



Welfare Rights Conference 2024

The transitional SDP element

Simon Osborne

Welfare Rights Adviser, CPAG



1. The transitional SDP element – legislation

From The Universal Credit (Transitional Provisions) Regulations 2014

SCHEDULE 2

Claimants previously entitled to a severe disability premium

- 1. This Schedule applies to an award of universal credit where the following conditions are met in respect of the claimant, or each of joint claimants.*
- 2. The first condition is that the award was not made as a consequence of the claimant becoming a member of a couple where the other member was already entitled to an award of universal credit.*
- 3. The second condition is that the claimant—*
 - (a) was entitled (or was a member of a couple the other member of which 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 within the month immediately preceding the first day of the award of universal credit; and*
 - (b) continued to satisfy the conditions for eligibility for a severe disability premium up to and including the first day of that award.*
- 4. Where this Schedule applies (subject to paragraphs 6 and 7), a transitional SDP element is to be included in the calculation of the award and the amount of that element is to be treated, for the purposes of section 8 of the Act, as if it were an additional amount to be included in the maximum amount under section 8(2) before the deduction of income under section 8(3)*
- 5. The amount of the transitional SDP element in the first assessment period is...*

...
- 6. In respect of the second and each subsequent assessment period, 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) are to apply in relation to the transitional SDP element as if it were a transitional element in respect of which the amount calculated in accordance with paragraph 5 was the initial amount.*
- 7. The award is not to include a transitional SDP element where the claim was a qualifying claim and the award is to include a transitional element.*

2. Transitional SDP element - 'basic' amounts

From ADM Memo 03/24

- 5. ...For awards of UC where the first AP begins on or after 08.04.24, the amounts are*
 - 1. for a single claimant*

1.1 £140.97 if the LCWRA element is included or

1.2 £334.81 if the LCWRA element is not included or

2. for joint claimants

2.1 £475.79 if the higher SDP rate was payable or

2.2 £140.97 if 2.1 does not apply and the LCWRA element is included for either of the claimants or

2.3 £334.81 if 2.1 does not apply and the LCWRA element is not included for either of the claimants.

3. The additional amount - legislation

From The Universal Credit (Transitional Provisions) (Amendment) Regulations 2023, SI 2023 No.1238 (inserting a new Schedule 3 to the Universal Credit (Transitional Provisions) Regulations 2014)

SCHEDULE 3

1. This Schedule applies to an award of universal credit where—

(a) in the first assessment period beginning on or after 14th February 2024 the award includes a transitional SDP element by virtue of Schedule 2 or a transitional SDP amount by virtue of that Schedule as saved by regulation 3 of the Universal Credit (Transitional Provisions) (Claimants previously entitled to a severe disability premium) Amendment Regulations 2021, or would have done had it not been eroded to nil by virtue of regulation 55 (the transitional element - initial amount and adjustment where other elements increase); and

(b) at least one of the conditions in paragraph 4 is satisfied.

2. This Schedule does not apply where the claim was a qualifying claim and the award is to include a transitional element.

3. Where this Schedule applies, in the assessment period described in paragraph 1—

(a) the transitional SDP element or, as the case may be, the transitional SDP amount, is to be increased by the additional amount specified in paragraph 5; and

(b) if the transitional SDP element or, as the case may be, the transitional SDP amount, has been reduced to nil by virtue of regulation 55, the additional amount is to be treated as if it were the initial amount of a transitional element calculated under regulation 55(1).

4. The conditions referred to in paragraph 1(b) above are that—

(a) within the month immediately preceding the first day of the award the claimant was entitled (or was a member of a couple the other member of

which was entitled) to an award of income support, income-based jobseeker's allowance or income-related employment and support allowance that included an enhanced disability premium, and continued to satisfy the conditions for eligibility for the enhanced disability premium up to and including the first day of the award of universal credit;

(b) within the month immediately preceding the first day of the award the claimant was entitled (or was a member of a couple the other member of which was entitled) to an award of income support or income-based jobseeker's allowance that included a disability premium and continued to satisfy the conditions for eligibility for a disability premium up to and including the first day of the award of universal credit; and/or

(c) within the month immediately preceding the first day of the award the claimant was entitled to an award of income support or income-based jobseeker's allowance that included a disabled child premium, or an award of child tax credit that included the disabled child element at the rate for a child or qualifying young person who is disabled but not severely disabled, and continued to satisfy the conditions for eligibility for the disabled child premium or the disabled child element up to and including the first day of the universal credit award and is entitled in the assessment period described in paragraph 1 to the lower rate of the disabled child addition in universal credit.

4. The additional amount – guidance (entitlement)

From ADM Memo 01/24

INTRODUCTION

- 1. This Memo gives guidance on The Universal Credit (Transitional Provisions) (Amendment) Regulations 2023 (S.I. 2023/1238).*
- 2. The regulations add an additional amount of Universal Credit (UC) to claimants entitled (or previously entitled) to the transitional SDP amount or transitional SDP element (TSDPE). This is achieved by the introduction of a new Schedule 3 into the Universal Credit (Transitional Provisions) Regulations 2014.*
- 3. The regulations come into force on 14/02/2024. Qualifying new natural migration claimants after that date will have the benefit of these changes immediately. For claimants already in receipt of UC the time and manner of the payments will be arranged in due course in a time and manner to be decided by the Secretary of State.*

THE ADDITIONAL AMOUNT

- 4. The Additional Amount applies in the first assessment period beginning on or after 14/02/24 where:*
 - 1. the claimant is entitled to a TSDPE or a transitional SDP amount (or was previously entitled to either, but those have eroded to nil), and*

2. within the month immediately preceding the first day of the UC award the claimant was entitled (or was a member of a couple where the other member was entitled) to

1. Income Support

2. Income-based Job-seekers Allowance

3. Income-related Employment and Support Allowance, or

4. Child Tax Credit, and

3. that benefit included:

1. an enhanced disability premium

2. a disability premium

3. a disabled child premium, or

4. a disabled child element at the disabled rate – but not the severely disabled rate, and

4. the claimant continued to satisfy the conditions for eligibility to the premiums or elements up to and including the first day of their UC award, and

5. where 3.3. or 3.4 applies, the claimant must also be entitled to the lower rate of the disabled child addition in their UC award.

5. The additional amount from April 2024 - amounts

From ADM Memo 03/24

6. ADM Memo 01/24 and M6771 give guidance on the extra benefit (the 'Additional Amount') paid from 14.02.24, to certain UC claimants who are entitled to the transitional SDP element (or transitional SDP amount) and who were also previously entitled to an enhanced disability premium, a disability premium or a child disability premium/element in certain legacy benefits. From 08.04.24 the Additional Amount is:

1. for a single claimant;

1.1 with an enhanced disability premium, £89.63

1.2 with a disability premium, £183.52

1.3 with a disabled child premium or disabled child element, £188.86 per disabled child

2. for joint claimants;

2.1 with an enhanced disability premium, £128.04

2.2 with a disability premium, £262.48

2.3 with a disabled child premium, £188.86 per disabled child.

6. Recent caselaw (from Welfare Rights Bulletin 299 (April 2024))

(1) Amount of the transitional element *before* the introduction of the additional amount on 14 February 2024:

FL v SSWP [2024] UKUT 6 (AAC) (11 December 2023) (appeal number UA-2021-001442-UOTH): Transitional SDP element – amount allowed unlawful considering *TP (No.3)* – Secretary of State to remedy

The claimant was entitled to income-related ESA that included the severe disability premium (SDP) and enhanced disability premium (EDP). In July 2018 she moved address and – having lost entitlement to housing benefit as a result – claimed UC, thus undergoing 'natural' migration to UC and so ending her income-related ESA award. Her UC award was eventually corrected to award a transitional SDP amount (now known as a transitional SDP element). The claimant appealed as her UC still fell short of her income-related ESA, particularly because the transitional SDP element did not compensate her for the absence of an EDP in her UC. The First-tier Tribunal dismissed her appeal, holding that the UC correctly included the transitional SDP element at the prescribed amount.

Judge Wikeley allowed the claimant's further appeal. The tribunal had erred in failing to find, as it was bound to do, that in the light of the High Court's decision in *R(on the application of) TP and AR* (TP and AR No.3) [2022] EWHC 123 (Admin) ('TP No.3'), the failure of the transitional SDP element to compensate the claimant for the loss of the EDP as well as the SDP was in breach of her human rights. It was accepted (including by the Secretary of State) that the effect of the High Court's declaration in *TP (No.3)* was that regulation 63 and Schedule 2 of the Universal Credit (Transitional Provisions) Regulations 2014 ('the TP regulations') were unlawfully discriminatory. That was due to a breach of Article 14 on Human Rights read with Article 1 of Protocol 1 of the European Convention on Human Rights ('the ECHR'). The breach was by failing to provide any transitional relief for the loss of the EDP on the claimants' natural migration from legacy benefits to UC. Judge Wikeley observed that it was a basic starting point that the tribunal 'is not, and should not be, in the business of applying unlawful regulations' (paragraph 39). That applied (unless the tribunal was prevented by acting by statute) regardless of the public law error that the regulations contain, whether that is because they are *ultra vires* or irrational or (as here) because they breach rights in the ECHR (*JN v SSWP* (UC) [2023] UKUT 49 (AAC); [2023] AACR cited).

However, that left the question of remedy of the unlawfulness. It was argued for the claimant that the correct approach was to disapply the part of the TP regulations (at regulation 48) that required 'managed migration' to have taken place before the claimant was entitled to full transitional protection to the amount of legacy benefit, so that that protection applied in natural migration cases too. Judge Wikeley disagreed. 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 included that there was nothing to prevent a tribunal disapplying subordinate (not primary) legislation where that was necessary to comply with the Human Rights Act (which applied the ECHR). But in the present case, it was not regulation 48 requiring managed migration to apply before the transitional element could be awarded that resulted in the breach of the claimant's human rights, but rather regulation 63 and Schedule 2 providing for the transitional SDP element. The judge also considered that the proposed disapplication of regulation 48 was not possible to do without undermining the statutory scheme by collapsing the distinction between natural and managed migration. 'Collapsing the distinction between natural migration and managed migration', said the judge, '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' (paragraph 54). However, the judge did agree with the claimant's secondary argument, that it remained that the tribunal had been in error and that (in the absence of an obvious way of remedying the error) the appropriate remedy was (as in *JM*) to allow the appeal and remit the decision to the Secretary of State with and a direction to remake the decision. The judge directed the Secretary of State to 'redecide on a lawful basis the claimant's entitlement to universal credit...' (paragraph 60).

Note: the Universal Credit (Transitional Provisions) (Amendment) Regulations 2023, SI 2023 No.1238 (see Bulletin 298, p11) make additions to the SDP transitional element so as also to compensate for loss of the EDP, but only take effect from 14 February 2014.

(2) 'Erosion' of the transitional SDP element – where result is a 'cliff-edge' loss of income

SSWP v JA [2024] UKUT 52 (AAC) (19 February 2024) (appeal number UA-2022-001286-UOTH): Transitional SDP element – 'erosion' – on move from specified to mainstream rented accommodation

The claimant lived in specified accommodation and was entitled to housing benefit (HB) and UC. The UC therefore did not include the housing element. But it did include a transitional SDP element (the claimant having been entitled to the severe disability premium when she underwent natural migration from legacy benefits to UC). In May 2021, she moved out of her specified accommodation and into mainstream rented accommodation, in which the rent was lower. Due to the move, she lost entitlement to HB and instead became entitled to the housing element of UC. It was decided that her transitional SDP element was immediately reduced (or 'eroded') to nil, because the housing element, although lower than the HB, exceeded the amount of the transitional SDP element. On appeal, the First-tier Tribunal held that the erosion to nil in this case was unlawful discrimination and that the rule applying the erosion (at regulation 55(2) of the Universal Credit (Transitional Provisions) Regulations 2014 (SI 2014 No.1230) should be disapplied in her case. The Secretary of State appealed to the Upper Tribunal.

Judge Church upheld the tribunal's decision, holding that it did not involve any material error of law. The erosion of the claimant's transitional SDP element had involved discrimination (and therefore breach of her human rights under Article 14 of the European Convention on Human Rights, read with Article 1 of Protocol 1). He also agreed that in the light of the breach the correct remedy was to disapply regulation 55 in her case, so that her transitional SDP element was not eroded at all. The Secretary of State argued that the claimant's argument was an attack on the 'erosion principle' in regulation 55 that transitional protection would erode over time in line with 'relevant increases' in UC amounts, and (in summary) that the arguments for discrimination under Article 14 were not made out.

The judge disagreed. There was no attack on the erosion principle; rather, what had happened here was not 'erosion', as properly understood. The tribunal had correctly identified, for the purpose of Article 14 discrimination, an 'other status' for the claimant, namely that of a person with a transitional SDP element who has moved from specified accommodation to mainstream rented accommodation. That was not so very different from the claimants in the '*TP* litigation that had led to the creation of the transitional SDP element, who were SDP-entitled claimants who moved home, albeit in those cases from one local authority area to another. The tribunal had also correctly identified a comparator for the discrimination, namely a claimant who instead moved from mainstream rented accommodation to another cheaper such property (ie, who would not have experienced erosion of the element, because they would not have had a relevant increase in their UC as a result; similarly someone who moved from one specified accommodation to another would not get more UC and not experience erosion). Given that she had lost her HB, and the UC housing element was for a lower amount than that, the immediate elimination of the transitional SDP element had occurred where in fact there had been no benefit increase on moving, but rather a 'significant reduction in her benefit...' (paragraphs 106-107). The judge considered that the claimant's loss of her transitional protection 'could not properly be characterised as erosion', but rather was the sort of 'cliff-edge' income loss found to be unlawful in the *TP* litigation, and which the transitional SDP element was supposed to protect against (paragraphs 108- 109). On whether the difference in treatment could be justified, the Secretary of State had made no argument to the First-tier Tribunal, and at the Upper Tribunal relied on the clarity of parliament's decision to provide for a UC system including erosion of transitional protection with increases in benefits. But it was the difference in treatment that had to be justified, not merely the underlying policy, and the Secretary of State still had not explained that.