Neutral Citation Number: [2023] EWHC 378 (KB)

Case No: CO/3490/2021
IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION
ADMINISTRATIVE COURT
BIRMINGHAM REGISTRY

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street
Birmingham B4 6DS

Date: 23/02/2023

Before:

MRS JUSTICE FARBEY

- -

Between:

R **on the application of** **BK**	**Claimant**
- and –	
(1) SECRETARY OF STATE FOR WORK AND PENSIONS **(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT**	**Defendants**

- -
- -

Zoë Leventhal KC and **Darryl Hutcheon** (instructed by **Central England Law Centre**) for the **Claimant**
Edward Brown KC and **Talia Zybutz** (instructed by the **Government Legal Department**) for the **Defendants**

Hearing date: 3 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 23 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MRS JUSTICE FARBEY

Mrs Justice Farbey:

1. The claimant is a Bangladeshi national born in 1993. On 20 February 2020, she entered the United Kingdom to join her husband. The relationship subsequently broke down and the claimant was granted leave to remain under the Destitute Domestic Violence Concession ("DDVC"). She received a formal endorsement of her leave in the form of a biometric residence permit ("BRP"). She was allocated and received, subsequently, a National Insurance Number ("NINo"). Having received her NINo, she began to receive payment of Universal Credit ("UC").

2. The claimant applies for judicial review of what is described in the claim form as the defendants' failure to provide the NINo in printed form on the BRP. The date of that failure is said to be 7 July 2021.

3. The claimant points to two groups of people who have their NINo placed on their BRP:

    i. **Skilled Workers** under the Immigration Rules Appendix Skilled Worker (which replaced Tier 2 of the Points Based System in the Immigration Rules). The provisions of Appendix Skilled Worker enable employers to recruit people to work in the United Kingdom in a specific job. A Skilled Worker must have a job offer in an eligible skilled occupation from a Home Office-approved sponsor.

    ii. **Refugees and others granted protection in the United Kingdom:** Those who are granted leave to enter or remain under the protection categories of the Immigration Rules, such as refugees, and their dependants. I shall for convenience call this group "refugees" albeit that the protection categories are wider than those granted refugee status.

4. These two groups are the beneficiaries of the NINo Alignment Scheme ("the Scheme") under which NINos are allocated at the same time as the grant of leave to enter or remain.

5. The claimant submits that the failure to place her within the Scheme amounted to unlawful discrimination. She claims that, as a result of that discrimination, she suffered undue delay in receiving certain welfare benefits and was destitute for longer than she would have been if she had received her NINo at the same time as her BRP.

6. In making her claim of unlawful discrimination, the claimant relies on the provisions of article 14 read with article 1 protocol 1 ("A1P1") and article 8 of the European Convention on Human Rights ("the Convention"). 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."

7. Article 8 of the Convention 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."

8. Article 14 of the Convention prohibits discrimination in the following terms:

> "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."

Factual background

9. By June 2021, the relationship between the claimant and her husband had broken down. The claimant left home and was accommodated on a temporary basis in a refuge run by Women's Aid, a charity which supports women and children who have been affected by domestic violence and abuse.

10. On 24 June 2021, the claimant applied for leave to remain under the DDVC. By letter dated 7 July 2021, she was informed that her application had been successful and that she had been granted three months leave to remain. She subsequently received a BRP. In accordance with the defendants' established policies, the BRP did not contain a NINo.

11. On 8 July 2021, the claimant applied for UC. On 21 July 2021, she was informed by the Department for Work and Pensions ("DWP") that her eligibility for UC had been confirmed subject to the allocation of a NINo. She was at the same time informed that she would start to receive any UC payment by 14 August 2021.

12. DWP arranged the allocation of a NINo to the claimant which required her identity to be verified to DWP standards. On 13 July 2021, an appointment with DWP as part of the verification process was cancelled because the claimant required an interpreter. The rescheduled appointment took place on 21 July 2021.

13. On 22 July 2021, a National Insurance Number Application Request Form (known as an eDCI1 form) was sent to DWP's NINo allocation team. On 27 July 2021, the team were unable to contact the claimant. She had changed her telephone number but did not record the change on her UC account until 30 July 2021 (albeit that she

had before then verbally informed her "Work Coach" within DWP). A new eDCI1 form was passed to the NINo allocation team on 30 July with the correct details held for the claimant at the time.

14. On 12 August 2021, the claimant reported during a telephone interview that she had changed to a new telephone number. She was advised to provide the change of number to DWP in accordance with DWP procedures. Another eDCI1 request was sent but the NINO allocation team reported that there was no working telephone number for the claimant. DWP sent a message to the claimant in Bengali via its online portal.

15. On 13 August 2021, the claimant's solicitors sent a letter before claim to the defendants challenging (i) the failure to make arrangements to provide the claimant with a NINo printed on the BRP and (ii) the first defendant's delay in paying UC on the basis that she did not have a NINo. The first defendant was asked to pay UC to the claimant by 14 August 2021. Both defendants were asked to:

> "amend their relevant policies and practices to ensure that NINos are printed on BRPs at the time of issue for individuals granted limited leave to remain under the DDVC."

16. On 18 August 2021, DWP managed to make contact with the claimant who confirmed her telephone number. This information was passed to the NINo allocation team and a new eDCI1 form was issued, allowing the NINo allocation team to allocate the NINo on the same day. The claimant received her first UC payment on the same day, which was five days later than requested in the letter before claim.

17. By letter dated 9 September 2021, the first defendant responded to the letter before claim, having previously sent two holding letters. The response emphasised that the first defendant had taken action to allocate a NINo and that a payment of UC had been made on 18 August 2021. By letter dated 15 September 2021, the claimant was notified of her NINo.

18. The delay in processing the UC claim has not led to any diminution in any payment of UC. The first UC payment covered the period from the date of the claimant's claim for UC to the date of payment. There is no evidence that any subsequent UC payment was delayed.

The claim for judicial review

19. On 6 October 2021, the claimant commenced proceedings for judicial review. The only particularised relief sought in the claim form was a declaration to the effect that the defendants have violated article 14 read with A1P1 and article 8 of the Convention by failing to include the claimant, and those sharing her relevant status or statuses, within the Scheme.

20. On 14 February 2022, HHJ Simon sitting as a Judge of the High Court made an order granting anonymity to the claimant and directed that the issue of permission to apply for judicial review should be determined at a hearing on notice to the defendants. Following a hearing on 9 May 2022, permission was granted by Heather Williams J.

The DDVC

21. The claimant became entitled to claim UC when she was granted limited leave to remain in the United Kingdom under the DDVC. Since around 1999, the second defendant has made provision for the grant of indefinite leave to remain ("ILR") to a victim of domestic violence with limited leave to remain as the spouse or (in more recent terms) partner of a person present and settled in the United Kingdom where the relationship has broken down because of domestic violence. The provision originated in a concession from the Immigration Rules but was subsequently incorporated into the Rules.

22. Entry as a partner is a route to settlement and so it is the second defendant's policy that partners may reasonably expect to obtain ILR subject to satisfying the conditions of the relevant Immigration Rules. The purpose of the provisions for victims of domestic violence is that someone who has come to the United Kingdom as a partner should not feel compelled to remain in an abusive relationship for the sake only of qualifying for ILR. Victims of domestic violence should not feel compelled to leave the United Kingdom when the purpose of their being in the United Kingdom (to live here permanently with a British or settled partner) falls away through no fault of their own.

23. Following the significant changes to the Immigration Rules on family migration in July 2012, the Government implemented a concession to the new domestic abuse provisions under Appendix FM to the Immigration Rules. The concession (the DDVC) allowed victims of abuse to apply for a change of conditions of their leave to enter or remain which would allow them to have recourse to public funds for a short period. The DDVC permits a person to remain for three months with recourse to public funds. During the three-month period, an application for ILR may be made under the Immigration Rules using (if necessary) public funds to submit the application from a place of safety.

24. It is plain on the wording of the DDVC (and Ms Brown confirms) that leave to remain under the DDVC does not amount to an acceptance that the applicant is a victim of domestic violence and is not a guarantee that the applicant will be granted ILR. Its primary purpose is to remove the condition of no recourse to public funds ("NRPF"). The removal of NRPF from a person's conditions of leave means that a victim of abuse is not precluded from accessing emergency accommodation (such as a refuge) on account of a condition of their leave to remain. It enables them to have access to public funds pending their application for ILR so that they can access appropriate support while they make an application for ILR under the domestic violence route to settlement.

25. I shall call the beneficiaries of the DDVC the "DDVC cohort." Unpublished Home Office data shows that the great majority of the DDVC cohort are women:

Year	Number of DDVC Applications Granted	Male	Female
2018/2019	1,495	167 (11%)	1328 (89%)

2019/2020	2,046	276 (13%)	1769 (86%)
2020/2021	2,231	305 (14%)	1926 (86%)
2021/2022	2,475	375 (15%)	2099 (85%)

The purpose of NINos

26. The purpose of NINos was summarised in *R (Bui) v Secretary of State for Work and Pensions* [2022] UKUT 189 (AAC), para 4 (Farbey J CP, Upper Tribunal JJ Wikeley and Church):

> "The national insurance scheme, and NINos, were introduced in 1948. NINos provide a unique personal identification number and serve a range of purposes (including for welfare payments, recording national insurance contributions and maintaining taxation records). There are no statutory criteria governing their allocation. The policy is to allocate a NINo to anyone with a legitimate reason to have one (irrespective of nationality or citizenship). In practice, they are allocated to those individuals who are entitled to social security benefits (whether contributory benefits or otherwise) and those persons who are entitled to access the labour market. In the absence of a national identification system, they are used in the benefits system as unique reference numbers, enabling data matching to take place so that potentially fraudulent claims for benefits may be discovered."

27. The policy and practice in relation to the allocation and function of NINos is set out in the detailed witness statements of Gillian Brown on behalf of the defendants. Ms Brown is a Policy Manager in the Home Office. She confirms that the issuing of NINos is the joint responsibility of HMRC and DWP, with HMRC responsible for Juvenile Registration and DWP responsible for Adult Registration. I do not need to set out the details of Juvenile Registration which has no bearing on the present claim. DWP's policy for Adult Registration is to allocate a NINo only where there is a "business need." There are two such needs:

    i. The recording of National Insurance contributions made by workers; and

    ii. The payment of social security benefits.

28. It is convenient to consider the process and timescale for the allocation of NINos in relation to each of these business needs in turn.

The allocation of NINos to workers

Process

29. Applicants who require a NINo for employment purposes apply online. They are asked to upload copies of their identity documents along with an image of themselves

holding their identity document close to their face. Most applicants in this group are United Kingdom passport holders or they have been granted settled or pre-settled status through the EU Settlement Scheme or they have an existing visa. They will therefore already have had their identity verified through another government department, primarily the Home Office. This enables the DWP, who have access to Home Office systems, to corroborate their identity and to confirm their rights to work and to reside in the United Kingdom without the need for a face-to-face identity check.

Timescale

30. Ms Brown's evidence makes plain that employment applicants are currently being advised that their NINo applications can take up to 8 weeks to be processed, though processing times vary, and some applications can take longer than publicly quoted timeframes if additional checks are required.

The allocation of NINos to UC claimants

Process

31. The UC system is designed so that a claimant cannot receive any payment of UC without a NINo. If a UC claimant does not have a NINo, an application for one will be initiated by DWP using an internal process.

32. The allocation of a NINo to a UC claimant is a separate and specialised function within DWP which requires a process of evaluation and verification in every case. The process was summarised by the Upper Tribunal in *Bui*:

> "5… A UC decision-maker determines whether a claimant meets the substantive conditions for UC that are stipulated in Part 1 of the Welfare Reform Act 2012… If they are met, but the claimant does not have a NINo, then a NINo Application Request form (an 'eDCI1') will be sent to the NINo allocation team. This team operates as a second-level check in order to mitigate the risk of fraud. In every case, the issue of a NINo is subject to reasonable verification of entitlement by the NINo allocation team. The extent of verification will depend on the individual circumstances and the assessed level of risk.
>
> 6. As part of the verification process, the NINo allocation team will conduct an advanced trace on the Department's Customer Information System ('CIS') to check the claimant does not already have a NINo. That team will conduct a telephone interview to fill in the NINo application form and check sources from other Government agencies. Each application is independently assessed. The decision-maker must be satisfied that the claimant has the right to reside and is permitted to have recourse to public funds. Identity is verified to a 'medium' confidence level in line with departmental standards. If a NINo is allocated, it will be recorded in the eDCI1 form and sent to the UC decision-maker."

Timescale

33. The timescale for the allocation of NINos should be considered against the timescale for the payment of UC after a claim for UC has been made. The details of the timing of a person's initial UC payment are described in *Bui*, para 7:

> "7. In all cases, irrespective of whether a claimant has a NINo at the time of applying for UC, the first instalment of UC should be paid within 7 days of the end of the relevant assessment period. An 'assessment period' is 'a period of one month beginning with the date of entitlement and each subsequent period of one month during which entitlement subsists' (Universal Credit Regulations 2013 (SI 2013/376) regulation 21(1)). As an assessment period is one month, this means that claimants do not receive their first payment of UC until about 5 weeks after their initial claim. The normal timescale for allocating a NINo via the eDCI1 procedure is 10 working days but this can be expedited where necessary. In the majority of cases, therefore, there is sufficient time for a NINo to be allocated before the point at which a claimant is paid benefit."

34. In short, the target for payment of UC is five weeks after the initial UC claim. By that time, if there is no other delay, the NINo ought to have been allocated so that those who do not have a NINo at the point of making a UC claim are not worse off.

35. DWP prioritises NINo applications for UC claimants without a NINo, providing an expedited process for the verification of information provided for the purpose of obtaining a NINo as well as for the allocation of a NINo when the information has been verified. The expedited process is designed to ensure that UC claimants – who may be destitute and vulnerable – do not suffer undue delays in payment of UC. The amount of benefit paid is then calculated by reference to the date of the original UC application, so that (in effect) any delay is mitigated by back payments.

36. The practical effect of prioritisation is that the normal timescale for allocating NINos to UC claimants was, during the period that is material to the present claim, 10 working days. The NINo team can expedite NINos for urgent cases where an advance payment of UC has been requested. Ms Brown indicates that expedition is achieved at the expense of others.

37. Given that no UC is paid without a NINo, DWP has made the speed of NINo allocation a high priority, which usually results in UC payments being made on time. Ms Brown states:

> "The administration of NINos for UC claimants is generally sufficient and does not cause delays. Nevertheless, it is an unfortunate reality that in such a large system there will be points of vulnerability to administrative and human error."

38. Flexibility within DWP systems means that DWP is able to react at speed to ensure that NINos are swiftly and efficiently allocated to vulnerable groups. There has been

expedition for Afghan nationals who were relocated to the United Kingdom when the Taliban returned to power in 2021 and for Ukrainian nationals who have more recently been evacuated to the United Kingdom. New internal DWP guidance (introduced in 2022) informs UC case workers that NINo applications identified as DDVC cases "are prioritised" and makes plain that DDVC cases must be flagged: UC case workers "must notify the National Insurance number allocation team of these cases by using the 'Notes' section on the eDCI1."

The Scheme

Process

39. Under the Scheme, NINos are allocated to certain categories of people who have successfully applied for leave to remain and are issued with BRPs. DWP, HMRC and the Home Office have aligned their processes to create a BRP that includes a NINo. Following a trial in 2014, the Scheme was extended to all Tier 2 visa holders in 2015 and now applies to the successor Skilled Worker category. It enables a NINo to be allocated to someone who is coming to the United Kingdom to work and who will be likely to pay National Insurance contributions. This cohort are able to collect their BRP and NINo at the same time.

40. Unpublished Home Office data shows that the number of male and female Skilled Workers is about equal:

Year	Number of grants of Skilled Worker visas	Male	Female
2020	6,291	2942 (47%)	3,349 (53%)
2021	171,070	83,546 (49%)	87,521 (53%)
2022	91,464	44,972 (49%)	46,492 (51%)

41. In 2018, a joint decision by the Home Office, DWP and HMRC was taken to include NINos on BRPs for refugees and others granted protection in the United Kingdom which would also enable their spouses, or civil partners, and their adult dependants to receive a BRP with a NINo. The DWP had since 2005 provided a fast-track service for allocating NINos to this cohort. The Scheme provided an opportunity to digitise this existing service and to expand it to family members.

42. Ms Brown states:

> "Including refugees in the NINo BRP initiative allows for a swift transition from asylum support to mainstream benefits. Asylum support from the Home Office (money and/or accommodation) ends 28 days after the BRP is received following a grant of leave. Around 70% of asylum applicants claim section 95 support from the Home Office and those granted leave are encouraged to apply for benefits immediately after receiving a BRP. A fast track NINo service therefore

> prevents any 'gap' between the ending of asylum support and receipt of DWP benefits."

43. Although Ms Brown uses the term "refugee" as a shorthand for the range of protection-based categories in the Immigration Rules, there are several hundred permutations of immigration routes and possible outcomes for those who seek protection and their families. As set out in correspondence from the Government Legal Department to the claimant's solicitors, the permutations include (with emphasis added for clarity):

> "**Family reunion** with possible outcomes being a grant of leave outside the rules (LOTR), discretionary leave (DL), leave to remain (LTR) and indefinite leave to remain (ILR).
>
> **Victim of trafficking** with possible outcomes being a grant of DL, LTR granted on family and private life grounds, indefinite leave to enter (ILE) under the Iraqi consideration and ILR under the Iraqi consideration.
>
> **Humanitarian protection** with possible outcomes being a grant of LTE/LTR as a refugee (not asylum), DL, LTR on family and private life grounds, LTR/LTE on humanitarian protection grounds, ILR on humanitarian protection grounds, LOTR, ILE under the Iraqi consideration, ILR under the Iraqi consideration, and an extension to UASC [i.e., Unaccompanied Asylum-Seeking Child] leave.
>
> **The Resettlement Mandate Scheme** with possible outcomes being a grant of restricted DL, LTE on private life grounds, LTE on family grounds, LOTR, extension of LTE/LTR DL, extension of LTE/LTR HP, grant UASC leave, ILR, LTR, ILE under the Iraqi consideration, ILR under the Iraqi consideration, grant of LTE/LTR as a refugee (not asylum) and grant of ILE/ILR as a refugee (not asylum)."

Timescale

44. The Scheme relies on a manual process whereby the Home Office provides details of successful visa applicants to DWP. If no NINo is located on DWP systems, DWP can allocate a NINo using the information provided by the Home Office. No further checks or corroboration are required in these cases as the Home Office has already conducted identity and immigration checks. The target timescale to determine that a person does not have a NINo and then to allocate one is 5 days for workers and 48 hours for refugees.

45. In cases subject to the Scheme, the BRP cannot be requested at the point of the immigration decision (as it would with other immigration routes). Instead, the BRP can only be requested once the exchange of information between DWP and the Home Office is complete. The BRP will only be issued once the NINo is allocated and has been entered into Home Office systems. The Scheme therefore introduces additional steps into the Home Office's normal process. Those additional steps mean that the

beneficiaries of the Scheme receive their BRP later than otherwise. Overall efficiency, in terms of time taken to grant leave and the issuing of a BRP, has not improved.

46. If DDVC applicants were to be added to the scheme, the time taken for those in the cohort to receive their BRP would (on the Home Office estimate) increase from 8-10 days to 10-12 days (on the basis that there were 2475 recipients in the last financial year and assuming a consistent intake of 10 a day). This estimate assumes a two-day timescale for the allocation of NINOs as in the case of refugees. Ms Brown states that it would not be possible to reallocate resources from elsewhere in order to maintain the 8–10-day timescale without an unreasonable detriment on the interests of others in the general population.

The allocation of NINos to other foreign nationals

47. All other foreign nationals with leave to enter or remain under other categories of the Immigration Rules fall outside the Scheme. These other categories include students, Tier 1 routes in the Points Based System (such as start-up entrepreneurs and "innovator" business owners), Global Talent visas and leave granted under the EU Settlement Scheme.

48. The proportion of NINo registrations by adult overseas nationals in the United Kingdom demonstrates a broadly equal split between men and women. The figures are as follows:

Year	Number of NINo registrations	Male	Female
2018	632,669	330,426 (52%)	302,244 (48%)
2019	766,131	388,525 (51%)	377,600 (49%)
2020	322,197	165,356 (51%)	156,842 (49%)
2021 (up to June)	176,189	87,939 (50%)	88,250 (50%)

49. Ms Brown observes that the Covid-19 pandemic had an impact on the figures from 2020 and 2021 due to global economic and labour market changes. I do not regard Ms Brown's caveat as bearing on any material issue between the parties.

The claimant's evidence

50. The claimant has filed a witness statement in which she says that she needed a NINo to complete her housing benefit application to cover the costs of the refuge accommodation provided by Women's Aid. She also needed a NINo in order to make an application to her local authority for homelessness assistance. As for UC, the delay in obtaining a NINo (which in turn caused a delay to the award of UC) caused

her uncertainty and hardship. She had been forced to rely on food parcels and a small amount of cash support from Women's Aid.

51. The claimant relies on a witness statement from Steph Haase of Birmingham and Solihull Women's Aid. Women's Aid is able to provide limited and temporary emergency support (both accommodation and subsistence support) through third party funding. Ms Haase vividly describes the circumstances of the DDVC cohort as follows:

> "17. The women (and children) who approach us and need to apply for leave under the DDV concession are often in very desperate circumstances. They have typically just been forced to flee their marital home due to domestic violence. Many women don't have much more than the clothes they are wearing, or a suitcase if they were able to collect some of their belongings before having to flee.
>
> 18. Having just fled their marital home, our clients will often have nowhere to stay and no income. They do not have access to mainstream support like UC, and the vast majority of the women we support are not employed, and never have been, and therefore do not benefit from such income either.
>
> 19. It is highly unusual for the women we support to be in employment when they approach us. It is typical for this client group to arrive in the UK with the expectation that they will form part of their husband's family household and be supported by them without having to work. Their duties are often restricted to domestic tasks and childcare. There are also cultural and language barriers preventing our clients from accessing employment. Sometimes, being prevented from taking part in society and employment is often a significant aspect of the abuse that my clients are subjected to."

52. Ms Haase describes in detail how any delay in receiving UC or housing benefit, or in entering employment, causes additional hardship to this group.

53. The claimant relies on two witness statements from her solicitor (Michael Bates). He sets out his experiences of delay in the allocation of NINos which in his view causes serious problems for those who have obtained leave to remain in the United Kingdom and particularly for people who want to apply for housing benefit or who seek employment. He describes his work and his colleagues' work with clients making applications for leave to remain under the DDVC. He sets out the way in which various aspects of the immigration system operate (with particular reference to those who enter the United Kingdom on partner visas and those who seek to remain under the DDVC).

54. Mr Bates is not put forward to the court as an expert witness so that his ability to give opinion evidence is in doubt. His statements provide a snapshot of his own experiences which may not be capable of wider extrapolation. I regard them as providing limited assistance to the court.

The court's approach

55. The law on article 14 of the Convention and its application by the courts of England and Wales was comprehensively considered by Lord Reed PSC in *R (SC) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, [2022] AC 223. In his judgment, with which the six other members of the court agreed, Lord Reed surveyed the case law of the European Court of Human Rights ("ECtHR") in order to draw out certain general principles and patterns in its overall approach.

56. Adhering to Lord Reed's analysis, the ECtHR's overall approach may be encapsulated in five foundational concepts (*SC*, paras 37 and 39):

(1) **Ambit:** The alleged discrimination must relate to a matter which falls within the "ambit" of one of the other, substantive articles of the Convention.

(2) **Status:** Only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of article 14.

(3) **Relevant difference in treatment:** In order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.

(4) **Justification:** Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(5) **Margin of appreciation:** States enjoy 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.

57. Lord Reed analysed the scope of these elements of an article 14 claim, which as I have said are derived from the approach of the supranational ECtHR, for the purpose of their application by judges in the domestic courts. I agree with Mr Edward Brown KC, who appeared with Ms Talia Zybutz on behalf of the defendants, that I should analyse the present claim by reference to the principles and analytical framework which the seven-judge court unanimously agreed in *SC*.

58. The various different elements of an article 14 claim are legally distinct but, on the facts of any particular case, there may be no need for the court to give discrete consideration to each of them. An example of this court finding it unnecessary to take a step-by-step approach is *R (T) v SSWP* [2022] EWHC 351 (Admin) in which Swift J applied *SC* and observed at para 20:

> "As is obvious from the authorities, any discrimination claim can contain a range of what can be described as moving parts – for example the closeness of the analogy that exists, the extent of the difference in treatment, and so on. In many instances, discrimination claims are better decided considering all these

> matters as part of a single exercise that includes justification, rather than taking each in turn as one of a series of discrete preconditions standing in the way of the need for any justification. In most instances the issue will not simply be whether some distinction can be drawn between the claimant and his comparator, but whether any distinction is a relevant distinction. This can require consideration of all evidence, including what is said by way of justification. This approach is not invariable…"

59. As it happens, I could in the present case move straight to justification and omit any analysis of the other elements of the claim. I do not propose to take that approach for three reasons.

60. First, the issues relate to those who have been the victims of domestic violence and who have been forced into destitution in order to leave their abusers. Violence against women is a crime which the state will not tolerate. As Ms Brown's first witness statement succinctly states:

> "Violence against women and girls consists of the most abhorrent of abuses; rape and sexual assault, domestic abuse, 'honour'-based violence such as forced marriage and female genital mutilation, stalking and harassment – and other crimes. What they have in common is that they disproportionately – but not exclusively – affect women and girls. In the UK, 1 in 4 women will experience domestic abuse and 1 in 5 sexual assault during their lifetime. Globally this rises to 1 in 3. The 2019-20 Crime Survey for England and Wales showed that 2.3 million adults, 1.6 million of whom were women, faced domestic abuse in the previous year."

The situation of those in the claimant's position warrants the court's close scrutiny.

61. Secondly, the claim has progressed despite the claimant having received all UC payment due to her. To this extent, the claim is academic. It provides, nevertheless, an opportunity for the court to consider the legal framework for the benefit of future cases raising the DDVC.

62. Thirdly, I heard full submissions on all issues. I record in this judgment my views on those submissions out of deference to the skill with which they were presented by counsel.

63. For these reasons, I shall consider each of the elements of an article 14 claim in accordance with the principles in *SC*. It is convenient to start by considering the question of "status."

Status

64. The issue of status is "one which rarely troubles the European court" and "merely refers to the ground of difference in treatment between one person and another" (*SC*, para 71). The ECtHR adopts a stricter approach to some grounds of differential

treatment than others, when considering the issue of justification, and refers in its judgments to certain "suspect grounds" such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. In cases which are not concerned with suspect grounds, it often makes no reference to status, but proceeds directly to a consideration of whether the persons in question are in relevantly similar situations, and whether the difference in treatment is justified (*SC*, para 71).

65. The claimant's skeleton argument relied on a difference in treatment resting on two grounds which (it was submitted) were each a "status" within article 14:

> "i. on the grounds that she is a victim of domestic violence, i.e. a person who has received leave to remain under the DDVC, which only applies to victims of domestic violence. Her immigration status derives from the breakdown of the relationship with her abusive partner.
>
> ii. on the grounds of her sex, i.e., female. There is no dispute that those in the DDVC cohort, and victims of domestic violence, are overwhelmingly likely to be women…The exclusion of the DDVC cohort is therefore indirectly discriminatory against women."

66. The defendants' detailed grounds of defence conceded that the claimant satisfied the criteria for a "status" on both these grounds. That concession is repeated in the Agreed List of Issues produced by the parties for the court. I shall therefore proceed on the basis that this part of the article 14 claim is established.

Ambit

The claimant's case

67. On behalf of the claimant, Ms Zoë Leventhal (with Mr Darryl Hutcheon) submitted that the claimant's exclusion from the Scheme falls within the ambit of A1P1. The claimant was required to have a NINo before receiving any payment of UC, including any advance payment to which she would otherwise have been entitled as of right. She was required to have a NINo before being entitled to claim housing benefit. The concept of "ambit" must be widely construed, and need involve "no more than a tenuous connection with the core values protected by the substantive article" (*R (JCWI) v Secretary of State for the Home Department* [2020] EWCA Civ 542, paras 100 and 104 per Hickinbottom LJ). There was a clear link between the claimant's exclusion from the Scheme and her ability to receive benefits which qualified as a "possession" under A1P1.

68. Further and in the alternative, Ms Leventhal submitted that exclusion from the Scheme fell within the ambit of the claimant's private life as touching on her immigration status; her ability to access subsistence and housing benefits; and the protection of her physical and psychological integrity as the victim of domestic violence.

Discussion

69. The ambit of an article of the Convention is a wider concept than that of interference with the rights guaranteed by that article. In the social security context, the refusal to grant a welfare benefit to a group of people need not amount to an interference with their article 8 rights since that article may not impose any positive obligation on states to provide the financial assistance in question. However, if a particular kind of welfare benefit is granted to one group of people (thereby demonstrating the state's decision to respect that group's private or family life in a way that goes beyond the minimum guarantees of article 8) but not to another group of people, the difference in treatment may give rise to a breach of article 14 taken together with article 8 (*SC*, para 40). The concept of "ambit" therefore reflects the general purpose of article 14 which is the fair and consistent treatment of individuals in relation to those rights which a state decides to bestow over and above the minimum guarantees of the substantive articles of the Convention (*SC*, para 71).

70. A similar approach applies to article 14 claims made in conjunction with A1P1. The ECtHR's established approach is set out by the Grand Chamber in its admissibility decision in *Stec v United Kingdom* (2005) 41 EHRR SE18, para 54, cited at para 42 of *SC*:

> "In cases, such as the present, concerning a complaint under article 14 in conjunction with article 1 of Protocol No 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question. Although Protocol No 1 does not include the right to receive a social security payment of any kind, if a state does decide to create a benefits scheme, it must do so in a manner which is compatible with article 14."

71. Ms Leventhal relied on part of the exposition of "ambit" in *In re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250. Baroness Hale of Richmond PSC (giving the judgment of the majority) held that article 14 is engaged when "the subject matter of the disadvantage…constitutes one of the modalities of the exercise of the right guaranteed" (*McLaughlin*, para 17, citing *Petrovic v Austria* (1998) 33 EHRR 14, para 28). The language of "modalities" was expressed in para 17 of *McLaughlin* as "[a]nother way of putting the relationship between article 14 and the substantive Convention rights" rather than as a substitute for the concept of "ambit." It does not in my judgment add anything of substance to the more recent analysis of "ambit" in *SC*.

72. As Mr Brown submitted, the claimant's complaint relates to an administrative process, namely that the payment of UC should not have had to await a particular process for allocating her a NINo. The claimant has not been denied all or part of a particular benefit. She has been paid UC in accordance with her statutory entitlement. She is not owed money. She was not the subject of any barrier to the payment of UC that was not anticipated by Parliament in legislation which she does not challenge as incompatible with her human rights. The focus of her claim is a decision by DWP to process UC claims and to allocate NINos in a certain way as opposed to some other way which she would in hindsight have preferred.

73. NINos are administrative reference numbers which enable the state to identify an individual reliably. The allocation of NINos does not give rise to enforceable rights; nor is there any enforceable right to have a NINo application processed in a particular way. In my judgment, the allocation of NINos has no more than a tenuous link with the core values which A1P1 and article 8 seek to protect and does not fall within the ambit of either of those rights.

74. As Mr Brown submitted, the claimant has not referred to any authority for the proposition that the process of administering social security (as opposed to a person's entitlement to receive benefits) brings a claim within the "ambit" of any substantive article of the Convention. The claim is not about the discriminatory award of welfare benefits or the denial of benefits to the claimant. It is about how her claim for UC was administered. In the absence of authority, I am not persuaded that the administrative procedures by which NINos are allocated fall as a matter of law within the "ambit" of A1P1 or of article 8.

75. Ms Leventhal went so far as to submit that the DDVC, which is designed to protect victims of domestic violence, forms part of the state's duty under article 8 to protect the physical and psychological integrity of victims as part of their right to respect for private life. She submitted that the exclusion of the DDVC cohort from the Scheme undermines the purpose of the DDVC and means that those in the cohort face barriers to their efforts to establish a private life away from an abusive partner.

76. In my judgment, these submissions turn the DDVC on its head. As Singh LJ observed of the DDVC in *R (FA) Sudan v Secretary of State for the Home Department* [2021] EWCA Civ 59, [2021] 4 WLR 22:

> "49. It is important to bear in mind that the Concession is limited in its scope. It is not a general policy dealing with all aspects of domestic violence in this country or even all aspects of domestic violence against people who have no right to remain in the UK. It is a limited concession, for a period of three months, to enable a person to make an application for settlement in the UK, so that they can access public funds that would otherwise be unavailable to them."

77. The essential purpose of the DDVC is to enable the victims of domestic violence to have a short period of leave to remain and to grant access to public funds on a temporary basis for the purpose of applying in safety for further leave to remain. To move from the terms of the concession to the administrative process of NINo allocation is tenuous and, in my judgment, does not relate to the ambit of the right to respect for private life.

78. Further and in any event, the process of allocating a NINo may (like any other administrative process) be subject to human error – whether on the part of a claimant or on the part of the Government. Human error may bring delay. It does not strike at any values which either A1P1 or article 8 seek to protect. The delay which founds the present claim was caused by the fact that the claimant could not be contacted for a period. Even if the delay was entirely the responsibility of the Government, which I do not accept, I do not regard the administration of NINos – or any part of the

allocation process – as falling withing the ambit of a substantive article of the Convention.

Relevant difference in treatment

The parties' submissions

79. Ms Leventhal submitted that the claimant is in an analogous situation to those in the Scheme. She submitted that the Scheme exists to improve "customer service" (reflecting the language of Ms Brown's witness statement and other evidence) by enabling those within it to obtain a NINo quickly and without having to make a further and discrete application. It exists to achieve efficiencies and to improve information-sharing among public authorities. It enables destitute refugees to avoid a "gap" between the ending of asylum support under the Immigration and Asylum Act 1999 and the receipt of DWP benefits. Each of these purposes applies to the DDVC cohort.

80. Mr Brown submitted that there is no relevant difference in treatment because there is nothing inherently advantageous about having a NINo printed on a BRP. The claimant is already part of a group that is prioritised for a NINo and moving her to a different priority group would have no practical effect. Printing a NINo on a BRP does not mean that a NINo will be allocated more quickly. In every case, a NINo can only be allocated after a process of verification which may take more or less time depending on fact-specific issues that arise. Nor are those who have leave to remain under the DDVC in a relevantly similar position to those groups who receive a NINo under the Scheme.

Discussion

81. Not all differences in treatment are relevant for the purposes of article 14. The difference is only relevant if the claimant is comparing himself or herself with others who are in a relevantly similar situation. An assessment of whether situations are "relevantly" similar will generally depend on whether there is a material difference between them as regards the aims of the measure in question (*SC*, para 59).

82. In an ordinary case of direct discrimination, there is an actual difference in treatment between comparable cases, directly based on a prohibited ground of discrimination (*SC*, para 47). The ECtHR has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group. Discrimination may therefore arise from a de facto situation (*SC*, para 49). This sort of discrimination will only violate article 14 if the policy or measure has no "objective and reasonable justification" (*SC*, para 49, citing *Guberina v Croatia* (Application No 23682/13) (2016) 66 EHRR 11, para 71, ECtHR). It is indirect discrimination because the policy or measure is based on an apparently neutral ground which in practice causes a disproportionately prejudicial effect on a group characterised by a salient attribute or status (*SC*, para 49).

83. In the present case, by the date of the Agreed List of Issues provided to the court, the claimant relied on direct discrimination, namely that as a victim of domestic violence she was actually treated differently from comparable cases by being excluded from

the Scheme. In her skeleton argument, Ms Leventhal relied also on indirect discrimination on grounds of sex. Little turns on whether the discrimination alleged should be regarded as direct or indirect, and there was no need for me to hear detailed submissions on that question. Ms Leventhal properly accepted that the two forms of discrimination, at least in this case, gave rise to overlapping issues.

84. The Scheme was established in order to facilitate the payment of National Insurance contributions by workers granted leave to enter or remain in the United Kingdom for work. Immigration status granted for the purpose of work is not the same as leave to remain granted for the protective purposes of the DDVC. By having a Scheme which ensures that a worker receives a BRP and a NINo in the same document, the purpose of granting the work visa is promoted because the visa holder will be ready to work and pay National Insurance contributions as soon as he or she qualifies for entry or stay. It cannot be contended that the purpose of the DDVC is to enable individuals to work and pay National Insurance. I am not persuaded that Skilled Workers and DDVC beneficiaries are in an analogous position.

85. Both Skilled Workers and the beneficiaries of the DDVC are – tritely – persons who do not have indefinite leave to remain. In relation to the wide group of those people who have only limited leave to remain, there is no general right to a NINo in a BRP and no general right to be part of the Scheme. The claimant is seeking to be taken out of the wider group and placed within a narrower group. As Mr Brown submitted, the claim is upon analysis a claim to the right to be treated differently to the general pool of people who are not settled in the United Kingdom.

86. The right not to be discriminated against is violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (*SC*, para 48, citing *Thlimmenos v Greece* (2000) 31 EHRR 15). In *Thlimmenos*, the applicant had received a criminal conviction as a result of his refusal, for religious reasons, to wear a military uniform. The conviction was a bar to his admission to the profession of chartered accountant. In relation to the applicant's article 14 claim, the ECtHR held that "there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony" (para 47). I agree with Mr Brown that the more appropriate legal analysis would lie in *Thlimmenos,* but the claim was not argued before me in that way and any such challenge would have faced considerable obstacles to success.

87. As for refugees and their families, Ms Leventhal emphasised that beneficiaries of the DDVC and those who are granted leave to remain in protection categories are some of the most vulnerable people in society. Any imperative to allocate a NINo to refugees applies, or should apply, to victims of domestic abuse.

88. This submission amounts in my judgment to a further *Thlimmenos* challenge and so fails for the reasons I have set out above. It assumes that (i) all those in the DDVC cohort have in fact been the victims of domestic violence or abuse; and (ii) that all refugees have been the victims of violence or abuse in their country of origin. I shall make those assumptions for present purposes, albeit that the latter assumption is generous to the claimant as it assumes that no one flees to the United Kingdom before they have been ill-treated, which is not the case. A person may become a refugee when living in the United Kingdom on the basis of future risk of ill-treatment upon return to his or her country of origin (a refugee sur place). Such a person may have no

vulnerabilities arising from physical or mental health and may never have been subject to physical abuse.

89. Setting aside these difficulties for the claimant's case, the key point made by the claimant is that victims of domestic violence will be included in the DDVC cohort only if they are destitute. Around 70% of asylum applicants claim asylum support under section 95 of the Immigration and Asylum Act 1999 because they too are destitute. The claimant's case is that those who are vulnerable and the victims of ill-treatment (which includes the DDVC cohort and many refugees) should be prioritised for the payment of UC because destitution brings greater risks and burdens for this group than for others. For this general purpose, Ms Leventhal submits that refugees and DDVC recipients should as a matter of public policy be treated as relevantly similar.

90. Attractively as Ms Leventhal put her submissions, refugees and others seeking protection in the United Kingdom (together with their families) do not share the same sort of immigration history or the same path to settlement as those granted leave under the DDVC. I need take only two examples: (i) an applicant for leave under the DDVC may have already worked in the United Kingdom and have a NINo whereas (on Ms Brown's unchallenged evidence) this is unlikely to be the case for a refugee; and (ii) DDVC is granted for three months whereas the Scheme only permits a NINo to be allocated to those granted leave for at least 6 months and so is available to those whose immigration status is more securely rooted.

91. In any event, the DDVC cohort (like refugees) are prioritised for the speedy allocation of a NINo. I am not persuaded that any residual delay for the DDVC cohort amounts to a material difference in treatment.

92. I have analysed this element of the claim in general terms. However, I reiterate that the term "refugee" is used by the defendants to describe several hundred permutations of routes to entry or stay in the United Kingdom which may lead to the grant of one of various possible kinds of leave. A deep analysis of the characteristics of the entirety of the refugee cohort was not undertaken by either party. Any such analysis would have been unwieldy and most likely unenlightening in the sense that it would not have advanced the claimant's case.

Justification and margin of appreciation

The parties' submissions

93. Ms Leventhal submitted that the court should apply close scrutiny to the defendants' justification for omitting the DDVC cohort from the Scheme. She emphasised that, as victims of domestic violence, the DDVC cohort are vulnerable people who are at risk of social exclusion which may be exacerbated by their status as foreign nationals who may often have few connections in the United Kingdom other than their abusive partner. There is a strong overlap with sex and gender, which has always attracted a particularly high standard of scrutiny as a suspect ground of discrimination.

94. Ms Leventhal contended that the Scheme has never been scrutinised by Parliament. She accepted that there was no requirement for Parliament to approve every aspect of the administration of immigration control but submitted that the absence of any

Parliamentary process is a relevant feature for the court to weigh in the balance when deciding on the appropriate standard of scrutiny; as is an absence of evidence that the issues at stake have been considered by the relevant decision-maker (*In re Brewster* [2017] UKSC 8, [2017] 1 WLR 519, paras 50-52; 62; 64).

95. Ms Leventhal submitted that, irrespective of the standard of review, the defendants had failed to discharge their burden on justification. There is no rational or reasonable foundation for the exclusion of the DDVC cohort from the Scheme. There are no proper grounds for declining to extend the Scheme to the DDVC cohort (a group which is relatively small in number and by definition urgently needs the support to which NINOs provide access). It is this difference in treatment (not the Scheme as a whole) which must be justified. Budgetary and resource implications, to which the defendants make resort, cannot alone justify discrimination (*R* (*TP) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37, [2020] PTSR 1785, paras 170-172).

96. Mr Brown submitted that the margin of appreciation in this context is wide. The defendants are responsible for evaluating and balancing the requirements of particular cohorts and the general community and for introducing measures which, in their view, are appropriately responsive to those requirements. It is not the court's function to decide for itself the extent of those requirements or the administrative systems appropriate to meet them (not least as the court will have no appreciation of other groups who may then in turn seek to articulate their own pressing requirements). Mr Brown submitted that any difference in treatment was in the context of this cases justified.

Legal framework

97. Once a prima facie case of indirect discrimination has been established, the burden shifts to the state to show that the indirect difference in treatment is justified (*SC*, para 53). The justification for a difference in treatment must be "objective and reasonable" as judged by whether it pursues a "legitimate aim" and by whether there is a "reasonable relationship of proportionality" between the aim and the means employed to achieve it (*SC*, para 98).

98. The approach of the ECtHR to the question of justification has not been systematically stated in its judgments but is nuanced (*SC*, para 99). The court usually applies a strict review to the reasons advanced in justification of a difference of treatment based on suspect grounds, albeit that these grounds form a "somewhat inexact category" which has been developed over time by the case law (*SC*, para 100). Difference in treatment on suspect grounds – such as sex, nationality and race – must be justified by "very weighty reasons" (*SC*, paras 103-108).

99. The broad principle that discrimination on suspect grounds requires the court to undertake an intensive review nevertheless sits alongside the principle that a wide margin of appreciation is allowed to the state in relation to general measures of economic or social strategy (*SC*, para 115).

100. The concept of margin of appreciation is specific to the ECtHR. Nevertheless, domestic courts have "generally endeavoured to apply an analogous approach" (*SC*, para 143). Accordingly, where the ECtHR would allow a wide margin of

appreciation to the legislature's policy choice, the domestic courts allow a correspondingly wide "discretionary area of judgment" (*SC*, para 143, citing *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 380).

101. Lord Reed in *SC* considered parts of the ECtHR and domestic case law which suggest that, in relation to general measures of economic or social strategy, the legislature's policy choice will generally be respected unless it is "manifestly without reasonable foundation." He held:

> "158…In the light of the [ECtHR] jurisprudence as it currently stands, it remains the position that 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. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a suspect ground is to be justified…But other factors can sometimes lower the intensity of review even where a suspect ground is in issue… Equally, even where there is no suspect ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children."

102. Lord Reed went on (at para 159) to caution against a mechanical approach based simply on the categorisation of the ground of the difference in treatment, holding:

> "A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions but will also take appropriate account of such other factors as may be relevant. As was recognised in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 and *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311, the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification.
>
> 160 It may also be helpful to observe that the phrase manifestly without reasonable foundation, as used by the European court, is merely a way of describing a wide margin of appreciation….
>
> 161 It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the manifestly without reasonable foundation formulation, it is more fruitful to

> focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in field such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows, as the Court of Appeal noted in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2021] 1 WLR 1151 and *R (Delve) v Secretary of State for Work and Pensions* [2021] ICR 236, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the manifestly without reasonable foundation formulation in circumstances where a particularly wide margin is appropriate."

103. In the context of welfare benefits, the correct approach is to "look at the compatibility of the system overall, without giving undue weight to the circumstances of the individual, since welfare systems, to be workable, have to deal in broad categorisations which will inevitably affect some people more prejudicially than others" (*SC*, para 125).

Discussion

104. In my judgment, there are three important public interests in play. First, there is the public interest in immigration control which, in its essence, involves rule- or policy-based distinctions between different groups and categories of people. The state is entitled to adopt different administrative procedures in relation to different groups in order to ensure that the interests of immigration control are promoted in accordance with law, rules and policies. The courts will generally be very slow to intervene in this area of social and economic policy which represents a core executive function. In my judgment, the administration, timing and content of a BRP fall within this area.

105. Secondly, there is the public interest in ensuring the fair and humane treatment of all those who claim social security benefits so that those who meet the statutory requirements for UC and other benefits receive payment without undue delay. Ms Brown confirms that resources are required to allocate a NINo in every case. She confirms that seeking to prioritise a large number of NINo allocations is resource intensive and will be detrimental to those who do not benefit from any form of prioritisation.

106. In my judgment, the distribution and allocation of administrative resources is primarily the function of the executive branch of Government. Identifying priority groups is the task of the Government subject to any legislative steer. The courts should be slow to intervene in a multifactorial exercise involving what may be fine distinctions within the complex structures of an advanced welfare state.

107. Thirdly, the administrative processes for the allocation of NINos are as a matter of constitutional responsibility the province of the executive branch of Government and not the courts. As Mr Brown submitted, it is the function of the executive to establish

rules of administration that are workable and efficient. The courts will not "micro-manage" the internal administration of Government departments.

108. I reject the submission that the absence of legislative scrutiny in relation to NINos means that the court should be more ready to intervene. As I have indicated, the allocation of NINos is an executive function which Parliament entrusts to the defendants. The absence of legislation in this area is not a deficit which should prompt the court to exercise its supervisory powers by way of democratic checks and balances: it is a consequence of the separation of powers.

109. Nor do I agree that the defendants failed to address or consider the issues at stake or that the court should be sceptical of DWP's justification. Ms Brown confirmed that DWP operates a "test and learn" approach in which it "constantly seeks feedback to improve" the processing of UC claims. DWP is able – and does – adopt an evidence-based approach to identifying the source of delays and to undertaking research into problems and their causes (subject to some pause in this work during the pressures of the Covid-19 pandemic).

110. By way of concrete example, on 15 December 2021, DWP introduced an automated prompt on its UC system to speed up NINo requests. The prompt provides a checklist of actions that UC decision-makers must complete to ensure the correct process is followed. Further, in March and April 2022, the NINo allocation team trialled a new online form enabling UC claimants to upload their own documents and complete a questionnaire. The trial was evaluated and was shown (among other things) to increase the speed of NINo allocations, and the decision was made to introduce the changes nationally. Ms Leventhal's submission that the defendants' justification for their actions relied on unquantified, unassessed and opaque practice lacks any real grounding in the evidence.

111. Balanced against these considerations are the characteristics of the claimant who is the victim of domestic violence and who was at all material times destitute and the beneficiary of charitable support which provided her with subsistence and with safety. There are four key respects in which she claims that she or others in her cohort have suffered a detriment from being outside the Scheme. I shall deal with each of these detriments in turn.

Detriment 1: Delay in receipt of UC

112. Ms Leventhal submitted that those in the DDVC cohort must wait longer to start receiving UC because they do not have a NINo. They must undergo a time-consuming NINo allocation process which only begins once all other UC internal processes are complete. The claimant had to wait 6 weeks before starting to receive UC payments. Ms Leventhal relied on the evidence both from Ms Haase and from Mr Bates as showing that it is common for people without a NINo to wait even longer.

113. There was some discussion before me about how to calculate any detriment in the form of delay to the payment of UC. One possible metric is Ms Brown's assessment that, if the DDVC cohort were to be treated as part of the Scheme, the timescale for receipt of BRPs would increase from 8-10 days to 10-12 days. The cohort's eligibility to have recourse to public funds is triggered by the BRP. It follows that, on

this metric, the cohort's entitlement to UC would decrease by 2 days and so entry to the Scheme would reduce the overall amount of money that this cohort would receive as a cash benefit from UC.

114. Ms Leventhal characterised the benefits of speed arising from the Scheme as being (assuming comparability with refugees) a two-day timescale for the allocation of a NINo. However, as Mr Brown emphasised, it does not follow that the processing time for the UC claim overall would decrease and so it does not follow that the DDVC cohort would receive UC sooner.

115. The present timescales enable UC claimants to be allocated a NINo in time for the first payment of UC. The defendants properly acknowledge that delays occur. But the DWP has established flexible administrative practices which allow for prioritisation in accordance with its corporate knowledge and institutional expertise.

116. In the claimant's case, there was an unexpected delay of 5 days in the payment of UC because of some lack of clarity as to her telephone number. Even applying the close scrutiny that is applicable to suspect grounds of discrimination, I do not regard that delay as a significant detriment or as raising serious questions that the state must answer. Nor does the evidence of Ms Haase and Mr Bates persuade me otherwise.

117. Ms Leventhal submitted that there was no good reason why the process of allocation should take longer for the DDVC cohort than for workers or refugees. She submitted that DDVC, as a form of leave to remain, flows from recent previous leave to enter or remain as a partner. The Home Office should therefore already have conducted identity and immigration checks on DDVC applicants in the same way as those checks would have been completed on workers and refugees.

118. The claimant, however, produced no proper evidence to support the assertion that identity and immigration checks will have been completed for DDVC applicants to the same degree of confidence as the checks carried out on workers and refugees. The court is not well-equipped, for example, to compare and contrast the robustness of biometric evidence (which may have been provided, if at all, by a partner at some point in the past) with near-contemporary biometric technology deployed in the administration of worker and refugee claims during the course of a different decision-making process.

119. Ms Leventhal emphasised that the DDVC itself states that those who meet the criteria must be granted 3 months leave outside the Rules "on conditions permitting employment and **immediate** access to benefits" (emphasis added). I do not accept that the language of the DDVC implies that all those who are granted leave to remain have a fast-track to the grant of benefits or a fast-track to a NINo that should override DWP policies on prioritisation. The DDVC goes on to state that:

> "It is important to note that if leave is granted under the DDV concession, the applicant must make a separate application for Department for Work and Pensions…benefits or housing benefits and will be assessed against the normal DWP criteria."

120. The reference to "immediate" access to benefits in an immigration policy operated by the Home Office must be read in context. It does not give rise to a freestanding right

to precedence in the benefits system which is administered by DWP in accordance with its own policies and practices.

121. As I have mentioned, the Scheme only permits a NINo to be allocated to individuals granted a visa for at least 6 months. Ms Brown's evidence is that it would not be workable to extend the Scheme to include every category of leave that carries a right to work or recourse to public funds. The operation of the Scheme is resource intensive. It relies on large volumes of information being sent and received via excel spreadsheets between the DWP and the Home Office. The diversion of limited resources from other areas would be unfair to other parts of the population, all of whom have particular needs.

Detriment 2: Advance Payment

122. Ms Leventhal emphasised that the allocation of a NINo is a gateway to an advance payment of UC under section 5(1)(r) of the Social Security Administration Act 1992 and regulation 5 of the Social Security (Payments on Account of Benefit) Regulations 2013. Advance payment may provide vital protection against ongoing destitution for those in the DDVC cohort. The two-day timescale for the allocation of NINos to refugees would enable those otherwise eligible for advance payment of UC to apply for it pending the determination of their overall UC claim and payment of UC itself.

123. Mr Brown submitted that this aspect of the claim was factually misconceived. As a matter of fact, placing a NINo on the BRP within a two-day timescale would not lead to advance payment being paid after two days. That is because the UC claim and the claim for advance payment would still need to be considered within the UC scheme, and decisions would still need to be made in accordance with the UC scheme.

124. It is not the court's function in judicial review proceedings to enter into a factual inquiry about whether placing a NINo on a BRP would hasten – to some material degree – the advance payment of UC to those who qualified for such a payment. The claimant does not in my judgment set out any persuasive case, whether in fact or in law, that the receipt of advance payment would materialise in the timescale for which Ms Leventhal contended.

Detriment 3: Housing benefit

125. Ms Leventhal submitted that both the claimant's own experiences and the wider evidence indicate that victims of domestic violence (who are otherwise eligible for housing benefit) cannot claim housing benefit until they have a NINo. This results in people in the DDVC cohort falling into arrears of rent in supported accommodation for which their housing benefit will not be backdated. She submitted that the defendants have ignored this part of the claimant's case.

126. The main target of criticism in the claimant's evidence is her local authority Birmingham City Council's handling of housing benefit claims. The Council has not been asked for its views and is not a party to the claim. In the claimant's grounds for judicial review, no more than glancing reference was made to the difficulties with housing benefit which were not squarely raised in the claimant's pleaded case until the Claimant's Reply to the Detailed Grounds of Defence which post-dated the grant of permission to apply for judicial review. Neither that Reply nor the claimant's

skeleton argument set out the particulars of any legal bar to making a claim for housing benefit before receiving a NINo.

127. The DWP publishes a Housing Benefit and Council Tax Benefit manual containing guidance on these benefits. The guidance states that NINos can be used to check identity but it also contains provision for making a referral to the local DWP office for a NINo to be allocated, confirmed or traced. If an individual does not have a NINo, therefore, the local authority can contact DWP to allocate one. I am not able to determine on the evidence before me whether Birmingham City Council has misunderstood the position or whether some element of the system is causing confusion for those who advise and assist housing benefit claimants. In my judgment, the claimant's submissions are not watertight and stray into the realm of speculation based on partial evidence. They do not undermine the justification for the defendants' processes for allocating NINos to the DDVC cohort.

128. Mr Bates' evidence is that the online application process for housing benefit in Birmingham creates an immediate problem because it requires a NINo before an application can be submitted. If the claimant was aggrieved by any practice within her local authority, she could have used other available routes of challenge. It is not the duty of the defendants to justify their national decision-making processes on the basis of particular local practices.

Detriment 4: Right to work

129. The claimant submitted that members of the DDVC cohort will find it harder to access employment because they do not have a NINo. Ipsos MORI research for HMRC in July 2016 (based on 50 telephone interviews) highlighted that employers requested a NINo on job application forms for tax and National Insurance purposes. Potential employees felt obliged to provide their NINo, believing there would be a negative impact if they did not do so. In his second witness statement, Mr Bates says that he has been made aware that, locally, employers insist on a NINo before making a job offer.

130. NINos on their own do not enable individuals to prove they have the right to work in the United Kingdom. The documents that are acceptable evidence of a right to work are prescribed in legislation, namely the Immigration (Restrictions on Employment) Order 2007. The most recent amendment to that list of documents is found in the Immigration (Restrictions on Employment and Residential Accommodation) (Prescribed Requirements and Codes of Practice) and Licensing Act 2003 (Personal and Premises Licences) (Forms), etc., Regulations 2022.

131. The list of documents is also in Codes of Practice laid before Parliament and may be found in published guidance. The most recent guidance is "An employer's guide to right to work checks: 6 April 2022" which was last updated on 27 April 2022. As this guidance demonstrates, in limited circumstances, an official document giving the person's NINo and their name issued by a Government agency or a previous employer can be used in conjunction with other documents as evidence of a right to work, as defined in the lists of acceptable documents for a manual right to work check.

132. Employers have been required to conduct right to work checks since 1997. The Home Office publishes guidance and a code of practice for employers on the website GOV.UK which provide information on the lists of acceptable documents to prove the right to work. It is Ms Brown's evidence – which accords with the longevity of the requirement on employers – that there is a high level of understanding about which documents may demonstrate a right to work. She states that it is generally well known that a NINo itself is not proof of a right to work, and there is no reason for the court to regard her evidence as unreliable.

133. In short, there is no legal bar to seeking and obtaining employment before a NINo is issued. The absence of any legal obstacle to access to the labour market diminishes the detriment to the DDVC cohort in being allocated a NINo outside the Scheme.

Conclusion on justification

134. Given the need for a high standard of scrutiny in cases of discrimination on suspect grounds, I have considered with care the various detriments on which Ms Leventhal relied. For the reasons set out above in relation to each detriment, I do not accept that they entail the degree or extent of adverse impact for which Ms Leventhal contended.

135. On the other side of the scales, I have balanced the weighty nature of the important public interests that I have described above and on which the defendants rely. In my judgment, the defendants have shown very weighty reasons for any difference in treatment which is upon analysis significantly less detrimental to the claimant than she contends. Any difference in treatment has in my judgment been cogently justified.

Overall conclusion

136. The claim fails because:

i. The subject of the claim does not fall within the ambit of article 14; and

ii. The claimant is not in an analogous or relevantly similar situation to those who receive a BRP with a NINo printed on it; and

iii. Any difference in treatment is justified.

137. It follows that no question of the grant of relief arises. I do not need to consider the defendants' submission that the court should refuse relief on the ground that it is highly likely that the outcome for the claimant would not have been substantially different if she had been included in the Scheme (section 31(2A) of the Senior Courts Act).

138. Accordingly, this claim for judicial review is dismissed.