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Case No: CO/813/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2022

**Before**:

**MR JUSTICE SWIFT**

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**Between**

**THE QUEEN**

**on the application of**

**(1) T**
**(2) PHILIP WAYLAND**
**(3) MARTIN KEATINGS**
**(4) IAN BARROW** **Claimants**

**-and-**

**SECRETARY OF STATE FOR WORK AND PENSIONS** **Defendant**

**Jamie Burton QC & Desmond Rutledge** (instructed by **Osbornes Law**) for the **Claimants**
**Edward Brown** (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 17 and 19 November 2021

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# Approved Judgment

**MR JUSTICE SWIFT** :

## A. Introduction

1. Between 30 March 2020 and 5 October 2021, the standard allowance element of Universal Credit was increased by approximately £20 per week. This decision was put into effect by the Social Security (Coronavirus)(Further Measures) Regulations 2020 ("the 2020 Regulations"), which raised the standard allowance for a single claimant aged over 25 from £323.22 to £409.89, and the Universal Credit (Extension of Coronavirus Measures) Regulations 2021 ("the 2021 Regulations") which by regulation 2(1) extended the duration of that increase to 5 October 2021. No corresponding increase was made to the personal allowance element of any of Income Support, Jobseeker's Allowance, or Employment and Support Allowance. The Claimants contend this difference of treatment amounted to unlawful discrimination by reference to their Convention rights under ECHR article 8, and article 1 of Protocol 1 to the ECHR.

## B. The Claimants, the benefits, and the decision under challenge.

### *(1) The Claimants – personal circumstances*

2. For the purposes of determining the issue raised in this case it is not necessary to set out the Claimants' personal circumstances in detail. The only matter material is that each is in receipt of a so-called "legacy benefit" – i.e. a state benefit that will, in time, be replaced by Universal Credit. The First and Second Claimants are each in receipt of Employment and Support Allowance. The Third Claimant is in receipt of Income Support. The Fourth Claimant receives Jobseeker's Allowance.

### *(2) The legacy benefits and Universal Credit*

3. Nor is it necessary for me to set out in detail the criteria that need to be met for entitlement to any of the benefits referred to in these proceedings. The following sketch of the general nature of each benefit is sufficient.

4. Employment and Support Allowance ("ESA") is payable under the provisions of the Welfare Reform Act 2007 and regulations made under that Act. There are two versions of ESA, one income-based (i.e. means-tested), the other based on National Insurance contributions ("contributory ESA"). Only the income-based version is relevant for present purposes. All persons receiving ESA have been assessed to have limited capability for work, must not meet the conditions for entitlement to either Income Support or Jobseeker's Allowance, and must not have an income above the relevant threshold set in Regulations made under the 2007 Act. ESA comprises a personal allowance and other premium payments. The personal allowance is intended as a contribution to living expenses. This is in keeping with the general purpose of means-tested benefits, which is to provide support to those on low incomes. If the ESA claimant has been assessed as having not merely limited capability for work but also limited capability for work-related activity (claimants who have been so assessed are referred to as being in the "Support Group") an additional allowance ("the Support Group component") is payable. Further additional premiums may be payable depending on personal circumstances. The premiums available include Enhanced Disability Premium (EDP), Severe Disability Premium (SDP), Pensioner Premium, and

Carer Premium. ESA is based on weekly rates for each element payable. It is paid fortnightly.

5. Income Support ("IS") is a means-tested benefit payable pursuant to the provisions of the Social Security Contributions and Benefits Act 1992 and regulations made under that Act. It is payable to people on low income who work less than 16 hours a week and who are either carers, single parents, or pregnant. This benefit too comprises a weekly allowance and additional premiums depending on the claimant's personal circumstances. For example, additional payments are made to claimants who are disabled or who care for another person. Like ESA, IS is calculated on the basis of weekly amounts and paid fortnightly.

6. Jobseeker's Allowance ("JSA") is payable to persons either looking for work, or who are in work but working less than 16 hours per week. It is payable pursuant to the provisions of the Jobseeker's Act 1995 and regulations made under that Act. There are two forms of JSA, contributory and non-contributory. Only the latter means-tested version is relevant for the purposes of this claim. JSA comprises a personal allowance, and premium payments payable depending on personal circumstances (one such premium payment is the Carer's Premium). Like ESA and IS, the amount payable is calculated weekly and paid fortnightly.

7. Each of these three benefits is being replaced by Universal Credit. Universal Credit has been rolled out in stages, initially in the form of pilot schemes, then across certain regions and for certain categories of claimant, and finally since 12 December 2018, nationally. From that date, no new claim for ESA, IS or JSA could be made unless the claimant also met the requirements for entitlement for SDP. That remained the position until 27 January 2021. Since then no new claims for any of ESA, IS or JSA could be made. Although new claims may not be made, persons already in receipt of any of ESA, IS or JSA have not yet been required to move to Universal Credit. A person presently in receipt of any of ESA, IS or JSA may choose to move to Universal Credit, but compulsory "migration" as it is termed, of persons receiving legacy benefits to Universal Credit is not yet complete, and will not be completed until 2024. The number of persons claiming ESA, IS and JSA is also reducing because if any claimant's circumstances change so as to require a new claim, that claim must be a claim for Universal Credit. For example, the evidence before me was that in the year to November 2020 the number of ESA claimants fell by approximately 99,000 to 1.37 million claimants. The numbers of claimants in receipt of either JSA or IS is significantly lower: at February 2020 the total was less than 450,000. By contrast, and as to be expected, the number of persons claiming Universal Credit rose significantly from December 2018. By March 2020 approximately 3 million people were in receipt of Universal Credit.

8. Entitlement to Universal Credit is governed by the provisions of Welfare Reform Act 2012 ("the 2012 Act") and the Universal Credit Regulations 2013 ("the 2013 Regulations"). By section 1(3) of the 2012 Act, Universal Credit is

> "… calculated by reference to,
>
> (a) a standard allowance,
>
> (b) an amount for the responsibility for children or young persons,

> (c) an amount for housing, and
>
> (d) amounts for other particular needs or circumstances."

The other particular needs and circumstances are specified in the 2013 Regulations. Regulation 23(2) states:

> "(2) The elements to be included in an award under section 12 of the Act in respect of particular needs or circumstances are—
>
> (a) the LCWRA element (see regulations 27 and 28);
>
> (b) the carer element (see regulations 29 and 30); and
>
> (c) the childcare costs element (see regulations 31 to 35)."

("LCWRA" means persons assessed as having limited capability for work and work-related activity). Universal credit is paid monthly.

9. The rates at which the various elements of ESA, IS, JSA and Universal Credit are payable are set by statute and may be up-rated each year. The up-rating provisions are at section 150 of the Social Security Administration Act 1992. Each year the Secretary of State of State is required to undertake a review. Section 150(2) provides:

> "(2) Where it appears to the Secretary of State that the general level of prices is greater at the end of the period under review than it was at the beginning of that period, he shall lay before Parliament the draft of an uprating order—
>
> (a) which increases each of the sums to which subsection (3) below applies by a percentage not less than the percentage by which the general level of prices is greater at the end of the period than it was at the beginning; and
>
> (b) if he considers it appropriate, having regard to the national economic situation and any other matters which he considers relevant, which also increases by such a percentage or percentages as he thinks fit any of the sums mentioned in subsection (1) above but to which subsection (3) below does not apply; and
>
> (c) stating the amount of any sums which are mentioned in subsection (1) above but which the order does not increase."

10. Decisions on what increase will be made are announced in November each year, taking account of any rise in the Consumer Price Index over the previous 12 months. The

increases determined by the Secretary of State then take effect from 1 April the following year. For example, as a result of the Social Security Benefits Up-Rating Order 2020 (made 10 March 2020, in force with effect from 1 April 2020) the personal allowance for a person aged 25 or more for each of ESA, IS and JSA rose to £74.35 per week, and the Universal Credit standard allowance for claimants aged 25 or over for each payment period rose to £323.22 per month (i.e. £74.59 per week).

*(3) The decision under challenge*

11. On 20 March 2020 the Chancellor made an announcement that included the following:

> "To strengthen the safety net, I'm increasing today the Universal Credit standard allowance, for the next 12 months, by £1,000 a year.
>
> For the next twelve months, I'm increasing the Working Tax Credit basic element by the same amount as well.
>
> Together these measures will benefit over 4 million of our most vulnerable households.
>
> And I'm strengthening the safety net for self-employed people too, by suspending the minimum income floor everyone affected by the economic impacts of coronavirus.
>
> That means every self-employed person can now access, in full, Universal Credit at a rate equivalent to Statutory Sick Pay for employees.
>
> Taken together, I'm announcing nearly £7bn of extra support through the welfare system to strengthen the safety net and protect people's incomes.
>
> And to support the self-employed through the tax system, I'm announcing today that the next self-assessment payments will be deferred until January 2021.
>
> As well as keeping people in work and supporting those who lose their jobs or work for themselves, our Plan for Jobs and Incomes will help keep a roof over your head.
>
> We've acted already to make sure homeowners can get a three-month mortgage holiday if they need it.
>
> I'm announcing today nearly £1bn of support for renters, by increasing the generosity of housing benefit and Universal Credit so that the Local Housing Allowance will cover at least 30% of market rents in your area.
>
> The actions I have taken today represent an unprecedented economic intervention to support the jobs and incomes of the British people.

> A new, comprehensive job retention scheme.
>
> And a significantly strengthened safety net."

12. The change to Universal Credit, contained in the announcement was put into effect by the 2020 Regulations (made 27 March 2020, in force 30 March 2020). So far as material, regulation 3 was as follows:

> "**3. —Universal credit – standard allowance modification**
>
> (1) Regulation 36 (table showing amounts of elements) of the Universal Credit Regulations, as amended by article 33 of, and Schedule 13 to, the Social Security Benefits Up-rating Order 2020 ("the 2020 up-rating order") is to be read as if the following amounts were substituted for the amounts of the standard allowance—
>
> (a) £342.72 for a single claimant aged under 25;
>
> (b) £409.89 for a single claimant aged 25 or over;
>
> (c) £488.59 for joint claimants both aged under 25;
>
> (d) £594.04 for joint claimants where either is aged 25 or over.
>
> (2) This regulation takes effect in relation to each award of universal credit in the first assessment period that ends on or after 6th April 2020 and continues to have effect only for the remainder of the tax year beginning with 6th April 2020.
>
> … "

In this way the Universal Credit standard allowance for a person aged 25 or over was increased to the equivalent of £94.59 per week, £20.24 more than the relevant personal allowance for each of the ESA, IS and JSA. The 2021 Regulations (made 15 March 2021, in force 6 April 2021) extended the up-lift up to and including 5 October 2021, a further 6 months.

13. Since 6 October 2021 the Universal Credit standard allowance for a claimant aged 25 or over has been £324.84 per month – i.e. £74.76 per week. This amount includes the annual uprating contained in the Social Security Benefits Up-Rating Order 2021. Taking account of the 2021 Up-Rating Order the personal allowance for a person aged 25 or over in receipt of any of ESA, IS or JSA is £74.70.

*(4) The Claimants – benefits payable under each regime*

14. The consequence of the 2020 Regulations was a £20.00 per week difference between the Universal Credit standard allowance and the personal allowances for each of the ESA, IS and JSA. However, each of these allowances is only one element of each

relevant benefit. Moreover, the £20.00 difference will not necessarily translate into an across the board distinction in the amounts paid to Universal Credit claimants and legacy benefit claimants, respectively. Much will depend on the personal circumstances of each claimant, for example eligibility for premium payments by reference to personal circumstances or the extent to which any sum prima facie payable as a standard or personal allowance needs to be off set against deductible amounts, whether in the form of other benefits payable, or earnings.

15. For the purposes of this litigation a comparison has been prepared between the amounts paid to each Claimant as ESA, IS or JSA, as appropriate, and the amount that would have been paid had each instead (as each was entitled to do) claimed Universal Credit.

    (a) As at April 2021 the First Claimant received ESA at the rate £198.60 per week, equivalent to £860.60 per calendar month. Had he made a claim for Universal Credit he would have received £875.14 per month (£201.96 per week).

    (b) As at April 2021 the Second Claimant received ESA at the rate of £131.29 per week; equivalent to £568.96 per calendar month. Had he made a claim for Universal Credit he would have received £755.14 per month (£174.26 per week).

    (c) As at May 2021 the Third Claimant received IS at rate £112.40 per week, equivalent to £487.07 per calendar month. Had he claimed Universal Credit he would have received £575.24 per month (£132.75 per week).

    (d) As at April 2021 the Fourth Claimant received JSA in the amount of £74.70 per week; equivalent to £323.70 per calendar month. Had he claimed Universal Credit he would have received £411.51 per month (£94.96 per week).

## C. Decision

16. The Claimants raise two discrimination claims. Each claim rests on article 14 ECHR, read together with either article 1 Protocol to the ECHR, or ECHR article 8. Each claim is of discrimination on grounds of “other status”. The first claim, pursued by all four Claimants, is that the increase in the Universal Credit standard allowance made by the 2020 Regulations comprised unlawful direct discrimination on grounds of their status as persons in receipt of a legacy benefit. The second claim, pursued by the First, Second and Third Claimants is a claim of indirect discrimination on grounds of disability.

17. The Secretary of State accepts that, in principle, the decision contained in the 2020 Regulations to increase the standard allowance element of Universal Credit is a decision on a matter within the ambit of article 1 of Protocol 1. No admission is made in response to the Claimants’ submission that the decision also falls within the ambit of ECHR article 8. I do not need to determine this latter issue. Neither side suggests that anything will turn on the Claimants’ reliance on ECHR article 8; no one suggests there is any part of this case that might fail if the case is put on the basis of article 1 Protocol 1 but succeed if analysed instead by reference to ECHR article 8.

18. The Secretary of State’s first response to the claims is that because the Claimants’ case rests on a comparison between two different benefits, and moreover on comparison between only one element of each benefit (i.e. between the Universal Credit standard allowance, and the personal allowance for each of ESA, IS and JSA), no fair or relevant

comparison can be drawn. The Secretary of State submits that although in its judgment in *Stec v United Kingdom* (2005) 41 EHRR SE 295, the European Court of Human Rights accepted that a discrimination claim concerning entitlement to all or part of a benefit was in principle a viable claim (see the judgment in that case at paragraph 54), no viable claim can exist when the comparison relied on is between different benefits within a social security system. The Secretary of State also submits that in this case, unlike the circumstances before the court in *Stec*, none of the Claimants has been denied access to a benefit. Each of the Claimants could have made a claim for Universal Credit instead of continuing to claim the relevant legacy benefits.

19. I accept that there are clear differences between the circumstances of this case and those considered in *Stec*. However, I do not consider that these differences are such as to prevent the discrimination claims from being made and considered on their merits. The reasoning at paragraph 54 in *Stec* does not rule out an article 14 claim alleging discrimination between persons entitled to different benefits. The premise relied in *Stec* is stated in the final sentence in paragraph 54 "… if a state does decide to create a benefit scheme, it must do so in a manner which is compatible with Article 14". A claim that alleges discrimination by reference to differences as between separate benefits may require very careful handling. Most systems of social security benefits are complex schemes; differences that appear to exist may well on closer inspection either be readily explicable, or may not exist at all. While it is possible that in situations that are clear-cut a claim may fail because, for example, no sustainable analogy exists between the claimants and their comparators, more often such differences as do exist will not have that consequence. Rather the fact, for example, that the positions of the claimants might not be precisely analogous to those of their comparators, or that there is some other material difference between the two benefits in issue, will be something to assess at the justification stage where such matters may narrow the scope of what needs to be justified, or go to explain the reasons for the different outcomes for the claimants and their comparators.

20. As is obvious from the authorities, any discrimination claim can contain a range of what can be described as moving parts – for example the closeness of the analogy that exists, the extent of the difference in treatment, and so on. In many instances, discrimination claims are better decided considering all these matters as part of a single exercise that includes justification, rather than taking each in turn as one of a series of discrete preconditions standing in the way of the need for any justification. In most instances the issue will not simply be whether some distinction can be drawn between the claimant and his comparator, but whether any distinction is a relevant distinction. This can require consideration of all evidence, including what is said by way of justification. This approach is not invariable, but the present case is one where it is better to look at matters raised by the Secretary of State as relevant to whether the comparison relied on is a fair and viable comparison, when considering the overall explanation of the reasons for the difference in treatment arising from the 2020 Regulations. The fact that the comparison the Claimants rely on is as between successor benefits, and the fact that the difference of treatment alleged concerns only one component part of each respective benefit is not such, of itself, as to prevent sensible comparison, assuming the elements characteristic of a discrimination claim are made out. Rather each may be relevant when considering what needs to be justified and whether the explanation for the decision provides sufficient justification.

21. The Secretary of State's next submission is the direct discrimination claim advanced by all four Claimants, is a claim asserting less favourable treated by reason of circumstances capable of being described as "other status". The premise of any article 14 claim is a difference of treatment (relevant to a matter falling within the ambit of a Convention right) "on any ground" specified in article 14. The article provides a list of proscribed grounds, ending with "|… or other status".

22. The Claimants' submission is that "being in receipt of a legacy benefit" is a sufficient other status for this article 14 claim. The Claimants rely on the judgment of the Supreme Court in *R(SC) v Secretary of State for Work and Pension*s [2021] 3 WLR 428. In that case Lord Reed, taking account of observations made by the European Court of Human Rights in *Clift v United Kingdom* (application no. 7205/07, judgment 13 July 2010) as to the general purpose of Article 14, made the following point (at paragraph 71 of his judgment):

> "… the issue of "status" is one which rarely troubles the European court. In the context of article 14, "status" merely refers to the ground of the difference in treatment between one person and another. Since the court adopts a stricter approach to some grounds of differential treatment than others when considering the issue of justification, as explained below, it refers specifically in its judgments to certain grounds, such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. But in cases which are not concerned with so-called "suspect" grounds, it often makes no reference to status, but proceeds directly to a consideration of whether the persons in question are in relevantly similar situations, and whether the difference in treatment is justified. As it stated in *Clift v United Kingdom*, para 60, "the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified". Consistently with that purpose, it added at para 61 that "while … there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by article 14 of the Convention should be narrowly construed". Accordingly, cases where the court has found the "status" requirement not to be satisfied are few and far between."

23. On the facts of that case the Supreme Court accepted the reasoning of the Court of Appeal ([2019] 1 WLR 5687 per Leggatt LJ at paragraph 76) that being a "member of a household or family unit which contains more than two children" was a relevant "other status" for the purposes of an article 14 claim, and further accepted that the claim before it was not one in which the status relied on was defined solely by the difference complained of. On the facts of *SC*, the discrimination complaint was directed to a rule,

commonly referred to as the "two-child limit", that an applicant claiming Child Tax Credit for one child could claim "the individual element of child tax credit for no more than one other child or qualifying young person". The upshot of the judgment in *SC* is that in some cases whether relevant other status exist will turn on a very fine line indeed. It is notable that the court accepted that there was "no reason to impose a requirement that the status should exist independently, in the sense of having social or legal importance for other purposes or in other contexts than the difference in treatment complained of": per Lord Reed at paragraph 69, referring to and agreeing with the reason of Leggatt LJ at paragraph 67 of his judgment.

24. However, the Court also accepted that other status could not be "defined solely by the difference complained of". Logically that must be correct. If other status could be defined in such terms, the resulting complaint would not be a complaint about discrimination. In this case, the Claimants' direct discrimination claim is put on the basis of less favourable treatment of them as persons in receipt of one or other of the legacy benefits. They compare themselves to persons in materially identical circumstances who have made a claim for Universal Credit. Notwithstanding the example provided by the judgment in *SC* of a case where the difference between the status relied on and the difference in treatment relied on was marginal, I do not consider that the Claimants' direct discrimination claim in this case rests on any matter that can properly be said to be "other status" for the purposes of an article 14 claim. There is no meaningful difference between the other status relied on – being a person in receipt of a legacy benefit – and the less favourable treatment alleged, namely the failure to raise the amount paid as personal allowance to persons in receipt of a legacy benefit. Analysed in this way there is nothing that can sensibly be described as a direct discrimination claim – i.e. a claim of less favourable treatment on grounds of an impermissible reason. The only complaint that arises concerns why the 2020 Regulations did not extend to legacy benefits. That is a complaint about the rationality of the decision, or whether it was a decision taken for a proper purpose, or following consideration of relevant matters, and so on. Put another way, it is a complaint about whether the decision taken met the well-known common law standards that measure the legality of decisions made by public authorities. It is not, coherently, a complaint about discrimination in the enjoyment of Convention rights.

25. No similar problem arises with the second way in which the discrimination claim is put. The indirect discrimination claim is a claim of disability discrimination. There is no dispute that disability is capable of being a relevant "other status" for the purposes of an article 14 claim. The factual premise of the Claimants' claim is that the number of disabled persons in receipt of legacy benefits as a proportion of persons still receiving those benefits is greater than the number of disabled persons receiving Universal Credit as a proportion of the total number of those claimants. The Secretary of State disputes this premise. She submits that any comparison or consideration of whether persons in receipt of the legacy benefits are subject to particular disadvantage must take account of not just the personal allowance, but also the premium payments made by reason of disability which are part of the legacy benefits. However, it seems to me that if this is a relevant matter, it is better considered in the context of justification rather than treated as a point barring the Claimants from establishing an in-principle claim that requires reasoned response.

26. The parties made detailed submissions on the standard required for justification, each relying on the judgment of the Supreme Court in *SC*. In particular, the submissions focused on whether the standard of review for a successful justification submission was the standard described as "manifestly without reasonable justification", or some different, more exacting standard.

27. In his judgment in *SC* between paragraphs 97 and 142, Lord Reed undertook an extensive review of the case law of the European Court of Human Rights and domestic case law. No summary I could attempt here would do justice to that review. In essence, he explains the apparent conflict between statements in a number of cases favouring a wide margin of review when the decision challenged involves legislative or executive judgment on a matter of social and economic policy (where the standard has been formulated by the phrase "manifestly without reasonable foundation"), and statements in other cases to the effect that where discrimination is alleged on a so-called "suspect ground" close scrutiny is required (a point often put in terms of need for "weighty" or "very weighty" reasons to explain the distinction under challenge). The overall point emerging from Lord Reed's analysis is that no purpose is served by seeing the issue as a form of contest between shibboleths in which, in any (or every) particular case, one test must always be the trump card to the exclusion of any other consideration. Lord Reed recognises that the cases do not speak with a single voice because there is no mechanical formula that suits every set of circumstances. The phrases commonly set in opposition to each other – manifestly without reasonable foundation, or a need for weighty reasons – are no more than descriptive of a conclusion, reached in the case in hand, of the proper limit of legal scrutiny. In each case there is a specific balance to be struck depending on the circumstances. Apparently similar considerations may have difference significance from case to case because other circumstances are or are not present.

28. Lord Reed's overall conclusion is between paragraphs 158 and 162 of his judgment. As I see it, the material passages from those paragraphs are these:

> "158. Nevertheless, it is appropriate that the approach which this court has adopted since *Humphreys* [2012] 1 WLR 1545 should be modified in order to reflect the nuanced nature of the judgment which is required, following the jurisprudence of the European court. In the light of that jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a "suspect" ground is to be justified. … But other factors can sometimes

lower the intensity of review even where a suspect ground is in issue, as cases such as *Schalk*, *Eweida* and *Tomas* illustrate, besides the cases concerned with "transitional measures", such as *Stec*, *Runkee* and *British Gurkha*. Equally, even where there is no "suspect" ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children.

159. It is therefore important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant. As was recognised in *Ghaidan v Godin-Mendoza* … and *R(RJM) v Secretary of State for Work and Pensions* …, the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification.

…

161. It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the "manifestly without reasonable foundation" formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. …

162. It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in *JD* [2020] HRLR 5, para 11:

> "Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore, any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts."

In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure

> when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented, at para 10:
>
> > "Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated."
>
> …"

29. In this case therefore, I approach the justification question considering all relevant circumstances. Although I have already concluded that the direct discrimination claim fails for lack of resting on a relevant "other status" I have considered the question of justification for the purposes of that ground of challenge as well for the indirect discrimination ground. So far as concerns the indirect discrimination challenge on grounds of disability, it is right to recognise that disability is accepted as a "suspect ground". Thus, the starting point is that a clear and substantial justification is required. However, it is also right to recognise two other matters that provide counter-weight. The first is that the form of discrimination alleged is indirect not direct discrimination. Action amounting to indirect discrimination is accepted as a lesser affront to dignity than direct discrimination – hence the possibility accepted for the purposes of claims under the provisions of the Equality Act 2020 to justify indirect discrimination, a possibility that is unavailable for claims of direct discrimination brought under that Act. This is neither to disregard nor improperly diminish the significance of indirect discrimination; it is simply one matter to take account of. The other matter is the circumstances in which the 2020 Regulations came to be made. It is not simply that the 2020 Regulations comprise a decision on a matter of social and economic policy, but also that that decision was taken under the acute circumstances of the government's response to the coronavirus pandemic.

30. My conclusion is that the difference in treatment of Universal Credit claimants over those claiming legacy benefits resulting from the 2020 Regulations was justified. The decision to increase the Universal Credit standard allowance was one of a series of decisions made at the beginning of the pandemic. The reasons for the decision are set out in a witness statement dated 22 June 2021 made by Kerstin Parker, the Deputy Director for Universal Credit at the Department for Work and Pensions. By the end of March 2020, the government's objective was to take steps to preserve stability in the

labour market in the short term, to provide a basis for rapid economic recovery once the pandemic had passed. The best-known measure in support of this objective was the Job Retention Scheme (usually referred to as the furlough scheme) which made it possible for many who would otherwise have been dismissed in consequence of the March 2020 lockdown, to remain in employment. The increase to the standard allowance was a way of providing additional support to those who did lose jobs or income because of the pandemic and became reliant on Universal Credit for the first time. This group would face particular disruption as a result. Ms Parker explains that the increase was intended to cushion the sudden impact of loss of employment or reduced employment. I accept this was legitimate objective. The decision to increase the standard allowance was made in anticipation of a dramatic rise in the numbers of new benefits claimants. The evidence before me shows that this is what happened. From March 2020 the number of people claiming Universal Credit rose dramatically. In the four weeks to 9 April 2020 there were 1.2 million new claimants. In the next five weeks (to 14 May 2020) there were 1.1 million further new claims, and the rate of new claims was running at between 20,000 and 25,000 per day, double the rate prior to the pandemic. By mid-May 2020 the total number of persons claiming Universal Credit was 5.3 million (approaching double the number of claimants in receipt of Universal Credit at the beginning of March 2020), and by 2021 6 million people were in receipt of that benefit. In the premises, the Secretary of State had legitimate reason to act to address a situation she had accurately anticipated.

31. The central question raised by the Claimants' discrimination claims is whether it was lawful for the Secretary of State to direct her attention to the position of new benefits claimants – all of whom would have made claims for Universal Credit. I consider that she was. New benefits claimants would need to adjust to a loss in income. They would be affected differently to persons already claiming benefits. Given the objective pursued by the 2020 Regulations and the circumstances in which the decision to make those Regulations was made, legal scrutiny of the decision to make the 2020 Regulations must allow the Secretary of State a degree of latitude. All this being so, the distinction between the legacy benefits personal allowances and the Universal Credit standard allowance, consequent on the 2020 Regulations, rested on sufficient reason.

32. I accept that the 2020 Regulations made no attempt to distinguish between new claimants and persons already in receipt of Universal Credit prior to March 2020. For this reason, the 2020 Regulations also benefited a group of people who fell outside the Secretary of State's objective. I do not doubt that distinguishing between these two groups of Universal Credit claimants and paying the standard allowance at different rates to each group would have given rise to technical difficulties, not the least because it would have been necessary to establish the distinction almost immediately, with effect from the end of March 2020. Be that as it may, in the circumstances that existed during the pandemic the Secretary of State was entitled to draw a line between Universal Credit claimants on the one hand and legacy benefit claimants on the other. The former group would definitely include all those the Secretary of State considered needed additional assistance. The fact that others also benefited does not go to the legality of her decision.

33. Ms Parker's evidence includes the following (at paragraph 53) which I consider adequately explains why the Secretary of State took the approach that she did when making the 2020 Regulations.

> "53. … the change provided a clear and strong message which the Government could deliver at a time of crisis to provide reassurance to society and improve morale. The Government's aim in responding to the pandemic was to identify policy changes that could swiftly and safely be implemented so as to provide support to the greatest number of people in the shortest possible time. The policy changes also had to be clear and capable of being simply presented to the public. This is often a consideration when announcing policy, but it was especially important at the time of the decisions (shortly before 20 March 2020) because of the very substantial (and understandable) concern amongst society as the pandemic unfolded. The concern about uncertainty also applied to businesses and the announcement helped to provide macroeconomic stability by confirming the public would have access to additional funds. The Government needed a clear and reassuring message to address this concern and emphasise the message that, in a time of acute need, the Government was prepared to make a substantial investment of public monies of the short term, so as to ensure the stability of the economy for when the pandemic recedes."

Given the Secretary of State's objective, those like the Claimants, in receipt of legacy benefits, were in materially different position.

34. The Claimants' submissions focus on the low level of income replacement provided by any of ESA, IS and JSA. In absolute terms the amounts paid are low. It is obvious that any person required to rely only on that level of income will suffer hardship. I also accept that in the context of the pandemic it is likely that it may have been more difficult still to meet basic expenses from that level of income. However, these matters are distinct from the justification advanced by the Secretary of State for the decision to make the 2020 Regulations.

35. The Secretary of State's evidence in this case also explains that, as of March 2020, thought was given as to whether the increase to the standard allowance could or should in some way be reflected in changes to the personal allowances paid as part of the legacy benefits. The decision taken – not to alter the levels of those allowances – was the consequence of several considerations. One (the primary consideration) was that such a change would not pursue the primary object of addressing disruption resulting from sudden, and it was hoped short-term unemployment and providing greater economic stability and confidence in the face of grave uncertainty. Another consideration was that, in any event, such a change to the legacy benefits was not feasible. The system available to the Secretary of State to deliver legacy benefits would not cope with the changes that would be required. Ms Parker explained this as follows:

> "60. The difficulties in increasing the rate of legacy benefit were considered by ministers in March 2020. Consideration was given to increasing the standard allowance of ESA, JSA and IS, but, as well as not serving the policy objectives, … this was not operationally deliverable as the rates for April 2020 had already been input for all the legacy benefit systems and could not be

> changed until the following year without considerable delivery risks. This is because of the ageing nature of the DWP's legacy IT systems. It was considered that any changes to the rates input into the legacy systems as part of a further, out-of-cycle exercise carried major delivery risks. Rates can only be changed when the relevant system is not being used by front line staff, which confides available windows to weekends. Moreover, once they are set it is not possible to change them in-year without a high level of risk of incorrect payments being made to customers. There are a large number of "benefit overlaps" which occur when one benefit rate is linked to another. Any errors could rapidly create "domino effect" where the IT Team would not have the capacity to predict or correct the knock-on implications. This would therefore carry a high level of risk that payments would be made at an incorrect rate, or that customers would not receive any payments at all."

36. The Secretary of State's evidence also addresses how the position of persons on legacy benefits continued to be considered after March 2020, in November 2020 at the time the annual up-rating measures were considered, and in March 2021 when the 2021 Regulations were made extending the up-lift to the Universal Credit standard allowance for a further six months. As at November 2020, the decision (included in the Chancellor's speech at the annual spending review) was that it was not appropriate to take decisions either on the level of the standard allowance or the personal allowances. Ms Parker says this (at paragraph 67 of her statement):

> "67. … the pandemic was evolving during autumn 2020; in particular, there was a spike in COVID-19 cases in autumn and Ministers were not sure at that time what the public health or economic state of affairs would be in March 2021. Evidently the financial and public health situations into the longer-term future is difficult to predict during a pandemic; however, a welfare system can best respond to that future situation is also hard to predict. Instead of making that decision in advance, the Government thus decided that it would need to consider the situation closer to time of the end of the up-lift. The cost of the up-lift at £6bn a year is very significant so not an amount the Government would decide to spend way ahead of time and before the full economic and COVID situation at the end of the twelve months UC up-lift was clearer, i.e., closer to the time. The advantage to this is that the conditions of the pandemic could then be considered; if it was still necessary to maintain the up-lift, that would be known with a greater degree of certainty in March 2021 than could be the case in 2020. In relation to legacy benefits, the process of inputting rates into the IT system for the following year needs to take place several months in advance: the rate to be paid up to March 2022 had to be programmed from November 2020. That would not have enabled the Government

> to respond to the rapidly - evolving demands of the pandemic with the latest and most accurate understandings of the situation."

Thus, while the routine, annual statutory up-rating decisions were made, no further decisions were taken.

37. The decision in March 2021 to make the 2021 Regulations extending the standard allowance up-lift, was a further decision resting on political judgement. In late 2020 restrictions on the economy had been re-imposed. In the early part of 2021 these measures continued, and the precise course of the pandemic remained unknowable. The reasons for the 2021 Regulations were materially the same as the reasons for the 2020 Regulations, as were the reasons why, when the 2021 Regulations were made, the legacy benefit personal allowances were treated differently.

38. In considering the case before me I have in mind what was said by Lord Reed at paragraph 162 of his judgment in *SC*. All legislation draws lines differentiating between different classes or persons. Any court adjudicating on a discrimination challenge must be astute to identify the permissible limit of political discretion. The circumstances in which the decisions to make the 2020 Regulations were taken and for that matter also, the decisions in November 2020 at the time of the annual up-rating, and in March 2021 when the 2021 Regulations were made, were exceptional. Each decision was an exercise of political judgment on aspects of a programme of measures designed to achieve macroeconomic objectives at a time of major national disruption. The 2020 Regulations adopted in pursuit of that programme, drew a broad distinction between Universal Credit and legacy benefits when deciding to provide additional support to persons who lost employment or income because of the pandemic and thereby came within the range of state means-tested benefits for the first time. With the benefit of hindsight it may well be possible to pick holes in the strict logic of the decisions taken. But in the circumstances of this case, where the decision challenged (the 2020 Regulations) was a temporary measure addressing a situation which the government was entitled to regard as one of national emergency, a sensible margin of discretion must be permitted. Even accounting for the fact that the Claimants' indirect discrimination case is a claim on grounds of disability, I am satisfied that the reasons relied on by the Secretary of State to explain the decision to make the 2020 Regulations provide a sufficient justification. The justification provided is sufficient to answer each of the discrimination claims the Claimants advance.

39. There is one further matter to mention. The Claimants' Claim Form, filed at the beginning of March 2021, describes the decision challenged as a "… decision not to up-lift the "personal allowance" provided to income-related ESA claimants despite having increased in response to coronavirus the "standard allowance" of Universal Credit", and goes on to describe that decision as an "ongoing decision to maintain the difference in treatment between the two groups of benefit claimants".

40. I consider that this description of the decision challenged side-steps the fact that this is a challenge to the 2020 Regulations commenced over a year after those Regulations were made. It is not accurate to describe the decision as an "ongoing" decision. The 2020 Regulations represent a discrete decision, albeit a decision with continuing consequences. Nor is the present case a situation in which any of the Claimants can contend that it was only sometime later they were affected by the decision under

challenge. The Claimants have provided no reason for commencing their challenge to the 2020 Regulations so late in the day.

41. The Secretary of State did not take any point that the claim was commenced out of time. As it is, I have considered the Claimants' claims on their merits, and rejected them on that basis. However, had the outcome been different, the fact that the challenge was commenced late may well have had a significant influence on any decision as to what, if any, relief should be granted. The well-known general rule is that claims must be commenced promptly and in any event within three months. The requirement to act promptly is of particular importance when the decision challenged is one of general application since that is likely to be the type of situation in which delay can cause harm to the public interest in good administration. The exceptional circumstances in which the decision to make the 2020 Regulations was taken only goes to underscore the need for any challenge to be commenced promptly. Be that as it may, for the reasons above, the Claimants' claims fail on their merits.

## D. Disposal

42. The Third and Fourth Claimants were added as parties to these proceedings by order of Lane J, sealed on 28 May 2021. His order left over the issue of whether to grant them permission to apply for judicial review. I grant the Third and Fourth Claimants permission to apply for judicial review. However, their claims for judicial review, and the claims by the First and Second Claimant, are dismissed.

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