Neutral Citation Number: [2020] EWCA Civ 618

Case No: C1/2019/0640

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mrs Justice May
[2019] EWHC 462 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2020

Before :

LORD JUSTICE SINGH
LADY JUSTICE ROSE
and
LORD JUSTICE ARNOLD

- -

Between :

The Queen (on the application of TD, AD and Patricia Reynolds)	**Appellants**
- and -	
Secretary of State for Work and Pensions	**Respondent**

- -
- -

Mr Richard Drabble QC and Mr Tom Royston (instructed by **the Child Poverty Action Group**) for the **Appellants**
Mr Edward Brown and Mr Jack Anderson (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 23 April 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 a.m. on Tuesday, 12 May 2020.

Lord Justice Singh:

Introduction

1. The Appellants (TD, her child AD, and Patricia Reynolds) appeal against the order of May J dated 1 March 2019, dismissing their challenge, by way of judicial review, to the implementation of aspects of the Universal Credit ("UC") scheme, which was created by Parliament in the Welfare Reform Act 2012 ("the 2012 Act").

2. On 13 September 2019 the Appellants were granted permission to appeal to this Court by me.

Factual Background

3. In March 2017, the Appellants were subject to adverse decisions made by the Respondent ceasing their entitlement to certain benefits which UC is intended to replace (referred to as "legacy benefits"). The trigger for these decisions was that the Appellants were considered by the Respondent to have undergone a change of circumstances altering their benefit entitlements. Following the Respondent's decisions, the Appellants applied for UC.

4. The Appellants' entitlements under UC were less than their legacy benefit entitlements and as a result each household received lower monthly payments.

5. The adverse decisions concerning the Appellants' entitlement to legacy benefits were later overturned as a result of reviews carried out by the Respondent (in the language of the relevant legislation, they were "revised"), but the effect of the legislation implementing UC was that the Appellants were obliged to remain on UC. In the relevant terminology, they had "migrated" and there could be "no turning back". At one time the phrase used was "the lobster pot" principle, a phrase that was used before the Judge and by her in her judgment, but I will use the currently preferred phrase "no turning back".

6. Although the 2012 Act provides a power to afford transitional protection to those who move from legacy benefits to UC, no such legislation had been enacted when the Appellants moved to UC in 2017. The Appellants therefore received no transitional protection against the drop in income. There is still no legislation in place that would provide transitional protection to people in the Appellants' situation, although there is now such legislation for certain other groups.

7. I gratefully adopt the Judge's summary of the particular facts in the case of TD/AD, which she set out at paras. 31-34 of her judgment:

> "31. TD is a single parent. She used to work as a laboratory research chemist until she gave up work in 2015 to look after her daughter, AD. AD has sickle cell anaemia and epilepsy. She requires monthly blood transfusions and needs to attend other regular medical appointments. At the beginning of 2017, TD was entitled to income support, carer's allowance and child tax credit, with a disability element. Her total entitlement

> (excluding housing benefit) was £1005.45 per month. She also received disability living allowance, on behalf of AD, of £333.23 per month.
>
> 32. From 25 March 2017 the SSWP stopped TD's award of income support. Her Job Centre advised her that she should claim UC, which was awarded to her from 27 April 2017. TD later successfully challenged the decision to stop her income support but the application of Regulations 8 and 13 described above, precluded her from receiving or claiming any legacy benefit after 27 April 2017.
>
> 33. TD was awarded UC of £872.90 per month, which was £136.99 per month less than the amount to which she had been entitled under the legacy system. The loss of entitlement on transfer to UC was because of the less generous treatment of some children with disabilities under UC compared with legacy benefits.
>
> 34. Subsequently, on 18 August 2018 the SSWP revised the level of AD's disability living allowance (DLA) upwards. This revision had consequences for TD's UC entitlement, entitling her to the highest rate of the disabled child element of child tax credit up to 27 April 2017 and thereafter at the highest rate of the disabled child element of UC. The effect of this has been that the household's combined entitlement is now at the same level under UC as it would have been had TD continued to receive her legacy benefits. Notwithstanding this increase in her UC payments, TD contends that her claim is not academic as she and AD continue to seek a declaration and damages for the distress caused to them resulting from the drop in income at the time of transfer; the declaration sought would also benefit others in the same position as TD/AD but who remain on a lower entitlement under UC."

8. More detail is contained in the second witness statement of Dr Beatrice Fannon, filed on behalf of the Respondent, at paras. 80-93; and in the statement of Mr Martin Williams, filed on behalf of the Appellants, at paras. 31-43.

9. The Judge summarised the particular facts of Ms Reynolds' case as follows at paras. 35-38 of her judgment:

> "35. PR lives on her own. She is severely affected with rheumatoid arthritis, spondylitis, depression and panic attacks, the effect of which caused her to give up work in 2015.
>
> 36. In March 2017 PR was receiving ESA [Employment and Support Allowance], with SDP [Severe Disability Premium]

> and support component, and was also entitled to a personal independence payment.
>
> 37. On 17 March 2017, the SSWP stopped PR's ESA. PR challenged that decision; in the meantime she claimed UC on 17 April 2017 as that was the only income replacement benefit available to her pending determination of her challenge to the ESA decision. The ESA decision was reversed on 7 August 2017 but the operation of Regulations 8 and 13 described above precluded PR from receiving or claiming any legacy benefits after 16 April 2017.
>
> 38. At the time of her transfer to UC, PR's legacy benefits entitled her to receive £814.67 per month. She was awarded UC of £636.58 per month, which is £178.09 less than she had formerly been receiving. The lower UC entitlement is attributable to the less generous treatment of some adults with disabilities in UC than under the legacy system."

10. More detail is contained in the second witness statement of Dr Fannon, at paras. 63-79; and the statement of Mr Williams, at paras. 44-48. It is right to note that a medical assessment was scheduled for 24 February 2017 but that Ms Reynolds failed to attend that assessment. As a consequence the Respondent terminated her ESA, but the official who took that decision on 17 March 2017 had not seen a letter sent by Ms Reynolds' GP on 9 March 2017 explaining the reasons why Ms Reynolds had not attended the appointment. It is also right to note that, as Dr Fannon points out at para. 75, the Respondent revised the decision in relation to ESA on 24 July 2017.

Material Legislation

The Welfare Reform Act 2012

11. The legislative provisions providing for the creation of UC are contained in the 2012 Act. Section 1 provides as follows:

> "1 – Universal credit
>
> (1) A benefit known as universal credit is payable in accordance with this Part.
>
> (2) Universal credit may, subject as follows, be awarded to—
>
> (a) an individual who is not a member of a couple (a 'single person'), or
>
> (b) members of a couple jointly.
>
> (3) An award of universal credit is, subject as follows, calculated by reference to—
>
> (a) a standard allowance,

> (b) an amount for responsibility for children or young persons,
>
> (c) an amount for housing, and
>
> (d) amounts for other particular needs or circumstances."

12. Section 33 provides for the abolition of legacy benefits and section 36 provides for migration to UC through the provisions of Sch. 6 to the 2012 Act.

13. Para. 1 of Sch. 6 provides a power to make provision "for the purposes of, or in connection with, replacing existing benefits with universal credit." Para. 4(1)(b) provides that the power in para. 1 includes "provision for making an award of universal credit, with or without application, to a person whose award of existing benefit is terminated." Para. 4(3)(a) confers the power to provide transitional protection. It provides 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 Universal Credit (Transitional Provisions) Regulations 2014

14. The provisions which resulted in these Appellants' entitlement to legacy benefits ceasing are, in respect of Income Support, Housing Benefit and Tax Credits, regulations 8 and 13 of the Universal Credit (Transitional Provisions) Regulations 2014 (SI 2014 No. 1230) ("the 2014 Regulations"). In respect of ESA, and materially to the same effect, the relevant provision was Article 4 of the Welfare Reform Act 2012 (Commencement No. 22 and Transitional and Transitory Provisions) Order 2015 (SI 2015 No. 101). I will set out here only the relevant provisions of the 2014 Regulations.

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

> "8. – Termination of awards of certain existing benefits: other claimants
>
> (1) This regulation applies where—
>
> (a) a claim for universal credit (other than a claim which is treated, in accordance with regulation 9(8) of the Claims and Payments Regulations, as having been made) is made; and
>
> (b) the Secretary of State is satisfied that the claimant meets the basic conditions specified in section 4(1)(a) to (d) of the Act (other than any of those conditions which the claimant is not

required to meet by virtue of regulations under section 4(2) of the Act).

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

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

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

…

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

16. Regulation 13 provided as follows:

"13. – Appeals etc relating to certain existing benefits

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

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

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

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

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

…

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

17. It is the combined effect of regulation 8(2) and regulation 13(3) (and materially similar legislation in the case of ESA) that resulted in these Appellants being prevented from reverting to their legacy benefits even though they had succeeded on the reviews of the decisions in their cases.

The Human Rights Act 1998

18. Section 6(1) of the Human Rights Act 1998 ("HRA") makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights, which are set out in Sch. 1. The two which are most relevant for present purposes are Article 14 and Article 1 of the First Protocol ("A1P1").

19. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] 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."

20. A1P1 provides:

> "1. 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.
>
> 2. 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."

21. It is well established that Article 14 is not freestanding, in other words it does not prohibit all discrimination by the state: it can be invoked only if the subject-matter falls within the ambit of another Convention right. It is also well established, and is common ground in this case, that, so far as material, social security benefits are a form of property (or "possessions") and therefore fall within the ambit of A1P1. It is accordingly common ground that, in principle, the Appellants are entitled to rely on Article 14, read with A1P1, in this case.

Grounds of Appeal

22. The Appellants submit that May J was wrong on the following grounds:

    i) Ground 1 – her approach to what justifies discriminatory treatment;

    ii) Ground 2 – her finding that the position of the Appellants had been adequately considered by the Respondent; and

    iii) Ground 3 – her approach to the appropriate comparators to the Appellants.

23. The Appellants' case before May J was that the transitional arrangements are discriminatory, irrational and in breach of section 149 of the Equality Act 2010 ("the 2010 Act").

24. On this appeal, pursuant to Ground 1, the Appellants argue that the Judge's approach to the justification of discriminatory treatment was wrong in principle, because it elided the Respondent's duty to "consider" and her duty to "justify" the discriminatory effect of a measure: see paras. 71, 76-77 and 80 of the judgment of May J. It is submitted that, although a lack of consideration may support a finding of unjustified discrimination, the presence of consideration does not mean that any differential treatment is for that reason justified.

25. The Appellants argue that, even where a decision-maker has undoubtedly considered the question of whether to treat two groups differently, the court still needs to give its own careful scrutiny to whether there is a reasonable basis for the ultimate decision about differential treatment. The Appellants submit that in the present case May J accepted that the Appellants' treatment was "apparently arbitrary" (para. 80) but failed to go on to identify what the reasonable foundation for the discrimination was or to give the Respondent's position careful or proactive scrutiny as required. It is argued that the legislative treatment of persons in the position of the Appellants was both manifestly without reasonable foundation and irrational.

26. Under Ground 2, the Appellants submit that the Judge was wrong to decide that the Respondent had evidenced adequate consideration of the circumstances of the Appellants. In particular, the Appellants critique the Respondent's inadequate consideration of Tax Credit claimants such as TD/AD and ESA/Incapacity Benefit claimants such as Ms Reynolds.

27. Pursuant to Ground 3, it is noted that the Judge correctly accepted that "individuals in respect of whose legacy benefits no error has been made" were a relevant comparator group to the Appellants (indeed this was conceded by the Respondent). However, it is

submitted, the Judge was wrong not additionally to accept that the Appellants' treatment amounts to discrimination in comparison with:

i) the future group of managed migrants; and

ii) non-disabled people.

Submissions for the Respondent

28. The Respondent observes that this challenge concerns the fact that there is no provision in legislation for transitional protection for the Appellants' cohorts. It is argued that there is, self-evidently, room for legitimate debate as to the desirability of providing transitional protection more widely than has been done to date but that debate, however, is properly one for Parliament. As the Secretary of State is not obliged to introduce transitional protection for anyone, it is submitted that she cannot be said to have infringed the Appellants' rights by not providing it here.

29. In response to Ground 1, it is noted that the starting point is to identify the relevant differential treatment (which will then be the focus of justification). It is argued that the Appellants have simply elided these analytical components to assert that:

> "The central issue in this case was whether the Respondent had justified discriminatory treatment between two groups of benefit claimants."

It is argued that this does not properly describe the exercise before the court below. It is necessary: (i) to identify what the "groups" are; (ii) determine whether they are sufficiently comparable; (iii) determine whether the treatment is on the ground of that status, before justification is considered: see Elisabeth Laing J in *R (Parkin) v Secretary of State for Work and Pensions* [2019] EWHC (Admin), at para. 90. The justification exercise requires careful consideration of the relevant differential treatment. It is submitted that the Judge applied the correct approach; the Appellants by contrast, simply ask the court to consider whether some parts of the scheme are justified.

30. On Ground 2, the Respondent submits that this is simply a challenge to the Judge's findings of fact. It is argued that it should be common ground that the threshold for review of a lower court's factual findings is exceptional and akin, essentially, to perversity: see e.g. *R (Blewett) v Derbyshire County Council* [2004] EWCA Civ 1508; [2004] Env LR 293, at para. 114. It is submitted that it is unclear what is meant by "adequate consideration" and it is unrealistic to require consideration of the circumstances of every individual in the population before making relevant decisions. The central deficiency in Ground 2 is said to be that it runs directly contrary to the evidence of Dr Fannon, at para. 41 of her first witness statement, where she states that:

> "The specific circumstances of claimants (such as TD and AD) whose challenge to legacy decision succeeds after their migration to UC has been specifically highlighted and considered by the Department and Ministers ..."

31. In addressing Ground 3, the Respondent first notes that the correct approach on a discrimination challenge is set out under Ground 1. The criticisms advanced under Ground 3 logically arise prior to the criticisms of justification. Nevertheless, the Respondent responds to the criticism in the way advanced on appeal. It is argued that comparison between natural migrants and managed migrants is misconceived, as there is no principle that all managed migrants will receive transitional protection: the whole point of the pilot scheme is to review the position before legislative choices are made. In addition, it is submitted that an assertion of discrimination between disabled people and non-disabled people is incorrect. Under the UC reforms, two-thirds of claimants in receipt of disability benefits will receive the same or greater entitlement (even leaving aside the transitional protection paid to severely disabled claimants). Accordingly, a disabled person who migrates to UC is more likely to be in a more advantageous financial position following migration than a non-disabled person.

Additional submissions

32. The Appellants submitted an additional Note containing their submissions on the decision of the Court of Appeal in *R (TP, AR & SXC) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37 ("*TP*"), which was given after the skeleton arguments in this appeal had been filed. The Appellants argue that the Court of Appeal's decision in that case:

    i) precludes the Respondent's argument that there was no differential treatment in the present case;

    ii) precludes the Respondent's argument regarding the *ratio* of the decision of Lewis J in *R (TP and AR) v Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin) ("*TP (No. 1)*");

    iii) precludes the Respondent's argument regarding "no turning back" as a justification;

    iv) illustrates that neither "cost" nor "administrative practicability" justify the discrimination against the Appellants.

33. The Respondent has filed a Note in response, in which it is submitted that the decision of the Court of Appeal in *TP* was concerned with its own facts and that the Court made it clear that it was not dealing with UC generally: see paras. 2 and 198 (in the judgment of Sir Terence Etherton MR and Singh LJ). For reasons that will become apparent, I do not consider that the decision of this Court in *TP* is dispositive of any of the issues in the present appeal, although it is helpful by way of background.

34. The Appellants also made brief written submissions following the hearing, dated 29 April 2020, to which the Respondent made a brief written response, dated 30 April 2020. These submissions dealt in particular with the comparison between the cohort to which these Appellants belong and the cohort of managed migrants to UC.

Ancillary matters

35. Before I address the specific grounds of appeal I will deal with some ancillary matters.

36. The Appellants made it clear through Mr Richard Drabble QC at the hearing before this Court that they no longer pursue their argument based on the public sector equality duty in section 149 of the 2010 Act. The Judge dismissed that ground of challenge at paras. 83-87 of her judgment. Mr Drabble was right to make that concession, since permission to appeal on this ground was neither sought nor granted.

37. Before May J reference was made to Article 8, although she observed that it "added little to the key issue": see para. 58 of her judgment. Article 8 did not feature in any of the arguments before this Court. In any event, it adds nothing to the substance of the submissions, since it is common ground that the subject-matter falls within the ambit of A1P1 and therefore the Appellants are entitled to rely on Article 14. I therefore need say nothing more about Article 8.

38. I intend to address the three grounds of appeal in reverse order. This is because, logically, Ground 3 arises first: it raises the question whether there is any relevant difference of treatment. It is only if there is, that such difference of treatment needs to be justified: Grounds 1 and 2 relate to the issue of justification.

Ground 3

39. Under Ground 3 the Appellants complain that the Judge erred in not recognising that their position was analogous to two suggested comparator groups. The first group is people who were to be in a managed migrant group in the future. The second group is people without disability. I would not accept either of those submissions. The Judge was entitled, on the evidence before her at that time, to reject these submissions.

40. The Judge was entitled to conclude that the first group was too speculative: see para. 55 of her judgment. This is not altered by the fact that, in a subsequent case called *TP (No. 2)*, Swift J found that the suggested group was not too speculative. He did so because the evidence before him had moved on since the decision in the present case. In any event, when *TP (No. 2*) came before this Court, it was held that it had been unnecessary for Swift J to decide this point: see para. 152 (in the judgment of Sir Terence Etherton MR and Singh LJ). The position of the managed migrant group is not, however, irrelevant in the present case, for reasons that I will explain later, when I address the issue of justification.

41. I would also reject the second suggested group. This argument was based on an allegation that, although there is no difference in treatment on grounds of disability as such (direct discrimination), the measure under challenge has a disproportionate effect on disabled people (indirect discrimination). The Judge was entitled to reject that argument on the basis of the evidence before her: see paras. 56-57 of her judgment.

42. In any event, Ground 3 in this appeal does not take matters further to any material extent. This is because it is common ground that there was an analogous comparator group: people who were entitled to legacy benefits and in whose cases no error was

made by the Respondent. Further, the Respondent conceded that the difference between the Appellants and the comparator group amounted to a relevant "other status" for the purposes of Article 14.

Ground 2

43. I will now briefly address Ground 2 in this appeal. Strictly speaking, Ground 2 must be an alternative to Ground 1. This is because, under Ground 2, it is submitted that the Judge was wrong to conclude that the Respondent had given adequate consideration to the issue of justification, whereas, under Ground 1, it is submitted that the Judge erred in her approach to the issue of justification because she proceeded on the basis that all that was required was that the Respondent had given adequate consideration to that issue. If Ground 1 is made out, then Ground 2 would not arise; it would only arise if Ground 1 is rejected.

44. Insofar as Ground 2 is an alternative to Ground 1, I would reject it. This is because, on the evidence before the Judge, she was entitled to conclude that adequate consideration had been given by the Respondent to the subject in hand: she summarised that evidence at para. 71 of her judgment and set out her conclusions, accepting that evidence, at paras. 77-80.

45. However, as became apparent during the hearing before this Court, the way in which Mr Drabble relies on Ground 2 is not strictly as an alternative to Ground 1 but in conjunction with it. I will therefore address it more fully when I deal with Ground 1.

The application to file a Respondent's Notice

46. In my view, Ground 1 gives rise to the first of the two main issues in this appeal. Under Ground 1 Mr Drabble submits that the Judge fell into error as a matter of principle because she failed to ask the right legal question. He submits that the Judge only asked herself whether the Respondent had given consideration (or adequate consideration) to the question of justification for the difference in treatment. He submits that is insufficient: what Article 14 requires is an answer to the question whether the difference in treatment is or is not justified.

47. The parties did not explore in their written submissions before this Court what should happen in the event that Ground 1 is made out. However, at the hearing before us, it became clear how the Court should then proceed. Both parties agreed that, if this Court concluded that Ground 1 was made out, it should make its own assessment of the question of justification. Neither party urged upon us a possible alternative course, that we should remit the matter to the High Court. I would endorse that approach. It accords with the normal practice of this Court where a lower court is found to have erred in principle, for example in its approach to the exercise of a discretion. This is not a case where it is necessary to remit for the purpose of further findings of fact to be made or for any other reason. That course would only serve to increase the delay and costs in these proceedings. This also accords with the approach which was approved

by the Supreme Court in *R (R) v Chief Constable of Greater Manchester* [2018] UKSC 47; [2018] 1 WLR 4079, at paras. 53-65, in particular at para. 56 (Lord Carnwath JSC).

48. Taking that course does have the consequence that, strictly speaking, a Respondent's Notice should have been filed. During the hearing before this Court Mr Edward Brown, who appeared on behalf of the Respondent, made an application (on a contingent basis should it be needed) to file a Respondent's Notice out of time. Mr Drabble was content to leave the matter to the judgement of the Court. After the hearing had finished the Court granted Mr Brown's application and in due course a Respondent's Notice was filed. In granting permission to file the Respondent's Notice out of time, this Court said that it would give its reasons when it gave judgment on the appeal itself. I now set out those reasons here.

49. There is no prejudice to the Appellants in granting permission to file a Respondent's Notice even though it is very late in the day. The possible need for it only arose during the course of the hearing before us. The substance of the arguments on the issue of justification was canvassed both in writing and at the hearing before us. Mr Drabble was able to deal with the substance of the arguments. It is accordingly in the interests of justice that the Respondent should have permission to file its Respondent's Notice.

50. Pursuant to that Notice, Mr Brown submits that, even if the Judge erred in her approach to the question of justification, this Court should dismiss the appeal on the alternative ground that the difference in treatment complained of is objectively justified in that it is not "manifestly without reasonable foundation". The Respondent's Notice raises the second of the two main issues in this appeal. I now turn to each of those two main issues.

Ground 1

51. It is important that the judgment of May J should be read fairly and as a whole. She did set out the relevant test ("manifestly without reasonable foundation") and referred to the decision of the Supreme Court in *R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 WLR 4550: see para. 59 of her judgment. That case is reported as *R (MA) v Secretary of State for Work and Pensions* and is sometimes referred to as the "bedroom tax" case. It is also right to note, as Mr Brown reminded this Court, that the Judge had a skeleton argument from the Secretary of State, which made submissions to the effect that the difference of treatment in this case was objectively justified: see in particular paras. 80-81 of that skeleton argument.

52. Nevertheless, in the critical part of her judgment on this issue, at paras. 76-80, I respectfully consider that the Judge did fall into error, as Mr Drabble contends. She treated the question of justification not as a question which she herself had to decide but as one which required adequate consideration by the Secretary of State.

53. It is well established that, under the HRA, the question of justification for an interference with a Convention right is a substantive question and not merely a process question: see e.g. *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] AC 100, at paras. 29-31 (Lord Bingham of Cornhill) and para. 68 (Lord Hoffmann). In this regard it differs from conventional grounds of domestic public law: for example, it

will not suffice that a decision-maker has taken a relevant consideration into account. What matters is whether the ultimate decision taken is or is not objectively justified. Conversely, unlike in domestic public law cases, it will not necessarily be fatal if a decision-maker has failed to take into account an issue under the Convention. It is the compatibility of the outcome of the process with Convention rights which has to be assessed by the Court, not the process by which that outcome was reached.

54. That said, it is also well established that the fact that an issue has been considered by a decision-maker is relevant to the question which the court itself has to determine. It may affect the weight which the court should give to the views of the decision-maker when coming to its own assessment of the issue of justification. This is the point to which the Judge made reference at para. 65 of her judgment, where she quoted Lord Kerr JSC in *Re Brewster* [2017] UKSC 8; [2017] 1 WLR 519, at para. 64. That passage included the following:

> "Where a conscious, deliberate decision by a government department is taken on the distribution of finite resources, the need for restraint on the part of a reviewing court is both obvious and principled. Decisions on social and economic policy are par excellence the stuff of government. But where the question of the impact of a particular measure on social and economic matters has not been addressed by the government department responsible for a particular policy choice, the imperative for reticence on the part of a court tasked with the duty of reviewing the decision is diminished."

55. However, in my view, at the critical part of her reasoning, at paras. 76-80 of her judgment, the Judge did not simply give weight to the views of the Secretary of State when making her own assessment of justification for the difference in treatment; she only asked herself the question whether the Secretary of State had given the matter adequate consideration.

56. Earlier, at para. 43 of her judgment, May J set out four questions which she had to address under Article 14/A1P1 in this case:

(i) whether there is differential treatment

(ii) on grounds of other status

(iii) in relation to a matter falling within the scope, or ambit, of Article 14 [she must have meant A1P1], which

(iv) the defendant cannot show is objectively justified.

57. The Judge then turned to the question of justification from para. 59 of her judgment. In that paragraph, as I have mentioned, she recorded that counsel appearing before her were agreed that the proper approach to justification in cases such as the present was that approved by the Supreme Court in *Carmichael*, namely whether the treatment is "manifestly without reasonable foundation". Furthermore, at para. 60, the Judge correctly noted that:

> "It is the discriminatory impact of a policy, rather than the policy itself, that must be shown to be manifestly without reasonable foundation."

For that proposition, she referred to the decision of the Supreme Court in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449, at para. 188. In that passage Lady Hale JSC cited the very important statement of principle in *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, at para. 68 (Lord Bingham of Cornhill), of which sight must never be lost. As Lord Bingham explained, in a discrimination case, what must be justified is the difference in treatment; it is not enough to show that the underlying policy is justified.

58. The difficulty arises from what the Judge said in setting out her conclusions on the issue of justification at paras. 77-80. It is clear from para. 77 that she was accepting what she understood (perhaps wrongly) to be Mr Brown's submission before her. She recorded that submission at para. 76 as follows:

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

59. In accepting that submission, the Judge concluded that the evidence showed that the difference in treatment had not "lacked consideration so as to render it manifestly without reasonable foundation": see para. 77. She stressed that point again several times at paras. 78 and 80. In my respectful view, she erred as a matter of principle in confining herself to the question whether the question of justification had been adequately considered by the Secretary of State. That was a question that the law required her to go on to answer for herself, having regard to the view of the Secretary of State.

60. Although, as I have said, the judgment must be read fairly and as a whole, it does sometimes happen that, while a judge has set out the correct test at one part of a judgment, they have fallen into error in the crucial part of the reasoning, at the point when they have to apply that test. In *Rhesa Shipping Co. SA v Edmunds* [1985] AC 948, at 957, Lord Brandon of Oakbrook said:

> "it is no doubt more likely than not that a judge who directs himself correctly on a certain aspect of the law in the earlier part of his judgment will apply the relevant principle properly later in his judgment when the occasion for its application arises. Failure by a judge to act in this way is, however, not unknown …"

61. On the facts of that case the House of Lords concluded that Bingham J (as he then was) had fallen into error because he had failed to apply the burden of proof in a shipping

case. It was observed by Lord Brandon that "on this occasion even Homer [had] nodded".

62. I have come to the conclusion that the Appellants are right on Ground 1. It is necessary therefore to go on to address the alternative submission made by Mr Brown in the Respondent's Notice.

The Respondent's Notice

63. It was common ground before us that the applicable test in law is whether the difference in treatment is "manifestly without reasonable foundation": see *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289, at para. 65. In that passage Lord Wilson JSC said:

> "… there was—and there still remains—clear authority both in the *Humphreys* case [2012] 1 WLR 1545 and in the bedroom tax case [2016] 1 WLR 4550 for the proposition that, in any rate in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it."

64. It is important also to note what Lord Wilson said at para. 66, where he emphasised that the court will "proactively examine whether the foundation is reasonable". This is consistent with what was said in the two cases cited by Lord Wilson, that there should be "careful scrutiny" of the reasons advanced by way of justification: see *Humphreys*, at para. 22 (Lady Hale JSC); and *MA* (the bedroom tax case), at para. 30 (Lord Toulson JSC).

65. I would also note what was said by Leggatt LJ, as he then was, in *R (C) v Secretary of State for Work and Pensions* [2019] 1 WLR 5687, a case decided shortly before *DA,* at para. 89:

> "Although it is not immediately obvious how the 'manifestly without reasonable foundation' test relates to the assessment of proportionality that the court must undertake, the explanation may be that the court is required to ask whether the difference in treatment is manifestly disproportionate to the legitimate aim. This would accord with the statement of the European Court in *Blecic v Croatia* (2005) 41 EHRR 13, para 65, that it will accept the judgment of the domestic authorities in socio-economic matters 'unless that judgment is manifestly without reasonable foundation, *that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued'* (emphasis added). It also reflects how the Supreme Court applied the test

in the recent case of *In re McLaughlin* [2018] 1 WLR 4250, paras 38–39 (Baroness Hale PSC) and para 83 (Lord Hodge JSC)."

66. Against that background of principle I turn to examine the evidence in this case on the issue of justification. May J summarised the evidence which had been filed on behalf of the Secretary of State, generally at paras. 23-30 of her judgment, and specifically on the issue of justification at para. 71. In para. 71 she quoted from the first witness statement of Dr Fannon, in particular at paras. 41, 45 and 53. In that witness statement Dr Fannon referred to two submissions made to Ministers on 25 March 2015 and 17 November 2015. It is important to have regard to the entirety of the evidence, in particular paras. 41-53 in Dr Fannon's first statement; paras. 94-99 in her second statement; and the submissions of 25 March and 17 November 2015.

67. There are certain matters which are not under challenge in the present case. First, the decision by Parliament to create a new scheme under the umbrella term "Universal Credit". Secondly, the decision made by the Secretary of State in regulations that there should be "no turning back" once a person has moved onto UC. Thirdly, the fact that benefits under the UC scheme may be lower than what a person would have received by way of "legacy benefits". It is important to appreciate that the introduction of UC was not intended to be a cost-saving measure. Rather it was introduced so as to redistribute finite resources and to create a more simplified scheme. Fourthly, the decision to introduce UC in phases rather than in one go. Nevertheless, that all said and as is common ground, the way in which the UC scheme is implemented must comply with the Convention rights, in particular for present purposes Article 14.

68. The starting point for the analysis in the present case must be that the objective circumstances of each Appellant did not change. They were entitled to legacy benefits, and would have continued to be entitled to exactly the same benefits, if it had not been for what in law amounted to errors made by the Respondent. Furthermore, those errors were subsequently acknowledged by the Respondent through the review process.

69. At the hearing before this Court Mr Brown emphasised that, although the circumstances of the Appellants may not have changed from their point of view, they had changed from the point of view of the Secretary of State, because each Appellant had in fact applied for UC. In my view, this is to elevate form over substance. Although it is true that the Appellants were not compelled by law to apply for UC, as a matter of practical reality they had no choice but to apply for UC. It is important that the legislation in this country governing social security should be interpreted in a way which conforms to practical reality, given the potential impact on some of the poorest people in society. Furthermore, as was made plain in the written submissions filed by both sides after the hearing, there is no material distinction in this respect between the Appellants and those who are selected for the managed migration pilot scheme. In the case of the latter, a notice is served on a person that their legacy benefits will cease. Strictly speaking they are not required to apply for UC but the practical reality is that they will do so because they will otherwise receive no benefits.

70. At the hearing before us Mr Drabble made it clear that he was not challenging the *vires* of regulation 13(3) of the 2014 Regulations. What he does submit is that Article 14 requires either (i) the reinstatement of the Appellants onto their former legacy benefits

or, (ii) if that infringes the "no turning back" principle, some transitional protection so that the Appellants are not left in a worse position than they would have been if the Respondent had not made the acknowledged errors in their cases.

71. It is clear from the legislative regime (para. 4(3)(a) of Sch. 6 to the 2012 Act) that the Secretary of State does have power to introduce some form of transitional protection instead of reinstating claimants to their legacy benefits. It is therefore the decision not to do so in the present context which is the subject of the challenge under Article 14.

72. It should be noted that transitional protection has been introduced in relation to those who have been selected to take part in a pilot scheme introduced in 2019: see the Universal Credit (Managed Migrant Pilot and Miscellaneous Amendments) Regulations 2019 (SI 2019 No. 1152). It is true that those people are not what the Respondent describes as "natural migrants". However, they were on legacy benefits and, having moved onto UC, they do receive transitional protection. If these Appellants had remained on legacy benefits, as they should have done if no error had been made in their cases, they too would have received transitional protection if they had then moved as managed migrants. This is why, as I mentioned earlier, the position of managed migrants is not irrelevant in the present case, even though I would not accept the specific complaint made for the Appellants under Ground 3.

73. The next point to note is that there is no evidence before the Court explaining what the rationale for the 2014 Regulations was, in particular for regulation 13. What the Court therefore has to do is evaluate such evidence as there is which came subsequently, in particular the submissions of 25 March and 17 November 2015 and the witness statements of Dr Fannon. The Court can also have regard to the evidence before it as to what the policy was prior to the making of the 2014 Regulations, in particular in 2012: I will return to this later.

74. The direct subject of the submission of 25 March 2015, which was addressed to Lord Freud (the relevant Minister in the House of Lords), was UC claimants who were previously on Employment and Support Allowance ("ESA") or Incapacity Benefit ("IB") and who successfully dispute an ESA Work Capability Assessment decision. In the submission the background was set out as follows. At para. 1 it was said:

> "In April 2012 you agreed that we should award TP [Transitional Protection] to claimants who move to Universal Credit and are subsequently successful with an outstanding reconsideration or appeal on their claim to a legacy benefit which means that their award of legacy benefits would have been greater than their entitlement to UC."

75. At para. 2 it was stated that, as plans developed,

> "you agreed in August 2012 that the necessary transitional arrangements should be separated so that we would proceed, at that time, with making provisions that govern new claims and natural migrations to UC but that regulations that cover managed moves and TP would be laid at a later date. After August 2012, the roll out plans were developed further with

> the introduction of a phased approach which would allow the UC Programme flexibility to learn from each phase before implementing the next. As part of this approach you agreed that regulations relating to managed migration and TP would not be introduced until we were more certain on the final implementation decisions for moving to this phase."

76. At para. 3 it was noted that the result of this was that at that time there was no legislation in place to provide transitional protection for any claimants. In the context of ESA/IB it was noted that it was therefore possible for a claimant to be financially worse off having claimed UC and successfully appealed. Importantly, it was said that:

> "This is not in line with your original decision of April 2012."

77. It is right also to note that para. 4 went on to mention a public commitment made by Ministers to provide transitional protection to managed migrants and that it was said that "these claimants would not have claimed UC as a result of our managed migration plans and so therefore are not covered by this commitment."

78. The submission of 25 March 2015 then set out various options for Ministers to consider. One of the options was to provide transitional protection. Another option was to allow claimants to return to ESA/IB if they won their appeal. Such options were rejected in the submission, essentially for administrative reasons and the cost associated with them. The "cons" set out in bullet points included the need for operational systems to identify the relevant people and to make appropriate calculations. It was said that these would have to be manual, at least initially, and not done by automation. The calculations would have to be done every month and would be costly and staff-intensive. It was also noted that a precedent might be set which could have an impact on future policy developments. On the other side of the balance the "pros" included that this would be in line with the Ministerial decision made in April 2012 and that it would protect the financial position of claimants who might otherwise be worse off because of a departmental decision which was subsequently overturned.

79. The option which was in fact recommended in the submission was to take no action. That was the option that was accepted. It was recognised that this would not be in line with the original decision on how to treat such claimants in 2012. However, the "pros" included the expectation that only a small number of claimants might be worse off. They also included the need there would otherwise be to introduce "complex legislation and administrative processes."

80. There is also in evidence before the Court a UC Policy Briefing Note dated 10 December 2012, which confirms, as the submission of 25 March 2015 noted, that in 2012 it was the Respondent's policy that: "we will offer Transitional Protection to claimants migrating to Universal Credit from legacy benefits where their circumstances have otherwise remained the same to ensure that they do not receive less as a result of their move to Universal Credit": see para. 1 of the Briefing Note.

81. In the same paragraph it was said that the circumstances in which transitional protection would come to an end were set out in para. 6 in more detail. Para. 6 included this: "it is appropriate to end this protection when circumstances underlying an award are no longer recognisable as those on which the legacy calculation was based. Therefore Transitional Protection will end altogether if a claimant's circumstances change significantly." Examples of a significant change of circumstances were then given and included where one or both members of the household stop work or a partner leaves or joins the household. The reference to a significant change in circumstances is there clearly a reference to a change in the underlying circumstances of a claimant, not simply the fact of making an application for UC. Were it otherwise, there would be no scope for considering transitional protection at all, since every application for UC would constitute a significant change in circumstances.

82. As it happens the introduction of the Managed Migrants Programme has been delayed by several years so that the managed migration of all legacy benefit claimants who had not naturally migrated has also been delayed. The numbers of people who have naturally migrated and hence did not receive transitional protection once they moved to UC have therefore been greater than was expected in 2015. In my view, although that is important, that is not the crucial point in this appeal.

83. What is crucial, in my view, is that these Appellants were treated as they were despite their successful reviews, for reasons to do with administrative cost and complexity, which have nothing to do with the merits of their cases; and that the only reason in reality why they moved from legacy benefits to UC was as a result of errors of law by the state itself.

84. The point was expressed succinctly by Ms Reynolds in her witness statement, at para. 21, where she says: "I fail to see why, because DWP got it wrong …, I should be the one who has to pay the price for their wrong decisions."

85. Both at the hearing before us and in written submissions filed after the hearing, Mr Brown sought to stress that the justification for the Respondent's policy is not based only on administrative or cost grounds. He submits that it also includes other factors such as social fairness and a desire to move from inefficient spending on legacy benefits to UC. However, it seems to me that this is why it is so important not to lose sight of the point made by Lord Bingham in *A v Secretary of State for the Home Department*, at para. 68, that, in a discrimination case, what must be justified is the difference in treatment and not merely the underlying policy. The other factors to which Mr Brown draws attention may help to justify the underlying policy (moving from legacy benefits to UC) but do not justify the difference of treatment which is in issue. This is because, but for the acknowledged errors made by the state itself in relation to these Appellants, they would have remained on legacy benefits. It is the difference in the way that they were treated as compared with others who did remain on legacy benefits (because no error was made in their cases) that needs to be justified.

86. As to cost, it is well established that cost alone does not justify a difference in treatment; if resources are finite then a non-discriminatory solution is required: see the summary of the relevant authorities in *TP*, at paras. 170-173 (in the judgment of Sir Terence Etherton MR and Singh LJ).

87. As to administrative complexity, the starting point is that, to the extent that there is such complexity, it is because of the Government's desire to apply the "no turning back principle" to people who have only undergone a change of circumstance for the purposes of the Regulations because of an incorrect decision by the Respondent, which means that they cannot simply be reinstated on their legacy benefits and instead will have to be afforded some form of transitional protection.

88. Secondly, paras. 13 and 14 of the Respondent's note dated 15 April 2020 made it clear that she was not contending that administrative complexity was in itself a sufficient justification.

89. Thirdly, in the case of the relevant cohort the relevant level of legacy benefits is known, because the only reason why they are denied those benefits is as a result of the application of regulation 13(3).

90. In any event, as Mr Drabble submitted, and the Appellants' note of 29 April 2020 confirms, much of the force of the point made by the Respondent is defused by the policy of giving managed migrants transitional protection, either as a lump sum or by tracking their legacy benefits. This shows that the Respondent was prepared, and able, to set up such a system for some people.

91. Mr Brown pointed to the fact that there can be many reasons why an appeal or a review may succeed. It does not necessarily mean that a decision was wrong at the time when it was made and on the basis of the material before the decision-maker. That may well be so but that does not lead me to conclude that these Appellants should be denied a just remedy if their rights under Article 14 have been violated. In the case of these Appellants it is acknowledged that, were it not for the effect of regulation 13(3), they would have continued to be on the same level of legacy benefits as previously: indeed, as its terms make clear, that is the situation in which regulation 13(3) applies. There was no change in their underlying circumstances.

92. I have come to the conclusion, that in the present context, the difference in treatment was manifestly disproportionate in its impact on these Appellants having regard to the legitimate aim which the Respondent sought to achieve. It was therefore manifestly without reasonable foundation.

93. I would therefore grant a declaration that these Appellants' rights under Article 14 have been violated. That is similar to the remedy which the European Court of Human Rights usually grants to a successful applicant, when it pronounces that the applicant's Convention rights have been violated. It is also the remedy which Lewis J granted in *TP (No. 1)* in a decision which was upheld by this Court.

94. It will be a matter for the Secretary of State to decide how to respond to a declaration by this Court that there has been a violation of these Appellants' rights under Article 14. That may or may not lead to a scheme being designed which benefits other people, who are not before this Court, but the design of any such scheme will in the first instance be for the Secretary of State, although it must be done in a way which is lawful, including by reference to the Convention rights.

95. In the circumstances which have arisen, the parties are agreed that the claim for damages should be transferred to the County Court.

Conclusion

96. For the reasons I have given I would allow this appeal.

Lady Justice Rose:

97. I agree.

Lord Justice Arnold:

98. I also agree.