed cost capping on terms subsequently agreed between the parties.

6. At the hearing, which took place remotely, the Claimants were represented by Mr Jude Bunting, Ms Clare Duffy and Mr Donnchadh Greene; the Defendants and Interested Party were represented by Mr Julian Milford QC and Mr Rupert Paines. I am grateful to all counsel for their clear and focussed submissions.

The Self-Employment Income Support Scheme

7. In response to the pandemic, on 17 March 2020, the Chancellor of the Exchequer announced various measures to provide financial support to businesses and local authorities. On 20 March 2020, he announced various measures to support employed people and businesses, including the Coronavirus Job Retention Scheme, the Coronavirus Business Interruption Loan Scheme, a deferral of VAT payments and self-assessment income tax payments for certain people. This preceded the first national lockdown which commenced on 23 March 2020.

8. On 26 March 2020, the Chancellor announced his action plan to support the self-employed. That included the Scheme. In the terms of the announcement:

> "The government will pay self-employed people, who have been adversely affected by the Coronavirus, a taxable grant worth 80% of their average monthly profits over the last three years, up to £2,500 a month."

The Chancellor said that HMRC were working on the Scheme urgently and he hoped that it would be open for applications from June 2020.

9. On 30 April 2020, the Chancellor exercised powers under the Coronavirus Act to establish the Scheme by means of "The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Self-Employment Income Support Scheme) Direction" (the "First Direction"). HMRC (the Interested Party in this claim) were to be responsible for the payment and management of payments under the Scheme.

10. The details of the Scheme were set out in a Schedule to the First Direction. Paragraph 2 of the Schedule states the purpose of the Scheme, in the following terms:

> "The purpose of [the Scheme] is to provide for payments to be made to persons carrying on a trade the business of which has been adversely affected by the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease."

11. Paragraph 4 described who qualified for a payment under the Scheme, being a person who had carried on a trade the business of which had been adversely affected by the pandemic, had delivered a tax return for a relevant year on or before 23 April 2020, had carried on a trade in the tax years 2018/19 and 2019/20, and intended to continue to carry on a trade in the tax year 2020/21. "Relevant tax year" was defined to mean all or any of 2016/17, 2017/18 and 2018/19, tax returns for those years then forming the basis on which the person's trading profit and relevant income "must" be determined for the purposes of the Scheme.

12. Paragraph 5 imposed a "profits condition", which varied in its detail depending on whether the person was subject to the loan charge (as defined in paragraph 9), and whether the person had been in business for the three previous tax years, or for only one or two. Described generally, the profits condition required a person to have trading profits of less than £50,000 pa and for those profits to be equal to or more than the sum of the person's relevant income that year. For those who had carried on a trade for the three preceding tax years (as had the Second Claimant), the average of trading profits over those years had to be £50,000 or less.

13. Paragraph 6 set out the amount of the payment, which was the lower of £7,500 or an amount representing three months' worth of 80% of the person's average monthly trading profits during the relevant year or years. The calculation of trading profits was defined as total income minus losses.

14. The Scheme opened for applications on 13 May 2020; that window closed on 13 July 2020. The Scheme has twice been extended (on 1 July 2020 and 20 October 2020).

The development of the Scheme

15. The Court was shown two witness statements from the Defendant and Interested Party respectively, which described the background to the Scheme's introduction. The first of those was a statement dated 27 October 2020 from Ms Suzanne Kantor, co-Director Personal Tax, Welfare and Pensions at HM Treasury (the Defendant). Ms Kantor described the early stages of the pandemic, and made this observation in relation to the situation towards the end of March 2020:

> "13. It was clear in light of the social distancing measures announced by the Prime Minister that large parts of the economy would be very substantially affected, and that large emergency measures would be required to deal with those effects. There was a risk that many sound businesses would permanently cease trading as a reaction to short-term pressure on cash flow from fixed costs and disappearing revenues. Preventing failures of otherwise sound businesses and large-scale job losses could only be achieved by quickly moving to alternative sources of cashflow."

16. She goes on to describe the way the Scheme was designed and came into existence. The emergency was unfolding, and the situation was urgent, as she makes clear in the following paragraphs:

> "40. It cannot be too strongly emphasised that SEISS was and had to be developed at great speed, so that it could be implemented as quickly as possible, against the background of the significant public health restrictions that were necessary to combat the Pandemic.
>
> 41. The pace of work on SEISS was intense. Everyone involved in the design and delivery of SEISS was conscious that it was likely that the Pandemic, and the public health response to it, would be likely to cause substantial difficulties for self-employed people, and that it was necessary to put a scheme in place to assist self-employed individuals with those difficulties so far as possible. There are around 5.75m such individuals, and there was no way of knowing (in the time available) what proportion of them would be affected by the Pandemic, and to what extent. Putting it bluntly, the overriding consideration when designing and implementing SEISS was to help as many eligible people as possible in as short a time as possible, without creating an unacceptable risk of fraud or error."

17. In fact, the Scheme opened for claims on 13 May 2020, earlier than the Chancellor had anticipated in his announcement. Two extensions of the Scheme over the winter

period were anticipated, those would of course serve to increase the value of claims for payments under the Scheme.

18. The Court was also provided with a witness statement dated 27 October 2020 from Mr Max Hacon, Project Director responsible for the delivery of the Scheme at HMRC (the Interested Party). He explained the decision to take existing data from the last three tax years as the basis for calculating payments:

> "11. … Using this data was the only practical approach to design of the SEISS system. This data was already within HMRC's possession, was 'historic' data that had been submitted and validated, and so would be impossible for applicants for falsify for the purposes of claiming SEISS. It would not have been possible to capture new sets of self-assessment information in the time available. …"

19. An IT system to administer the Scheme had to be built from scratch, which required a large number of teams working across Government to cooperate together; as Mr Hacon says at paragraph 16, the scale of this project was beyond anything HMRC had previously attempted in such a short timescale. In fact, the work was completed within six weeks.

20. Anyone claiming under the Scheme was required to submit the following: a. Self-assessment Unique Taxpayer Reference ('UTR'); b. National Insurance number; c. Government Gateway user ID and password; and d. UK bank details able to receive a BACS payment. This information was then transferred (through a number of integration layers) into a new "SEISS Core Database". The functionalities of the SEISS Core Database included holding data about potentially eligible self-employed people, calculating the amount of the grant each individual is due based on the data held, accepting data about the claim submitted by each applicant, facilitating compliance and fraud checks, and making payments to individuals.

21. Mr Hacon summarises the design requirements in this way:

> "19. In the light of all of the above, certain fundamental principles underlay the design of SEISS. SEISS had to be put in place at great speed, for the reasons that I have set out. It had to be a reliable system, which would get money in people's bank accounts as quickly as possible. It had to be accurate, calculating grants on the basis of certain and verifiable underlying data, which was already in HMRC's possession. It had to have measures built in that would protect (to the extent possible) from errors and fraudulent claims. It had to be automated so far as possible, given the need for speed, reliability, and accuracy, and the constraints on HMRC's resource: ultimately computers are far more efficient at analysing and cross-referencing information than human beings. It also had to be simple for those seeking to make a claim: both in order to encourage people actually to use the system, and in order to ensure that they could do so with a minimum of 'live' administrative support from HMRC staff. Simplicity is not simply a matter of our administrative convenience: it was and is vitally important that all those eligible to claim SEISS, from whatever different backgrounds they come, and whatever their linguistic abilities

> and familiarity with administrative processes, are able in practice to do so."

22. He gave total figures for claims under the scheme of £7.6 billion, relating to 2.6 million claims, with an average award of £2,900 per person.

23. Mr Hacon described the varied process used for 2018/19 parents, who become eligible under the Second Direction. There were only around 421 claims from this group, although HMRC thought that the group itself might have comprised as many as 10,000. Each claim from this group was risk assessed (an automated process), but any claims which were considered high risk had to be subject to a manual verification process. The information required from these claimants was different and more extensive, and their claims took longer to complete.

24. Ms Kantor exhibited to her witness statement seven separate Ministerial submissions for the Chancellor prepared by civil servants in Ms Kantor's team (or by Ms Kantor herself). The first Ministerial submission was dated 22 March 2020. It noted that the Chancellor had requested officials to work on a scheme to help the self-employed. Early recommendations included making the scheme subject to some conditionality (noting that the conditions would be difficult to check or enforce) and that the scheme should cover 80% of income up to a cap, with annual income of £50,000 marking the upper limit of eligibility and for payments to be paid by way of taxable grant (not loan). It was suggested that individuals should apply for payment under the proposed scheme, and that those applications could be "very light touch" because HMRC already had the data and could check the application against existing records. This would require a bespoke IT build. It would not be possible to build in strong protections against fraud and this approach was recognised to be vulnerable and attractive to fraud. Some consideration was given to "hard cases" but the plight of women who had recently been on maternity leave was not mentioned in this submission.

25. The second submission was dated 24 March 2020. It set out the final decisions the Chancellor was asked to take before making the announcement of support for the self-employed. The Chancellor was asked to confirm his previous view, recorded in this submission, that payments should be based on the average of the previous three years' trading profits. Applications would be invited from traders identified from data already held by HMRC. The cost of the proposed scheme was likely to be £2.8bn - £3.1bn per month, with first payments being made at the end of May or beginning of June:

> *"*This time is needed for HMRC to identify eligible taxpayers based on their existing data, design the relevant forms and payment processes, and ensure the relevant payment processes are set up and have some, though not comprehensive, protections against fraud."

26. There was some discussion of equality impact, noting that females were not any more or less likely to meet the eligibility requirements than males. There was no specific reference to women who had recently been on maternity leave. Under the heading "hard cases", a number of categories were identified but women who had recently been on maternity leave were not amongst them.

27. The third submission was dated 25 March 2020. It posed a number of questions on the detail of the proposed scheme.

28. The Scheme was announced the following day, 26 March 2020.

29. The fourth submission was dated 2 April 2020. Some groups had complained about the Scheme after it was announced. The submission recorded that "opening the scheme up further will increase the fraud risk and put significant pressure on the delivery timelines you announced last week". Under the heading "self-employment for part of the year" the submission addressed the difficulty of those with only part year earnings, including women who had recently had a baby, as follows (emphasis added):

> "12. The current scheme design encounters issues for those who have only partial year earnings, for example because they started their trade mid-year, **or if they paused trading to care for a new baby. In particular, the issue around pausing trade to care for a new baby has been flagged by UK Music and Labour MPs including Jess Phillips**. One way to address for some individuals this could be to annualise profits to calculate what an individual could have expected to earn if they had been trading for a full year. Eligibility and the level of grant could then be determined using the annualised figure.
>
> 13. This would be of most benefit to individuals who started trading mid-year and would allow for their SEISS payment to more accurately reflect their (assumed) normal income. It would provide unfair benefit to those whose partial-year profits are already an accurate reflection of what their total year profits would be if, for example, their trade is seasonal.
>
> 14. **However, annualising would not capture the majority of individuals who took time off to care for a new baby, as through self-assessment data we cannot identify breaks in trade of any sort which last for less than one year.**
>
> 15. This option could also create hard cases. For example, someone who started trading in January 2019 with £15,000 profits from three months of trading would become ineligible as pro-rating would bring them above the upper income cap.
>
> 16. Annualising amounts would also carry a risk that we were seen to be departing from the principle of using the amounts returned, and annualising part year figures for existing self-employed could increase pressure to provide additional support for 19/20 starters.
>
> 17. Initial estimates suggest that the magnitude of cost for allowing pro-rata of partial year earnings would be c.£1bn for the three months. However, this is an initial estimate and so highly uncertain at this stage.
>
> ...

> **DECISION: Do you agree not to pro-rate profits for individuals with partial year self employment?**
>
> ..."

30. The fifth submission was dated 5 April 2020. It is headed "Options for groups with periods of disrupted trade and special tax treatment". Two groups in particular were identified: military reservists who had been called up in 2018/19, and those with periods of maternity leave within the relevant tax years. It was stated that "both groups have experienced periods where they have paused their trade which could affect eligibility for, and the grant value of, the SEISS". The recommendation from officials was that the Scheme eligibility conditions should be amended for reservists and some forms of parental care, so as to make them eligible where they might not otherwise have been, but that there should be no amendment to the grant calculation for these groups "as the 3 year averaging process mitigates for volatile incomes, and is a strength of the scheme". It was noted that at least 65,000 mothers had given birth in 2016/17 and 2017/18, and that there was no definition of maternity leave for the self-employed.

31. The submission provided lengthy analysis of the options. In the end, the advice given, which was adopted as the basis for the Second Direction (see paragraph 34 below), was:

> "We recommend you enable reservists and those with periods of all forms of parental leave in 2018-19 to use 2017-18 as the reference year for submitting a self-assessment return if required and that the grant calculation for both groups is not amended."

32. The sixth submission was dated 22 April 2020. It was headed "Final Steers for Treasury Direction" and gave the Chancellor a deadline for decision to enable the Scheme to be put into effect and payments to start at the earliest possible opportunity. The submission contained the following passage specific to women who had recently taken maternity leave (emphasis in the original):

> *"Maternity leave*
>
> 17. You have a statutory obligation through the Public Sector Equalities Duty, to consider the equality impacts of the SEISS, and consider mitigating action if a protected characteristic is discriminated against, whether directly or indirectly.
>
> 18. Since we initially advised you on the equality impacts of the SEISS, several stakeholders have argued that the SEISS disproportionately discriminates against pregnancy and maternity, a protected characteristic, as (i) a person currently on maternity leave may be unable to show that their trade has been adversely affected by coronavirus, and (ii) a trader who was on maternity leave for the whole of 18-19, and did not file a tax return in that year, would not be eligible for the scheme, and (iii) a trader who took maternity leave during any of the relevant years may receive a

> grant which does not reflect their usual level of trading profit, due to the averaging of trading profits.
>
> 19. … HMRC still consider a trader to be trading even if she is on maternity leave, and therefore remains fully eligible for the SEISS. Therefore situation (i) does *[sic]* causes no detriment based on the basis of pregnancy or maternity. **We recommend making this position clear in guidance.**
>
> 20. … situations (ii) and (iii). Our view is that:
>
> (ii) is a rule which applies to anyone who did not file a tax return for 18-19, and does not outwardly discriminate against those on maternity leave. However, it is clear that there are hard cases in this group, and you may wish to address this.
>
> (iii) is a consequence of the decision to average across three years to determine the level of award, which protects those who had unusually low income in 18-19. In previous advice, you ruled out pro-rating partial years of trading, which would have had a small mitigating effect on this issue, but led to over subsidisation of many others.
>
> 21. We are exploring … whether we could invite affected people to make themselves known to us through the disputes process, and apply some special rules to disregard the maternity period when calculating their claim. This would be outside the fully automated process, so we need to explore the numbers and impacts involved before determining the feasibility of this. If you do decide to take mitigating action, this will need to be achieved through issuing a second Treasury Direction.
>
> **DECISION: Please note that you have considered these further equality impacts of the SEISS."**

33. The seventh and final submission was dated 12 June 2020. It referred back to the earlier discussions about the two specific groups (reservists and 2018/19 parents – as discussed in the fifth submission of 5 April 2020 and see paragraph 31 above). So far as amendments to accommodate parental leave were concerned, officials recommended that "as a minimum, you act by amending the SEISS eligibility conditions to ensure a grant is available to those whose pregnancy/childbirth affected their 2018-19 trading profits". The Chancellor was reminded about the PSED.

34. On 1 July 2020, in line with recommendations in the seventh submission, the Chancellor made a further direction (the "Second Direction"), to introduce a second round of grants under the Scheme (this time based on three months' worth of 70% of average monthly trading profits), with applications opening on 17 August 2020 and closing on 19 October 2020. The Second Direction extended the Scheme to two specific groups who had not originally been eligible: military reservists who had been on military service in 2018/19 and persons who had not qualified because of the effects of pregnancy, maternity or childcare in 2018/19 (meaning that they had not filed self-assessment tax returns for 2018/19 or had not met the profits condition for

that year). The method of calculating the benefit for those who had become parents in 2018/19 required the submission of alternative evidence to support the claim, in the manner described by Mr Hacon in his witness statement (see paragraph 23 above).

Submissions

35. The Claimants point to what they contend is the discriminatory impact of the Scheme on women who have taken maternity leave during a relevant tax year, meaning that their trading profits for that year were lower than they otherwise might have been, and in consequence that the payments under the Scheme are lower than they otherwise might have been. The Second Claimant's position illustrates the problem: she was awarded £1,119 per month under the Scheme. This was based on the Scheme formula, taking account of her trading profits for the three relevant accounting years during which she had been in business on a self-employed basis. Her trading profits for those years were: £2,400 in 2016/17 (the year in which she commenced her business, so reflecting only part of a year's work), £8,600 in 2017/18 (during which year she took maternity leave) and £5,781 in 2018/19 (during which year she took maternity leave). She suggests that, if she had not been on maternity leave but had been able to continue to earn at similar rates, she would have received a payment of around £3,996 per month. (Mr Hacon does not agree that she would have received such a payment if the Scheme had been designed differently, but the details of the notional calculation are not important for present purposes.)

36. The First Claimant, by evidence in the form of a witness statement dated 10 July 2020 from Ms Joeli Brearley, founder and CEO of the First Claimant, suggests that this is an example of a wider problem, and that many women have been disadvantaged by the Scheme. She cites the evidence given to Parliament by Parental Pay Equality, an organisation founded in 2017, and other evidence provided to the House of Commons Petitions Committee, which on 6 July 2020 recommended that "the Government should amend the terms of [the Scheme] to take into account periods of maternity and parental leave, to avoid discriminating against new parents."

37. The Claimants submit that pregnant women and recent mothers have a special status. That status cannot be compared to men or non-pregnant partners, the status is unique. Further, pregnant women and recent mothers should not be compared to those who are unable to work for other reasons, whether medical or non-medical. This, they say, is well-established in EU and domestic law. So, for example, maternity-related discrimination does not require a comparator: see sections 17 and 18 of the Equality Act 2010, see also section 13(6)(b) of that Act allows for "special treatment" of women in connection with pregnancy or childbirth. Article 3(3) of the Equal Treatment Directive (Council Directive 76/207/EEC) reserves to Member States the right to retain or introduce provisions which were intended to protect women in connection with pregnancy and maternity. The Pregnant Workers Directive (Council Directive 92/85/EEC), although not applying to self-employed women, recognises the "vulnerability of pregnant workers, workers who have given birth or who are breastfeeding". These sources were cited by the CJEU in Case C/32/93 *Webb v EMO Air Cargo Ltd* [1994] QB 718, where the Court stated at paragraph 25:

> "… pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds,

> both of which are situations that may justify the dismissal of a woman without discriminating on grounds of sex."

38. The Claimants rely on *Ali v Capita Customer Management Ltd* [2020] ICR 87, where the Court of Appeal approved the following proposition:

> "66. [There are] ... the following six purposes of statutory maternity leave: (1) to prepare for and cope with the later stages of pregnancy, (2) to recuperate from the pregnancy, (3) to recuperate from the effects of childbirth, (4) to develop the special relationship between the mother and the newborn child, (5) to breastfeed the newborn child (recommended for a period of six months by the World Health Organisation), and (6) to care for the newborn child."

39. The Claimants argue that these principles apply with equal force to this claim which is brought under the Convention, so that in this context too, the Court should approach pregnancy and maternity as giving rise to a unique need for protection, and that women like the Second Claimant should not be equated with those who are or were unavailable for work for different reasons.

40. There was no dispute that payments under the Scheme come within the ambit of Article 1, Protocol 1 for the purposes of Article 14, relying on *Stec v UK* (2006) 43 EHRR 47 at paragraph 53. The Claimants put their case under Article 14, read with Article 1, Protocol 1, in two distinct ways. First, they argue that the Scheme has a disproportionately prejudicial effect on women who have not worked in the preceding three tax years for maternity reasons; the prejudice is that those women receive smaller payments than they would otherwise be entitled to, and thus the Scheme indirectly discriminates against such women. They cite *DH v Czech Republic* (2008) 47 EHRR 3, paragraph 175 to define indirect discrimination:

> "[the application of] a general policy or measure that has disproportionately prejudicial effects on a particular group [which] may be considered discriminatory notwithstanding that it is not specifically aimed at that group."

41. Alternatively, they argue that the Defendant has failed to treat women who have had periods away from work for maternity reasons differently from others who are eligible for payments under the Scheme even though these women are in a materially different situation from those others, applying the approach in *Thlimmenos*. The Claimants rely on *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, per Lord Wilson JSC who explained *Thlimmenos* at paragraph 40:

> "… the concept of discrimination is … underpinned by the fundamental principle not only that like cases should be treated alike but also that different cases should be treated differently. And in some cases, unlike the *A* case but exemplified by that in the ECtHR of *Thlimmenos v Greece* (2000) 31 EHRR 15, the natural formulation of the complaint is indeed that the complainants have been treated similarly to those whose situation is relevantly different, with the result that they should have been treated differently."

42. The Claimants accept, for present purposes, that the test on justification is whether the Scheme was manifestly without reasonable foundation ("MWRF"). But they take issue with the Defendant's evidence on justification for treating women in this way under the Scheme. They say that women who have recently been on maternity leave should not and at law cannot properly be compared to or treated in the same way as those who may have had periods of absence from work for other reasons, for example, ill-health. They say that the Defendant seeks, by the evidence of Ms Kantor and Mr Hacon, to rationalise these policy decisions after the event and that the Court should be cautious in accepting reasons which are now put forward; the justifications now advanced did not form part of the decision-making process at the time. They rely on *In re Brewster* [2017] UKSC 8 at paragraph 50, where Lord Kerr of Tonaghmore JSC stated:

> "… 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. In such circumstances, the court's role in conducting a scrupulous examination of the objective justification of the impugned measure becomes more pronounced. …"

43. The better evidence, they suggest, comes from the set of seven Ministerial submissions, which are contemporaneous documents, which show how the policy developed over the spring and summer of 2020. They reveal the central flaw at the heart of the Defendant's approach, which was to conclude that the *reason* why a self-employed person was away from work was irrelevant. The Claimants say that to disregard the reason for absence is, in essence, to equate maternity leave with other sorts of reasons for absence, which is wrong in principle and law. They say that the law required the Defendant to make special provision for women who had been on maternity leave during the relevant tax years and that the justifications now advanced are insufficient.

44. Finally, they say that the Defendant breached the duty to have due regard to the needs of this group of women. These women share a protected characteristic, namely that they have been on maternity leave in the past three years, and the Chancellor was obliged to have regard to the need to take steps to meet their different needs (relying on section 149(3)(a) and (b) of the Equality Act 2010). By reference to the contemporaneous evidence, the Claimants argue that he failed so to do. They point to the announcement of the Scheme on 26 March 2020 and note that by that date, the Chancellor had given no regard to the effect of the calculation on women who had been on maternity leave; the subsequent discussion of the effect of this approach on women who had recently been on maternity leave was ineffectual and insufficient, because by this stage the decision to use ATP was already made.

45. The Defendant denies that the Scheme breaches Article 14 in either of the ways that is argued. The Defendant (and Interested Party) contend that using ATP to calculate payments under the Scheme is to treat everyone in the same way. It is not a provision, criterion or practice ("PCP") which it is harder for women, or those who have recently taken maternity leave, to satisfy than, for example, men or even other women who have not taken maternity leave in the recent past. Further, there is no *Thlimmenos* discrimination because there is no basis for arguing that the Second

Claimant or other women who have recently taken maternity leave must be given special assistance; they are not different and they do not require different treatment.

46. In any event, even if there was discrimination of either kind, it is justified. The test is whether the measure was MWRF. There are five separate justifications for the use of ATP as the basis for calculating payment under the Scheme: the purpose of SEISS, policy delivery, fraud mitigation, the avoidance of perverse effects and the minimisation of cost. All of these were operative in the design of the Scheme from its earliest conception; but in any event, the issue for the Court is whether the measure is substantively justified, and it matters not precisely when the various justifications came to be articulated (see *Brewster* at paragraph 52). To have adjusted the calculation as the Claimants suggest would have been to undermine the coherence of the Scheme overall; none of the Claimants' vague suggestions for how the adjustment could have been effected are workable.

47. Finally, the Defendant says that the Chancellor did have regard to general equalities considerations and to the specific impact of the Scheme on women who had recently taken maternity leave. He did thereby comply with the PSED.

Discussion

48. It is important to identify some key points about the Scheme. Its purpose was to provide for payments to be made to self-employed people who had lost or would lose income because of the pandemic (see paragraph 2 of the Schedule to the First Direction). The context for the Scheme was the commencement of the first lockdown in response to the pandemic, which led to far-reaching social restrictions and a dramatic reduction in turnover for many businesses.

49. The Scheme was devised under enormous pressure of time, with the aim of getting payments out to the self-employed as soon as possible.

50. The quantum of payments under the Scheme had to be based on some proxy. This was not a flat-rate payment scheme, but a scheme which based the amount of payment on the established profitability of the business, up to a maximum figure. The aim of the Scheme was, by making payments in this way, to compensate for business profits forgone as a result of the pandemic. The proxy chosen was an average of the last three years' trading profits, with adjustments for those traders who could not show three years' worth of trading profits.

51. The last three years' trading profits were shown in tax returns filed for those tax years. Thus, the calculation was based on data already held by HMRC. That was why the application process could be "light touch", because it depended on accessing data already held. The calculation aimed to replace unknown and unknowable lost profits in 2020/21, and to that extent was hypothetical; but the figure arrived at was based on actual trading profits averaged over the last three years. The result was a projection based on past profits, up to a maximum per month.

Ground 1: Article 14

Discrimination

52. It is common ground that the approach to indirect discrimination claims in the context of Article 14 is to be guided by *R (Stott) v Justice Secretary* [2020] AC 51 per Lady Black JSC:

> "8. In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations."

53. There is no dispute in this case that the circumstances fall within the ambit of a Convention right, that being Article 1, Protocol 1. There is no dispute that women who, like the Second Claimant, had been on maternity leave in the last three years share a protected characteristic which qualifies as "other status" for Article 14 purposes.

54. An issue arises over whether the claimant is in an analogous situation with others who have been treated differently. The Claimants' case was that the Scheme is a neutral PCP, which applies in the same way to everyone, but it has a differential effect on women who have taken maternity leave in the recent past who are thus disadvantaged by it. It is in this context that the Claimants press the point that pregnancy and childbirth are unique circumstances which cannot be compared with other reasons for absence from work. It was not clear to me how the submission about uniqueness fitted with Lady Black's third step and in the end I understood the argument to be that the index group were disadvantaged by comparison with everyone else who was eligible for a payment under the Scheme, because these women's trading profits had been lower during the relevant tax years for reasons connected with maternity and childbirth, a unique state which did not affect others who were eligible for payments under the Scheme.

55. In the alternative, the Claimants argue that their unique situation required a unique solution, and that the calculation for these women should have been different, so as to remove the disadvantage which affected them if they were treated in the same way as everyone else who was claiming payment under the Scheme. This is the *Thlimmenos* discrimination argument.

56. A debate arose at the hearing about the nature of *Thlimmenos* discrimination, specifically, whether it is a form of indirect discrimination (as the Defendant argued) or a separate kind of discrimination altogether (as the Claimant contended). In light of that argument, I gave permission to the parties to file submissions after the hearing relating to two cases: *R (Adath Yisroel Burial Society) v Inner London North Senior*

Coroner [2018] EWHC 969 (Admin) and *R (Nichola Salvato) v Secretary of State for Work and Pensions* [2021] EWHC 102 (Admin). I was grateful for those further submissions. I have decided that it is not necessary for me to settle the issue which gave cause for them. It is sufficient to note that Article 14 clearly encompasses both kinds of discrimination. I found Chamberlain J's analysis in *Salvato,* drawing on *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, to be a helpful in identifying the types of discrimination which fall within Article 14 (see paragraphs 89 - 94 of *Salvato*).

57. The Defendant's answer to the Claimants' challenge depended in large part on a series of cases. The last in time, although the starting point for the Defendant's case, was *R (Adiatu) v HM Treasury* [2020] EWHC 1554 (Admin), where the Claimant challenged the rate at which statutory sick pay ("SSP") was paid in the context of measures taken to support employees under the Coronavirus Job Retention Scheme, arguing that it constituted indirect discrimination against female and BAME employees who were more likely to be dependent on SSP because they were disproportionately represented in the lowest income groups. The Divisional Court dismissed that argument as misconceived (paragraph 141). It went on to say, in that same paragraph (my emphasis):

> "… The rate of SSP is not a PCP which places certain categories of employees at a particular disadvantage. The classic PCP which does so is a requirement that must be satisfied in order for persons to qualify for a particular opportunity or benefit, such as a height requirement in order to be permitted to join a police force, or the requirement to be a full-time worker in order to qualify for a pension. These examples place women at a particular disadvantage because women are less likely than men to be tall, and are more likely to be part-time workers (because of child-care responsibilities). The rate of SSP is not a barrier or gateway in this sense. **It is a sum that is paid, in exactly the same way, to everyone who receives SSP, regardless of their protected characteristics. It does not place women or BAME employees at a particular disadvantage: everyone is treated the same**."

58. The Claimants' argument was dismissed at paragraph 149, in the following terms (my emphasis, again):

> "In relation to the rate of SSP, there is no "hidden barrier". … In our judgment, the defendant is right to submit the claimants do not rely upon any disadvantage that is caused by the rate of SSP itself. **Rather, they rely upon an alleged disadvantage, the absence of other financial resources, which is not caused or related to the rate of SSP in any way.** This does not turn the rate of SSP into a PCP which places women or BAME employees at a particular disadvantage. In our view the EU law challenge to the rate of SSP is wholly unsustainable.

59. Mr Milford relied on two other cases which were also before the Court in *Adiatu*. The first is *Trustees of Uppingham School Retirement Benefits Scheme v Shillcock* [2002] Pens LR 229, which concerned a challenge to the school's occupational pension scheme which excluded salary below the lower earnings limit for state pensions. The scheme was challenged on the basis that it created indirect discrimination against

women. The challenge was rejected, Neuberger J holding that the measure "involved a consistent, not a discriminatory, approach to all categories of employee". The second is *Barry v Midland Bank* [1999] 1 WLR 1465, earlier in time but considered in *Shillcock*. The bank calculated severance payments following voluntary redundancy on the basis of salary at termination date. Mrs Barry was at the time she finished her employment a part-time worker, having previously been full time. She contended that the method of calculation created indirect discrimination against women who were more likely to be part-time workers. The House of Lords dismissed the claim. Neuberger J in *Shillcock* accepted that the reasoning of the House by a majority was to reject the notion that there could be indirect discrimination in circumstances where there was no difference in treatment which placed particular employees at a particular disadvantage; everyone was treated the same way and there was no precondition or requirement which was harder for women to satisfy than men.

60. Mr Bunting argues that none of these cases concern Article 14 discrimination, nor indeed do they concern maternity rights. He suggests that the Defendant's reliance on *Barry* came late in the day and that case involves a different factual background which is not analogous. *Shillcock* is on different facts entirely, as is *Adiatu*.

61. There are of course differences between those cases and this. But there are also valuable pointers in those cases to the analysis of cases like this, even though this is a claim under the Convention (which these other cases were not).

62. I consider the Divisional Court's comments in *Adiatu* to have relevance to this case, especially the passage at paragraph 149. In this case, too, the disadvantage is not caused by the Scheme itself; rather it is a disadvantage which flows from an absence of or reduction in a person's income in the past; for the group of women represented by the Claimants, it is the consequence of a self-employed woman being unable to earn while on maternity leave. I accept the point made in the Defendant's evidence and by submission on behalf of the Defendant, that there may be many reasons why a self-employed person is unable to work. This is not to draw comparisons between the different reasons; it is simply to recognise the fact that for self-employed people, absence from work is likely to translate into lower earnings.

63. *Barry* is also of assistance in providing a factual analogy with this case: just as lower final earnings as a part-time employee could be used to calculate the termination payment, so here the lower ATP of a recent mother could be used to calculate the Scheme payments, without in either case being discriminatory.

64. I am not therefore persuaded that there is any indirect discrimination, approaching the matter on a conventional analysis. The measure imposes no hidden barriers to eligibility. So far as quantum of payment is concerned there is no hidden barrier either: quantum is based on past (average) trading profits, which are a matter of past fact. The same rule applies to all and it is no harder for a woman who has been on maternity leave to qualify or calculate their payment, than someone who has not. The fact that some claimants will receive lower payments than others reflects the fact of lower earnings in past years; I agree with the Defendant that the reasons for lower earnings in past years, in the context of this Scheme with its stated purpose, are not relevant.

65. Applying his alternative approach based on *Thlimmenos*, Mr Bunting suggests that women who have recently been on maternity leave, who are thus in a unique situation, must be afforded different treatment to reflect the fact that they have lost out on self-employed earnings in the relevant tax years; in other words, the calculation for them must be adjusted to take account of the period of lost earnings related to childbirth. This is an argument that such women have been treated similarly when they should have been treated differently. Many of the same points already outlined could be made in this context. But in my judgment, there are (at least) two problems specific to this argument.

66. First, accepting for present purposes that pregnancy and maternity are unique situations for which no comparator exists and in relation to which special protections are warranted, they are circumstances which for the Second Claimant and the group she represents exist in the past. The effect of the Claimants' argument would be to demand redress by means of the Scheme in relation to a unique situation *in the past*. None of the six factors noted by the Court of Appeal in *Ali* are relevant at this distance of time. I was shown no authority to support the proposition that uniqueness, or difference, in the past is a basis on which to require different treatment in the present, such that failure to accord that different treatment in the present amounts to unlawful discrimination.

67. Secondly, and as stated above, the disadvantage identified by the Claimants follows from the fact - for that is what it is - that they earned less in past years. I fail to see how that state of affairs requires them to be compensated through the benefits system now, by receiving a higher level of benefit. This is the *Adiatu* point: the disadvantage is not caused by the measure but rather it exists independently of the measure. I do not accept that the Scheme's failure to take account of and rectify historic disadvantage amounts to discrimination.

68. I am not persuaded that Article 14 is breached, whether on the basis of indirect discrimination of the conventional type or on a *Thlimmenos* analysis. But in case I am wrong about that, I go on to consider justification.

Justification

69. Here too there is common ground on the approach. In determining whether a measure meets the test of MWRF, the Courts should "proactively examine whether the foundation is reasonable" (Lord Wilson JSC in *DA* at paragraph 66). At paragraph 50 of *R (Langford) v Secretary of State for Defence* [2020] 1 WLR 537, McCombe LJ said this was "a clear practical guide". The question for the Court is a single compendious one: is the foundation advanced by the Defendant reasonable?

70. It is agreed that MWRF provides the appropriate test here, even though the alleged discrimination goes to a core characteristic (sex), because this is a case concerning state benefits: see *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545 per Baroness Hale JSC at paragraph 19.

71. Mr Milford also urged on me (and Mr Bunting did not suggest otherwise) that the margin of appreciation is broad in a case like this where measure is a general one, aimed at meeting economic and social needs. He relies on cases such as *Carson v United Kingdom* (2010) 51 EHRR 13 where the Grand Chamber held that:

> "61. … A wide margin is usually allowed to the state under the Convention when it comes to general measures of economic and social strategy…"

72. The Defendant relies on five separate justifications. The first is the **purpose** of the Scheme, namely, to provide support for self-employed people whose businesses were adversely affected by the pandemic. The Claimants argue that the stated purpose of the Scheme would have been better achieved by designing in an adjustment for those self-employed women who had recently been on maternity leave. I cannot accept that submission. That would be to go far beyond the stated purpose of the Scheme. It would in effect be to give it a new purpose, that of correcting perceived inequalities in the past, unrelated to this Scheme.

73. The stated purpose of the Scheme was a reasonable one. It was, in my judgment, reasonable to seek to advance that purpose by calculating payments under the Scheme by reference to ATP.

74. The second justification is **policy delivery**. The Claimants suggest that the Scheme should have included an adjustment for women who had been on maternity leave in the recent past. That could have been done, for example, by excluding months of maternity leave and allowing such a woman to gross up their earnings to arrive at a notional annual profit figure based on income in months actually worked in that year, or by excluding altogether the year when the woman in question was on maternity leave. In submissions before me, the Claimants argued that the Defendant should have adopted the same approach as it did, in fact, adopt for 18/19 parents, so as to permit alternative evidence to be submitted, which could be manually verified if necessary and which would have provided the necessary flexibility.

75. The Defendants dispute this. By their witnesses, they argue that any such alterations to the design would have introduced complexity which in turn would have led to cost and delay. Further, this would have given rise to further anomalies or "hard cases" which would have fallen on the wrong side of this new line. What is more, they say that the cohort of 18/19 parents was small (10,000) compared to the cohort of women who had been on maternity leave in the last three tax years (around 65,000), and that making an adjustment for the first group does not require an adjustment for any other group: these are political decisions balancing many factors.

76. The Defendant also points to the increased costs of including such an adjustment – assuming, for the sake of argument, that it was possible to identify an approach that was workable – because that would have required more sophisticated IT, and some degree of manual intervention in individual cases.

77. I accept that a move away from a method of calculation based on actual profits, reflected in data collected and held by HMRC, would have involved expense and led to delay, both of which were antithetical to the required quick delivery of the policy. The Defendant had good reason for adopting an approach that was simple and quick, which used one rule, one approach, applicable to all. IT overheads and manual intervention was kept to a minimum so that the Scheme could be implemented quickly. This was not unreasonable.

78. The third justification is the desire to minimise **the risk of fraud**. The Claimants suggest that the risk of fraud was not a consideration at the time, but that it has

become a justification put forward after the event. The Claimants further suggest that the Scheme was already open to extensive fraud in the form of the self-certification that the business had been adversely affected by the pandemic, so that this justification lacks cogency. Mr Hacon answers this in his witness statement, in terms that I accept (paragraph 22). He says that there was a necessary trade-off between simplicity (and speed) on the one hand, and protecting against fraud on the other; the Government took a risk that some claims would be fraudulent (in that there was no way of checking whether an individual's business had been adversely affected by Covid-19) because that was necessary if the Scheme payments were to be delivered quickly.

79. The desire for claims to be verifiable by reference to data already held by HMRC is a powerful justification for the design of the Scheme. It meant that the claims could be automated, which achieved speed and cost savings, and the risk of fraud was reduced. The concern about fraud is canvassed in the ministerial submissions right from the first, and the Defendant's evidence confirms that it was at the heart of the Scheme's design from the outset. I accept that evidence. The Claimants' suggested alternative, based on a woman self-certifying that she had been on maternity leave for certain periods, would in the Defendant's view have been "wide open to fraud", because such certifications could not realistically have been checked and for that reason would not have been acceptable. That is an understandable position to take.

80. Overall, it was reasonable for the Government to accept some areas of fraud risk while seeking to minimise that risk in other areas. The design of the Scheme involved a balance of various interests and factors.

81. The fourth justification advanced is the risk of **perverse effects** if the Claimants' proposals were adopted. The Claimants have not formulated with any precision what a Convention-compliant Scheme (in their view) could and should have looked like; they simply point to the deficiencies in this one. The Defendant answers that the omission in the Claimant's case is striking, because in truth it is not possible to arrive at a solution to the Claimants' problems which does not itself create a range of hard cases and anomalies, which fall on the wrong side of the line.

82. This point merges with the policy delivery point examined above: the Defendant wished to preserve the Scheme's simplicity. For every tweak to the simple formula, a new cohort of hard cases would have been created which fell on the wrong side of the tweaked line. The bright line solution was preferred. This, again, was a political decision for Government to make. The making of some changes (tweaks) for some groups (eg reservists and 18/19 parents) does not require wider inroads. This is a political decision, for the architects of the Scheme. It is not a matter for lawyers.

83. The fifth justification was **value for money.** The Claimants' proposals would have cost money, on IT and human intervention. The Defendant by Ms Kantor argues that such expenditure was not justified. This point too is closely allied to the second justification related to policy delivery and the third related to reduction of fraud.

84. Simplicity was the key to this Scheme; simplicity meant that the payments had to correlate with data already supplied by self-employed individuals who claimed payment under the Scheme to HMRC in their tax returns. That kept implementation costs down and enabled swift payments to be made.

85. Whether the various justifications are taken separately or in combination, the Defendant's decisions were reasonable ones, especially when judged in context. The Scheme was a macro-economic policy involving substantial public expenditure to mitigate the effects of a global pandemic. The Government had a wide margin of appreciation. The design of the Scheme, specifically in the way the payments were calculated by reference to ATP, was not manifestly without reasonable foundation.

Ground 2: Public Sector Equality Duty

86. By section 149(1) of the Equality Act 2010, a public authority must have "due regard to" the need to eliminate discrimination and promote equality of opportunity. The duty is procedural and is not a duty to achieve any particular result. The Court should not go further than to identify whether the essential questions have been conscientiously considered and that any conclusions reached are not irrational. The position was summarised in *R. (British Medical Association) v Secretary of State for Health and Social Care* [2020] Pens LR 10, per Andrews LJ who held on the facts of that case that the PSED had been breached:

> "142. Elias LJ in *R. (Hurley) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin) at [78] elegantly summarised the approach that the Court should take in these terms:
>
> > "the concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria… the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognize the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors."
>
> That passage was expressly approved in *Bracking* [2013] EWCA Civ 1345."

87. The Claimants argue that the Chancellor committed himself to the ATP approach at an early stage, before there had been any consideration of the equality impact. In the briefings prior to announcement, there was no reference to the impact on those who had recently been pregnant or had taken periods of maternity leave. Although those specific issues were raised in later briefings, notably the submission dated 2 April 2020 and the briefing dated 22 April 2020, the Chancellor was never asked to consider measures to protect women in this category, specifically; he was not given any sense of how much such an adjustment might cost or how it might be achieved. Thus, it is suggested that his consideration of the plight of this group of women was not "proper and conscientious", if it occurred at all. Even in the two briefings which led to the Second Direction (dated 5 April 2020 and 12 June 2020), women who had been on maternity leave (and had lower profits in consequence) were lumped together with reservists, a totally different group.

88. In my judgment, the general equality implications as well as the particular position of mothers who had recently taken maternity leave were considered by the Defendant, prior to the First Direction. These matters were raised generally in the ministerial submission of 24 March 2020, and expressly in the submissions of 2 April 2020 and 22 April 2020. Although the Scheme had been announced before those submissions,

the whole point of those submissions was to focus on the detailed implementation of the Scheme; work was underway to perfect the detail and it was not too late to adjust or carve out an exception, if that is what the Chancellor had wanted to do. I am satisfied that the Chancellor had the specific issue well in focus and that the regard he had to it was proper and conscientious.

89. Accordingly, there has been no breach of the PSED.

Conclusion

90. The Second Claimant and the group of women she represents have not been the subject of indirect discrimination under the Convention in either of the ways suggested. But even if I had found discrimination to exist, I am satisfied that it would be justified applying the MWRF test.

91. Further, the Chancellor was not in breach of the PSED because he did have due regard to the plight of women who had recently been on maternity leave.

92. This application for judicial review is dismissed.