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Case No: CO/5828/2017
CO/552/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2018

Before :

THE HONOURABLE MR JUSTICE LEWIS

Between :

R (TP and AR)

Claimants

- and -

**SECRETARY OF STATE FOR WORK AND
PENSIONS**

Defendant

**EQUALITY AND HUMAN RIGHTS
COMMISSION**

Intervener

**Zoe Leventhal and Yaaser Vanderman (instructed by Leigh Day Solicitors) for the
Claimants**
**Edward Brown and Nicholas Flanagan (instructed by Government Legal Department) for
the Defendant**
Chris Buttler (instructed by Equality and Human Rights Commission)

Hearing dates: 1 - 4 May 2018

Approved Judgment

THE HONOURABLE MR JUSTICE LEWIS:

INTRODUCTION

1. These are two claims challenging aspects of the regulations creating and implementing the system of universal credit, which is intended to replace the existing system of welfare benefits. The claimants are both individuals who, under the previous system governing welfare benefits, had been in receipt of an income related employment and support allowance (“the basic allowance”). In addition, as they met certain additional criteria, they had been in receipt of certain additional premiums (known as Severely Disability Premium (“SDP”) and Enhanced Disability Premium (“EDP”)).
2. On moving to a new local housing authority area, the claimants had to apply for universal credit which replaced both housing benefit and the former income related benefits (including the basic allowance, and SDP and EDP) which the claimants had been receiving. The amount of the standard allowance payable as part of universal credit was higher than the basic allowance formerly payable but as universal credit does not include the additional disability premiums (the SDP and EDP) the total cash payment received by way of income related support under universal credit was less than the income related support that the claimants had been receiving under the former system. The claimants received over £170 a month less as a result of the transfer to universal credit.
3. The claimants contend that the way in which the system of universal credit is constructed, in that it does not include additional disability premiums, constitutes unlawful discrimination contrary to Article 14 read with Article 1 of the First Protocol to the European Convention on Human Rights (“ECHR”). The claimants further contend that, in any event, the implementation arrangements gave rise to unlawful discrimination contrary to Article 14 read with Article 1 of the First Protocol to the ECHR as they had to apply for universal credit but there was no element of protection to reflect the difference between the amount they received under the former system and what they received by way of universal credit whereas other groups would not be treated in that way and would either continue to receive SDP and EDP or would receive an additional cash payment by way of transitional protection. The defendant denies that there is any unlawful discrimination.
4. The claimant in the first case, Mr P was granted permission to apply for judicial review on these two grounds by Lang J by an order made on 26 January 2018. Permission was refused, on the papers, to claim that the defendant had breached the duty imposed by section 149 of the Equality Act 2010 (the “2010 Act”). The claimant applies for a reconsideration of that refusal. The case involving Mr R, is brought on identical grounds. Permission has not yet been granted in Mr R’s case and Lang J. ordered that his case be linked to and heard with Mr P’s case. As a result, the hearing dealt with the two grounds upon which permission had been granted (the challenge to the universal credit regulations and the failure to provide any element of transitional protection on implementation) and the application for permission to apply for judicial review in relation to the ground concerning the 2010 Act.

THE FACTS

5. The first claimant, Mr P, is a single man aged 52 years of age. He has been diagnosed with non-Hodgkin lymphoma and, sadly, the diagnosis is that the condition is likely to be terminal. Mr P also suffers from other serious medical conditions. He and his then partner moved to the London Borough of Hammersmith and Fulham in November 2015. They separated in early 2016. At that stage, Mr P was in receipt of housing benefit from the local authority and also of the basic allowance by way of income related support. In October 2016, Mr P 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, Mr P also became eligible for SDP and EDP. At that stage, his total monthly income, including the basic allowance, SDP and EDP, was £809.90.
6. In December 2016, Mr P returned to London in order to have access to a hospital providing specialist cancer care. As he would need accommodation, he would need financial assistance to cover his housing costs. At that stage, he was not able to apply for housing benefit from his local housing authority. He was in a group of persons who had to apply for universal credit. That includes a housing element. It also had different provision for those with disability needs. The standard allowance forming part of the universal credit payments was higher than the basic allowance he had previously been entitled to. However, universal credit did not include amounts corresponding to the SDP and EDP that Mr P had also formerly received. 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 able to continue to receive income related benefits under the former system. There was no system in place to temper or mitigate the drop in income.
7. Persons who moved house within the same local housing authority area did not have to apply for universal credit to enable them to receive housing benefit: they simply received housing benefit from the local housing authority for the new property. Consequently, they continued to receive their disability related benefits, including the basic allowance and SDP and EDP, and did not have any change to their monthly income in respect of their income related benefits.
8. Mr P details in his witness statement the difficulties that the reduction in income of over £170 a month (over £40 a week) has caused him. By reason of his diagnosis with non-Hodgkin lymphoma and his other conditions, and his chemotherapy treatment, he needs to travel frequently to hospital appointments and 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 support from family and a cancer support organisation. His financial worries have made him more isolated, depressed and tired and less able to focus on recuperation.
9. Mr R is a single man aged 36. He suffers with mental health issues and receives medication to alleviate depression and suicidal tendencies. In May 2015, Mr R 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 Mr R was judged to be underusing it, his entitlement to housing benefit was reduced. In July 2017, he moved to a different local housing authority area, Hartlepool, and rented a two-

bedroom property in order to avoid any reduction in the money provided to assist with housing. As he had moved to a different local housing authority area, he had to apply for universal credit to obtain assistance with his housing costs. As a result, he too ceased to be eligible for payments under the former regime and cash payments arising out of his disability needs were met by universal credit. That did not include any element equivalent to SDP and EDP and, whilst the standard allowance was higher, the total amount received by way of universal credit was £636.58 a month which was £178.11 a month less than he would have received had he remained eligible for assistance under the former system. A person in receipt of housing benefits and who moved house within Hartlepool would not have had to apply for universal credit. That person's housing benefit would continue to be paid by the local housing authority and that person would continue to have received welfare assistance under the former scheme including payment of the SDP and EDP. Mr R explains 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 and has twice had to use food banks and has been given vouchers by a mental health charity. He cannot afford to heat his home and has been unable to pay all his council tax. He is unable to pay for travel to visit family.

THE LEGISLATIVE FRAMEWORK

The System Prior to Universal Credit

10. Elements of the previous welfare system have their origins in the Welfare Reform Act 2007 ("the 2007 Act"). That provided in section 1 for an allowance to be known as an employment and support allowance be paid to persons who met certain criteria including having a limited capability for work by reason of a physical or mental condition. The amount payable to a person with a low income who has limited capability for work-related activity is calculated in accordance with section 4(1), (2) and (4) of the 2007 Act. That amount is referred to in the judgment as the basic allowance and the group in receipt of that allowance is referred to as the support group.
11. Paragraph 6 of Schedule 4 of the Employment and Support Allowance Regulations 2008 ("the 2008 Regulations") provided for payment of a severe disability premium (the SDP) to a person who was a severely disabled person. There were criteria that had to be satisfied in order to qualify for the SDP including the fact that the person lived alone and was eligible for certain other benefits (the middle or higher rate of disability living allowance or the care component or daily living component of the personal independence payment). Para 7 of Schedule 4 to the 2008 Regulations also provides for payment of an additional payment (the EDP) to certain persons.
12. In addition to income related support, the welfare system provided for other benefits. These included housing benefit which was administered by local housing authorities and was related to the need for assistance with housing costs.
13. The Care Act 2014 ("the 2014 Act") also imposes obligations on local authorities to assess a person's needs for assistance and imposes duties to provide for those assessed needs.

Universal Credit

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

“Universal Credit is a radical new approach to welfare

- It will bring together different forms of income-related support and provide a simple, integrated benefit for people in or out of work
- It will consist of a basic personal amount (similar to the current Jobseeker’s Allowance) with additional amounts for disability, caring responsibilities, housing costs and children.
- As earnings rise, we expect Universal Credit to be withdrawn at a constant rate of around 65 pence for each pound of net earnings. Higher earnings disregards will also reinforce work incentives for selected groups.

When introduced, Universal Credit will initially apply to new claimants. It will be phased in for existing benefit and Tax Credit recipients. There will be no cash losers at the point of change, ensuring that no one will see their benefits reduced when Universal Credit is introduced.”

15. There were further passages in the White Paper dealing with the anticipated impact of the proposed scheme on existing benefits. These noted that “in most cases Universal Credit will provide a similar or higher level of support than the current system” (paragraph 12 of chapter 2). That paragraph noted the government’s intention that no one would lose as a direct result of the reform and its intention to provide additional cash sums to a person who would receive less under the new system than they were receiving under the existing system.
16. In relation to disability, paragraphs 21 and 22 of the White Paper stated that:

“21. The Government is absolutely committed to supporting disabled people to participate fully in society, including remaining in or returning to work wherever feasible. The model introduced in 2008 for the Employment and Support Allowance has worked well. This provides additional benefit components for people in the Work related Activity and Support Groups. We intend to mirror this approach in Universal Credit.

“22. The Government believes the existing structure of overlapping disability premiums is overly complex and causes confusion. We are considering what extra support may be needed for disabled people in Universal Credit, over and above the additional components mentioned above and the benefits available elsewhere in the system”.

The Legislation

17. The legislative provisions providing for the creation of universal credit are contained in the Welfare Reform Act 2012 (“the 2012 Act”). Section 1 provides that:

“1 Universal credit

(1) A benefit known as universal credit is payable in accordance with this Part.

(2) Universal credit may, subject as follows, be awarded to—

(a) an individual who is not a member of a couple (a “single person”), or

(b) members of a couple jointly.

(3) An award of universal credit is, subject as follows, calculated by reference to—

(a) a standard allowance,

(b) an amount for responsibility for children or young persons,

(c) an amount for housing, and

(d) amounts for other particular needs or circumstances.”

18. Sections 2 to 7 of the 2012 Act dealt with eligibility and the process for claims. Sections 8 to 12 of the 2012 Act dealt with the calculation of awards and the different elements forming part of universal credit and provided for regulations to be made setting out the detailed provision governing the standard allowance, allowance for responsibility for children and young persons, and housing costs. Section 12 of the 2012 Act dealt with other particular needs or circumstances which includes needs arising out of disability. That section provided, so far as material, that:

“(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-

.....

(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.

(3) Regulations are to specify, or provide for the determination or calculation of, any amount to be included under subsection (1).

(4) Regulations may—

(a) provide for inclusion of an amount under this section in the calculation of an award of universal credit—

(i) to end at a prescribed time, or

(ii) not to start until a prescribed time;

(b) provide for the manner in which a claimant's needs or circumstances are to be determined.”

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

20. Section 33 of the 2012 Act provided for the abolition of the existing welfare benefits. Section 150 of the 2012 Act provided for commencement of the majority of the provisions (including the ones relevant to this case) on a day to be appointed.
21. Section 36 of the 2012 Act provided for what was described as migration to universal credit, that is the process of replacing existing benefits by universal credit. Detailed provision was made in Schedule 6 to the 2012 Act. Paragraph 1 of Schedule 6 provided a power to make regulations “for the purpose of or in connection with replacing existing benefits with universal credit”. Paragraph 4 of Schedule 6 to the 2012 Act provided, amongst other things, for the termination of an award of an existing benefit and included power to make provision for additional payments to ensure that the amount of the new benefit was not less than the amount of benefits previously retained. Paragraph 4(3)(a) of Schedule 6 to the 2012 Act provided, so far as material, that:

“Provision ...may secure that where an award of universal credit is made

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

The Regulations

22. The first set of regulations made under section 12 of the 2012 Act were the Universal Credit Regulations 2013 (“the 2013 Regulations”). Those regulations provide in regulation 27 for the award to include an amount in respect of the fact that the claimant had a limited capability for work and work-related activity.
23. The amount payable in respect of that element of universal credit is intended to be higher than the amount paid to persons who, under the existing welfare system, fell within what is known as the support group (that is, those who currently receive the basic allowance by reference to the fact that they have a limited capacity for work and work-related activity). The 2013 Regulations did not, however, include any additional disability premiums such as the SDP or the EDP. A person who had previously been in receipt of these premiums would receive less money overall – a higher allowance than previously but no additional disability premiums.
24. An equality impact assessment of the impact of the system expected to be contained in the regulations had been conducted in November 2011. A further impact assessment was published in December 2012.
25. The draft regulations were laid before each House of Parliament on 10 December 2012. They were approved by the House of Commons on 12 February 2013. They were approved by the House of Lords after debate and after an amendment discussed below was withdrawn. The 2013 Regulations were made by the minister on 25 February 2013. I deal with the commencement provisions below.

The Question of Additional Disability Premiums

26. The question of including provision within universal credit equivalent to the current SDP and EDP had been considered by Parliament when the Bill which became the 2012 Act was before it. An amendment was moved in the House of Lords to provide

for an addition to universal credit which, in the words of the Baroness who moved the amendment on 14 December 2011, would be “similar to the severe disability premium”. The minister promoting the Bill in the House of Lords resisted the amendment and indicated that it would, in the Government’s view, involve a return to the complexity of the existing system and would entail an additional cost which was unaffordable. The amendment was withdrawn.

27. Separately from any government initiative, a non-governmental organisation, the Citizens Advice Bureau, itself considered the question of the potential impact of the introduction of universal credit and the abolition of SDP and carried out a survey of 1243 disabled people to obtain detailed information. It published a report, entitled “Holes in the Safety Net”, in October 2012. That report found that disabled persons who lived alone and did not have a carer faced considerable additional costs. The report noted that up to 230,000 people could be affected and that they could lose up to £58 a week as a result of the abolition of the SDP. The report recommended that SDP be retained.
28. The minister responsible for the draft regulations met with the member of the House of Lords who had chaired the inquiry resulting in the Holes in the Safety Net Report to discuss this issue. On 19 December 2012 the minister wrote to the peer and confirmed that he had considered the Holes in the Safety Net Report and had decided not to make any changes in the draft regulations which he had laid before Parliament but would look carefully at how the system of universal credit was working once implementation began.
29. In January 2013, a civil servant made a submission to the minister. That submission noted that SDP had been intended to meet additional needs arising from disability on the assumption that these resulted in extra costs and to an extent overlapped with disability allowance. The submission stated that over time “there had been problems over its administration, together with questions about whether it was targeted appropriately”. The submission referred to the Holes in the Safety Net report and considered various options. The first option was to retain the proposed arrangements set out in the draft regulations. A second was to change the structure of universal credit. The submission noted that none of the proposed reforms looked attractive and it did not seem sensible to reform universal credit before it had been introduced and evaluated. A third option was to undertake further work on how the proposals would impact on those without a carer. The author of the submission noted that the provision of social care was key and that, in theory, needs met by SDP should be met by local authorities through the social care system following a social care assessment which local authorities were obliged to carry out although it noted it would be difficult to say that social care would be filling the gap because in some cases this would not be true. The author of the submission recommended the first option.
30. An amendment to the resolution approving the draft regulations was introduced in the House of Lords on 13 February 2013 noting, amongst other things, that the draft regulations would not meet the needs of disabled people. The debate on the amendment included reference to the Holes in the Safety Net report and the fact that that report indicated that 230,000 severely disabled people who did not have another adult to care for them would lose up to £58 a week as a result of the abolition of the SDP and the failure of universal credit to provide a counterpart. The minister did not propose any changes. He noted that the report indicated that 230,000 households were

in receipt of SDP and stated that the department would be monitoring carefully the impact of the measure on disabled people. The amendment was not adopted and the draft regulations were approved.

The Question of Transitional Protection

31. The question of transitional protection had been considered before and during the passage of the 2012 Act and the making of the 2013 Regulations. The Government had indicated its intentions in a number of documents.

32. The White Paper Cm 7957 presented by the Secretary of State to Parliament in November 2010 noted that the then Government was “committed to ensuring that no-one loses as a result of these reforms” (paragraph 8).

33. Documents entitled Universal Credit Policy Briefing Notes were issued by the then Government setting out its thinking at the time. Briefing Note Number 1, issued on 12 September 2011, noted that the new system was thought to be simpler and fairer. In relation to the possibility of some element of transitional protection, as universal credit replaced existing benefits, the Briefing Note appeared to recognise that there may be a need for some element of transitional protection in some cases and noted at paragraph 5(c) (under a heading “How it will work in practice”) that:

“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:

....

People who have been awarded the severe disability premium in the existing out of work benefits

.....”

34. On 14 December 2011, the minister noted in the House of Lords that transitional protection would be provided for those claimants with existing premiums whose overall universal credit entitlement would be less than under the previous system as a direct result of moving to universal credit provided their circumstances stayed the same. The minister noted that work was continuing on defining transitional protection with precision.

35. It appears that the Government’s thinking, and intentions, have evolved over time and may not yet have reached a settled view. I was shown another Universal Credit Policy Briefing Note dated 4 July 2012. That considered the question of when transitional protection should end, that is when was there a significant change of circumstances which might be said to justify ending any transitional protection. At that stage, it appeared that the then Government contemplated that a change in relation to the housing element (losing, or gaining, payment of assistance for housing as an element of universal credit) might constitute one such significant change in circumstances. A Universal Credit Policy Briefing Note dated 10 December 2012, however, did not indicate that a change in relation to entitlement to the housing element of universal

credit would be a sufficient change of circumstances to end transitional protection in respect of income related support. This may indicate either that the then Government had changed its view on the matter or that Government policy was still developing.

36. It is also right to note that the minister who laid the draft regulations before Parliament said in his letter of 19 December 2012 that:

“Although new claims to Universal Credit will start from April 2013, these will only be in a small geographic area and from single unemployed people who would otherwise have been on Jobseeker’s Allowance. We are still considering how Universal credit will roll out to other groups such as disabled people. No-one whose circumstances remain the same will lose out in cash terms as a direct result of the move to UC. These claimants will be given transitional protection to avoid cash loss at the point of change”.

37. I was not shown any further policy documents setting out the current Government’s policy on transitional protection. The regulations dealing with the replacement of existing benefits by universal credit for the population generally have not yet been made. I was told that it was expected that those regulations, when made, will deal with what have been called managed migrants – those whom the department move to universal credit – and the circumstances in which such people will be eligible for an additional cash payment to reflect the fact that the amount of an award paid by way of universal credit may be less than the amount received under the current system.
38. For completeness, I note that the equality impact assessments published in November 2011 and December 2012 noted that there would be transitional protection to ensure that there would be no cash losers as a direct result of moving to universal credit if the claimant’s circumstances remained the same.

The Current Implementation Regime

39. The replacement of the current system of benefits by universal credit is a complex exercise. Universal credit has been implemented, and the existing system of benefits replaced, for particular groups of claimants (starting with single unemployed claimants in certain areas).
40. The arrangements that are relevant for present purposes are those which affect persons who wish to make a claim for assistance with housing costs. Prior to the introduction of universal credit, those persons would have applied to their local housing authority for housing benefit. The system of universal credit contemplates instead that universal credit, payable by the Department for Work and Pensions, will include an element to reflect housing costs (as well as elements to reflect income related support).
41. Under the Universal Credit (Transitional Provisions) Regulations 2014 (“the Transitional Regulations”), where a person who is, or has been, in receipt of housing benefit from one local housing authority housing area moves to another local housing authority area, he can no longer apply for housing benefit from that second local housing authority housing. Rather he must apply to the Department for Work and Pensions for universal credit which will include assistance with housing costs and which will also replace the former income related benefits. One of the consequences is that a person who moves local housing authority no longer receives the basic allowance and SDP and EDP; rather he receives universal credit. The total amount

received by way of universal credit for non-housing income related support is less than the amount previously received by way of the basic allowance and SDP and EDP. The current transitional arrangements do not include payment of any additional cash sum to reflect the difference between what the person receives by way of universal credit and what he previously received by way of the basic allowance plus SDP and EDP.

42. If, however, a person moves within a local housing authority area, he continues to receive housing benefit from that authority: he does not have to apply to the Department for universal credit. He continues to receive benefits under the former welfare system including the basic allowance and SDP and EDP.
43. That is what happened in the present case. Mr P and Mr A were both in receipt of income related support, that is the basic allowance and SDP and EDP. They both moved to another local housing authority area. They had to apply for universal credit. The total amount they received was less (the standard allowance forming part of universal credit was higher than the basic allowance payable under the previous system but they do not receive any SDP or EDP as those disability premiums do not form part of universal credit). Consequently, they receive about £40 a week less than they were previously receiving. There is no transitional protection available for persons in their position. If they had been in receipt of housing benefit, and moved within the same local housing authority area, they would have continued to receive the existing basic allowance and the SDP and EDP.
44. The mechanism by which this achieved is complex but is as follows. Regulation 5 of the Transitional Regulations provides that a claimant is not entitled to certain benefits, including income support and housing benefit. Regulation 6 provides that a person may not make a claim for income support or housing benefit except as provided in that regulation. If the claimant is not in receipt of housing benefits and seeks assistance with housing costs, and is not within an exception, it appears that he must then make a claim for universal credit (as he is prohibited from making a claim for housing benefits).
45. In terms of the person who moves within a local housing authority area, the position appears to be dealt with (albeit curiously) in regulation 6(3) of the Transitional Regulations. That provides that a person makes an application for a benefit if he takes any action which results in a decision on a claim being taken under certain regulations. In other words, regulation 6(3) states what constitutes a (prohibited) application under Regulation 6(1) rather than, as Regulation 6(1) contemplates, defining what constitutes an exception to the prohibition on applying for housing benefit. Notifying a local housing authority who is currently paying housing benefit of a change of circumstances – for example, that the person has moved house – does not, I was told, involve a “decision on a claim being required”. Only a move to a new local housing authority area and an application to that new authority would result in a decision on a claim being required. The person who moves house within a local housing authority area therefore may apply for the continued payment of housing benefit (rather than having to apply for universal credit) and continues to receive income related support under the existing welfare regime, that is, he continues to receive the basic allowance, the SDP and the EDP.

THE ISSUES

46. Against that background, the claimants challenge two elements of the universal credit system. First, they challenge the 2013 Regulations contending that the absence of any additional payment as part of the universal credit for those who previously were eligible to claim SDP and EDP constitutes unlawful discrimination contrary to Article 14 read with Article 1 of the First Protocol to the ECHR. They say that there:
- (1) is differential treatment between persons with severe disabilities who have a carer caring for them as that carer receives a cash payment by way of a carer's allowance as compared with persons such as the claimants who are severely disabled but do not have a carer and for whom there is no payment included within universal credit to enable them to have their needs met; or
 - (2) the "2013 Regulations" treat those with severe disabilities in the same way as those who have less severe disabilities and both now receive the same payment whereas those with severe disabilities were previously recognised as requiring higher payments (in the form of the SDP and EDP); and
 - (3) the defendant is unable to provide an objective justification for any of that differential treatment.
47. Secondly, the claimants challenge the absence of any element of transitional protection as part of the implementation arrangements contending that this, too, constitutes unlawful discrimination contrary to Article 14 read with Article 1 of the First Protocol to the ECHR. They contend that:
- (1) there is differential treatment between (a) those who move from one local housing authority area to another, such as the claimants, and who have to apply for universal credit and no longer receive SDP or EDP and (b) those who move within a local housing authority who continue to receive the existing benefits including SDP and EDP; or
 - (2) there is differential treatment between (a) those who move from one local housing authority area to another and lose SDP and EDP and (b) those who will transfer (or undergo managed migration as it is described) to universal credit automatically as, it is said, the Government's intention is that that latter group will receive an element of transitional protection; or
 - (3) there is a failure to treat two different groups differently, namely those who transfer to universal credit and who have severe disabilities and those who transfer and do not have such needs. It is said that treating both groups in the same way, and failing to recognise the additional needs of those who are severely disabled, amounts to differential treatment for the purposes of Article 14 ECHR; and
 - (4) the defendant is unable to provide an objective justification for any of that differential treatment.
48. Permission has been granted to argue those two issues (which are grounds 2 and 3 in the claim form) in Mr P's case. I grant permission to Mr R to argue grounds 2 and 3 in his case.

49. Thirdly, permission was refused to Mr P to argue that the making of the 2013 Regulations or the Transitional Regulations involved a breach of the public sector equality duty imposed by section 149 of the “the 2010 Act”. Mr P seeks a reconsideration of that refusal and he, and Mr R, seek permission to argue that ground. I deal with that below.

THE FIRST ISSUE – THE CHALLENGE TO THE REGULATIONS

50. Ms Leventhal, on behalf of the claimants, puts the issue in this way. First, she contends that there is differential treatment between two groups of people under the 2013 Regulations. There is a category of persons who are severely disabled and have a friend or relative who provides care for them. Those persons receive the standard allowance under universal credit and the carer receives a carer’s allowance to reflect the time spent caring for the individual (or will receive payment of a carer’s element as part of universal credit). Those persons’ needs, therefore, are met by the combination of the payment of the standard allowance and the carer’s allowance.
51. Ms Levanthal submits their position should be contrasted with a second group of persons. They are those persons who have similar needs but do not have a carer living with them. Under the former system their needs were recognised by the payment of the SDP or EDP in addition to the basic allowance. Now, under universal credit, they will receive a standard allowance but not any additional element relating to their needs. The differential treatment constitutes the provision of a standard allowance and additional support (by way of the carer’s allowance) for those severely disabled who have a carer as compared with those who have similar needs but who have no carer: they receive the standard allowance but not any other cash payment to reflect their additional needs. The defendant could not objectively justify that difference in treatment.
52. Secondly, Ms Levanthal contrasts the treatment of two other groups. She contrasts the position of those with some disability who needed assistance but who were not eligible to receive SDP or EDP under the former regime. They continue to have their needs met under the universal credit system by payment of a cash sum – the standard allowance (which is, in fact, higher than the amount of the basic allowance formerly payable). Those such as the claimants who were previously recognised as having greater needs by reason of their disabilities formerly received the SDP and EDP to reflect their greater needs. Now they receive the same cash payment as other disabled persons. That, submits Ms Levanthal, constitutes differential treatment within the meaning of Article 14 read with Article 1 of the First Protocol to the ECHR, because different cases were being treated in the same way, relying on the approach of the European Court of Human Rights in *Thlimmenos v Greece* (2000) 31 EHRR 15. The claimants submitted that the defendant could not objectively justify the differential treatment.
53. Mr Brown for the defendants contends that any differential treatment is objectively justified. In addition, in relation to the first way the issue is put, he submits that any differential treatment is not on the grounds of any other status and for that additional reason does not constitute discrimination contrary to Article 14 ECHR. In relation to the second way in which the claimants put this issue, he further submits that the absence of an entitlement to a benefit does not fall within the ambit of Article 14 ECHR.

Analysis

54. Article 14 ECHR provides that:

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

55. Article 1 of the First Protocol to the ECHR protects rights in relation to the peaceful enjoyment of possessions and the right not to be deprived of possessions, subject to certain exceptions. That Article 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 the state creates a system of welfare benefits, it must do so in a manner compatible with Article 14 ECHR: see *Stec v United Kingdom* (2006) 43 EHRR 47 at paragraph 53.

56. In considering whether the 2013 Regulations involve a breach of Article 14 read with Article 1 of the First Protocol to the ECHR in this case, it is necessary to consider whether (1) there is differential treatment (2) on grounds of other status (3) in relation to a matter falling within the scope, or ambit, of Article 14 ECHR and (4) which the defendant cannot show is objectively justified.

57. In relation to objective justification, what the defendant needs to justify is the differential treatment complained of. In relation to universal credit, which is a cash payment made as part of a system of welfare benefits by the state, a

“ difference of treatment is, however, discriminatory if it has no objective or reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised” (per the Grand Chamber in *Stec* at paragraph 51).”

58. In matters relating to the justification of differential treatment arising out of economic or social measures, the courts will generally respect the choice of the legislature or government unless that choice is manifestly without reasonable foundation. Courts should exercise considerable caution before interfering with a scheme approved by Parliament. See, e.g. *R (MA) v Secretary of State for Work and Pensions* [2016] 1 W.L.R. 450 at paras. 29 to 38 per Lord Toulson, citing and applying *Humphreys v Revenue and Customs Commissioners* [2012] 1 W.L.R. 1545, and *Mathieson v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 3250 at paragraphs 24 to 26 per Lord Wilson. That is particularly so when there is evidence that the decision-maker has addressed its mind to the particular issue under consideration or the issue has received active consideration by Parliament (see *R (Tigere) v Secretary of State for Business, Innovation & Skills* [2015] 1 W.L.R. 3820 at paragraph 32 per Baroness Hale). The grounds of justification must still be considered carefully by the court and a point may come “where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable” (*Humphreys* [2012] 1 W.L.R. 1545 at paragraph 18, per Baroness Hale). The court must therefore scrutinise with care the justifications advanced for a policy even in the

area of economic and social policy: see *R (MA) v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 4550 at paragraph 30.

59. There is an issue as between the defendants and the claimants as to the appropriate approach to be taken by the courts to the question of whether differential treatment is objectively justifiable. The defendant submits that, in the light of *R (MA) v Secretary of State for Work and Pensions*, all the court need ask in the context of a policy dealing with the allocation of cash payments as part of a welfare system is whether the measure giving rise to the differential treatment is manifestly without reasonable foundation.
60. The claimants contend that the court should adopt a more structured approach to objective justification as seen, for example, in cases such as *Tigere* and ask (1) does the measure pursue a legitimate aim (2) is the measure rationally connected to that aim (3) could a less intrusive measure have been adopted to achieve that aim and (4) bearing in mind the consequences of the measure, the importance of the measure and the extent to which the measure will achieve those aims, has a fair balance been struck between the rights of the individuals affected and the interests of the community? The claimants recognise that the courts will generally approach the first three questions by asking whether the legislature's view is manifestly without reasonable foundation. They contend, supported by Mr Buttler for the Equality and Human Rights Commission ("the Commission") that that approach does not apply to the fourth element, namely whether the measure strikes a fair balance between the rights of the individual and the interests of the community. They accept that, even here, the court will accord significant respect to the view of the legislature or policy maker that the balance struck is a fair one particularly, it seems, where that issue has actively been considered by the legislature or policy-maker. The claimants rely on the observation of Lord Mance at paragraph 52 of his judgment in *In re Recovery of Medical Costs* [2015] AC 1016:
- "52 I conclude that there is Strasbourg authority testing the aim and the public interest by asking whether it was manifestly unreasonable, but the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of "manifest unreasonableness". In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker."
61. I recognise the apparent difference of emphasis between the two approaches. I doubt that the different approaches would lead to different results in the context of changes to welfare benefits where the legislature or decision-maker has consciously considered what groups, subject to what criteria, should be eligible to obtain cash payments and what amount those payments should be. That is likely to be the case as the rights, or interests, of the individual will in fact flow from the decisions of the state as to what cash payments should be paid by way of benefits rather than

involving a situation where, for example, the courts are weighing the justification for a policy against a specific right derived from the Convention. In any event, for present purposes, I propose to review the differential treatment by reference to both approaches.

The Differential Treatment Between Severely Disabled Persons With Carers and Those Without Carers

62. The purpose, or aim, underlying the 2012 Act and the 2013 Regulations was to restructure the benefit system by introducing a simpler system which would replace the existing system of overlapping benefits with a single benefit. That was seen to be a means of ensuring the system was fairer, more affordable and better able to address poverty and worklessness. One of the things that was considered in making the 2013 Regulations was the appropriate allocation of resources to those with disabilities. The view was taken that there should be a level of support for those with disabilities which was higher than the basic allowance previously paid to the support group but that there should not be additional components in universal credit equivalent to the former SDP and EDP.
63. The context here involves decisions on which groups should receive cash assistance by means of welfare benefits. That included consideration of which groups should receive cash payments to assist with disabilities, how those cash payments should be structured and what the amounts of those payments should be. That involves difficult questions of social policy and the allocation of resources. A conscious and considered decision was taken by the decision-maker that resources should be allocated to particular groups but that additional premiums, akin to the SDP and EDP paid as part of the former system of welfare benefits, should not be included as part of the system of universal credit. That issue was debated as part of the consideration of the Bill which became the 2012 Act. The issue was again raised when the minister laid the draft regulations before the House of Lords for approval under the affirmative resolution procedure. The draft regulations did not provide for elements equivalent to SDP and EDP as part of the universal credit. The question of whether an equivalent to additional disability premiums should be included within universal credit was again raised in debate. The House of Lords, however, approved the draft regulations without the addition of any element equivalent to SDP or EDP as part of universal credit. The House of Commons also approved the draft regulations without, it seems, a debate.
64. In those circumstances, the 2013 Regulations pursue a legitimate aim, namely the proper allocation of resources and the appropriate method of structuring a welfare benefits system to provide, amongst other things, assistance to those with disabilities. The conclusion reached on how to achieve those aims was not manifestly without reasonable foundation. It is correct that where disabled persons have carers those carers will receive a cash payment in respect of the care provided to the disabled person. That reflects the view of the decision-maker that it is desirable to encourage people to act as carers and to provide them with a financial incentive to do so. Those without carers will not receive, as they formerly did, additional disability premiums in the form of SDP or EDP which they could have used, if they had wished, to purchase care. That, however, reflects the view that such disability premiums were not an appropriate mechanism for targeting support to those with such disabilities.

65. The claimants criticise the view that social care would be available from local authorities, referring to the Holes in the Safety Net report and the submission of January 2013 to the minister. It is not, however, unreasonable to take the view that the previous system should be simplified and that disability premiums did not represent the best allocation of resources or to take the view that individuals seeking assistance in the area of social care should have resort to local authorities which are obliged to assess their needs and provide assistance in respect of those needs under the 2014 Act.
66. In all the circumstances, it cannot be said that the decision to structure universal credit in the way that was done was manifestly without reasonable foundation. Consequently, applying that approach, it cannot be said that the differential treatment between those persons with disabilities who have carers, and those who do not, is not objectively justified.
67. Applying the approach favoured by the claimants, the defendant has demonstrated that the differential treatment, resulting from the 2013 Regulations, is objectively justified. The aim is a legitimate one, to provide for the proper allocation of resources and an appropriate structure of welfare benefits. The measures adopted are rationally connected with that aim. In truth, the different method advocated by the claimants, namely the inclusion of a component within universal credit which is similar to the SDP and EDP, is not a less intrusive means of achieving that aim; it involves achieving a different aim.
68. In terms of whether the measures strike a fair balance it is appropriate to bear in mind that the context is the allocation of cash payments as part of the welfare system. That involves questions of social and welfare policy. The measure reflects the conscious and deliberate assessment by the government of the appropriate balance between the competing interest groups. That assessment has been considered and approved by the legislative bodies. The claimants, and others, are seeking an allocation of resources to assist with their needs. They are not entitled to insist upon the continuation of the previous level of resources they received under a previous system particularly where that system is considered by government, and the legislature, to be unduly complex and not to achieve the appropriate aims of a welfare benefits system in the present day. In all those circumstances, the 2013 Regulations do strike a fair balance in the way that it deals with needs arising out of disability and the community interest.
69. For those reasons, the challenge to the Regulations on this aspect fails as any differential treatment is objectively justified. In the circumstances, it is not necessary to consider if any differential treatment was on the grounds of other status within the meaning of Article 14 ECHR.

The Position of Those With Additional Needs and Those Without Such Needs

70. The second way in which the claimants put their challenge to the 2013 Regulations is as follows. They contend that under the former benefit rules those in the support group were entitled to a basic allowance to meet their needs. Those who satisfied additional criteria received the basic allowance and SDP and EDP. Now, they say, those in the support group continue to have their needs met by payment of a standard allowance (at a higher rate than the previous basic allowance) but those who have additional needs receive the standard allowance but do not have any additional amounts paid to them by way of additional disability premiums. This, they say, is to

treat people in different positions (i.e. people with different levels of need) in the same way. That, they say, amounts to differential treatment which the defendant must objectively justify or it will amount to discrimination contrary to Article 14 read with Article 1 of the First Protocol. They rely upon the principle summarised by the European Court of Human Rights in paragraph 44 of its judgment in *Thlimmenos v Greece* (2001) 31 EHRR 15:

“44 The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification.⁵ However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.

71. First, this is not, in truth, a case where people in different positions are treated differently under the relevant legislation. The fact is that universal credit, provided for by the 2012 Act and the 2013 Regulations provide for certain levels of cash benefits to certain persons who meet certain criteria. The claimants, however, seek to rely upon previous decisions of the legislature and the executive as to the amounts of, and the circumstances in which, cash payments were to be payable under the former legislative regime providing for welfare benefits. The criteria identified under the previous regime do not define an objectively ascertainable factual state of affairs which must similarly be accommodated by any replacement system. Rather, the criteria previously adopted reflected the judgement then made as to how best to direct assistance to those perceived to be in need of such assistance. Universal credit is a self-contained system which will operate according to the criteria provided by the legislation creating that system. It is not appropriate to say that any replacement benefit system must replicate features and definitions used in the former system and, if it does not do so, then to seek to argue that the new system includes differential treatment within the meaning of Article 14 ECHR as the new system treats people in the same way when, under a different and replaced system, they would have been treated in a different way.
72. Secondly, in any event, the decision to pay a higher allowance to all persons with a particular level of disability, and not to pay additional disability premiums (such as the SDP and EDP payable under the former welfare system) is objectively justifiable. It is a conscious and considered decision by the legislature and the executive in the context of the allocation of resources in the context of social and welfare policy. The decision-makers consider that this approach best directs assistance to those who need it (and those with other needs should have those needs assessed under the social care legislation rather than as part of universal credit). The previous disability premiums were seen as complex to administer and were not seen to have been appropriately targeted. For those reasons, discussed more fully above in relation to the first aspect of this challenge, any differential treatment arising out of the fact that claimants now received the same level of benefits for disability, whereas formerly different groups received different benefits, is objectively justifiable. Such a policy is not manifestly without reasonable foundation. Applying the claimants’ preferred approach, the measure pursues a rational aim, is connected to that aim and that aim could not be achieved by a less intrusive measure. Indeed, to adopt a different measure and give

different payments to these groups would be to seek to achieve a different aim, not the aim pursued by universal credit. For the reasons set out in paragraph 68 above, the measure strikes a fair balance.

73. In those circumstances, it is not necessary to consider the question of whether any differential treatment was done on the grounds of other status or whether the claim to a benefit falls within the ambit of Article 14 read with Article 1 of the First Protocol to the ECHR. There is no differential treatment and if, contrary to that view there were, such treatment would be objectively justified.
74. For those reasons, this challenge to the 2013 Regulations fails.

THE SECOND ISSUE – THE IMPLEMENTATION ARRANGEMENTS

- 75 The second issue concerns the implementation arrangements for replacing the existing benefit system with universal credit. The process of implementation is being carried out in phases. The claimants contend that the implementation arrangements for these claimants do not provide for any element of transitional protection, with the result, that the total amount of money for income related support which they receive by way of universal credit, is less than the amount they previously received when in receipt of the basic allowance and SDP and EDP.
- 76 The first ground of differential treatment identified by Mr Buttler on behalf of the Commission, and adopted by Ms Levantahl for the claimants, concerns the differential treatment for those with severe disabilities who move to universal credit and those who are able to continue to claim benefits under the previous welfare regime.
- 77 As explained above, this differential treatment arises in connection with those who need assistance with housing costs. If a person previously in receipt of the basic allowance and SDP and EDP moves from one local housing authority area to another, the Transitional Regulations prohibit him from applying to that authority for housing benefit. Instead he has to apply to the Department for Work and Pensions for universal credit. That then replaces his existing income related benefits (including SDP and EDP if he were in receipt of those) and he receives assistance with housing costs as part of the universal credit benefit. Where a person is in receipt of housing benefit and moves house within a local housing authority area, he can continue to receive housing benefit from that authority. He is not required to apply for universal credit and he continues to receive the income related assistance by way of the allowance and SDP and EDP (if eligible).
- 78 The Commission initially defined the first group as severely disabled persons who move on to universal credit by force of circumstances. In fact, that additional element is not a necessary element of the definition and serves only to complicate matters. It is preferable to focus on the differential treatment of those previously in receipt of the basic allowance and SDP and EDP who move to a different local housing authority area and those who move within a local housing authority.
- 79 Mr Brown for the defendant accepts that the benefits in question fall within the ambit of Article 14 ECHR as they involve existing rights to cash payments. Mr Brown, as I understand it, also accepts that there is differential treatment in the form described above. The real issues concern the question of whether this differential treatment is

objectively justified and, if not, whether it involves differential treatment on grounds of other status within the meaning of Article 14 ECHR.

- 80 The justification for the differential treatment is the need to implement universal credit. Given the complexity of universal credit, and the numbers involved, it would not be possible to introduce universal credit immediately for all claimants. Ms Young, the universal credit policy team leader in the defendant's department, explains this in her witness statement. The need for a phased transition arises out of the need to test the computer systems, to train a very large number of decision-makers in different organisations, the need to address problems as they are identified and the benefits of publicising the system to claimants as it is gradually introduced.
- 81 All parties accept the legitimacy of a phased transition from the existing benefits system to universal credit. I agree that the aim of achieving a gradual, or phased, introduction of universal credit is a legitimate aim. I further agree that it is legitimate to identify the fact that one aspect of the assistance needed, such as assistance with housing costs, is an appropriate trigger to move a person from the existing benefit system to universal credit.
- 82 The difficulty that arises in the present case, however, is the way in which the Transitional Regulations achieve that for the present group of claimants. The trigger is moving local housing authority area. Such a move however, has far-reaching consequences in relation to the income related benefits that the person receives. In particular, those who were in receipt of income related benefits in the form of the basic allowance and the SDP and EDP cease to be able to continue receiving those, and move to universal credit, and consequently suffer a considerable loss of income – but without any consideration, apparently, being given as to whether or not an element of transitional protection is appropriate for persons in this position. There is nothing in the contemporaneous material before this court to indicate that the decision-maker addressed the consequences of this method of implementation or whether, and if so what, element of protection might be appropriate.
- 83 Such a situation arises in a context where the Government has previously indicated that there may be groups (including severely disabled persons who were in receipt of additional disability premiums) who may need an element of transitional protection and where the Government has indicated that it needed to identify the groups for whom, and the circumstances in which, such transitional protection should be made available. That material indicates that the Government considered that this issue needed, at least, to be addressed and an element of protection may need to be provided at least in some circumstances to some groups. It is not a policy aim created or imposed by the courts. It is a potential need apparently recognised by the Government.
- 84 That potential need was recognised in the White Paper Cm 7957 presented to Parliament before the Bill which became the 2012 Act was enacted. It was referred to by the minister in Parliament in the debates upon the 2013 Regulations. It was referred to by the minister in correspondence in December 2012. The Briefing Notes issued in 2011 and 2012 refer to the issue and, indeed, appear to reflect the thinking of the then Government that an element of transitional protection for this group should be provided and that a change of circumstances arising out of changes in the need for housing assistance would not justify the ending of transitional protection for income related benefits.

- 85 Despite that, there is nothing in the material before me to indicate that the issue had been considered before the making of the Transitional Regulations either by the Government or by Parliament when the draft regulations were laid before it. There is no material indicating why the Transitional Regulations do not include any element of protection and why it is considered that the financial burden arising out of the differences between amounts received in respect of income related benefits for those with severe disabilities under the former system and payable universal credit should now fall on those who have moved from one local housing authority area to another. A change in housing circumstances may provide an explanation as to why it was appropriate to require them at that point to switch to universal credit. It does not explain why they should do so without any apparent consideration of whether any element of transitional protection should be provided in those circumstances in relation to the income related element of universal credit.
- 86 Applying the approach to justification favoured by the defendant, the decision to move a group of persons previously eligible for SDP and EDP onto universal credit because they move to another local housing authority area, without considering the need for any element of transitional protection (particularly in the light of earlier Government statements that an element of protection may be needed and the circumstances in which it should continue needed to be defined) is manifestly without reasonable foundation.
- 87 Applying the approach to justification favoured by the claimants and the Commission, the Transitional Regulations seek to pursue a legitimate aim, the phased transition to universal credit, and are rationally connected to that aim. In the absence of any evidence about the connection between that aim and the absence of any element of transitional protection, it is not easy to determine whether or not any less intrusive measure could have been adopted.
- 88 In any event, the material before court does not establish that the Transitional Regulations as they stand strike a fair balance between the interests of the individual and the interests of the community in bringing about a phased transition to universal credit. The impact on the individuals is clear. They were in receipt of certain cash payments (the basic allowance and SDP and EDP). They are now in receipt of cash payments which, overall, are significantly lower than the amount previously received. They are a potentially vulnerable group of persons as the Government in its own material recognises. On the material before me, there appears to have been no consideration of the desirability or justification for requiring the individual to assume the entirety of the difference between income related benefits under the former system and universal credit when their housing circumstances change and it is an appropriate moment to transfer them to universal credit. That is all the more striking given the Government's own statements over a number of years that such persons may need assistance and that there was a need to define with precision the circumstances in which they would not receive such assistance. In all the circumstances of this case, the operation of the implementation arrangements in the way they do is manifestly without reasonable foundation and fails to strike a fair balance.
89. Next, I consider whether the differential treatment arises out of other status within the meaning of Article 14 ECHR. The differential treatment does not of itself arise out of disability – both the group of people which has suffered the adverse financial consequences and the group which has not are people who are severely disabled and, in addition, met the criteria under the former system for payment of the SDP and EDP.

The basis for the differential treatment is that one group has moved from one local housing authority area to another and the other group has not.

90. In my judgment, the situation here is analogous to that in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 3250. There, at paragraph 22, Lord Wilson (with whom Baroness Hale, Lord Clarke and Lord Reed JJSC agreed) cited the approach taken by the European Court of Human Rights in its judgment in *Clift v United Kingdom*, reported in *The Times*, 21 July 2010 and said that:

“The question whether there is a difference of treatment based on a personal *or identifiable* characteristic ... is ... to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective ...” (Emphasis supplied by Lord Wilson.)

91. The Supreme Court there considered differential treatment between severely disabled children who needed a lengthy stay in hospital (a period in excess of 84 days) and disabled children who did not. The Supreme Court concluded that a severely disabled child in need of a lengthy hospital stay did have a status for the purposes of Article 14 ECHR: see per Lord Wilson at paragraph 23 and per Lord Mance at paragraph 60. A severely disabled person (i.e. a person who was in receipt of SDP and EDP) who moves to a different local housing authority area similarly has a status for the purposes of Article 14 ECHR.
92. It follows that the claimants have established a case of differential treatment on grounds of status in respect of the implementation arrangements for introducing universal credit and the defendant has failed to establish that the differential treatment is objectively justified. An appropriate declaration in those terms should therefore be made. It will then be open to the defendant to consider how the element of unlawful discrimination should be rectified, as happened in *Burnip v Birmingham City Council* [2013] PTSR 117 at paragraph 24.
93. In addition, the claimants have applied to amend their statement of facts and grounds of claim to claim damages under section 8 of the Human Rights Act 1998. That application will need to be considered and, if granted, arrangements made to enable that claim to be determined.
94. In the light of the above, it is possible to deal relatively briefly with the claimants’ two other ways in which they challenge the implementing arrangements. The claimants contend that there is differential treatment between them and those who will be transferred to universal credit in due course. The later are referred to as “managed migrants” as their transfer will be effected automatically by the Department when appropriate regulations are made (expected to be later in 2018 or in 2019). The claimants contend that those who are in receipt of SDP and EDP and who transfer to universal credit after regulations are made will be given transitional protection, unlike those such as the claimants who were formerly eligible for SDP and EDP but have already transferred to universal credit (as they have claimed housing assistance following a move to a different local housing authority area) and do not receive transitional protection.

95. The difficulty with this aspect of the claim is that no regulations have been made relating to the transfer, or managed migration, of persons to universal credit. It is not known what the terms of the regulations will be. It is not known whether there will be any differential treatment and if so, what the differential treatment will consist of. Furthermore, in the absence of knowledge of what the differential treatment may be, it is not feasible to consider if any differential treatment would be capable of objective justification.
96. Ms Levanthal relies on statements made in very different contexts indicating that the ECHR is intended to guarantee rights in a way that is practical and effective (such as the statement of the European Court of Human Rights in *Airey v Ireland* (1979-1980) 2 EHRR 305 at paragraph 24 of the judgment). The statements relied upon are primarily concerned with not treating possible hypothetical courses of action as being sufficient to avoid a breach of a right guaranteed by the ECHR. They appear to fall far short of enabling a court to consider now if there is differential treatment within the contemplation of Article 14 ECHR by reference to what treatment might be adopted in the future in relation to potential groups of persons and to compare that potential, future treatment with an existing group. Nor would the statements relied upon as establishing the likely course of action be sufficient in my judgment to establish a legitimate expectation in domestic public law that particular groups would be given particular treatment in future (in this case transitional protection on transferring from the existing benefit regime to universal credit). The statements do not amount to clear, unequivocal and unqualified statements as to what course of action the Government will ultimately pursue in relation to those whom they transfer to universal credit.
97. There is, in my judgment, a difference between two situations. It is permissible when considering the question of objective justification to take account of government statements indicating that severely disabled people may be a group needing protection and that that position will need to be clarified. That may be relevant when assessing whether the measure in question is manifestly without reasonable foundation or fails to strike a fair balance particularly when there appears to have been no consideration given to that issue when making transitional arrangements. It is not, however, permissible to seek to compare the treatment given to one group and treatment that may be given in future to different groups for the purposes of seeking to establish that there is differential treatment.
98. In those circumstances, it is not necessary to consider whether such claims fall within the ambit of Article 14 ECHR or whether any differential treatment that were to emerge in future was treatment on the grounds of other status.
99. The alternative way in which the claimants put this issue is that there is a failure to treat differently two different groups, those the claimants describe as persons who have severe disabilities and were formerly eligible for SDP and EDP who have transferred to universal credit (referred to as natural migrants) and others who have also transferred to universal credit who do not have those needs. The claimants contend that the former group requires an additional cash payment as they will receive less by way of universal credit than they formerly received yet they are being treated in the same way as other persons who have transferred to universal credit who do not suffer any overall loss in income. The claimants contend that the failure to differentiate between these two groups is not objectively justified. The claimant do not identify the persons who have transferred to universal credit but have suffered no

loss. They appear to assume that there must be such persons. In the absence of such information it is difficult to assess if there is any differential treatment, and if so whether it is on grounds of other status. In any event, the issue of objective justification appears to add little, if anything, to the issues discussed above in connection with the group of persons eligible for SDP and EDP who are transferred to universal credit on moving local housing authority area and those who move houses within an area. It is not necessary to consider further this way of putting the challenge to the implementing arrangements.

THE THIRD ISSUE – THE PUBLIC SECTOR EQUALITY DUTY

100. The claimants seek permission to argue that the minister failed to have due regard to the matters referred to in section 149 of the 2010 Act when he made the 2013 Regulations on 25 February 2013 and the Transitional Regulations. That duty is recognised in the case law as an important duty. The principles governing the operation of the duty are conveniently summarised for present purposes in the decision of the Court of Appeal in *R (Bracking) v Secretary of State for Work and Pensions* (2013) 16 CCL Rep. 479.
- 111 Lang J. refused permission to Mr P on the papers to argue this noting that in the light of the evidence it was unarguable that the public sector equality duty was breached. Mr P seeks a reconsideration of that refusal and he and Mr R seeks permission to apply for judicial review on this ground.
- 112 It is clear from the material that the minister did have due regard to the matters referred to in section 149 of the 2010 Act when he made the 2013 Regulations. There had been equality impact assessments of the draft regulations. He had read, and discussed, the Holes in the Safety Net report identifying the possible impact upon those who were in receipt of SDP and EDP. There is no arguable basis on the evidence for contending that the minister failed to assess the risk and extent of any adverse impact and the ways in which the risks may be eliminated before he made the 2013 Regulations. It is not arguable that, having taken a decision to lay draft regulations, the minister was not prepared to reconsider the issue in the light of new information such as the Holes in the Safety Net Report (what is described in the case law as a “rearguard action” following a concluded decision). Rather, the minister considered all the material and decided not to amend the draft regulations but to make the 2013 Regulations and monitor the impact of those regulations. The minister was aware of the subject matter of the duty. His attention was drawn in the equality impact assessment to the very groups with protected characteristics as defined by the 2010 Act and considered the impact upon those groups. There is no arguable case that he was unaware of the substance of the duty. The equality assessments carried out before the making of the 2013 Regulations did address the question of transitional protection for those who may need it if the overall income they received under universal credit was lower than their income under the previous welfare regime and there was no arguable breach of the duty in relation to the 2013 Regulations. In so far as there was, apparently, no further consideration of that matter before the Transitional Regulations were made, that is dealt with above in terms of whether those regulations are compatible with Article 14 ECHR. The claimants recognise that this issue goes to the substance of the Transitional Regulations and, in my judgment, is better assessed in that context. For those reason, Lang J. was correct to refuse permission on this ground. I too refuse permission.

CONCLUSION

113. The 2013 Regulations establishing universal credit do not involve discrimination contrary to Article 14 ECHR in so far as they do not include any element which corresponds to the additional disability premiums payable under the previous regime. Any differential treatment between different groups is objectively justifiable.
- 114 The implementing arrangements do at present give rise to unlawful discrimination contrary to Article 14 ECHR read with Article 1 of the First Protocol to the ECHR. There is differential treatment between the group of persons who were in receipt of additional disability premiums (the SDP and EDP) and who transferred to universal credit on moving to a different local housing authority area and so receive less money by way of income related support than they previously received and the group of persons in receipt of SDP and EDP and who move house within the same local housing authority area but are not required to transfer to universal credit and continue to receive the basic allowance and SDP and EDP and suffer no loss of income. That differential treatment is based on status. That differential treatment has not been objectively justified at present. A declaration will be granted that there is unlawful discrimination. The defendant will then be able to determine how to rectify the unlawful discrimination.