Neutral Citation Number: [2021] EWCA Civ 970

Case No: C1/2021/0193

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
MR JUSTICE SWIFT
[2020] EWHC 2827 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2021

Before :

LORD JUSTICE SINGH

and

LADY JUSTICE SIMLER

- -

Between :

(1) TAYLOR MOORE **(2) SG (a child by her litigation friend and mother, Taylor Moore)**	**Appellants**
- and -	
THE SECRETARY OF STATE FOR WORK AND PENSIONS	**Respondent**

- -
- -

Mr Martin Westgate QC and Ms Shu Shin Luh (instructed by **Child Poverty Action Group**) for the **Appellants**
Mr Edward Brown and Mr Jack Anderson (instructed by **DWP Legal Advisers, GLD)** for the **Respondent**

Hearing date: 23 June 2021

We direct, pursuant to paragraph 6.1 of Practice Direction (Citation of Authorities) [2001] 1 WLR 1001, that this judgment may be cited despite being given on an application for permission to appeal

Approved Judgment

Lady Justice Simler:

Introduction

1. The applicants are Ms Taylor Moore and her young daughter SG, who seek permission to appeal the decision of Swift J dismissing their claim for judicial review concerning the difference in treatment between Maternity Allowance ('MA') and Statutory Maternity Payment ('SMP') when calculating the amount of Universal Credit ('UC') payable to them. Their case is that these two payment types are not relevantly distinguishable but despite this they are treated very differently: MA is treated as "unearned income" and deducted in full from an award of UC whereas SMP is treated as "earned income" and is subject to an earnings disregard and deducted from an award of UC on a tapered basis.

2. Following a "rolled up" hearing on 24 and 25 June 2020 where the applicants contended that the treatment of MA as unearned income was (i) unlawfully discriminatory for the purpose of article 14 ECHR taken together with article 8 or article 1 of the First Protocol ('A1P1'); (ii) irrational and so unlawful; and (iii) introduced without complying with the Public Sector Equality Duty ('PSED') under section 149 Equality Act 2010, Swift J granted permission but dismissed the claims under (i) and (ii), and refused permission under (iii) on the basis that the PSED claim was out of time.

3. The applicants now seek permission to appeal on each of these issues, Mr Westgate QC who appeared for them accepted that what must be shown is an arguable error of law or failure to have regard to material considerations. In overview in relation to issues (i) and (ii), the challenge to the judge's approach is in summary that having identified a reason why SMP was treated as earned income he treated that as determinative of the claim, wrongly failing to consider whether the *difference* in the impact on recipients of MA and SMP was unlawful because not objectively justified, and failing to refer to or make findings on evidence going to that issue. It is said that this flawed approach followed from his erroneous analysis that the claim could not readily be analysed as one of discrimination at all and that raises an important point of principle about the relationship between status and justification under article 14. Further, he failed to recognise that the case involved unequal treatment in relation to a provision having the effect of advancing equality between men and women in employment. As for the PSED claim, the judge erred because the claim was not out of time since the Universal Credit Regulations 2013 ('UCR 2013') had no application to Ms Moore until she made her claim for UC and it was awarded to her in the impugned way. Mr Westgate contended that all issues raise important points of law or practice and amount to compelling reasons why the appeal should be heard.

4. The respondent's case, accepted by the judge, was, in summary, that MA and SMP have different origins, entitlement criteria and structure. MA is a (non-taxable) payment or "allowance" paid directly by the state to qualifying recipients, with wide qualifying criteria; SMP is a form of (taxable) "statutory pay", payable by employers directly to qualifying employees, with different recoupment levels from the state. The status, amount and means of administration of SMP are such that it is reasonably treated as earnings for the purpose of UC. There was good reason for this intentional treatment which was well within the respondent's margin of discretion. Both sets of provisions do interact with the labour market (entitlement is linked to being in work, although MA is available to recipients not in work, but who have sufficient employment prior to the

start date) but they are, and always have been, structured differently to provide different assistance to different sub-cohorts within the cohort of maternity. The pre-existing differences are reflected within the structure of UC. Within UC, "earned income" (in broad terms, pay) is intentionally treated more favourably than "unearned income" (in broad terms non-pay including social security payments), by reference to the work allowance and tapering method which underpin the UC calculation. This is because, amongst other scheme objectives, UC is designed to interact with pay in a way that furthers the social policy objective of incentivising work.

5. Before the judge the respondent recognised that it would be possible to redesign the scheme and deem MA to be earned income but maintained the position that it does not wish to do so. First, the distinction between earned and unearned income is important in furtherance of wider social policy goals, and the objective of the welfare system is not to provide complete parity of provision simply because of the common fact of maternity. The incentivisation of work is a central objective, and while MA assists with costs during maternity leave and also provides an incentive to move from non-work into work generally, SMP provides a greater incentive to move into more stable employment and accordingly substitutes contractual pay. Secondly, administrative convenience is part of the justification (and legitimately so in the context of social security). But the central disagreement concerns a series of social policy choices in relation to the purposes of the different maternity benefits and UC. These social policy choices are not irrational or manifestly without reasonable foundation on any view.

6. The judge dealt with the facts and the legislative framework at paragraphs 2-11 of his judgment, setting out the material provisions in full and explaining their inter-relationship. I do not repeat that material but in essentials:

   i) UC is a single welfare payment to assist a claimant meet basic needs of accommodation, warmth, food and clothing. Some components are designed to meet the cost of being responsible for a child or children.

   ii) The aggregate of any allowances to which a claimant is entitled form the maximum amount of UC but this is subject to deductions including in respect of certain income from other sources. The UC scheme distinguishes (UCR 2013, regulation 22) between "unearned income" which is deducted in its entirety and "earned income" in respect of which any applicable "work allowance"[1] is disregarded with the remainder being subject to a "tapered" reduction at the rate of 63% (or 63p in every £1) against the maximum amount.

   iii) The difference in treatment between earned and unearned income reflects the principle in UC that work should pay. As held by the judge at [27]:

> "This approach was intended to avoid disincentives to work by minimising the likelihood that when a person in receipt of Universal Credit commenced work, MA is therefore deducted in full (in other words, pound for pound). Earned income includes "employed earnings" they would suffer a reduction of income"

[1] The work allowance is only afforded to those which childcare responsibilities or limited capability for work. See table in regulation 22 of the UCR 2013.

iv) Earned and unearned income are subject to further definition in the UCR 2013. Unearned income is defined by regulation 66 and included MA (see regulation 66(1)(b)(viii)). MA is therefore deducted in full (in other words, pound for pound). Earned income includes "employed earnings" (see regulation 55). A number of payments are "to be treated as employed earnings" (see regulation 55(4)) including SMP (see regulation 55(4)(b)). SMP is therefore deducted on a tapered basis and only after disregarding a "work allowance" in cases concerning people with childcare responsibilities or limited capability for work.

v) The effect is to produce a significant difference in household income for women on maternity leave who meet the conditions for SMP and those who qualify for MA only. This was demonstrated by the facts of Ms Moore's own case as set out in her witness statement for the judge. It was common ground that Ms Moore would have been better off had she been entitled to receive SMP and that she received £419.19 less per month by way of UC award as a consequence of receiving MA rather than SMP. Her circumstances are not unique as the evidence before the judge from various maternity charities/organisations demonstrated (see witness statements from Rosalind Bragg, the Director of Maternity Action, which provided an account of the development of maternity pay and its impact on family incomes, and Lisa Jennison, a helpline advice worker at Gingerbread, a national charity working with single parent families).

vi) The judge also had evidence on behalf of the respondent from Kerstin Parker, deputy director for UC in the DWP, who provided an account of the government's main policy proposals, core objectives, rational and principles underpinning UC, and the treatment of SMP and MA. She also dealt with the operational difficulties that could arise were SMP to be treated as "unearned income". She exhibited contemporaneous written ministerial submissions leading to the implementation of the UCR 2013 and the policy behind treating SMP and MA in the way they are treated.

7. So far as material to this application and to the appeal, the judge made the following findings of fact:

i) Reasons for distinguishing between "earned" and "unearned income": contemporaneous written ministerial submissions preceding the UCR 2013 and witness evidence recorded that UC payments should be reduced to take account of unearned income since UC was supposed to meet basic needs. UC was reduced to take account of earned income but by reference to a taper provision, to avoid disincentives to work by minimising the likelihood that a person in receipt of UC would suffer a reduction of income when they commenced work: [27].

ii) The judge made findings as to the reasons for the difference in treatment, including, first, that there was alignment between SMP and other employed earnings and employment, because SMP was paid by employers through the payroll and accordingly treated in the same way as earnings paid through the PAYE system. The qualifying criteria for SMP reflected this alignment, by requiring continuous employment and a contract of service. Secondly, there were operational considerations: payments of SMP are recorded by employers and reported to HMRC through the Real Time Information system ('the RTI

system'), which is a source of information to establish a person's earnings for the purpose of UC. Using the RTI system aligned the tax and benefits systems in terms of the basic information used by each and pursued the objective of rendering the UC regime as automated a process as possible. While it may have been possible to require employers to record unearned income separately through the RTI system, this would give rise to a risk of employers mis-recording information.

iii) There were also points of distinction between SMP and MA: while accepting the similarities in purpose between the two benefits, the judge found the following distinctions between them. First, unlike SMP, MA is paid directly by the state. Secondly, the qualifying criteria for each are different: SMP is more closely linked to employment by requiring as conditions for entitlement, a contract of service and a period of continuous employment: [35].

8. In light of the evidence and the factual findings he made, the judge concluded in summary that the difference in treatment between the two types of payment was justified for article 14 purposes. The judge accepted that UC falls within the ambit of both article 8 and A1P1 (see [14]-[15]). While expressing doubt as to whether qualifying for MA could amount to "other status" for the purposes of article 14, the judge nevertheless accepted it was a sufficient status for the purposes of considering the article 14 claim (see [16]-[22]). Having done so, he concluded that the decision to treat SMP as earned income and not to treat MA in the same way was justified, applying the "manifestly without reasonable foundation" test (see [31] and [33]). Although he accepted that the purposes served by SMP and MA were materially the same, he found that there were distinctions in their payment mechanisms and criteria justifying the difference in treatment (see [34-35]). He also found that the difference in treatment of SMP and MA before and after the introduction of UC did not identify anything that indicated illegality (see [36]-[37]). Finally, the judge dismissed the applicants' reliance on the UN Convention on the Rights of the Child ('UNCRC'), holding that payment of UC was sufficient to discharge any obligation the UNCRC imposed on the UK (see [44]).

9. The common law rationality challenge failed for the same reasons (see [46]).

10. The judge rejected the applicants' submission that time to bring a claim by reference to the PSED does not start to run until the breach of the PSED alleged has been remedied. He held that the time for commencing proceedings alleging a breach of the PSED started when the relevant substantive decision (in this case to bring into force the impugned Regulations) was taken (see [50]).

11. The judge refused permission to appeal to this court.

12. The renewed application for permission to appeal was adjourned to an oral hearing by order of Singh LJ dated 12 May 2021 on the basis that the court would benefit from hearing oral submissions before determining the application. The direction for an oral hearing has enabled this court to consider this application quickly and thoroughly, and the court has benefitted from hearing Mr Westgate develop his written submissions orally. Nonetheless having considered the papers, the parties' written arguments and the oral submissions made by Mr Westgate (who appeared with Ms Luh), I have concluded that this proposed appeal does not have a real prospect of success, nor is

there any other compelling reason for the appeal to be heard. My reasons for these conclusions follow.

Ground 1: substantive challenge to the finding that the difference in treatment between SMP and MA Allowance was justified

13. The main argument advanced under this ground is that the judge failed to embark on the exercise of weighing up the benefit to the respondent in organising the UC scheme in the way it did, with the cost of extending that arrangement to the MA cohort, and whether that was a sufficient justification for the large difference in treatment between what are in effect materially identical groups. Instead, Mr Westgate contended that the judge found the reason for the difference in treatment and went no further. Five particular criticisms of the judge's conclusions on justification were made and I deal with them in turn though there is overlap between them.

Error 1: difference in treatment

14. The first criticism is that the judge failed or failed properly, to address whether the *difference i*n treatment between SMP and MA was justified or proportionate. Mr Westgate submitted that given the judge's approach to ambit, analogous situation and the recognised fact that there *was a difference of treatment* on the ground of Ms Moore's status, the remaining issue was justification and consideration of that issue that could not be avoided. He submitted that it is well established that what has to be justified is the difference in treatment (see *R (on the application of DA) v Secretary of state for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 at [53] ('DA')), or the discriminatory effect of the measure, rather than the measure itself: see *AL (Serbia)* [2008] UKHL 42, [2008] INLR 471 at [38]:

> "the issue is not whether some exercise of this sort might be justified, but whether this particular exercise, selecting some people for more favourable treatment than others, could be justified".

What is required evidentially is not just an explanation of why a group is treated in a specific way but why that group is treated differently to the comparator group: *R (TP and Ors) v Secretary of state for Work and Pensions* [2020] EWCA Civ 37 (Etherton MR and Singh LJ at [163]).

15. He accepted that *DA* (at [65]) establishes that in domestic law the appropriate test for justification in the context of discrimination in welfare benefits is whether the treatment complained of is "manifestly without reasonable foundation". Nonetheless, he submitted that the court must subject the claimed justification to close scrutiny: *R (MA v SSWP* [2016] PTSR 1422, [29]-[38]. Moreover, 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*": *Brewster, Re application for judicial review (Northern Ireland)* [2017] UKSC 8, [2017] 1 WLR 519 (Lord Kerr at [64]). That he submitted was the position here because the respondent did not make the connection between treating SMP as earned income for UC purposes, and the disadvantageous impact or proportionality of treating MA as unearned income in the same circumstances.

16. Here he contended that the judge failed to address justification for the difference in treatment or the discriminatory impact between the MA and SMP cohorts. The judge's finding at [35] that the reasons for treating SMP as earned income were not applicable to MA did no more than explain why SMP was treated in this way. It was not sufficient to dispose of the claim; and did not establish why MA was not also treated as earned income. Nor did the reasoning address justification for the impact of the difference in treatment as described by the evidence on behalf of the applicants. Had the judge properly considered justification for the difference in treatment, he would have concluded that it manifestly lacked a reasonable foundation and so was unjustified.

17. I am not persuaded that this challenge has a reasonable prospect of success in the circumstances of this case. As Mr Brown, who appeared for the respondent, submitted in writing, it was common ground below that the difference in treatment of the two types of payment and their impact is what fell to be justified in this case. Read as a whole the judge's careful judgment demonstrates that this was undoubtedly the approach he adopted. He recognised at the outset of his judgment that the treatment of SMP as earned income and MA as unearned income when calculating UC "*has significant practical consequences*". He correctly understood and explained the difference for UC calculation purposes and asked "*Is this difference of treatment unlawful*?..." (see [1]). The judge summarised the impact of this difference in treatment on Ms Moore specifically. I am in no doubt accordingly that he appreciated that what was in issue was the impact of the difference in treatment caused by the impugned provisions, both on Ms Moore and her daughter and more generally on the SMP and MA cohorts respectively.

18. Moreover, the judge's analysis was not simply a statement of why SMP was treated as earned income. He explained why it was appropriate for SMP to be treated differently from other benefits, including MA, which are treated as unearned income. This is reflected at [31] and [35] where he held as follows:

> "31. I consider that these reasons are sufficient to justify the decision to treat Statutory Maternity Pay as earned income notwithstanding: (a) that it is unearned income; and (b) that Maternity Allowance, a different form of unearned income, is not treated in the same way.
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> …
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> 35. The Claimants' submissions to the contrary are not persuasive. I accept that the purposes served both by Statutory Maternity Pay and Maternity Allowance are materially the same. However, it does not follow from this that any distinction between them is illegitimate. For example, one point of difference between the two benefits is in the way each is paid: Statutory Maternity Pay by employers through their payroll; Maternity Allowance paid directly by the Secretary of State. This difference, which supported the Secretary of State's pragmatic decision to treat Statutory Maternity Pay as if it is earned income, is neither anomalous, nor a matter of chance. The criteria for entitlement to each benefit are not identical. Payment of Statutory Maternity Pay is restricted by reference to

> the existence of a contract of service and a period of continuous employment. Given the way in which the class of persons entitled to Statutory Maternity Pay is identified, there is sense in the decision that Statutory Maternity Pay is paid by the employer through PAYE. Not only does it recognise that the class entitled to Statutory Maternity Pay is more closely linked to employment than the class that meets the criteria (at section 35 of the 1992 Act) for entitlement to Maternity Allowance; the tying-in of the employer and employee helps create a situation that promotes the exercise of the employee's right to return to work after maternity. Thus, the payment mechanism (through PAYE) which supported the decision to treat Statutory Maternity Pay as earned income itself serves a material purpose. Further, although, as I accept for the reasons above at paragraph 30, that there is sufficient reason for the decision to treat Statutory Maternity Pay as earned income. I also accept that the Secretary of State was entitled to conclude that it would be anomalous to treat Maternity Allowance as earned income, just because she treated Statutory Maternity Pay as earned income. In this regard, the reasons that apply to the latter have no application to the former."

19. Nor am I persuaded that he failed to apply a justification and proportionality analysis. Rather, and correctly, the judge said that the appropriate approach to analysing justification (and accordingly proportionality) would depend on the status in issue. In a case where the status engaged is closely linked to the impugned measure, it makes no sense to conduct a justification exercise focusing on whether the reason for the measure was independent of the status because this gives rise to the circularity problem the judge identified. Rather, in that situation the focus should be on the reasons for adopting the measure in question in light of the factual context, and whether they meet the relevant standard of scrutiny.

Errors 2 and 3: status

20. I deal with these errors together because they both concern the question of status.

21. The second error, relied on by Mr Westgate as underpinning the first, relates to an aspect of the judge's approach to the status question. Mr Westgate submitted that the distinction drawn by him, between cases where treatment is independent of the characteristics that define the class and those where it is not, is not one that is supported by Strasbourg caselaw. By seeking to assimilate article 14 claims with direct discrimination claims under domestic law (which he characterised as "outlawing" certain reasons as valid) the judge failed to recognise that the structure of domestic discrimination law is different from the principles adopted under article 14 (see *AL (Serbia*) at [20-25]). The article 14 caselaw requires that the difference in treatment be justified as proportionate whatever status is engaged, though in practice, direct discrimination on the ground of a status such as race or sex will rarely be justifiable. The result, he submitted was that the judge failed to focus on justification for difference and instead placed the emphasis on the reason for the measure itself. Mr Westgate relied on ambiguities in the use of the word 'measure' in [19] and [20] to submit that the judge wrongly focussed on the reason for treating SMP as earned income without

going onto consider whether a fair balance had been struck in treating MA as unearned income given the impact of the difference.

22. Furthermore, he submitted that the judge mischaracterised Ms Moore's status (error 3) as being no more than that she met one set of technical qualification criteria rather than another, and thereby failed to give any weight to the fact that the context here was a payment that is only available on account of pregnancy and childbirth, with both payments having been designed to promote equality between men and women in the workplace. The background is therefore that of correcting defacto inequality between men and women in relation to pregnancy and maternity, and in that context, it was simply not enough to help one part of the disadvantaged cohort (by treating SMP as earned income) without also supporting the MA cohort. This was a form of *Thlimmenos –v- Greece* (2001) 31 EHRR 15 type discrimination. The consequence of the wrong approach adopted by the judge is that there is no indication that he regarded Ms Moore's status as having any particular weight in evaluating proportionality. Mr Westgate made clear that he was not approaching the question of weight in a binary way but recognising that some statuses make justification easier than others, and this status was weightier than the judge acknowledged.

23. So far as relevant to these arguments, the judge held:

> "19. But if what amounts to "other status" is allowed to extend beyond characteristics (whether inherent or acquired) that exist independently of the complaint, to matters that coincide with the decision challenged, the complaint cannot be approached in the same way as a discrimination claim. It would be futile to decide the case only by asking "was the prohibited reason the reason for the decision challenged?" because the answer would always be yes. If "other status" is extended in this way it must be accepted that the decision taken was directed to a class of people because of the characteristics of that class, and the question then becomes whether that is a permissible or justifiable reason for that treatment of that class, as a class. This is not a question about discrimination in any classic sense; rather it is a question about the rationality or justification of a specific policy choice. …
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> …
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> 20. The point is not so much that the requirement to demonstrate "other status" has diminished, rather it is that if "other status" has the extended meaning suggested by the European Court of Human Rights in *Clift*, that has consequences for what may count as the criteria for legality and illegality. This matter has not, so far as I can see, been addressed in terns in the authorities. However, in situations where the court has determined article 14 claims where the "other status" relied on seems to be closely aligned to the scope of the measure complained of (e.g. *Mathieson and DA*) the decision on the legality of the measure has tended to rest on whether there was a sufficient reason for the measure imposed on the class rather than whether the reason

> for the measure was independent of the characteristics that defined the class".

24. It seems to me that the difficulty with the argument advanced by the applicants is that the line drawn between the two groups in this case is not a line drawn between men and women, or pregnant women and non-pregnant women, but between two sub groups of a cohort of women, all of whom are either pregnant or on maternity leave having had a child. The group have the same protected status in that regard, and the status relied on was necessarily therefore framed solely by reference to the status of being a woman in receipt of MA as compared with a woman in receipt of SMP. It was the impact that difference had on the calculation of UC to which each cohort was entitled that was in issue. In other words, the status was the difference in treatment that was the subject of the challenge, and a conventional discrimination analysis would have been circular.

25. It follows in my judgment, that the judge was entitled to find that the treatment complained of was not independent of the status in question; the treatment was the way MA was catered for in the legislation drawn by Parliament for awarding UC (by deduction in full) as compared with the tapered approach legislated for in relation to SMP, with entitlement to these two types of payment being the status relied upon for discrimination purposes. In these circumstances, there could be little purpose in asking whether the reason why Ms Moore suffered a pound for pound deduction of her MA from her award of UC was because she fell within the MA cohort. The answer was obviously yes, and the question would not have illuminated the answer to the question whether unlawful discrimination had occurred.

26. However, and notwithstanding, the judge also accepted that this was not an insuperable obstacle to an article 14 claim. Adopting the approach of the Supreme Court in *DA* he proceeded to consider whether sufficient reasons existed to justify the treatment of MA as unearned income while treating SMP as earned income in the context of an award of UC. In other words, faced with this situation the judge said that the appropriate approach to analysing justification (and accordingly proportionality) would depend on the status in issue. In a case where the status engaged is closely linked to the impugned measure, it made no sense to conduct a justification exercise focusing on whether the reason for the measure was independent of the status because this would have given rise to the circularity problem just mentioned. Rather, in this situation the focus had to be on the reasons for adopting an earned income approach to SMP while adopting an unearned income approach to MA, and whether that stood up to relevant scrutiny.

27. As far as the standard of scrutiny adopted by the judge is concerned, at [32]-[33] the judge identified the applicable standard as being the "manifestly without reasonable foundation" test. That was plainly correct (see *DA*, Lord Wilson at [65]). However, as the judge recognised, the argument about the standard for assessing justification raise no issue of substance for the reasons explained by Singh LJ in *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502 at [76] where he held as follows:

> "76. … the crucial point is not so much whether the "manifestly without reasonable foundation" test is the applicable test; it is rather how the conventional proportionality test, even if that is the applicable test, should be applied given that the context is one in which a public authority is required to allocate finite resources and to choose priorities when it comes to setting its

> budget; and is also a context in which the ground of discrimination is not one of the "suspect" grounds. In this context, it seems to me that there is no material difference between application of the conventional proportionality test, giving appropriate weight and respect to the judgment of the executive or legislature, and the "manifestly without reasonable foundation" test".

That passage makes two things clear: how the justification and proportionality analysis is to be approached depends on the status and context in issue. In a case like this one, where the context is the state allocating finite resources in accordance with its chosen priorities, and the status is an "other status", the proportionality analysis must give appropriate weight and respect to the judgment of the executive, whether or not the manifestly without reasonable foundation test is adopted or not. That was the approach adopted by the judge and he concluded that the respondent's reasons for treating SMP as earned income and not treating MA in the same way, met the standard of scrutiny in the circumstances of this case.

28. To the extent that Mr Westgate submitted that some additional degree of weight should have been accorded to Ms Moore's status given the context was a payment made on account of pregnancy and childbirth intended to counteract discrimination against women and in favour of men, I do not consider that this takes the argument any further. The challenge does not in substance involve discrimination on the ground of sex or pregnancy, but rather as I have said, discrimination *within* the cohort of pregnant or maternity leave taking women, as the judge held (see [13]). No relevant difference of treatment arose between Ms Moore and those who are not pregnant or caring for children (for example, men or non-pregnant women). It is not open to the applicants in these circumstances to contend that the context is maternity benefits, and therefore sex discrimination of some kind can be inferred so as to require weighty reasons for justification. As the judge explained at [13]:

> "13. …The point of substance is whether there is any appropriate reason for treating Maternity Allowance as unearned income, while treating Statutory Maternity Pay as earned income. That issue better presents itself as one of rationality. That is not the least because the basic comparison that this claim requires to be made is between the treatment of two classes of women, each of which comprises both pregnant women and those who have recently given birth."

29. Accordingly, what had to be justified was the differential treatment in this case. That involved no question of sex discrimination and weighty reasons were not required. I can see no error in the judge's approach.

Error 4: approach to UNCRC

30. Mr Westgate submitted that the judge erred at [44] in finding that the difference in treatment was not contrary to the UK's obligations under the UNCRC. This he submitted, required the best interests of children of recipients of MA to be given primary consideration in deciding how to construct and operate the UC scheme. Where such children's rights to social security are not as fully realised as the children of

recipients of SMP, that cannot have been done; and there was no evidence that this primary consideration had been given due regard. That should have fed into the article 14 analysis: see *DA* at [70] and [78].

31. In writing Mr Brown submitted that the judge was correct to find the UK discharges its obligations under the UNCRC by paying applicable benefits (which include maternity benefits). As award of UC is reduced because the need is met by the payment of MA, and there is no obligation under the UNCRC or public international law in general to go further. The UNCRC, as an unincorporated treaty, was merely an interpretive aid when considering the question of justification in the article 14 challenge and the judge correctly took it into account as such.

32. I consider this submission to be correct and can see no error in the judge's approach at [44]. As he observed, where conditions for payment of UC are met, payment of UC, including the responsibility for children allowance, is sufficient to discharge any obligation that could be said to arise in domestic law by reference to the UNCRC. In those circumstances, the treatment of MA by reason of the UCR 2013 (i.e. deduction from the maximum amount of UC payable) is not contrary to any norm arising from the UNCRC because in every case, a social security payment equivalent to the maximum amount of UC remains payable. The fact that those in receipt of SMP and UC receive higher sums because the payments are treated as earned income does not alter that. The same is true of the arguments based on CEDAW and the Pregnant Worker's Directive.

Error 5: conclusion on justification

33. Finally in relation to ground one, I turn to the overarching submission made by Mr Westgate (which repeats many of the arguments advanced below) that SMP and MA have such significant similarities (and trivial distinctions) to mean that the reasons put forward by the respondent either did not identify any proper basis for distinguishing between SMP and MA or were manifestly insufficient to justify the impact of the difference in treatment. He submitted that the three strands of justification identified by the judge for treating SMP as "earned income" either applied equally to justify treating MA as "earned income"; or the points of difference accepted by the judge were merely peripheral, inaccurate and insufficient to distinguish the two for the purposes of justification. He submitted that if the judge had adopted a correct approach, he would have been bound to find that the difference in treatment was irrational and not justified.

34. In writing Mr Brown submitted that the judge conducted a careful examination of the legislative scheme and the evidence adduced (both by way of underlying documents and the witness evidence which expanded upon it, including that of Ms Parker), and concluded that there were significant differences between the two benefits and, in particular, in their interaction with the labour market and wider principles underpinning the UC scheme. The applicants' case that both benefits concern maternity, was, in essence, superficial as there are also relevant differences (such as the qualifying criteria, taxability, etc) which justify the different treatment. The judge correctly summarised those clear points of distinction between the two (see [35]) and held that to level down SMP to be treated as unearned income would introduce an unprincipled distinction with other forms of statutory pay in substitution for contractual pay.

35. I accept these broad submissions. Dealing with each strand in turn, SMP is seen as analogous to earned income paid by employers through their payroll and is and always has been treated as a form of statutory pay in substitution for contractual pay. It is paid through the RTI system and taxed as earnings income. MA does not share these features. The qualifying conditions of the two payments are different, both in terms of the requirement for a contract, and the period of and minimum level of earnings required. The fact both types of payment apply to working mothers taking absence from work to look after a child/their own health, and are payments to replace earned income and enable new mothers to take a temporary absence while maintaining their position in the job market does not compel the same treatment in relation to UC given the differences between them. In my judgment, the judge was entitled to accept that the differences meant SMP was more closely linked to employment and the earnings therefrom than MA. A stronger connection with work is required as a qualifying condition for SMP than for MA. Whatever similarities exist between the two in terms of employment protection, that does not begin to compel the treatment of MA as earned income. Nor do I accept the argument that the fact SMP is paid by the employer in the first instance has "no bearing" on whether the payment can be treated as equivalent to earnings or related to paid work. It plainly has a bearing on these matters, as does its taxability, and neither the fact that a mother can receive MA and contractual enhanced maternity pay, nor that ESA is unearned but taxable, arguably undermines that distinction. There was a principled basis for treating SMP as "earned income" and MA as unearned income in the circumstances identified by the judge.

36. Mr Westgate made a similar submission in relation to the second strand of justification (work incentivisation), contending that the objective of work incentivisation applied with equal force to MA given that the need for work incentivisation also applies where a person moves from work onto UC, particularly for maternity leave. Nor can SMP be distinguished on the basis that it provides a greater incentive to move into *stable* employment; such a rational was not borne out on the evidence and was inconsistent with the operation of the taper which is calculated to ensure that all work pays.

37. The UC scheme operates at the macro socio-economic level and so incentivises work in broad and general terms. To the extent that Mr Westgate submitted that was not the case, I reject his submission. While work incentivisation was accepted by the judge at [27] as an objective of the UC scheme's distinction between "earned" and "unearned income" and is plainly relevant to justification, there will inevitably be aspects of the scheme or certain situations where that argument is less strong. But that does not render this strand irrational.

38. As to the third strand of justification (administrative difficulties), Mr Westgate maintained that such difficulties as were identified by Ms Parker (at her witness statement, paragraphs 81-86) were not formidable as suggested: the costs of obtaining the necessary information compared to the costs of applying a taper to SMP have never been quantified, and there has never been any explanation why or when the system was designed in this way. Moreover, SMP data must already be readily available, otherwise HMRC would have no information on which to reimburse employers for the sums they have paid. Further and in any event, neither the respondent nor the judge identified any administrative difficulty in treating MA as earned income. In writing Mr Brown maintained that it was never contended that there would be "formidable" difficulties. In any event, the judge did not consider this point to be decisive and so regardless of

whether the applicants are correct, this does not undermine the judge's overall conclusion.

39. In my judgment, it is important to be clear about the nature of the "administrative difficulties" referred to by the judge. Information relating to SMP was readily available through the RTI system because as a payment made by the employer, it was reported to HMRC through the RTI system well before the UCR. MA as a payment made by the state was not. The administrative consequences of levelling down SMP, and so requiring employers to report this information in an alternative way that would either risk confusion and thereby mis-recording of information, or manual intervention, did not apply to MA. But these (and other) potential operational or administrative difficulties were not the drivers for the decision to treat the two payments differently. The driver was the fact that the distinctions between MA and SMP, would mean that treating MA as earned income would be to make an "unprincipled distinction" with other payments as Ms Parker explained.

> "79. Treating MA in the same way as SMP would undermine, for no sufficient reason, the principle that the state does not make dual provision for living costs through benefits. If the approach to MA within UC were to be altered, it would then be out of step with contributory benefits and would raise the question as to whether these should also be treated as earned income."

40. The judge's decision on justification relied on an overall appraisal of a range of matters. It is possible to criticise each separate matter relied on. However, having considered all the strands of justification in the round it seems to me that he was amply entitled to conclude that the decision to distinguish between SMP and MA and to treat MA as unearned income for UC purposes notwithstanding the impact that would have on those in Ms Moore's cohort, was not manifestly without reasonable foundation, and was therefore justified. Taken together I am not persuaded that there is any identifiable error in the judge's consideration of these strands in so far as they applied to the distinction drawn between MA and SMP.

Ground 2: substantive challenge to the finding that the difference in treatment was not irrational at common law.

41. This ground is parasitic on the first ground and pursues the same points as a challenge to the judge's conclusion at [46] that the difference in treatment of SMP and MA under the UCR was not *Wednesbury* unreasonable, or irrational. Given my conclusion that there is no real prospect of success in the argument that the judge erred in his analysis of the justification issue in relation to the first ground, it follows that this ground is also not properly arguable.

Ground 3: substantive challenge to the finding that PSED claim was made out of time.

42. This ground is directed at the judge's conclusion that the applicants' PSED challenge was made out of time ([48]-[49]). Mr Westgate contends that the grounds for making this claim first arose when Ms Moore applied for UC in June 2018, at which point the impugned provisions became applicable. He relied on *R (Badmus and Ors) v Secretary of State for the Home Department* [2020] EWCA Civ 657, [2020] 1 WLR 4609 at [77]-[78]. Based on that approach, he contended that the grounds for making a judicial

review claim in so-called "person specific" cases first arise when a person is affected by the application of the challenged policy or practice, not when the challenged policy or practice was first implemented. Applying that to this case, the PSED challenge first arose when the challenged legislation was applied to Ms Moore; in other words, when she applied for and was awarded UC in 2019.

43. I do not accept the application of this analysis here and do not consider that this argument has a reasonable prospect of success. In *Badmus* this court made clear that in order to determine when the grounds to make the claim first arose for the purposes of CPR 54.5(1) it is necessary to identify precisely what is being judicially reviewed. The facts in *Badmus* were very different to these and concerned the substantive outcome of a decision taken in exercise of public law powers. Here by contrast, the PSED challenge is directed, not at the application of the UCR 2013 to Ms Moore's case (this was the subject of a separate challenge which was implicitly treated by the parties and the judge as in time, albeit made slightly outside the three month time limit), but at the process of decision making leading to the UCR 2013 themselves. Precisely when a person first becomes affected for the purposes of determining when time runs will depend upon the facts and circumstances of each case; and in order to determine when the grounds first arose it is necessary to identify what is sought to be judicially reviewed in the case under consideration.

44. Here, the PSED aspect of the applicants' judicial review challenge is not to the application of the impugned provisions to an individual or group of individuals, but to the process leading to the decision to adopt the impugned provisions in question. Whether those provisions are applied on a discretionary or automatic basis, that is not what is being challenged in a PSED challenge. This is not accordingly, one of the so-called "person specific" categories of case identified in *Badmus* at [63]. I agree with the judge that PSED challenges must be brought promptly and within the period of three months set out in CPR 54.5. Where the challenge is directed to the process of decision-making, the correct approach is as with any other process type public law challenge, to require the claimant to bring the challenge promptly within three months of the breach alleged, and to make good all application for an extension of time to bring the claim outside the relevant time limits where that arises. Applying a different approach to PSED claims would significantly destabilise public authority decision making, while serving no necessary public interest. The judge was correct to distinguish *Badmus* on that basis. It follows that the claim was made out of time, and in the absence of any application for an extension of time the judge was unarguably correct to refuse permission to bring that challenge.

45. That conclusion makes it unnecessary to address the argument advanced by Mr Westgate that the evidence before the judge below demonstrated that the PSED had not been complied with.

Conclusion

46. I have sought to deal with the main contentions advanced by Mr Westgate, both orally and in writing. The applicants can rest assured that I have considered all of the material provided in support of this application and all points made on their behalves, even where those have not been expressly addressed.

47. For all the reasons given, and subject to the views of my Lord, I have concluded that the application for permission to appeal falls to be refused. Although I have considerable sympathy for Ms Moore's circumstances, I do not consider the appeal to have a real prospect of success, nor do I consider there to be some other compelling reason for the appeal to be heard.

Lord Justice Singh:

48. I agree.