Neutral Citation Number: [2023] EWCA Civ 24

Case No: CA 2022 000604

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Swift
[2022] EWHC 351 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2023

Before:

LADY JUSTICE SIMLER
LORD JUSTICE WILLIAM DAVIS
and
LADY JUSTICE WHIPPLE

- -

Between:

T, PHILIP WAYLAND, MARTIN KEATINGS and IAN BARROW	**Appellants**
- and -	
THE SECRETARY OF STATE FOR WORK & PENSIONS	**Respondent**

- -
- -

Jamie Burton KC and Desmond Rutledge (instructed by **Osbornes Law Solicitors**) for the **Appellants**
Edward Brown KC and Jackie McArthur (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 7 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Simler:

Introduction

1. This appeal concerns a temporary measure introduced by the Secretary of State for Work and Pensions ("the SSWP") in response to the COVID-19 pandemic, in March 2020 and extended in March 2021, which increased the standard allowance element of Universal Credit ("UC") by £20 per week.

2. There is no doubt that the four individual appellants each struggled financially during the COVID-19 pandemic and the restrictions that accompanied it. They have mental health or physical disabilities that impact significantly on their own capability for work, and some also have caring responsibilities. As further explained below, they challenged as unlawfully discriminatory the decision of the SSWP not to increase the personal allowance element of the benefits they were then receiving at the same time as the decision was taken to continue to pay the increased standard allowance element of UC. An anonymity order has been made in the case of the first appellant as necessary in the interests of justice and proportionate, and that order is maintained.

3. The measure that initially introduced the increase in the standard allowance element of UC was the Social Security (Coronavirus) (Further Measures) Regulations 2020 ("the 2020 Regulations"). It applied for 12 months from 30 March 2020. It was then extended for a further six months to 5 October 2021 by the Universal Credit (Extension of Coronavirus Measures) Regulations 2021 ("the 2021 Regulations"), before being withdrawn on 6 October 2021. At neither stage was any corresponding increase made to the personal allowance element of Employment and Support Allowance ("ESA") (received by appellants 1 and 2), Income Support ("IS") (received by appellant 3), or Jobseeker's Allowance ("JSA") (received by appellant 4). ESA, JSA and IS are in the process of being replaced by UC, and like the judge below, I shall refer to these benefits collectively as "legacy benefits".

4. The target of the judicial review was not the initial decision to introduce the UC uplift in March 2020. Rather, the appellants challenged the SSWP's failure to make a corresponding increase to the personal allowance element of the legacy benefits for the period 6 April 2021 to 5 October 2021 only. They contended that once the exceptional circumstances prevailing during the early part of the pandemic ceased to apply, this difference in treatment between those in receipt of UC and those in receipt of legacy benefits, ceased to be justified and constituted both unlawful direct discrimination on the grounds of "other status" and/or unjustified indirect discrimination on the grounds of disability. It was therefore incompatible with article 14, read with article 1, Protocol 1 and/or article 8 of the European Convention on Human Rights ("the Convention"), and unlawful.

5. By a judgment dated 18 February 2022, Swift J dismissed the claim for judicial review. He held that there was no unlawful direct discrimination for article 14 purposes because there was no meaningful difference between the other status relied on – being a person in receipt of a legacy benefit – and the less favourable treatment alleged, namely the failure to raise the amount paid as personal allowance to persons in receipt of a legacy benefit. By contrast, although Swift J held that there was indirect discrimination because the measure had a disproportionate impact on disabled people, the judge found that the difference in treatment was justified. The claim therefore failed.

6. The sole ground of appeal on which permission was granted by Holroyde LJ is the contention that, in assessing whether the SSWP's actions in this regard were justified, the judge erred by assessing justification/proportionality only as at the time the measure was enacted in March 2020, and not by reference to the facts and evidence as at the time of the proceedings below. Permission to appeal was refused on other grounds: namely, a contention that the judge was wrong to conclude that the status of being in receipt of a legacy benefit was not an "other status" for article 14 purposes; and secondly, a contention that the judge's overall approach to justification/proportionality was flawed.

7. The appellants were represented by Jamie Burton KC leading Desmond Rutledge, and the SSWP by Edward Brown KC leading Jackie McArthur. The case was very well argued on both sides, and the court was greatly assisted by the written and oral arguments received.

The relevant provisions

8. It is unnecessary to describe the primary legislation, the Welfare Reform Act 2012 ("the 2012 Act"), that introduced UC. In short, and as is well-known, UC represents a major reform and simplification of the previous welfare system, replacing a large number of previous entitlements including, in due course, the legacy benefits in this case. It provides for a payment which includes a standard allowance to reflect basic living costs, and additional elements to reflect additional costs such as housing. It has been introduced in stages and at the times material to this claim the appellants continued to claim legacy benefits, though they could have moved onto UC had they chosen to do so. Each appellant has explained the structural or systemic reasons associated with the payment of UC which meant that they chose not to do so.

9. The £20 per week increase in UC (the subject of this challenge) was put into effect by the 2020 Regulations (made on 27 March 2020 and in force on 30 March 2020). So far as material, regulation 3 provided as follows:

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

The UC standard allowance for a person aged 25 or over was accordingly increased to the equivalent of £94.59 per week, £20.24 more than the relevant personal allowance for each of ESA, IS and JSA.

10. The 2021 Regulations (made on 15 March 2021 and in force on 6 April 2021) extended this uplift for a further 6 months, up to and including 5 October 2021.

11. From 6 October 2021 the UC standard allowance for a single claimant aged 25 or over has reduced to £74.76 per week (including the relevant annual uprating). The corresponding personal allowance for a single person aged 25 or over (including the relevant up-rating) in receipt of any of ESA, IS or JSA is £74.70.

The factual background

12. Much of the evidence before the judge was undisputed. The appellants each made a witness statement in the proceedings, describing their personal circumstances, the legacy benefits they were receiving, the increased basic living costs experienced and the significant financial impact on them arising from the pandemic, and explaining why they had not moved over to UC.

13. The evidence on behalf of the SSWP came from two witness statements. The first from Lindsey Whyte, Director of Personal Tax, Welfare and Pensions in HM Treasury ("HMT"), who is responsible for policy advice to HMT Ministers in respect of the Coronavirus Job Retention Scheme and other support schemes, described the wider financial and welfare support measures taken in response to the pandemic. The second is from Kerstin Parker, Deputy Director for Universal Credit Policy in the Department for Work and Pensions ("DWP"), who addressed relevant aspects of the social security system and the legacy benefits in issue, describing also the financial position of each appellant. Based on her evidence, the judge described the legacy benefits and how they are gradually being replaced by UC. He also described the rules of entitlement for UC. I gratefully adopt his summary as follows.

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

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

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

17. As stated, these legacy benefits are being replaced by UC. Since 12 December 2018, no new claim for ESA, IS or JSA could be made unless the claimant also met the requirements for entitlement for SDP. That remained the position until 27 January 2021. Since then, no new claims for any of ESA, IS or JSA could be made. Although new claims may not be made for these benefits, people already in receipt of ESA, IS or JSA have not yet been required to move to UC. A person presently in receipt of ESA, IS or JSA may choose to move to UC, but compulsory "migration" as it is termed, of people currently receiving legacy benefits to UC, is not yet complete. The number of people claiming ESA, IS and JSA is also reducing because if any claimant's circumstances change so as to require a new claim, that claim must be a claim for UC. For example, the evidence before the judge was that in the year to November 2020 the number of ESA claimants fell by approximately 99,000 to 1.37 million claimants. The number of claimants in receipt of either JSA or IS is significantly lower: as at February 2020 the combined total was less than 450,000. By contrast, and as to be expected, the number of people claiming UC rose significantly from December 2018. By March 2020 approximately 3 million people were in receipt of UC.

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

> "… calculated by reference to —
>
> (a) a standard allowance,
>
> (b) an amount for the responsibility for children or young persons,
>
> (c) an amount for housing, and
>
> (d) amounts for other particular needs or circumstances."

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

> "(2) The elements to be included in an award under section 12 of the Act in respect of particular needs or circumstances are—
>
> (a) the LCWRA element (see regulations 27 and 28);

(b) the carer element (see regulations 29 and 30); and

(c) the childcare costs element (see regulations 31 to 35)."

("LCWRA" refers to persons assessed as having "limited capability for work and work-related activity"). UC is paid monthly.

19. The rates at which the various elements of ESA, IS, JSA and UC are payable are set by statute. They must be reviewed by the SSWP and may be up-rated each year. The up-rating provisions are at section 150 of the Social Security Administration Act 1992. Decisions on whether to increase the rates are announced in November each year, but only take effect from 1 April the following year. The unchallenged evidence, accepted by the judge, was that the nature of the IT systems used to administer the legacy benefits was such that rates of legacy benefits could only be changed in accordance with the normal annual timetable for introducing up-rating. Any other change to the rates of legacy benefits carried a high risk of incorrect or missed payments.

20. In her witness statement, Ms Parker also described the SSWP's response to the pandemic in terms of the impugned measures. The relevant measures were heralded by an announcement made by the Chancellor on 20 March 2020, which included the following statements:

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

A new, comprehensive job retention scheme.

And a significantly strengthened safety net."

21. Ms Parker explained (and the judge accepted) that the consequence of the 2020 Regulations which implemented part of that announcement, was a weekly difference of £20 between the UC standard allowance and the personal allowances for ESA, IS and JSA. However, each allowance is only one element of each relevant benefit. Moreover, the £20 difference will not necessarily translate into an across the board distinction in the amounts actually paid to UC claimants and legacy benefit claimants respectively, because much depends on the personal circumstances of each benefit claimant. For example, eligibility for premium payments is determined by reference to personal circumstances and any sum prima facie payable as a standard or personal allowance may be reduced by certain deductible amounts, whether in the form of other benefits payable, or earnings. The judge also recorded a comparison prepared for the purposes of this litigation between the amounts paid to each appellant as ESA, IS or JSA, and the amount that would have been paid had each instead claimed UC. It is unnecessary to set these out.

22. From paragraph 40 onwards of her statement, Ms Parker explained that the response to the pandemic was guided by three overarching principles. These were as follows:

"41. First, the role of the social security system for those of working age is, fundamentally, to assist (within certain constraints) those with no or low incomes. The Government decided to provide further support for individuals and businesses through a broad package of measures, including through the Coronavirus Job Retention Scheme ("CJRS") and the Self-Employed Income Support Scheme ("SEISS"), which are explained in the witness evidence of Lindsey Whyte. These measures, alongside the UC uplift, are directed at preserving the stability of the economy and labour market in the short-term, so as to allow for a rapid recovery from the pandemic.

42. Second, the approach taken by DWP has been to adapt existing schemes, where options exist at the time of the decisions, rather than create new systems or embark upon the redesign of existing schemes. UC has been designed to allow for such flexibility. This approach has been adopted to ensure that social security provision can be of material support to the greatest number of people in the shortest possible time with the lowest amount of risk as possible. It is neither possible nor sensible to attempt significant, complex or risky alterations to the social security system in the middle of a pandemic given (a) the time that is required to design and implement such alterations (both at a policy and an operational level) and (b) the fact that much of social security policy is complex and inter-related. Social security policy involves balancing a wide range of incentives so as best to achieve the outcomes that the Government seeks (within the inevitable constraints that arise in any large-scale system). A change to incentives in one area can have a 'knock-on' effect in other areas.

43. Third, given that DWP has primary responsibility for ensuring that people who need financial support from the benefits system are able to access it, DWP has sought to ensure practical, effective and efficient delivery of financial support. This has meant focusing DWP resources on those who were likely to face the most

financial disruption from the start of the pandemic, and also adopting a flexible approach to the way that benefits are administered. This has meant targeting support at those who have lost income as a result of the pandemic, rather than those who may have faced increased costs (which could not have been accurately calculated by the Government). I note that the Claimants' evidence is that they have faced increased costs because of the pandemic. The Government recognises that this may be the case, but it is likely to be so for very many individuals. The Government focused its response on those who had lost income (who would likely also face increased costs during the pandemic), as it considered they were likely to face the greatest financial disruption. This also assists in providing a cushion to individuals who have suffered short-term loss of employment or reduction in employment, but who would be expected to return quickly into the labour market.

44. It is essential that any short-term measures are capable of being delivered efficiently, otherwise they simply could not be implemented. By way of illustration:

> 44.1 The pandemic has led to an unprecedented increase in the overall number of benefit claims being made. At the peak of the outbreak in early 2020 the department received 10 times the normal daily number of UC claims on the benefits system. There were 2.2m UC declarations between 16 March and 19 May 2020, with over 500,000 in the single week when the country went into lockdown (w/c 23 March 2020). The high numbers claiming UC has continued into 2021, with 39,000 UC claims per week in the four weeks to 8 April 2021. As a result, there were 6 million people on UC by 8 April 2021. At the same time, across DWP we were experiencing a significant reduction in staffing levels as a result of absences due to COVID-19.
>
> 44.2 A number of policy and operational easements have been made to enable the system to continue to cope with this increased volume of claims, and in response to the lockdown measures which by necessity reduce face-to-face contact."

23. In relation to the £20 uplift, she explained that the purpose of the increase was not to cover lost income that benefit claimants would likely face as a result of the pandemic. Indeed, she observed that when making the announcement on 20 March 2020, the Chancellor of the Exchequer had recognised that there would be "*hardship in the weeks ahead*" and that it would not be possible to address everyone's financial difficulties. Rather, she said that the decision was designed to achieve fiscal and social policy objectives, which she described as follows:

> "51. First, the financial support measures were primarily designed to assist those likely to face the most significant financial disruption during the pandemic, for example, those who had lost or were at risk of losing employment or significant income, and who as a result were making new claims for social security benefits for the first time having previously been financially self-sufficient. This objective was not considered to apply in the same way to those who had already been on existing income-related DWP benefits for some time and were less likely to have any reduction in income (as is the case for the claimants). This, therefore, was specifically designed to cushion the impact of sudden unemployment or reduced employment with the objective of facilitating a rapid return to the labour market

(thereby benefitting the economy and tax base in general). However, the Government was required to consider which investments would be most efficient and represent the best use of taxpayers' money. Although the investments made were substantial, that in turn simply highlighted the need to ensure that public money was being spent for the best possible effect.

52. Second, the Universal Credit service has been developed by an in house product team using agile principles, this means that the service can be very adaptive to change. At the height of the pandemic we were able to introduce changes such as the £20 uplift very quickly so that the changes could reach our claimants immediately. The change to UC could be rapidly implemented and safely introduced without risk to the stability of the system, or delays (in contrast with changes to the legacy systems which I deal with below). Indeed, this was one of the reasons why UC was originally introduced. The substantial IT investment was intended to deliver a system that could adapt rapidly and, therefore, it made sense to use that system.

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

24. Ms Parker said that consideration was given by the government to an increase in some legacy benefits in March 2020, in a similar manner to the uplift for UC. She said that the uplift was not also applied to legacy benefits because this was not consistent with the fiscal and socio-economic policy objectives she had described and because it was impracticable. She explained that of all the income related benefits, it was:

"57. … overwhelmingly new and existing Universal Credit claimants and existing Working Tax Credit claimants who were most likely to have experienced an unexpected loss of income, having previously been financially self-sufficient. The overwhelming majority of legacy benefits recipients were unlikely to experience similar disruption (namely a significant loss of income) especially given the very narrow circumstances in which new claims for legacy benefits could be made at that time.

58… Sudden and short-term unemployment is capable of triggering other social problems and affecting mental health. This can result in a situation in which a

> person becomes dependent on welfare, and hamper a return to employment, even where there are vacancies. Those effects are likely to be exacerbated by the pandemic. It follows that seeking to prevent these social problems from arising following sudden unemployment can benefit individuals and society."

25. Ms Parker also explained that it was not operationally practicable to deliver an increase in legacy benefits, such as IS, within a meaningful time scale using the existing legacy IT systems, which did not have capacity to uplift benefits mid-year without a number of risks, including that there would be significant mistakes in benefit payments or payments would stop altogether. The view of the DWP was that the risk of system failure was too high to proceed with a change.

26. In relation to the question of extending the uplift, Ms Parker explained that there was the usual annual up-rating review of benefits in autumn 2020, which was separate from the temporary £20 uplift. She said the SSWP considered various options for whether to continue the UC uplift and whether to introduce a similar uplift for legacy benefits at that time. Ultimately, the government decided that it was not in a position to decide in autumn 2020 whether to extend the UC uplift and apply an uplift to legacy benefits because the pandemic appeared to be evolving and there was uncertainty about what the position would be in March 2021. The result was that no decision was made in November 2020 on whether, and if so how, to maintain the UC uplift and whether to apply an uplift to legacy benefits.

27. However, as Ms Parker explained, by December 2020 the pandemic situation had deteriorated rapidly and a further lockdown was announced on 4 January 2021. During the months that followed the SSWP decided that she wanted to extend the UC uplift on a temporary basis, but by that stage it would not be operationally possible to adjust the rate of legacy benefits for 2021/ 2022. Ms Parker explained:

> "72. The Government ultimately decided on a temporary extension of the UC uplift of an equivalent of £20 per week for 6 months, until October 2021. It was implemented through the Universal Credit (Extension of Coronavirus Measures) Regulations 2021. The Government decided that although some groups with protected characteristics might benefit to a lesser extent from the changes than other groups, any differential impact was justified due to the aims of the measure and its importance. The 6 month extension of the £20 per week uplift gave economic reassurance and financial support to those likely to experience the most financial disruption due to the pandemic, including a significant number of people only making benefit claims due to a loss of, or significant reduction in their income due to Covid-19 restrictions. As the pandemic and its effects were continuing, it was not considered an appropriate time to withdraw that support.
>
> 73. It was not known in November 2020 whether the uplift would be continued, how long the Covid-19 restrictions were due to last and the progress on the vaccination programme. By the time these facts were known and a decision on the future of the uplift was taken, it would not have been possible operationally to include new legacy rates into the benefit system by April 2021. In any event, the extension of the uplift was temporary and not for a full financial year. The extension of the uplift to legacy benefits would be an extension of the policy intent. Legacy claimants would not now be facing a drop in the benefits they receive as they were never in receipt of the £20 uplift and all existing legacy benefit claimants

in Great Britain are able to make a new Universal Credit claim at any time to benefit from the temporary uplift (as the Severe Disability Premium (SDP) gateway which prevented claimants who received SDP from making a new Universal Credit claim was removed on 27 January 2021, which I explained at paragraphs 12, 21.2 and 25 above).

74. The reasons for this matched the original reasons for the UC uplift (which I addressed at paragraphs 49-53 above). Further, for the reasons I explained at paragraph 70 above, it was not possible to make changes to the rates of legacy benefits for 2021/2022 as part of the budgetary process in spring 2021. In addition, even if changes could have been made to the legacy benefit rates at that time, it would not have been possible to make an equivalent decision to that made in respect of UC (a 6-month uplift). This is because it is practically difficult and operationally risky to change benefit rates in-year (i.e. to move from an uplifted rate to a default rate in October 2021):

> 74.1 Once rates have been input into the legacy IT systems, they cannot be changed until the following year without a very significant risk to the safety and stability of the IT system. Such risks would include IT system failure, the risk of payments not being made to claimants or incorrect claims being made to claimants. These risks arise because of the ageing nature of the legacy IT system and complex interactions and interdependencies between different parts of the system, together with the fact that programming an up-rating to legacy benefits outside of the annual up-rating exercise is un-tested.
>
> 74.2 Given that DWP was experiencing a significant increase in claims since the start of the pandemic, the Government's priority was to make sure it could continue paying legacy benefits. Changing legacy benefits outside of the annual up-rating exercise would present an unacceptable risk to the safety and stability of the benefits system overall."

28. The appellants served three further witness statements in response to the SSWP's evidence. They relied on evidence from Peter Matejic, Deputy Director of Evidence and Impact at the Joseph Rowntree Foundation. He is a professional statistician and gave evidence that, even among those on low incomes, disabled people were particularly adversely affected during the pandemic. He said that there is no factual basis for the government's statement that new UC claimants were in greater need of an increased subsistence benefit than those who had been receiving benefits before the pandemic. On the contrary, by reference to data he identified, he said that the new UC cohort were in a better position to cope and suffered less financial disruption in terms of increased debt or material deprivation when compared with existing benefit claimants. He said that all pre-March 2020 claimants had experienced historically low benefit levels and generic living costs had increased for all of them, but only legacy benefit claimants on IS, JSA and ESA had been left to cope with both at the same time as the pressures arising from the pandemic.

29. Dr Jed Meers, an academic with a particular research interest in social security law with many publications to his name, and Karl Handscomb, a Senior Economist with the Resolution Foundation, also supported the appellants' claims. Their evidence, in summary, was that the experience of those unfortunate enough despite the Coronavirus Job Retention Scheme to lose work or employment during the pandemic was not

particularly different from those who were similarly unfortunate before the pandemic. Both groups faced similar periods out of work and a drop in income. There was no evidence that new UC claimants were worse off financially than existing UC or legacy benefit claimants. They described as anomalous the treatment of the legacy benefit claimants in this case: the adverse differential treatment was without obvious economic purpose and in light of the fact that all recipients of subsistence benefits faced similar levels of hardship both before and during the pandemic, it lacked any principled explanation.

The judgment below

30. I summarise the judgment below only insofar as it is relevant to the appeal. The judge identified the factual premise of these claims as being that the number of disabled people in receipt of legacy benefits as a proportion of people still receiving those benefits was greater than the number of disabled people receiving UC as a proportion of the total number of UC claimants. Though this was disputed by the SSWP, the judge took the view that the points raised about the particular allowances received by the different groups were points to be considered in the context of justification. He therefore concluded that there was prima facie indirect discrimination on the ground of disability. The judge rightly recognised disability as a "suspect ground" calling for clear justification.

31. In terms of the standard required for justification, the judge summarised Lord Reed's conclusions in *R(SC) v SSWP* [2021] UKSC 26, [2022] AC 223 ("*SC*") following Lord Reed's extensive review of the case law (both European and domestic). In light of *SC* he approached the justification question considering all relevant circumstances. That included recognising that the form of discrimination alleged was indirect not direct and therefore involved a lesser affront to dignity; and the circumstances in which the 2020 Regulations came to be made did not merely comprise a decision on matters of social and economic policy, but reflected decision-making under emergency circumstances in response to the COVID-19 pandemic.

32. The judge accepted the evidence of Ms Parker as adequately explaining why the SSWP took the approach she did when making the 2020 Regulations. Given her three objectives, he said that those in receipt of legacy benefits were in a materially different position to the new UC claimant cohort. He continued:

> "34. The Claimants' submissions focus on the low level of income replacement provided by any of ESA, IS and JSA. In absolute terms the amounts paid are low. It is obvious that any person required to rely only on that level of income will suffer hardship. I also accept that in the context of the pandemic it is likely that it may have been more difficult still to meet basic expenses from that level of income. However, these matters are distinct from the justification advanced by the Secretary of State for the decision to make the 2020 Regulations.
>
> 35. The Secretary of State's evidence in this case also explains that, as of March 2020, thought was given as to whether the increase to the standard allowance could or should in some way be reflected in changes to the personal allowances paid as part of the legacy benefits. The decision taken – not to alter the levels of those allowances – was the consequence of several

considerations. One (the primary consideration) was that such a change would not pursue the primary object of addressing disruption resulting from sudden, and it was hoped short-term unemployment and providing greater economic stability and confidence in the face of grave uncertainty. Another consideration was that, in any event, such a change to the legacy benefits was not feasible. The system available to the Secretary of State to deliver legacy benefits would not cope with the changes that would be required. Ms Parker explained this as follows:

> "60. The difficulties in increasing the rate of legacy benefit were considered by ministers in March 2020. Consideration was given to increasing the standard allowance of ESA, JSA and IS, but, as well as not serving the policy objectives, … this was not operationally deliverable as the rates for April 2020 had already been input for all the legacy benefit systems and could not be changed until the following year without considerable delivery risks. This is because of the ageing nature of the DWP's legacy IT systems. It was considered that any changes to the rates input into the legacy systems as part of a further, out-of-cycle exercise carried major delivery risks. Rates can only be changed when the relevant system is not being used by front line staff, which confides available windows to weekends. Moreover, once they are set it is not possible to change them in-year without a high level of risk of incorrect payments being made to customers. There are a large number of "benefit overlaps" which occur when one benefit rate is linked to another. Any errors could rapidly create "domino effect" where the IT Team would not have the capacity to predict or correct the knock-on implications. This would therefore carry a high level of risk that payments would be made at an incorrect rate, or that customers would not receive any payments at all."

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

> "67. … the pandemic was evolving during autumn 2020; in particular, there was a spike in COVID-19 cases in autumn and Ministers were not sure at that time what the public health or economic state of affairs would be in March 2021. Evidently the financial and public health situations into the longer-term future is difficult to predict during a pandemic; how the welfare system can best respond to that future situation is also hard to predict. Instead of making that decision in advance, the Government thus decided that it would need to consider the situation closer to the time of the end of the up-lift. The cost of the up-lift at £6bn a year is very significant so not an amount the

> Government would decide to spend way ahead of time and before the full economic and COVID situation at the end of the twelve months UC up-lift was clearer, i.e., closer to the time. The advantage to this is that the conditions of the pandemic could then be considered; if it was still necessary to maintain the up-lift, that would be known with a greater degree of certainty in March 2021 than could be the case in 2020. In relation to legacy benefits, the process of inputting rates into the IT system for the following year needs to take place several months in advance: the rate to be paid up to March 2022 had to be programmed from November 2020. That would not have enabled the Government to respond to the rapidly - evolving demands of the pandemic with the latest and most accurate understandings of the situation."

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

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

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

33. In other words, he concluded that the reasons for both sets of Regulations were materially the same. The circumstances were exceptional throughout; and the decisions had temporary effect. They were an exercise of political judgment on aspects of a programme of measures designed to achieve macroeconomic objectives at a time of major national disruption. Despite the fact that the indirect discrimination in issue was on the suspect ground of disability, a sensible margin of appreciation had to be accorded to the SSWP. The judge concluded that in light of all the circumstances the decisions were justified.

34. Finally, and because it is relevant to the appeal, I note that having reached his conclusions on the application, the judge identified one further matter at [39], although, given his conclusions, it had no impact on the outcome of the claim, and he recognised that the SSWP took no point on delay. The point was that the claim form, filed at the beginning of March 2021, described the impugned decision as a "… decision not to up-lift the 'personal allowance' provided to income-related ESA claimants despite having increased in response to coronavirus the 'standard allowance' of Universal Credit", and described that decision as an "ongoing decision to maintain the difference in treatment between the two groups of benefit claimants". He continued:

> "40. I consider that this description of the decision challenged side-steps the fact that this is a challenge to the 2020 Regulations commenced over a year after those Regulations were made. It is not accurate to describe the decision as an "ongoing" decision. The 2020 Regulations represent a discrete decision, albeit a decision with continuing consequences. Nor is the present case a situation in which any of the Claimants can contend that it was only sometime later they were affected by the decision under challenge. The Claimants have provided no reason for commencing their challenge to the 2020 Regulations so late in the day."

The appeal

35. There is one ground of appeal. The appellants contend that the judge failed to assess proportionality by reference to the current facts and evidence because:

    i) the judge's approach was based on the mistaken belief that if a measure is proportionate at the time it comes into force, having regard to the circumstances prevailing at the time, it cannot subsequently become disproportionate, notwithstanding the discriminatory impact it has on a group of people. This is contrary to established authority (see *Wilson v First County Trust* [2003] UKHL 40, [2004] 1 AC 816 HL at [62]-[63], *"Wilson No 2"*).

    ii) The judge was wrong to characterise the appellants' claims as a challenge to the decision to increase the standard allowance of UC by the 2020 Regulations, such that their claims were late (judgment at [40]). The target of the judicial review was the ongoing failure by the SSWP to remedy the difference in treatment, not the initial increase to UC itself. The judge did not consider the balance struck by the 2020 Regulations after the initial upsurge in new claims had subsided in June 2020, and throughout the period the 2020 Regulations were in force.

36. Both parties made extensive written and oral submissions. It is unnecessary to set these out in full, and I will simply summarise each side's main arguments. For the appellants, Mr Burton KC contended as follows:

i) The policy to apply an uplift to UC in March 2020, and then continue this policy in March 2021, was, properly construed, an anti-poverty measure. The policy was ineffective in limiting the shock of sudden unemployment. It was, however, effective in alleviating poverty by covering basic living costs. Indeed, the intended mischief of the policy included helping new UC claimants avoid going into debt and arrears and protecting their mental health, and was not designed to replace lost earnings.

ii) When making the decision in March 2020 the DWP decided to focus resources on those who were likely to face the most financial disruption from the pandemic. This decision was predicated on a comparison between different cohorts and involved an assessment of who would experience the most disruption. However, evidence available in 2021 demonstrated that the predications upon which the policy was based were wrong: new UC claimants did not face greater financial disruption compared to existing claimants in terms of their inability to meet their needs. Further, circumstances had materially changed since the 2020 Regulations were made, and the policy had profoundly adverse implications for disabled people who bore a disproportionate and unnecessary burden. Disabled benefit recipients (unable to work through no fault of their own) were disproportionately affected both by the failure to increase legacy personal allowances and by the significantly higher basic living costs they faced during the pandemic. This evidence was highly relevant to the proportionality of the policy and whether the difference in treatment remained objectively justifiable, but the judge failed to address it.

iii) The exigencies of the situation in March 2020 could not alone justify differential treatment when this ceased to be justified having regard to the current evidence and circumstances. Fairness (and the principle established by *Wilson No 2*) required an assessment by reference to the evidence in November 2021. However, the judge assessed whether the measure was justified solely by reference to the circumstances and evidence prevailing in March 2020. That was an error of law. He should have considered whether the evidence of changed circumstances and about comparative disruption available in November 2021 meant that the measure was objectively justified and proportionate for its full duration. Consistently with that failure, there was no consideration given to the evidence provided in support of the appellants' claims that the surge in numbers of new UC claimants had subsided; as to the disproportionate impact on disabled people; and as to the actual levels of comparable disruption experienced by the two cohorts. Any logistical problems in the legacy benefits computer system were plainly surmountable in the short to medium term. The judge's substantive conclusions in [38] did not engage with the necessary examination of the evidence available to him; and he did not conduct the proportionality assessment himself.

iv) Any reconsideration of proportionality would have to take account of all these matters.

v) Moreover, disability is a suspect ground and requires greater vigilance in the assessment of disparate adverse treatment. While the discrimination in play is indirect discrimination, it is as close to direct discrimination as could be in the circumstances given the proportion of disabled people claiming legacy benefits. The measure was enacted with little Parliamentary scrutiny, using the negative procedure; and the implications of the decisions for disabled people were not confronted until after the 2021 Regulations were announced.

vi) The decision to extend the uplift for UC alone in 2021 was arbitrary, unprincipled, and unlawful.

37. Mr Brown KC resisted the appeal. In summary he submitted:

i) The policy decision to continue the uplift to UC in March 2021, and not apply the uplift to legacy benefits, was lawful and the judge made no legal error in reaching that decision. The appellants pointed to hardship caused by the increased cost of living arising from the pandemic, and therefore the benefit of wider welfare support. The SSWP acknowledged that when considering a cash-based social welfare policy, poverty alleviation is one of the objectives of such a measure. Moreover, the government was well aware of hardship during the pandemic, but could not alleviate it. The appellants' focus on the alleviation of hardship, to the exclusion of other material policy objectives, misunderstands the nature of the impugned measure as an instrument of social policy.

ii) The UC uplift was a temporary measure targeted at individuals who became unemployed due to the pandemic and were newly claiming UC. It was part of a package of social policy measures intended to mitigate the impact of the pandemic on society and the labour market. Questions about the scope of social welfare payments, affordability, fairness, and who should receive assistance are quintessentially political decisions constitutionally reserved to the executive and the legislature (*SC* at [208]). The measure succeeded in cushioning the impact on the labour market, thereby furthering community interest. It was not contrary to the Convention for the government to have acted in this way, without also making a larger, less efficient investment to further entirely different social policy goals.

iii) The appellants' arguments do not grapple with the actual purpose of the UC uplift measure: it was not to alleviate financial difficulties experienced by all individuals facing hardship as a result of the pandemic. Nor was an assessment of comparative disruption relevant or required. Swift J expressly accepted the SSWP's evidence and reasons, both for the 2020 Regulations and the 2021 Regulations. By implication, he rejected the evidence advanced by the appellants.

iv) The uplift policy formed part of a raft of measures designed to work in conjunction, to reduce the effects of the pandemic on the labour market and ensure its resilience. This objective was vindicated, and not undermined by the statistics of how many new UC claimants there were. Further, although an uplift could have been applied to legacy benefit claimants in the November 2020 uprating review, at that point the government did not know that it would extend the uplift in March 2021. There was no reason to change the policy rationale:

the two cohorts are not in truly comparable positions, and the rationale of the policy measure was such that it would never extend to legacy benefit claimants.

v) Moreover, by the time circumstances changed in 2021 and a decision to continue the uplift was taken, it was not operationally possible to make changes to the legacy benefits. The nature of the IT systems which administer legacy benefits meant these benefits could only be changed in accordance with the normal timetable for up-rating (November each year). Any other changes carried a high risk of incorrect or missed payments.

vi) In the context of a social policy and macroeconomic decision, the margin that was to be afforded to the SSWP in this case was necessarily exceptionally wide.

vii) There was no challenge to the legal principle established by *Wilson No 2* and other cases relied on by the appellants, the challenge was merely to its application to the facts. Swift J considered the decisions in March 2020, November 2020 and March 2021, and made no error in his assessment. The decisions were fully justifiable for the reasons he gave.

Discussion and conclusions

38. The approach to determining whether a measure is incompatible with article 14 requires four questions to be answered:

(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?

39. Article 14 applies equally to measures which, on their face, are apparently neutral in application, but which have a disproportionately harsh effect on members of a particular group (in other words, indirect discrimination).

40. Here there is no challenge to Swift J's conclusions that this case fell within the ambit of article 1, Protocol 1; that the appellants were treated less favourably than the new UC claimant cohort (whose situation was "relevantly similar") when the uplift was introduced in March 2020 and extended in March 2021 for six months; and that the indirect discrimination was on the ground of disability, a characteristic listed in article 14. The only question is whether the judge's conclusion that there is an objective and reasonable justification for that difference in treatment was correct.

41. Like the present case, *SC* was a case of alleged indirect discrimination (although on grounds of sex) in the field of welfare benefits. In *SC* Lord Reed explained that the requirement for justification is an expression of the proportionality principle: the question is whether a difference of treatment pursues a legitimate aim, and whether there is a reasonable relationship of proportionality between the legitimate aim sought

to be realised and the means employed. The state is entitled to a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment. The scope of the margin will vary according to the circumstances, the subject-matter and the background. For example:

> "158. …A low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation."

42. This is not a mechanical exercise. The correct approach is a nuanced one, taking proper account of those factors which are relevant in the circumstances of the case. For example, a greater intensity of review is generally appropriate where one of the "suspect" grounds in article 14 has to be justified. On the other hand, Lord Reed also stated in *SC* that where a transitional measure is the subject of alleged discrimination that is a factor indicating a lower intensity of review.

43. Looking at the position overall, Lord Reed concluded that it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy and other areas like national security, penal policy, and matters raising sensitive moral or ethical issues.

44. Swift J referred to and expressly applied that guidance, and his broad approach is not now, and cannot realistically, be challenged. The appellants contend, however, that he erred by failing to conduct the necessary evaluation by reference to the circumstances prevailing at the relevant time, namely at the time of the 2021 decision, with the benefit of the evidence about those circumstances which was available to the court by the time of the hearing in November 2021, and that the evidence of the appellants' three witnesses became relevant to that exercise. The question he should have asked himself was whether the failure to increase the legacy benefits in line with the UC uplift in March 2021 was, or was not, objectively justified as a matter of outcome, not as a matter of process.

45. The argument relies on what was said by Lord Nicholls in *Wilson No 2* about the role of the court when applying the proportionality test, as follows:

> "62. The legislation must not only have a legitimate policy objective. It must also satisfy a "proportionality" test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a "value judgment" by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force."

Further, at [144] he continued:

> "144. … The question of justification and proportionality has to be answered by reference to the time the events took place to which the statutory provision is being

> applied. … But as circumstances change so the justification or the absence of it may change. Merely to examine the situation at the time the Act in question was passed and treat that as decisive is wrong in principle…"

46. This position was reiterated more recently by Singh LJ in *R (TD & Ors) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618:

> "53. It is well established that, under the HRA, the question of justification for an interference with a Convention right is a substantive question and not merely a process question: see e.g. *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] AC 100, at paras. 29-31 (Lord Bingham of Cornhill) and para. 68 (Lord Hoffmann). In this regard it differs from conventional grounds of domestic public law: for example, it will not suffice that a decision-maker has taken a relevant consideration into account. What matters is whether the ultimate decision taken is or is not objectively justified. Conversely, unlike in domestic public law cases, it will not necessarily be fatal if a decision-maker has failed to take into account an issue under the Convention. It is the compatibility of the outcome of the process with Convention rights which has to be assessed by the Court, not the process by which that outcome was reached."

47. I respectfully agree with the observations in both cases. Those observations are not controversial. The Human Rights Act 1998 ("the HRA") undoubtedly requires the court to exercise a different role in a public law challenge to the one previously applicable on conventional judicial review grounds. In a case involving Convention rights, the court is concerned with the question whether the impugned decision is in fact justified, and not with whether the decision-maker asked him or herself the right questions or considered questions of proportionality at the time.

48. As for timing, the issue in *Wilson No 2* arose because of the introduction of the HRA in domestic law. This necessarily had the potential to affect existing legal arrangements. As a living instrument, the Convention evolves alongside societal norms and behaviour. Matters regarded as justifying a particular policy in 1974 might as a result of demographic, social or other changes thirty years later no longer be considered sufficient to afford continued justification. In other words, in *Wilson No 2*, the introduction of the HRA was regarded as, at least potentially, a material change of circumstances requiring a different analysis.

49. However, I do not accept the argument that the judge erred in his approach to the assessment of proportionality by reference to these principles, either by limiting his consideration to the circumstances at the time the 2020 Regulations came into force, and failing to consider the circumstances at the time of the 2021 Regulations; or by failing to conduct a proportionality assessment which took account of the appellants' evidence and subsequent circumstances.

50. I start with the fact that it is inherent in the appellants' case that they recognise that the decision to implement the 2020 Regulations was both rational and lawful in March 2020. On the evidence before the judge, the exceptional circumstances prevailing justified the approach adopted by the SSWP. Further, as the judge found, many of the factors that informed the decision in March 2020 at the outset of the pandemic, inevitably informed the decision in March 2021. It is implicit that he rejected the

appellants' assertion that the "exceptional circumstances" that supported the original measure no longer applied in March 2021. Moreover, it was not possible for the judge to consider the rationale for the decision taken in March 2021 without first considering the rationale for the 2020 Regulations. That rationale was set out in the evidence of Kerstin Parker and was expressly accepted by the judge.

51. There were three aspects to the rationale: providing enhanced support to mitigate the impact of the impending pandemic on society by cushioning those who it was anticipated would lose their jobs in dramatically high numbers and newly become benefit claimants; doing it in a way that made practical implementation possible; and having clear messaging to provide reassurance to civil society. The latter is not a hard-edged point but is significant as Mr Brown emphasised. The mitigation actions were adopted in recognition of the fact that sudden, short-term unemployment can trigger social and health problems, leading to dependence on welfare, and hampering a return to employment. They were designed to address this particular disruption; to provide reassurance, build confidence and morale, in order to preserve the labour market and economy so that there would be jobs to return to and the economy would bounce back once the pandemic effects receded.

52. The appellant cohort were either not in the labour market at all by virtue of their disabilities, or only to a limited extent. That does not mean they were not a deserving group, and they were undoubtedly vulnerable. Nonetheless, a hard choice was made to prioritise those in the labour market but who it was anticipated would quickly become unemployed as a direct consequence of the pandemic and the lockdown measures that followed, and do so in large numbers. The difficult choice being made was confronted by the SSWP as Ms Parker explained.

53. Thus the SSWP's rationale and social policy objective was different to the policy objective advanced by the appellants as the reason for the 2020 Regulations. Mr Burton contends as he did below, that the uplift provided for by the 2020 Regulations was in substance an anti-poverty measure to prevent destitution. While mitigating destitution is inevitably an objective of a cash-based benefit like the benefits involved in this case, it is not the only objective and the appellants' case misunderstands or misstates the rationale and purpose advanced here by the SSWP. The uplift was not targeted at alleviating hardship as a result of increased costs during the pandemic. It was targeted at alleviating a particular type of financial disruption, namely that experienced by those who had lost or were at risk of losing employment or significant income, and who as a result were making new claims for social security benefits for the first time having previously been financially self-sufficient. It was specifically designed to cushion the impact of sudden unemployment or reduced employment, with the objective of facilitating a rapid return to the labour market (thereby benefitting the economy and tax base in general) once the impact of the pandemic receded. The SSWP did not make the impugned decisions by reference to a comparative hardship or disruption assessment or analysis, and as Ms Parker emphasised, the measure was not directed at meeting a shortfall in income.

54. Although he did not spell it out, the judge's acceptance of Ms Parker's evidence necessarily involved an inference that the anti-poverty goal the appellants say the measure was intended to achieve was rejected. That rendered the evidence from the appellants' witnesses, which assumed that the reduction of poverty was the goal of the measure, irrelevant. Instead, the judge accepted the SSWP's broad focus on the

position of new UC claimants, adjusting to a sudden loss in income in the pandemic and thereby affected differently to existing benefit claimants. He also accepted that although the 2020 Regulations made no attempt to distinguish between new and existing UC claimants and so benefited a group of people who fell outside the SSWP's objective, distinguishing between these two groups of UC claimants would have given rise to technical difficulties, particularly in the urgent circumstances that presented. Moreover, the across-the-board change to UC could be implemented safely and swiftly, allowing for support to be provided to the greatest number of people in the shortest possible time. It was also capable of being easily and simply presented to the public.

55. Significantly, the judge recognised that in absolute terms the amounts paid by way of legacy benefits were low and it was obvious that any person required to rely on that level of income replacement provided by legacy benefits would suffer hardship and would find it more difficult to meet basic living expenses during the pandemic. However, given that the SSWP's policy rationale was not to alleviate poverty or financial hardship faced in consequence of the pandemic, he regarded this as a different matter and distinct from the SSWP's justification for the decision to make the 2020 Regulations. In other words, applying an uplift to legacy benefits would not have furthered the SSWP's policy objectives in March 2020. In any event, nor would it have been operationally feasible without significant risk to the delivery of legacy benefits.

56. It is plain from paragraph 38 that the judge did not treat the question of justification as one that simply required adequate consideration by the SSWP, as Mr Burton appeared to suggest in reply. The judge treated it as a question which he had to decide himself, having regard to the policy rationale advanced by the SSWP and the prevailing circumstances. The judge found that the SSWP's broad policy rationale and reasons for making and extending the UC uplift without also making a corresponding uplift in the legacy benefit amounts payable, were sufficient justification for each decision in this case. As Lord Reed explained, justification is an expression of the proportionality principle: the question is whether a difference of treatment pursues a legitimate aim, and whether there is a reasonable relationship of proportionality between the legitimate aim sought to be realised and the means employed.

57. In making his assessment the judge rightly recognised that the decisions in this case involved complex social and political judgments and difficult socio-economic choices. The measures introduced were temporary, designed to address a situation reasonably regarded as a national emergency. The assessment made by the judge having regard to all the circumstances of this case was that the difference in treatment was proportionate in its impact on the disabled legacy benefit claimants having regard to the legitimate aims which the SSWP sought to achieve. There was no error in that approach.

58. For the reasons I have given, the appellants' criticisms of the judge's approach based on a policy objective of alleviating poverty that required the accurate identification of those suffering the greatest financial deprivation or most increased hardship (namely that faced by disabled legacy benefit claimants), cannot found any arguable basis for concluding that Swift J erred in law. The evidence advanced in support of the appellants' case, while compelling on its own terms, was not relevant to the SSWP's broad policy objective or rationale, and the judge cannot be criticised for regarding it as directed to a distinct and different point.

59. Furthermore, the judge expressly addressed the ongoing nature of the decision- making process: see for example, paragraphs 30, 36 and 37 of his judgment. His conclusions in those paragraphs (and in paragraph 38) reflected his evaluation of the SSWP's evidence as to the reasons for the successive decisions made "*throughout the relevant period*" not to apply the uplift to recipients of legacy benefits. Many of the factors that informed the decision in March 2020 inevitably informed the decision in March 2021 as the judge found. Taking it in stages, he found that the SSWP reasonably concluded that there was nothing to justify a change in policy in November 2020: the course of the pandemic remained unpredictable, and at that stage it was anticipated that the 2020 Regulations would expire in March 2021 without extension. By March 2021 when the decision was taken to extend the UC uplift for a further six months, lockdown measures had been reimposed and the pandemic impacts continued to be felt, justifying the need for continued support for the UC cohort. For the same reasons as those relied on in March 2020, the SSWP decided not to apply an equivalent uplift to legacy benefits: to do so would not fulfil the government's primary objective, and it would not have been operationally feasible to do so at that point.

60. It is plain from these paragraphs and the judgment read as a whole, that the judge understood that the challenge was to the 2021 Regulations. The 2021 Regulations (and the decisions underlying them) could not be considered in a vacuum. He had to consider what happened in March 2020 given the evidence in the case, and the fact that the measure was introduced and renewed in changing circumstances but with a broad rationale and social policy objective that remained unchanged. In my judgment, the judge made no error and *Wilson No 2* does not dictate that he should have adopted a different approach.

61. Where there is a demonstrable and material change in circumstances that shows that a measure adopted is no longer rationally connected to a legitimate objective, or its impact is significantly different at the time of the challenge being heard than it was when the measure was adopted, those are plainly matters that a reviewing court should take into account. However, neither has been shown to apply in this case. Although Mr Burton submitted that the exceptional circumstances in support of the uplift measure for the UC cohort only no longer applied in the changed circumstances of March 2021, in the context of the broad rationale and policy objectives relied on by the SSWP, that submission is mere assertion and not one that the SSWP is or was bound to accept. Put simply, the appellants' argument relies on establishing as fact matters which are actually value judgements or opinions, and upon which there is substantial scope for reasonable disagreement. The submissions that new benefit claimants faced less disruption compared to existing claimants and that disabled people faced higher living costs are both distinct from the justification that was advanced for the measure. In the circumstances, it has not been shown that the judge proceeded on a mistaken basis that if a measure is proportionate at the time it comes into force, having regard to the circumstances prevailing at the time, it cannot subsequently become disproportionate, notwithstanding the discriminatory impact it has on a group of people. On the contrary, I am satisfied that he did not do so.

62. Moreover, for the reasons already given, the judge did not wrongly characterise or treat the appellants' claims as a challenge to the decision to increase the standard allowance element of UC by the 2020 Regulations or fail to consider the actual target of the judicial review claim. Rather, the judge recognised the target of the claim and dealt

with the merits of the argument that there was an ongoing failure by the SSWP to remedy the difference in treatment. It is plain that he did not focus solely on the initial decision to increase the standard allowance element of UC itself. The judge's comments at [39] and [40] on the failure of the appellants to bring their claims promptly were expressly *obiter dicta* and made after the substantive decision had been reached.

63. In conclusion, for the reasons I have given, and despite the natural sympathy felt for the hardship and disruption faced by the appellants in consequence of the pandemic, I can detect no error in Swift J's approach in this case. Accordingly, I would dismiss this appeal.

William Davis LJ:

64. I agree.

Whipple LJ:

65. I also agree.