IN THE UPPER TRIBUNAL **Case Nos.** CIS/620/2019; CIS/2245/2018
ADMINISTRATIVE APPEALS CHAMBER

Before:
Judge Thomas Church

Representation:
Mr Michael Spencer of counsel appeared for the Appellants
Ms Julia Smyth of counsel and Mr Yaaser Vanderman appeared for the Respondent

DECISION

The decision of the Upper Tribunal is to allow both appeals.

The decision of the First-tier Tribunal made on 23 October 2018 under reference SC200/17/01364 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake the decision in the following terms:
"The Appellant's appeal against the Respondent's decision of 20 July 2017 is allowed. The Respondent's decision is set aside and replaced with a decision that the Appellant satisfied the conditions of entitlement to a Sure Start Maternity Grant under the Social Fund Maternity and Funeral Expenses (General) Regulations 2005 (as amended)."

The decision of the First-tier Tribunal made on 27 April 2018 under reference SC993/17/00785 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake the decision in the following terms:
"The Appellant's appeal against the Respondent's decision of 26 April 2018 is allowed. The Respondent's decision is set aside and replaced with a decision that the Appellant satisfied the conditions of entitlement to a Sure Start Maternity Grant under the Social Fund Maternity and Funeral Expenses (General) Regulations 2005 (as amended)."

REASONS FOR DECISION

Background and facts

1. These appeals concern the eligibility conditions for the Sure Start Maternity Grant ("SSMG") under the Social Fund Maternity and Funeral Expenses (General) Regulations 2005 (the "2005 Regulations"). The SSMG is a £500 grant targeted at low income women to assist with the cost of items required on the arrival of a new baby.
2. The focus of both appeals is on the general rule laid down in Regulation 5A of the 2005 Regulations (as amended) that a claimant for the SSMG in respect of an infant will not be eligible if there is another child aged under 16 in the family for whom they are responsible (the "first child only rule"). The issue is whether those conditions (as they were in force at the date of the Respondent's respective decisions on the Appellants' respective claims) discriminate unlawfully against the Appellants under EU law and/or under human rights law.

SK

3. Case no. CIS/620/2019 relates to SK, who came to the UK from Iraq in 2015 with her son (who was then three and a half years old) and claimed asylum. In January 2017 SK was granted leave to remain and made a successful claim for means-tested benefits. In July 2017 SK made a claim for SSMG while pregnant with her daughter, who was born in the UK in August 2017.
4. SK's claim was refused on the basis that she was not eligible for SSMG under Regulations 5 and 5A of the 2005 Regulations because there was an existing member of her family under the age of 16 for whom she was responsible (i.e. her son, who had been born in Iraq), and her situation didn't fall within the exceptions to the first child only rule.

LL

5. Case no. CIS/2245/2018 relates to LL, who has been the carer of her nephew under a Residence Order since he was 18 months old. LL became pregnant with her first child and made a claim for SSMG. Her claim was refused on the basis that, because she had an existing member of her family under the age of 16 for whom she was responsible (i.e. her nephew under the terms of a Residence Order), and her situation didn't fall within the exceptions to the first child only rule that applied at that time, she was not eligible for the SSMG under Regulations 5 and 5A of the 2005 Regulations.

Procedural history

6. Both Appellants appealed the Respondent's decisions in their respective cases to the First-tier Tribunal (Social Entitlement Chamber). In each case the First-tier Tribunal upheld the decision of the Respondent and refused the appeal.
7. The Appellants each applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal and in each case a salaried judge of the First-tier Tribunal granted permission to appeal on the basis that the appeals raised important points of principle that warranted the attention of the Upper Tribunal.
8. Both matters came before me. I agreed to link the appeals and made directions for an oral hearing and for skeleton arguments.

LL's appeal

9. The ground of appeal on which LL's appeal proceeded was that the application of Regulation 5A of the 2005 Regulations unlawfully discriminated against her rights under Article 14 of the European Convention on Human Rights (the "Convention") when read with Article 1 Protocol 1 ("A1P1") of the Convention, and the Article 14/A1P1 rights of others sharing her status. The "other status" she relied upon was the status of being pregnant with her first biological child while already being responsible for a child who came into her care after reaching 12 months of age). She maintained that the First-tier Tribunal was wrong to uphold the Respondent's decision that she didn't meet the eligibility conditions for a SSMG because it should have disapplied the offending provision and found her to be entitled to an award.

10. After the Respondent's decision on LL's case Regulation 5A of the 2005 Regulations was further amended by the insertion of a new provision (regulation 5A(3)(d)) by the Loans for Mortgage Interest and Social Fund Maternity Grant (Amendment) Regulations 2018 (the "2018 Regulations"). That new provision had the effect of excluding from the definition of the phrase "existing member of the family" in the eligibility conditions a child for whom a claimant is responsible under a formal or informal non-parenting caring arrangement, provided that the child was over 12 months of age when the claimant became responsible for them. However, that amendment applies only to claims for the SSMG made from 6th April 2018, so it doesn't help LL.

11. The Respondent initially opposed LL's appeal on the basis that:
    a. no Article of the Convention was engaged;
    b. in any event there had been no discrimination because the provision restricting awards of SSMG to the first child of the family applied equally to all claimants; and
    c. even were the provision discriminatory it was objectively justified.

12. The Respondent has since conceded that the application to LL of Regulation 5A in the form that applied as at the date of the decision on her claim was incompatible with Article 14 read with A1P1 of the Convention.

13. Having considered the Supreme Court's judgment in *RR v SSWP* [2019] UKSC 52 the Respondent made further submissions on remedy, inviting me to remake the decision to decide that LL was entitled to an award of SSMG.

The parties' positions on SK's appeal in summary

14. Like LL, SK claimed that the application of Regulation 5A of the 2005 Regulations to her and others sharing her status was unlawfully discriminatory and that the First-tier Tribunal was therefore wrong to uphold the Respondent's decision on her entitlement. The status she relied upon was that of "refugees and those granted humanitarian protection who have in their family a child born before them came to the UK and who are claiming the SSMG for their first child born in the UK (or born outside the UK but within the 3-month time limit from the date of birth for claiming an SSMG). Since that framing of her status is a bit cumbersome for ease of reference I will refer to this class of claimants as "refugees with pre-flight children".

15. SK said that refugees with pre-flight children are much less likely than UK nationals to have been able to bring baby items with them when coming to the UK. SK's evidence

before the First-tier Tribunal was that when she and her son came to the UK she brought only one bag, and she had no baby clothes or baby equipment in that bag. While no specific findings of fact were made about the items that SK brought with her from Iraq, the First-tier Tribunal appears to have accepted this evidence and the Respondent didn't challenge it. SK argued that the failure to exclude the pre-flight children of refugees from the definition of "existing member of the family" amounts to:

a. unlawful discrimination under EU law contrary to Article 28 of Directive 2004/83/EC (the "Qualification Directive"); and/or
b. unlawful discrimination under human rights law contrary to Article 14 of the Convention read with A1P1 and Article 8.

16. The Respondent opposes SK's appeal.

17. In answer to the EU law discrimination argument the Respondent maintains that Article 28 of the Qualification Directive means that Member States must make benefits available to refugees subject to the same conditions as others, but it doesn't require Member States to create special benefit schemes for refugees, with conditions that are more advantageous to refugees than to others.

18. The Respondent attacks SK's human rights law discrimination argument on several bases. She says:

a. the status that SK seeks to rely upon cannot properly be regarded as an "other status" for the purposes of Article 14 of the Convention;
b. SK is treated *similarly* to persons who are in a *similar* situation, so cannot demonstrate *Thlimennos*-type discrimination; and
c. in any event, the absence of an exemption from the operation of Regulation 5A of the 2005 Regulations in respect of a particular category of refugees is not "manifestly without reasonable foundation".

Oral hearing

19. There was an oral hearing of the two linked appeals. Both appellants were represented by Mr Michael Spencer of counsel (instructed by the Child Poverty Action Group), and the Respondent was represented by Ms Julia Smyth and Mr Yaaser Vanderman of counsel (each instructed by the Government Legal Department).

20. I am grateful to counsel for their clear and thoughtful submissions and to both counsel and those instructing them for the meticulous preparation they put into these appeals. I am particularly grateful to Mr Spencer for acting on both appeals pro bono.

21. Since the Respondent accepted that the application to LL of Regulation 5A in the form that applied as at the date of the decision on her claim was incompatible with Article 14, read with A1P1, the argument before me at the oral hearing focused exclusively on SK's case and my decision on LL's appeal was made having regard to the Respondent's extensive concessions.

Post-hearing delay

22. At the hearing I agreed to Ms Smyth's request for a month to make submissions on remedy, which I duly received. Regrettably the issue of this decision will be delayed

due to logistical and administrative difficulties associated with my being required to self-isolate away from the Chamber due to Covid-19, for which I apologise.

The legal framework

23. The rules relating to the SSMG are set out in the 2005 Regulations. In summary:
    a. Regulation 4A makes provision in respect of persons to be treated as responsible for children.
    b. Regulation 5 sets out four conditions of entitlement for an SSMG:
        i. the claimant or the claimant's partner must be in receipt of a qualifying benefit (Regulation 5(2));
        ii. the claimant (or in some cases the claimant's partner or a member of the claimant's family) must either be pregnant, or have given birth to a child, or have become responsible for a child aged less than 12 months in certain specified circumstances (Regulation 5(3));
        iii. except in the case of a still-birth, the claimant or the claimant's partner must have received advice from a health professional (Regulation 5(4)); and
        iv. the claim must have been made within the prescribed time limit.
24. Regulation 5A was introduced by the Social Fund Maternity Grant Amendment Regulations 2011 (the "2011 Regulations") which came into force on 24 January.
25. A new version of Regulation 5A was substituted by the Social Fund Maternity Grant Amendment Regulations 2012 and this was further amended with effect from 6th April 2018 by the 2018 Regulations (discussed above in relation to LL's claim).
26. The version of Regulation 5A in force when the Respondent's decisions on SK's and LL's entitlement were made provided as follows:

> **"Entitlement where another member of the claimant's family is under the age of 16**
> **5A.** — (1) In this regulation—
> (a) "C" means the child or still-born child in respect of whom a Sure Start Maternity Grant is claimed; and
> (b) "existing member of the family" has the meaning given in paragraph (2) or, as the case may be, (3).
> (2) Where a parent of C ("P") is under the age of 20 and a member of the claimant's family, "existing member of the family" means any member of the claimant's family who is also a child of P, apart from C or any other child born as a result of the same pregnancy as C.
> (3) In any other case, "existing member of the family" means any member of the claimant's family apart from—
> (a) C;
> (b) any other child born as a result of the same pregnancy as C;
> (c) any child whose parent is under the age of 20 and a member of the claimant's family.
> (4) Subject to the following provisions of this regulation, a Sure Start Maternity Grant shall not be awarded if, at the date of claim, any existing member of the family is under the age of 16.
> (5) Where C is one of two or more children —
> (a) born or still-born as a result of the same pregnancy, or

(b) (if the claim is made before the confinement in a case where regulation 5(3)(a) applies) who are expected to be born as a result of the same pregnancy,

(c) the number of Sure Start Maternity Grants to be awarded is to be determined in accordance with paragraphs (6) and (7).

(6) Where at the date of claim no existing member of the family is under the age of 16 a Sure Start Maternity Grant is to be awarded in respect of each of the children mentioned in paragraph (5).

(7) Where at the date of claim any existing member of the family is under the age of 16 then—

(a) where each of those existing members of the family under the age of 16 was born as a result of separate pregnancies, a Sure Start Maternity Grant is to be awarded for all but one of the children mentioned in paragraph (5); and

(b) where two or more of those existing members of the family under the age of 16 were born as a result of a single pregnancy, the number of Sure Start Maternity Grants to be awarded in respect of the children mentioned in paragraph (5) is the number of children mentioned in paragraph (5) minus the maximum number of existing members of the family born as a result of a single pregnancy."

27. So, in summary, Regulation 5A provided for two exceptions to the general rule that SSMG cannot be awarded if any "existing member of the family" is under 16. Those exceptions relate to multiple births (provided that there are no other children in the household) (Regulation 5A(3)(b)) and situations in which the parent is herself under 20 years old and a member of the claimant's family (provided that the parent has no other children in the household aged under 16) (Regulation 5A(2) and (3)(c)).

The background to the introduction of Regulation 5A

28. The policy of restricting eligibility to the SSMG to the first child in a family only was announced in the June 2010 "emergency" budget statement as part of a package of measures intended to reduce the budget deficit.

29. As well as the witness statement of Ms Angela Kidd, a very experienced senior official at the Department for Work and Pensions with responsibility for Social Fund policy, I had the benefit of reading the report on the Equality Impact Assessment carried out in relation to the measures. This sets out the Government's policy objectives, the impact that the new eligibility condition was expected to have on various groups, and the alternative options for reducing expenditure on the SSMG which were considered before the decision was made to settle on the "first child only" rule to restrict entitlement.

30. I have also had the benefit of reading the report of the Social Security Advisory Committee ("SSAC") on the measures, as well as the Government's response to that report and the Explanatory Memorandum to the 2011 Regulations. All this material helped me to put the parties' submissions in context.

31. I will return to the background to the introduction of Regulation 5A when I address the Respondent's justification arguments in relation to the human rights law claim in paragraph [97] and following below.

SK's case under EU law

32. Mr Spencer argued SK's case under EU law on three alternative bases:
    a. the application of Regulation 5A to refugees with pre-flight children directly discriminates against them because they are in an analogous position to UK nationals who are having their first child born in the UK and yet are treated differently from them (the "direct discrimination argument");
    b. the application of Regulation 5A to refugees with pre-flight children places them at a "particular disadvantage" (per *O'Flynn v Adjudication Officer* C-237/94, EU:C:1996:206, [1996] ECR I-2617) and *Patmalniece v SSWP* [2011] UKSC 11; [2011] 1 WLR 783; [2011] AACR 34) since they are more likely to have had a child outside the UK in circumstances in which they have been unable to keep any baby items and it thereby indirectly discriminates against them (the "indirect discrimination and disguised discrimination arguments"); and
    c. by applying the same eligibility conditions to refugees with pre-flight children as are applied to UK nationals, when the circumstances of refugees with pre-flight children are materially different, Regulation 5A discriminates unlawfully against refugees with pre-flight children (the "*Thlimennos* argument").
33. Ms Smyth's starting position on behalf of the Respondent in relation to Mr Spencer's EU law arguments was that, unlike under the Convention, there is no EU anti-discrimination law applicable to all situations. Rather, she maintained, EU law regulates only discrete situations, with discrimination on the grounds of nationality, sex, employment status, racial or ethnic origin, religion or belief, disability, age and sexual orientation being specifically proscribed.
34. While this is correct as a matter of the architecture of EU legislation on discrimination, in *Milkova* [2017] EUECJ C-406/15 (09 March 2017) the Court confirmed the principle of equal treatment to be a general principle of EU law:

> "The principle of equal treatment is a general principle of EU law, now enshrined in Articles 20 and 21 of the Charter, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgments of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350, paragraph 43, and of 21 December 2016, *Vervloet and Others*, C-76/15, EU:C:2016:975, paragraph 74 and the case law cited). A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment (judgment of 22 May 2014, *Glatzel*, C-356/12; EU:C:2014:350, paragraph 43 and the case law cited)."

35. As such the reach of EU law's prohibition on discrimination cannot be limited in quite the way that the Respondent seeks to.
36. SK's EU law discrimination argument is founded on Article 28 of the Qualification Directive, which provides:

> *"Article 28*
> **Social Welfare**
>
> 1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status receive, in the Member State that has granted such statuses, the necessary social assistance, as provided to nationals of that Member State.
>
> 2. By exception to the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals."

37. The Respondent says that Article 28 is clear in what it requires: eligibility conditions that are uniformly applied and benefit levels that don't discriminate, and Ms Smyth says that this is precisely what the 2005 Regulations (as amended) provide for: a general rule that a person who already has a child under 16 will not be entitled to an SSMG. The general rule (as it applied at the relevant time) applied to all claimants, whether refugees or UK nationals, subject only to two (and, since the coming into force of the 2018 Regulations, three) very narrow exceptions. These exceptions themselves apply to all claimants, whether they are UK nationals or refugees.

The direct discrimination argument under EU law

38. Mr Spencer's argument on direct discrimination was based on the proposition that refugees with only pre-flight children were "analogous" to UK national claimants who were having their first biological child, and so should be treated the same as them (i.e. provided they met the other conditions to entitlement they should be given the grant notwithstanding that they had pre-flight children). This somewhat *Alice in Wonderland* approach was not pursued with much vigour by Mr Spencer. It is not a natural way to characterise SK's situation, and it is not necessary to take such a tortuous approach. SK's situation is much more sensibly seen in the context of possible indirect discrimination or disguised discrimination, discussed below.

The indirect discrimination and disguised discrimination arguments under EU law

39. SK's case on indirect discrimination under EU law is that Article 28 prohibits not only rules which directly discriminate against refugees, but also rules which are neutral on their face but which indirectly place refugees at a particular disadvantage. He relied upon the authority of *MM and SI v SSWP* [2016] UKUT 149 (AAC); [2016] AACR 38, in which Judge Markus QC of the Upper Tribunal held that the past presence test in regulation 2(1)(a)(iii) of the Social Security (Disability Living Allowance) Regulations 1991 was indirectly discriminatory against refugees and not justified.

40. *O'Flynn* concerned the Social Fund (Maternity and Funeral Expenses) Regulations 1987, which provided for the making of funeral payments, a form of means-tested social benefit to cover the costs incurred by a claimant in relation to the death of a family member. The benefit did not cover the costs of transporting a coffin a long distance from the deceased's home and it restricted payments to cases where the funeral took place in the UK. The court held that, unless objectively justified and proportionate to its aim, a national measure would be regarded as indirectly discriminatory if it was intrinsically liable to affect migrant workers more than

national workers and if there was a consequent risk that it would place the former at a particular disadvantage. It decided that, in view of the links which the members of a migrant worker's family generally maintain with their State of origin, migrant workers were more likely to have to arrange for deceased family members to be buried in another Member State, and therefore the territorial condition imposed by the regulations was, *prima facie,* indirectly discriminatory. In *O'Flynn* the condition was found not to be justified. The justification argument that was put, that the cost of paying the allowance if the burial took place outside the UK would be prohibitive, was rejected on the basis that the cost of transportation of the coffin to a place distant from the deceased's home was not, in any event, covered by the benefit and because the costs of burial abroad could be limited to what was reasonable.

41. *Patmalniece* concerned the right to reside test. The court held that, while on the face of the provisions all claimants "enjoy the same benefits" regardless of nationality, in practice the test involves "disguised discrimination" against nationals of other Member States because they were much less likely to satisfy that test, albeit that the Supreme Court held that the discriminatory effect was justified in that case.

42. *O'Flynn* and *Patmalniece* establish that where the EU legislature requires Member States to provide "the same" benefits as provided to their own nationals it also intends to prohibit rules which discriminate in favour of their own nationals indirectly or in a disguised manner, by imposing conditions that are intrinsically liable to affect migrant workers more than national workers, with a risk that it would place the protected group at a particular disadvantage.

43. While those cases concerned free movement of workers, which Ms Smyth rightly pointed out is a principle guarded particularly jealously by the CJEU, I am not persuaded that they are not also potentially relevant to the current circumstances. This position is supported by the Upper Tribunal's decision in *MM and SI v SSWP,* referred to above.

44. The residence test in *Patmalniece* was found to discriminate against nationals of other Member States because it was much less likely that a non-UK national would satisfy it. By contrast, the "first child only" rule in Regulation 5A(4) of the 2005 Regulations is not inherently more difficult for refugees to satisfy than it is for other claimants, and there is no greater tendency for refugees to be caught by it than other claimants. As such I am not persuaded that the decision in *Patmalniece* advances SK's case.

45. In *O'Flynn*, the court held that "unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage" (at [20]). While it would in theory be open to a migrant worker to opt to hold a burial or cremation in the UK, the court took the view that the condition was inherently more likely to "bite" on migrant workers than on UK nationals, given their geographical and family ties and that they were, as a consequence, placed at a disadvantage. The situation of refugees is different. While the "first child only" rule is likely to disadvantage refugees more than others in terms of the impact it has on them when it does apply (given how unlikely it is that they would have baby items), it cannot be said that they are inherently more likely to be affected by the rule than other claimants. *O'Flynn* doesn't, therefore, help to establish discrimination in SK's case.

46. In *MM and SI v SSWP* the basis of the Upper Tribunal's finding of discrimination under EU law was that refugees and their families were intrinsically less likely to satisfy the past presence test than UK nationals were, so there was disguised discrimination. Again, this doesn't advance SK's case because refugees and non-refugees were equally likely to satisfy, or to be caught by, the eligibility condition in Regulation 5A.
47. Because it is not intrinsically more likely that the "first child only" eligibility test will bite on refugees than UK nationals, albeit that refugees with pre-flight children are likely to be disadvantaged in terms of the greater severity of the impact of the provision on them given their likely lack of baby items, Mr Spencer's arguments on indirect and disguised discrimination fail.

The Thlimennos argument under EU law

48. Mr Spencer argued that Regulation 5A treats refugees in the same way as UK nationals, notwithstanding that many of them will be in a materially different position, having come to the UK with a child but none of their child's baby items, and that this offends the principle recited in *Milkova* that different situations must not be treated in the same way unless such treatment is objectively justified.
49. *Milkova* concerned a civil servant in Bulgaria whose position was terminated. She brought an action in the administrative court on the basis that her termination wasn't lawful because, under the Bulgarian Labour Code, a prior authorisation was to be obtained before terminating the employment of an employee with her type of disability. The court of first instance dismissed her claim on the basis that, while Ms Milkova had a disability of the type contemplated by the provision of the Bulgarian Labour Code she relied upon, she didn't qualify for the special protection invoked as it applied only to "employees" and not to "civil servants". She appealed to the Supreme Administrative Court which made a reference to the CJEU for a ruling on four questions on the proper interpretation of Directive 2000/78 and the United Nations Convention on the Rights of Persons with Disabilities.
50. In that case the difference in treatment at issue was not based on one of the grounds listed in Article 1 of Directive 2000/78 (i.e. Ms Milkova's disability), but rather on the nature of her employment status (i.e. a "civil servant" rather than an "employee"). It didn't matter that she was disabled, or that she had suffered disadvantage, because the discrimination that she suffered was nothing to do with her disability.
51. In *Milkova* the court considered the wording of Article 7 of Directive 2000/78, which explicitly addresses the taking of positive action in the context of the principle of equal treatment:

> *"Article 7*
>
> **Positive action**
>
> 1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
>
> 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures

> aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment."

52. It can be seen from Directive 2000/78 that where the EU legislature contemplated Member States taking positive action to prevent or compensate for disadvantages linked to protected characteristics notwithstanding the principal of equal treatment it said so explicitly. So what, if anything, does the Qualification Directive say about positive action?
53. The main objective of the Qualification Directive is explained in its sixth recital:

> "The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States."

54. Recital 33 sets out the principle of non-discrimination:

> "Especially to avoid social hardship, it is appropriate, for beneficiaries of refugee or subsidiary protection status, to provide without discrimination in the context of social assistance the adequate social welfare and means of subsistence."

55. Chapter VII of the Qualification Directive deals with international protection, with Article 28 (set out above) setting out the position in relation to social welfare. The emphasis is on provision of assistance *at the same levels* and *under the same eligibility conditions* as nationals. There is no mention here, or indeed anywhere in the Qualification Directive (see Article 26 in relation to access to employment, Article 27 in relation to access to education, and Article 29 in relation to access to healthcare), of any obligation to take positive action to alleviate the particular difficulties faced by refugees.
56. Regulation 5A causes SK difficulties, just as the provision of the Bulgarian Labour Code that provided special protection to disabled workers only if they were employees, and not civil servants, caused Ms Milkova difficulty. That doesn't mean, however, that Regulation 5A amounts to indirect discrimination against her under EU law any more than the provision of the Bulgarian Labour Code in issue in the *Milkova* proceedings discriminated against Ms Milkova on grounds of disability.
57. Mr Spencer's argument demands too much of *Milkova*. Since Directive 2000/78 explicitly dealt with positive action one could expect that where the EU legislature intended Member States to take positive action to help particular groups who face particular problems in enjoying their rights then that too would be dealt with explicitly. I am not persuaded that EU law imposes a *Thlimennos*-type obligation to look at SK's circumstances and consider whether special provision should be made for her given the difference in her circumstances.
58. For the reasons set out above I am not persuaded that Regulation 5A of the 2005 Regulations is discriminatory under EU law. Given that I have not found any

discrimination under EU law I have no need to consider issues of justification or proportionality under EU law.

The case under human rights law

59. Whether SK's and LL's discrimination cases can succeed under human rights law depends on the answers to four key questions:
    a. do their respective circumstances fall within the ambit of one or more Convention right?
    b. are the respective Appellants relying on a listed characteristic, or "other status"?
    c. are the respective Appellants being treated similarly to those whose situation is relevantly different, with the result that (subject to justification) they should have been treated differently from those persons?
    d. if the answer to the question posed in c. above is "yes", is there an objective justification for the failure to treat the respective Appellants differently?
60. I will address these questions in turn.

Ambit

61. Article 14 of the Convention provides:

> "ARTICLE 14
> PROHIBITION OF DISCRIMINATION
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

62. A1P1 of the Convention provides:

> "THE FIRST PROTOCOL
> ARTICLE 1
> PROTECTION OF PROPERTY
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

63. It was not in dispute that both these cases fell within the scope of the Convention right in Article 14 when read with the Convention right in A1P1.
64. SK argued that her situation was also within the ambit of Article 8(2) of the Convention, which the Respondent did not accept.

Article 8

65. Article 8 provides:

> "ARTICLE 8
> RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

66. In *R (DA) v SSWP* [2019] UKSC 21, [2019] 1 WLR 3289, in which the Supreme Court considered whether the regulations implementing the "benefits cap" unlawfully discriminated against lone parents with young children, Lord Wilson considered the ambit of Article 8. He said (at [35]):

> "It cannot seriously be disputed that the values underlying the right of all the appellants to respect for their family life include those of a home life underpinned by a degree of stability, practical as well as emotional, and thus by financial resources adequate to meet basic needs, in particular, for accommodation, warmth, food and clothing."

67. He considered a variety of potential effects of the imposition on the appellants of the cap on their benefits, including requiring a move to cheaper accommodation, building up rent arrears or other debts, ceasing to buy meat for the children, or turning off the heating. He concluded (at [37]):

> "Whatever their individual effect, provisions for a reduction of benefits to well below the poverty line will strike at family life."

68. The regulations for the provision of maternity grants that preceded the 2005 Regulations were considered in the case of *Francis v SSWP* [2005] EWCA Civ 130. In that case it was accepted on behalf of the Secretary of State that the grant fell within the ambit of Article 8 of the Convention. Ms Smyth says that she doesn't know why the point was conceded in *Francis*, but that given that the decision was founded on a concession it is of no assistance to SK.

69. Ms Smyth argued that the reasons for finding Article 8 to be engaged in *R (DA) v SSWP* were not applicable here because, while the Supreme Court was considering a subsistence benefit, the SSMG is only a one-off grant of £500. I disagree. The fact that the SSMG is a single payment in a modest amount doesn't stop it being a very significant benefit at a particularly expensive and formative time for those at whom it is aimed. Given that Regulation 5(2) of the 2005 Regulations requires claimants to be in receipt of a qualifying benefit, those who would (absent the "first child only" rule) be eligible for the SSMG are unlikely to have significant extra resources from which to purchase baby items. If they do not qualify for the SSMG because of the application of the "first child only" rule but they don't already have baby items from their existing child, they may well have to go without, or to make sacrifices in other areas of basic provision like those posited by Lord Wilson in *R (DA) v SSWP*. This is sufficient to bring the current situation within the ambit of Article 8(2).

70. The answer to the first question in paragraph 59 above is "yes" in respect of both SK and LL.

Status

71. Mr Spencer says that being a refugee who already had a pre-flight child when she arrived in the UK, is an "other status" which attracts the protection of Article 14 of the Convention. Ms Smyth disagrees, arguing that the status relied upon is simply too narrow. She describes it as a "subset of a subset", and says that it is "too far removed from any personal characteristic, to count as "other status"".

72. The Respondent relied upon what Judge Jacobs said in *FM v SSWP (DLA)* [2017] UKUT 380 (AAC) at [26] to [27]. In *FM v SSWP* the status relied upon was the claimant's past residence. Judge Jacobs said that the issue for him was:

> "whether past residence abroad is a personal characteristic that is used to distinguish one group of people from another (*Carson v United Kingdom* (2010) 51 EHRR 31 at [70]; *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 at [9]), something that, while not innate or inherent (*Clift v United Kingdom* Application no. 7205/07), generally identifies what someone is as opposed (sic) what is being done to them (*R(RJM) v SSWP* [2009] 1 AC 311 at [45])."

73. Judge Jacobs said that the proper approach to deciding whether what was relied upon amounted to a "status" was to reason from principle, "albeit from cases after taking into account their individual contexts" (at [26]).

74. In *R (DA) v SSWP* the status relied upon by the parents was of lone parents of children aged under two (in the *DA* appeal) and under five (in the *DS* appeal), respectively. They said that their situation differed from the situation of other claimants subject to the cap and that the failure to treat them differently was discriminatory. Ms Smyth highlighted the comments of Lords Carnwarth and Hodge in *R(DA) v SSWP* (at [103]-[108] and [124]-[126]) who both expressed doubt as to the appropriateness of the narrow forms of "status" asserted by the appellants, but in the leading judgment Lord Wilson said he had "no doubt" that the appellants had the requisite status on the basis that the statuses asserted were clearly composed of personal characteristics.

75. In *Hode and Abdi v UK* (Application no. 22341/09 [2012] ECHR 1871 (at [48]) the European Court of Human Rights found that "a refugee who married after leaving his country of permanent residence and the spouse of such a refugee" enjoyed "other status" for the purpose of Article 14. This, and what Lord Wilson said about status in *R(DA) v SSWP*, indicates that a combining of statuses and a narrowing of the class like that proposed in SK's case doesn't necessarily exclude the protection of Article 14, albeit that the Supreme Court was divided on whether the statuses asserted were appropriate in that case.

76. Another argument advanced by Ms Smyth against the status asserted by SK being a status attracting the protection of Article 14 was that the status claimed is defined entirely by the discrimination she complains of. She invokes the Court of Appeal's decision in *Simawi v LB Haringey and SSHCLA* [2019] EWCA Civ 1770, which was about whether the statutory provisions governing succession to secure tenancies unlawfully discriminated against Mr Simawi because of his status. The status Mr Simawi asserted in pleadings was "whether a person becomes a sole tenant through death or assignment after relationship breakdown", a status that Lord Justice

Lewison found was defined by what kind of tenancy was originally granted and what happened to it, which was not permissible.

77. Ms Smyth argued in her oral submissions that SK's refugee status explains why she doesn't have baby items, but that her true status is really just "someone who doesn't have baby items and who is caught by Regulation 5A", and that this is the same as the discrimination being complained of. I disagree. SK's status is a combined status linked directly to two personal characteristics of refugee status and motherhood/birth. Both of these statuses enjoy specific protection under international law (the Refugee Convention, the UN Convention on the Rights of the Child and the UN Convention on the Elimination of Discrimination Against Women). It is of an entirely different character to the status asserted in *Simawi*.

78. Indeed, the Respondent accepts that there was a breach of LL's Article 14 rights in the appeal linked to SK's appeal, and the "other status" relied upon by LL was that of a person who takes on responsibility for the care of a child aged over 12 months and then has her first biological child. It is difficult to see why SK's formulation isn't accepted by the Respondent to be an "other status" when LL's formulation is.

79. SK's status as a refugee with a pre-flight child is something that identifies "who she is" rather than simply "what has happened to her". As such it is a sufficiently personal characteristic to amount to an "other status" attracting the protection of Article 14. I am equally convinced that the Respondent is right to accept that LL's status is sufficiently personal to amount to an "other status". The answer to the second question posed in paragraph [59] above is therefore "yes" in relation to SK.

80. I am also satisfied that the Respondent is right to concede that LL's status as a woman pregnant with her first biological child while already being responsible for a child who came into her care after reaching 12 months of age, is sufficiently personal to amount to an "other status" attracting the protection of Article 14.

Same treatment, relatively different situation?

81. The Respondent accepts that SK is treated the same as other claimants of SSMG in terms of the application of the "first child only" rule in Regulation 5A(4). However, she disputes that SK is in a relatively different situation from other claimants, and so argues that there is no *Thlimennos*-type requirement for her to be treated differently from them.

82. *Thlimennos v Greece* (Application No. 34369/97) (2000) 31 EHRR 15 concerned the refusal by the Greek Institute of Chartered Accountants to appoint Mr Thlimennos, notwithstanding his impressive performance in the public examination for the appointment. Its refusal to appoint him was on the grounds that he had been convicted of a serious crime and under domestic legislation no person convicted of such a crime could be appointed as a chartered accountant.

83. The crime of which he had been convicted was of insubordination for refusing to wear military uniform at a time of general mobilisation. The circumstances of this refusal were that Mr Thlimennos was a Jehovah's Witness and his religious beliefs prevented him from serving in the military. He argued that by refusing to serve he had manifested his religious beliefs, and his non-appointment as a chartered accountant, being directly linked to that manifestation, fell within the ambit of Article 9 of the Convention. He argued that it could serve no useful purpose to exclude someone from the profession of chartered accountant for having refused to serve in

the armed forces on religious grounds. He said that no distinction was made between the application of the relevant law to persons convicted of offences committed exclusively because of their religious beliefs and its application to persons convicted of other offences. Its failure to take account of this difference, he argued, amounted to discrimination in breach of Article 14 read with Article 9 of the Convention.

84. The Court said (at [44]):

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

85. The Court found that Articles 14 and 9 were engaged. While it acknowledged that states had a legitimate interest in excluding some offenders from the profession of chartered accountant, it decided that excluding Mr Thlimennos on the ground that he was an unfit person was not justified because the offence of which he had been convicted did not imply any dishonesty of moral turpitude likely to undermine his ability to exercise that profession and, given that he had served a prison sentence for the offence, imposing a further sanction on him by way of barring him from the profession of chartered accountant was disproportionate. Excluding him from the profession did not, therefore, pursue a legitimate aim. The Court concluded that "there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime" (see [47]).

86. SK maintains that refugees with pre-flight children are in a relevantly different situation to other claimants of SSMG since, because of this status, they are much less likely to have retained baby items and are therefore at a particular disadvantage as a result of the eligibility condition in Regulation 5A(4).

87. SK's and LL's complaints are that they and their respective cohorts should not have been subjected to the "first child only" rule in Regulation 5A(4). Therefore, adopting the approach taken by Lord Wilson in *R(DA) v SSWP* (at [47]), the "natural comparator" cohort for the purposes of assessing "relevant difference" is "all others who are subject to the "first child only" rule". This is the comparator favoured by Mr Spencer.

88. The Respondent points to other groups of potential claimants who are unlikely to have access to baby items and who, like SK, are not eligible for the SSMG because of the operation of Regulation 5A(4) because they have a child under the age of 16:

    a. those who have migrated to the UK for reasons other than seeking international protection with no expectation of having another child, or for whom bringing baby items was simply impractical;
    b. EU nationals exercising free movement rights;
    c. those who had a baby when their first child was much older (but under 16);
    d. those whose baby items were destroyed in a fire;
    e. those who were employed when their first child was born (and so not eligible) but who were on a qualifying benefit when their second child was born; and

f. those who have fled domestic abuse.

89. SK is not, the Respondent argues, in a relevantly different situation from such potential claimants, who may very well not have brought with them, or kept, baby items which they acquired when their first child was a baby. She says that this lays bare that what SK is really asking for is the removal of the Regulation 5A(4) condition in its entirety.

90. I must say that I am not persuaded by that argument at all. Ms Hannah Caithness (Service Manager at the Nottingham and Notts Refugee Forum) provided *prima facie* evidence in her two brief witness statements that refugees coming to the UK with pre-flight children are highly unlikely to bring baby items with them (see paragraph [118] below). Her evidence is based on the knowledge she has gained of the circumstances of the numerous refugees she has encountered through her work over a period of four years, and is credible.

91. By contrast, those falling within the categories listed in paragraph [88 a.] and [88 b.] above are in a relevantly different position from refugees with pre-flight children, because such people will not, like SK, have required to leave their home country with only a suitcase of belongings. To the extent that those in the categories identified by the Respondent might come to the UK with very few belongings, initially only intending to stay a short period, they would be likely to have the opportunity to return to collect further belongings when their resettlement became more permanent. It is reasonable to assume that many such families will continue to have access to baby items they acquired when their existing children were babies.

92. Those who had an "unexpected" second child or who had a baby long after the birth of their first child, having sold, gifted or otherwise disposed of the baby items they acquired for their first child, cannot be said to form a separate class for discrimination purposes, and neither can those who have lost their baby items in a fire, no matter how unfortunate their situation.

93. Those falling within the category listed in paragraph [88 e.] differ from refugees in that they are more likely to have had some opportunity to save while working than refugees, who are highly unlikely to have had any opportunity to save due to the restrictions placed on their ability to work while seeking asylum.

94. The one category of claimants identified by the Respondent with much in common with SK is the category of those who have fled domestic abuse. They, like refugees, are likely to have left their homes with little in the way of belongings and without an opportunity to return safely to collect further belongings. However, just because there is another category of claimants whose circumstances differ from those of the general pool of claimants subject to the "first child only" rule in a similar way to SK and who, like her, are treated the same as the general pool of claimants, does not mean that Regulation 5A(4) does not discriminate against SK. It may simply indicate that that this category of claimants invoked by the Respondent is also discriminated against. That is not a matter I need comment on further. In any event, it isn't necessary for SK to show that she is in a relatively different situation to everyone in the broader class (see *R(DA) v SSWP* [2019] UKSC 21 at [47]).

95. For the reasons outlined above I am satisfied that SK is, with the exception of those who have fled domestic abuse, in a relevantly different situation from other claimants of the SSMG who are caught by the "first child only" rule in Regulation 5A(4), and that she is, by reason of her status, particularly disadvantaged by the

application of that rule. Since she is treated similarly to those whose situation is relevantly different the answer to the third question in paragraph [59] above in relation to SK and those who share her status is "yes". Subject to justification arguments, then, she should be treated differently from the general pool of claimants caught by the "first child only" rule but who do not share her status and are not, therefore, so disadvantaged.

96. LL and other first-time biological mothers who are already carers for another child who came into their care after the child's first birthday are, again, in a relatively different situation from the general class of SSMG claimants with existing children, including those examples identified by the Respondent and discussed in sub-paragraphs a. to c. of paragraph [88] above, because due to the circumstances that define their status they will not have had reason to acquire baby items for their first child in the first place. The answer to the third question in paragraph [59] above in relation to LL and those who share her status is, therefore, also "yes".

Justification under human rights law

97. It having been established *prima facie* that SK and LL and those who share their respective statuses are in a relevantly different situation from others who have been treated similarly to them by their common subjection to the "first child only" rule, the burden of proof was on the Respondent to show that the such similar treatment was justified and therefore not discriminatory (see *R (DA) v SSWP* per Lord Wilson at [51]).

Test for justification

98. The test to apply to establish justification is that set out by the Grand Chamber in *Stec v United Kingdom* (2006) 43 EHRR 47 (at paragraph [51]):

> "A difference in treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

99. In *Stec* the Grand Chamber said in relation to the "margin of appreciation" to be afforded to the state in matters of economic or social strategy (at [52]):

> "The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation."'"

100. The eligibility conditions for maternity benefits fall in a difficult area of social and welfare policy, and the case on justification must be viewed through the prism of the

Government's response to the global financial crisis, the substantial increase in public borrowing and the deficit. I must give considerable weight to the explanations and justifications given at the time that the policy was introduced and implemented (as to which I have the benefit of substantial documentary evidence).

101. Both parties put their cases on the basis that the applicable test for justification under human rights law was whether the discriminatory effect of Regulation 5A(4) was "manifestly without reasonable foundation", rather than any lower standard. However, that doesn't mean that the justifications provided can escape scrutiny. Even though I must accord substantial weight to the reasons given by the legislators I must still assess whether those reasons "stack up".

102. In *R (DA) v SSWP* Lord Wilson analysed the interplay between the burden falling on the state to justify its treatment on the one hand, and the "manifestly without reasonable foundation" test on the other, given that it is for the complainant to establish that the justification offered by the state is manifestly without reasonable foundation. He concluded (at [66]):

> "The rationalisation has to be that, when the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."

United Nations Convention on the Rights of the Child

103. Mr Spencer invited me to examine the justification put forward by the Respondent by reference to Article 3 of the United Nations Convention on the Rights of the Child 1989 (Cm 1976) (the "UNCRC"), which provides:

> "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. "

104. UNCRC is not part of our law. It has, however, been ratified by the United Kingdom and the relevance of international conventions was aptly summarised by Lord Wilson in *Mathieson v SSWP* [2015] UKSC 47; [2016] All ER 779 at [38]:

> "They are not part of our law so our courts will not ordinarily reach for them. Courts sometimes find, however, that the law which they *are* required to apply demands reference to them."

105. In *R(DA) v SSWP* Lord Wilson said (at [72]) that "when relevant, the content of the UNCRC can inform inquiry into the alleged violation of article 14 of the Convention, when taken with one of its substantive rights."

106. The amending of the eligibility conditions for a maternity grant is clearly an "action concerning children". The concept of the best interests of the child in Article 3.1 of the UNCRC encompasses a rule of procedure that, whenever a decision is to be made that will affect a specific child, an identified group of children or children in general

the decision-making process must include an evaluation of the possible impact of the decision on them (see *Mathieson v SSWP* at [39]).

107. A discrimination claim under Article 14, taken with A1P1 and Article 8, of the Convention in relation to those eligibility conditions raises the question whether, in formulating the conditions and the exceptions to them, the Government breached Article 3.1 of the UNCRC. A finding that such a breach did occur would be relevant to the assessment of whether the Government's justification for its refusal to provide an exemption to those with the respective statuses of the Appellants was "manifestly without reasonable foundation".

Focus of justification

108. In determining whether there is justification I must first identify the focus of the justification. In *R (DA) v SSWP* Lord Wilson identified (at [54]) what the Government had to justify in that case, which was not the introduction of the benefit cap scheme, but rather "its failure to amend the [Housing Benefit Regulations 2006] so as to provide for exemption of the *DA* and *DS* cohorts from the revised cap".

109. In this case what the Respondent had to justify, then, was not the general policy of restricting eligibility for the SSMG to the "first child only", but rather its failure to amend the 2005 Regulations to exclude those with the statuses shared by SK and LL from its operation.

The Respondent's case on justification

110. As discussed above, the policy of restricting eligibility to the SSMG to the "first child only" in a family was arrived at as part of a package of measures in the June 2010 "emergency budget" intended to reduce the deficit in the wake of the global financial crisis. Ms Kidd explained in her witness statement that the measure was intended to target the support provided by the SSMG at those families who are "starting from scratch", without baby clothes or equipment, and so for whom the one-off costs associated with a new baby are highest. The policy justification for the restriction was that those who already had a child would already have baby items and so would not have the same need of financial support as those who didn't already have such items.

111. The 2011 Regulations were the subject of a report by the SSAC. Its report accepted that there was some logic in the "first child only" approach to the extent that it applied to the circumstances of an "archetypal" family, but commented that "as is well known, many families do not fall within the compass of the archetypal image. It is a plain fact of life in modern Britain that the composition of many families is somewhat fluid and unpredictable."

112. The SSAC report was highly critical of the measures in the 2011 Regulations and the rationale provided for them. It said:

    a. "We do not find the measure to be either coherent or consistent with broader policy objectives." See §4.2 of the SSAC's report.
    b. "The Department are proposing that two exceptions from the new rule should apply, but it would appear that those exceptions have been alighted upon in a somewhat ad hoc fashion, rather than because they are viewed as being part of a more stringent but transparently reasoned approach. See §4.4 of the SSAC's report.

c. "The Explanatory Memorandum lacks a reasoned explanation as to why the government chose the option it did and, conversely, why the others were rejected." See §4.5 of the SSAC's report.
d. "Our primary concern is that the proposal is an overly blunt instrument that will have harsh repercussions for some families in vulnerable circumstances where the living arrangements and relationships are less than straightforward. Whilst we acknowledge and accept the need for simple rules where possible, we believe that it has to be balanced against the requirement to preserve fairness and avoid excessive harshness. In this particular case we believe that the complexity of many family situations demands a higher degree of subtlety in policy-making, even if a measure of simplicity has to be sacrificed in the process." See §4.9 of the SSAC's report.

113. In response the Government acknowledged the SSAC's criticisms but said:

> "…this measure is about helping families who do not have a child already in their household to purchase items for their new baby, a time that all families need help the most. The other options were considered and ruled out because they were not as well targeted, or because the money available would be spread too thinly, particularly to the priority households. Basing eligibility on the composition of the household will inevitably create some hard cases, including those identified by the Committee. However, the Government believes that concentrating help on those families where the baby will be the only child in the household under 16 provides the best use of limited resources." See paragraph [31] of the Secretary of State's statement in accordance with section 174(2) of the Social Security Administration Act 1992, exhibited to Ms Kidd's witness statement.

114. Ms Kidd summarised the Government's position in paragraph [18 b)] of her witness statement:

> "The majority of families do not purchase the full range of items needed for a new baby when their second or subsequent child is born and it is unreasonable to continue to provide them with the same level of help through the Sure Start Maternity Grant scheme. Just like the majority of other low-income families do, families in receipt of the qualifying benefits for the Sure Start Maternity Grant scheme reuse the items they already have when they have another child."

115. SK accepted that the policy of excluding from entitlement to SSMG families who are likely to have baby items from a previous birth was a legitimate aim. However, SK argued that there was no rational basis for refusing to exclude the pre-flight children of SK and others sharing her status from the definition of "existing member of the family" because it was highly unlikely that refugees will come to the UK with baby items from a previous birth.

Undermining of policy objectives

116. The Respondent argued that exempting this group would risk undermining the twin policy objectives of (1) reducing expenditure and (2) targeting the benefit in the way intended because it might result in a significant increase in spending on the SSMG, and because it might result in SSMGs being awarded to refugees who have been able to keep baby items from the birth of their first child.

117. In her witness statement Ms Kidd put the number of refugees in the UK at 124,018, but said that it was not possible to know how many female refugees have had a child in another country or to estimate the impact on expenditure of exempting that group. However, Ms Caithness explained in her witness statement that it can be deduced from available statistics that the figure for female refugees who have had a child in another country will be dramatically smaller than this total. For example, she cited Eurostat figures that indicate that the number of first time asylum applications by women aged 14 to 64 in the 2018 calendar year was 3,275 (from a total of 37,295 asylum applications). These figures were not challenged by the Respondent.

118. Ms Kidd did not accept that all refugees coming to the UK would come without baby items because, she said, refugees have "varied factual backgrounds". However, Ms Caithness's evidence was that, while she could not say definitively that no refugee would ever come to the UK with baby items, in her 3 years' experience as an employee at Nottingham and Notts Refugee Forum and her 1 year of volunteering there she had not come across a single case of a refugee woman arriving in the UK with items needed for a new baby (see paragraph [2] of her second witness statement). I found Ms Caithness's evidence to be credible, and it was not contradicted by any evidence adduced by the Respondent, who simply posited that refugees *might* in some circumstances come to the UK with such items.

119. Based on the figures cited by Ms Caithness, and given the likely circumstances of the vast majority of refugees, I find that the likelihood of refugees with pre-flight children who satisfy the eligibility conditions for an award of SSMG (other than that under Regulation 5(A)(4), by reason of having a pre-flight child) presenting in numbers sufficient to make a meaningful impact on Government finances must be vanishingly small. This makes it highly unlikely that the Government's policy objective would be undermined by the pre-flight children of refugees being excluded from the definition of "existing member of the family" in Regulation 5A(3) of the 2005 Regulations.

Mitigants

120. Ms Kidd said that the Government accepted that there would be families who, "for a range of reasons", may need financial support when their second or subsequent child was born. To deal with such situations the Government passed legislation amending the rules relating to Social Fund Budgeting Loans to allow them to be used for maternity expenses. Amendments to Section 138(1)(b) of the Social Security Contributions and Benefits Act 1992 were effected by the Welfare Reform Act 2012. To qualify for such a loan a claimant must be in receipt of a qualifying benefit for at least 26 weeks. It is intended to cover intermittent expenses that are considered difficult to budget for. The qualifying benefits are Income Support, income-related Employment and Support Allowance, income-based Jobseekers' Allowance and Pension Credit. The amount awarded is related to the claimant's ability to repay and the loan is repaid via deductions from the borrower's benefit payments. Ms Kidd provided details of the number of Budgeting Loan applications and awards and the expenditure on Budgeting Loans in the year 2017-2018, indicating that the average loan amount was £408, but she was unable to say what proportion of loans related to the purchase of maternity or baby items.

121. Ms Kidd also gave details of the Universal Credit Budgeting Advance scheme, which allows claimants who have been continuously in receipt of Universal Credit or a

qualifying benefit (Employment and Support Allowance, Income Support and/or Jobseekers' Allowance) for the last 6 months to borrow amounts of up to £348 (if single), £464 if part of a couple, and £812 if the claimant has children (subject to pound for pound deductions in respect of capital over £1,000, and subject to certain other conditions). Such advances may be used to help with maternity or baby items among other things. Ms Kidd said that the average amount awarded for a Universal Credit Budgeting Advance in the year July 2018 to June 2019 was £390, but she was not able to provide a breakdown to show what the loans advanced were used for.

122. The Appellants did not produce any evidence to contradict Ms Kidd's evidence as to the availability of Social Fund Budgeting Loans or Universal Credit Budgeting Advances, and there is no reason to doubt the accuracy of her evidence. What Mr Spencer, on behalf of SK, did dispute was that the provision of Asylum Support, Social Fund Budgeting Loans or Universal Credit Budget Advances assisted the Respondent in terms of justification. I deal with these considerations in paragraphs [130] and following below.

Consideration of impact on refugees

123. Ms Kidd acknowledged in her witness statement (at paragraph [34]) that she was not aware of any specific consideration having been given to the position of refugees when the 2011 Regulations were considered or formulated, having not herself been personally involved in the development of the policy which led to the introduction of the 2011 Regulations, and neither was she aware of any colleagues now in the Department for Work and Pensions who were involved in the change.

124. There is no discussion in the policy documents or memoranda exhibited to Ms Kidd's witness statement about the impact that the introduction of the "first child only" policy might have on refugees, and no evidence indicating that the position of refugees was considered at all. All that Ms Kidd could say on this topic was that the Government was clearly aware that the rule would give rise to some "hard cases" and it factored that into its decision-making. Ms Kidd offered a number of what she called "good policy reasons" for excluding those in the position of SK from eligibility for SSMG, and ventured that if the 2011 Regulations were introduced today the Government would still make no exception for those in SK's position.

125. The main thrust of Ms Kidd's argument was that refugees as a class were not in a sufficiently different position from other groups excluded from SSMG to justify them being exempted. This is dealt with above in paragraphs [88] to [95] above.

126. Ms Kidd also argued that refugees "cannot meaningfully be compared with other groups" because they benefit from a separate system of support. She pointed out that those who have access to asylum support pending consideration of their asylum claim will benefit from a £300 grant for every new-born child.

127. I find the Respondent's reliance on the availability of asylum support puzzling, because asylum support is available to asylum seekers but not to those with refugee status. It is illogical to say that refugees "cannot be meaningfully compared with other groups" due to a separate system of support being available to a group from which refugees are, by definition, excluded. A refugee might benefit from asylum support before their refugee status was recognised, but given the eligibility conditions for a maternity payment, an asylum seeker would only very rarely receive a maternity payment in respect of a pre-flight child, and SK does not propose that

post-flight children should be excluded from the rule because refugees with post-flight children are in a similar position to the class of claimants as a whole.

128. Even were a maternity grant to be awarded to an asylum seeker who then became a refugee, the amount of that grant is considerably lower than the amount of the SSMG, so such a claimant would still be disadvantaged by their ineligibility for the SSMG.

129. If the Respondent's concern is that if the pre-flight children of refugees were carved out from the definition of "existing member of the family" a refugee who received a £300 maternity payment by way of asylum support might then be able to claim a £500 SSMG, thereby enjoying grants in a greater aggregate amount than other claimants and gaining an advantage over the general class of claimants, I have no doubt that this could be prevented by careful drafting.

130. Ms Smyth pointed to the loan schemes available for the purchase of the kind of items that the SSMG was designed to cover (described by Ms Kidd in her witness statement) as mitigation for the position of those who became ineligible for the SSMG as a result of the restrictions introduced by the 2011 Regulations. However, in her witness statement Ms Josephine Tucker (the Head of Policy and Research at the Child Poverty Action Group) provided a compelling analysis of the statistics in the annual reports for the Social Fund for the years April 2011 – April 2012 and April 2012 – April 2013, from which it can be inferred that the liberalisation of the rules relating to Budget Loans was not an effective mitigant to the tightening of the rules for entitlement to the SSMG.

131. While one would expect to see a significant increase in the uptake of Budgeting Loans in the April 2012 to April 2013 period (following the introduction of the "first child only" rule from 24 January 2011 and the change in the rules relating to Budgeting Loans from 08 May 2012) compared to the previous year, there was in fact no increase in the number of awards made, and an increase of only a little over £7m in the total amount of the awards made (from nearly £448m to £455m). Further, there was a decrease in the percentage of the total expenditure given to lone parents and the number of awards to people with children dropped from 589,000 in 2011-2012 to 581,000 in 2012-2013.

132. While the lack of take-up for Budgeting Loans does not, by itself, demonstrate that the Government's policy was not justified, the Court of Appeal and the Supreme Court have both made it clear that injustice caused by discriminatory measures cannot be dealt with simply by way of discretionary grants or loans (see *Burnip v Birmingham CC* [2012] Civ 629 and *MA v SSWP* [2016] UKSC 58). There is a clear qualitative difference between support provided by way of a loan which has to be repaid over a relatively short period on the one hand and support by way of grant on the other. This is especially the case for claimants who can be expected to have very limited income from which to make the necessary repayments. It is perhaps unsurprising that those who became ineligible for SSMG but who would now qualify for Budgeting Loans seem to have opted to live without baby items rather than to incur debt.

"Bright lines"

133. In response to the SSAC's assertion that the "first child only" policy implemented by Regulation 5A was a "blunt instrument" Ms Smyth argued that "bright lines" were

necessary to avoid any undue complexity and burden in administering the benefit, and that this militated against making an exception to the general rule in relation to refugees with pre-flight children.

134. In *Mathieson v SSWP* Lord Mance (at [51]) said:

> "Courts should not be over-ready to criticise legislation in the area of social benefits which depends necessarily upon lines being drawn broadly between situations which can be distinguished relatively easily and objectively."

135. He quoted Lord Bingham's speech in *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 3 All ER 193, [2008] 1 AC 1312 at [33], in which he said:

> "… legislation cannot be framed so as to address particular cases. It must lay down general rules … A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial."

136. Lord Wilson's take on bright lines in his leading judgment in *Mathieson* was more cautious, saying (at [27]) that the courts accept the argument that a bright line rule has "intrinsic merits", in particular in the saving of administrative costs, "but only within reason".

137. So the drawing of bright lines, with attendant hard cases, is generally permissible but it is not permissible if those lines are drawn arbitrarily or in a way which means that they are not, if judged in the round, beneficial.

138. While the Respondent invoked the need for bright lines to avoid any undue complexity and burden in administering the SSMG, she hasn't explained with any clarity or particularity why she considers that the exemption proposed by SK would be administratively burdensome or otherwise difficult or costly to administer. After all, qualification for such an exemption could be conditional on the provision of satisfactory documentary confirmation of the claimant's refugee status, and birth certificates in respect of pre-flight children. If that were the case the administration of the benefit with such an exemption would be no more burdensome than the administration of many other benefits administered by her, and far less burdensome than the administration of some other benefits.

139. A policy preference for a "bright line" can't operate disproportionately at the expense of fairness. The Respondent was aware that the limitations on eligibility in Regulation 5A would result in "hard cases". The Government consulted on the proposals and was told by the SSAC that it considered the proposed rule to be a "blunt instrument". Three exceptions have now been provided to the general rule in Regulation 5A: those relating to multiple births, teenage pregnancies and (since 06 April 2018) first time biological mothers caring for another child who came into their care over the age of 12 months.

140. In her evidence Ms Kidd sought to address the Government's decision to amend the 2005 Regulations again in 2018 to exempt this last group from "first child only" rule. She said that the exemption furthered other policy objectives because the stability that such caring arrangements provided was of "immeasurable" value to the children concerned and that it stopped them being taken into local authority care, at considerable saving to the public purse. These are certainly very compelling arguments for introducing the exemption.

141. Ms Kidd also maintained that making the exemption introduced by the 2018 Regulations did not compromise the objectives of the 2011 Regulations, but she offered no explanation of why she considered this to be so, or indeed why she considered that an exemption in respect of refugees with pre-flight children would blur the "bright line" that the Respondent says is required if the exemption introduced by the 2018 Regulations (and indeed the two other existing exemptions) does not.

142. Taking all of this into account, I am not persuaded that the exclusion of pre-flight children (but not post-flight children) from the definition of "existing member of the family" in Regulation 5A(3) of the 2005 Regulations would undermine or blur the policy behind the "first child only" rule. Rather, it would lend consistency to it by focusing the support offered by SSMG on those who could not be expected to have any baby items and were "starting from scratch", while denying it to those whose need is assessed to be less because they can be expected to have baby items from a previous child.

Floodgates

143. The Respondent made a "floodgates" argument that if an exception were made for refugees then there may be others who might also argue that they should be the subject of a special exemption, and that there is no reason to give more favourable treatment to refugees in this respect. Again, this is not persuasive because such exemptions would only need to be made in respect of claimants whose ineligibility would not further the stated policy objective.

Consideration of best interests of the child

144. Ms Smyth says that Article 3 of the UNCRC does not advance SK's case on justification because the contemporaneous materials show that the Government had regard, as a primary consideration, to the best interests of new babies and it evaluated the possible impact of the proposed measures upon them. There is no mention in any of the policy documents or memoranda relied upon by the Respondent of the UNCRC or the primacy of the best interests of children. However, the Equality Impact Assessment exhibited to Ms Kidd's witness statement does show that the Government gave significant consideration to the impact on children when formulating the provisions, and its principal rationale for the measures was that they would focus the Government's limited resources on those children most in need of them.

145. I note, however, that when considering whether Article 3.1 of the UNCRC had been breached in *R(DA) v SSWP* Lord Wilson framed the question the court had to answer in much narrower terms, by reference to the particular status claimed by the appellants:

> "In deciding upon the terms of the revised cap, did the Government have regard, as a primary consideration, to the best interests of children below school age of lone parents and did it evaluate the possible impact of its decision upon them?"

146. The equivalent question in relation to SK's appeal to that asked by Lord Wilson would be:

> "In deciding upon the revised eligibility conditions, did the Government have regard, as a primary consideration, to the best interests of new babies of refugee mothers with pre-flight children and did it evaluate the possible impact of its decision upon them?"

Given that there is no evidence that the Government considered the impact of its measures on refugees at all, the answer to this narrower question must be "no".

147. However, the issue whether the Government was required to give specific consideration to the best interests of the specific subset of children of mothers with the status asserted by SK (rather than to the children of claimants more generally) wasn't argued before me and, given the nature of my general conclusions in relation to the justification put forward by the Respondent, I do not need to rule on any breach of Article 3.1 of the UNCRC to conclude that the decision not to exempt SK and those sharing her status from the reach of the "first child only" rule was manifestly without reasonable foundation.

Justification under Human Rights law - conclusions

148. The rationale for the "first child only" policy holds up only to the extent that it is implemented in a way which excludes from eligibility those who are likely to have baby items while including those who are unlikely to have them.

149. The problem with the purported justifications for the measures provided by the Respondent is that when applied to refugees with pre-flight children the measures achieve the precise opposite of the stated aim of the provisions. Excluding such claimants from eligibility does not further the legitimate aim of targeting the SSMG at the families who need it most. Rather, it denies claimants who are likely to be among those the most in need of such support. It is therefore not merely a disproportionate way of achieving the stated objective, but an inappropriate measure which defeats the stated objective.

150. I conclude that applying the measures designed to promote the Government's legitimate policy objectives to refugees with pre-flight children (i.e. not treating that class of claimants differently) had no objective, rational foundation. Further, the Government's legitimate policy objectives could be achieved by implementing the measures subject to the exception suggested. The answer to the final question in paragraph [59] above is therefore "no".

Conclusions and disposal

151. Regulation 5A of the 2005 Regulations does not unlawfully discriminate against refugees with pre-flight children under EU law but it does unlawfully discriminate against them contrary to Article 14 read with Article 8 and A1P1 of the Convention.

152. As conceded by the Respondent, Regulation 5A of the 2005 Regulations also unlawfully discriminates against those having their first biological child while already responsible for a child who came into their care after reaching 12 months old contrary to Article 14 read with A1P1 of the Convention. I make no findings in relation to discrimination under EU law in this regard as LL's appeal was restricted to a claim of discrimination under the Convention.

153. For the reasons set out above I find that the decisions of the First-tier Tribunal on SK's appeal and on LL's appeal were each made in error of law. I set those decisions aside pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.
154. Having set aside the decisions I may either remit the appeal to be re-heard by the First-tier Tribunal or re-make the decision.
155. In each of these cases it is appropriate to re-make the decision as the First-tier Tribunal should have made it. Applying section 6(1) of the Human Rights Act 1998 I disapply the offending provision in the 2005 Regulations (as amended).
156. There is no dispute that the Appellants satisfied the other conditions to entitlement for SSMG under the 2005 Regulations, so the decision I make is that at the relevant time the Appellants were each entitled to a SSMG.

Thomas Church
Judge of the Upper Tribunal

Authorised for issue on
16 March 2020