UA-2023-000561-USTA

IN THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER) **Appeal No. UA-2023-000561-USTA NCN No. [2025] UKUT 035 (AAC)**

On Appeal from the First-tier Tribunal (Social Entitlement Chamber) SC302/22/00270

BETWEEN

Appellant THE SECRETARY OF STATE FOR WORK AND PENSIONS

and

Respondent MJ

BEFORE UPPER TRIBUNAL JUDGE WEST

Decided after an oral hearing on 30 October 2024: 29 January 2025

Representation: Mr Denis Edwards, counsel, for the Appellant (instructed by the Government Legal Department)

Ms Julia Smyth, counsel, for the Respondent (instructed by Child Poverty Action Group)

DECISION

The decision of the First-tier Tribunal sitting at Ashford dated 19 April 2024 under file reference SC302/22/00270 involves an error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

The decision is remade, although it is to the same effect as the original decision, but on a correct basis in law.

The decision is that the erosion of the full amount of MJ's transitional severe disability premium element ("TSDPE") is discriminatory and contravenes her Convention rights. The decision is that the erosion of the full amount of MJ's TSDPE is discriminatory and contravenes her Convention rights. Regulation 55(2)(c) and Regulation 55(4) of the 2014 Regulations must be interpreted and/or disapplied to avoid the discriminatory outcome. MJ's TSDPE is to be eroded by the difference between the carer's element of UC and the LCWRA element of UC from the assessment period from 10 October 2021 to 9 November 2021 and for each subsequent assessment period.

This decision is made under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. In this case the Appellant, the Secretary of State for Work and Pensions ("the Secretary of State"), appeals to the Upper Tribunal from the decision of the First-tier Tribunal ("the Tribunal") dated 19 April 2023 by which it allowed the Respondent's ("MJ's") appeal against a decision of the Secretary of State dated 10 November 2021. On that date the Secretary of State decided to erode MJ's transitional severe disability premium element ("TSDPE") of Universal Credit ("UC") to nil for the period 10 October 2021 until 9 November 2021 ("the erosion decision") on the basis that an element for limited capability for work and work-related activity ("LCWRA") was added to her UC entitlement.

The Issues

2. The appeal raises the issue of whether the erosion decision following the award to MJ of LCWRA was lawful, including not being in breach of her rights guaranteed by Article 14 and Article 1 of the First Protocol to the European Convention on Human Rights ("the Convention rights"). MJ does not challenge

the fact that, pursuant to regulation 29(4) of the Universal Credit Regulations 2013 ("the 2013 Regulations") she ceased to be entitled to the carer element of UC following her award of LCWRA. What she challenges is the fact that she also lost the entirety of her transitional protection.

Background

3. MJ was in receipt of Employment and Support Allowance (income-related) ("ESA") between 8 March 2011 and 10 February 2018. Her award included Severe Disability Premium ("SDP") in the period immediately preceding her claim to Universal Credit ("UC").

4. On 10 February 2018 she made a claim for UC as a natural migrant (i.e. because of a change of circumstances). On 11 August 2019 the Secretary of State determined that she was entitled to the transitional SDP amount in the sum of an additional £285 per month. That decision was made pursuant to Schedule 2 to the Universal Credit (Transitional Provisions) Regulations 2014 ("the 2014 Regulations"), inserted by the Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019 ("the 2019 Regulations"), which provided for transitional SDP amounts and which were made following the High Court decision in ***R (TP, AR and SXC) v. Secretary of State for Work and Pensions*** [2018] EWHC 1474 (Admin)) ("***TP1***") (on appeal [2020] EWCA Civ 37).

5. On 13 October 2020, the Secretary of State converted the transitional SDP amount to the TSDPE. On 18 June 2021 MJ notified the Secretary of State of a relevant change in circumstances, namely that she had been diagnosed with polymyalgia.

6. At the time of the erosion decision, MJ's UC award comprised a carer element of UC. On 25 October 2021, with effect from 10 October 2021, the Secretary of State decided to add a LCWRA element to MJ's UC award and in consequence the carer element of the UC award was removed, pursuant to regulation 29(4) of the 2013 Regulations.

7. By virtue of regulation 55 of the 2014 Regulations, the effect of the addition of the LCWRA element was to erode MJ's TSDPE to nil. Overall, the amount of her UC award went from £975.20 for the earlier assessment period (10 September 2021 to 9 October 2021) to £879.98 for the following UC assessment period (10 October 2021 to November 2021, i.e. the assessment period which is the subject of the appeal).

MJ's Entitlements to UC before and after the erosion decision

8. The amount of TSDPE received by MJ prior to the erosion decision was £275.12 per month. The addition of LCWRA to her award of UC amounted to £343.63 per month. The Secretary of State's submission was that the erosion decision, which gave effect to regulation 55 of the 2014 Regulations, did not leave her worse off compared to the position before the addition of LCWRA.

9. It was the Secretary of State's contention that MJ's real complaint was that, when LCWRA was added to her UC award, she lost the carer element of UC. The carer element of her UC award amounted to £163.73. However, a person could not have both an award of LCWRA *and* the carer element of UC at the same time: that followed from the provisions of regulation 29 of the 2013 Regulations.

10. On behalf of MJ, the before and after position was conveniently set out by Ms Smyth in her skeleton argument as follows.

11. In the period from 10 September 2021 to 9 October 2021, MJ's award was £975.20, made up as follows:

Standard allowance	£324.84
Housing	£504.44
Carer element	£163.73
Transitional protection	£275.12
(Less deduction for carer's allowance)	(£292.93)
	£975.20

12. On 25 October 2021, following the work capability assessment, the Secretary of State decided that MJ had LCWRA. As a result, her monthly award decreased for the next assessment period by almost £100, as follows:

Standard allowance	£324.84
Housing	£504.44
LCWRA	£343.63
Carer element	~~£163.73~~
Transitional protection	~~£275.12~~
(Less deduction for carer's allowance)	(£292.93)
	£879.98

13. By way of riposte to the Secretary of State's position, that the Upper Tribunal should reinstate her original decision, it was MJ's contention that that would have the perverse consequence that her monthly award of UC would decrease, despite her needs increasing. Her case was that the original decision breached her rights pursuant to Article 14 ECHR because she was treated less favourably than other transitionally protected claimants, none of whom suffered a loss of benefit on a change of circumstances which resulted in their needs increasing.

14. MJ contended that the Secretary of State had not only failed to justify the differential treatment, but had failed even to attempt to explain it. Instead, she had sought to justify a different provision, regulation 29(4) of the 2013 Regulations, concerning the interaction between the carer's element and the LCWRA element of UC, which was not and never had been at issue in the proceedings.

15. It was to be assumed that that was because the Secretary of State was simply not able to offer any kind of explanation or justification. If so, that was scarcely surprising: it was difficult to envisage what sensible justification might be offered to justify MJ's situation, particularly in the light of the Secretary of State own policy, which was that: (a) transitionally protected claimants should not be subject to a reduction in benefits as a result of an increase in their needs, and (b) transitional protection should be gradually eroded (as opposed to wiped out a

stroke, causing a cliff-edge reduction in benefit), save in specified circumstances which did not apply here.

16. Ms Smyth submitted that MJ's case was strongly supported by the reasoning of the Upper Tribunal in a recent case which the Secretary of State did not even mention in her written submissions: ***Secretary of State for Work and Pensions v JA*** [2024] UKUT 52 (AAC) ("***JA***"), as well as a long line of earlier case-law in which the Secretary of State's decisions in respect of transitional protection had repeatedly been held to breach Article 14 ECHR.

Mandatory Reconsideration

17. MJ sought mandatory reconsideration of the erosion decision of 25 October 2021. On 4 March 2022 the decision was upheld on mandatory reconsideration.

The Decision of the Tribunal

18. On 16 March 2022 MJ appealed to the Tribunal and on 19 April 2023 the Tribunal allowed her appeal. The Tribunal upheld her appeal on the grounds that her Convention rights were breached by the erosion decision which eroded the whole of the TSDPE. The Tribunal agreed with MJ's argument that the erosion decision discriminated against her because it treated her, a carer in receipt of the carer element, differently compared with a person who was not a carer who moved from having the LCW element to having the LCWRA element.

19. The Tribunal disapplied regulation 55 of the 2014 Regulations to avoid the discriminatory outcome. MJ's TSDPE was to be eroded by the difference between the carer's element and the LCWRA element from the assessment period from 10 October 2021 to 9 November 2021 and for each subsequent assessment period.

20. The decision notice stood as the statement of reasons and the Tribunal gave permission to appeal to the Upper Tribunal on the day of the hearing. I have not set out the decision notice at length because in large measure it accepted and incorporated MJ's submissions by reference rather than setting out her contentions in the body of the decision. It is also common ground that the decision of the Tribunal erred materially in law and that its decision should be set

aside and remade. There was a brief argument at an earlier stage in the proceedings as to whether the Tribunal had power to grant permission to appeal in the absence of an actual application by the Secretary of State. MJ accepted, however, that the appeal should be treated as such an application and she did not object to the Secretary of State being granted such permission. For the avoidance of doubt, and to the extent necessary, I grant permission to appeal to obviate any argument on the point hereafter.

21. The error of law occurred in this way. As explained by CPAG in its initial response of 31 January 2024, a misunderstanding led CPAG to base its draft submissions on a factual premise which did not actually exist in the case. The "relevant facts" section of CPAG's draft submission stated, incorrectly, that MJ had, prior to claiming UC, been assessed as having LCW and then, correctly, that she had been receiving ESA and (again, correctly) that, once on UC, she had later been assessed as having LCWRA.

22. On receiving CPAG's draft submissions MJ's representative spotted the inaccuracy and, with one minor exception, corrected the "relevant facts" section of the submission to make clear that she had not been assessed as having LCW. However, the discrimination argument relied upon before the Tribunal had depended crucially on a difference in treatment between a carer with LCW moving to UC and a carer without LCW moving to UC at the point when they were both later assessed as having LCWRA. That meant, that once the facts had been corrected, the legal argument made was no longer applicable. As a consequence MJ's submissions, as provided to the Tribunal, continued to put forward arguments based on MJ having been assessed as having LCW prior to having subsequently being assessed as having LCWRA.

23. In accepting MJ's arguments, which were argued on the basis of facts which did not pertain in her case, the parties are in agreement that the Tribunal erred in law. MJ's position is nevertheless that the Tribunal's decision (a) that there was discrimination contrary to Article 14 ECHR and (b) its outcome decision were correct.

24. Thus the Tribunal erroneously agreed with MJ's argument that the erosion decision discriminated against her because it treated her, a carer in receipt of the carer element, differently compared with a person who was not a carer who moved from having the LCW element to having the LCWRA element.

25. The Secretary of State submitted that that was not a sound comparator in any event: the LCW and LCWRA elements are health-related elements whereas the carer element is not. MJ now accepts that the comparator identified by the Tribunal was erroneous, in particular because MJ did not at the material time have LCW (as explained above). However, MJ now advances two different comparators in order to resist the appeal. The first is someone in "exactly the same situation as [her]", but who is "not a carer". That is, someone who is not a carer, who receives TSDPE and then is awarded LCWRA which will erode TSDPE. The second is "any other person with a transitional element of UC" leading to a change in a UC element.

26. It is the Secretary of State's contention that, when MJ's case is correctly analysed, the erosion principle in regulation 55 of the 2014 Regulations is not material to the case. Rather, the appeal only concerns the effect on the amount of an award of UC to which a claimant is lawfully entitled where LCWRA is added, with the consequence that the carer element is removed. Essentially for that reason, the Secretary of State contends that the erosion decision was correct in law and the various comparators, whether the one erroneously addressed by the Tribunal or the two now advanced by MJ, are not relevant.

27. Before the Tribunal the Secretary of State's arguments on justification, viz. that the TSDPE was only a transitional measure, were not accepted by the Tribunal. As explained above, it considered that the TSDPE was only to be eroded by the difference between the carer element and the LCWRA element for the assessment period and each subsequent assessment period.

The Statutory Framework

28. The Welfare Reform Act 2012 ("the 2012 Act") introduced UC to replace six types of legacy benefits, including income-related ESA. Subject to qualifying

conditions, an award of a legacy benefit could include an amount in respect of disability. An award of UC includes, inter alia, a standard allowance (s.9), an amount for housing costs, that is, the housing element (s.11), an LCW or LCWRA element (s.12(2)(a) and a carer element (s.12(2)(c)).

29. The 2012 Act did not replicate any legacy premiums in respect of disability. Subsequently, the 2014 Regulations were, as noted previously, amended in light of the ***TP1*** ruling to award transitional SDP amounts to persons who had received the premium as part of their legacy benefit, in this case income-related ESA. The Regulations also made provision for a transitional SDP amount to become the transitional element of UC.

30. Material for present purposes is regulation 55 of the 2014 Regulations, which provides for the circumstances in which the transitional element will be eroded over time in light of changes to, or increases in, an award of UC. This regulation forms part of the 2014 Regulations which deal with managed migration to UC and provides for transitional protection to those previously in receipt of legacy benefits (subject to conditions). So far as material, regulation 55 (in the version in force between 24 July 2019 and 24 July 2022 and thus at the date of the decision under appeal on 25 October 2021) provides (with emphasis added):

> "(1) The initial amount of the transitional element is—
>
> (a) if the indicative UC amount is greater than nil, the amount by which the total legacy amount exceeds the indicative UC amount; or
>
> (b) if the indicative UC amount is nil, the total legacy amount plus any amount by which the income which fell to be deducted in accordance with section 8(3) of the Act exceeded the maximum amount.
>
> (2) The amount of the transitional element to be included in the calculation of an award is—
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> (a) for the first assessment period, the initial amount;
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> (b) for the second assessment period, the initial amount reduced by the sum of any relevant increases in that assessment period;

(c) for the third and each subsequent assessment period, the amount that was included for the previous assessment period reduced by the sum of any relevant increases (as in sub-paragraph (b)).

(3) If the amount of the transitional element is reduced to nil in any assessment period, a transitional element is not to apply in the calculation of the award for any subsequent assessment period.

(4) A "relevant increase" is … an increase in any of the amounts that are included in the maximum amount under sections 9 to 12 of the Act (including any of those amounts that is included for the first time), apart from the childcare costs element".

31. Regulation 29 of the 2013 Regulations provides (so far as material):

> "(1) An award of universal credit is to include an amount ("the carer element") specified in the table in regulation 36 where a claimant has regular and substantial caring responsibilities for a severely disabled person …
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> …
>
> (4) Where an amount would, apart from this paragraph, be included in an award in relation to a claimant by virtue of paragraphs (1) to (3), and the claimant has limited capability for work and work-related activity … only the LCWRA element may be included in respect of the claimant."

32. S.3(1) of the Human Rights Act 1998 ("the HRA") provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

33. Article 14 of the Convention provides

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

34. Article 1 of the First Protocol ("A1/P1") to the Convention provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

35. It is well-established (and not in dispute in this case) that entitlements to social security benefits are "possessions" for the purposes of the A1/P1 right: see ***Stec v UK*** (2005) 41 EHRR SE18.

36. The approach required in considering claims relying on Article 14 is well-established (and again not in dispute). In ***T v Secretary of State for Work and Pensions*** [2023] EWCA Civ 24, Simler LJ (as she then was) explained the approach in this way (at [38]):

> "(1) does the alleged discrimination concern the enjoyment of a Convention right, such as article 1, Protocol 1 or article 8?
>
> (2) has the claimant been treated less favourably than a similarly situated group of people?
>
> (3) is the difference in treatment on the ground of a "status" recognised under article 14?
>
> (4) is there an objective and reasonable justification for the difference in treatment?"

37. However, the authorities also stress that a mechanistic approach should not be taken in all cases. Rather, a holistic view of all the circumstances, including the reasons for differences in treatment between different persons and the justification for these differences, must be taken. The issues of "breach" and "justification" often interact and that must be borne in mind when assessing whether there is any violation of Article 14. The point was explained by Swift J in ***R (T) v. Secretary of State for Work and Pensions*** [2022] EWHC 351 (Admin) in this way (at [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."

(See also ***JNW & BHW v. Secretary of State for Work and Pensions*** (UA-2023-000748-USTA, issued on 14 August 2024) at [35]-[36].)

The Secretary of State's Submissions

38. Dealing first with the comparator issue, given that MJ agrees with the Secretary of State that the comparator relied on by the Tribunal is not apt, she does not address that comparator further.

39. As regards MJ's preferred comparators, the Secretary of State submits that the two comparators now advanced by her to resist the appeal are misconceived. In the first place, the hypothetical comparators have the common feature of a person who is not a carer before LCWRA is added to her UC award. Accordingly, MJ's hypothetical comparators are also not appropriate because they do not take account of the fundamental differences between LCWRA (or LCW) on the one hand, and the carer element of UC on the other. In short, MJ's comparators do not provide a basis on which the erroneous decision of the Tribunal could be supported for other reasons.

40. The key facts relevant to MJ for the purposes of any comparison with a hypothetical comparator are these:

(i) at the time of the decision under appeal, her UC award comprised a carer element of UC. That was awarded because she is the carer for her adult son.

(ii) on 25 October 2021 the Secretary of State decided to add a LCWRA element to MJ's UC award. Consequently, the carer element of the UC award was removed and she was notified of that decision on 10 November 2021.

(iii) the effect of the addition of the LCWRA element was to erode the TSDPE to nil.

(iv) if the only issue were the application of the erosion principle to the TSDPE upon the addition of LCWRA to MJ's UC award, she would receive £68.51 per month *more* in UC (see in more detail the table below). However, because the LCWRA leads to removal of the carer element, she receives £95.22 *less* per month after the carer element is removed.

41. It is readily seen from these facts that the difference in treatment about which MJ complains turns on the withdrawal of the carer element of UC upon the addition of LCWRA. However, the purpose of the LCWRA is to recognise needs arising from MJ having limited capability to work because of a health-related condition. In contrast, the carer element is a benefit which recognises a person's difficulty with working arising from caring responsibilities. It would plainly be wrong in principle if a person could be entitled to two elements of UC at the same time, where both elements address entitlement arising from different reasons for being unlikely to be fully engaged in employment viz. either because of caring responsibilities of 35 hours or more per week, or a health-related limitation on her ability to work.

42. To avoid the overlap arising, regulation 29(4) of the 2013 Regulations provides that if a person has the carer element of UC and LCWRA is awarded, "only the LCWRA element may be included in respect of the claimant". It is the effect of regulation 29 which is material in MJ's case, not the operation of the erosion principle contained in regulation 55 of the 2014 Regulations. If the matter only concerned regulation 55, the addition of LCWRA to her award, while eroding the TSDPE to nil, would lead to her receiving a larger award of UC than before the addition of LCWRA.

43. A UC claimant whose case is affected by regulation 55 may or may not be affected by regulation 29 and vice versa. The operation of regulation 29 turns on a person having caring responsibilities and receiving the carer element, who is then awarded LCWRA. The difference with MJ's two comparators (as also with that of the Tribunal) is that the comparators were not carers and/or were not in receipt of the carer element. The Secretary of State submits that that is fatal to MJ preferred comparators, as it was to the comparator adopted by the Tribunal.

44. One can anticipate that MJ will say that the effect of regulation 29 of the 2013 Regulations is the problem and that it gives rise to an unjustifiable breach of her Convention rights. The question then is whether there are "very obvious relevant differences between the two situations" of MJ and her comparators: ***AL (Serbia) v Secretary of State for the Home Department*** [2008] 1 WLR 1434 at [23]-[25], per Lady Hale. The obvious relevant difference between MJ and her preferred comparators is that she was a carer who could work, was not in receipt of LCWRA, but who was awarded LCWRA because of a health condition meaning that she was unlikely to be fully engaged in employment.

45. In so far as she continues to advance her second comparator, the Secretary of State submits that it is too broadly framed and imprecise so as to be practically useful as a relevant comparator with MJ. There are too many variables to be able meaningfully to compare MJ with someone else's "change of circumstances" which has an impact on his or her entitlement to UC. It should be rejected for this reason.

The Justification for Regulation 29(4) of the 2013 Regulations

46. If the issue of justification for regulation 29(4) has to be reached in this case, its legitimate aims and proportionality are easily identifiable in light of the facts of MJ's case.

47. When she received the carer element of UC, she was responsible for caring for her son for at least 35 hours per week. However, prior to the addition of LCWRA (or LCW), she may have been more capable of engaging in the labour

market. In this regard, there was no legal limit on the number of hours that she could work or income that she could receive while still being entitled to the carer element. This is in contrast to the position under carer's allowance. The approach to the conditions for the carer element of UC is consistent with one of the principal objectives of the UC scheme, namely to encourage people into work. The availability of the carer element, to recognise caring responsibilities while also permitting entitlement irrespective of the amount of income received from employment, is an important policy aspect of the UC scheme.

48. The carer element of UC is not a health-related element. Rather, it is awarded on the basis that someone is not able to work because of caring responsibilities, but, as just noted, an award of the carer element of UC does not prevent someone working if they are able to do so, and the UC scheme incentivises that situation by imposing no limit on the income which may be received from work affecting entitlement to the carer element.

49. Equally, the UC scheme recognises that some people have limited capability to work for health-related reasons. In such cases, LCWRA may be awarded. LCWRA therefore covers a different reason for difficulties in engaging fully with employment, namely, health-related considerations.

50. LCWRA is paid at double the rate of the carer element. This reflects the greater needs arising from health problems leading to a limited capability for work. Accordingly, it is wrong to say, as MJ does, that the award of LCWRA does not reflect the greater needs of a person awarded LCWRA as compared to someone awarded the carer element who has caring responsibilities. The level at which LCWRA is paid, as compared to the level of the carer element, reflects the "increasing" needs of a person in receipt of LCWRA who is limited in their employment for health-related reasons.

51. Moreover, it cannot be ignored that MJ receives other benefits, for example, personal independence payment ("PIP"). These awards address needs which she has and which are provided for by those benefits. It is not correct to suggest, as she appears to do, that there is a failure of the benefits system as a whole to

address her needs. In summary, a person cannot at the same time receive LCWRA in recognition of a health-related reason for having limited capability for work and the carer element of UC for caring for someone for at least 35 hours per week. If receipt of both LCWRA and the carer element were possible, a person would be entitled to two elements of UC which are both addressed to work considerations. Moreover, the level at which LCWRA is paid reflects the increased need of someone whose ability to fully engage with employment is diminished for health-related reasons. Given these considerations, regulation 29(4) pursues legitimate aims as part of the UC scheme and does so in a proportionate way, not least given the level at which LCWRA is paid.

Conclusion

52. The Secretary of State submits that the decision of the Tribunal contains an error of law which was material to its decision in MJ's favour. For this reason, the appeal should be allowed and the decision of the Tribunal set aside.

53. The Secretary of State further submits that the Upper Tribunal should remake the decision of the Tribunal to the effect that regulation 55 of the 2014 Regulations applies to MJ's case and that, upon the award to her of LCWRA with effect from 10 October 2021, her award of the TSDPE is eroded to nil for the assessment period 10 October 2021 until 9 November 2021 9and for subsequent assessment periods).

MJ's Submissions

General approach to Article 14

54. In ***R (SC) v Secretary of State for Work and Pensions*** [2022] AC 223 at [37], Lord Reed set out the general approach to be adopted:

> "(1) The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14.
>
> (2) Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.

> (3) Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> (4) The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.""

55. In ***R (TD & ors) v Secretary of State for Work and Pensions*** [2020] EWCA Civ 618 at [69] the Court of Appeal emphasised the need for social security legislation, in the context of Article 14 claims, to be "interpreted in a way which conforms to practical reality, given the potential impact on some of the poorest people in society." The Secretary of State needs to justify differential treatment, rather than policy generally.

56. It is crucial to recall that what needs to be justified by the Secretary of State in any Article 14 claim is the relevant difference in treatment, or the failure to treat different cases differently.

57. This principle is not only well established in general, but has repeatedly been stated by the Courts in the specific context of claims concerning transitional relief for loss of the SDP premium. The Secretary of State could not possibly be in any doubt about this: she has now failed successfully to defend a number of Article 14 claims for precisely this reason.

58. Thus, for example, in ***R (TP) v Secretary of State for Work and Pensions*** [2019] EWHC 1116 (Admin), [2019] PTSR 2123 ("***TP2***"), upheld on appeal, Swift J said this:

> "49. … This claim is not directed to the difference in the level of benefits paid to severely disabled persons under the legacy benefits system and under the universal credit system. Nor is the claim directed to any general proposition that article 14 requires transitional provision to be paid at

> any specific level. The claim does concern the arrangements for transitional provision, but it is directed only to one narrow matter - the justification of the difference in treatment between the members of two groups, the SDP natural migrant group and the regulation 4A group, respectively. The members of each of these groups met, and had legacy benefits remained in place would have continued to meet, the eligibility requirements for SDP. In this context, the argument that article 14 does not per se generate the need for specific transitional provision loses its force, because the present case is one where the Secretary of State has decided to make transitional provision but has chosen to do so in different ways for the different groups.
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> …
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> 51 … the no turning back principle does not itself explain or provide a reason for the distinction between the transitional arrangements applied to the SDP natural migrant group and those that apply to the regulation 4A group. The reason why this is so is underlined by the nature of the trigger events that caused natural migration of SDP claimants (prior to the application of regulation 4A). As demonstrated by the circumstances of *TP and AR*, the trigger events are not aligned to any material change of circumstances relevant to the needs of SDP claimants. Thus, natural migration is not any indication either that the circumstances of the members of the SDP natural migrant group are likely to be any different from those who are members of the regulation 4A group, or that there is any particular reason to treat the members of the two groups differently.
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> …
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> 60. … No sufficient explanation for the difference in treatment has been provided. The Secretary of State's "bright line"/administrative efficiency submission explains the treatment of the SDP natural migrant group on its own terms, but does not explain why that group is treated differently to the regulation 4A group ..."

59. In the earlier case of ***TP1***, also upheld on appeal, Lewis J rejected the Secretary of State's justification argument, because she had failed to provide any evidence explaining the reason for the difference in treatment in that case: see especially [82]-[88].

60. The need for evidence explaining the reason for the difference in treatment between two comparator groups was also emphasised by the Court of Appeal on appeal in the above cases ("***TP (CA)***"). For example, the Court (per Sir Terence Etherton MR and Singh LJ) said this, at [37], [127], [158] and [162]:

> "37. In the light of the issues that arise on the appeal in *TP (No 1)*, what is significant about the evidence of Ms Young in those proceedings is not so much what she says but what she does not say. As will become apparent, Lewis J considered that it was of crucial importance that there was no evidence placed before the High Court to explain what the objective justification was for the difference in treatment as between the affected group of which TP and AR were members (people with severe disability who moved from one local authority to another) and those who moved but remained within the same local authority area.
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> ...
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> 127. The fundamental difficulty that the Secretary of State faces is that there was no evidence placed before Lewis J on her behalf to explain the difference in treatment between the comparator groups. On the evidence that was placed before him, there appeared to have been no consideration of this issue … The reality was that the Secretary of State had simply not placed evidence before Lewis J which would assist him in deciding that there was a reasonable foundation for the difference in treatment.
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> ...
>
> 158. At para 45 of his judgment Swift J rightly observed that, in an article 14 case: "What must be justified is the difference in treatment." There is the highest authority for that proposition in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 68 (Lord Bingham of Cornhill):
>
> > "Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is *not the measure in issue but the difference in treatment* between one person or group and another." (Emphasis in original)

> 162. At para 49, on a point which is also relevant to the third ground of appeal, Swift J said:
>
> > "This claim is not directed to the difference in the level of benefits paid to severely disabled persons under the legacy benefits system and under the universal credit system."
>
> As Swift J observed in the same paragraph, this was a situation in which the Secretary of State had already decided to make some transitional provision but had then chosen to do so in different ways for the different groups. It was that difference of treatment which needed to be justified."

61. The Court of Appeal reiterated this point in ***TD***: see [85].

62. The principle that what needs to be justified is the difference in treatment was emphasised again, in the context of transitional SDP protection, by:

(a) the Administrative Court in ***R(TP & AR) v Secretary of State for Work and Pensions*** ("***TP3****")*, per Holgate J, as he then was, at e.g. [74], [162]-[163], [166]-[168], [222]-[224]. Pertinently to this appeal, at [166] Holgate J observed that:

> "… The background points advanced by the defendant … should not distract the court from examining whether a legally adequate explanation has been provided for the differential treatment now in issue. The need for the Secretary of State to provide such an explanation must have been apparent from the outcome of *TP 1* and *TP 2*."

(b) the Upper Tribunal, in ***JA*** [2024] UKUT 52 (AAC): see e.g. [116] – [118].

Status and comparators

63. MJ's previous written submissions identified two alternative statuses. The Secretary of State has taken no point on the status issue and MJ does not address it further. There is plainly a relevant status (and cf. ***JA*** at [71]-[90)].

64. As to comparator 1, a person who is not already a carer, but has an award superseded to receive the LCWRA element, MJ drew attention to the fact that

bespoke protection is now available, in regulation 55(5) of the 2014 Regulations, for a person who moves from having LCW to LCWRA, so that the transitional protection is not wiped out at a stroke. The Secretary of State's own material expressly accepts that this protection is necessary, to avoid an overall reduction in entitlement in UC when needs change.

65. An example under comparator 2 is a person who is receiving the TE and the LCWRA (prior to the conversion date), who subsequently becomes a carer. Crucially, she does not see any reduction in her UC award (and her TE remains intact) as a result of the combination of being a carer and having LCWRA. That completely disposes of the point made by the Secretary of State. Moreover, there is nothing remotely "vague" about that as a comparator. On the contrary, it shows the patently unjustifiable differential treatment to which MJ is subject.

66. These are the Secretary of State's benefit rules and she ought to be well aware of the different scenarios which might arise in practice, not least given that she has both a public law obligation to ensure consistent treatment amongst claimants, and is also subject to the public sector equality duty in s.149 of the Equality Act 2010. The fact that she has not identified a single alternative scenario where a transitionally protected claimant receives *less* UC as a result of a change in circumstances which *increases* her needs (still less sought to justify this situation) is telling in itself. It shows that MJ's situation is an outlier. The Tribunal is clearly not assisted by the Secretary of State's failure to explain any of this.

Ambit

67. There is no issue about ambit. MJ's claim is clearly within the ambit of Article 14 and Article 1 Protocol 1.

Analogous position

68. The comparators described above are plainly in an analogous situation to MJ. All are persons who were recognised as severely disabled through an award of the SDP and are persons whom SSWP accepted as a matter of policy ought to be awarded transitional protection to protect them from a cliff-edge. Moreover, the

situations of MJ and the person described in paragraph 65 above are more or less exactly the same: the only difference is that one became a carer *before* she was assessed as having LCWRA, and the other became a carer *after* having LCWRA. It cannot sensibly be suggested that their positions are materially different for this reason.

Justification

69. The Secretary of State has, yet again in the context of transitionally protected claimants, completely failed to address, still less justify, the differential treatment of which complaint is made. Instead, her submissions are largely dedicated to defending an irrelevant issue, namely why a person cannot receive the carer element and the LCWRA element at the same time. But that is not MJ's complaint. Her complaint is that she is treated less favourably than other transitionally protected claimants, who are not subject to a reduction in benefit entitlement by virtue of a change in their circumstances which increases their needs.

70. It is self-evidently not a good defence to this complaint to say that it arises because it is the consequence of the way the rules operate in MJ's case. That does not address the reasons why it is justified for the rules to operate in that way.

71. On the face of it, reducing a claimant's UC award, when his or her needs are recognised by the Secretary of State to have increased, is perverse. Plainly, it is a matter which requires the most cogent explanation, particularly as: (a) others in an identical situation suffer no loss of benefit; and (b) the Secretary of State has herself recognised, through legislative changes, that others in an analogous position should not suffer a decrease in benefit when they are assessed as having LCWRA. The Secretary of State has not just provided no evidence which is capable of justifying this differential treatment of transitionally protected claimants; she has, as already set out, not even attempted to explain it.

72. That the Secretary of State should have failed to offer any justification is scarcely surprising, since this situation is manifestly not justifiable. It has the

effect that MJ is not just subject to a cliff-edge, through a very substantial loss of benefit (the very thing which transitional protection sought to avoid), but is subject to that cliff-edge when her needs have increased, because she has been assessed as having LCWRA.

73. CPAG is aware of other cases where individuals, who are carers, have subsequently developed LCWRA and have lost their transitional protection, meaning that they are substantially worse off despite their needs having increased. CPAG is also aware of a situation where an individual (who is a carer) has suffered a deterioration in his or her health, but has asked the Department of Work and Pensions not to conduct a work capability assessment so that they do not end up with a decrease in their award. (I should add that, unusually, the hearing before me was attended remotely by welfare rights representatives from more than one organisation, suggesting that the issue does have significantly wider impact than usual.)

74. MJ specifically relies on the recent decision of the Upper Tribunal in ***JA***. Although the facts were different, exactly the same reasoning applies here.

75. The Secretary of State refers to the unreported decision of this Tribunal in ***JNW*** (UA-2023-00748-USTA), although rightly she does not suggest that the decision in that case is capable of being read across to the current situation. That case concerned a claimant who had never been transitionally protected, and was effectively a claim that transitional protection should have been broader. The issue here is completely different.

Remedy

76. On the question of remedy, the Tribunal can: (a) interpret the secondary legislation so as to achieve a Convention-compliant result, pursuant to s.3 of the Human Rights Act 1998; or (b) disapply an offending provision of secondary legislation: see ***RR v Secretary of State for Work and Pensions*** [2019] UKSC 52, [2019] 1 WLR 6430.

77. As to the former, the Tribunal can give effect to the MJ's Convention rights by reading "the sum of any relevant increases" in regulation 55(2)(c), read with regulation 55(4), as meaning the actual increase in award attributable to elements included in the award under ss.9 to 12 (here, the difference between the LCWRA element and the carer's element, which is £179.90). This results in MJ's transitional protection eroding to £95.10, rather than being wiped out altogether. The word "sum" (as in the "sum of any relevant increases") indicates that a *sum* should be done (i.e. calculating what the increase actually is, rather than simply looking at the quantum of the LCWRA element), which is precisely what this interpretation does.

78. Alternatively, applying ***RR***, the relevant provision here is regulation 55(4). It can be "blue-pencilled" so that it reads: ""A "relevant increase" is an increase in the maximum amount, apart from the childcare costs element." "Maximum amount" is defined in s.8(2) of the 2012 Act. The Secretary of State has not argued that ***RR*** does not provide a remedy in this case.

Conclusion

79. For these reasons, the Tribunal is invited to allow the appeal.

Analysis

80. It is a stark fact in the present case that MJ's monthly award of UC decreases from £975.20 to £879.98 despite her needs increasing.

81. I am satisfied that there is no justification for such differential treatment, indeed there is no real explanation for it. What the Secretary of State has sought to do is to justify regulation 29(4) of the 2013 Regulations, which concern the interaction between the carer's element of UC and the LCWRA element of UC, which is not and never has been in dispute in these proceedings, as Ms Smyth made clear in her skeleton argument and her opening submissions.

82. In reaching this conclusion, I have particularly borne in mind the injunction of the Court of Appeal in ***TD*** at [69] to the effect that

> "It is important that the legislation in this country governing social security should be interpreted in a way which conforms to practical reality, given the potential impact on some of the poorest people in society."

83. Regulation 29(4) provides that, where an amount would, apart from that paragraph, be included in an award in relation to a claimant by virtue of paragraphs (1) to (3) (i.e. a carer element) and the claimant has limited capability for work and work-related activity, only the LCWRA element may be included in respect of the claimant.

84. That, however, is not an answer to MJ's claim that she has been treated differently, and less favourably, than other transitionally protected claimants, none of whom suffer a *loss* of benefit on a change of circumstances which result in their needs *increasing*.

Ambit and Status

85. So far as the approach required in considering an Article 14 claim is concerned, there is no real difference between the approach of Lord Reed in ***R(SC)*** set out in paragraph 54 above and that of Simler LJ in ***T*** set out in paragraph 36 above.

86. Ambit and status are not in dispute in this case and I do not therefore need to consider them further. The alleged discrimination concerns the enjoyment of a Convention right and the difference in treatment is based on an identifiable characteristic or status within the meaning of Article 14. What are in dispute are (a) whether the claimant MJ has been treated less favourably than a similarly situated group of people and (b) whether there was an objective and reasonable justification for the difference in treatment.

Comparators

87. In considering the question of comparators, I bear in mind that the exercise of identifying comparators in analogous situations in the context of a discrimination claim is a way of assessing whether like cases have been treated differently for some unjustified status-based reason, such that the state has failed to "secure"

equal enjoyment of underlying Convention rights on grounds of status. The question of whether situations are relevantly comparable so as to require the same treatment (or the converse of that) cannot be neatly separated from the question of whether differences in treatment, or treating those whose situations are relevantly different the same, are justified (and see ***JA*** at [63-64] cited below).

88. I also bear in mind what Upper Tribunal Judge Church said in ***JA*** to the effect that

> "65. Mr Royston cited *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, in which Lord Nicholls of Birkenhead said (at [3]) that he favoured an approach to discrimination cases of keeping the formulation of the issues as simple and non-technical as possible, and that while in some cases there may be
>
> > "such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."
>
> 66. This overlap between the exercises of assessing whether cases are in a "similar situation" and whether the difference in treatment is justified was also noted by Baroness Hale in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 at [24] that:
>
> > "…the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether "differences in otherwise similar situations justify a different treatment."
>
> 67. Mr Edwards referred me to *R (T) v Secretary of State for Work and Pensions* [2022] EWHC 351 (Admin), in which Swift J reviewed the authorities and concluded that a holistic approach was called for:
>
> > "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."
>
> 68. Both parties agreed that it was appropriate for me to take such a "holistic" approach, which is what I have decided to do."

89. Moreover, in ***Re McLaughlin*** [2018] UKSC 48, [2018] 1 WLR 4250 Baroness Hale explained at [26]:

> "It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the two persons that they are not in an analogous situation. The factors linking the claim to [the substantive article in issue] are also relevant to this question."

90. Mr Edwards submitted that MJ was a carer and in receipt of the carer element of UC, unlike the two proffered comparators relied on by the claimant, and that that difference was fatal to those two comparators. I accept that that is a difference between the claimant and the comparators, but when one looks at the question of comparability in the context of the measure in question and its purpose, namely to ask whether there is such an obvious difference between the two persons that they are not in an analogous situation, the difference is not as obvious as Mr Edwards suggests; rather there is all too plainly an analogy to be drawn between the claimant and the comparators.

91. In my judgment, Ms Smyth is right when she says that the comparators described above are plainly in an analogous situation to MJ. All are persons who were recognised as severely disabled through an award of the SDP and are

persons whom the Secretary of State accepted as a matter of policy ought to be awarded transitional protection to protect them from a cliff-edge. The analogy is therefore closer to their actual situation than the difference identified by Mr Edwards, albeit that the situations are not on all fours, but that is inevitably the case where one is seeking to draw an analogy.

92. In the case of comparator 1, a person who is not already a carer, but has an award superseded to receive the LCWRA element, the cliff-edge is avoided by virtue of the fact that bespoke protection is now available (as from 25 July 2022), in regulation 55(5) of the 2014 Regulations, for a person who moves from having LCW to LCWRA, so that the transitional protection is not wiped out at a stroke. The subsection provides that

> "In cases where the LCW element is replaced by the LCWRA element, the "relevant increase" is to be treated as the difference between the amounts of those elements".

(Ms Smyth did not suggest that this provision was in force at the date of the decision under appeal, but she relied on it in relation to the question of justification, with which I deal below.)

93. Comparator 2 is a person who is receiving the TE and the LCWRA (prior to the conversion date), who subsequently becomes a carer. Significantly, she does not see any reduction in her UC award (and her TE remains intact) as a result of the combination of being a carer and having LCWRA.

94. Contrary to the submission of the Secretary of State, I see nothing vague about that comparator. The situations of MJ and comparator 2 are indeed more or less exactly the same. The only difference is that one became a carer *before* she was assessed as having LCWRA and the other became a carer *after* having LCWRA, but their situations are not materially or relevantly different for that reason. As Ms Smyth rightly submitted, on the contrary, it shows the patently unjustifiable differential treatment to which MJ is subjected.

95. Ms Smyth produced three discrete situations, in none of which did the claimant end up worse off (as MJ did in her situation). In the first place, comparator 1, was someone who, unlike MJ, was not carer but then received LCWRA. The table captures the difference in treatment (housing costs are excluded, but that makes no difference for present purposes):

	Carer – initial UC award	**Comparator 1 – initial UC award**	**Carer – UC award after LCWRA element**	**Comparator 1 – UC award after LCWRA element**
Standard Allowance	£324.84	£324.84	£324.84	£324.84
Carer Element	£163.73			
LCWRA Element			£343.63	£343.63
Transitional SDP element	£275.12	£275.12		
Total UC Award	£763.69	£599.96	£668.47	£668.47
Difference after LCWRA added			**-£95.12**	**£68.51**

96. The second situation was comparator 2, to which I have referred above. The net effect was that in that case there was no change in the award; the claimant, unlike MJ, did not end up with less than she had.

97. The third was the current position with regard to comparator 1 in the light of regulation 55 (see paragraph 92 above) where the "relevant increase" is to be treated as the difference between the amounts of the LCW and the LCWRA

elements. Why, asked Ms Smyth, was MJ alone in suffering a loss of benefit when no one else did? The Secretary of State did not suggest who else would suffer such a loss. Indeed the reality is that no other group so suffers in the way that MJ does. It is not an adequate answer to say, as the Secretary of State does, that MJ's higher level of needs is reflected in a higher award of LCWRA if the net effect of the legislation is to reduce her benefit overall when her needs actually increase. That is not the practical reality enjoined by the Court of Appeal in ***TD*** at [69]. It is not mixing and matching elements of UC to achieve a more favourable outcome. It is, by contrast, avoiding hardship by falling off a cliff-edge when there is no relevant difference between someone in MJ's position and someone in an analogous position.

98. In this case the reality is that the factors which link the claim with the substantive Article at issue are essentially the same ones which Rose LJ identified in ***TP (CA)*** (with emphasis added):

> "211 … the 'very purpose' of A1P1 combined with Article 14 is to prevent people being arbitrarily deprived of their possessions … in a way which discriminates against them. *The effect of the substantial drop in income on these severely disabled benefits recipients is particularly harsh because of their particular needs and vulnerabilities* …"

99. I am therefore satisfied that the position of the claimant and comparators 1 and 2 are analogous and are not incomparable. On the contrary, to accept the submissions of the Secretary of State on the point would be to accept precisely the sort of "unduly technical" distinction which was rejected in ***TP (CA)*** and which I reject here. As has been observed in a similar context, if every difference made situations incomparable there would be no comparators for anything.

100. I am reinforced in that conclusion by what Swift J said in ***TP2*** to the effect that a discrimination claim can contain a range of what can be described as moving parts, e.g. for example the closeness of the analogy, 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 which

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. When one considers the matter as a whole, including the issue of justification (with which I deal separately below), the answer becomes all the clearer.

Justification

101. In considering the question of justification for the difference in treatment, it is necessary to set out the relevant policies of the Secretary of State in the light of the decided cases.

102. One begins with the Universal Credit Policy Briefing Note of 1 September 2011. Paragraph 3 set out the key policy proposals including (with emphasis added)

> "(e) **Within Universal Credit individuals will only qualify for either a disability or a carer element, not both**. The Government is removing current overlapping provision that allows people to simultaneously claim an addition by virtue of a medical condition and a carer element for themselves to reflect the fact that the additions are paid in respect of not being able to work through either a medical condition or by virtue of caring responsibilities. However, as now, couples could get a disability addition for one member and the carer element for the other partner.
>
> (f) Whilst many people may benefit from Universal Credit, **transitional protection will apply to current claimants** *so that there will be no cash losers as a direct result of the move to Universal Credit where circumstances remain the same*".

103. Thus the policy is that transitional protection will apply to current claimants, so that there will be no cash losers as a direct result of the move to UC where circumstances *remain the same.* It is apparent that there is no suggestion that claimants whose circumstances had changed *for the worse* (as here) should lose in cash terms.

104. On the contrary, paragraph 5 included a description of how the protection would work in practice (again with emphasis added)

> "(d) Transitional protection will protect the existing entitlements of people already receiving the various premiums in the current system. In an individual case the need for transitional protection will depend on how the overall benefit entitlement is affected by the move to Universal Credit. The groups who may need some transitional protection as a result of the changes described in this paper include:
>
> • Families who receive the disabled child element of Child Tax Credit (or the disabled child premium in Income Support) for a child but not the severely disabled child element
>
> • People who have been awarded the severe disability premium in the existing out of work benefits
>
> • People with an addition not linked to limited capability for work or work-related activity (eg the disabled worker element in working tax credit)
>
> ...
>
> (f) Some of these households may gain from Universal Credit as a whole. *For those households who would lose from Universal Credit as a whole, transitional protection will apply where circumstances remain the same*".

The same point as made in paragraph 103 above applies again.

105. Next comes the Universal Credit Policy Briefing Note: Transitional Protection and Universal Credit of 10 December 2012 which stated that (again with emphasis added)

> **"2. Background**
>
> The principle of offering Transitional Protection which avoids cash loss at the point of change and which erodes over time is an established one. It is similar to the approach adopted when Income Support was introduced in 1988 and in the current move from Incapacity Benefit/Income Support to Employment and Support Allowance.
>
> ...

3. Key Policy Principles

For many claimants, Universal Credit will provide a level of support that is the same as, or higher than, the current system.

To ensure, there will be no cash losers directly as a result of the migration to Universal Credit where circumstances remain the same, the Government will provide cash protection to claimants whose Universal Credit award would be less than under the old system, in the form of an extra amount to make up the difference between the old and the new. The maximum amount will be fixed at the point of change and cash protection will continue to be paid until the value of the award under the new system overtakes the levels of the pre-Universal Credit entitlement. Section 5 outlines what happens to the cash protection as the amount of a Universal Credit award changes.

...

5. How will Transitional Protection change?

Transitional Protection will be eroded by changes in the underlying Universal Credit Award, as outlined below.

Subsequent increases in Universal Credit award: for example, if a claimant qualifies for £20 cash protection and subsequently sees a rise in their underlying Universal Credit award, perhaps through a small fall in income, the birth of a child, or through uprating of the Universal Credit elements, the total award will not increase until the £20 cash protection is used up. This approach ensures that people move eventually to their new rate but without seeing any cash reductions in the amount.

Subsequent decreases in Universal Credit award: if a claimant sees a fall in their Universal Credit award, maybe through an increase in their earnings, the amount of cash protection given at the point of transition will be unaffected, ensuring that work incentives are also protected.

Should a claimant continue to increase their earnings past £0 Universal Credit net entitlement then their Transitional Protection will be removed at the set single taper rate. This ensures that claimants do not experience a ‘cliff-edge’ by losing all their Transitional Protection once they are no longer entitled to Universal Credit. However it ensures that they do not continue to receive support should they no longer need it.

6. When will Transitional Protection end?

As stated, we believe it is correct to cushion claimants who are affected by a change that the DWP is making when the claimant has had no changes in circumstance. However, it is appropriate to end this protection when circumstances underlying an award are no longer recognisable as those on which the legacy calculation was made. Therefore Transitional Protection will end altogether if a claimant's circumstances change significantly. The following occurrences are defined as a significant change in circumstance:

• a partner leaving/joining the household;

• a sustained (3 month) earnings drop beneath the level of work that is expected of them according to their claimant commitment;

• the Universal Credit award ending; and/or

• one (or both) members of the household stopping work.

Once Transitional Protection has ended it will not be applied to any future awards".

106. The stated policy is therefore to cushion claimants who are affected by a change made by the Secretary of State when the claimant has had no changes in circumstance. It is, however, appropriate to end the protection when circumstances underlying an award are no longer recognisable as those on which the legacy calculation was made. Transitional protection will therefore end altogether if a claimant's circumstances change significantly. Again, nothing is stated to the effect that transitional protection will end *altogether* if a claimant's circumstances change significantly *for the worse* and I reject the Secretary of State's argument to that effect nor do I accept that the interaction between the carer's element of UC and the LCWRA element is envisaged in these documents as a means of altogether extinguishing the transitional protection afforded to MJ.

107. The Explanatory Memorandum to the 2019 Regulations stated that

"Purpose of the instrument

2.1 The regulations make provision to:

- introduce 'transitional payments' for those eligible claimants who were in receipt of the Severe Disability Premium (SDP) as part of their award of JSA(IB), ESA(IR) or IS and have already moved to UC following a relevant change in their circumstances. These payments will comprise:

- an ongoing monthly payment where they are eligible for it;

- an additional lump-sum payment to cover the period since they moved;

- the conversion of the monthly payment into a transitional element at a date to be determined by the Secretary of State so that it can be administered and ended in the same way as for those claimants who are receiving transitional protection;

- abolish, from January 2021, the SDP Gateway that prevents claimants entitled to the SDP from making a claim to UC if they have a relevant change of circumstances. Once the Gateway is removed claimants will move to UC if they have a relevant change of circumstances and may be eligible to be considered for transitional payments.

3. Matters of special interest to Parliament
Matters of special interest to the Joint Committee on Statutory Instruments

...

3.2 The principal changes to the regulations are to add a provision to remove the SDP Gateway and increase the transitional payment amounts to be paid to claimants previously entitled to the SDP.

...

7. Policy background
What is being done and why?

...

Transitional Protection – transitional element

...

7.26 The regulations also allow for the transitional element to be eroded by an increase in the second or subsequent assessment period if another element included in the UC award increases, or when a new UC element is added to the UC award. An illustrative example of how this would work is below.

7.27 A claimant is in receipt of £1,901.57 UC, which is made up as follows:

Child Element for 2 children	£277.08 + £231.67
Standard Allowance	£317.82
Housing Element	£975.00
Transitional Element	£100.00
Total monthly UC indicative amount	£1,901.57

7.28 However, if the claimant reports an increase in rent by £25 to £1,000 in an assessment period after the transitional element has been awarded, the UC award would be adjusted as follows:

Child Element	£277.08 + £231.67
Standard Allowance	£317.82
Housing Element	£1000.00
Transitional Element	£75.00
Total monthly UC indicative amount	£1,901.57

...

Claimants in receipt of Severe Disability Premium (SDP)

7.40 Regulations have been included to support the transition for those claimants who are entitled to the SDP in JSA(IB), IS, or ESA(IR). Those who were entitled to SDP as part of a Housing benefit (HB) only claim will not be eligible for these SDP transition payments. The legacy system's complex mix of disability elements has been simplified in UC. UC has two disability elements for adults, and its funding has been targeted differently from the existing benefits, with more money targeted at the most severely disabled.

...

7.46 The regulations provide for a one-off check, which:

• ensures that the additional transitional payment is restricted to claimants who are still entitled to UC. This is because claimants who have ceased to be entitled would have had changes of circumstance which means that they cannot be considered as being in an equivalent position to someone still on UC and requiring support;

• excludes cases where, since moving to UC following a relevant change in their circumstances, they have formed a couple or separated from their partner. These would be excluded on the basis that such wider changes would have been likely to affect entitlement to the SDP had the claimant remained on existing benefits, and that protection should not cover such wider lifestyle changes;

• both the above criteria are also criteria by which it is proposed to end Transitional Protection for managed migration cases, thereby providing a continuity of treatment.

...

7.49 As with Transitional Protection, the 'transitional payment' will end where UC claimants form a couple or separate from their partner or where entitlement to UC ends. At a future date, to be determined by the Secretary of State, these payments will be converted into a transitional element. Once these payments have been converted to a transitional element, they will be subject to the rules associated with Transitional Protection and will erode or end in certain circumstances.

...

10. Consultation outcome

...

Severe Disability Premium

10.38 The SSAC report welcomed the decision not to migrate claimants in receipt of the SDP if they had a change of circumstances, the payment to claimants who had already migrated to UC and lost SDP and arrears being paid in respect of this from the start of a claimants UC award. However, it felt that the payment on offer fell short of the level available via SDP within existing benefits. It also commented that:

> • payment of the Enhanced Disability Premium was not included in the proposals for transitional payment even though this was not replicated in UC either;
>
> • an element should be added to UC equivalent to the value of SDP and fulfilling a similar function; and
>
> • the claimants in this group will be the least able to comply with the obligation to make a timely claim for UC and, therefore, are most in danger of missing out on Transitional Protection.
>
> 10.39 The Government has considered these comments and believe the current proposals offer a fair and balanced response to help provide additional financial support to what is a very specific group of claimants with distinctive needs.
>
> ...
>
> *Loss of Transitional Protection*
>
> ...
>
> 10.48 The Department considered these comments, but believes it appropriate to end Transitional Protection when a claimant's circumstances no longer resemble those on which the original Transitional Protection calculation was made, i.e., it is no longer a like-for-like comparison. Therefore, Transitional Protection will end altogether if a claimant's circumstances change significantly.

108. As Ms Smyth submitted, there is no engagement in any of this material with the position which arises here. There is no explanation or justification proffered to a claimant in a position like MJ's to the effect that "yes, you are worse off when your circumstances change for the worse - and this is the reason why".

109. The Explanatory Memorandum to the 2021 Regulations explained that (again with emphasis added)

> "...
>
> **6. Legislative Context**
>
> ...

6.2 The 2019 regulations also introduced a SDP transitional payment for claimants entitled to SDP as part of their legacy award who had already moved to UC before the gateway came into effect on 16 January 2019 and for others who moved after that date but who were subsequently awarded SDP retrospectively. These payment provisions came into effect from 22 July 2019. This was intended to provide transitional support to these claimants in acknowledgement of the decrease in financial award they would have experienced moving to UC prior to the introduction of the SDP gateway.

...

7. Policy background
What is being done and why?

...

7.4 From 27 January 2021, a transitional SDP element will be considered for those people who had an SDP in their legacy award of either ESA (income related), JSA (income based) or Income Support within the previous month of their move to Universal Credit and where eligible, it will be paid as part of the claimant's Universal Credit award as a 'transitional element'. This transitional element will then be subject to a reduction by the amount of any increase to any other Universal Credit element, other than the child care costs element, or by the amount of any new award of a Universal Credit element other than the child care cost element.

...

7.7 The erosion of SDP related transitional element will *gradually align entitlement to Universal Credit for those that migrate to Universal Credit with those of new claimants to Universal Credit in the same circumstances in line with a principle based on equality*".

110. Finally, the Explanatory Memorandum to the 2022 Regulations (which effected the amendments to regulation 55) explained that (again with emphasis added)

"...

7. Policy background
What is being done and why?

...

Transitional Protection

...

Managed migration – adjustment to transitional element where other elements increase

7.25 During the passage of the 2012 Act, the Government announced that existing benefit claimants who are migrated to UC by the Government who would otherwise have an initial lower entitlement to UC than they had to their existing benefits at the point they make their UC claim will be Transitionally Protected. To this end, regulation 55 of the 2014 Regulations establishes how Transitional Protection will be applied to the UC award via the calculation of a Transitional Element (TE) in UC.

7.26 The announced policy has also always been that TE will subsequently be reduced by an increase in a UC element already in award or the award of a new UC element. Although this is the case, an issue has been identified in the legislative structure that where a UC claimant:

• was previously on income-related Employment and Support Allowance and was in receipt of both the Severe Disability Premium (SDP) and the Work-Related Activity Component;

• was moved to UC by the Government and awarded the Limited Capability for Work (LCW) addition and received TE as a result of previously receiving the SDP in their existing benefit(s);

• they could lose out financially at a later date if they were subsequently found to have Limited Capability for Work and Work-related Activity (LCWRA).

7.27 From a policy perspective, it has always been the intention that a reassessment from LCW to LCWRA be treated as an increase in the claimant's health-related element and TE should therefore be reduced by the amount of the difference between the LCW and the LCWRA.

7.28 However, the issue identified in the legislative structure means that LCW and the LCWRA are two distinctly different elements. They are not two rates of the same element and therefore, where a claimant's health deteriorates and their

> work capability is reassessed, they do not experience an "increase" in their health-related element. Instead, the LCW is terminated and the LCWRA is awarded as a new element.
>
> *7.29 This means, that under a strict reading of regulation 55, the claimant's TE should be reduced by the full amount of the Limited Capability for Work and Work-related Activity (LCWRA) (not the difference between it and the Limited Capability for Work (LCW)) whilst the LCW amount would also be stopped. This could result in claimants having their overall entitlement to Universal Credit (UC) reduced when they experience a deterioration in their health.*
>
> *7.30 As a result, these regulations amend the 2014 Regulations to put it beyond doubt that the treatment of the LCWRA as a relevant increase is an exception to the general rule regarding amounts awarded for the first time to ensure these claimants do not lose in the above cases where LCWRA is subsequently applied to the UC award".*

111. It is apparent from this that the driver for these proposals was to *avoid* reduction of an award when health *deteriorates*. Why then, asked Ms Smyth pointedly, should that result eventuate when the claimant is carer? Again there is nothing to explain why someone in the position of MJ should be subject to a cliff-edge when no one else in a comparable position is.

112. Ms Smyth quoted to me extensively from the cases in the ***TP*** litigation, in particular from ***TP1*** at [36], [64], [82-88], ***TP2*** at [30-38]. [48-51], [59-60], [64-65], ***TP (CA)*** at [38], [87], [92-93], [127], [158] and [162-163], ***TD*** at [53-55] and [90] and ***TP3*** at [23-25], [99-113],]152-156], 158-166], [192-196], [206], [211], 22] and [222-224]. I do not need to set out all of those passages in this judgment, which would serve only to increase the length of my decision inordinately. Suffice it to say that

(i) the policy identified in ***TP1*** at [64] that the view of the decision maker that it is desirable to encourage people to act as carers is hardly consistent with deciding that a carer whose needs *increase* is thereupon expected to do so for £100 *less* per month

(ii) just as in ***TP1*** at [82-88] there is no material before me to indicate that the issue of the loss of benefit for someone in MJ's position was considered before the making of the relevant regulations either by the government or by Parliament when the draft regulations were put before it (and see to the like effect ***TP (CA)*** at [127])

(iii) the point made in ***TP2*** at [48-52] applies with equal force in the present case. The claim in this case is not directed to any general proposition that Article 14 requires transitional protection to be paid at any specific level; nor does it concern the general arrangements for transitional provision. Rather it is directed only to one narrow matter, namely the justification of the difference in treatment between members of two groups, those in MJ's position and those in (as I have found) analogous positions. As Ms Smyth put it, the Secretary of State's reliance on the no turning back principle in ***TP2*** is no different from the reliance on regulation 29(4) of the 2013 Regulations in this case. The existence of regulation 29(4) (like the no turning back principle in ***TP2***) does not of itself explain or provide a reason for the distinction between the transitional protection applied to the two groups or why one should face a cliff-edge in terms of loss of benefits when the needs of the claimant actually increase

(iv) as Swift J found in ***TP2*** at [64], the requirement of justification brings with it the burden of explanation. Overall, I am not satisfied that the Secretary of State has identified any reason which explains the different treatment of those in MJ's position and those in analogous positions. The standard which MJ must meet for this purpose is the manifestly without reasonable foundation standard. Even though that standard is low (so far as the burden which it places on the Secretary of State), there is a mismatch between the reasons on which the Secretary of State relies and the difference in treatment which needs to be justified

(v) as in ***TP2*** at [65], it may be that the shortfall to MJ and those in her situation is small in absolute terms (£100 per month), but the difference in real terms is very significant indeed. She is a carer whose needs have increased, yet she is expected to get by on £100 per month less, notwithstanding the increase in her

needs. Bizarrely, if the Secretary of State is correct, the loss which she suffers is triggered precisely *because* her needs increase

(vi) the argument that it is inherent in the UC scheme that there will be winners and losers or that the erosion principle applies to all claimants across the board fails, just as it did in in ***TP (CA)*** at [86-87]; that would introduce an unduly technical approach to a question which should be viewed in a realistic way. In reality there can be no sensible dispute that there is a difference of treatment between MJ and those in her position on the one hand and, on the other, people in an analogous situation. The latter simply do not suffer the financial loss by plummeting over the financial cliff-edge as MJ does

(vii) as explained in ***TP (CA)*** at [158], citing Lord Bingham of Cornhill in ***A v Secretary of State for the Home Department*** [2005] 2 AC 68 at [68]

> "Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is *not the measure in issue but the difference in treatment* between one person or group and another." (Emphasis added.)

(viii) as the Court of Appeal explained in ***TD*** at [54]

> " ... it is also well established that the fact that an issue has been considered by a decision-maker is relevant to the question which the court itself has to determine. It may affect the weight which the court should give to the views of the decision-maker when coming to its own assessment of the issue of justification. This is the point to which the Judge made reference at para. 65 of her judgment, where she quoted Lord Kerr JSC in *Re Brewster* [2017] UKSC 8; [2017] 1 WLR 519, at para. 64. That passage included the following:
>
> > "Where a conscious, deliberate decision by a government department is taken on the distribution of finite resources, the need for restraint on the part of a reviewing court is both obvious and principled. Decisions on social and economic policy are par excellence the stuff of government. But where the

> question of the impact of a particular measure on social and economic matters has not been addressed by the government department responsible for a particular policy choice, the imperative for reticence on the part of a court tasked with the duty of reviewing the decision is diminished."

113. In short, approaching the matter in terms of the ***Bank Mellat v HM Treasury (No 2)*** test ([2013] UKSC 39), it is important to have in mind the narrow nature of the differential treatment in issue (just as in ***TP2***), albeit of very great importance to MJ and others in the like position. I am not satisfied on the material before me that the broad aims of promoting phased transition, curtailing public expenditure or administrative efficiency required the complete erosion of transitional relief against the loss in the case of a carer who is in receipt of UC, but whose health conditions subsequently worsen.

114. 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 MJ and those in her situation and the contribution which that measure makes to the achievement of the Secretary of State's aims, *a fortiori* where there is no rational connection between the triggering event, the decline in the health of the claimant, and any rational assessment of why it is that that fact should result in a reduction in her benefits by a significant amount.

115. I am also therefore satisfied that there was no objective and reasonable justification for the difference in treatment between MJ as claimant in this case and the comparators on which she relies.

JA

116. Although Mr Edwards submitted that ***JA*** was not a guide to the present case, I do not agree, although I accept that ***JA*** arose in a different factual context.

117. In ***JA*** the agreed facts were that

> "6. From 10 November 2016 until 10 June 2018 the Claimant was in receipt of income-related Employment and

Support Allowance ("ESA") with the Severe Disability Premium ("SDP").

7. On 11 June 2018 the Claimant made a claim for Universal Credit as a 'natural migrator'. This was triggered by her moving home from one local authority to another.

8. On 11 September 2019 the Secretary of State decided that the Claimant was entitled to Transitional SDP of £285 for each full assessment period between 11 June 2018 and 11 September 2019, and thereafter each month (pursuant to Schedule 2 to the 2014 Regulations, inserted by the Universal Credit (Managed Migration Pilot and Misc. Amendments) Regulations 2019 (the "Transitional Protection Regulations").

9. On 14 September 2020 the Claimant moved again, this time from mainstream accommodation into specified accommodation.

10. On 18 September 2020 the Claimant notified the Department for Work and Pensions ("DWP") of her move to specified accommodation, which amounted to a relevant change of circumstances.

11. On 13 October 2020 ("Conversion Day") the Secretary of State converted the Transitional SDP Amount to a transitional element which would be included within the Claimant's monthly Universal Credit award, rather than paid as a standalone payment (the "Transitional Element"). The Transitional Element was £285 per month.

12. On 18 May 2021 the Claimant moved out of her specified accommodation into mainstream rented accommodation, which represented another relevant change of circumstances. The Claimant notified the move to the DWP on 22 June 2021.

13. On 11 July 2021 the Secretary of State decided that, as a result of the Claimant's move, the Claimant was now entitled once again to a Housing Costs Element in her award of Universal Credit to cover her monthly rental and service charge. As a consequence, the Claimant's award of the Transitional Element of Universal Credit was reduced to nil, in accordance with regulation 55 of the 2014 Regulations (the "SoS Decision"), because the additional amount awarded for the Housing Costs Element (£369.37) exceeded the amount of the Transitional Element (which was £285 per month)."

118. The Tribunal at first instance found (as set out in the Upper Tribunal decision at [17]) that

> "21. On the basis of the decision in *TP and AR* and the other authorities cited, the Tribunal accepted that the implementation arrangements for Universal Credit, including the availability (or not) of transitional protection, fell within the ambit of a convention right. Indeed, the respondent had not contested this point.
>
> 22. The [Claimant's] Representative submitted that she "has an 'other status' as someone with a transitional element based on her severe disability premium, included in her Universal Credit award calculation and who has moved from specified accommodation to mainstream rented accommodation". The Tribunal agreed that this was the case.
>
> 23. Furthermore, "[the] Claimant and person who has been treated differently are in analogous situations. [The Claimant] has been treated differently compared to someone ("person 1"), also receiving Universal Credit Transitional Severe Disability Premium, who moves from mainstream rented accommodation to another cheaper mainstream rented property. The Tribunal accepted this as fact.
>
> 24. It was explained that "[The Claimant] has moved from a more expensive to less expensive rented property, and in doing so eroded her transitional element in its entirety. In contrast person 1 would, because they are moving between mainstream rented properties, experience no erosion of the same element. This difference in treatment occurs even though, like [the Claimant], person 1 is moving to accommodation which was cheaper than their previous accommodation. Therefore it is only because [the Claimant's] housing costs were previously met via [H]ousing [B]enefit and are now met by Universal Credit that her transitional element has been eroded: this factor causes her Universal Credit maximum amount to increase despite the fact her overall amount of benefit entitlement has decreased (i.e. Housing Benefit plus Universal Credit before her move are less than Universal Credit including Housing Costs Element would be in new property)."
>
> 25. "[The Claimant] has not moved to accommodation with rent which is either the same, or more expensive than, her previous property. However, it is instructive to compare the

difference in treatment as compared to person 1 in these situations:

(a) if [the Claimant] had moved to a mainstream property with rent at the same level her transitional element would erode by the full amount of the Universal Credit Housing Costs Element, in most cases eroding the transitional element entirely. If person 1 were to move to a property with the same rent they would not see any erosion in their transitional element.

(b) If [the Claimant] were to move to a mainstream property with higher rent, then her transitional element would erode by the full amount of the Universal Credit Housing Costs Element, in most cases eroding the transitional element entirely. In contrast, if person 1 were to move to more expensive accommodation, then their transitional element would only erode by the difference between the Universal Credit Housing Costs Element for the old property and the Universal Credit Housing Costs Element for the new, more expensive, property."

26. On that basis it was argued that the Appellant has also been treated differently to someone ('person 2') receiving Universal Credit transitional element who moved from specified or temporary accommodation to another property which is also specified or temporary accommodation. Person 2's transitional element would not be affected at all by moving to a new home – regardless of whether or not the rent was more or less than at the previous accommodation.

27. The Tribunal acknowledged this analysis and found that that [sic] the [Claimant] had been treated differently and less favourably than the hypothetical comparators 'person 1' and 'person 2'.

28. The Representative addressed the question as to whether the difference in treatment could be objectively justified, stating that "[the Claimant] is unaware of any justification for the differential treatment, and the Secretary of State for Work and Pensions has not attempted to provide justification. Indeed, they state in their Mandatory Reconsideration decision (at page 71) "I must clarify that there is no dispute that the above sequence of events represents circumstances largely outside of your control".

29. They point out, it is "important to bear in mind that what has to be justified is not the underlying policy behind the erosion of the transitional element but rather the difference in treatment in [the Claimant's] case (see *TD and others v*

> *SSWP* [2020] EWCA Civ 618 at [85]). The Tribunal concurred with this view.
>
> 30. Finally, the [Claimant's] Representative addressed the question of remedy, stating that the remedy is to disapply provisions to avoid a discriminatory outcome. Inter alia, it is stated, "In *RR v SSWP* [2019] UKSC 52 the Supreme Court held that a tribunal must, where it is possible to do so, disregard a provision of subordinate legislation which results in a breach of a right under the European Court [sic] of Human Rights."
>
> 31. The Tribunal agreed that the appropriate remedy was to disapply the legislation giving rise to the discriminatory outcome. As the Tribunal did not have sufficient information before it to calculate the appropriate award of Universal Credit it directed that the Secretary of State must calculate the [Claimant's] Universal Credit award to include the Transitional Element as is [sic] it have [sic] not been eroded by the inclusion of the Housing Costs Element from 11/05/2021.
>
> 32. The appeal was allowed. The decision of the Secretary of State was set aside."

119. In his analysis, Upper Tribunal Judge Church cited the approach of Simler LJ in ***T*** as to the proper approach to an Article 14 argument and added

> "63. The exercise of identifying comparators in analogous situations in the context of a discrimination claim is a way of assessing whether like cases have been treated differently for some unjustified status-based reason, such that the state has failed to "secure" equal enjoyment of underlying Convention rights on grounds of status.
>
> 64. The question of whether situations are relevantly comparable so as to require the same treatment (or the converse of that) cannot be neatly separated from the question of whether differences in treatment, or treating those whose situations are relevantly different the same, are justified."

120. I do not need to set out his analysis of ambit at [69-70] and status at [71-90] since neither is in issue in this case. By contrast, as to comparators and differential treatment, he said that

"91. The First-tier Tribunal decided that the Claimant:

> "has been treated differently [as a person moving from specified accommodation to mainstream accommodation] compared to someone … who moves from mainstream rented accommodation to another cheaper mainstream rented property" (see [23] of the FtT statement of reasons).

92. That is clearly the case, because the calculation that was made upon the relevant change of circumstances (the Claimant moving from specified to mainstream accommodation) took into account her new entitlement (i.e. to the Housing Costs Element of Universal Credit in the amount of £366.37 per month) but it ignored what she had lost in terms of her entitlement to Housing Benefit (in the amount of £613.12 per month). This resulted in the Claimant losing the entirety of her £285 per month Transitional Element of Universal Credit in one fell swoop. By contrast, the calculation for a claimant who moves from mainstream rented accommodation to another cheaper mainstream rented property would take into account both the gain and the loss experienced, so they would experience no erosion at all. For example, moving from a mainstream property with a monthly rent of £500 to another mainstream property with a rent of £400, they would be treated as having experienced no "relevant increase" because the gain of £400 per month was cancelled out by the loss of the £500 per month, and so any Transitional Element award would be unaffected. Similarly, claimants moving from one specified accommodation setting to another would be treated as experiencing "no relevant increase", as would claimants moving from mainstream rental accommodation to specified accommodation. The only category treated as experiencing a "relevant increase" to the full extent of their award of Housing Costs Element is those moving from either specified or temporary accommodation into mainstream rental accommodation.

93. The Secretary of State doesn't accept the applicability of the "person 1" and "person 2" comparators identified by the First-tier Tribunal, pointing out that the essence of these comparators was that each had either always been in receipt of Housing Benefit or had never been in receipt of Housing Benefit. By contrast, the Claimant received the Housing Costs Element of Universal Credit upon migration, then had a period of receiving Housing Benefit when she moved into specified accommodation (upon which change of circumstances her entitlement to the Housing Costs Element ceased), and then received the Housing Costs

Element again upon her second change of circumstances when she moved into mainstream rented accommodation, and ceased to be entitled to Housing Benefit.

94. Mr Edwards proposed different comparators: someone who receives Housing Benefit because they are in specified accommodation on the one hand, and someone who does not receive Housing Benefit because they are in a different type of rented accommodation on the other.

95. I find the Secretary of State's position somewhat puzzling. While I agree that the difference in the respective positions of the First-tier Tribunal's "person 1", "person 2" and the Claimant are as he described (and as I have summarised above), I don't see why this makes the First-tier Tribunal's choice of comparators inapposite. Rather, it is this very difference that highlights the difficulty with which we are concerned. That is what makes the choice of comparators apposite.

96. In *Re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250 Baroness Hale explained:

> "26. It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the two persons that they are not in an analogous situation. The factors linking the claim to [the substantive article at issue] are also relevant to this question…"

97. The factors that link this claim with the substantive ECHR article at issue are the same ones that Rose LJ identified in *TP (CA),* and quoted above:

> "211 … the 'very purpose' of A1P1 combined with Article 14 is to prevent people being arbitrarily deprived of their possessions … in a way which discriminates against them. The effect of the substantial drop in income on these severely disabled benefits recipients is particularly harsh because of their particular needs and vulnerabilities …"

98. The Secretary of State argued that the Claimant's comparators incurred "a different liability for paying rent attendant on the move between the accommodation", but there is nothing inherent in the nature of a tenancy or license of "specified" accommodation that makes this so, and it is unclear why it would render their situation incomparable if it there was such a difference. The real

difference seems to be that specified accommodation is funded through Housing Benefit administered by the local authority, while the Housing Costs Element of Universal Credit is funded centrally.

99. The Secretary of State hasn't persuaded me that the mere change from one category of accommodation to another inherently makes the situations of the Claimant and comparators 1 and 2 incomparable. This is the kind of "unduly technical" distinction that was rejected in *TP (CA),* and I reject it here. As Mr Royston observed, if every difference made situations incomparable there would be no comparators for anything.

100. Mr Edwards encouraged me to assess the issues of comparators, differential treatment and justification against the backdrop of the rationale for Parliament's policy decisions:

(1) to erode the transitional protections provided to prevent sudden "cliff" losses to vulnerable claimants,

(2) to carve Housing Benefit out of the Universal Credit scheme,

(3) to keep specified accommodation within Housing Benefit so that its higher costs wouldn't be caught by the 'benefit cap' calculation and because local authority social services teams were best placed to assess claimants' needs, and

(4) to disregard receipt of Housing Benefit for the purpose of calculating entitlement to Universal Credit.

101. He warned me that these were "polycentric policy matters" that were properly for the legislature to decide, and were not amenable to be reconsidered by the courts or tribunals. He reminded me that when Parliament makes changes to the law 'bright line' rules will often be introduced in the interests of predictability and legal certainty, citing Lord Bingham's words in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15 at [33]:

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

invalidate the rule if, judged in the round, it is beneficial."

102. He also referred me to the dissenting judgment of Lords Reed and Sumption *JJSC in R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 at [93], urging restraint in interfering with the choices made by those who are democratically accountable.

103. I accept that it is well-established that Parliament has a wide discretion in deciding where to draw such lines, and I must accept that it is all the more so where the legislation in question takes the form of transitional regulations.

104. I note, however, that the provisions with which we are concerned are comprised in a statutory instrument introduced by way of "negative procedure". If primary legislation which has been debated in Parliament and voted upon is at the top end of the scale in terms of the restraint required, legislation such as this must be at the bottom end of the scale, and so a lesser degree of restraint is appropriate.

105. The Secretary of State maintained that the Claimant did not experience any relevant difference in treatment compared with person 1 and person 2 that might engage Article 14, because regulation 55 of the 2014 Regulations applies equally to all these cases, just with different results.

106. However, there is a very important difference in the way that erosion applies to the Claimant and anyone sharing her status on the one hand, and those who do not share that status on the other. Where Universal Credit claimants who do not share the Claimant's status experience erosion of their transitional protection it is because *the benefit they receive has gone up* (whether by way of annual uprating, an increase in their housing costs, or a new or increased entitlement to some other element). Despite experiencing erosion, they receive no less benefit. Rather they experience *less of an increase in benefit* than they would have done without erosion. This is the way that erosion is supposed to work. There is a clue in the heading to regulation 55 of the Transitional Regulations (as amended): "The transitional element – initial amount and adjustment *where other elements increase*" (my emphasis).

107. In the case of the Claimant and those sharing her status, however, the erosion occurs despite there being *no increase in their benefit entitlement at all*. Indeed, in the Claimant's case there was a *significant reduction* in her

benefit in respect of rent and service charge of £246.75 due to her moving out of specialist accommodation into much cheaper mainstream accommodation.

108. Mr Edwards characterised the Claimant's case as an attack on the erosion principle. That is certainly not how Mr Royston presented it. Indeed, he said that to the contrary the Claimant accepts the principle of erosion. He says that erosion should apply to the Claimant and those of her status, just as it does to other claimants, but he maintains that the Claimant's loss of her Transitional Element is not properly characterised as 'erosion'. I agree.

109. The loss of transitional protection experienced by the Claimant on moving from specified accommodation (or temporary accommodation as defined in paragraph 3B of Schedule 1 to the 2013 Regulations) to mainstream accommodation is not incremental and gradual, but sudden and total. The regulations apply to expose the Claimant and her cohort of vulnerable people with disabilities to precisely the "cliff-edge" income loss that the High Court found to be unlawful in *TP1*, and which the Transitional Protection Regulations were introduced to remedy. Further, the elimination of the transitional protection occurs in circumstances where there is no increase in the Claimant's benefit, so it is inconsistent with the "erosion principle". It is, in Mr Royston's words, a "cuckoo in the nest".

110. I am satisfied that the treatment complained of amounts to discrimination on the basis of the Claimant's "other status" ..."

121. Turning to justification, Judge Church found that

"111. The fourth ground of appeal asserts that the First-tier Tribunal erred in law in its approach to considering, "or failing to consider", that any discrimination contrary to the Claimant's Convention rights arising from the Secretary of State's decision and/or regulation 55 of the 2014 Regulations, was objectively justified.

112. Taking the "failing to consider" reference first, it is clear from what the First-tier judge said in his statement of reasons that he did consider the issue:

"28. The Representative addressed the question as to whether the difference in treatment could be objectively justified, stating that, "[the Claimant] is unaware of any justification for the differential treatment and the Secretary of State for Work and

> Pensions has not attempted to provide justification. Indeed, they state in their Mandatory Reconsideration decision (at page 71) "I must clarify that there is no dispute that the above sequence of events represents circumstances largely outside of your control."

113. This explanation is admittedly brief, but it must be read in context. I note that the First-tier Tribunal judge made case management directions inviting the parties to make sequential submissions and listed the appeal for an oral hearing. The Secretary of State declined to make further submissions and seemingly chose not to be represented at the oral hearing (which was listed as a telephone hearing). It was for the Secretary of State to demonstrate justification, not for the Claimant to show that there was none. In the absence of submissions or evidence on justification there perhaps wasn't much more to be said by the judge.

114. In the proceedings before the Upper Tribunal there was an oral hearing, and both parties were represented. By way of justification, Mr Edwards cited Parliament's clear decision to reform the benefits system, and to do so in a way which did not replicate all that had gone before. It decided not to replicate certain of the premiums included in the legacy benefits except to the extent of transitional protections, and it decided that those protections would erode over time with increases in benefits.

115. This is just where Parliament chose to draw the line, Mr Edwards explained. That decision was not manifestly without foundation, and so it should be respected. To the extent that there was less favourable treatment on a discriminatory basis it was justified because Parliament was entitled to reform benefits and there was no right to benefits staying the same.

116. However, what must be justified is "the difference in treatment; it is not enough to show that the underlying policy is justified" (see *TD and others v SSWP* [2020] EWCA Civ 618 at [57] per Singh LJ).

117. The Secretary of State offered no evidence to show that the potentially discriminatory effect on the Claimant and those sharing her status was considered before the relevant legislation was made law, or that any thought was given to how this effect could be mitigated.

118. The Secretary of State has not explained why, to achieve the legitimate aims identified by Mr Edwards, it is necessary that those in the Claimant's position should not

be afforded the same protection from cliff-edge loss that the High Court held to be necessary in *TP1* to protect those who experience such a loss as a result of a move from one local authority to another triggering a transition from a legacy benefit into Universal Credit.

119. The administration of social security benefits is a very complicated business, and this is relevant to an assessment of the proportionality of measures which have a discriminatory effect. However, no evidence was adduced to demonstrate that it would be administratively complicated, burdensome or costly to identify those who share the Claimant's status and to treat them in a way which does not subject them to a cliff-edge income loss, for instance by applying erosion only in circumstances where the claimant enjoys an increase in benefit payments.

120. Mr Edwards maintained that the proper standard of review was "manifestly without reasonable foundation". Mr Royston said that, given the absence of any evidence that the question of the impact on those sharing the Claimant's status was even considered, there should be a somewhat more exacting standard.

121. In the circumstances, it doesn't matter which standard I apply. I acknowledge the wide margin of appreciation given to legislative or executive judgments on matters of social and economic policy, such as the administration of social security benefits (see Lord Sales JSC in *R (Z) v Hackney LBC* [2020] UKSC 40 at [107]-[110]). However, I remain unpersuaded that the less favourable treatment accorded to the Claimant and those of her status was a proportionate means of achieving a legitimate aim (even on a "manifestly without reasonable foundation" basis). It is not sufficient that there was a reasonable foundation to the erosion principle itself.

122. Further, I consider that such treatment ran counter to the policy objective behind the Transitional Regulations (as amended by the Transitional Protection Regulations). Their purpose was to provide for transitional protection to natural migrators who had been in receipt of SDP or EDP prior to transitioning to Universal Credit, and eroding that protection as the claimant experiences increases in their benefits. Far from furthering that policy objective, the policy objective is positively frustrated by the way that regulation 55 eliminates the Claimant's entitlement to the Transitional Element in its entirety in circumstances which the Secretary of State concedes are largely beyond her control, and where she experiences no increase in the benefits she receives.

123. In *TP1* Lewis J concluded:

> "88 … the material before the court does not establish that the Transitional Regulations as they stand strike a fair balance between the interests of the individual and the interests of the community in bringing about a phased transition to [U]niversal [C]redit…"

124. The same applies in this case to the Transitional Regulations as amended. For all of these reasons, Ground 4 also fails."

122. Finally, when considering the question of remedy, Judge Church stated that

> "125. Judge Johnson's decision that the application of Schedule 2 and regulation 55 of the Transitional Regulations (as amended) in the way that the Secretary of State applied it resulted in unlawful discrimination against the Claimant in breach of section 6 of the HRA 1998 and Article 14 of the Convention involved no material error of law.
>
> ...
>
> 127. Having found a breach of the Claimant's Convention rights Judge Johnson decided that the appropriate remedy was to disapply the offending provision of secondary legislation and to set the SoS Decision aside on the basis that the Claimant's Universal Credit award should be recalculated to include the Transitional Element as if it had not been reduced to nil by the award of the Housing Costs Element from 11 May 2021.
>
> 128. In his skeleton argument Mr Edwards argued that the First-tier Tribunal's remedy was inappropriate. He argued that it was not possible simply to disregard the offending provision because it is central to the statutory scheme, and it isn't clear how the statutory scheme can be applied without it.
>
> 129. Remedy was not challenged by the Secretary of State in his amended grounds of appeal, and Mr Royston argued that it was an abuse of process for it to be pursued. In any event I am not at all persuaded by the Secretary of State's case on this point. It is predicated on his case that the appeal is an attack both on the erosion principle and on the transitional relief provided by the Transitional Protection Regulations remaining transitional in nature. It is neither. Disapplying the provisions to the extent that they

> discriminate unlawfully against the Claimant and those sharing her status does not require a wholesale unpicking of the Universal Credit scheme. Erosion can still occur, and the transitional protections can be eroded to nothing as claimants enjoy increases in their benefit. What cannot occur is the unfair stripping away of all transitional protection in one fell swoop when a claimant's circumstances change such that they need to move between specified accommodation which is funded via Housing Benefit and non-specified accommodation which attracts the Housing Costs Element of Universal Credit.
>
> 130. The judge's decision on disposal was consistent with the Supreme Court's decision in *RR v SSWP* [2019] UKSC 52, which was binding upon him. He was entitled to dispose of the appeal in the way that he did."

123. Mr Edwards submitted that the case of ***JA*** was distinguishable in that it concerned the interaction of housing benefit with UC and that housing benefit was extraneous to the UC scheme, as opposed to this case which concerned the interaction of 2 different elements of UC, the carer element and the LCWRA element (both of which concerned absence from the labour market, but for different reasons). However, I agree with Ms Smyth's submission that, although arising in a different factual context, ***JA*** (which I have deliberately cited at some length) is very close on point to this case. (Significantly, ***JA*** has not been the subject of an appeal by the Secretary of State.) Both cases concern the potentially discriminatory effect of regulation 55 of the 2014 Regulations; both concern the cliff-edge erosion at a stroke of the TE of UC to nil; both involve the argument that the hypothetical comparators are not analogous to the claimant's circumstances; both involve the argument that regulation 55 applies equally to all claimants so that there is no differential treatment.

124. There is, on the contrary, an all too obvious parallel between the position of the claimant in ***JA*** and the position of MJ as claimant in this case:

> "106. However, there is a very important difference in the way that erosion applies to the Claimant and anyone sharing her status on the one hand, and those who do not share that status on the other. Where Universal Credit claimants who do not share the Claimant's status

> experience erosion of their transitional protection it is because the benefit they receive has gone up (whether by way of annual uprating, an increase in their housing costs, or a new or increased entitlement to some other element). Despite experiencing erosion, they receive no less benefit. Rather they experience less of an increase in benefit than they would have done without erosion. This is the way that erosion is supposed to work. There is a clue in the heading to regulation 55 of the Transitional Regulations (as amended): "The transitional element – initial amount and adjustment *where other elements increase*" (my emphasis).
>
> 107. In the case of the Claimant and those sharing her status, however, the erosion occurs despite there being no increase in their benefit entitlement at all. Indeed, in the Claimant's case there was a significant reduction in her benefit in respect of rent and service charge of £246.75 due to her moving out of specialist accommodation into much cheaper mainstream accommodation.
>
> 108. Mr Edwards characterised the Claimant's case as an attack on the erosion principle. That is certainly not how Mr Royston presented it. Indeed, he said that to the contrary the Claimant accepts the principle of erosion. He says that erosion should apply to the Claimant and those of her status, just as it does to other claimants, but he maintains that the Claimant's loss of her Transitional Element is not properly characterised as 'erosion'. I agree.
>
> 109. The loss of transitional protection experienced by the Claimant on moving from specified accommodation (or temporary accommodation as defined in paragraph 3B of Schedule 1 to the 2013 Regulations) to mainstream accommodation is not incremental and gradual, but sudden and total. The regulations apply to expose the Claimant and her cohort of vulnerable people with disabilities to precisely the "cliff-edge" income loss that the High Court found to be unlawful in *TP1*, and which the Transitional Protection Regulations were introduced to remedy. Further, the elimination of the transitional protection occurs in circumstances where there is no increase in the Claimant's benefit, so it is inconsistent with the "erosion principle". It is, in Mr Royston's words, a "cuckoo in the nest"."

125. Just as in ***JA***, so in this case there is another obvious parallel in the Secretary of State's approach to the issue of justification:

"116. However, what must be justified is "the difference in treatment; it is not enough to show that the underlying policy is justified" (see *TD and others v SSWP* [2020] EWCA Civ 618 at [57] per Singh LJ).

117. The Secretary of State offered no evidence to show that the potentially discriminatory effect on the Claimant and those sharing her status was considered before the relevant legislation was made law, or that any thought was given to how this effect could be mitigated.

118. The Secretary of State has not explained why, to achieve the legitimate aims identified by Mr Edwards, it is necessary that those in the Claimant's position should not be afforded the same protection from cliff-edge loss that the High Court held to be necessary in *TP1* to protect those who experience such a loss as a result of a move from one local authority to another triggering a transition from a legacy benefit into Universal Credit.

119. The administration of social security benefits is a very complicated business, and this is relevant to an assessment of the proportionality of measures which have a discriminatory effect. However, no evidence was adduced to demonstrate that it would be administratively complicated, burdensome or costly to identify those who share the Claimant's status and to treat them in a way which does not subject them to a cliff-edge income loss, for instance by applying erosion only in circumstances where the claimant enjoys an increase in benefit payments.

120. Mr Edwards maintained that the proper standard of review was "manifestly without reasonable foundation". Mr Royston said that, given the absence of any evidence that the question of the impact on those sharing the Claimant's status was even considered, there should be a somewhat more exacting standard.

121. In the circumstances, it doesn't matter which standard I apply. I acknowledge the wide margin of appreciation given to legislative or executive judgments on matters of social and economic policy, such as the administration of social security benefits (see Lord Sales JSC in *R (Z) v Hackney LBC* [2020] UKSC 40 at [107]-[110]). However, I remain unpersuaded that the less favourable treatment accorded to the Claimant and those of her status was a proportionate means of achieving a legitimate aim (even on a "manifestly without reasonable foundation" basis). It is not sufficient that there was a reasonable foundation to the erosion principle itself.

> 122. Further, I consider that such treatment ran counter to the policy objective behind the Transitional Regulations (as amended by the Transitional Protection Regulations). Their purpose was to provide for transitional protection to natural migrators who had been in receipt of SDP or EDP prior to transitioning to Universal Credit, and eroding that protection as the claimant experiences increases in their benefits. Far from furthering that policy objective, the policy objective is positively frustrated by the way that regulation 55 eliminates the Claimant's entitlement to the Transitional Element in its entirety in circumstances which the Secretary of State concedes are largely beyond her control, and where she experiences no increase in the benefits she receives.
>
> 123. In *TP1* Lewis J concluded:
>
> > "88 … the material before the court does not establish that the Transitional Regulations as they stand strike a fair balance between the interests of the individual and the interests of the community in bringing about a phased transition to [U]niversal [C]redit…"
>
> 124. The same applies in this case to the Transitional Regulations as amended. For all of these reasons, Ground 4 also fails."

126. In particular, the Secretary of State offered no evidence to show that the potentially discriminatory effect on MJ and those sharing her status was considered before the relevant legislation was enacted or that any thought was given to how that effect could be mitigated. Nor has it been explained why, to achieve the aims identified by Mr Edwards, it is necessary that those in MJ's position should not be afforded the same protection from cliff-edge loss which the High Court held to be necessary in ***TP1*** to protect those who experience such a loss as a result of a move from one local authority to another triggering a transition from a legacy benefit into Universal Credit. Nor was any evidence was adduced to demonstrate that it would be administratively complicated, burdensome or costly to identify those who share MJ's status and to treat them in a way which does not subject them to a cliff-edge income loss, for instance by applying erosion only in circumstances or to a limited extent.

Remedy

127. For ease of reference I again set out the material provisions of regulation 55 as they existed at the date of the decision under appeal:

> "(1) The initial amount of the transitional element is—
>
> (a) if the indicative UC amount is greater than nil, the amount by which the total legacy amount exceeds the indicative UC amount; or
>
> (b) if the indicative UC amount is nil, the total legacy amount plus any amount by which the income which fell to be deducted in accordance with section 8(3) of the Act exceeded the maximum amount.
>
> (2) The amount of the transitional element to be included in the calculation of an award is—
>
> (a) for the first assessment period, the initial amount;
>
> (b) for the second assessment period, the initial amount reduced by the sum of any relevant increases in that assessment period;
>
> (c) for the third and each subsequent assessment period, the amount that was included for the previous assessment period reduced by *the sum of any relevant increases* (as in sub-paragraph (b)).
>
> (3) If the amount of the transitional element is reduced to nil in any assessment period, a transitional element is not to apply in the calculation of the award for any subsequent assessment period.
>
> *(4) A "relevant increase" is … an increase in any of the amounts that are included in the maximum amount under sections 9 to 12 of the Act (including any of those amounts that is included for the first time) ..."*

128. As to remedy, the Tribunal can either interpret the secondary legislation so as to achieve a Convention-compliant result, pursuant to s.3 of the HRA or disapply an offending provision of secondary legislation: see ***RR*** above.

129. As to the former, I accept Ms Smyth's contention that the Tribunal can give effect to MJ's Convention rights by reading "the sum of any relevant increases" in

regulation 55(2)(c), read with regulation 55(4), as meaning the actual increase in award attributable to elements included in the award under ss.9 to 12 (here, the difference between the LCWRA element and the carer's element, which is £179.90). This results in MJ's transitional protection eroding to £95.10, rather than being wiped out altogether. The word "sum" (as in the "sum of any relevant increases" in regulation 55(2)(c)) indicates that a sum should be done (i.e. calculating what the increase actually is, rather than simply looking at the quantum of the LCWRA element), which is precisely what that interpretation does.

130. The alternative solution, again applying ***RR***, is to disapply the offending provision.

131. The relevant provision here is regulation 55(4). Regulation 55(4) provides that

> (4) A "relevant increase" is … an increase in any of the amounts that are included in the maximum amount under sections 9 to 12 of the Act (including any of those amounts that is included for the first time), apart from the childcare costs element".

132. It can easily be "blue-pencilled" so that it reads:

> (4) A "relevant increase" is … an increase ~~in any of the amounts that are included~~ in the maximum amount under sections 9 to 12 of the Act (including any of those amounts that is included for the first time), apart from the childcare costs element".

133. I can see no objection to that blue pencil exercise, which can easily be essayed without disturbing or altering the rest of the provision.

134. I accept that here may be cases where it is not possible to disregard a provision in subordinate legislation because it is not clear how the statutory scheme can be applied without the offending provision, but this is not such a case.

135. The Secretary of State's case is largely predicated on the fact that a person cannot receive the carer element and the LCWRA element at the same time, but that is not MJ's complaint. Her complaint is that she is treated less favourably than other transitionally protected claimants, who are not subject to a reduction in benefit entitlement by virtue of a change in their circumstances which increases their needs. MJ's case is not an assault on the erosion principle (the existence of which she accepts) or on the fact that transitional relief provided by the 2014 Regulations is transitional in nature.

136. Disapplying the provisions or Regulation 55(2)(c) and 55(4) to the extent that they discriminate unlawfully against the claimant and those sharing her status does not require a wholesale unpicking of the UC scheme. Erosion can still occur and the transitional protections can be eroded to nothing as claimants enjoy increases in their benefit. What cannot occur is the unfair stripping away of all transitional protection in one fell swoop and making her worse off when a claimant's circumstances change such that her needs increase.

Conclusion

137. For these reasons I am satisfied that the decision of the First-tier Tribunal sitting at Ashford dated 19 April 2023 under file reference SC302/22/00270 involves an error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

138. I remake the decision which the Tribunal should have made, although it is to the same effect as the original decision, but on a correct basis in law.

139. The decision is that the erosion of the full amount of MJ's TSDPE is discriminatory and contravenes her Convention rights. Regulation 55(2)(c) and Regulation 55(4) of the 2014 Regulations must be interpreted and/or disapplied to avoid the discriminatory outcome. MJ's TSDPE is to be eroded by the difference between the carer's element of UC and the LCWRA element of UC from the assessment period from 10 October 2021 to 9 November 2021 and for each subsequent assessment period.

Mark West
Judge of the Upper Tribunal

Signed on the original on 29 January 2025