Neutral Citation Number: [2022] EWHC 123 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2022

Before :

THE HON. MR JUSTICE HOLGATE

Case No: CO/4187/2019

THE QUEEN (on the application of) TP and AR (TP and AR No.3)	**Claimants**
- and –	
Secretary of State for Work and Pensions	**Defendant**

Case No: CO/2392/2020

THE QUEEN (on the application of) AB and F	**Claimants**
- and –	
Secretary of State for Work and Pensions	**Defendant**

- -
- -

Zoe Leventhal and **Jessica Jones** (instructed by **Leigh Day**) for **TP** and **AR**
Zoe Leventhal and **Darryl Hutcheon** (instructed by **Southwark Law Centre**) for **AB** and **F**
Julian Milford QC and **Jack Anderson** (instructed by **Government Legal Department**) for the **Defendant**)

Hearing dates: 19, 20 and 21 October 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties or their representatives by email and released to BAILII. The date and time for hand-down will be deemed to be 10.30am on 21 January 2022.

Mr Justice Holgate :

Introduction

1. The Welfare Reform Act 2012 ("WRA 2012") introduced Universal Credit ("UC") to replace six types of benefit –

   - income-based jobseekers' allowance
   - income-related employment and support allowance ("ESA")
   - income support ("IS")
   - housing benefit
   - child tax credit ("CTC")
   - working tax credit

   These are referred to as "legacy benefits."

2. The reform had a number of aims including the simplification of the benefits system and its administrative processes, encouraging people into work where possible, improved targeting of financial support to meet needs, the removal of overlapping benefits, reduced scope for error and fraud, and the achievement of a fairer overall financial burden on taxpayers.

3. In summary, UC provides a claimant with a single monthly payment in arrears, comprising a number of elements to reflect individual circumstances. The elements are:-

   - the standard allowance according to the claimant's age and whether single or part of a couple (s.9)

   - an amount for each child (or "qualifying young person") for which a claimant is responsible (s.10)

   - an amount for housing costs (s.11)

   - amounts for other particular needs or circumstances which may include limited capability for work and work-related activity ("LCWRA") or the claimant's caring responsibilities for a severely disabled person (s.12).

4. The White Paper "Universal Credit: Welfare that works" (November 2010: Cm 7957) referred to the scale of the process required for "migrating" claimants from legacy benefits to UC. The Secretary of State for Work and Pensions ("SSWP") was advised that it would affect over 19 million existing claims and about 8 million households transitioning to 10 million UC claims (see memorandum dated 9 September 2010). A system of benefits administered by the Department for Work and Pensions ("DWP"), HMRC and local authorities is being replaced by one administered by DWP. It is a huge and complex exercise, which of necessity involves phased transition.

5. In a witness statement dated 19 July 2021 Ms Janina Young (the Universal Credit Policy Team Leader for Universal Credit claims relating to health and/or disability) summarises the process of transition. There are two main types of migration to the new

system, "managed" and non-managed, the latter being referred to in the White Paper as "natural."

6. Managed migration to UC occurs where the DWP serves a notice on a claimant or group of claimants, at a time of its choosing, that they must make a claim for UC. The migration is controlled and initiated by the Department. It allows the Department to test rigorously the IT systems needed, train large numbers of staff, run pilot schemes and to resolve any problems identified, before selecting a date for requiring claimants to migrate to UC.

7. Natural migration to UC occurs where a claimant chooses to make a claim for UC because he considers he would be better off, or because there has been a change in his circumstances which makes it necessary for a fresh claim to be made. Such a change of circumstances is referred to in the documents as a trigger event. The circumstances in which the need to make a fresh claim is triggered are defined in the legislation governing legacy benefits. The Government considered that it would make no sense for a fresh claim addressing new circumstances to be assessed under legacy regimes which are in the process of being phased out. By contrast, managed migration does not involve a change of circumstance.

8. Both types of migration involve the "no turning back" principle. A transition to UC is once and for all and cannot be followed by reversion to a legacy benefit.

9. These principles were set out, in part, in the Universal Credit (Transitional Provisions) Regulations 2014, SI 2014 No. 1230 ("the 2014 Regulations"). Regulation 5(1) provides that a person entitled to UC is not entitled to income support, housing benefit, tax credit, or a state pension credit. The effect of regulation 6(1) to 6(3) is that a claimant who takes any action which requires a fresh claim to be determined may not claim income support, housing benefit, or a tax credit, but must apply for UC.

10. The upshot is that claimants receiving legacy benefits continue to receive those benefits until either managed migration takes place or a trigger event occurs resulting in natural migration, whichever is the earlier, unless, of course, they choose to apply for UC.

11. Chapter 2 of the White Paper stated that in most cases UC would provide a similar or higher level of benefit than the legacy benefits. But the Government added that it was committed to ensuring that "no one loses as a direct result of these reforms." Consequently, "if the amount of Universal Credit a person is entitled to is less than the amount they were getting under the old system, an additional amount will be paid to ensure that they will be no worse off in cash terms."

12. These transitional arrangements were developed in a series of Policy Briefing Notes to Ministers and in Ministerial statements. What became known as "transitional protection" was to apply in cases of *managed* transition, but not where migration to UC takes place "*naturally*" because of a triggering event.

13. Section 36 and Schedule 6 of the WRA 2012 authorised the making of regulations for migration to UC, including transitional protection.

14. By way of example, the scheme for a *managed* migration pilot in Harrogate introduced by The Universal Credit (Managed Migration Pilot and Miscellaneous Amendments)

Regulation 2019 (SI 2019 No. 1152) provided that a "transitional element" would be included in the amount of UC awarded to make up for the *whole* of any shortfall from the level of the legacy benefits previously payable that would otherwise be suffered. But that element would gradually be reduced by the total amount of any subsequent increases in the other elements of the UC award, referred to as "erosion" or tapering. Over time, therefore, that uplift in UC to make up for the shortfall would reduce to zero. That initial "indemnity", as it has been described, only applied in *managed* migration cases and simply smoothed the transition from the total legacy benefits formerly payable to a less advantageous entitlement to UC. The uplift was not to be perpetuated.

15. The statutory scheme does not provide transitional relief for cases of *natural* migration generally, even though a triggering event may result in a sudden drop in the overall level of benefit payable, referred to as a "cliff-edge" effect. However, it has been recognised that the absence of such relief in the case of severely disabled persons involved unlawful discrimination which had to be remedied Notwithstanding the subsequent introduction of some transitional relief for such persons, it is contended in these claims that there remain two respects in which unlawful discrimination persists.

16. The remainder of this judgment is set out under the following headings:

Severely disabled persons

17. Chapter 2 of the White Paper addressed the position of disabled persons. Paragraph 21 referred to the Government's commitment to supporting disabled people to participate fully in society "including remaining in or returning to work wherever possible." It was thought that the ESA model had worked well, by providing additional benefit components for people in the Work Related Activity and Support Groups. Government

intended "to mirror that approach in Universal Credit." The term "Support Group" referred to people whose conditions affect them particularly badly such that they have "limited capability for work and work-related activity" ("LCWRA"). The Government also stated that "the existing structure of overlapping disability premiums is overly complex and causes confusion." But consideration was being given to what extra support might be needed for disabled people over and above the additional components for the Work Related Activity and Support Groups "and the benefits available elsewhere in the system."

18. The Bill which became the WRA 2012 did not include in UC any element equivalent to the Severe Disability Premium ("SDP") and the Enhanced Disability Premium ("EDP") which had previously been payable in connection with ESA and IS.

19. In summary, SDP has been payable only where a claimant:-

    (i) was severely disabled, meaning (a) someone receiving the middle or highest level of the care component of the disability living allowance ("DLA") or (b) receiving the daily living component of the personal independence payment ("PIP"); and

    (ii) did not have a carer receiving a carer's allowance or the carer's element in UC; and

    (iii) was not living in the same household as a non-dependent adult.

    If a claimant had a partner, then essentially the same requirements had to be satisfied in relation to both persons. Ms. Young refers to a Policy Briefing Note which succinctly explains that SDP had been introduced as a higher, additional premium for people with high care needs not met by someone receiving a carer's allowance, that is a full-time carer (para.28 of WS). This premium would assist a recipient to buy in care and support, although the Department took the view that it overlapped with social care provided by local authorities under the Care Act 2014.

20. In summary, EDP has been payable to:-

    (i) an ESA claimant in the Support Group; or

    (ii) someone receiving the highest rate of the DLA care component or the enhanced rate of PIP daily living component.

    Ms. Young explains that EDP had been introduced to provide support for people facing greater barriers than normal to the labour market because of their disability (para. 36 of WS). In contrast to SDP, EDP is payable even if the claimant has a full-time carer claiming a carer's allowance.

21. In February 2018 there were 1.43 million ESA claimants in receipt of SDP and/or EDP. Of those people 940,000 received solely EDP, 60,000 received solely SDP and 430,000 received both SDP and EDP. There were about 18,000 IS claimants, of whom 11,000 received SDP alone and 7,000 also received EDP. These claims solely relate to those in receipt of SDP who have migrated naturally to UC.

22. It is plain from the material before the Court that the suggestion that UC should include elements replicating SDP and EDP was considered by Government and by Parliament during the passage of the Bill and was rejected, after taking into account a report by three NGOs (the Citizens Advice Bureau, the Children's Society and Disability Rights UK) entitled "Holes in the Safety Net." That report identified the significant additional costs incurred by severely disabled people living alone without a full-time carer.

23. The decision not to replicate the SDP and EDP in the UC, meant that a seriously disabled person who had previously received SDP or SDP and EDP would receive significantly less under the UC regime. Where he or she moved to the UC scheme by natural migration, the absence of any transitional arrangements would cause that person to suffer the full extent of that reduction immediately, the cliff-edge effect.

24. Indeed, from around the time when the Bill was under consideration, the SSWP and her Department had identified the possible need for an element of transitional protection in some cases, notably those where SDP had previously been awarded. For example, paragraph 5(d) of "Universal Credit Policy Briefing Note 1" dated 12 September 2011 stated:-

> "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
>
> • People who have been awarded the severe disability premium in the existing out of work benefits
>
> ……."

25. The DWP's position on this issue firmed up by January 2019 when an Equality Analysis was prepared for the SSWP's proposals to introduce "transitional payments" for seriously disabled persons who had naturally migrated to UC before 2019. Paragraph 27 of the report plainly distinguished the cohort of seriously disabled persons from other cohorts of disabled people:-

> "Therefore, unlike the SDP cohort, where there has been a significant concern about this group since UC was first debated in Parliament, it has been considered that there is no clear or coherent rationale as to why other claimants should be compensated in the same way when they have a major change of circumstance. SDP targets a specific cohort of disabled claimants who have a severe disability and do not have a carer, and therefore the proposed SDP transitional payment will apply to this group only."

The claimants and the issues raised by their claims

The removal of SDP and EDP – the claim by TP and AR

26. In CO/4187/2019 TP and AR are two individuals who live alone and were previously in receipt of legacy benefits which included both SDP and EDP. Simply because each claimant moved home to the area of a different local housing authority, he had to make a new claim for benefits. This was a triggering event which meant that he was no longer entitled to legacy benefits and could only claim UC. It is common ground that if he had moved home whilst remaining in the area of the same local housing authority, there would have been no triggering event requiring him to claim UC in place of legacy benefits.

27. The first claimant, TP, is a single man aged 56. He has been diagnosed with non-Hodgkin lymphoma and, unfortunately, the condition is likely to be terminal. TP also suffers from other serious medical conditions.

28. TP and his then partner moved to the London Borough of Hammersmith and Fulham in November 2015. They separated in early 2016. At that stage, TP was in receipt of housing benefit from the local authority and also the basic allowance for income related support. In October 2016, TP became seriously ill. He moved to his parents' home in Dorset at which time he ceased to be in receipt of housing benefit but continued to be in receipt of the basic allowance. On 13 December 2016, TP also became eligible for SDP and EDP. At that stage, his total monthly income, including the basic allowance, SDP and EDP, was £809.90.

29. In December 2016, TP returned to London in order to have access to a hospital providing specialist cancer care. He needed accommodation there and financial assistance to cover his housing costs. At that stage, he was not allowed to apply to a local housing authority for housing benefit. Under the scheme for natural migration he had to apply for UC. That benefit includes a housing element. But it made different provision for those with disability needs. The standard allowance for UC was higher than the basic allowance he had previously been entitled to. However, UC did not include amounts corresponding to the SDP and EDP that TP had also been receiving up until that point. As a consequence, he received £633.42 a month for non-housing related benefits. That was over £170 a month less than he would have received had he remained eligible for legacy benefits. There was no system in place to temper or mitigate the drop in income.

30. TP details in his first witness statement the difficulties that this reduction in income of over £170 a month (over £40 a week) caused him. Because of his non-Hodgkin lymphoma and other conditions, and his chemotherapy treatment, he has needed to travel frequently to hospital appointments. He has had to use taxis, rather than public transport, to avoid the increased risk of infection he faces as a result of the impact of his condition on his immune system. He has difficulty with tasks such as cleaning or carrying shopping. His dietary requirements have changed. He has to deal with increased costs with reduced income. He has at times had to rely on assistance from his family and a cancer support organisation. His financial worries have made him more isolated, depressed, tired and less able to focus on recuperation.

31. AR is a single man aged 40. He suffers with mental health issues and receives medication to alleviate depression and suicidal tendencies. In May 2015, AR moved to Middlesbrough. He was in receipt of welfare benefits including the basic allowance and SDP and EDP. He began receiving housing benefit from the local housing authority. As the house in Middlesbrough had 3 bedrooms, and AR was judged to be underusing it, his entitlement to housing benefit was reduced.

32. In July 2017, AR moved to a different local housing authority area, Hartlepool, and rented a two bedroom property in order to avoid the reduction in the benefit paid for housing. But because he had moved to a different local housing authority area, he had to apply for UC to obtain assistance with his housing costs. As a result, he too ceased to be eligible for payments under the former regime. In his case also, the UC to which he became entitled did not include any element equivalent to SDP and EDP. The total amount received by way of UC was £636.58 a month, which was £178.11 a month less than he would have received had he remained eligible for legacy benefits. By contrast, a person in receipt of housing benefit and who moved home within the same local authority area would not have had to apply for UC. That person's housing benefit continued to be paid by the local housing authority and he continued to receive legacy benefits including SDP and EDP.

33. AR has explained the effect of the reduction in his weekly income on his daily life. He has struggled to buy necessities and has had to buy cheaper and less nutritionally suitable food. He has had to use food banks and been given vouchers by a mental health charity. He has been unable to heat his home and to pay all of his council tax. He is unable to pay for travel to visit his family.

34. In their first claim for judicial review ("TP 1") TP and AR challenged the natural migration provisions in Regulations 5 and 6 of the 2014 Regulations as discriminating unlawfully against them, contrary to Article 14 of the European Convention of Human Rights ("ECHR") read with Article 1 of the First Protocol to that Convention ("A1P1"). Their first ground challenged the non-inclusion of SDP and EDP in the UC scheme. Alternatively, their second ground challenged the absence of any element of transitional protection for the loss of SDP and EDP for claimants migrating naturally to UC.

35. In his judgment delivered on 14 June 2018 Lewis J (as he then was) rejected the first ground of challenge and upheld the second ([2018] EWHC 1474 (Admin); [2019] PTSR 238).

36. On the first ground he held (in part) that (a) the differential treatment between severely disabled persons with carers and those without and (b) any differential treatment arising from the decision to pay the same level of benefits to disabled persons with different levels of need, was objectively justified.

37. On the second ground, he held that the decision to move persons previously eligible for SDP and EDP to UC because they had moved to a different housing authority area, without considering the need for any element of transitional protection, was manifestly without reasonable foundation; alternatively the evidence did not show that a fair balance had been struck between the interests of the community and those of the individual. Either way the evidence was insufficient to justify the differential treatment ([85] to [88]).

38. It is important to note the terms of the declaration granted by Lewis J:-

> "…… it is declared that the implementation arrangements for Universal Credit, in the form of regulations 5 and 6 of the Universal Credit (Transitional Provisions) Regulations 2014 (and the associated Commencement Orders in respect of the relevant geographical areas), unlawfully discriminate against the claimants, contrary to Article 14 of the European Convention on Human Rights read with Article 1 of the First Protocol to that Convention, as they are persons who were previously in receipt of Severe Disability Premium and Enhanced Disability Premium ("the disability premiums") but who, having moved across local housing authority boundaries and made a claim for housing costs, were compelled to make a claim for Universal Credit (and ceased to be eligible to receive the disability premiums) whereas persons in receipt of the disability premiums who moved within a local housing authority area and needed assistance with housing costs were not required to make a claim for Universal Credit and continued to receive the disability premiums."

The declaration expressly referred to both SDP and EDP.

39. In fact, from February 2018 the SSWP and her officials had already been considering possible remedies. First, a "gateway," but in reality a barrier, was to be introduced by legislation so that in future natural migration would not apply to claimants in receipt of SDP. Second, generic, fixed-rate transitional payments would be introduced for those claimants previously in receipt of SDP who had already migrated to UC. That information was not put before Lewis J.

40. On 16 January 2019 The Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations (SI 2019 No. 10) came into force. Regulation 2 inserted a new Regulation 4A into the 2014 Regulations. Regulation 4A prohibited the making of a claim for UC on or after 16 January 2019 by a single claimant who was, or by joint claimants either of whom were, entitled to legacy benefits which included SDP. That prevented natural migration to UC from taking place as a result of what would otherwise be a triggering event. It will be noted that people who received only EDP and not SDP did not benefit from the "gateway."

41. On 14 January 2019 the SSWP laid before Parliament the draft Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019. Although these regulations never came into force because the affirmative resolution procedure was not completed, the relevant part was quashed by Swift J in the second judicial review brought by TP and AR ("TP 2"). The draft Regulations would have provided firstly, a scheme for managed migration which was to apply to a pilot dealing with 10,000 claims. Those managed migration claimants were to be entitled to a "transitional element" as part of their UC award which initially would make up the whole of any shortfall between their UC benefits and their legacy benefits as at the date of migration. That element would be eroded or tapered over time by the amounts of any subsequent increases in other elements of their UC award. Second, the draft Regulations set out a "SDP transitional payment" scheme for those who had naturally migrated to UC before 16 January 2019. In the case of a single person, the fixed monthly amount

was to be £80 on top of the UC award if that award included the LCWRA element and £280 if not. From the "conversion day" the SDP transitional payment would be treated as a "transitional element" of the UC benefit (rather than as an addition) so as to be subject to the provisions for "erosion" or tapering.

42. The defendant points out that the LCWRA element payable as part of a UC award is substantially larger (343.63 a month) than the equivalent "Support Group" increment in the ESA scheme (£170.73 a month). Savings from the abolition of SDP and EDP were used for funding the increased sum payable as LCWRA.

43. In TP 2, TP and AR challenged that part of the draft 2019 Regulations which provided for fixed-rate SDP transitional payments for SDP claimants who had naturally migrated to UC before 16 January 2019 (referred to as "the SDP natural migrants group").

44. Relying upon Art.14 and A1P1 of the ECHR, TP and AR challenged the legality of the difference in treatment between the SDP natural migrants group and the "Regulation 4A group". The former would only receive the fixed-rate SDP transitional payment, whereas the latter, who were shielded from natural migration, would continue to receive legacy benefits and would subsequently at the point of managed migration receive "transitional protection" reflecting the level of those legacy benefits. The transitional payments under the draft 2019 Regulations would still have left the claimants about £100 a month worse off in comparison with the legacy benefits payable to members of the Regulation 4A group.

45. On 3 May 2019 Swift J rejected several of the claimants' contentions ([2019] EWHC 1116 (Admin); [2019] PTSR 2123). But he did accept that the SSWP had failed to provide any justification for the difference in treatment between the SDP natural migrants group and the Regulation 4A group. At that stage the court's order quashed that part of the draft 2019 Regulations which would have provided for SDP transitional payments to be made to the SDP natural migrants group.

46. The SSWP appealed against the decisions of Lewis J and Swift J. TP and AR did not file a respondent's notice in relation to the issues on which they had been unsuccessful. On 29 January 2020 the Court of Appeal dismissed those appeals ([2020] EWCA Civ 37; [2020] PTSR 1785).

47. Following the decision of Swift J, the SSWP laid SI 2019 No. 1152 before Parliament on 22 July 2019 (see [14] above). First, Regulation 7 revoked Regulation 4A of the 2014 Regulations (the "gateway" provision) with effect from 27 January 2021 (see regulation 1(5)). The SSWP was advised that it would be impracticable to revoke regulation 4A before then. Second, with effect from 24 July 2019, Regulation 3(7) inserted a number of provisions into the 2014 Regulations which included Regulation 63 and Schedule 2. These provided for SDP transitional payments to be made to the SDP natural migrants group going back to the date from which UC became payable in each case. Schedule 2 laid down the same approach as had been set out in the draft regulations laid before Parliament earlier that year. However, for a single claimant the amount of the payment was increased from £80 to £120 a month, if the LWCRA element was included in the award of UC, and from £280 to £285 if not. So, the shortfall for a single claimant considered by Swift J was reduced from about £100 to about £60 a month. According to an Equality Analysis carried out for the DWP in June 2019 (para. 13) these increased payments broadly reflected the value of the SDP lost. The remaining

shortfall related to the EDP element. From 8 October 2020 these payments have been subject to erosion or tapering according to the amounts by which other elements of a claimant's UC benefits increase.

48. The claimants raise no legal challenge to these revised arrangements in respect of the loss of SDP. It is accepted that SI 2019 No. 1152 adequately addressed the cliff-edge effect of losing SDP for members of the SDP natural migrants group. The issue now raised by TP and AR, and also by AB and F is that the transitional payments do not address the loss relating to EDP.

49. The Universal Credit (Transitional Provisions) (Claimants previously entitled to a severe disability premium) Amendment Regulations 2021 (SI 2021 No. 4) ("the 2021 Regulations") came into force on 27 January 2021, the same day as the Regulation 4A "gateway" was revoked by SI 2019 No. 1152. Regulation 2 substitutes a new Schedule 2 in the 2014 Regulations to replace the version previously inserted by SI 2019 No. 1152. In essence, where a former member of the Regulation 4A group migrates naturally to UC from 27 January 2021, the award of UC is to include a transitional element equivalent to the initial level of SDP transitional payments payable to a member of the original SDP natural migrants group.

50. Regulation 3 of the 2021 Regulations preserves the version of Schedule 2 of the 2014 Regulations which had previously been enacted by SI 2019 No. 1152 in relation to migrations to UC which had occurred before 27 January 2021. Accordingly, that version continues to apply to the original SDP natural migrants group. It is that version of Schedule 2 which the claimants seek to have declared unlawful in this their third claim for judicial review ("TP 3").

51. Under Ground 1 TP and AR maintain that at all stages of the history of this litigation the members of the SDP natural migrants group have suffered, and continue to suffer, differential treatment in breach of Article 14 of the ECHR read together with A1PI. Although the introduction of the SDP transitional payments by SI 2019 No. 1152 has overcome discrimination relating to the loss of SDP, that is not so in relation to EDP.

52. The Court has been assisted by witness statements from TP and AR in September 2021 updating the information on the effects of the reduction in their benefits. Ms Leventhal on behalf of the claimants referred, in particular, to paragraphs 18 to 35 of TP's statement and to paragraphs 32 to 38 of AR's statement. These passages have to be understood in the context of the other problems to which they both also refer. Reliance is also placed upon the witness statement of Sam Royston on behalf of Marie Curie.

53. As matters now stand in TP 3, relevant changes in differences in treatment over time may be summarised as follows:-

(i) *Pre 16 January 2019 (pre "gateway")*
A recipient of SDP and EDP who before 16 January 2019 moved home to the area of a different housing authority, or experienced some other trigger event, ceased to be entitled to legacy benefits (the SDP natural migrants group). By virtue of SI 2019 No. 1152 they have received SDP transitional payments (e.g. £120 a month for a single person receiving the LCWRA element) backdated to the time when natural migration occurred. The claimants accept that that payment provides adequate transitional protection for the cessation of SDP, but

it does not address the transition to benefits with no equivalent to EDP. By contrast, a recipient of SDP and EDP, who moved home within the area of the same housing authority, or who experienced no other trigger event, continued to receive legacy benefits, including SDP.

(ii) *16 January 2019 to 26 January 2021 (the "gateway" period)*
The SDP natural migrants group described in (i) above continued to receive SDP transitional payments (subject to the tapering arrangements which apply as from 8 October 2020). But all severely disabled persons in receipt of SDP who had not migrated to UC before 16 January 2019 were shielded by Regulation 4A from migration during the gateway period. Those who moved home during this period to the area of a different housing authority, or who underwent what would previously have been treated as a trigger event requiring a fresh claim to be made under the UC code, remained on legacy benefits for the whole of the "gateway" period. The extent of the financial difference remains the same as under (i) above. Thus, the effect of the legislation during the gateway period was to continue that financial differential until 26 January 2021 but to prevent any increase in the size of the SDP natural migrants group.

(iii) *27 January 2021 to date (post "gateway")*
Natural migration to UC applies once again if after 26 January 2021 a triggering event occurs for any claimant still receiving legacy benefits. Where natural migration takes place, the claimant receives essentially the same transitional payment in relation to SDP as in the case of a member of the original SDP natural migrants group (subject to the tapering arrangements). From 27 January 2021 a natural migrant, like a member of the original SDP natural migrants group, does not receive any transitional relief for loss of EDP. But such a person will have continued to receive legacy benefits, including EDP, throughout, even if during the gateway period they had experienced a change of circumstance which would previously have been treated as a triggering event. From 27 January 2021 other SDP individuals who do not undergo a triggering event before managed migration takes place (in particular those who move home within the same local authority area) continue to receive legacy benefits, including EDP.

54. The claimants have not challenged the revocation of the Regulation 4A "gateway." The position in TP 3 is rather different from that in TP 1. Following the complex legislative and litigation history, the differential treatment now complained of under Ground 1 for those who underwent natural migration before 16 January 2019, relates solely to the cliff-edge experience of losing EDP as the result of a triggering event.

55. In summary, the effects of the analysis in [53] above are as follows:-

(i) From a date prior to 16 January 2019, members of the original SDP natural migrants group experienced a loss of EDP without transitional relief, through moving home to a different local authority, as compared with others who moved home within the same local authority area before 16 January 2019 and therefore continued to receive EDP;

(ii) Members of the original SDP natural migrants group experienced a loss of EDP (without transitional relief) through moving home to a different local

authority on a date prior to 16 January 2019, as compared with recipients of SDP and EDP who moved home during the gateway period, whether or not they remained within the same local authority area;

(iii) Both members of the original SDP natural migrants group and any recipient of SDP and EDP required to migrate naturally after the revocation of the gateway experienced a loss of EDP (without transitional relief), through moving home to a different local authority area, as compared with other persons continuing to receive SDP and EDP who moved home within the same local authority area after 26 January 2021.

56. In a Ministerial submission dated 3 June 2019 providing advice on how the SSWP might respond to the judgment in TP 2, it was said that in order to provide initial compensation for the loss of both SDP and EDP, fixed-rate monthly transitional payments would need to be set at £190 for a single person receiving LCWRA as part of UC, £360 for a single person not receiving LCWRA, and £505 for a couple. Compared to the fixed-rate payments introduced by SI 2019 No. 1152 for loss of SDP alone, it can be seen that to compensate additionally for the cliff-edge effect of losing EDP, those rates would need to be increased by £70, £75 and £100 respectively. Ms. Leventhal showed the court figures that for a single person receiving LWCRA the EDP element would now be £80 and for a couple (for example someone in the position of AB) £106.60, before any "erosion" adjustment of the SDP transitional element. These figures were not disputed by the defendant during the hearing.

The Covid-19 pandemic

57. The defendant points to the fact that as a response to the Covid-19 pandemic, all UC claimants have received an uplift of £20 a week or £86.67 per calendar month between April 2020 and early October 2021 (see The Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020 No. 371), The Social Security (Coronavirus) (Further Measures) Regulations 2020 (SI 2020 No. 379) and The Universal Credit (Extension of Coronavirus Measures) Regulations 2021 (SI 2021 No. 313)).

58. This uplift was not provided to recipients of legacy benefits. Consequently, it is agreed between the parties that during that period a single claimant in the position of TP and AR received approximately the same overall amount of benefit under the UC scheme compared to the legacy benefits (including EDP) that would have been payable if there had been no natural migration.

Child Tax Credit - the claim by AB and her son F

59. I turn to summarise the circumstances of AB and her son F, the claimants in the second claim for judicial review now before the court (CO/2393/2020). AB has been profoundly deaf since birth. She also suffers from fibromyalgia. She lives with her partner CD and her son F aged 3 and her daughter E aged 10. CD, E and F are also profoundly deaf. Neither AB nor CD are fit for work.

60. Until March 2018 AB lived alone with her two children and was entitled to and claimed legacy benefits, IS, child tax credit and housing benefit. AB's IS entitlement included a carer's premium, a disability premium, SDP (but not EDP), a child tax credit ("CTC") comprising the family element, the child element and the disabled child element (for

both of her two children), disability living allowance (for herself and her two children) at the middle rate for care and the lower rate for mobility, child benefit (for both of her two children), and a carer's allowance for E.

61. Until March 2018 CD was living alone. He was receiving contributory ESA and PIP with the enhanced rate daily living component. He was also entitled to income-related ESA, SDP and EDP.

62. In March 2018 CD moved in to live with AB and their two children. AB and CD had decided that the children should benefit from having both parents living in the same house. AB did not move from her address. But the formation of a couple living together constituted a change of circumstance which triggered the need to make a fresh claim for welfare benefits. Once again, the effect of regulations 5 and 6(1) to (3) of the 2014 Regulations was that AB could only make a claim for UC and not for legacy benefits.

63. The effect of having to migrate "naturally" to UC was that there was an immediate drop in benefit entitlement. This is partly because of the absence of any element in UC to reflect SDP and EDP. That has been offset by the introduction of the SDP transitional payment by SI 2019 No. 1152 to provide transitional relief for the loss of SDP. The remaining loss in this part of the case relates to EDP. In this respect AB relies upon the same legal arguments as TP and AR. The defendant takes no point about the fact that EDP was formerly payable to CD when he lived alone and not to AB.

64. The second and greater element of loss relates to the child tax credit. The computation of legacy and UC benefits for AB shows no overall loss in relation to the former family element and child elements. But the disabled child element under CTC of £286.25 per child a month has been replaced under UC by a lower rate for a disabled child of £128.89 a month. The overall loss for AB in this respect is £314.72 a month for her two children. Unlike SDP the legislation does not provide for any transitional payments. This is an ongoing loss compared to persons who remain on legacy benefits including the CTC disabled child element, until managed migration takes place. The combined effect of the EDP and CTC loss in the case of AB is £421.32 a month, or just over £5000 a year.

65. As AB's solicitor Ms. Rachel Lovell points out in paragraph 5 of her witness statement, parents in receipt of SDP who started to live together as a couple after 15 January 2019 were protected from natural migration to UC and they would continue to receive legacy benefits.

66. In paragraphs 21 to 25 of her witness statement AB describes the serious impacts which the migration to UC have had on her and her family.

67. CTC was introduced in 2003 pursuant to the Child Tax Credit Regulations 2002 (SI 2002 No. 2007). It was administered by HMRC. CTC was payable to a person aged over 16 responsible for the care of a child (or a "qualifying young person"). It was payable irrespective of the work status of the adults in a household, but was means-tested. A disabled child element was payable of £3,435 a year. In the case of a severely disabled child that element was increased by £1,390 to £4,825 a year. Parliament has decided that under the UC system these two elements should be replaced by a lower rate of £128.89 a month (£1546.68 a year) and a higher rate of £402.41 (£4828.92 a year). The higher rate is payable for a child receiving the highest rate of the care

component of DLA or the enhanced rate of the daily living component of PIP, or where the child is blind. That rate broadly equates to the CTC element for a severely disabled child. It is the lower rate for a disabled child under UC which has been reduced compared to its CTC equivalent.

68. Ms. Amanda Batten, Chief Executive Officer of Contact, has provided a witness statement. She describes DLA as the "main benefit for children under 16 with a condition or disability" (paragraph 15). DLA helps to meet the extra costs that might arise because of a child's disability. Once a child reaches 16 they are normally asked to claim PIP. DLA or PIP could also entitle a household to additional assistance under CTC (paragraph 16).

69. It should be noted that although s.33 of the WRA 2012 abolished CTC it did not abolish DLA or PIP (or treat a change in entitlement to DLA or PIP as a triggering event – see regulation 6(4) of the 2014 Regulations). DLA and PIP were payable in addition to legacy benefits abolished by the WRA 2012 and they remain payable in addition to UC, without any reduction in the amount of UC. They are helpfully described at paragraphs 38 to 46 of the witness statement of Ms. Young. So, for example, monthly DLA payments for E and F currently total £622.70 (Young WS paragraph 94).

70. Ms Young has also explained the genesis of the CTC for disabled children by reference to paragraphs 4(e) and (f) of UC Policy Briefing Note No.1 (see para. 25 of WS). Additional payments for disabled children were introduced in 1988 to address certain costs which had previously been met under the supplementary benefits system, but not the costs arising from a child's disability which are met by DLA. These payments were moved into the CTC scheme when that was introduced in 2003. By the time the UC system was created the disabled child element had increased at a faster rate than similar payments made to adults. The Government decided that under the UC scheme the new lower rate for the disabled child element should be aligned with the payments made to adults. Thus, paragraph 133 of the Detailed Grounds of Defence states that the purpose of the disabled child element is not to make a contribution to the additional costs of caring for a disabled child (that is the purpose of DLA), but in recognition of the reduced ability to participate on the labour market where a person has a disabled child.

71. In setting the UC element at a lower level than under the CTC scheme, the intention was to help smooth the transition for disabled children into adulthood and to redirect the money saved towards increasing UC payments for severely disabled adults. This policy approach was debated in Parliament. An amendment which would have brought the lower rate of the disabled child element under UC into line with the CTC scheme was defeated (see Young WS paras. 77-81).

72. Ms. Batten deals with transitional arrangements for natural migration to UC in paragraphs 33 to 48 of her witness statement. At paragraph 40 she explains that trigger events may include a range of changed circumstances which in no way affect a child's disability needs or a family's needs relating to that child. Such events include not only moving home to a different local authority area, but also a parent losing their job, or a couple forming or separating. The defendant has not disputed that point.

The grounds of challenge

73. Ground 1 is common to both claims for judicial review. The claim brought by AB and F raises a second ground of challenge concerning CTC which arises in their case but not in the claim by TP and AR. The grounds of challenge may be summarised as follows:-

> **Ground 1**
>
> Regulation 63 and Schedule 2 of the 2014 Regulations as originally enacted discriminate against SDP natural migrants by failing to provide transitional relief for the loss of EDP.
>
> **Ground 2**
>
> (1) In the case of a severely disabled claimant migrating naturally to the UC scheme, the absence of any transitional relief for the loss relating to the former disabled child element of the CTC, as compared with other SDP claimants with similarly disabled children who did not experience a triggering event resulting in natural migration, and therefore continued to receive legacy benefits, amounts to unlawful discrimination contrary to Article 14 of the ECHR read together with A1PI and/or Article 8. This group is a subset of the SDP natural migrants cohort. The absence of any element of transitional relief at any stage since the UC scheme came into force amounts to less favourable treatment.
>
> (2) This ground involves comparison within the group to which Schedule 2 to the 2014 Regulations (as inserted by SI 2019 No. 1152) applies, namely persons who were entitled to SDP at the point when they migrated "naturally" to UC. AB (and others with disabled children) were treated by Schedule 2 in the same way as other persons falling within Schedule 2 but without disabled children. They were all entitled to the same transitional payment for the loss of SDP, but AB (and others with disabled children) were not given any entitlement to a transitional payment in respect of the loss arising from the replacement of the CTC element for a disabled child by the lower rate for a disabled child under UC. In terms of entitlement to transitional payments, Schedule 2 treated materially different persons in the same way, amounting to discrimination under Article 14 read with A1P1 and/or Article 8 in breach of the principle in *Thlimmenos v Greece* (2001) 31 EHRR 15.

74. In view of the wide-ranging nature of some of the criticisms of the UC scheme contained in the evidence before the Court, I should clarify what this case is and is not about. Both claims are essentially concerned with alleged discrimination against members of the SDP natural migrants group. They are not concerned with any

disadvantages flowing from natural migration to UC more generally. The challenges do not relate to the decisions made not to replicate EDP and the full amount of the CTC element for a disabled child in the UC scheme. Instead, they relate solely to the lack of transitional protection in cases of natural migration to UC against the cliff-edge effect of suddenly experiencing the loss of the EDP element and, the reduced amount of the UC's lower rate for a disabled child compared with the CTC scheme. In that respect, the claimants do not argue for a complete indemnity against these losses. They accept that a fixed payment approach could be lawful as a way of overcoming the unlawful discrimination they allege. There is also no legal criticism of the rules for tapering or erosion of transitional elements of a UC award.

Statutory framework

Welfare Reform Act 2012

75. Section 1(3) provides:-

> "(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."

76. Section 9 provides for regulations to be made prescribing the amount payable as a standard allowance to a single claimant or joint claimants.

77. By s.10 an award of UC is to include an amount for each child, or qualifying young person, for whom a claimant is responsible.

78. By s.11 an award of UC is to include an amount in respect of residential accommodation occupied by a claimant as their home.

79. Section 12 provides (inter alia):-

> "(1) The calculation of an award of universal credit is to include amounts in respect of such particular needs or circumstances of a claimant as may be prescribed.
> (2) The needs or circumstances prescribed under subsection (1) may include
> (a) . . . . . .
> (b) the fact that a claimant has limited capability for work and work-related activity;
> (c) the fact that a claimant has regular and substantial caring responsibilities for a severely disabled person."

80. Section 33 provided for the abolition of legacy benefits including ESA, IS, housing benefits and CTC.

81. Section 36 provides for migration to UC by enacting the detailed provisions in Schedule 6. Paragraph 1 contains a general power to make regulations "for the purposes of, or in

connection with, replacing existing benefits with universal credit." Paragraph 4 authorised regulations to provide for terminating the award of an existing benefit and for providing UC "with or without application, to a person whose award of existing benefit is terminated." In such circumstances, paragraph 4(3) provided that regulations may also secure that where an award of UC 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;"

The Universal Credit Regulations 2013

82. Part 4 of SI 2013 No. 376 gives effect to the WRA 2012 by setting out in more detail the elements of UC. The table in regulation 36 sets out the amounts payable for the standard allowance, the child element, the LCWRA element and the carer element. Regulation 26 provides for the computation of the housing costs element.

83. Regulations 24(1) and 36 provide that £282.50 a month is payable for a claimant's first child and £237.08 a month for other children. In addition, regulations 24(2) and 36 provide for the payment of an additional amount in respect of each child who is disabled, at a "higher rate" of £402.41 a month or a "lower rate" of £128.89 a month. The higher rate is payable where the child is entitled to the care component of the DLA or the daily living component of PIP at the highest rate, or is blind. The lower rate is payable to other children entitled to DLA or PIP.

84. Regulations 27 and 36 provide for the payment of the LCWRA element at a rate of £343.63 a month.

85. Under regulations 29, 30 and 36, a claimant for UC with regular and substantial caring responsibilities for a severely disabled person may be entitled to a carer's element of £163.73 a month.

86. The WRA 2012 and the 2013 regulations did not provide for any equivalent to SDP or EDP.

The Universal Credit (Transitional Provisions) Regulations 2014

87. Regulation 5(1) of the 2014 Regulations (SI 2014 No. 1230) lays down the general rule that for any period where a claimant is entitled to UC, that person is not entitled to IS, housing benefit or a tax credit (the "no turning back" principle).

88. The effect of regulation 6(1) to (3) is that a person who "takes any action which results in a decision on a claim being required" under regulations relating to IS, housing benefits or tax credit may only make a claim for UC. Thus, someone who moves home to the area of a different local housing authority is treated as taking an action which requires a decision to be made on a new claim, and so must make a claim for UC. He ceases to be entitled to legacy benefits. But a person who notifies an authority that they have moved home within the same authority's area, is not so treated and therefore continues to receive legacy benefits (see Lewis J in TP 1 at [45]).

The Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019

89. SI 2019 No. 10 introduced the "SDP gateway" by inserting regulation 4A into the 2014 Regulations (SI 2014 No. 1230):-

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

The Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019

90. Regulation 3(7) of SI 2019 No. 1152 introduced a code for *managed* migration in a pilot scheme by inserting regulations 44 to 57 into the 2014 Regulations (SI 2014 No. 1230). Regulation 52 provides that where the total amount of legacy benefits at the point of migration exceeds entitlement to UC, a "transitional element" equivalent to that shortfall is to be included in the award of UC. From the next month onwards that transitional element is gradually reduced to zero by the amounts of any increases over time in other elements of the UC award (regulation 55). This is the erosion, or tapering, referred to in [14] above.

91. Regulation 3(7) also inserted regulation 63 and Schedule 2 into the 2014 Regulations to provide for a generic, fixed-rate "transitional SDP amount" to be paid to members of the SDP natural migrants group. The payments were backdated to when natural migration took place. Paragraph 1 of Schedule 2 defined eligibility for those payments. Paragraphs 2 to 4 provided for the fixed-rate amounts payable. These amounts were greater than the figures set out in the draft 2019 Regulations considered by Swift J in TP 2 (see [41] and [45] above). By paragraphs 5 and 6 a "transitional SDP amount", is treated as a "transitional element" under regulation 55 as from the "conversion day" (subsequently prescribed as 8 October 2020) and thereby subject to tapering.

92. Regulations 1(5) and 7 revoked regulation 4A of SI 2014 No. 1230 (the "gateway" provision) with effect from 27 January 2021.

The Universal Credit (Transitional Provisions) (claimants previously entitled to a severe disability premium) Amendment Regulations 2021

93. SI 2021 No. 4 substitutes a new version of Schedule 2 in SI 2014 No. 1230 with effect from 27 January 2021 for SDP claimants who migrate *naturally* to UC after that date. The transitional SDP "elements" are set at the same level as for those who migrated naturally before the gateway was introduced, but erosion or tapering under regulation 55 of SI 2014 No. 120 applies from the outset (to reflect the fact that the "conversion day" had already passed – see [91] above)

94. As noted above, regulation 3 saved the original version of Schedule 2 introduced by SI 2019 No. 1152 for the benefit of the original SDP natural migrants group, that is those who had migrated naturally to UC before the gateway period began.

Human Rights Act 1998

95. Section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a "Convention right" as defined in s.1(1). It is common ground that the SSWP is a public authority and that the making of secondary legislation falls within the ambit of s. 6(1).

96. Article 8 of the ECHR provides:-

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

97. Article 14 provides:-

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

98. Article 1 of the First Protocol to the ECHR ("A1P1") provides:-

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Legal principles on discrimination under Article 14

99. Many of the relevant legal principles on discrimination under the ECHR have been laid down in the decision of the Supreme Court in *R (SC) v Secretary of State for Work and Pensions* [2021] 3 WLR 428. They have been helpfully summarised more recently in

R (Salvato) v Secretary of State for Work and Pensions [2021] EWCA Civ 1482. There is therefore no need in this judgment for those principles to be set out at length.

100. A1P1 does not require the creation of any particular system of welfare benefits, nor does it dictate the type or amount of such benefits. But where a state creates a system of welfare benefits it must do so in a manner compatible with Article 14 (*Stec v United Kingdom* (2006) 43 EHRR 47 at [53] and Lewis J in TP 1 at [55]).

101. In order to determine whether a measure is incompatible with Article 14 it is necessary to address four questions:-

(1) Do the circumstances fall within the ambit of one or more Convention rights?

(2) Have the claimants been treated less favourably than a class of persons whose situation is "relevantly similar" or who are in an "analogous situation"?

(3) Is that difference in treatment on the ground of one of the characteristics listed in Article 14 or an "other status"?

(4) Is there an objective and reasonable justification for that difference in treatment?

These questions are not rigidly compartmentalised (*In re McLaughlin* [2018] 1 WLR 4250 at [15]; *SC* at [37]; *Salvato* at [24]). Where the first three questions are answered yes, the burden switches to the defendant to justify the difference in treatment.

102. As to question (2), an assessment of whether situations are "relevantly similar" generally depends upon there being a material difference between them as regards the aims of the measure in question (*SC* at [59]).

103. Turning to question (3), "status" cannot be defined solely by the difference in treatment complained of. It must be possible to identify a ground for the difference in treatment in terms of a characteristic which is not merely a description of the difference in treatment itself. But there is no requirement that a status should exist independently of that difference in treatment (*SC* at [69] – [71]). There is also no requirement that a status be permanent in nature rather than transitory (*R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 at [38]).

104. In *SC* Lord Reed explained at [71] why status is something which has rarely troubled the ECtHR. In the context of article 14, status merely refers to the ground of the difference in treatment between one person and another. Given the purpose of that article, any exception to the protection it affords should be narrowly construed. "Accordingly, cases where the court has found the "status" requirement not to be satisfied are few and far between."

105. Mr. Milford QC sought to rely upon *Zammit v Malta* (2015) 65 EHRR 17 in order to argue that the requirement of status is not satisfied in the present proceedings. But the Court of Appeal held in TP 1 and TP that *Zammit* was concerned with a difference in treatment based solely upon the date on which legislation comes into force ([2020] PTSR 1785 at [100] to [102]).

106. In *SC* Lord Reed stated that the requirement for justification is an expression of the proportionality principle. The issue is whether a difference of treatment does not pursue a legitimate aim, or whether there is not a reasonable relationship of proportionality between the legitimate aim sought to be realised and the means employed. The state is entitled to a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject-matter and the background (see e.g. [37], [49], [98]).

107. "A low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation" (*SC* at [158]). But that formulation does not express a test, in the sense of a requirement the satisfaction or non-satisfaction of which will in itself necessarily be determinative of the outcome. The phrase indicates the width of the margin of appreciation, subject to any other relevant factors. It is important to avoid a mechanical approach. The correct approach is nuanced, taking account of those factors which are relevant in the circumstances of the case (*SC* at [142], [151] and [159] to [160] and *Salvato* at [30] to [34]).

108. A greater intensity of review is generally appropriate where one of the "suspect" grounds in Article 14 has to be justified. There can also be other grounds which call for a stricter standard of review than would otherwise be appropriate, such as the impact of a measure on the best interests of children (*SC* at [158]).

109. In *SC* Lord Reed pointed out that under ECtHR jurisprudence a relatively strict approach may also be justified in cases concerned with disabled persons as a vulnerable group ([112], [133], [136]).

110. On the other hand, it was also stated in *SC* that where a transitional measure is the subject of alleged discrimination that is a factor indicating a lower intensity of review ([115(4)], [123], [133], [135-9], [157-8]). Mr. Milford QC also refers to Lord Walker's speech in *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 at [3] for the proposition that the "more peripheral or debateable" the status of a claimant's group, the less likely it is to come within "the most sensitive area where discrimination is particularly difficult to justify."

111. Looking at the position overall, Lord Reed said (at [161]) that rather than attempting to define precisely the ambit of the "manifestly without reasonable foundation" criterion, it is more fruitful to focus on the issue whether a wide margin of appreciation is appropriate in the circumstances of the case. The ordinary approach to proportionality gives an appropriate degree of weight to the judgment of the "primary decision-maker", which will normally be substantial in fields such as economic and social policy. The ordinary approach to proportionality will accord the same margin as the "manifestly without reasonable foundation" approach in circumstances where a particularly wide margin is appropriate.

112. Similarly, in *Salvato* at [79]-[87] the Court of Appeal rejected the contention that the "manifestly without reasonable foundation" criterion had superseded the four tests for assessing proportionality laid down in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700 at [74].

113. This important passage then followed in *SC* at [162]:-

> "It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in JD [2020] HLR 5, para 11:
>
> > "Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts."
>
> In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented, at para 10:
>
> > "Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated." "

The judgments in the TP judicial reviews

The judgment of Lewis J in TP 1

114. Lewis J dealt with the statutory scheme up to and including the 2014 Regulations as originally enacted (see [34] and [87]-[88] above). At that stage the legislation did not provide for any transitional protection in relation to the sudden loss of SDP and EDP.

115. The judge noted that Parliament had considered amendments to both primary and secondary legislation to include within UC an element equivalent to SDP and EDP. The amendments were not made ([26] and [30]).

116. The judge identified the relevant arrangements as being those which affected persons seeking assistance with housing costs ([39-40]). He identified the distinction drawn by the scheme between a person who moved home within a housing authority's area (who would remain eligible for legacy benefits) and a person who moved to a different local authority area (who would migrate to UC but without any element corresponding to SDP and EDP) ([41-45]).

117. Lewis J rejected at [46] and [50-74] the first ground of challenge which complained about unlawful discrimination under Article 14 in two respects:-

    (a) Differential treatment between a severely disabled person who has a carer receiving a carer's allowance and a severely disabled person without a carer and for whom no payment is made under UC equivalent to SDP and EDP; and

    (b) SI 2013 No. 376 treated those with severe disabilities in the same way as those with less severe disabilities by awarding the same level of benefit under UC, whereas those with severe disabilities were previously recognised as requiring a higher level of benefits in the form of SDP and EDP.

118. In relation to ground 1(a), Lewis J stated that UC had been introduced to replace a system of overlapping benefits with a single structured benefit that was fairer, more affordable and better able to address needs. The view had been taken that there should be a level of support for those with disabilities which was higher than the basic allowance previously payable to the Support Group, but there should not be any additional component equivalent to SDP or EDP ([62]). Difficult questions of social policy and resource allocation had been addressed by deciding which groups should receive assistance for disabilities, how payments should be structured and their amount. These issues had been considered by the Executive and by Parliament on more than one occasion ([63]). The legislation had pursued a legitimate aim, namely the proper allocation of resources, which included the encouragement of people to act as carers by providing them with a financial incentive to do so. It had been concluded that SDP and EDP were not an appropriate mechanism for targeting support to those with disabilities ([64]). It had not been unreasonable for the Secretary of State to take the view that the previous system of welfare benefits should be simplified, that disability premiums did not represent the best allocation of resources and that persons seeking assistance with social care should resort to local authorities under the Care Act 2014 ([65]). Accordingly, the way in which UC had been structured had not been manifestly without reasonable foundation. The differential treatment between persons with severe disabilities who have carers and those who do not was objectively justified ([66]).

119. Applying a proportionality approach, Lewis J held that the aim to provide a proper allocation of resources, was legitimate, and the measures adopted were rationally connected with that aim. The suggested inclusion of a component in UC for the former SDP and EDP was not a less intrusive means of achieving that aim; it involved a different aim [67]. The measures achieved a fair balance. The claimants were not entitled to insist upon continuing to receive the level of benefits they had previously received, particularly where the Government and legislature considered that system to be unduly complex [68].

120. Lewis J rejected the *Thlimmenos* challenge raised as ground 1(b). First, he concluded that it had not been shown that the principle had been breached because people treated in the same way under the UC scheme had been treated differently under the legislation it replaced. The earlier scheme did not define an objectively ascertainable state of affairs which had to be replicated under any replacement system [71]. Secondly, the "conscious and considered" decision to pay under UC a higher allowance to all persons with a particular level of disability and not to make additional payments equivalent to SDP and EDP had been objectively justified. The decision-makers had been entitled to conclude that this approach best directed assistance to those in need, relying also upon social care legislation to address other needs. For the reasons given under ground 1(a) the policy of UC was not manifestly without reasonable foundation and was proportionate ([72]).

121. Ground 2 of the challenge addressed the lack of transitional protection to deal with the cliff edge effect of natural migration from legacy benefits to UC and the differential treatment of recipients of SDP and EDP who move home according to whether their new home is in a different or the same local authority area ([75]-[79]).

122. Lewis J accepted that the aim to achieve a gradual or phased introduction of UC was legitimate and that it had been appropriate to identify the need for assistance with housing costs as an appropriate trigger for migration to UC ([81]). The context for the legal challenge was the Government's previous acceptance that there may be groups, including severely disabled persons in receipt of SDP and EDP, who would need an element of transitional protection, that this issue needed to be addressed and some protection might need to be provided ([83]). That potential need had been recognised in *inter alia* the White Paper and in briefing notes to Ministers in 2011 ([84] and see the passages referred to in [16] and [24]-[25] above).

123. Lewis J went on to decide that there was nothing in the material before the court to show that the decision-maker had addressed the consequences of the phased introduction of UC and whether any, and if so what, element of transitional protection might be appropriate ([82]). There was nothing to explain why no element of transitional protection had been provided for those who had previously received SDP and EDP but who ceased to do so when they moved from the area of one local housing authority to another. Although a change in housing circumstances could explain why a switch to UC should be triggered, it could not explain the absence of any consideration of transitional protection ([85]). The judge held that natural migration to UC in the event of a move to the area of a different local housing authority without considering the need for any transitional protection was manifestly without reasonable foundation ([86]). In addition, the material before the court did not establish that a fair balance had been struck between the interests of the individual and the interests of the community. That was all the more striking given that the Government had identified the need to consider transitional protection for persons in receipt of SDP and EDP ([88]).

124. Lewis J pointed out that the differential treatment did not arise of itself out of disability. Both of the groups being compared comprised severely disabled persons. The basis for the differential treatment was that the people in one group had moved from one local housing authority area to another and the people in the other group had not. The judge decided that a severely disabled person in receipt of SDP and EDP who moved to the area of a different housing authority had a "status" for the purposes of Article 14 of the ECHR, rejecting the defendant's arguments to the contrary ([90-91]).

125. Accordingly, the challenge under ground 2 succeeded.

126. The judge held that the court was unable to consider the additional allegations of differential treatment in transitional protection between natural and managed severely disabled migrants to UC. This was because the terms of the regulations providing transitional protection for managed migrants were not yet known ([94-95]).

The judgment of Swift J in TP 2

127. Swift J considered the legislation down to and including SI 2019 No. 10 (the introduction of the Regulation 4A "gateway") and the draft scheme for the SDP transitional payments to the SDP natural migrants group (see [41]-[43] and [89] above).

128. The judge referred at [23] to the judgment of Lewis J as being authority for two propositions:-

(i) It is not unlawful for the *absolute* value of UC benefits for persons previously entitled to ESA, SDP and EDP to be lower than the value of those legacy benefits; but

(ii) Trigger events for natural migration are capable of falling foul of article 14 if the basis for the trigger is incapable of appropriate explanation.

129. Swift J accepted that there was differential treatment between the SDP natural migrants group (pre 16 January 2019) and the regulation 4A group (post 15 January 2019), in that the former would receive generic fixed-rate transitional payments in respect of SDP, whereas the latter would continue to receive legacy benefits and eventually, at the point of managed migration to UC, would receive a transitional element calculated so as to make up the whole of any shortfall from legacy benefits, subject to tapering thereafter (see [26]-[29]). By contrast, in February 2018, prior to making the draft regulations referred to in [41] above, Ministers had been considering providing payments to the SDP natural migrants group to mirror the transitional protection for the Regulation 4A group. But by May 2018 the Department's thinking had moved to providing fixed-rate generic payments for that group [33-35]. The Ministerial submission did not address either the reasons for this change or, more importantly, the reasons for the difference in transitional arrangements between the SDP natural migrants group and the Regulation 4A group ([36] and [38]).

130. In [41] Swift J focused on the same difference in treatment between these two groups and agreed with the Secretary of State's concession that this was a difference on the grounds of "other status" ([43]). The judge also agreed with the SSWP's submission that no relevant comparison could be made between legacy benefits and UC benefits and so article 14 said nothing about the amounts that should be paid by way of transitional provision [48]-[49]. But the judge said that that did not assist the SSWP because the claim in TP 2 was not directed to the difference in the level of benefits paid to severely disabled persons as between the legacy regimes and UC. It was only concerned with "one narrow matter", the justification for the different ways in which the SSWP had chosen to provide transitional protection for the two groups, the SDP natural migrants group and the Regulation 4A group [49].

131. The "no turning back" principle failed to provide any explanation for this difference in treatment. Furthermore, trigger events for natural migration are not aligned to any material change of circumstances relevant to the circumstances and needs of SDP claimants. Natural migration is not any indication that the circumstances of members of the two groups are different, or that there is any reason to treat the members of the two groups differently ([14], [51], [55] and [60]).

132. The judge acknowledged that generic, fixed-rate payments would save public expenditure as compared with payments meeting the shortfall. He stated that that could be a legitimate aim, but it would not of itself provide justification for differential treatment unless there was a reasonable relationship of proportionality between the aim sought to be achieved and the means chosen to pursue it. So the question for the court was whether it was proportionate for members of the SDP natural migrants group to bear the costs of those savings, having regard to the protection provided to the Regulation 4A group [53]. The judge accepted that there would be some "administrative gain" because generic rates avoided the need to calculate shortfall payments for each claimant ([55]). The transitional arrangements for the SDP natural migrants group were also said to represent a justifiable "bright line rule" promoting consistency and legal certainty. "Appropriate latitude" had to be given to the decision-maker on the justification for a bright line rule ([56 to 57]).

133. In [58] Swift J stated:-

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

134. The parties disagreed as to what was the subject and effect of [58]. I consider the position is clear when that paragraph is read in context, particularly in the light of earlier parts of the judgment (e.g. [27], [41] and [52]-[56]). Swift J was there looking at the SDP transitional payment scheme in the draft 2019 Regulations. He compared, for the pre-gateway period, persons who had experienced a triggering event by moving home to the area of a different housing authority (who would receive the proposed fixed-rate SDP transitional payments) to those who moved home within the same authority's area (who would continue to receive legacy benefits including SDP and EDP). The claim of unlawful discrimination contrary to Article 14 was based upon the use of fixed-rate transitional payments (see also the Court of Appeal at [68] and [71]-[72]). This was rejected by Swift J. The judge said that although the *value* of those payments for SDP natural migrants was less than the shortfall between legacy benefits and UC benefits, that difference in treatment compared to those who moved home within the same local authority area and continued to receive legacy benefits, was sufficiently justified.

However, Swift J did not address the EDP issues raised by both sides in this case. The justification he accepted for the difference in treatment complained of related to (i) the legitimate aim of controlling public expenditure and (ii) the overall benefits of bright line provisions for public administration. Accordingly, that overcame the illegality identified by Lewis J, namely the failure to consider any element of transitional relief for the SDP natural migrants group, assuming that no other change in the law had been made.

135. But there had been another change. Swift J went on to address the introduction of the gateway and the Regulation 4A group. The SSWP's previous submissions on "bright line/administrative efficiency" had adequately explained the difference introduced by Schedule 2 to the 2014 Regulations "on its own terms" ([60] referring back to [58], i.e. the difference in treatment between natural migration and no migration for SDP recipients), but did not explain why the SDP natural migrants group was treated differently to the Regulation 4A group, for which the distinction between natural and no migration had been removed ([60]):-

> " …… Both groups comprise severely disabled persons; all of whom meet the criteria for payment of SDP (or would continue to meet those criteria but for natural migration). The simple fact of natural migration is not a satisfactory ground of distinction because the trigger conditions for natural migration are not indicative of any material change in the needs of the claimants (or the other members of the SDP natural migration group), as severely disabled persons. "

136. Swift J detected that the SSWP had been concerned to avoid the provision of transitional protection for SDP natural migrants from being used by other *natural* migrants, who do not have the benefit of any transitional relief against cliff-edge changes in benefit, to piggyback and found their own claims to transitional protection ([62]). The judge did not think that that was *capable of* providing a justification for the difference in treatment with which he was dealing, that is the difference between the SDP natural migrants group and the Regulation 4A group. Even, if it were possible that other such claims were legally valid, that could not justify subjecting the SDP natural migrants group to the discrimination which they were challenging [63]. Quite apart from that, the piggybacking concern was unrealistic. The position taken by both the House of Commons Select Committee and by the Department was that the severely disabled persons previously entitled to SDP were in a different position from other natural migrants (see [30] to [33] of Swift J's judgment and also [24] – [25] above).

137. Swift J concluded that, although the SSWP only had to meet the low standard set by the manifestly without reasonable foundation test, he had not been given any reason to explain the difference in treatment of the SDP natural migrants group and the Regulation 4A group ([64]). The judge added that he was not satisfied that reliance upon fixed-rate generic payments to reduce the administrative burdens of calculating shortfall payments involved a fair balance between the interests of the SDP natural migrants group and the general public interest. Once again, the court was impressed by the point that the trigger events resulting in natural migration in the case of the claimant's TP and AR did not correlate to any material change in need, in particular as seriously disabled persons ([65]).

The Court of Appeal's judgment in TP 1 and TP 2

138. The SSWP appealed against the orders made by Lewis J and Swift J. The leading judgment was given by Sir Terence Etherton MR and Singh LJ.

139. The SSWP's appeal against the decision of Lewis J was dismissed. First, the Court of Appeal held that there had been a differential treatment in terms of transitional protection between SDP natural migrants and those who remained on legacy benefits according to whether a person moved home to a different housing authority's area or stayed within the same area ([87]).

140. Second, the Court of Appeal rejected the SSWP's submissions that this difference was not on the grounds of "other status." The relevant status was the fact of moving home across a local authority boundary (by analogy with *Carson v United Kingdom* (2010) 51 EHRR 13). Place of residence constitutes an aspect of personal status for the purposes of Article 14. Alternatively, the status was that of a severely disabled person who moves across a local authority boundary ([92-93], [96] and [112-113]). The principle in *Zammit* was simply concerned with differences arising from the date when legislation comes into force, which was not the position here ([100-103]). The Court rejected the SSWP's submissions that the characteristic relied upon by TP and AR did not exist independently of the treatment complained of and for that reason did not constitute a status. It held that a person moving home across a local authority boundary is a physical fact which exists in the real world and does not arise from the terms of the legislation under challenge ([104]-[107]).

141. The Court of Appeal rejected the SSWP's third ground of appeal, holding that Lewis J had applied the correct tests in relation to justification and had been entitled to find that no evidence had been placed before the court to justify the difference of treatment ([115] to [128]).

142. The SSWP's appeal against the decision of Swift J was also dismissed. First, the Court of Appeal rejected the Secretary of State's complaint that Swift J had made a comparison between the wrong comparator groups. He had been entitled to compare the SDP natural migrants group with the Regulation 4A group ([147]-[153]).

143. Second, the Court of Appeal held that the handling by Swift J of the justification issue was not open to challenge. The Court agreed that it had been open to the SSWP to decide to provide a fixed-rate transitional payment because of the administrative difficulties of ascertaining shortfalls according to the varying circumstances of individual cases, and to do so retrospectively ([169]).

144. On the issue of cost, the Court of Appeal applied the principle that savings in public expenditure can be a legitimate aim for the purposes of Article 14. But that cannot constitute a justification for discriminatory treatment without more, because justification depends not only upon whether the measure has a legitimate aim but also on there being a reasonable relationship of proportionality between the means employed and that aim ([171]-[173] citing Lord Reed JSC in *R (JS) v Secretary of State for Work and Pensions* [2015] PTSR 471 at [63]-[64]). The Court pointed out that the transitional payment proposed in TP 2 of £80 a month was about £100 less than the estimated loss of £180 a month, of which about £70 a month was attributable to the removal of EDP (figures similar to those set out in [56] above). The Court concluded that the sole reason

given in the evidence on behalf of the SSWP for not addressing the loss of the EDP element was the increased cost to public finances without more ([174] and [188]).

145. In relation to the piggybacking concern, the Court of Appeal agreed that, as a matter of principle, that could not be a legally valid reason for discriminating against the claimants in TP 2 ([180]). In addition, and in any event, Swift J had been entitled to conclude on the evidence before him that the fear of piggyback claims was "not realistic" ([183] and [186]).

146. Third, the Court of Appeal held that, although the triggering events were appropriate in principle to determine when a person should naturally migrate from legacy benefits to UC, Swift J had been entitled to conclude that the triggers did not in themselves amount to sufficient justification for the difference in treatment between the SDP natural migrants group and the Regulation 4A group ([194]).

Ground 1

Ambit

147. The parties have helpfully prepared a list of the issues in these claims. In relation to TP 3, it is agreed that the claim falls within the ambit of A1P1 of the ECHR for the purposes of Article 14.

Differences in Treatment

148. In TP 1 the difference in treatment was between the members of the SDP natural migrants group who did not receive any transitional protection compared to SDP recipients who moved home within the same local authority area and remained on legacy benefits until managed migration. In TP 2 the difference in treatment was between the members of the SDP natural migrants group who were to receive backdated and ongoing SDP transitional payments and members of the Regulation 4A group.

149. The treatment about which TP and AR complain (along with any member of the SDP natural migrants group before 16 January 2019) stems from the requirement that they had to migrate once and for all from legacy benefits to UC. They thereby suffered an immediate drop in income merely because they moved home to the area of a different local authority. Subsequent changes in the legislation have not altered the simple point that all those in the position of TP and AR have suffered cliff-edge effects through ceasing to be entitled to legacy benefits. They became entitled retrospectively to SDP transitional payments which provided adequate transitional relief for the loss of SDP, but not EDP. That treatment began before 16 January 2019 and persists. In addition, the transitional element (to which tapering applies under Regulation 55 of SI 2014 No. 1230) will be less than it would otherwise have been because it does not include anything referable to the loss of EDP.

150. The differences in transitional treatment between the SDP natural migrants group and other SDP recipients have been summarised in [53] and [55] above. It can be seen that changes in legislation after 15 January 2019 have not overcome the differences in treatment affecting members of that group. Throughout the three periods of analysis those members of the original group have received no transitional relief in respect of the loss of EDP. By contrast,

(i) Before the introduction of the gateway, those who moved home within the same local authority area continued to receive EDP;

(ii) While the gateway subsisted, *all* SDP recipients who moved home, whether inside or outside the same local authority area, continued to receive legacy benefits, including EDP. The introduction of the gateway prevented the number of SDP natural migrants from growing. The gateway provisions did not alter the extent of the difference in treatment;

(iii) When the gateway was removed on 27 January 2021, those who migrate naturally thereafter by moving home to a different local authority area are still treated more favourably than members of the original SDP natural migrants group. For example, someone who experienced a triggering event during the gateway period will have remained on full legacy benefits. If such a person experienced a further triggering event after 26 January 2021, whether or not of the same kind as the first, they will retain full legacy benefits (including EDP) down to the date of natural migration and only then will the SDP transitional element and tapering apply (see [93] above). But there is a second effect: from the date of natural migration such a person is treated less favourably in relation to transitional relief for loss of EDP than another SDP recipient who experiences a change of circumstance not amounting to a triggering event (e.g. by moving home within the same local authority area).

151. Accordingly, the differential treatment identified by Swift J in TP 2 (see e.g. [26] – [29]) between fixed-rate transitional payments and the continuation of legacy benefits persists. TP and AR, and those in a like position are less favourably treated by reason of being a natural migrant as compared with other persons in a "relevantly similar" or "analogous situation". As Swift J pointed out, there is no material difference between the two groups being compared in terms of the disability needs of the SDP recipients or the nature of the relevant trigger events ([14], [51] and [55]). I entirely agree. The changes in the legislation will have produced changes in the composition of the comparator groups over time, but have not changed the essential nature of the differential treatment itself. In any event, the differential treatment about which the original members of the SDP natural migrants group complain (taking into account the retrospective entitlement to SDP transitional payments), occurred once and for all before 16 January 2019, and has continued since then.

Status

152. The next issue is whether the difference in treatment is on the ground of an "other status" for the purposes of Article 14.

153. Lewis J held in TP 1 at [90] – [91] that a severely disabled person in receipt of SDP and EDP who moved to the area of a different local housing authority had such a status. The point was conceded by the SSWP in TP 2 (see [41]). Two members of the Court of Appeal (Sir Terence Etherton MR and Singh LJ) agreed with the conclusion of Lewis J for the reasons set out in [92 – 93], [96] and [112-113]. They also gave a second reason for their conclusion, namely that the severe disability of persons in the situation of TP and AR is a component part of the relevant status; it is the status of a severely disabled person who moves home across a local authority boundary. In that respect, an analogy

can properly be drawn with the reasoning of the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 at [19] – [23] (see also Rose LJ (as she then was) at [211] – [212]).

154. I do not accept the submission of Mr. Milford QC that the "status" which TP and AR had before 16 January 2019 has, in effect, evaporated or disappeared because of the subsequent changes in the legislation relating to the removal of the gateway. Equally, the circumstances are not analogous to cases concerned solely with the time when legislation is brought into force (e.g. *Zammit*). That argument was rejected by the Court of Appeal at [101] and [213]. In that context, the Court did not regard the introduction of the gateway from 16 January 2019 as rendering inappropriate the Secretary of State's concession on status in TP 2. The comparator group in TP 2 was the Regulation 4A group.

155. While it subsisted, Regulation 4A removed the distinction between trigger events resulting in natural migration and other changes of circumstance not treated as a trigger event (e.g. moving home within the same local authority area). But the introduction of Regulation 4A had no retrospective effect in relation to the original members of the SDP natural migrants group. It only served to accentuate the differential treatment they had experienced requiring justification under Article 14. Put simply, why had it ever been necessary for the provision of transitional relief to distinguish between triggering events and non-triggering events, including the distinction between those who moved home inside or outside their current local authority area? Having failed to justify the difference in treatment which Swift J found to be unlawful, the SSWP then removed the gateway. That did not remove the difference in treatment experienced by the original members of the SDP natural migrants group, based upon the distinction between moving home either inside or outside the same local authority area. From then on, other SDP recipients have also been subject to that distinction. Whether or not such persons had in the meantime benefited from the protection against natural migration afforded by the gateway is of no real significance. The point remains that those SDP recipients who, after 26 January 2021, move home to the area of a different housing authority naturally migrate to UC and experience a sudden loss of EDP without any transitional protection, whereas those who move home within the area of the same authority continue to receive legacy benefits.

156. As Ms. Leventhal pointed out, a generous approach is taken to "status" (see e.g. *R (Stott) v Secretary of State for Work and Pensions* [2020] AC 15 at [56], [63], [184]-[185], [228]-[229] and [235]).

157. I conclude that TP and AR satisfy the requirement of "status" for the purposes of Article 14.

Justification and Proportionality

158. In the light of the legal principles summarised above the starting point is that a low intensity of review is appropriate for this challenge to legislation involving judgments of social and economic policy in the field of welfare benefits. That is reinforced by the fact that the challenge is to a transitional measure.

159. As in TP 1, discrimination in this case is not between disabled persons and non-disabled persons. The relevant comparisons fall to be made between groups comprising severely

disabled persons, all of whom have qualified for SDP (and EDP). However, I accept Ms. Leventhal's submission that in such a case Article 14 is no less engaged than in another case where differential treatment exists between a disabled person and an able-bodied person (applying *Mathieson* at [23]). As the Court of Appeal has said, the present case is analogous to *Mathieson* (see [153] above).

160. I acknowledge Mr. Milford QC's point that, viewed overall, the transition from legacy benefits to UC is a vast and particularly complex exercise involving large numbers of claimants and considerable administrative burdens in terms of human resources and costs. Having said that, it has long been recognised by the SSWP and her department that the SDP cohort would need some form of transitional relief (see [24] – [25] above). Furthermore, the SSWP and Parliament have decided that it was appropriate for such relief to be provided to the SDP natural migrants group.

161. I also bear in mind that the SSWP failed in TP 1 and TP 2 because she did not produce a sufficient justification for the differential treatment identified in those cases. Indeed, the defendant relies upon that point in order to submit that in the present case she has placed additional material before the court to justify the differential treatment now complained of. Counsel have helpfully prepared two notes identifying what is said to amount to new material. There are some differences of view between them on this subject, which I do not need to resolve in order to determine this challenge. But it is plain from the analysis and the documents themselves that much of the material in the present case has previously been placed before the court in TP 1 and TP 2.

162. To some extent this is because the defendant has sought to explain the policy thinking for deciding not to replicate SDP and EDP in the UC system and to improve the targeting of the monies involved to meet needs more appropriately. However, the SSWP has already won the argument on that issue in TP 1 (see [62] – [74] of TP 1). The present claim does not seek to resurrect that issue. It is simply to do with the absence of any transitional relief to address the cliff-edge effect of the removal of EDP for persons in the SDP natural migrants group. In that context, the claimants accept that the SSWP was entitled to decide that any transitional relief provided should be fixed-rate (and subject to tapering) rather than starting off as a complete indemnity against any short fall (see [74] above).

163. In TP 2, Swift J was careful to point out that the claim there was not directed at the proposition that transitional relief should be paid at any specific level ([49]). He went on to hold at [58] that the fact that the use of generic fixed-rate payments was not unlawful, even though the draft 2019 Regulations set a value below the equivalent legacy benefits (i.e. £80 rather than £180 a month). The adverse impact on SDP recipients of that difference in value had been justified by the legitimate aims of (1) controlling public expenditure and (2) the benefits of bright line provisions for public administration, and a reasonable balance had been struck ([29] and [58]). But those matters did not explain the difference in treatment between the SDP natural migrants group and the Regulation 4A group ([60]-[65]).

164. Swift J proceeded on the basis that the claim in TP 2 was "directed only to one narrow matter": in a situation where the Secretary of State had decided that transitional relief should be provided to two groups in different ways (i.e. fixed-rate payments as opposed to full protection), what was the justification for that difference ([49]). The narrowness of that issue did not prevent the claimants from succeeding in TP 2 (or, indeed, in TP

1). Rather, it defined the matter which the defendant was required to justify, yet failed to do so. The present case also raises a narrow and similar issue. Here, the legislation does not provide for SDP natural migrants to receive any transitional relief at all in relation to EDP. By contrast, recipients of SDP in the comparator groups have continued to receive EDP as part of their legacy benefits. In this regard the issue is closer to ground 2 upheld by Lewis J in TP 1 (see also the declaration he granted).

165. Mr. Milford QC relied upon a number of matters as forming part of the background to the defendant's case on justification:

(i) Overlapping disability provisions under the legacy benefits system were overly complex, caused confusion and were poorly targeted (see e.g. para. 22 of the White Paper);

(ii) The money saved by abolishing disability premiums was used to fund an increase in the LCWRA element;

(iii) The complexity of the move to UC necessitated a phased transition;

(iv) The aim of phasing out legacy benefits;

(v) The appropriateness of the distinction between natural and managed migration;

(vi) The "no turning back" principle;

(vii) The introduction of the gateway to avoid the administrative burden of having to carry out manual checks to determine the entitlement of any additional SDP natural migrants to SDP transitional payments (Young WS paras. 145-149);

(viii) The removal of the gateway at the first opportunity in January 2021 in order to address the criticisms made by Swift J in TP 2, by "levelling down";

(ix) The purpose of transitional payments and transitional protection is only to smooth the change for severely disabled persons from legacy benefits to the lower level of benefits which the Government and Parliament have judged to be appropriate for meeting their needs.

166. Paragraph 6 of Counsel's helpful agreed note shows that essentially all of these points, apart from point (viii), have previously been put before the High Court and the Court of Appeal in TP 1 and TP 2. Those Courts were fully appraised of the reasoning underlying the relevant parts of the statutory framework, key aspects of which were referred to in the judgments. The Court is now dealing with the residual part of the claim brought by TP and AR in relation to the SDP natural migrants group. The claim by AB and F raises an additional issue for those members of that group who had previously been in receipt of the disabled child element of child tax credit. It is not suggested that there are any other cliff-edge effects for members of the SDP natural migrants group. The background points advanced by the defendant, most of which are of a broad nature, should not distract the court from examining whether a legally adequate explanation has been provided for the differential treatment now in issue. The need for the SSWP to provide such an explanation must have been apparent from the outcome of TP 1 and TP 2.

167. Ms. Leventhal does not dispute the accuracy of that summary in [165] of the Government's thinking as far as it goes. But she submits, and I agree, that the points made do not go to justifying the specific difference in *transitional* treatment which is in issue in this third challenge. They do not assist the court on the issue of justification which has to be determined.

168. In this context I refer briefly to Mr. Milford's submission that the gateway had been introduced in order to reduce administrative burdens, and not to provide full transitional protection in respect of SDP and EDP for natural migrants. He also said that the claimants could not gain any support from the fact that the gateway remained in existence until January 2021, because the mechanisms necessary to cope with its removal could not be in place until then. But Ms. Leventhal had not sought to argue the contrary. Therefore, Mr. Milford's gateway points were no more than a defensive submission which he did not need to make. Certainly, they do not provide any positive justification for the differential treatment which actually exists. Furthermore, as Swift J stated in TP 2 at [61], the gateway simply necessitated an additional explanation for this further differential treatment of the SDP natural migrants group. In other words, it did not supply one.

169. Mr. Milford QC advances essentially six points specifically to justify the differential treatment in TP 3, relying also upon the evidence of Ms. Young.

170. First, he submits that the decision to fix the flat rate SDP transitional payment at the value of the SDP element, and not also the EDP element, accords with the SSWP's reason for giving special transitional treatment to SDP natural migrants in the first place. Extending SDP transitional payments to address EDP would not accord with the aim of the regulations, which was to provide protection solely for the SDP element. The purposes of the two premia are different. SDP was introduced for disabled people with high care needs but without a full-time carer receiving a carer's allowance, so that they could buy in care and support. EDP was introduced to provide support for disabled persons facing greater barriers to accessing the labour market than normal. It was therefore available even if the claimant had a full-time carer claiming a carer's allowance (but it is to be noted that in that situation SDP would *not*, of course, be payable in addition) (see [19]-[20] above).

171. I accept Ms. Leventhal's response that these submissions simply identified one of the aims of the SSWP. Accepting that that aim was to provide transitional relief broadly equating to the value of SDP, but not to include EDP, the question remains what was the explanation for making that distinction. Persons receiving SDP have high care needs but no carer and so receive SDP, but their disability may also have impeded normal access to the labour market, so as to justify receipt of EDP as well. Neither premium is provided for in the UC regime, but the question remains what was the SSWP's justification for providing *transitional* relief for natural migrants against the cliff-edge effect of losing SDP but not EDP?

172. The Equality Impact Assessment produced for the SSWP in May and October 2018 identified the aim to provide transitional relief in respect of SDP. But the passages quoted in Ms. Young's statement (see paras. 129-132), and to which I was referred, did not explain why the same approach should not be taken for SDP claimants also in receipt of EDP.

173. The briefing to the SSWP dated 3 June 2019 stated that officials proposed rates of transitional payments for the SDP natural migrants group which would broadly compensate for the loss of SDP but go no further. This briefing did put forward three reasons as to why it was considered that EDP should not be included along with SDP in the transitional payment scheme (paras. 9 to 11 of the paper on Option 1). First, 96% of those receiving EDP (but not SDP as well) benefit from migration to UC whereas only 4% lose, and it was not proposed to provide any relief for the latter. Second, some SDP recipients are not entitled to EDP and so to include EDP in the transitional relief would require six fixed-rates to be set in order to avoid overpaying those claimants. These rates would cover the three SDP cases already being addressed (i.e. single claimants either with or without the LCWRA element and certain couples) and in addition those parallel cases where EDP is also being paid. It was said that this was not operationally deliverable, without more. Third, it was suggested that to include EDP would undermine the principle of only providing "full transitional protection" to managed, not natural, migrants. The Equality Analysis produced in June 2019 also referred to the first of these three points.

174. I will address the first two points below when dealing with Mr. Milford's remaining submissions. The third point is incorrect. Ms Young explains very clearly at paragraphs 178-179 of her witness statement that *full transitional protection* would involve a precise calculation of the amount of the legacy benefits which would otherwise have been payable over time to compare with the UC benefits payable. For natural migrants that would need to be done manually, which would be "administratively impossible" on an individualised basis. But the claimants have not challenged that position. That is why SDP transitional payments are made on a simple fixed-rate basis and why the claimants have accepted that the same approach should apply to transitional relief in respect of loss of EDP. Indeed, the figures which would need to be used if EDP were to be included in the transitional payments scheme have already been calculated by the Department (see e.g. [56] above).

175. Accordingly, Mr. Milford's first submission does not provide any justification for the differential treatment in this case. SSWP's case depends on the remaining points he advanced.

176. Secondly, Mr. Milford QC submitted that the balance has materially changed since the decision in TP 2 because firstly, the gateway has been removed and secondly, during most of the period when the gateway was in existence, SDP natural migrants in the position of TP and AR received the Covid uplift of £20 a week, which put them in a better position than those who continued to receive EDP as well as SDP as part of their legacy benefits (see [57] – [58] above).

177. I do not accept that the removal of the gateway assists the defendant. That has addressed the absence of any justification for treating the Regulation 4A group (including people who would otherwise have become natural migrants during the gateway period) differently from original members of the SDP natural migrants group in relation to transitional relief for SDP. That has addressed the particular legal flaw identified by Swift J in TP 2. The removal of the gateway has not removed the differential treatment previously identified in relation to EDP (see [53] and [55] above). More particularly, the removal of the gateway does not provide an explanation or help to justify the outstanding part of the differential treatment about which TP and AR complain.

178. I am wholly unimpressed by the "Covid-19 uplift" argument. First, the claimants are challenging the arrangements made for SDP transitional payments which were laid down by SI 2019 No.1152, the relevant parts of which came into force on 24 July 2019, long before the pandemic. Plainly, this was not a factor which formed any part of the thinking of the SSWP or her department when the decision not to address EDP in the transitional payments was made. Second, although the Covid 19 uplift covers a period of approximately 18 months, it does not cover the entirety of the period during which members of the SDP natural migrants group have had no transitional relief in respect of the EDP element. Third, both TP and AR explain in their witness statements that the uplift has only just covered the *additional* costs that they have had to incur because of Covid. That is hardly surprising. No doubt public money was expended in this way for that very reason. This case is not about the reasons why a Covid 19 uplift has not been applied to those in receipt of legacy benefits. Fourth, the uplift has not been applied in order to address transitional relief in relation to EDP. It has been given to UC recipients *generally*. It is not targeted at members of the SDP natural migrants group in order to address the cliff edge loss of EDP. As the claimants put it in paragraph 41B of their Re-Amended Statement of Facts and Grounds, the Covid-19 uplift does not undo the disadvantage caused by the differential treatment.

179. Thirdly, Mr. Milford QC submits that the inclusion of transitional relief for EDP would overpay those of the 71,000 claimants who receive SDP but not EDP (see [21] above) and who undergo natural migration at some point. I agree with Ms. Leventhal that this point assumes that overpayment cannot be avoided. But, it can be if the legislation were to provide for six fixed-rates of payment rather than three. It has to be remembered that under the existing scheme there are three different rates because it has been, and is, necessary in any event to distinguish between the following categories:

(i) A single claimant who does receive the LCWRA element;

(ii) A single claimant who does not receive the LCWRA element;

(iii) Joint claimants who receive the single rate of SDP where no person has become a carer for either claimant.

Joint claimants not falling within (iii) are assigned to (i) or (ii) according to whether the LCWRA element is payable to either of them. The addition of three further fixed-rates would simply involve a figure set by regulations in respect of EDP for each of the categories in (i) to (iii) where the claimant had been eligible for EDP as well as SDP. As Ms. Leventhal demonstrated, the application of these additional three rates would essentially depend upon one additional question, namely whether there had been entitlement to EDP and, if so, for what period.

180. Fourthly, Mr. Milford QC relies upon the administrative burden of implementing fixed-rate payments for the cliff-edge loss of EDP and consequential delay to the roll out of UC more generally.

181. It is necessary to distinguish carefully between the two types of transitional relief which have been under consideration. Ms. Young describes at paragraphs 177 – 184 how *full transitional protection* is applied in cases of managed migration. Both she and Mr. Milford QC illustrated the points being made by reference to the Harrogate pilot. That process has involved the computation of the actual amount of any shortfall by

comparing the entitlement to all legacy benefits with the entitlement to UC for each individual claimant, one by one. It has had to be done manually. By contrast, transitional relief has been provided to SDP natural migrants as fixed-rate payments, to avoid the need to carry out the sort of exercise which has been necessary for managed migration cases (see para. 188 of Young WS). In TP 2 Swift J accepted the justification for providing transitional relief to the SDP natural migrants group as fixed payments rather than full protection ([54] to [58]).

182. In the present case, the claimants accept the principle that any transitional relief in respect of EDP should be by way of fixed-rate payments. Accordingly, much of the evidence provided by Ms. Young and the submissions of Mr. Milford QC were, with respect, directed at the wrong target. I bear in mind Ms. Young's evidence about the number of staff required to carry out manual checks on entitlement to SDP for members of the SDP natural migrants group and the determination of which fixed-rates to apply (paras. 147-149 of WS). But in paragraph 80 of the claimants' skeleton for TP 2 it was pointed out that to determine whether a claimant was entitled to EDP as well as SDP was relatively straightforward by looking at the Department's own records (e.g. its CIS system – see below). Was the claimant in the ESA Support Group prior to transfer and therefore in receipt of the support component? If yes, they would have qualified for EDP. If no, was the claimant entitled to higher rate DLA or the enhanced rate daily living component of PIP? If yes, then the claimant would have been entitled to EDP. Those questions simply reflect paragraph 7 of Schedule 4 to the Employment and Support Allowance Regulations 2008 (SI 2008 No. 794). The questions relating to DLA and PIP entitlement were built into the questions needing to be asked in relation to SDP entitlement in any event (see para. 4(b) of the "Joint Note on Statutory Framework". Ms Young has not suggested otherwise.

183. The question of possible staff resources to deal with the EDP issue has been addressed very briefly in paragraph 193 of Ms. Young's witness statement without any detail at all. I note that going forwards the entitlement to an SDP transitional element in the event of natural migration after 26 January 2021 (i.e. under SI 2021 No.1230) is predominantly dealt with by automated systems (para. 171 of Young WS). It is not suggested that original members of the SDP natural migrants group have not already been identified through the process of determining entitlement to the SDP transitional payments (see e.g. para 148 of Young WS). The suggestion that transitional payments in respect of EDP could not be deliverable has simply not been made out.

184. In paragraph 154 of her witness statement, Ms. Young states that the delivery of the SDP transitional payment scheme contributed to the end date for managed migration being pushed back to late July 2023. But she says that this was also "linked with the wider rules for transitional protection" without any further detail, and, apparently, the removal of the gateway. She goes on "to say that any further changes to the SDP transitional payments would further impact on the end date for managed migration". But nothing is said about the extent of any delay that might result. This court has been told that the pandemic has made a significant contribution to delay in any event. For example, the Harrogate Pilot has been suspended.

185. Taking into account the paucity of information given to the Court, I conclude that it would be inappropriate to attach significant weight to the administrative burden and delay factors.

186. The administrative burden and delay arguments are even more unattractive when viewed in the context of the history of the TP litigation. TP 3 was filed as long ago as 22 October 2019, because it was a challenge to the scheme for transitional payments introduced by SI 2019 No.1152. No doubt the manual work on establishing entitlement to those payments began some time after July 2019. However, because the SSWP decided to appeal against the order of both Lewis J and Swift J, a consent order was made on 22 November 2019 staying TP 3 until 21 days after the Court of Appeal gave its judgment. On 29 January 2020 that judgment was handed down. A further consent order stayed TP 3 until 13 March 2020 to allow the SSWP to consider the claim in the light of that judgment. Consent orders made on 15 April 2020 (in the light of the pandemic) and on 16 April 2021 stayed TP 3 until late April 2021. It appears that the work on identifying persons entitled to SDP transitional payments under SI 2019 No.1152 was completed by about September 2020 (see para. 148 of Young WS). If TP and AR are otherwise able to succeed in their unlawful discrimination claim, I do not see why they, or others in the same position, should in effect be penalised on the grounds of administrative burden and delay to the roll out of UC, given the effects which the SSWP's resistance to the challenges in TP 1 and TP 2 has had on the resolution of the EDP issue. It should not be forgotten that the issue of transitional relief for the SDP cohort was identified as far back as 2011.

187. Fifthly, Mr. Milford QC relies upon the risk that others might seek to piggyback upon the claimants' success in this case. The SSWP says that most of the 900,000 claimants who receive EDP but not SDP (96%) are better off under UC than the legacy benefits system. But about 4% or roughly 50,000 people are worse off. The concern is that they might seek to argue that they should be entitled to transitional payments to address the cliff-edge effect of reduced benefit in the event of natural migration.

188. The short answer to this point is that in TP 2 Swift J decided that, as a matter of principle, the risk of piggybacking could not be a defence to a claim of discrimination to guard against the possibility that other legally valid claims might as a consequence be brought (see [63]). The Court of Appeal agreed with him ([180]).

189. In any event, the risk suggested by the defendant, even as presented in TP 3, is not "realistic", to borrow the term used by Swift J in TP 2 ([63]). Different treatment in the provision of transitional relief for the members of the SDP natural migrants group, as opposed to natural migrants more generally, is justified for the reasons expressed by the Department (see e.g. [24] – [25] above and see also Ms Young's WS e.g. at para. 130, para. 9 of the Ministerial submission dated 3 June 2019 and paras. 16-18 of the Equality Analysis in June 2019). It should also be recalled that Parliament approved the introduction of the gateway and transitional payments for those receiving SDP, and not for those receiving EDP alone or for natural migrants generally (see [40] and [47] above). I would add that the reasoning in this judgment is limited to the differential treatment and status identified above.

190. Sixthly, Mr. Milford QC relies upon the cost of providing transitional relief in respect of the loss of EDP. This would involve expenditure of up to £150m over the period up to 2024/5. It is said that this would require approval by HM Treasury and most likely result in a requirement for offsetting savings elsewhere in the UC programme (para. 194 of Young WS). The briefing note to the SSWP dated 3 June 2019 stated that it would be "*very challenging*" to find offsetting savings. It is not clear whether any

further detail was provided to the Secretary of State. Certainly, none was provided to the Court.

191. Undoubtedly £150m is a substantial amount of public money. According to the briefing note to the SSWP, it involves sums of typically £20-35m a year over a six-year period. I note in passing that it is not clear why, by contrast, the SDP transitional payments introduced by SI 2019 No.1152 have been assessed as largely cost neutral. For example, was that the result of cost savings elsewhere and, if so on what matters?

192. At all events, proportionality raises the question whether it is appropriate for SDP natural migrants to receive no transitional relief in respect of the cliff-edge effects of losing EDP, when others moving home within the same local authority area have remained on full legacy benefits and receive full protection on managed migration. It is necessary to apply the principles restated by the Court of Appeal in TP 1 and TP 2 (see [144] above). In that context, what is the cost of the transitional protection afforded to other SDP recipients, let alone the cost of the UC programme over the same six-year period, so that the figure of £150m can be seen in context? There is no evidence on such matters.

193. Nor is there any evidence on what other UC expenditure would be at risk and why it is considered that it should be prioritised over the needs of the highly vulnerable members of the SDP natural migrants group, if indeed that exercise has in fact been carried out. The witness statements filed for the claimants in TP1 demonstrate powerfully just how serious the sudden drop in benefits has been for those members.

194. Like Swift J, I bear in mind that the standard for justification which the Secretary of State has to meet is relatively low. But I also bear in mind the criticisms which the Court has previously made of the adequacy of the material relied upon by the SSWP and the consequent need for more information to be provided. Taking into account all the material now available in these proceedings, I am not satisfied that the SSWP has shown that there is a reasonable relationship of proportionality in this case between the defendant's aims, including reducing or curtailing public expenditure, and the means chosen to pursue it, namely the decision not to provide any element of transitional relief against the loss of EDP for members of the SDP natural migrants group.

Conclusions on Ground 1

195. Whether the approach to justification is expressed as a low intensity of review, or a wide margin of appreciation based upon whether the decision in question was manifestly without reasonable foundation, I am not satisfied that the SSWP has justified the differential treatment identified under Ground 1 for the reasons set out above.

196. Approaching the matter in terms of the *Bank Mellat* tests, it is important to have in mind the narrow nature of the differential treatment in issue (just as in TP 2), albeit of very great importance to the claimants and others in the like position. I am not satisfied on the material before the Court that the broad aims of promoting phased transition, curtailing public expenditure or administrative efficiency required the denial of transitional relief against the loss of EDP for SDP natural migrants. Quite apart from that, I reach the firm conclusion that a fair balance has not been struck between the severity of the effects of the measure under challenge upon members of the SDP natural migrants group and the contribution that that measure makes to the achievement of the

defendant's aims, *a fortiori* where there is no connection between the triggering event, the move to a home in a different local authority area, and any rational assessment of the disability needs of a severely disabled claimant.

197. Likewise, it is not suggested that the triggering event in the case of AB had any connection with the assessment of the needs of herself and her family. I do not accept the submissions made by the defendant that AB lacked status for the purposes of Ground 1 (see also Ground 2(1) below).

198. Accordingly, I uphold Ground 1 in the claim brought by TP and AR. Taking into account also the analysis below on differences in treatment and status, AB and F also succeed on Ground 1.

Ground 2(1)

Ambit

199. It is common ground that the claims falls within the ambit of Article 8 and A1P1 of the ECHR for the purposes of Article 14.

Differences in Treatment

200. Like the claimants in TP 3, AB is an SDP natural migrant. Her partner CD was also entitled to SDP. Previously they had lived separately and each had made a single person claim for benefit. The triggering event for each of them was that they began to live together as a couple with their children. As a result, both of them had to migrate naturally to UC. They both became SDP natural migrants once and for all. It is important to appreciate that AB's claim is based upon the treatment of two people who became a couple, *both of whom* were entitled to SDP.

201. As in the case of TP and AR, this triggering event did not involve any change in the needs of AB and F (or for that matter CD and E), in particular as disabled persons. However, CD lost his entitlement to EDP and both AB and CD lost their entitlement to SDP. Subsequently, they received transitional payments which provided transitional relief for the removal of SDP but not EDP, in accordance with SI 2019 No.1152. The other consequence of natural migration was that the lower disabled child element under UC replaced the disabled child element under CTC without any transactional relief. This drop in income has continued from March 2018 to date and is continuing. Although the triggering event in AB's case happens to have been the forming of a couple, the loss of EDP and CTC would have been suffered by any couple receiving SDP who underwent natural migration before the gateway was introduced, e.g. by splitting up or, indeed, by moving home to a different local authority area.

202. The treatment about which AB complains, like TP and AR, is the sudden, cliff-edge drop in benefits, in this case EDP and CTC, without any element of transitional relief. The analysis of the differences of treatment is similar to that in TP 3 (see [147] – [152]).

203. Before the introduction of the gateway in January 2019 this treatment of AB was less favourable compared to others in a relevantly similar situation, that is those severely disabled persons in receipt of SDP, EDP and the CTC disabled child element who experienced a change of circumstance not constituting a triggering event (e.g. moving

home within the same local authority area) and who therefore remained on legacy benefits.

204. When the gateway was introduced regulation 4A prevented those still in receipt of SDP from migrating to UC, whether naturally or otherwise. So severely disabled persons who experienced the same sort of triggering event as a member of the SDP natural migrants group (e.g. forming a couple or moving home to a different local authority area) would receive more favourable treatment. They would remain on full legacy benefits, at least during the gateway period. In addition, those who experienced a change of circumstance not amounting to a triggering event, also received that more favourable treatment (as before the introduction of the gateway).

205. With the removal of the gateway in January 2021, those severely disabled persons who had previously experienced during the gateway period what would otherwise have been treated as a triggering event (e.g. the formation of a couple or a couple moving home to a different area) continued to receive more favourable treatment by remaining on full legacy benefits until the date of managed migration. Even when that managed migration takes place, this group retains that margin over the UC benefits otherwise payable (subject to tapering). Even if such a person experienced a triggering event (such as the formation of a couple) after the revocation of the gateway but before any managed migration, he or she would still receive more favourable treatment than a person in the position of AB. Legacy benefits would continue to be paid to the date of natural migration, and only at that point would they receive the SDP transitional element and tapering apply.

206. In his oral submissions Mr. Milford QC went back to the tortuous analysis in paragraphs 82 to 94 of the Detailed Grounds of Defence involving eight different scenarios. The court was not assisted by that material, most of which was not directed to the relatively straightforward case which the claimants are entitled to advance. The points were not argued in any detail and I will not prolong this judgment in order to deal with each of them. Scenarios where one of the couple is not entitled to SDP are irrelevant to this case. The whole of the discussion in these judicial reviews has focused on severely disabled persons because they represent the group which always loses out when migrating to UC and hence transitional relief has been necessary. In any event, where one person in a relationship is not entitled to SDP, the other loses their entitlement to SDP under the rules *governing that benefit* and not because of the UC scheme. Furthermore, we are concerned with the position leading up to migration to UC, not what happens thereafter. Some of the scenarios depend upon an interpretation of Regulation 4A of the 2014 Regulation of the 2014 Regulations, which is doubtful and which the defendant has not shown to be correct. I found the whole exercise unhelpful.

Status

207. Once the differences in treatment are properly understood, there is no merit in the defendant's submissions that the comparisons upon which the claimants rely are too "artificial" to qualify as a status for the purposes of Article 14 (see para. 70 of the defendant's skeleton).

208. The status of AB is analogous to that which was accepted by the Court of Appeal in TP 1 (see [113]). The status of AB is that of a severely disabled person with at least one disabled child, who experiences natural migration on grounds having no connection

with their disability needs, whether through the formation of a couple or by moving home across a local authority boundary. Once again, there is no merit in the defendant's submission relying on *Zammit.* The difference of treatment does not simply relate to the date from which legislation came into force. The differential treatment arose before January 2019. The defendant is simply relying upon subsequent legislation as having sufficiently removed that difference of treatment based on status. It has not.

Justification and Proportionality

209. The starting point is that a low intensity of review is appropriate for this challenge to legislation involving judgments of social and economic policy in the field of welfare benefits. Rightly, Mr. Milford QC says that this is underscored by the transitional nature of the measure which is the subject of this challenge.

210. However, as in TP 3, it is important to bear in mind that the claimants do not challenge the decision to set the disabled child element at a rate substantially lower than that payable under CTC. The Parliamentary debate referred to above related to that point of principle and not to the much narrower question raised by this challenge, namely whether those in the SDP natural migrants group should not receive *any* transitional relief in relation to the cliff-edge effect of this reduction in benefit, whereas the comparator groups have been protected.

211. It is to be noted that a good deal of the material put forward on behalf of the SSWP is relevant to the justification for the principle of altering the level of benefit for a disabled child under UC and not the issue of transitional relief.

212. As in TP 3, Ground 2(1) involves comparison between groups, all of whom comprise severely disabled persons, and not between disabled persons and non-disabled persons. All of these persons have qualified for SDP, EDP and the disabled child element of CTC. I accept the claimant's submission that Article 14 is no less engaged on this account. The present case is analogous to *Mathieson* at [23] (see [153] above).

213. The claimants rely upon Article 3(1) of the UN Convention of the Rights of the Child and Article 7(2) of the UN Convention on the Rights of Persons with Disabilities, which provide that the best interests of the child are a primary consideration in any state action concerning children or disabled children. The defendant suggests that the mere fact that the measure under challenge does not give additional protection or an additional benefit does not turn it into a state action concerning children (para. 69 of Skeleton). But the true position is that for a severely disabled person required by the statutory scheme to migrate naturally to UC, the disabled child element is suddenly reduced without any transitional relief. Plainly in this case state action has taken place which concerns a child, applying the approach taken in *DA* at [75] et seq and in *SC*.[1] However, even if I had accepted Mr Milford's submission on this point, I would still have concluded that the defendant fails on the issue of justification and proportionality.

214. Although it is not for the Court to determine whether a breach of those unincorporated international treaties has taken place, the best interests of the child is a relevant consideration in determining whether differential treatment is justified under Article 14

[1] Mr Milford QC relied upon paragraph [91] of *SC*, but that dealt with the separate issue of whether the court could find that an international treaty had been breached or violated.

(*SC* at [77]-[78], [84], [86] and [91]). The impact of a measure upon the best interests of children may be an important factor (*SC* at [114] and [158]).

215. I note that when rejecting an argument in *SC* that differential treatment should be assessed in that case by comparing adults and children, Lord Reed said at [63] that CTC is not paid to adults for their own benefit, but to assist them in meeting the needs of children for whom they are responsible. A reduction in CTC affects the children in a household, since it limits the amount that can be spent on their case. Of course, in the present case we are not dealing with transitional relief in relation to the loss of CTC generally, but the effect of natural migration upon severely disabled persons who have been receiving not only SDP but also CTC for a disabled child.

216. It is helpful to put the arguments on justification into context. First, it was recognised at an early stage that transitional protection might be required not only for people in receipt of SDP but also families receiving the disabled child element of CTC, not the severely disabled child element (see [24] above).

217. Second, the SDP natural migrants group was identified as being exceptional and therefore requiring transitional payments because, unlike others, they always suffer losses in migrating to UC (see e.g. DWP's Equality Analysis June 2019 paras. 16-18).

218. Third, AB and SDP claimants in a like position with disabled children form a sub-group of the SDP natural migrants cohort.

219. Fourth, this sub-group is estimated by the Department to be very small. There are only a "few hundred" UC claimants receiving a SDP transitional payment as well as the lower disabled child addition (Young WS para. 205). The derivation of that estimate has been explained in letters from the GLD dated 10 September and 6 October 2021. It is said that "at most a couple of percent" of households receiving UC included an adult who had received the SDP and CTC allowance. When that percentage is applied to the number of persons receiving SDP transitional payments in September 2020, around 16,000, it can be seen that this sub-group comprises only about 300 claimants.

220. Fifth, Ms. Leventhal points out that none of the contemporaneous material produced for the defendant shows that any consideration has been given by the SSWP or by the Department to the issue of whether some element of transitional relief should be given to this sub-group in respect of the cliff-edge effect of the reduction in the disabled child element. The defendant made no submission to the contrary. By way of example Ms. Leventhal referred to section VI of the Equality Analysis produced for the Department in October 2018. This considered the effect of losing SDP and the reduction in the disabled child allowance, having regard to the UN Conventions, but only in the context of *full transitional protection* provided for *managed* migration. No consideration was given to whether any transitional relief is necessary for people in the same position who undergo natural migration. There is no evidence of the subject being considered in the light of the judgments in TP 1 and TP 2. The relevant regulations followed the negative resolution procedure and there is no evidence of there having been any Parliamentary debate on the matter. The position is therefore similar to that with which Lewis J was faced in TP 1 (at [85]).

221. The defendant's case rests on the brief evidence from Ms. Young dealing with the issue of justification in this claim, together with the submissions made.

222. Much of the material relied upon by the defendant is concerned with the reasons why it has been decided to replace the disabled child element under CTC with a lower rate under UC (e.g. Young WS paras. 77-85, 197-198 and the first part of 204). This claim does not challenge that change. Other lengthy passages describe the consideration given to the lower disabled child addition in the context of managed migration and *full transitional protection* (Young WS paras. 200-201). Again, this claim does not seek that form of transitional protection. This material is not in point.

223. Ms. Young says (paras 199 of WS) that the "CTC cohort" covers a wide range of circumstances. Some recipients are capable of work. Others may not need additional support beyond that provided by UC. Some may be better off under UC than under legacy benefits. There would be no justification for giving transitional payments to those who receive larger benefits under the UC. Although no details are given, there is no reason to doubt the broad thrust of what is said in paragraph 199 of Ms. Young's statement. But, once again, it is aimed at the wrong target. The claimants do not contend for transitional payments for the so-called CTC cohort. Their case is only concerned with the SDP natural migrants group, the members of which have been recognised by Government to be exceptional because they are always worse off under UC and are readily identifiable as a cohort. Likewise, paragraph 200 of Ms. Young's statement says that there is no basis for any transitional payments for "natural migrants" previously in receipt of the disabled child element of CTC. But that is not the case that the defendant has had to deal with or the Court now has to decide.

224. Mr. Milford QC repeats the submission made under Ground 1 (see [170] above) that to provide a transitional payment for the reduction in the disabled child element would not reflect the purpose for which SDP transitional payments have been made, namely to address the loss of SDP for SDP natural migrants. There are two flaws in that argument, the first of which applied under Ground 1. The point made by the defendant does not explain why the distinction was drawn. Second, in this instance there is no evidence of transitional payments in connection with CTC being considered and rejected with the reasons identified (contrast [173] above).

225. Mr. Milford also submits that the purpose of the disabled child allowance was different to that of SDP. But that is true whether migration is natural or managed and yet, in the latter case, full transitional protection is provided. As with the issue in relation to EDP, the question remains, as it did in TP 1, what is the justification for not providing any element of transitional relief for this substantial cliff-edge loss for SDP natural migrants as an exceptional group which always loses out when migrating to UC. The cliff-edge effects of natural migration have impacted upon the relationship between the disability of severely disabled persons and their ability to provide and/or pay for care for their disabled children.

226. Ms. Young suggests that because the number of claimants involved is very small the benefit of providing transitional relief would be limited as against the administrative burden involved (WS para. 205). I see no merit in this point. It is plain from the evidence filed on behalf of the claimants that the absence of any transitional relief for this aspect of SDP natural migration has caused, and is continuing to cause, very substantial harm to those affected.

227. Ms. Young suggests that very substantial costs would be involved if the lower disabled child allowance for UC were to be increased to match the rate payable under the former

scheme: £250 million in 2021/2022 rising to £500 million a year by 2025/2026 (£1.8 billion over a 5 year period). These figures have not been explained. Even the initial amount of £250 million appears to bear no relationship to the simple fact that we are dealing with only 300 or so families. For example, AB's loss is under £4000 a year in relation to two children. Furthermore, the claim relates to a form of transitional relief which would be subject at some point to tapering. It is wholly unclear why the Department's figures increase over time. Ms. Leventhal submitted that Ms. Young's figures related to the overall cost of providing a disabled child allowance equivalent to the former CTC allowance for *all* natural migrants. That, of course, is not the subject of this claim. The defendant has not denied this. On that basis the Court has not been provided with costs relevant to the SDP natural migrants group. Accordingly, I do not attach any significant weight to this factor. On the material before the Court, it is reasonable to assume that the costs involved would be correspondingly small relative to the small number of claimants. It has not been shown that they would give rise to substantial budgetary issues.

228. With regard to administrative burdens, the defendant has provided very little evidence. For example, no indication has been given as to how many staff would be needed. As Ms. Leventhal says, the position is more straightforward than in the case of EDP. The relevant cohort is a sub-group of the SDP natural migrants who were already identified by the Department in September 2020. Here, the eligibility criterion for entitlement to the CTC disabled child element and the UC disabled child lower addition is "effectively identical" (paras. 6 and 8(b) of the agreed "Joint Note on Statutory Framework"). Accordingly, when someone in the SDP natural migrants group moved to UC the Department had to check whether that person was entitled to the CTC allowance and it would also need to know whether they have continued to be eligible for the UC allowance in respect of a disabled child. The Department has needed to obtain that information in any event.

229. The defendant's skeleton (para. 98) added that this information would need to be verified with HMRC. But this was only a distraction. The defendant has not refuted the points to which I have just referred. Furthermore, Ms. Leventhal helpfully drew attention to a document produced by the Department in July 2018 entitled "Customer Information System (CIS): the information held about you". CIS "is a computer system used by the [DWP]" (pare 5). Page 21 states that CIS holds details of a claimant's tax credits "to enable DWP staff to quickly obtain a picture of your dealings with…Her Majesty's Revenue and Customs". There is "one HMRC computer system which provides CIS" with information about a person's tax credits (p. 21). The details provided include when a claim for a tax credit was made, the start date and end date of a tax credit awarded, and the components of that tax credit, including the number of disabled children (pages 35-37). I am surprised that this document had not previously been disclosed by the defendant. No real attempt was made to explain what burden would truly be involved in establishing entitlement to the tax credit, particularly as it is a matter which the Department will have addressed in any event throughout the relevant period. The low evidential burden placed on the defendant does not mean that the Court can simply disregard a lack of basic, essential evidence to explain and substantiate a point being asserted.

230. In paragraph 203 of the witness statement, Ms. Young describes the steps which she says would have to be undertaken to identify all families who were previously in receipt

of a CTC disabled child element and to award "*transitional protection"*. As I have previously pointed out, this case is not about the provision of full protection to all such claimants. It is only concerned with transitional relief in the form of generic, fixed-rate payments to members of the SDP natural migrants group, which could be established by secondary legislation, as in the case of EDP.

231. Mr. Milford QC went on to submit that if such relief were to be given to that group, it would be illogical not to provide the same relief to approximately 100,000 people who are in receipt of a UC award which includes the lower disabled child addition (if they had been entitled to the similar benefit under the legacy system). This is a piggybacking argument once again. As I have already explained, and as the defendant has accepted, the CTC cohort is not in the same position as the SDP natural cohort group. The SSWP has proceeded on the basis that the latter is in an exceptional position. Its members are always losers upon migration to UC. CTC recipients were a disparate collection of persons, many of whom are in work and/or are "winners" when they migrate to UC naturally. The defendant has advanced insufficient material to suggest any piggybacking concern which could legitimately justify the discrimination of which the claimants are entitled to complain.

Conclusions on Ground 2(1)

232. Even applying a low intensity of review, or giving a wide margin of appreciation, I am not satisfied that the SSWP has justified the differential treatment identified under Ground 2(1). That discrimination is manifestly without reasonable foundation.

233. Similarly, I reach the firm conclusion that the material before the court does not establish that, on the issue of whether no transitional protection should be provided to SDP natural migrants in respect of the cliff-edge effect of reducing the disabled child addition, a fair balance has been struck between the substantial harm caused to the persons concerned and the aims which have been advanced in the defendant's legal submissions and the evidence of Ms. Young.

234. For all these reasons, I uphold Ground 2(1).

Ground 2(2)

235. Here the defendant accepts that AB has a "status" as an SDP natural migrant with a disabled child (skeleton, para. 102).

236. The claimant AB argues that as the severely disabled mother of a disabled child she is in a materially different position from other severely disabled persons without disabled children who, as natural migrants, also receive the same transitional payments (for SDP alone). No transitional payment is made for the cliff-edge effects of the reduction from the tax credit formerly payable in respect of a disabled child.

237. Mr. Milford QC says that AB is treated differently from her comparators and in a relevant way. Unlike them, she receives an additional UC element, a disabled child addition, and DLA for each of her children. In other words, the similarity of treatment relates solely to one component of the overall benefit package, namely the transitional arrangements made for mitigating the cliff-edge effect of a sudden drop in benefits, but not to the substantive benefits themselves.

238. The resolution of this issue is not straightforward and there is little authority to guide the court on the narrow point which arises here. Although I prefer Ms. Leventhal's submissions for the reasons she has given, this is not an issue which I consider it appropriate to decide on the submissions I have received. It is common ground that if the Court were to reach the justification stage under Ground 2(2), the factors relied upon by both parties would be the same as under Ground 2(1). I have already resolved that issue in favour of the claimants and the claimants are entitled to the relief they seek in any event under Ground 2(1).

Conclusion

239. I wish to express my gratitude for the considerable help I received from all the legal representatives in these cases.

240. I uphold Ground 1 in the claims brought by TP, AR, AB and F and I uphold Ground 2(1) in the claim brought by AB and F. I invite the parties to agree appropriate declarations.