FL v Secretary of State for Work and Pensions (UC)
[2024] UKUT 6 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001442-UOTH**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

F.L.

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Hearing date: 13 November 2023
Decision date: 11 December 2023

Representation:
Appellant: Mr Paul Skinner of Counsel, instructed *pro bono* by FRU
Respondent: Mr Jack Anderson of Counsel, instructed by GLD

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 21 October 2020 under file number SC142/19/01658 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 re-make the decision of the First-tier Tribunal as follows:

> *The claimant's appeal to the First-tier Tribunal is allowed.*
>
> *The Secretary of State's decision of 25 October 2019 is set aside as being unlawfully discriminatory. The case is on all fours with TP (No.3).*
>
> *It will now be for the Secretary of State to redecide on a lawful basis the claimant's entitlement to universal credit for the period from 13 July 2018.*

REASONS FOR DECISION

The issues raised by this appeal

1. This is a case which is, in the most general of terms, about a claimant whose entitlement to benefit fell when she was required to claim universal credit as compared with her previous entitlement under the so-called legacy benefits.

2. In narrower terms, the case concerns a claimant who was not provided with any transitional protection, contrary to Article 14 of the ECHR, in respect of the 'cliff edge' withdrawal of her enhanced disability premium (EDP) when she 'naturally migrated' from legacy benefits onto universal credit (UC).

3. The UC regime differentiates between 'natural migration' and 'managed migration'. The former is where a claimant has to move from legacy benefits to UC because of a change in their circumstances. Natural migration therefore occurs randomly. In contrast, managed migration is planned, in that it applies only where a claimant receives a migration notice from the Secretary of State and is (in effect) required to transfer to UC.

4. The distinction between the two forms of migration to UC is important in various ways. At the risk of gross over-simplification, one such distinction is that a claimant who is subject to managed migration should receive an individualised form of transitional protection to compensate for any cash loss in benefit occasioned by their (effectively mandatory) transfer to UC. In contrast, a claimant who is subject to natural migration may at best receive a flat-rate amount of transitional protection which can still leave them financially 'out of pocket', as happened to the claimant in this appeal. The significance of this distinction can be especially acute for those claimants previously in receipt of the EDP and severe disability premium (SDP) under their now-terminated legacy benefit awards.

The background to the appeal to the First-tier Tribunal

5. The claimant had since August 2016 been in receipt of income-based employment and support allowance (IRESA) and child tax credit, two of the legacy benefits replaced by UC, while living in Scotland. She also claimed housing benefit from her local authority. However, on 13 July 2018 she moved to an address in England in order to be closer to her family, as she required support with mental health issues. Before moving she sought information from both the ESA and UC helplines and was advised (wrongly and several times) that she could remain on IRESA until UC was 'rolled out' to all claimants in her new postcode area. In fact, her new address was in a UC 'digital' area; as such, she was eventually advised (correctly) that she could no longer claim IRESA or housing benefit at her new address and had to make a claim for UC instead.

6. On 28 July 2018 the claimant applied for UC from her new address as a single person with one child dependant. Her UC claim was subsequently backdated to the date she had moved address (i.e. 13 July 2018). In her claim she explained that she suffered from anxiety, depression, OCD and IBD and was in receipt of personal independence payment (PIP). None of this is in dispute, and I recognise with regret that the long drawn-out nature of the current proceedings will not have helped her mental health.

7. On 17 August 2018 a decision-maker awarded her UC at the rate of £1,246.53 for each assessment period (i.e. for each month). Disregarding the £323.31 attributable in respect of the housing costs element, and so as to make a like-for-like comparison, this resulted in a net UC entitlement figure of £923.22 a month.

8. Over a year later, on 25 October 2019, a decision-maker revised the decision of 17 August 2018. The revised decision was that the claimant was entitled to receive a further £120 per assessment period from the date of her UC claim in respect of the severe disability premium (SDP) that she had been receiving while she was entitled to IRESA. This additional award reflected a flat-rate form of transitional protection introduced as a response to the *TP* litigation (discussed further below) for those claimants previously in receipt of SDP who had naturally migrated to UC.

9. On 29 October 2019 the claimant asked for the decision of 25 October 2019 to be reconsidered. It was reconsidered the same day but confirmed.

The First-tier Tribunal proceedings and its decision

10. In her notice of appeal to the First-tier Tribunal, the claimant put her case very clearly as follows:

> I have provided all the evidence and still they have not paid me correctly. Whilst I was on ESA and Child Tax Credits I received £13282.88 over a yearly period which worked out at £1108.90 per month. On Universal Credit … I receive £11078.64 over a yearly period which works out at £923.22 per month, That is a difference of £183.68 per month, I have not included the housing element when calculating either of my ESA or Universal Credit as it is classed separately even though it is included with my Universal Credit payment and paid direct to my landlord. On 25.10.2019 they decided I was entitled to an extra £120 per month – that still leaves a shortfall of £63.68 per month and over a 12 month period £764.16. That is a huge amount of money to lose and find from nowhere. Especially after the government stated you should not be financially worse off.

11. The DWP decision-maker's response to the claimant's appeal acknowledged her argument that her previous IRESA award "was higher than her universal credit award and the government has said that no-one should be worse off when they claim universal credit". The DWP's response accepted that immediately before claiming UC the claimant's benefit entitlement (IRESA and child tax credit) amounted to £1,106.91 a month. However, her UC entitlement as from the date of claim, as a result of the revised decision of 25 October 2019, was £1,043.22. Accordingly, and even with the addition of the £120 a month SDP transitional payment, the claimant had suffered a shortfall of £63.69 per assessment period, or £764.28 a year. Nonetheless, the DWP's response concluded that the claimant's "entitlement to Universal Credit has been calculated correctly in accordance with the aforementioned regulations." This was a reference to the Universal Credit (Transitional Provisions) Regulations 2014 (SI 2014/1230).

12. The DWP's response to the First-tier Tribunal appeal dealt with the claimant's "worse off" argument as follows:

> … in accordance with the aforementioned legislation, a claim under the *managed migration* process if a qualifying claim and the claimant may be eligible for transitional protection. This includes a transitional element which compares entitlement of existing benefit with that of UC based on the circumstances on the day before any UC award begins, and provides for an amount to be included in the UC award where otherwise this would be less than the existing benefit awards.
>
> Therefore, under managed migration no claimant would be financially worse off when their previous income based ESA, income based JSA or IS claim was migrated over to UC.
>
> However, in this case [the claimant] moved address. Therefore, her claim was not part of the *managed* migration process; it was a naturally migrated over to UC. Consequently, her previous awards of Child Tax Credit and Income Related employment and support allowance were not unfortunately transitionally protected.

13. The appeal first came before the First-tier Tribunal ('the Tribunal') in Norwich on 4 March 2020. On that occasion a District Tribunal Judge adjourned the appeal, ruling that, in the light of the Court of Appeal's decision in *R (on the application of TP) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37, it was in the interests of justice for the DWP to have the opportunity "of filing a further submission dealing with precisely how it is proposed that the discrimination that the Appellant has suffered should be remedied." The Tribunal added further that in the light of *RR v Secretary of State for Work and Pensions* [2019] UKSC 52 it was considering "disregarding the Appellant's application for Universal Credit and directing that her award of legacy benefits should be reinstated with retrospective effect, or in the alternative that her award of Universal Credit is paid at a rate equivalent to that payable in respect of her legacy benefits".

14. On 10 May 2020 the Tribunal received a supplementary written submission from the DWP. However, this submission wholly failed to engage with the issues identified by the Tribunal. It simply asserted that the claimant had provided no new evidence and so flatly denied that there were any grounds to revise the decision under appeal.

15. On 21 October 2010 the matter came back before the Tribunal for a final hearing, this time sitting in Chelmsford but by way of a remote hearing and in front of a different judge. The Tribunal dismissed the appeal, confirming the decision-maker's decision of 25 October 2019 and ruling that the claimant's entitlement to UC had been correctly calculated. The Tribunal's statement of reasons reviewed the history of the claim for UC. It concluded (at paragraph 24) by stating that it "records and recognises that the migration to Universal Credit for [the claimant] has resulted in an overall reduction in her benefit. However, this was necessary and the entitlement to Universal Credit has been properly calculated in accordance with the Regulations." The previous Tribunal's reasons for adjourning were noted, but the final Tribunal reiterated (at paragraph 27) that

"by virtue of the Regulations, the entitlement is properly calculated and the appeal is dismissed accordingly."

16. As I noted in my initial observations on the claimant's appeal:

> … the [final] FTT seems to have taken the approach of metaphorically throwing its hands in the air and saying it's all very difficult and unsatisfactory but there is nothing it can do about it (see statement of reasons at [22]-[27]). It is not immediately obvious that such an approach is consistent with that laid down by the Supreme Court in *RR v Secretary of State for Work and Pensions* [2019] UKSC 52.

17. On 24 February 2021 the District Tribunal Judge who had comprised the earlier adjourning Tribunal granted the claimant permission to appeal to the Upper Tribunal. In a careful and detailed ruling, the District Tribunal Judge concluded it was arguable that the Tribunal had "erred in law in the manner in which it dealt with the issue relating to the discriminatory effect of the failure of the Universal Credit Regulations. The Tribunal may, arguably, have been obliged to apply these Regulations in ways which were not discriminatory thereby allowing the Appellant to claim legacy benefits with retrospective effect."

The proceedings before the Upper Tribunal

18. The claimant provided detailed grounds of appeal with her notice of appeal. The case was then subject to several stays while the *TP* litigation wended its way through the courts. The claimant's appeal finally came on for hearing before the Upper Tribunal on 13 November 2023. The claimant was represented *pro bono* by Mr Paul Skinner of Counsel, instructed by the Free Representation Unit (FRU). I am especially grateful to Mr Skinner and his colleagues at FRU for ensuring that the claimant has received the best quality representation and advocacy. I am also indebted to Mr Jack Anderson of Counsel, instructed by the Government Legal Department, who represented the Secretary of State, for his written and oral submissions.

The relevant legislation

19. The statutory basis for the (in the claimant's case) £120 SDP flat-rate transitional protection per assessment period was regulation 63 of the Universal Credit (Transitional Provisions) Regulations 2014. As inserted with effect from 24 July 2019 by regulation 3(7) of the Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019 (SI 2019/1152), regulation 63 provides as follows:

> **Claimants previously entitled to a severe disability premium**
>
> **63.** Schedule 2 contains provision in respect of certain claimants who have been entitled to a benefit which included a severe disability premium.

20. Schedule 2, as also in force from 24 July 2019, further provided as follows:

> SCHEDULE 2
>
> Claimants previously entitled to a severe disability premium:
>
> transitional payments

Determination by Secretary of State

1. Where it comes to the attention of the Secretary of State that—

(a) an award of universal credit has been made in respect of a claimant who, within the period of one month immediately preceding the first day on which the claimant became entitled to universal credit as a consequence of making a claim, was entitled to an award of income support, income-based jobseeker's allowance or income-related employment and support allowance that included a severe disability premium;

(b) in a case where the award of income support, income-based jobseeker's allowance or income-related employment and support allowance ended during that month, the claimant continued to satisfy the conditions for eligibility for a severe disability premium for the remainder of that month;

(c) the award of universal credit has not since terminated (whether by a claimant ceasing to meet the conditions of entitlement to universal credit or becoming, or ceasing to be, a member of a couple);

(d) the claimant has not (or, in the case of joint claimants, neither of them has) ceased to be entitled to the care component, the daily living component, armed forces independence payment or attendance allowance (all of which have the same meaning as in paragraph 6 of Schedule 4 to the Employment and Support Allowance Regulations 2008); and

(e) no person has become a carer for—

(i) in the case of a single claimant, the claimant, or

(ii) in the case of joint claimants—

(aa) if a severe disability premium was payable at the higher rate, both of them, or

(bb) if a severe disability premium was payable at the lower rate, the claimant who was the qualifying partner,

the Secretary of State must determine an additional amount of universal credit ("the transitional SDP amount") which is to be payable in respect of each assessment period that precedes that determination and then for each subsequent assessment period that begins before the conversion day.

2. The transitional SDP amount, calculated by reference to the date of the determination, is—

(a) in the case of a single claimant—

(i) £120, if the LCWRA element is included in the award, or

(ii) £285, if the LCWRA element is not included in the award;

(b) in the case of joint claimants—

(i) £405, if the higher SDP rate was payable and no person has since become a carer for either of them,

(ii) £120, if paragraph (i) does not apply and the LCWRA element is included in the award in respect of either of them, or

(iii) £285, if paragraph (i) does not apply and the LCWRA element is not included in the award in respect of either of them.

3. The Secretary of State must decide the manner in which the transitional SDP amount is to be paid, which may include payment of a lump sum covering all assessment periods preceding the determination under paragraph 1 and monthly payments thereafter.

4. If the LCWRA element is not included in the award at the time of the determination under paragraph 1, but is included in a later assessment period (and paragraph 2(b)(i) does not apply), the amount for that assessment period, and each subsequent assessment period beginning before the conversion day, is to be £120 (and the Secretary of State must make a further determination).

Conversion to a transitional element

5. In the first assessment period that begins on or after the conversion day, the calculation of the award is to include the amount of the transitional SDP payment as if it were the initial amount of a transitional element calculated under regulation 55(1).

6. In respect of each subsequent assessment period, the award is to be treated, for the purposes of regulation 55(2) (adjustment where other elements increase), regulation 56 (circumstances in which transitional protection ceases) and regulation 57 (application of transitional protection to a subsequent award), as if the transitional SDP payment had been converted into a transitional element.

Capital disregard

7. Any amount paid as a lump sum as a consequence of a determination under this Schedule is to be disregarded in the calculation of capital for 12 months from the date of that payment or, if longer, the remainder of the award.

Interpretation

8. In this Schedule—

"the conversion day" is a day determined by the Secretary of State having regard to the efficient administration of universal credit;

"LCWRA element" has the meaning in the Universal Credit Regulations;

"the lower SDP rate" and "the higher SDP rate" are the rates specified in sub-paragraph (i) and (ii) respectively of paragraph 11(2)(b) of Schedule 4 to the Employment and Support Allowance Regulations 2008 or, as

> the case may be, the corresponding rates of a severe disability premium in relation to income support or income-based jobseeker's allowance;
>
> "the qualifying partner", in relation to a couple in respect of whom the lower SDP rate was payable, is the partner who had no carer or, as the case may be, had not been a patient for a period exceeding 28 days,
>
> and references to a person being a carer for another person are to the person being entitled to, and in receipt of, a carer's allowance or having an award of universal credit which includes the carer element in respect of caring for that other person.

21. This version of Schedule 2 ('the original Schedule 2') is the version that was in force at the material time (namely at the date of the decision-maker's decision that was on appeal to the First-tier Tribunal, being 25 October 2019). It was subsequently replaced by a new version of Schedule 2 with effect from 27 January 2021 (substituted by regulation 2 of the Universal Credit (Transitional Provisions (Claimants previously entitled to a severe disability premium) Amendment Regulations 2021 (SI 2021/4)).

The *TP* litigation

22. The legislative provision for transitional SDP element payments within the UC scheme for claimants who were previously entitled to SDP under the legacy benefits has been subject to repeated challenge in a series of cases which can be compendiously referred to as the *TP* litigation. On 4 July 2022, in the course of making directions for the case management of this appeal, I made the following observations on the *TP* litigation:

> **A review of the case law**
>
> *Introduction*
>
> 6. In this section I summarise my understanding of the relevant case law emanating from the courts. I acknowledge it may or may not be accurate and/or complete. It is designed to help the parties with focussing their further submissions.
>
> *TP No.1 (Lewis J)*
>
> 7. The starting point is probably the decision of Lewis J in *R (TP and AR) v SSWP* [2018] EWHC 1474 (Admin) (*TP No.1*), which was concerned with the UC (Transitional Provisions) Regulations 2014 as they were originally enacted.
>
> 8. TP and AR challenged (on two grounds) the natural migration provisions in regulations 5 and 6 of the 2014 Regulations as discriminating unlawfully against them, contrary to Article 14 of the ECHR read with A1P1. Their first ground of judicial review challenged the non-inclusion of the SDP and EDP elements in the UC scheme. Alternatively, their second ground challenged the absence of any element of transitional protection for the loss of SDP and EDP for claimants who migrated naturally to UC.
>
> 9. Lewis J dismissed the first ground of judicial review, holding (in part) that (a) the differential treatment between severely disabled persons with carers and those without, and (b) any differential treatment arising from

the decision to pay the same level of benefits to disabled persons with different levels of need, was objectively justified.

10. However, Lewis J upheld the second ground of challenge. The High Court held that the decision to move persons previously eligible for SDP and EDP onto UC because they had moved to a different housing authority area, without considering the need for any element of transitional protection, was manifestly without reasonable foundation. Alternatively, Lewis J held that the evidence did not show a fair balance had been struck between the interests of the community and those of the individual. Either way the evidence was insufficient to justify the differential treatment ([85] to [88]). The Judge pointed out that the differential treatment did not arise of itself out of disability. Both of the groups being compared comprised severely disabled persons. The basis for the differential treatment was that the people in one group had moved from one local housing authority area to another and the people in the other group had not. The Judge decided that a severely disabled person in receipt of SDP and EDP who moved to the area of a different housing authority had a "status" for the purposes of Article 14 of the ECHR, rejecting the DWP's arguments to the contrary ([90-91]).

11. Subsequently, in *R (On the Application of TP, AR & SXC) v SSWP* [2019] EWHC 1116 (Admin) (*TP No.2*), Swift J helpfully observed (at [23]) that Lewis J's judgment in *TP No.1* is authority for two propositions. The first (Proposition 1) is that it is not unlawful for the *absolute* value of UC benefits for persons previously entitled to ESA, SDP and EDP to be lower than the value of those legacy benefits. However, the second (Proposition 2) is that trigger events for natural migration are capable of falling foul of article 14 if the basis for the trigger is incapable of appropriate explanation (i.e. justification).

TP No.2 (Swift J)

12. In *TP (No.2)* Swift J was concerned with the UC (Transitional Provisions) Regulations 2014 as amended by the introduction of the regulation 4A 'SDP gateway' and the draft scheme for SDP transitional payments to the SDP natural migrants group.

13. The claimants in *TP No.2* argued there was a difference in treatment between, on the one hand, the SDP natural migrant group (who would receive the fixed-rate, generic transitional payments) and, on the other hand, the regulation 4A group (who would be for the present shielded against natural migration, and would in due course receive transitional protection as managed migrants). Subject to the tapering provision, the latter such transitional protection would ensure no loss of income from benefits, at least in cash terms. The claimants contended this was unlawful treatment contrary to ECHR Article 14 when read together with A1P1.

14. Swift J agreed with the SSWP's submission that no relevant comparison could be made between legacy benefits and UC benefits. On that basis Article 14 said nothing about the amounts that should be paid by

way of transitional provision ([48]-[49]). But the Judge said that that did not assist the SSWP because the claim in *TP No.2* was not directed to the difference in the level of benefits paid to severely disabled persons as between the legacy regimes and UC. Rather, it was only concerned with "one narrow matter", the justification for the different ways in which the SSWP had chosen to provide transitional protection for the two groups, namely the SDP natural migrants group and the Regulation 4A group ([49]).

15. In considering the SDP transitional payment scheme in the draft 2019 Regulations, Swift J appeared to hold that the provisions in those rules were justified (at [58]). Subsequently Holgate J in *TP No. 3* put it as follows (at [134]):

> "… Swift J was there looking at the SDP transitional payment scheme in the draft 2019 Regulations. He compared, for the pre-gateway period, persons who had experienced a triggering event by moving home to the area of a different housing authority (who would receive the proposed fixed-rate SDP transitional payments) to those who moved home within the same authority's area (who would continue to receive legacy benefits including SDP and EDP). The claim of unlawful discrimination contrary to Article 14 was based upon the use of fixed-rate transitional payments (see also the Court of Appeal at [68] and [71]-[72]). This was rejected by Swift J. The judge said that although the *value* of those payments for SDP natural migrants was less than the shortfall between legacy benefits and UC benefits, that difference in treatment compared to those who moved home within the same local authority area and continued to receive legacy benefits, was sufficiently justified. However, Swift J did not address the EDP issues raised by both sides in this case. The justification he accepted for the difference in treatment complained of related to (i) the legitimate aim of controlling public expenditure and (ii) the overall benefits of bright line provisions for public administration. Accordingly, that overcame the illegality identified by Lewis J, namely the failure to consider any element of transitional relief for the SDP natural migrants group, assuming that no other change in the law had been made."

16. There was, however, another change in the law, namely the introduction of the SDP gateway and the regulation 4A group. As Holgate J observed:

> "137. Swift J concluded that, although the SSWP only had to meet the low standard set by the manifestly without reasonable foundation test, he had not been given any reason to explain the difference in treatment of the SDP natural migrants group and the Regulation 4A group ([64]). The judge added that he was not satisfied that reliance upon fixed-rate generic payments to reduce the administrative burdens of calculating shortfall payments involved a fair balance between the interests of the SDP natural migrants group and the general public interest. Once again, the court was impressed by the

> point that the trigger events resulting in natural migration in the case of the claimant's TP and AR did not correlate to any material change in need, in particular as seriously disabled persons ([65]).”

TP (No.1) and TP (No.2) in the Court of Appeal

17. The Secretary of State's appeals against the judgments of Lewis J and Swift J were dismissed by the Court of Appeal in *R (On the Application of TP, AR & SXC) v SSWP* [2022] EWCA Civ 37. The following points seem to be relevant from the Court's judgment.

18. First, the Court of Appeal held that there had been a differential treatment in *TP (No.1)* in terms of transitional protection between SDP natural migrants and those who remained on legacy benefits, depending on whether a person moved home to a different housing authority's area or stayed within the same area ([87]).

19. Second, the Court of Appeal rejected the DWP's argument that this difference in *TP (No.1)* was not on the grounds of “other status”. The relevant status was the fact of moving home across a local authority boundary (by analogy with *Carson v United Kingdom* (2010) 51 EHRR 13). Place of residence constitutes an aspect of personal status for the purposes of Article 14. Alternatively, the status was that of a severely disabled person who moves across a local authority boundary ([92-93], [96] and [112-113]). The Court further held that a person moving home across a local authority boundary was a physical fact which existed in the real world and did not arise from the terms of the legislation under challenge ([104]-[107]).

20. Third, and as regards *TP (No.2)*, the Court of Appeal ruled that Swift J had been entitled to compare the SDP natural migrants group with the regulation 4A group ([147]-[153]).

21. Fourth, the Court of Appeal rejected the DWP's challenge to Swift J's approach to the issue of justification. The Court agreed that it had been open to the SSWP to decide to provide a fixed-rate transitional payment because of the administrative difficulties of ascertaining shortfalls according to the varying circumstances of individual cases, and to do so retrospectively ([169]). In addition, on the issue of cost, the Court of Appeal applied the principle that savings in public expenditure can be a legitimate aim for the purposes of Article 14. However, as Holgate J explained in *TP (No.3)* at [144]:

> “But that cannot constitute a justification for discriminatory treatment without more, because justification depends not only upon whether the measure has a legitimate aim but also on there being a reasonable relationship of proportionality between the means employed and that aim ([171]-[173] citing Lord Reed JSC in *R (JS) v Secretary of State for Work and Pensions* [2015] PTSR 471 at [63]-[64]). The Court pointed out that the transitional payment proposed in TP 2 of £80 a month was about £100 less than the estimated loss of £180 a month, of which about £70 a month was attributable to the removal of EDP. … The Court concluded that the sole reason given

> in the evidence on behalf of the SSWP for not addressing the loss of the EDP element was the increased cost to public finances without more ([174] and [188]).”

22. The Court of Appeal went on to hold that, although the triggering events were appropriate in principle to determine when a person should naturally migrate from legacy benefits to UC, Swift J had been entitled to conclude that the triggers did not in themselves amount to sufficient justification for the difference in treatment between the SDP natural migrants group and the regulation 4A group ([194]).

TP (No.3) (Holgate J)

23. For present purposes – putting to one side the separate issue in the case about child tax credit – the sole ground of challenge in *TP (No.3)* was that regulation 63 and Schedule 2 of the UC (Transitional Provisions) Regulations 2014 as originally enacted discriminated against SDP natural migrants by failing to provide transitional relief for the loss of EDP. Holgate J clarified the issues in dispute (and not in issue) as follows at [74]:

> “Both claims are essentially concerned with alleged discrimination against members of the SDP natural migrants group. They are not concerned with any disadvantages flowing from natural migration to UC more generally. The challenges do not relate to the decisions made not to replicate EDP and the full amount of the CTC element for a disabled child in the UC scheme. Instead, they relate solely to the lack of transitional protection in cases of natural migration to UC against the cliff-edge effect of suddenly experiencing the loss of the EDP element and, the reduced amount of the UC’s lower rate for a disabled child compared with the CTC scheme. In that respect, the claimants do not argue for a complete indemnity against these losses. They accept that a fixed payment approach could be lawful as a way of overcoming the unlawful discrimination they allege. There is also no legal criticism of the rules for tapering or erosion of transitional elements of a UC award.”

24. In keeping with established authority, Holgate J identified the four questions to be addressed in determining whether a measure is compatible with Article 14 (at [101]):

> (1) Do the circumstances fall within the ambit of one or more Convention rights?
>
> (2) Have the claimants been treated less favourably than a class of persons whose situation is “relevantly similar” or who are in an “analogous situation”?
>
> (3) Is that difference in treatment on the ground of one of the characteristics listed in Article 14 or an “other status”?
>
> (4) Is there an objective and reasonable justification for that difference in treatment?

25. As to (1), this was not in dispute in *TP (No.3)* ([147]).

26. As to (2), Holgate J concluded as follows ([151]):

> "… the differential treatment identified by Swift J in TP 2 (see e.g. [26]-[29]) between fixed-rate transitional payments and the continuation of legacy benefits persists. TP and AR, and those in a like position are less favourably treated by reason of being a natural migrant as compared with other persons in a "relevantly similar" or "analogous situation". As Swift J pointed out, there is no material difference between the two groups being compared in terms of the disability needs of the SDP recipients or the nature of the relevant trigger events ([14], [51] and [55]). I entirely agree. The changes in the legislation will have produced changes in the composition of the comparator groups over time, but have not changed the essential nature of the differential treatment itself. In any event, the differential treatment about which the original members of the SDP natural migrants group complain (taking into account the retrospective entitlement to SDP transitional payments), occurred once and for all before 16 January 2019, and has continued since then.

27. As to (3), Holgate J ruled that both claimants satisfied the requirement of "status" for the purposes of Article 14: "The point remains that those SDP recipients who, after 26 January 2021, move home to the area of a different housing authority naturally migrate to UC and experience a sudden loss of EDP without any transitional protection, whereas those who move home within the area of the same authority continue to receive legacy benefits" ([155]).

28. As to (4), following a detailed analysis of the various justification and proportionality arguments ([158]-[194]), Holgate J rejected the Secretary of State's case, concluding as follows:

> "195. Whether the approach to justification is expressed as a low intensity of review, or a wide margin of appreciation based upon whether the decision in question was manifestly without reasonable foundation, I am not satisfied that the SSWP has justified the differential treatment identified under Ground 1 for the reasons set out above.
>
> 196. Approaching the matter in terms of the *Bank Mellat* tests, it is important to have in mind the narrow nature of the differential treatment in issue (just as in TP 2), albeit of very great importance to the claimants and others in the like position. I am not satisfied on the material before the Court that the broad aims of promoting phased transition, curtailing public expenditure or administrative efficiency required the denial of transitional relief against the loss of EDP for SDP natural migrants. Quite apart from that, I reach the firm conclusion that a fair balance has not been struck between the severity of the effects of the measure under challenge upon members of the SDP natural migrants group and the contribution that that measure makes to the achievement of the defendant's aims, *a fortiori* where there is no connection between the triggering event, the

move to a home in a different local authority area, and any rational assessment of the disability needs of a severely disabled claimant."

29. The Secretary of State's representative states that an application for permission to appeal against the judgment of Holgate J in *TP (No.3)* to the Court of Appeal was made (presumably initially to the High Court) on 11 February 2022 (p.144). However, at least so far as I can tell, the Secretary of State does not appear to have pursued an appeal against Holgate J's judgment – at least, there is no reference to the case on the Court of Appeal's online Case Tracker for Civil Appeals (the application listed in the Case Tracker for *R (on the application of T and Others) v SSWP* relates to a different case involving the non-payment of the COVID-19 uplift to those claimants in receipt of legacy benefits).

The effect of all this on the Appellant's appeal

30. In the discussion above I have barely referred to the Court of Appeal's decision in in *R (TD and Others) v Secretary of State for Work and Pensions (SSWP)* [2020] EWCA Civ 618. This is because it does not seem to me, as presently advised, to be directly relevant.

31. However, the litigation in the TP series of cases appears to be highly relevant.

32. *TP (No.1)* is instructive in terms of Lewis J's Propositions 1 and 2. In other words, it is not in principle unlawful for the *absolute* value of UC benefits for persons previously entitled to ESA, SDP and EDP to be lower than the value of those legacy benefits (Proposition 1) but trigger events for natural migration are capable of falling foul of article 14 if the basis for the trigger is incapable of appropriate explanation (Proposition 2).

33. *TP (No.2)* is instructive in that the SSWP was unable to establish justification for the different ways in which she had chosen to provide transitional protection for the two groups, namely the SDP natural migrants group and the Regulation 4A group.

34. *TP (No.3)* is instructive in that the SSWP was unable to establish justification for the lack of transitional protection in cases of natural migration to UC against the cliff-edge effect of suddenly experiencing the loss of the EDP element.

35. On the face of it at least, and subject to more detailed argument, the Appellant's case would appear to be materially on all fours with *TP (No.3)*, as she incurred a financial loss as a result of losing both the SDP and the EDP, payable with her ESA award, in turn as a result of being effectively compelled to claim UC on moving to a different part of the country.

23. Although I was referred to several other passages in the various court judgments in the *TP* litigation, neither counsel took issue with the preceding summary of the 'highlights' of that line of cases. Mr Skinner positively adopted that analysis. Furthermore, and in particular, Mr Anderson, on behalf of the Secretary of State, accepted that the claimant's case in the present appeal was factually on all fours with the situation of the claimants in *TP (No.3)*.

24. Accordingly, the outcome of the TP trilogy of cases may now be usefully summarized as follows.

25. In *TP (No.1)* the High Court (Lewis J) declared that there was unlawful discrimination arising as a consequence of a difference in treatment between persons in receipt of disability premiums who transferred to UC on moving to a different local housing authority area, as compared to those who remained within the same area and were not required to claim UC.

26. In *TP (No.2)* the High Court (Swift J) held that draft regulations – taken together with regulation 4A of the Universal Credit (Transitional Provisions) Regulations 2014 – were unlawfully discriminatory as between persons in receipt of the SDP who were prevented from moving onto UC by the regulation 4A gateway (who would in due course receive transitional protection), and persons who had naturally migrated and received transitional SDP element payments in the sum of £80 per month.

27. In *TP (No.3)* the High Court (Holgate J) concluded that the transitional SDP amounts remained discriminatory because they compensated for the loss of the SDP but not for the loss of the EDP (in respect of those persons in receipt of SDP who received both). The High Court accordingly made a declaration in *TP (No.3)* in the following terms:

> "In relation to ground 1 in both claims, regulation 63 and Schedule 2 of the Universal Credit (Transitional Provisions) Regulations 2014 ("the 2014 Regulations"), as originally enacted, unlawfully discriminate against the Claimants contrary to Article 14 ECHR read with A1P1 by failing to provide any transitional relief in relation to the loss of Enhanced Disability Premium ("EDP") and thereby treating the Claimants less favourably, without objective and reasonable justification, than (i) legacy benefits claimants entitled to the Severe Disability Premium ("SDP") who have not experienced a "trigger event" compelling them to claim Universal Credit and (ii) legacy benefit claimants entitled to SDP who experienced a "trigger event" on or after 16 January 2019 and before 27 January 2021 (i.e. during the currency of the SDP Gateway)."

28. It is, however, also only right to mention two further developments in the *TP* saga since the (extensive) summary at paragraph 22 above was drafted.

29. The first is that on 12 January 2023 Nicola Davies LJ, in a robust ruling, refused the Secretary of State's application for permission to appeal to the Court of Appeal in *TP (No.3)* (CA-2022-000398). We must therefore accept the judgment in *TP (No.3)* as the final word on what it decides.

30. The second development is that on 22 November 2023 – and so just over a week after the Upper Tribunal oral hearing in the instant case – the Secretary of State laid before Parliament the Universal Credit (Transitional Provisions) (Amendment) Regulations 2023 (SI 2023/1238), but which do not come into force until 14 February 2024. The purpose of the new statutory instrument, according to the accompanying Explanatory Memorandum, is as follows:

> to provide additional amounts of transitional protection to eligible claimants who move from a legacy benefit to Universal Credit (UC) and are entitled to the transitional severe disability premium (SDP) element (tSDPe). …
>
> The Regulations make provision for new claimants, who commence their Universal Credit award on or after the date the regulations come into force, to receive the additional amount with their Universal Credit award.

31. It is only right to record, if only by way of context, that the Department's approach has already been the subject of some adverse comment in Parliament. The Fifth Report of the House of Lords' Secondary Legislation Scrutiny Committee, published on 7 December 2023 (and so again, obviously, after the Upper Tribunal oral hearing) set out the Committee's concerns as follows (bold font as in the original, but with footnotes omitted):

> **The latest judgment**
>
> 26. The latest judgment, Queen (on the application of) TP and AR, concluded that there was an unjustified difference in treatment because of the SDP Gateway, resulting in a significant reduction in the overall level of benefit, referred to as a "cliff-edge" effect, payable to those migrating naturally to Universal Credit due to a change in their circumstances.
>
> 27. In supplementary material, DWP clarified that the two groups of claimants are:
>
> > "1) claimants who were prevented from making a claim to Universal Credit when the Severe Disability Premium (SDP) Gateway was in force between 16 Jan 2019 to 26 Jan 2021 who therefore had their benefit entitlement fully protected, and who would only be moved to Universal Credit by the DWP's managed migration process; and
> >
> > 2) those claimants who moved to Universal Credit either before the SDP Gateway was introduced or after the provision was revoked.
> >
> > This second group of claimants receive a lower Universal Credit benefit entitlement compared to those in the first group who were protected by the Gateway."
>
> 28. The changes made by this instrument provide that all eligible claimants who move from a legacy benefit to Universal Credit on or after 14 February 2024 will be entitled to receive the 'transitional severe disability premium element' (tSDPe) with their Universal Credit award.
>
> **Unexplained delays**
>
> 29. We asked why, if the judgment was handed down in January 2022, these Regulations were not coming into effect until February 2024. In supplementary information, DWP explained:
>
> > "The Secretary of State for Work and Pensions (SSWP) sought permission to appeal the original judgment in February 2022, and the

> decision from the Court of Appeal refusing permission was not received until January 2023.
>
> The original High Court judgment did not specify the action the Government should take, however in response the Government decided to amend the Universal Credit (Transitional Provisions) Regulations 2014.
>
> Work commenced in February 2023 to obtain SSWPs approval for introducing new regulations, followed by HMTs funding approval. The UC service delivery programme were commissioned to design, build, and test the system automation required to deliver the changes being introduced by the regulations.
>
> Due to operational constraints the earliest date from which the regulations can come into force will be 14 February 2024."

30. Given the series of judgments against DWP on this issue, we find it surprising that DWP did not start work on a remedy at an earlier stage. **We also note that, "due to operational constraints", it will be just over two years between the latest judgment finding the provision discriminatory and DWP taking action to prevent new claimants being subject to the discrimination identified.**

Redress?

31. This instrument ensures that, from 14 February 2024, new claimants formerly entitled to SDP will be identified and paid the additional tSDPe sum automatically. DWP estimates around 600 claims per month will be impacted initially.

32. We also enquired whether the claimants who transitioned earlier will get backdated benefits. DWP told us that

> "A financial settlement was agreed for the three claimants who brought the legal challenge. They have received arrears payments covering the period up to the date they moved to Universal Credit and continue to receive monthly payments covering the shortfall between Universal Credit and the amount they were receiving before their move […] SSWP is currently developing an approach to delivering this additional support to eligible claimants."

33. The Explanatory Memorandum (EM) gave no indication of the number of claimants affected by the judgment. In supplementary material DWP explained:

> "[I]n May 2023 there were around 44,000 claimants who received a transitional SDP element as part of their Universal Credit award and these (and others newly receiving the SDP element between then and 14 February 2024) will be considered for additional transitional

> protection, as outlined in the regulations, at a future date to be determined."
>
> 34. We also questioned why the EM states that there is no significant impact on the public sector, reasoning that acting on this judgment would require unplanned extra DWP expenditure and additional staff resource in reviewing the relevant cases, as well as substantial sums in back pay for those identified as unfairly discriminated against by the judgment. DWP responded that the current Regulations will only apply to eligible new claimants from 14 February 2024, when the process to identify and make the transitional protection payments will be automated. The assessment of the additional costs to identify and compensate other claimants will form part of the approach that DWP is currently developing.
>
> 35. **The House may wish to press the Minister on how and when DWP is going to remedy the position of this large group of severely disabled claimants.** In particular, it is not simply a matter of the back payments owed them, but also that further delay by DWP prolongs the underpayments to these claimants that the judgment identified as discriminatory.
>
> **Conclusion**
>
> 36. This instrument provides another example of the 'too narrow' approach to EMs to which we have drawn attention in recent reports. The EM explains accurately and in some detail what the legislation in this instrument does but fails to explain the policy fully or the numbers involved. **When the policy involves correcting the payment of benefits to individuals with severe disabilities, however, the House will always wish to have the full picture.**

32. I include this extract only because this Parliamentary report gives some (quite possibly contested) indication of the wider context of the present appeal. In fairness it will also need to be read in the light of the Government's formal response to the Committee's report, which is doubtless currently a 'work in progress'.

An outline of the parties' submissions

33. It may be helpful to start with the common ground. It was accepted on both sides that the effect of the High Court's declaration in *TP (No.3)* was that regulation 63 and Schedule 2 were unlawfully discriminatory, contrary to Article 14 ECHR read with A1P1, by failing to provide any transitional relief for the loss of the EDP on the claimants' natural migration from legacy benefits to UC. It was also common ground that the material facts of the claimant's case in this appeal were on all fours with those of the claimants in *TP (No.3)*.

34. Mr Skinner, for the claimant, then advanced his submissions on two fronts.

35. Mr Skinner's primary submission was that disapplication was possible. He developed his argument in written submissions as follows:

> 18. In this case, as in the *TP* cases, the unlawful discrimination is between those who were in receipt of SDP and EDP and are part of managed

> migration and those who were in receipt of SDP and EDP who naturally migrate. If there is a part of the 2014 Regulations that can be disapplied so as to remove the difference in treatment between these two groups then it is "possible" to remedy the discrimination in the way required by *RR*.
>
> 19. In relation to managed migration, the transitional protections afforded by the 2014 Regulations apply to a "qualifying claim". A qualifying claim is defined in Reg. 48 as "a claim for universal credit by a single claimant who is a notified person or by joint claimants, both of whom are notified persons, where the claim is made on or before the final deadline". A "notified person" is a person to whom the Secretary of State has issued a notice inter alia telling them that their legacy benefits are to terminate and that they will need to make a claim for universal credit (see Reg. 44(1) and (6)).
>
> 20. Disapplication of the requirement in the definition of a qualifying claim of receipt of a migration notice (i.e. the words "by a single claimant who is a notified 6 person or by joint claimants, both of whom are notified persons, where the claim is made on or before the final deadline") in Regulation 48 has the effect of bringing someone unlawfully discriminated against within the scope of the transitional provisions applied to those in the managed migration group: by virtue simply of their having made a claim for UC, such a person will have made a "qualifying claim", and are accordingly afforded the benefit of the transitional protections afforded by the 2014 Regulations to those in managed migration.
>
> 21. In the circumstances, disapplication is possible so as to remove the discrimination which the Secretary of State accepts the Appellant has suffered and the decision maker was required, as a matter of law, to effect that disapplication. The FTT accordingly erred in law in upholding the Secretary of State's decision which did not do so.

36. Mr Anderson's response to the claimant's primary submission was to point out that it was not possible to disapply regulation 63 and Schedule 2 without removing the legislative basis for transitional SDP payments entirely. Mr Skinner, he submitted, was now inviting the Upper Tribunal to disapply different provisions in the Universal Credit (Transitional Provisions) Regulations 2014. However, "that would not address the provisions found to be at fault; would not be possible without undermining the scheme; and would lead to disapplication of legislation for which the Courts have upheld the rationale" (Respondent's skeleton argument at §2).

37. Mr Skinner's secondary submission, if I were not with him on his primary submission, was to invite the Upper Tribunal nonetheless to allow the appeal and to remake the underlying appeal to the First-tier Tribunal by allowing it and remitting the matter to the Secretary of State to make a lawful decision.

38. Mr Anderson's response to the claimant's secondary submission was to argue that disapplication of the offending secondary legislation was not possible, applying the principles as laid down by the Supreme Court in *RR*. That being so, the Upper Tribunal should continue to apply the regulations as they were made. The question of what steps were appropriate by way of further legislation

to remedy the breach of Article 14 identified by the High Court in *TP (No.3)* was a task for the Secretary of State and not for the Upper Tribunal.

Discussion and analysis

Introduction – the basic principle

39. The starting point is the principle that the First-tier Tribunal (and indeed the Upper Tribunal) is not, and should not be, in the business of applying unlawful regulations. This has been described by Upper Tribunal Judge Ward as "the basic principle", namely "that a person's entitlement falls to be determined in accordance with the (lawful) legislation in force and that secondary legislation which is vitiated by a public law flaw must be disapplied" (*TS (by TS) v Secretary of State for Work and Pensions (DLA)* [2020] UKUT 284 (AAC); [2021] AACR 4 at paragraph 21). This basic principle applies – unless the Tribunal is prohibited from acting by statute – regardless of the species of public law error that infects the regulations in question, e.g. whether they are *ultra vires* or irrational, or because they breach Convention rights or conflict with rights conferred by primary legislation.

40. Furthermore, as Upper Tribunal Judge Wright observed in *JN v Secretary of State for Work and Pensions (UC)* [2023] UKUT 49 (AAC); [2023] AACR 7:

> 22. Section 11 of the Tribunals, Courts and Enforcement Act 2007 confers the right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the First-tier Tribunal". Section 12 of the same Act deals with the Upper Tribunal's powers of remedy on such an appeal. These arise, per section 12(1), "if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law".
>
> 23. It has long been settled that "an error on a point of law" includes where the decision made by the First-tier Tribunal involved the application of legislation which is *ultra vires* (i.e. outwith the regulation-making powers provided for in the parent Act of Parliament). In *Chief Adjudication Officer v Foster* [1993] A.C. 754 (*R(IS) 22/93*), the House of Lords confirmed that what is now the Upper Tribunal's 'error of law' jurisdiction includes irrational regulations or regulations which are irrational in their effect. This is a species of illegality or unlawfulness in terms of the Secretary of State having acted irrationally in the exercise of his regulation making powers, as Lord Justice Underhill stated in paragraph [115] of *Johnson* itself.

41. Therefore, as Mr Skinner submitted, tribunals have the power to determine whether regulations are vitiated by public law error. However, as he also argued, there was no need for a tribunal to reach its own independent conclusion on the issue, given the High Court has provided a 'short-cut' by making a declaration which it is agreed applies to the claimant's circumstances. In that context I gratefully adopt the key points identified by Upper Tribunal Judge Wright in *JN* following his extensive review of the relevant case law:

> 33. The following points may be emphasised from the decisions in *NCCL* and *Craig* and may be applied as such to the declaration in *Johnson*. First, the declaration is a binding statement by the court pronouncing upon the

> existence of a legal state of affairs, which in *Johnson* was a binding statement that the earned income calculation method in the UC Regs is irrational and unlawful. Second, the Secretary of State was required to act in conformity with that declaration. Third, such compliance is one of the core principles of the rule of law: see further para. [45] of *Majera*. Fourth, in these circumstances the lack of any coercive effect in the declaration is immaterial.

42. The question then is the appropriate remedy in a 'lookalike' case such as the claimant's so as to address the unlawfulness identified by the High Court in *TP (No.3)*.

The Appellant's primary submission: disapplication is possible

43. Starting with Mr Skinner's primary submission, which advocates disapplication, there was agreement between counsel that the relevant principles were those set out by the Supreme Court in *RR v Secretary of State for Work and Pensions* [2019] UKSC 52. That appeal concerned the application of the so-called 'bedroom tax' in regulation B13 of the Housing Benefit Regulations 2006 (SI 2006/213) against the background of previous cases in which declarations had been made that certain claimants had suffered unlawful discrimination in various circumstances contrary to Article 14 ECHR.

44. Lady Hale's judgment in *RR*, with which all the other members of the Supreme Court agreed, referred to the Court's earlier decision in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 in the following terms (at [18]):

> The regulations governing entitlement to disability living allowance ("DLA") suspended the entitlement of a child under 16 after the first 84 days of free in-patient treatment in an NHS hospital. This Court held that, in the circumstances of that case, to suspend entitlement was a violation of the child's Convention rights under article 14 read with article 1 of the First Protocol. The Secretary of State was not obliged by any provision of primary legislation to suspend payment; thus he had acted unlawfully under section 6(1) of the HRA in deciding to do so. The FTT should have allowed the child's appeal against that decision and substituted a decision that he was entitled to continued payment of DLA from the date when it was suspended until the date when it was reinstated. This Court allowed the child's appeal and made the order which the FTT should have made.

45. Lady Hale then discussed other analogous case law:

> 21. The *Mathieson* approach had previously been applied in a number of other benefit cases. In *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303; [2006] 1 WLR 3202, the regulations governing entitlement to a maternity grant were held incompatible with the Convention rights of a woman who had obtained a residence order giving her parental responsibility for her sister's baby son, because they treated the holder of a residence order less favourably that the holder of an adoption order. The remedy was not to construe the regulations in her favour but to make a declaration that she was entitled to the maternity grant. In *Burnip v Birmingham City Council* [2012] EWCA Civ 629; [2013] PTSR 117, mentioned earlier, the Court of Appeal remitted each case

where a violation had been found to the local authority for the decision to be remade in accordance with the Court of Appeal's judgment. Each claimant was entitled to such further sum as was necessary to comply with the judgment and article 14. As Leggatt LJ explained in *Carmichael (CA)*, at para 94, "Thus, the Court of Appeal treated the Housing Benefit Regulations as having no effect in the three individual cases before them insofar as applying the Regulations in calculating the claimants' entitlement to housing benefit violated their Convention rights by treating them as under-occupying their accommodation."

22. A further example of the application of the same approach, albeit in a rather different context, is the decision of the House of Lords in *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] AC 173. Article 14 of the Adoption (Northern Ireland) Order 1987 (SI 1987/2203) provided that an adoption order could only be made in favour of more than one person if they were married to one another. The House of Lords held that this discrimination between married and unmarried couples was irrational and in breach of article 14 read with article 8 of the Convention. The remedy was a declaration that this particular couple were entitled to apply to adopt the child. Had the Order been primary legislation, the courts would have been bound to give effect to it: the most they would have done was to make a declaration of incompatibility under section 4 of the HRA. But, at para 116, it was explained that:

> "The courts are free simply to disregard subordinate legislation which cannot be interpreted or given effect in a way which is compatible with the Convention rights. Indeed, in my view, this cannot be a matter of discretion. Section 6(1) requires the court to act compatibly with the Convention rights if it is free to do so."

23. A more recent example of the same approach is *JT v First-tier Tribunal* [2018] EWCA Civ 1735; [2019] 1 WLR 1313. This concerned a rule in the criminal injuries compensation scheme which barred victims who had suffered injury before 1979 from making a claim if at the time of the injury they were living under the same roof as the perpetrator. The Court of Appeal held that this was incompatible with article 14 read with article 1 of the First Protocol and granted a declaration that the claimant was not prevented by the rule from being paid an award of compensation under the scheme. As Leggatt LJ explained, at para 122:

> "Where, as here, a provision of subordinate legislation cannot be given effect in a way which is compatible with a Convention right and there is no primary legislation which prevents removal of the incompatibility, the court's duty under section 6(1) is to treat the provision as having no effect, as to give effect to it would be unlawful."

46. Having reviewed the authorities and the parties' respective submissions, Lady Hale concluded (at [27]) that "there is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate

legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear." Lady Hale continued as follows:

> 28. The HRA draws a clear and careful distinction between primary and subordinate legislation. This is shown, not only by the provisions of section 6(1) and 6(2) which have already been referred to, but also by the provisions of section 3(2). This provides that the interpretative obligation in section 3(1):
>
> > "(a) applies to primary and subordinate legislation whenever enacted;
> >
> > (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
> >
> > (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents the removal of the incompatibility."
>
> Once again, a clear distinction is drawn between primary and subordinate legislation.
>
> 29. The obligation in section 6(1), not to act in a way which is incompatible with a Convention right, is subject to the exception in section 6(2). But this only applies to acts which are required by primary legislation. If it had been intended to disapply the obligation in section 6(1) to acts which are required by subordinate legislation, the HRA would have said so. Again, under section 3(2), primary legislation which cannot be read or given effect compatibly with the Convention rights must still be given effect, as must subordinate legislation if primary legislation prevents removal of the incompatibility. If it had been intended that the section would not affect the validity, continuing operation or enforcement of incurably incompatible subordinate legislation, where there was no primary legislation preventing removal of the incompatibility, the HRA would have said so.
>
> 30. Contrary to the Secretary of State's argument, *Mathieson* was not a "one off". As shown by the authorities listed in paras 21 to 23 above, the courts have consistently held that, where it is possible to do so, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded. There may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision. But that was not the case in *Francis*, where the maternity grant could be paid to the holder of a residence order who qualified for it in all other respects; nor was it the case in *In re G*, where the unmarried couple could be allowed to apply to adopt (in reaching my Opinion, I satisfied myself that this would not cause problems elsewhere in the statutory scheme); nor was it the case in *Burnip* and *Gorry*, where housing benefit could simply be calculated without making the deduction for under-occupation; nor was it the case in *Mathieson*, where DLA could simply continue to be paid during the whole period of hospitalisation; nor was it the case in *JT*, where criminal injuries compensation could be paid without regard to the "same roof" rule;

> and nor is it the case here, where the situation is on all fours with *Burnip* and *Gorry*. There is no legislative choice to be exercised. As Dan Squires QC, for the Equality and Human Rights Commission, put it, where discrimination has been found, a legislator may choose between levelling up and levelling down, but a decision-maker can only level up: if claimant A is entitled to housing benefit of £X and claimant B is only entitled to housing benefit of £X-Y, and the difference in treatment is unjustifiably discriminatory, the decision-maker must find that claimant B is also entitled to benefit of £X.

47. It is against those statements of principle that Mr Skinner's proposed disapplication must be considered. Mr Skinner submitted that the solution was to disapply a (substantial) part of regulation 48 of the Universal Credit (Transitional Provisions) Regulations 2014. Regulation 48, which is headed 'Meaning of "qualifying claim"', defines that term as follows:

> **48.** A "qualifying claim" is a claim for universal credit by a single claimant who is a notified person or by joint claimants, both of whom are notified persons, where the claim is made on or before the final deadline (see regulation 46(4)).

48. Mr Skinner's submission is that it is possible to remedy the discrimination suffered by the claimant in this case by disapplying the requirement in the definition of a "qualifying claim" that the person concerned be in receipt of a migration notice. In other words, the disapplication would have the effect of reading regulation 48 as follows:

> **48.** A "qualifying claim" is a claim for universal credit ~~by a single claimant who is a notified person or by joint claimants, both of whom are notified persons, where the claim is made on or before the final deadline (see regulation 46(4))~~.

49. Reading regulation 48 in this way. Mr Skinner contended, meant that a claimant who had been subject to natural migration and had been unlawfully discriminated against would be brought within the ambit of the transitional protection accorded to claimants in the managed migration group. Accordingly, he argued, disapplication as per *RR* was possible so as to remove the discrimination highlighted by *TP (No.3)*.

50. However, Mr Skinner's primary submission, while ingenious, is not persuasive. Mr Anderson advances several arguments to the contrary, two of which are especially compelling.

51. The Respondent's first counter-argument is that there is a mismatch between the identified wrong and the remedy sought. Thus, Mr Anderson submitted, the proposed disapplication must relate to "a provision of subordinate legislation <u>which results</u> in a breach of a Convention right" (see *RR* at [30], emphasis added). In all the various cases discussed in *RR* there was a direct nexus or linkage between the regulation in breach and the relief sought. But in the present case such discriminatory provision is to be found in regulation 63 and Schedule 2, which Mr Skinner's blue-pencil leaves untouched. Rather, his proposed disapplication concerns regulation 48, but that qualifying criterion for transitional protection has not been adjudged to involve a breach of a

Convention right at any point in the *TP* litigation. Put simply, regulation 48 is not "a provision of subordinate legislation which results in a breach of a Convention right".

52. In contrast, as Upper Tribunal Judge Wright observed in *GH (deceased) v Secretary of State for Work and Pensions (PIP)* [2023] UKUT 104 (AAC) at paragraph 19, "It was the regulation in issue in *RR*, regulation B13, that itself mandated the (discriminatory) deduction to the claimant's housing benefit. The effective remedy in *RR* was therefore to ignore or disapply regulation B13, because to apply it would be unlawful under the Human Rights Act 1998." Again, there is nothing in the *TP* litigation to suggest that applying regulation 48 would be unlawful under the HRA 1998. Thus, Mr Anderson submitted, there was nothing in *RR* which gave a licence to rove far and wide across the relevant regulations to seek a remedy based on some other aspect of the UC scheme which had not itself been found to be in breach of the claimant's Convention rights.

53. The Respondent's second counter-argument is that the proposed disapplication is not in terms "possible". Lady Hale in *RR* acknowledged with regard to disapplication that "There may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision." As Mr Anderson submitted, gutting the substance of the definition of a "qualifying claim" in the manner proposed would undermine the whole statutory scheme. In particular, it would collapse the distinction between natural migration and managed migration, a distinction which the courts have upheld in the *TP* litigation. The issue as to whether disapplication is "possible" is not simply a question of linguistics or semantics. Mr Skinner contended that the art of the possible does not include taking administrative difficulty into account as a relevant consideration. However, gutting regulation 48 of its intended substantive meaning would involve a re-engineering of the whole process by which cases are transferred from legacy benefits to UC.

54. Thus, any proposed deletion or read-in must be considered in the context of whether the effects would be "inapt" or "substantially incoherent" (*GH (deceased) v Secretary of State for Work and Pensions (PIP)* at paragraphs 22 and 23). Collapsing the distinction between natural migration and managed migration would be to stretch the art of the possible beyond breaking point, and would involve social engineering on a massive scale. Such decisions are for Parliament and not judges. This reflected by the fact that in the *TP* litigation the courts have recognised there are sound administrative reasons for transitional payments in the context of natural migration to take the form of fixed rate payments, whereas transitional protection payments in cases of managed migration can be more closely calibrated to an individual claimant's own circumstances.

55. These two counter-arguments are sufficient to dispose of the claimant's primary submission on the question of the appropriate remedy. For the record, however, I also accept Mr Anderson's submission that the claimant's proposed solution would result in an element of double recovery. This is because the effect of Mr Skinner's approach would be that the claimants in question would become entitled both to the transitional protection for managed migration cases and the

transitional SDP element under the original Schedule 2, there being no bar on double recovery (in contrast to the new Schedule 2, paragraph 7).

The Appellant's secondary submission: the appeal should be allowed in any event

56. Mr Skinner's secondary submission represented his fallback position in the event it was found that it was not possible to remedy the unlawfulness in the regulations by the process of disapplication. In that scenario, and bearing in mind the basic principle identified by Upper Tribunal Judge Ward in *TS*, he submitted that the appropriate remedy (as adopted in *JN*) was for the Upper Tribunal to allow the claimant's appeal, to set aside the First-tier Tribunal's decision under challenge and for that decision to be remitted to the Secretary of State with a direction to re-make the set aside decision on a lawful basis.

57. Mr Anderson's response to the alternative second limb of the claimant's case was that the declaratory relief granted in *TP (No.3)* represented a judicial recognition that, going forward, it was for the Secretary of State, and he alone, to decide how to address the finding that there was a contravention of Article 14 ECHR. This might involve 'levelling up', 'or 'levelling down', or some intermediate solution, but whatever course of action was chosen would necessarily depend on both policy and operational considerations. Moreover, Mr Anderson submitted, the fact that the regulations had not been quashed meant that they continued in force as made and pending any amendment in due course.

58. I agree with Mr Skinner's secondary submission, and essentially for the same reasons as Upper Tribunal Judge Wright identified in the analogous case of *JN*:

> 60. Following *Foster*, the tribunal whose decision is under challenge in this appeal made an error on a point of law in upholding the four decisions of the Secretary of State. This is because, in so doing, it too was applying delegated legislation that was irrational and unlawful. For me not to set aside its decision on this basis would be to perpetuate that error of law. Moreover, for the same reasons I would be acting in error of law if I remade the decision on the same basis and to the same effect. Nor is there any obvious basis on which I can lawfully remake the First-tier Tribunal decisions on appeal from the four decisions of the Secretary of State. The amending regulations, which I will assume do solve the problem, do not apply. Furthermore, it was not suggested to me by either party, nor can I separately identify, how disapplying or blue pencilling any part of either regulation 54 or regulation 61 of the UC Regs in force at the relevant times would work to assist the appellant.
>
> 61. It is in these circumstances that I make the decision in the terms set out above. It is only the Secretary of State who can 'sort out the problem' identified in *Johnson* for periods before 16 November 2020. What he cannot do following *Johnson* is to apply the earned income calculation method in the UC Regs as they stood before 16 November 2020 as to do so would be for him to act unlawfully.

59. Thus, the short answer to Mr Anderson's objection to Mr Skinner's secondary submission lies in Lady Hale's observation in *RR* (at [32]):

> 32. As that great judge, Lord Bingham of Cornhill, put it in *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68; [2004] 2 AC 72, 92, "I cannot accept that it can ever be proper for a court, whose purpose is to uphold, vindicate and apply the law, to act in a manner which a statute (here, section 6 of the Human Rights Act 1998) declares to be unlawful".

60. I am accordingly satisfied that the First-tier Tribunal erred in law for the reasons set out above in relation to the claimant's secondary submission. I therefore allow the Appellant's appeal to the Upper Tribunal and set aside the Tribunal's decision. There is no point in remitting the original appeal for re-hearing to a new Tribunal as the facts and law have been fully traversed. I therefore substitute the decision that the Tribunal should have made in the following terms:

> *The claimant's appeal to the First-tier Tribunal is allowed.*
>
> *The Secretary of State's decision of 25 October 2019 is set aside as being unlawfully discriminatory. The case is on all fours with TP (No.3).*
>
> *It will now be for the Secretary of State to redecide on a lawful basis the claimant's entitlement to universal credit for the period from 13 July 2018.*

61. I formally find that the Tribunal's decision involves an error of law on the basis as outlined above.

Conclusion

62. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I re-make the original decision under appeal (section 12(2)(b)(ii)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 11 December 2023