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Case No: CO/5242/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/09/2019

Before :

MRS JUSTICE ELISABETH LAING

- -

Between :

THE QUEEN on the application of CHARMAINE PARKIN	**Claimant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant**

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- -

MS KARON MONAGHAN QC AND MR TOM ROYSTON
(instructed by **LEIGH DAY SOLICITORS**) for the **Claimant**
MR JAMES CORNWELL AND MR PAUL SKINNER
(instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **Defendant**

Hearing date: 17 & 18 July 2019

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Approved Judgment

MRS JUSTICE ELISABETH LAING :

Introduction

1. This is my decision on the Claimant's application for judicial review. Permission to apply for judicial review was given on the papers by Murray J on 5 March 2019. At the hearing, the Claimant was represented by Ms Monaghan QC and Mr Royston. The Defendant ('the Secretary of State') was represented by Mr Cornwell and Mr Skinner. I am grateful to counsel for their helpful written and oral submissions.

2. The Claimant challenges the effect of regulation 62 of the Universal Credit Regulations (2013 SI No 376) ('the Regulations'). The Regulations make provision about a welfare benefit, Universal Credit ('UC'). Regulation 62 provides for a minimum income floor ('MIF'). I will say more about its effect in due course. The Claimant argues that regulation 62 discriminates against her contrary to article 14 of the European Convention on Human Rights ('the ECHR'), on the grounds of her status as a self-employed person. She also argues that regulation 62 is irrational at common law, and that the Secretary of State did not, in formulating regulation 62, have due regard to the equality needs listed in section 149 of the Equality Act 2010 ('the 2010 Act').

3. The Secretary of State denies that self-employment is a status for the purposes of article 14, and that a self-employed person is a in situation which is relevantly analogous to that of an employee. The Secretary of State asserts that, if contrary to those arguments, there is discrimination, it is justified by the broad policy aim that the state should not be required to subsidise, by means of welfare benefits, businesses which are not commercially viable. The Secretary of State also resists the Claimant's two remaining arguments.

The facts

4. The Claimant is an actor, producer and director, with a degree in theatre. She has worked in theatre as a self-employed person since she graduated. She has two young children and lives in rented accommodation. She claimed UC in 2017 after separating from her partner. Her MIF is £861.11 per month. Her turnover in the 2017-8 tax year was £25,504. It was £16,383.96 in the 2018-9 tax year. Her annual profits in each of those years were £2,306 and £2,842.24 respectively. Her self-employed earnings have varied between £1,401 and £0 per month.

5. She also has some employed income.

6. The claimant's monthly award of UC includes an amount for her, an amount for one child (£277.08) and an amount for housing costs. That has gone up since 2018 from £834.05 to £859.07 per month. She does not get any UC in respect of her second child because she has arrangements for sharing the care of her children.

7. Over the 20 months during which she has claimed UC (to 20 June 2019), the total of her UC and earned income has been £28,369.96. She would have got a further £5,318.65 if she had been employed with equivalent earnings (because, if so, the MIF would not have been applied to her) and £610.86 more if she had been unemployed. Her local authority's scheme for calculating council tax liability adopts UC income figures. Because she is subject to the MIF, she gets no means-tested reduction in her

liability to council tax. If she were to stop working, she would benefit from the maximum means-tested reduction in her liability to council tax (80%). If her income came from employment she would also have a smaller liability to council tax.

8. The Secretary of State has determined that the Claimant is in gainful self-employment ('GSE') for the purposes of calculating the UC which is paid to her (see further, paragraph 31, below). She appealed that determination to the First-tier Tribunal ('the FTT'). The FTT dismissed her appeal in a decision promulgated on 30 May 2019.

A summary of the main provisions of the Welfare Reform Act 2012 ('the WRA') and of the Universal Credit Regulations (2013 SI No 376) ('the Regulations')

The WRA

9. 'A benefit known as universal credit is payable in accordance with' Part 1 of the WRA (section 1(1) of the WRA). It is calculated by reference to a standard allowance, an amount for responsibility for children or young persons, an amount for housing, and amounts for particular needs or circumstances (section 1(3)). Further provision is made about those four amounts in sections 9, 10, 11 and 12, respectively. In short summary, the amounts provided for in sections 9 and 10 are to be prescribed amounts (with some exceptions) whereas the amounts provided for in sections 11 and 12 are (again with some exceptions) to be calculated in a prescribed way.

10. A claimant is entitled to UC if he meets the basic conditions and the financial conditions for a single claimant (section 3(1)). The basic conditions are listed in section 4(1). One is that the claimant has accepted 'a claimant commitment' (section 4(1)(e)). Regulations may provide for exceptions to the requirement to meet the basic conditions (section 4(2)(c)). Regulations may specify circumstances in which a person is to be treated as having accepted or not accepted a claimant commitment (section 4(7)). The financial conditions are described in section 5. One such condition is that the claimant's income is such that, if he were entitled to UC, the amount payable would not be less than any prescribed minimum (section 5(1)(b)).

11. Section 7(1) provides that UC is payable in respect of each complete assessment period within a period of entitlement; an assessment period is a period of 'prescribed duration' (section 7(2)). 'Period of entitlement' is defined in section 7(4)). The relevant prescription is in regulation 21 (see paragraph 21, below).

12. The amount of UC is the balance of the maximum amount, less the amounts to be deducted (section 8(1)). The maximum amount is the total of the four amounts about which further provision is made in sections 9-12 (section 8(2)). The amounts to be deducted are an amount in respect of earned income, 'calculated in the prescribed manner' (which may include multiplying some or all of the earned income by a prescribed percentage) and an amount in respect of unearned income, similarly calculated (section 8(3)). The relevant regulation is regulation 22 (see paragraph 22, below).

13. Chapter 2 is headed 'Claimant responsibilities'. It provides for the Secretary of State to impose work-related requirements ('WRR') with which claimants must comply for the purposes of Part 1 of the WRA (section 13(1)). There are four WRR. They are listed in section 13(2). Further provision is made about them in sections 15, 16, 17 and 18,

respectively. The WRR which the Secretary of State must, or may, impose, are set out in sections 19-22. Those sections divide claimants into four groups: those who are subject to no WRR (section 19), those who are subject to a 'work-focused interview' requirement only (section 20), those who are subject to a 'work preparation requirement' (section 21) and those who are subject to all the WRR (section 22). Significantly for present purposes, section 19 applies, among others, to a claimant who is of a prescribed class (section 19(2)(d)).

14. Section 22(1) of the WRA provides that a claimant who does not fall within sections 19-21 falls within section 22. The Secretary of State must, except in prescribed circumstances, impose on a claimant who falls within section 22 the WRR listed in section 22(2), and may impose the WRR listed in section 22(3) on such a claimant.

15. Section 26(1) is headed 'Higher level sanctions'. It provides for the amount of an award of UC to be reduced in accordance with section 26 'in the event of a failure by the claimant which is sanctionable under [section 26]'. The failures which entail sanctions are listed in section 26(2). Section 26(3) provides that there is such a failure 'if by reason of misconduct, or voluntarily and for no good reason, a claimant [to whom section 19(3) applies] ceases paid work or loses pay so as to cease to fall within [section 19] and to fall within section 22 instead'. The effect of this is that if a person who is in work (whether he is employed or self-employed) ceases that paid work 'by reason of misconduct or voluntarily and for no good reason', with the result, also, that section 19(3) ceases to apply to him, he is liable to a sanction.

16. Section 28 confers a power to make regulations providing for the making of additional payments of UC to a claimant ('hardship payments') where an award is reduced by a sanction imposed under section 26 and where the claimant is or will be in hardship. The scheme for such payments may be prescribed by regulations, including the requirements or conditions to be met by a claimant in order to receive such payments (section 28(2)(c)) (see paragraph 36, below).

17. Section 30 of the WRA enacts Schedule 1 to the WRA, which contains 'supplementary regulation-making powers'. Paragraph 4 of Schedule 1 is headed 'Calculation of capital and income'. Paragraph 4(3)(a) enables regulations to be made which specify the circumstances in which a person is to be treated as having, among other things, earned income. Paragraph 4(4) provides that regulations made under paragraph 4(3)(a) may 'in particular provide that persons of a prescribed description are to be treated as having a prescribed minimum level of income'. This provision authorises the Secretary of State to make regulations the effect of which is to treat a claimant as having a minimum level of income which he does not in fact have.

18. Section 33 provides for the abolition of six former, or as they are sometimes known, 'legacy' benefits. Section 41 authorises pilot schemes. Section 40 defines terms used in the WRA. 'Work' has such meaning as may be prescribed.

19. Section 43 provides for the procedure to be adopted for making regulations under the WRA. A statutory instrument made under the WRA is in general to be subject to the negative resolution procedure (section 43(2)). Exceptions are listed in section 43(3), by reference to sections of the WRA. The list includes some of the subjects which are included in the Regulations. A statutory instrument subject to the affirmative resolution

procedure may not be made unless a draft of the instrument has been laid before, and approved by, a resolution of each House of Parliament (section 43(6)(b)).

The Regulations

20. Regulation 7 introduces Part 2 ('Entitlement'). It says that Part 2 has provisions about the requirements to meet the basic conditions of section 4 of the WRA, the maximum amount of capital and the minimum amount of UC for the financial conditions in section 5 of the WRA, and cases where there is no entitlement to UC even if the basic conditions and financial conditions are met. Regulations 15 and 16 deal with claimant commitments.

21. Regulation 20 introduces Part 3 ('Awards'). It says that Part 3 contains provisions for the purposes of sections 7 and 8 of the WRA about assessment periods and about the calculation of the amount of an award of UC. Regulation 21(1) provides that an assessment period is a period of one month. An assessment period is the period of one month which begins with the first date of entitlement, and each subsequent period of one month during which the entitlement continues (ibid). Regulation 21 makes further detailed provision about assessment periods.

22. Regulation 22 provides for the amounts to be deducted from the maximum amount in accordance with section 8(3). For example, a claimant who has responsibility for one child or more, and whose award includes an amount for housing costs, is entitled to the lower work allowance currently £287. The effect of regulation 22 is that all of his unearned income, and 63% of the amount by which his earned income exceeds that work allowance, are to be deducted from the maximum amount.

23. Regulation 23 introduces Part 4 ('Elements of an Award'). It provides that Part 4 contains provisions about the amounts ('elements') under section 9 (standard allowance), section 10 (responsibility for children and young persons), section 11 (housing costs) and section 12 (particular needs and circumstances) which, together, make up the maximum amount of an award of UC, as provided in section 8(2) of the WRA.

24. By regulation 31, an award of UC is to include an amount in respect of childcare costs for any assessment period in which a claimant meets the work condition (defined in regulation 32) and the childcare costs condition (regulation 33). The work condition is met for an assessment period if the claimant is in paid work (or has a relevant offer of paid work). 'Paid work' is defined in regulation 2 as meaning 'work done for payment or in expectation of payment and does not include being engaged by a charitable or voluntary organisation, or as a volunteer, in circumstances in which the payment received or due to be paid to the person is in respect of expenses'.

25. Part 6 of the Regulations is entitled 'Calculation of Capital and Income'. Regulations 51-64 deal with the calculation of earned income.

26. Regulation 52 of the Regulations defines 'earned income'. Its meaning includes 'the profits…derived from a trade profession or vocation'. Regulation 54 enacts general principles about the calculation of earned income. Unless otherwise provided in the relevant chapter of the Regulations, income is to be based on actual amounts received in an assessment period (regulation 54(1)). An example of an exception to that rule is

regulation 60. It is headed 'Notional earned income'. It provides that a person who has deprived himself of earned income, or whose employer has arranged for him to be deprived of it, for the purpose of affecting his entitlement to UC, is to be treated as possessing that earned income.

27. 'Assessment period' is defined in regulation 21 (see paragraph 21, above).

28. Regulation 55 deals with the calculation of employed earnings. There is no provision in regulation 55 the effect of which is to treat a person as having received income which he has not in fact received, but see regulation 60, noted above. By contrast, regulation 74 makes provision for notional unearned income.

29. Regulation 57 provides for the calculation of 'earned income that is not employed earnings and is derived from carrying on a trade, profession or vocation (self-employed earnings)' (regulation 57(1)). Regulation 57(2) provides for five steps in that calculation. Step 1 starts with a calculation of the profit or loss from the enterprise in question, by taking actual receipts and deducting from them amounts allowed as expenses under regulations 58 or 59. Step 5 provides for the treatment of 'unused losses', taking the oldest first. The term 'unused losses' is explained in some detail in regulation 57A.

30. Regulation 62 is headed 'Minimum income floor'. It applies to a claimant who is in 'gainful self-employment' ('GSE') (see further, paragraph 31, below), and who would, apart from regulation 62, fall within section 22 (regulation 62(1)). Where regulation 62 applies to a claimant, then, in any assessment period in respect of which his earned income is less than his individual threshold ('IT'), he is to be treated as having earned income equal to that threshold (regulation 62(2)). The IT is the amount set out in regulation 90(2), converted into net amounts by deducting such amount for income tax and national insurance as the Secretary of State considers appropriate. Assessment periods any part of which falls within start-up periods (explained in regulation 63) do not count (regulation 62(5)).

31. GSE is defined in regulation 64. A person is in GSE for the purposes of regulations 62 and 63 where the Secretary of State has determined that the claimant is carrying on a trade, profession or vocation as their main employment, their earnings from that enterprise are self-employed earnings, and that enterprise is 'organised, developed, regular, and carried on in the expectation of profit'. As the Secretary of State points out in her skeleton argument, it follows that if the self-employment either, is not expected to make a profit, or is not the claimant's main employment, a claimant will not be in GSE (and the MIF will not apply to him). But if self-employment is not a claimant's main employment, he is subject, potentially, to the WRR, and potentially, if those are breached, to sanctions.

32. Regulation 63 provides for a start-up period of 12 months. During that period a self-employed claimant is not subject to the MIF. This provision recognises that many businesses do not make a profit initially. After five years, a claimant is permitted a further 12-month start-up period (regulation 63(2)). The start-up period applies if a claimant has begun to carry on an enterprise which is his main employment in the 12 months preceding the beginning of the assessment period in which the Secretary of State decides that the claimant is in GSE, and the claimant is taking active steps to increase his earnings from that employment to the level of his IT (regulation 63(1)).

The Secretary of State may end the start-up period at any time if the person is no longer in GSE, or is no longer taking active steps to increase his earnings (regulation 63(3).

33. Chapter 8 of the Regulations deals with WRR.

34. Regulation 90 is headed 'Claimants subject to no [WRR] – the earnings thresholds'. Regulation 90(1) provides that a claimant falls within section 19 of the WRA (and thus cannot be subject toWRR) if his monthly earnings are equal to, or exceed, his IT. A claimant's IT is defined (by regulation 90(2)) by reference to the claimant's age, varying hours per week, and regulation 4 or 4A of the National Minimum Wage Regulations 2015 ('the NMWR'), as the case may be. By regulation 90(5), a person also falls within section 19 of the WRA if he is treated as having earned income in accordance with regulation 62. Thus there are, in regulation 90, two criteria for exemption from the WRR. One criterion, which applies to both employees and to claimants who are self-employed, is meeting or exceeding the IT. The other criterion, which applies only to self-employed claimants, is the application of regulation 62 when a claimant's earnings do not meet or exceed his IT. In this respect, claimants who are self-employed and have low earnings are treated more favourably than employed claimants on low earnings; but see the next paragraph.

35. Regulation 99 is headed 'Circumstances in which requirements must not be imposed'. It provides for cases in which the Secretary of State must not impose WRR. One example is where regulation 99(6) applies. In such a case, the Secretary of State must not impose a work search requirement on a claimant, and '"able and willing immediately to take up work under a work availability requirement means" able and willing to take up paid work or attend an interview, immediately once the circumstances set out in paragraph … (6) no longer apply' (regulation 99(1)). A work search requirement previously applying to a claimant ceases to have effect from the date on which the circumstances in paragraph (6) begin to apply (regulation 99(2)). Regulation 99(6) applies when the claimant has monthly earnings (excluding earnings that are not employed earnings) that are equal to, or more than, £5 plus the amount of the personal allowance in a jobseeker's allowance ('JSA') for a single person aged 25 or over, converted into a monthly amount. The weekly amount of JSA in such a case is £73.10 (see paragraph 1 of Schedule 1 to the Jobseeker's Allowance Regulations 1996 (1996 SI No 207)). That amount converted into a monthly payment is £338.43. This is likely to be less than the IT which applies to at least some employed claimants and may also, therefore, be less than the amount of the MIF for some self-employed claimants. In her reply, the Claimant for the first time submitted, in short, that regulation 99(6) shows that the MIF is flawed. I gave the parties an opportunity to make further written submissions on that issue. I consider those submissions in paragraphs 112 - 118, below.

36. Chapter 3 of Part 8 of the Regulations is headed 'Hardship'. Regulation 115 explains that Chapter 3 contains provisions under section 28 of the WRA for the making of hardship payments where the amount of an award is reduced under section 26 or 27 of the WRA. Regulation 116 prescribes the conditions for the exercise by the Secretary of State of her discretion to make hardship payments. That prescription is an exhaustive statement of those conditions (see regulation 116(1)). They include that the claimant has met any 'compliance condition' specified by the Secretary of State under section 104(2)(a)(i) (regulation 116(1)(b)). Hardship payments are recoverable in some circumstances (regulation 119).

The policy materials

The White Paper

37. The WRA was preceded by the White Paper, 'Universal Credit: Welfare that Works (Cm 7957) which was presented to Parliament in November 2010 ('the White Paper'). That, in turn, had been preceded by a Consultation Paper, '21st Century Welfare' (Cm 7913, July 2010). I summarise here the main features of the White Paper for current purposes. There are further references to it in my summary of the Secretary of State's evidence, in paragraphs 40, 42, and 43, below.

38. The White Paper described problems with the welfare system. It was complicated, and did not create incentives to work. There were over 30 different benefits, and claimants could be entitled to more than one benefit at a time. They were not administered by the same government departments. Chapter 2 described the Government's intention to create a new system, UC. A simpler system would reduce error and the scope for fraud (paragraph 16 and Chapter 5).

39. Annex 3 of the White Paper dealt with self-employed claimants. It said:

> *'Some self-employed people under Tax Credits report very low levels of income. We know that in starting up a business that [sic] it can take some time before it becomes profitable. But once established we would expect to see a reasonable income from the business activity. So for Universal Credit we are considering introducing a floor of assumed income from self-employment for those registering as such. The floor will be set at the National Minimum Wage for the reported hours; clearly profits above this limit may be received and reported.'*

A summary of the Secretary of State's evidence

40. In her first witness statement, Ms Niamh Parker, UC policy team leader at Department for Work and Pensions, explains the background. UC was part of the Coalition's Programme for Government. It was seen as a way of simplifying the complicated existing system of benefits. The White Paper stated that the purpose of UC was to make benefits 'fairer, more affordable and better able to tackle poverty, worklessness and welfare dependency'.

41. One of the benefits which UC was designed to replace is Working Tax Credits ('WTC'). These provide support for those who are in work (whether they are employed, or self-employed) and on low incomes. The Government's view was that the existing benefits, such as WTC, often did not provide an incentive to work. Until recently, there were no checks on self-employed claimants; they only had to say that they were self-employed, and that they were working the necessary qualifying hours. The benefit was therefore open to abuse. Unscrupulous claimants could claim support for non-existent businesses. In other cases, businesses never made a profit. As Ms Parker puts it: 'The system was costly, broken and unfair'. Those claiming other benefits (such as Jobseeker's Allowance) were required actively to seek work, go to fortnightly appointments, and were liable to sanctions as conditions of getting support. She describes the complexity of the old system in paragraph 13 of her first witness statement. There were different benefits with different eligibility criteria, and their design created perverse incentives at the margins not to work, or to earn, more.

42. She describes changes to WTC after 2015, to reduce abuse, which mirror the approach taken by the UC regime (paragraph 14). The old system was intended to protect people from poverty, but the lack of a coherent overall policy meant that 'it was trapping individuals, families and whole communities in the very conditions it was supposed to alleviate' (see paragraph 28 of the White Paper). The new system was designed to produce a 'leaner but fairer system…delivering support that is integrated and explicitly focused on ensuring that work always pays' (paragraph 21 of the White Paper). The foreword to the White Paper noted that the welfare budget had gone up by 45% in 10 years but that poverty had increased and social mobility had reduced. Vast sums of money had been spent, but the poor had got poorer and it was harder for them to become prosperous.

43. The White Paper recognised that some self-employed people receiving WTC reported very low incomes (see further, below). That was so even in September 2017 (see paragraph 16 of Ms Parker's first witness statement). For that reason, she says, and in order to reduce the risk of errors, fraud, and overpayments, and in order to ensure that work always pays, regardless of employment status, those UC claimants whose main source of income is self-employment are treated differently by the UC regime (I assume that Ms Parker means 'differently from employed claimants'). The MIF is designed to address flaws in the WTC system which allowed self-employed claimants to receive full benefits while persistently declaring low, or no, earnings. This was not considered fair to taxpayers, and did not ensure that a person who was self-employed would always be better off in work than on benefits.

44. UC was designed to cause significant changes in behaviour, to provide incentives for work, to increase earnings, to encourage self-sufficiency and to simplify the system and make it fairer. It was also designed to remove perverse incentives. Those aims are described in greater detail in paragraph 18 of Ms Parker's first witness statement. UC was not designed to 'provide an indemnity against all costs arising from need. It represents, instead, a judgment by Parliament about how much money should be paid in particular circumstances, having regard to the different needs of different types of claimant and the amount of money available'. There is no flat rate; the amount of UC depends on a number of factors which will vary from case to case.

45. Monthly assessment and payment are cornerstones of the policy, because that pattern mimics working life: most people in work are paid monthly. The same approach applies whether a claimant is working or not. A claimant who is not in work therefore has to budget in the same way as a claimant who is in work. This means that UC can be calculated and paid in the same way whether a person is in or out of work, or moves between the two, and whether his earnings are from employment, self-employment or a mixture. Behaviour is influenced by a claimant commitment, on which entitlement to UC depends. That includes the WRR derived from sections 20 - 22 of the WRA (see above). The amount of benefit does not depend on compliance with those, but if a claimant does not comply, the Secretary of State may apply sanctions to that claimant with the result that the amount of UC is reduced. The severity of the sanctions varies.

46. Ms Parker describes the similarities in the ways that earnings from employment and from self-employment are calculated in paragraph 26 of her first witness statement. But their earnings are not treated in exactly the same way, because their circumstances are different. A self-employed person can pay himself whatever he likes. He is not subject to the National Minimum Wage ('the NWM') or the National Living Wage ('NLW').

The time of a self-employed claimant is not controlled by someone else as an employee's is by his employer. A self-employed person is free to do as much, or as little, work, as he wants. Those differences mean that incentives designed for employees are unlikely to work for self-employed claimants. Ms Parker refers to a Parliamentary written answer by the then Minister of State for Employment on 7 September 2017. The policy is to discourage those earning persistently low incomes from self-employment. Persistence in an unprofitable business which cannot be supported without outside help may cause lower incomes and long-term poverty. Claimants whose self-employment is not their main source of income are not in GSE for the purposes of the Regulations. They are subject to WRR, but not to the MIF. The same applies to claimants who have a self-employed business but do not run it in the expectation of a profit. Any such income is, however, taken into account in assessing entitlement to UC.

47. As Ms Parker explains, the fact that a GSE claimant is exempted from the WRR, in order to enable him to focus on improving his business, means that they are not subject to sanctions. This means that (other things being equal) a self-employed claimant could do very little work, and make very little money, still claim UC, and have no incentive either to work harder or to find better paid work. It was therefore necessary to design different 'behaviour-changing incentives' for self-employed claimants; and that led to the MIF (first witness statement, paragraph 36). The MIF is set at a level which reflects a claimant's 'individual work expectation' (ibid paragraph 37). The amount of UC is calculated by taking a claimant's actual earnings (on the MIF), deducting the work allowance and applying the taper, not simply deducted from the UC award, as the UC payment is first subject to the work allowance and the 63% taper. The purpose of the MIF, in contrast to sanctions, is to encourage self-employed claimants to earn at an appropriate level in circumstances where they cannot earn the NMW and NLW (because they are not in employment).

48. A decision to end GSE would not result in sanctions. The Secretary of State accepts that a claimant is the best judge of whether he should carry on with his business. One purpose of the MIF is to encourage claimants to make frank assessments of their work choices. Once, however, a claimant has decided to cease his GSE, he would be subject to the WRR. Such a claimant could continue with his business, but it would no longer be his main employment.

49. Ms Parker describes the early development of the MIF policy, before the WRA received Royal Assent, in paragraphs 68-74 of her first witness statement. On 23 August 2012, the Social Security Advisory Committee ('the SSAC') reported on the draft Regulations, having consulted on them in August 2012. It recommended further consultation. Officials then formed a 'Stakeholder Engagement Group' for that purpose. They also consulted Equity, the actors' trade union, in 2013. The Secretary of State accepted most of the recommendations of the SSAC (first witness statement, paragraph 87). The Regulations were approved by the House of Commons on 12 February 2013. Ms Parker describes the debate in the House of Lords on 13 October 2012 in paragraphs 87-90 of her first witness statement. The Minister said, among other things, that UC provided appropriate support for self-employed people but 'only in so far as self-employment is the best route for them to become self-sufficient'. A regret motion was not approved by the House.

50. Regulation 62 was amended on 29 October 2014. The amendments came into force on 26 November 2014. In December 2014, officials established the Universal Credit Self-

employed Stakeholder Advisory Group to help review and monitor the MIF, and other matters, as part of what Ms Parker describes as the Secretary of State's 'test and learn approach'. It met several times. The Minister also met Equity in February 2015 to discuss UC policy with them. He corresponded with Equity's General Secretary. An entertainers' sub-group was set up. In February 2015 Ministers considered whether to create an exemption from the MIF. They considered a range of options. The result was further regulations which introduced regulations 54A and 57A into the Regulations.

51. An attempt was made to amend the MIF in a debate in the House of Lords on 17 November 2015 on the Welfare Reform and Work Bill. The response of the Minister is set out at paragraph 102 of Ms Parker's first witness statement. UC supported self-employment where 'it is a realistic route to self-sufficiency…the welfare system is not there to prop up unproductive or loss-making businesses'. The effect and purpose of the MIF were described. The amendment was withdrawn.

52. A report of the House of Commons Work and Pensions Committee ('the WPC') published on 1 May 2017 expressed the view of the WPC that the MIF did not achieve the Secretary of State's aim. The WPC asked the Secretary of State to commission a review of the MIF. The Government's Response was published on 19 December 2017. It rejected the recommendation but said that the Department would continue to monitor and to evaluate the impact on self-employment, including analysis of how different types of claimant responded to the MIF. Regulations 54A and 57A were further amended, after consultation with the SSAC, on 11 April 2018. Ms Parker quotes from the explanatory memorandum and explains the effects of the amendments in paragraphs 107-110 of her first witness statement. They represent the Secretary of State's assessment of how irregularities in income should be treated.

53. She describes further engagement between the Department and stakeholders, including Equity, in paragraph 112. The WPC published a further report on 10 May 2018. It was critical of the MIF. The Government's Response rejected a recommendation that there be annual reporting periods and explained why monthly reporting periods were needed.

54. Ms Parker comments on the Claimant's circumstances and income history in paragraphs 116-131. She remarks (paragraph 123) that those figures illustrate the rationale for the MIF. They show that the Claimant's business is not financially viable and that she would be better off if she ceased being in GSE, becoming subject to conditions, and, in that way, being encouraged to find work that pays better. 'This is one of the hard truths that the MIF is designed to make claimants face'. She says that the Government has made a policy decision that it is not fair, if a claimant's business cannot support him, however much he may care about that business, for the taxpayer to prop up that business.

55. Ms Parker explains in paragraphs 126-131 what the Claimant can do (if she wishes no longer to be in GSE for the purposes of the Regulations) to change her position. She could decide, for example, that her business is no longer her main employment. That would not require her to stop her business. She could do it part-time, but would be subject to WRR. It is she who has chosen her self-employed business as her main employment, and she could change that at any time.

56. In her second witness statement, Ms Parker addresses, principally, the Claimant's recent, third, ground of challenge. Her first point is that as the MIF was part of a 'large

set of interlocking welfare reforms, any analysis of the effect of the MIF alone on protected groups would have been largely meaningless'. The aim of the MIF is to bring about behaviour change. Supposing that it is correct that the MIF affects more women than men, having due regard to the equality needs listed in section 149 involves more than simply noting (if it is the case) the amount of the reduction in benefit caused by the MIF and the impact of that, without taking into account also the behavioural changes which the MIF is designed to achieve. That change is moving from unprofitable self-employment to the 'conditionality regime'. Any assessment of the MIF is inextricably linked to the impact of conditionality and to the UC regime as whole.

57. The Government, she explains, assessed the impact of the scheme as a whole on claimants, but not the impact of the individual components of the scheme. There was a full Equality Impact Assessment ('the EIA') in November 2011. Gender was considered in section 3.2. Officials tried to ensure that the various population pools were defined fairly and reasonably. They took into account guidance from the Equality and Human Rights Commission on this point. She further explains what data were used in paragraph 7. Officials considered how best to present the information consistently, and in a way which was accessible to the public and so as to minimise the risk of misinterpretation. The EIA used two ways of measuring the financial effects of UC: participation tax rates ('PTRs') and marginal deduction rates ('MDRs'). PTRs measure the proportion of income which a claimant loses when he moves into work. MDRs measure the proportion of any increase in income which is lost as a result of tax, or of reduced benefit payments. I consider the EIA in more detail in paragraphs 63 - 66, below.

58. She also describes an Impact Assessment which was done in December 2012. I say

more about that in paragraphs 67 to 79, below.

The relevance of the policy materials

59. Ms Monaghan accepted that it was legitimate to consider the Secretary of State's evidence as a source for the policy aims of the legislative scheme and of regulation 62.

60. Nevertheless, the best material for deducing the policy aims of the WRA, which is primary legislation, is its language: cf *Wilson v First County Trust Ltd* [2003] UKHL 40, [2004] 1 AC 816, paragraphs 61-67, 116-118, 140-145, 173 and 178. That was a case in which the House of Lords considered what material was relevant when, on an application for a declaration of incompatibility, the court was asked to identify the policy objective of a statutory provision, and to assess its proportionality. Lord Nicholls said that other materials, such as statements in a White Paper about the mischief or mischiefs which the statutory scheme was designed to address, are also admissible for the purpose of deducing the policy of the legislation. He added that, for this purpose, the court was also entitled to look at Ministerial statements made in Parliament, statements made by any member of either House, and explanatory notes. Resort to Hansard was unlikely often to be necessary (paragraph 66). Lord Nicholls explained the limited relevance of the content of Parliamentary debates in paragraph 67 of his speech, and emphasised the primary source is the language used by Parliament. Where the exercise is an exercise of construction only, then unless the conditions in *Pepper v Hart* [1993] AC 593 are met, the primary source is the language used by Parliament

supplemented, where appropriate, by external aids such as Law Commission reports and White Papers (see *R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Limited* [2001] 2 AC 349 per Lord Nicholls at pages 396D-398E).

61. The primary source from which the purpose of delegated legislation is to be deduced is, again, its language. If delegated legislation is made in order to further a purpose of primary legislation, logically, the same external materials (such as Law Commission Reports and White Papers) as are relevant to ascertaining the mischief at which the primary legislation is aimed must be relevant in order to decide at what mischief the secondary legislation is also aimed. In some circumstances debates in Parliament may be relevant to the construction of secondary legislation, for example, when secondary legislation (the effect of which is to amend primary legislation) is introduced in order to produce compliance with an obligation of EU law (see *Pickstone v Freemans plc* [1989] AC 66). The explanatory note to a statutory instrument, which is not part of the statutory instrument, may be used to identify the mischief at which the instrument is aimed (ibid, per Lord Oliver of Aylmerton at page 127A-B).

62. The evidence of an official is relevant and admissible in two contexts. First, while the question whether a provision of social security legislation breaches article 14 is for the court, and not for the decision-maker, the court is entitled to take into account the decision maker's assessment of the relative weights to be given to the decision maker's policy aims and to any Convention Rights which are in play, and, depending on the context, may defer to it to a greater or lesser extent. Second, whether and if so how officials have assessed the impact of legislation and delegated legislation may well be relevant to the court's assessment of whether a public body has complied with section 149 of the 2010 Act.

The Impact Assessments

63. As I noted when summarising Ms Parker's evidence, there was an EIA in November 2011. It updated an EIA which had been done in March 2011. The assessment related to the regulation-making powers rather than to what was then the relevant Bill. Paragraph 14 estimated that some 2.8 million households would gain from the changes, but 2 million would be entitled to less. Paragraph 19 explained that the impact of work incentives had been measured by PTRs and MDRs. UC's dynamic impact would be to increase the likelihood that claimants would work, or to work more. There would also be static effects (paragraphs 20 and 21) (the losses and gains just referred to); the entitlements of 2.7 million households would not be affected.

64. Paragraphs 24-26 explain the choice of population pool. The impact of UC on gender is considered at paragraphs 49-74, under five headings: 'Impacts on incentives to move into work', 'Impacts on incentives to increase hours of work', 'Overall impact on incentives to work', 'Impact on welfare and individual incomes', 'Impacts on poverty'. Section 3.2.6 is an assessment of gender impact under the headings 'Opportunities to promote gender equality' and 'Risks of negative impact'. The section on gender ends with an 'Overall assessment of gender impact'. The analysis is at a high level of generality, and focuses on the main purposes which the policy is designed to achieve. The conclusion on impacts is that both men and women will see significant improvements in their incentives to work. They will no longer face the 'punitively high PTRs and MDRs of the current system'. Women would have better incentives than men

to move into work. UC would also significantly reduce the risks inherent in moving into work. Section 3.2.4 analysed the impact of entitlement changes for single men, single women and couples (see table 6). Paragraph 63 noted that UC was likely to reduce poverty 'by 900,000 individuals, including over 350,000 children…'. 50,000 of those children would be in female lone parent households. That analysis did not capture the dynamic effects of UC, such as greater employment.

65. Paragraph 65 noted that the majority of lone parents are women. Their employment rate is 13% points lower than the average. Many find it hard to work because of problems with childcare. About 80% of lone parents are in employment, looking for a job, or would like to work. UC is an opportunity to promote equality by narrowing the employment gap. The new system was expected particularly to benefit lone parents, including those who wanted to work a few hours a week as the Government would pay support for childcare for those working fewer than 16 hours a week. Evidence suggests most lone parents want to work during school hours. Help with childcare would be targeted at low earners. Extending that was an opportunity to promote gender equality by helping parents to take up employment.

66. The overall assessment was that UC improved financial incentives for men and women broadly equally. The changes in entitlement and increases in take-up would have a strong positive impact on poverty rates for women and on their incentives to work. Improving work incentives might have the dynamic effect of improving family life.

67. Some of the policy changed between that EIA and December 2012, especially the MIF. On 7 December 2012, Lord Freud, then Minister for Welfare Reform, signed an Impact Assessment ('IA') of the WRA and of the 2013 Regulations. It described welfare dependency as a significant problem in the United Kingdom. The two problems with the current system were poor work incentives and complexity. In about 1.1 million households, a person would lose between 70% and all of their earnings if they were to work 10 hours a week. The incentives to increase hours were also weak. The current system stopped people from using work as a way out of poverty and its complexity increased the risks of mistakes and of fraud. The effects of the policy included reducing the number of workless households by ensuring that work always pays. The policy was to be reviewed in 2014/15. Lord Freud endorsed the IA. He was satisfied that it was a 'fair and reasonable view of the expected costs, benefits and impact of the policy' and that its benefits justified its costs.

68. In the long run, some 2.8 m households would receive less from UC than they did from the old system. They were typically on incomes below the average, so the impact on them would be proportionately higher. UC would lead to an increase in employment 'due to improved financial incentives, simpler and more transparent system and changes to the requirements…on claimants'. The model used is explained on page 4. The IA continues, 'It is very difficult to estimate the dynamic impacts of [UC] due to the radical nature of the reform. As such, estimated employment impacts should be treated with caution'. Various effects of the policy are summarised on pages 5-6 of the IA.

69. Paragraph 1 on page 7 refers to the White Paper, which is said to describe the principles of reform to the benefit system (a point repeated in paragraph 8). The aim is to reduce the barriers to work in the current system. The IA sets out 'the Government's current assessment of the broad impacts of' UC as set out in various regulations, which include

the 2013 Regulations. Annex 1 describes changes to the policy since the last IA in 2011. Paragraph 2 says that the reform is designed to ensure that 'work always pays'. Paragraph 9 explains that one of changes considered in Annex 1 is the MIF.

70. Paragraphs 20-23 describe the transitional protection which will be provided, including, at paragraph 23, reference to transitional protection for those who will be affected by the MIF. The idea is not to provide an incentive to under-report earnings. Paragraph 24 explains the choice of population pool for the purposes of the IA. Paragraph 32 deals with those households which will have a notionally lower income after the introduction of UC. The MIF is described as a policy change which will lead to lower entitlement under UC. Tables 1 and 2 and the text which accompanies them give an idea of the complexity of the reform and the potentially large changes in entitlement. Paragraph 39 refers to table 3. As a group, lone parents would receive lower awards than under the old system, but the group would gain overall from UC. This analysis did not take account of the increased incentives for lone parents to 'take their first steps into employment'.

71. Paragraph 40 summarises the effect of UC. It refers to a tailored system of work allowances which are generally higher than the earnings disregards in the old system and which allow claimants to keep more of their earnings. The work allowances would be higher for lone parents. Support for childcare would be extended to below 16 hours per week to encourage people back into work. The MIF is also referred to again. Paragraphs 51-54 are headed 'Impact on household income for protected groups'. Paragraph 54 compares the broad effect of the changes on men and women.

72. Paragraphs 55-57 consider transitional protection and paragraphs 58-65 impacts on income distribution and poverty. Paragraph 66 is headed 'Impact on work incentives'. UC was expected substantially to increase the incentive to start work in three ways (see paragraph 66). The current system mainly rewards those working 16 or 30 hours. 'Conditionality' ended for most people when their earnings reach a minimum level which can be as low as £70 per week (equivalent to less than 12 hours a week at the NMW). Under UC, all hours of work would be rewarded and the Department would explore ways to extend conditionality so as to incentivise UC claimants earning over £70 per week to work more and to reduce their dependency on benefits (paragraph 67). Paragraph 68 describes the higher work allowances and lower taper rates which will allow more claimants to keep a higher proportion of their earnings. UC would provide strong incentives for claimants in workless households to take up jobs with a low number of hours per week, which would help, for example, lone parents to get back into the workplace.

73. Paragraph 71 explains that a PTR measures the incentive for a person to start work. It reflects how much of gross earnings will be withdrawn in tax, national insurance and lost benefits for any given level of earnings. The lower the PTR at a level of earnings, the more incentive they have to work. A key aim of UC is to increase that incentive, and to make what is happening clear to claimants. This effect is explained in detail in paragraphs 71-80. The UC policy is 'gender neutral. Where men and women are in the same circumstances they are treated equally under UC' (paragraph 80).

74. Paragraph 83 explains that a MDR measures the incentive for a claimant to increase their hours of work. As earnings increase, means-tested benefits and tax credits are withdrawn, and above a certain level of earnings, an increase in wages will be offset by

liabilities to tax and national insurance. The MDR is the proportion of an increase in earnings which is lost because of those effects. UC will reduce the highest MDRs (see tables 8 and 9: paragraph 85). Table 10 shows the distribution of changes in MDRs, and table 11 shows their impact on different types of family, including lone parents. Paragraphs 96-98 describe earnings incentives by protected groups. Paragraphs 99-103 describe other effects of UC, including the benefit of reducing complexity. Paragraphs 101-2 describe the intention to apply 'conditionality' to more people, for example the partners of claimants who are out of work. Some claimants would be exempt (paragraph 103).

75. Paragraphs 104-118 try to predict the effects on the labour market; which were said to be highly uncertain (paragraph 104). UC would 'change the financial gains from work'. It was expected that that would affect decisions about whether to enter the labour market, and about how many hours to work. People would be better able to understand the incentives (paragraph 112). The introduction of conditionality to up to 1 million more claimants could result in 50,000-100,000 moving into work.

76. Paragraphs 117-118 deal with the introduction of the MIF. 'It is likely that some claimants would respond to this by acting to increase their earnings from self-employment, or find other forms of employment to increase their income. Others might stop their self-employed activity and search for other work and some may not change their behaviour' (paragraph 117). It was difficult to estimate the overall impact on employment, but the intention of the policy was to reduce the number of people who did not progress from low-earning activity and who do things which are not 'self-sufficient in the long term' (paragraph 118).

77. Paragraphs 119-139 consider other aspects of UC such as the UC Pathfinder, the consequences of UC for pensioners, and the regime for sanctions and hardship. Current data suggested that under the old system, women were slightly less likely to receive sanctions than men (paragraph 132). Paragraph 133 explains when hardship payments are available. They are recoverable (paragraph 134). Paragraph 135 explains that payments are made monthly to mimic work and the receipt of salary, to help households to understand what money they receive and how choices about work affect it. Over 70% of people in work are paid monthly in arrears. The Government wants households to be responsible for their own budgets. They will be required to pay expenses, such as rent, themselves (paragraph 138).

78. Annex 1 explains changes to the policy since the first IA. There are three main changes: to the earnings disregards, to the MIF, and to the rates for claimants under 25. Paragraphs 7-8, 11 and 12 describe the MIF, and paragraph 9, the start-up period. Paragraph 10 says that the purpose of the MIF is to encourage self-employed claimants to increase their earnings, reduce fraud (including fraudulent claims of self-employment and fraudulent under-declaration of income from self-employment), and to prevent long-term subsidy of activities which do not make a self-employed claimant self-sufficient. Paragraph 13 says that the MIF 'will ensure that the self-employed cannot continue to be supported indefinitely by the benefit system in activities which do not provide an adequate level of earnings'.

79. Annex 4 is headed 'Risks and opportunities to promote equality'. Under 'Gender', Annex 4 says that the new system was expected to be particularly beneficial to those who want to work a small number of hours, as the Government will pay for childcare

for those earning less than 16 hours a week. 'Groups with higher barriers to work, such as lone parents (the majority of whom are women) will face improved financial incentives to taking their first steps into work'. There was an opportunity to improve gender equality 'through helping more parents access the right support to take up employment'. The extension of the conditionality regime to partners, around 70% of whom were women, would also present an opportunity to narrow the employment gap. There was a risk of decreased work incentives for second earners in couples (mostly women). The Government's view was that it is important to help at least one person into work.

The law

80. Section 1(1) of the Human Rights Act 1998 ('the HRA') defines 'Convention rights'. They include Article 1 of Protocol 1 ('A1P1') to the ECHR, article 8 and article 14. They are set out in Schedule 1 to the HRA. In interpreting Convention rights, a court must 'take into account' the materials listed in section 2(1) of the HRA. In so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights (section 3(1)). It is unlawful for a public authority to act in a way which is incompatible with a Convention right (section 6(1)).

Article 8

81. Article 8 of the ECHR provides:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 1 of Protocol 1

82. Article 1 of Protocol 1 ('A1P1') to the ECHR provides:

> *Protection of property*
>
> *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. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

Article 14

83. Article 14 of the ECHR provides:

> *Prohibition of discrimination*
>
> *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.*

84. There are four questions to be decided in order to see whether a public authority has discriminated against a person contrary to article 14.

i. Do the circumstances 'fall within the ambit' of another Convention right?

ii. Is there a difference in treatment between the claimant and another person whose situation is, in relevant respects, analogous?

iii. Is the difference in treatment on the grounds of the claimant's status?

iv. Is the difference in treatment objectively justified?

See *In re McLaughlin's Application for Judicial Review* [2018] UKSC 48; [2018] 1 WLR 4250 at paragraph 15.

Section 149 of the Equality Act 2010

85. Section 149(1) of the 2010 Act obliges a public authority, 'in the exercise of its functions', to have 'due regard' to the equality needs listed in section 149(1)(a), (b) and (c). Those are the needs to:

> *'(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
>
> *(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
>
> *(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it'.*

86. Section 149(3) explains that having due regard to the need described in paragraph (b)

> *'involves having due regard, in particular, to the need to -*
>
> *(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
>
> *(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*

> *(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.*

87. Section 149(5) explains that having due regard to the need described in paragraph (c)

> *'involves having due regard, in particular, to the need to -*
>
> *(a) tackle prejudice, and*
>
> *(b) promote understanding.'*

88. There have been many decisions about the scope of section 149. Some were cited in counsels' skeleton arguments. There are four key features of those decisions which are relevant to this case.

i. Section 149 does not require a substantive result.

ii. It implies a duty to make reasonable inquiry into the obvious equality impacts of a decision.

iii. It requires a decision maker to understand the obvious equality impacts of a decision before adopting a policy.

iv. Complying with it is not a box-ticking exercise.

89. Ms Monaghan relied on the well-known passage from the judgment of McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] EqLR 60 at paragraph 26. She submitted, in particular, that the Secretary of State breached section 149 because she was never 'clear precisely what the equality implications' of imposing the MIF would be (cf paragraph 26(8) of the judgment in *Bracking*). I note that at paragraph 44 of *Powell v Dacorum Borough Council* [2019] EWCA Civ 23 [2019] EWCA HLR 21, McCombe LJ recently uttered a note of caution about the authorities on section 149. The previous decisions about section 149 have to be taken in their contexts. The way in which section 149 will apply on the facts will be different in each case, depending on what function is being exercised, and on the facts. The judgments, including the judgment in *Bracking*, must not be read as if they were statutes. He referred, with approval, to a similar statement by Briggs LJ (as he then was) in paragraph 41 of *Haque v Hackney London Borough Council* [2017] EWCA Civ 4, [2017] PTSR 769.

Discussion

Article 14

90. The logic of the order I describe in paragraph 84, above, is not obvious. If the issue were free of authority, I consider that it would make more sense to ask the questions in the following order:

i. Do the circumstances 'fall within the ambit' of another Convention right?

ii. Does the claimant have a status for the purposes of article 14?

iii. There are two questions at this third stage.

1. Is there a difference in treatment between the claimant and another person?

2. Is that person's situation, in relevant respects, analogous to the claimant's?

iv. Is that treatment on the grounds of the claimant's status?

v. Is the treatment justified?

I will do so for convenience, as, because of my answers to the relevant questions, the order in which I answer them makes no difference to the overall result.

Question 1: are the circumstances within the ambit of a Convention right?

91. The Secretary of State accepts that the circumstances fall within the ambit of A1P1. She does not accept, however, that they fall within the ambit of article 8. The authorities do not state a clear criterion for deciding whether circumstances fall within the ambit of a Convention right. The Secretary of State submits that the 'subject matter of the disadvantage' does not 'constitute one of modalities of the exercise of the rights guaranteed by article 8' (see *Petrovic v Austria* (1998) 33 EHRR 14 at paragraph 28, cited by Baroness Hale in *McLaughlin* at paragraph 22). This test seems to mean that the subject matter of the disadvantage has to arise from 'a way in which the state chooses to respect article 8 rights'. The Secretary of State submits that UC is not a benefit by which the state shows its respect for the article 8 rights of a claimant, by contrast with the widowed parent's allowance in *McLaughlin*. It is payable whether or not a claimant has children, for example. I accept Ms Monaghan's submission that UC has components designed in part to meet (at least in part) costs of housing and the costs of being responsible for a child or for children. On that basis it is at least arguable that the subject matter of the disadvantage is within the ambit of article 8. I will therefore assume that that is so.

Question 2: does the Claimant have a 'status' for the purpose of article 14?

92. The parties cited passages from *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311 and from *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 WLR 1831 in particular. The statuses covered by article 14 are self-evidently not limited to the grounds specified in article 14. As Lord Walker explained in paragraph 5 of *RJM*, the phrase 'personal characteristics', used to gloss the term 'other status' by the European Court of Human Rights ('the ECtHR') in *Kjeldsen v Denmark* (1976) 1 EHRR 711 is not limited to innate characteristics. It can include acquired personal characteristics, such as language, religion and political beliefs. But other acquired statuses, 'more concerned with what people do, or what happens to them, than with who they are…may still come within article 14'. The fact that a person has chosen his situation does not prevent it from being a 'status' (see per Lord Neuberger, at paragraph 47 of *RJM*).

93. In paragraph 58 of *Clift v United Kingdom* 31 July 2010, the ECtHR listed examples of cases in which it had treated characteristics which were not innate as an 'other status' for the purposes of article 14. One example is a distinction based on military rank as opposed to civilian status. Another is a distinction between private and public sector tenants. It is difficult to deduce any principles from the decided cases for identifying statuses which are at the margins of, but nonetheless included in, the phrase 'other

status'. I consider that it is likely that if this case were considered by the ECtHR, it would hold that self-employment is an 'other status' for the purposes of article 14. I therefore accept that, in the context of this case, being self-employed is an 'other status' for the purposes of article 14.

Questions 3(1) and 4: is there a difference in treatment and is it on the grounds of the Claimant's status?

94. The Claimant compares herself with an employed claimant. It is clear, as the Secretary of State realistically accepts, that the UC scheme results in different treatment of employed and self-employed claimants, in various respects, and that that treatment is on the ground of their status. In particular, regulation 62, which influences the amount of UC to which a claimant is entitled, treats self-employed claimants with earnings lower than the MIF as if they have self-employed earnings equal to the MIF, although they have not in fact received such earnings. There is no equivalent general provision in respect of claimants who are employed.

95. What this means, in broad terms, is that what is deducted from the maximum amount of UC in order to calculate the award of UC in the case of an employed claimant is, subject to the work allowance and to the taper (and except where regulation 60 applies), their actual employed earnings. What is deducted from the maximum amount in the case of a low-earning self-employed claimant, on the other hand, subject to the work allowance and to the taper, is the MIF, which, ex hypothesi, is more than their actual earnings from self-employment. There is no such difference in treatment between A self-employed claimant who earns more than the MIF and an employed claimant.

Question 3(2): are the situations analogous?

96. Mr Cornwell submits that employed and self-employed claimants are not in relevantly analogous situations. He cites paragraph AI.1.B(1)[5] of *Harvey on Industrial Relations and Employment Law*.

> *'The employee undertakes to serve; the contractor does not. The employee sells his labour; the contractor sells the end product of his labour. In the one case the employer buys the individual; in the other he buys the job.'*

97. This, he submits, has three relevant consequences.

    i. An employee is entitled to the NMW/NLW for the hours which he works, which enables him to be self-sufficient to some extent. A person who is self-employed can sell his services at the rate he thinks is appropriate, to the extent that a buyer will pay it. The difference therefore is that an employee is entitled to be paid a fixed minimum for the hours he works, whereas a self-employed person has no fixed minimum entitlement to pay which is directly related to the hours he works.

    ii. An employee is subject to the control of his employer during his working hours. No-one controls how, on what, or for how long, a self-employed person works.

    iii. There are times when a self-employed person will work for no direct remuneration at all, for example when he is developing his business, seeing

> clients, advertising, and doing administrative jobs such as budgets and accounts.

98. Ms Monaghan submitted in her skeleton argument that the fact that employed and self-employed claimants were similarly treated under the scheme which UC replaces shows that they are in analogous situations. However Parliament, and the Secretary of State, exercising powers conferred by Parliament in a way that was subject to Parliamentary scrutiny (because the Regulations were made under the affirmative resolution procedure) have decided to adopt a totally new scheme of benefits. The former view of Parliament and the executive about the appropriate treatment of benefit claimants in these two groups, in any event, tells us nothing about their characteristics which are independent of their treatment by the benefits regime, which is what really matters for the purposes of this comparison. As to that comparison, I accept the submission recorded at paragraph 97, above. It follows that I accept Mr Cornwell's submission that the treatment of the two groups by the old scheme is irrelevant.

99. Ms Monaghan also submitted that the Secretary of State's position ignored that the new regime does not treat two 'much more different groups' similarly; that is, those with earned, and those with unearned, income. Mr Cornwell's riposte was that those two groups are treated differently, because there is no taper, and no work allowance, in the case of unearned income. I accept that submission. In any event, I do not see how the treatment of those with unearned income is in any way relevant to the question whether employed and self-employed claimants are in a relevantly analogous position. This argument is tangential to the main issue.

100. Finally, Ms Monaghan submitted that a court is precluded, or at least, discouraged, from considering this question by a dictum of Baroness Hale in paragraph 25 of *AL (Serbia) v Secretary of State for the Home Department* [2008] ULHL 42, [2008] 1 WLR 1434. Baroness Hale said:

> *'...unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification.'*

101. Mr Cornwell submits that *McLaughlin*, which is a more recent authority, indicates that this is a relevant stage of the analysis. I accept that submission.

102. The question, then, is whether this is a case in which there are very obvious relevant differences between the two situations. I have already accepted Mr Cornwell's submissions (recorded in paragraph 97 above) about the legal distinctions between all employees and self-employed people, and the practical differences which flow from those. The next question is whether those differences mean that the two categories of claimant are not in relevantly analogous situations for the purposes of the scheme enacted by the WRA and the Regulations.

103. It is clear that one of the intentions of the statutory scheme is to make work pay, and to encourage claimants to do more productive activities in order to encourage them, over time, to reduce their reliance on benefits. The practical effects of the legal distinctions between the two groups mean that a work requirement imposed on an employee has an immediate, predictable and measurable effect. There is no directly effective practical

equivalent in the case of a self-employed claimant. If Parliament and the executive wanted to achieve the aims I have described in the case of self-employed claimants, a different mechanism had to be designed in order to influence their behaviour. I therefore consider that employed and self-employed claimants are not in relevantly analogous situations for the purposes of this scheme. I also consider, for that reason, that I can, and should, conclude at this stage of the analysis that this part of the claim fails.

Question 5: is the difference in treatment justified?

104. In case that approach is wrong, I will consider the question of justification. It now seems to be settled that the test which a court applies in deciding whether a measure in the field of social security is justified is whether the measure is 'manifestly without reasonable foundation' ('MWRF'): see *R (Carmichael) v Secretary of State for Work and Pensions* 2016] UKSC 58; [2016] PTSR 1422 at paragraph 27 and *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 paragraph 65. Importantly, at paragraph 120 of the latter case, Lord Carnwath said that 'It is necessary to distinguish between the general impact of [the measure at issue]…and particular effects on an identifiable group which can properly be the subject of a distinct claim under article 14'.

105. The Court of Appeal has very recently, in *Langford v Secretary of State for Defence* [2019] EWCA Civ 1271, adopted a narrow approach to the application of the test stated in paragraph 65 of *DA*; see paragraphs 52-56, per McCombe LJ. He rejected a submission that the MWRF criterion had to be applied to each of the four stages of the conventional justification/proportionality test.

106. Despite that, Ms Monaghan, relying on Baroness Hale's judgment in *DA* (paragraphs 153-156) submitted that (because Baroness Hale accepted that MWRF was the right test) I should ask the two questions posed by Baroness Hale in paragraphs 153 and 154 of her judgment, that is, whether the MIF is rationally related to its legitimate aim, and whether a fair balance has been struck between the benefits to the community and the harm to the Claimant and her children which result from applying the MIF to the UC to which the Claimant is entitled. I consider that such an approach is inconsistent with Lord Wilson's judgment in *DA*, and inconsistent with the way in which his judgment was interpreted by the Court of Appeal in *Langford*. I say more, below, about whether, in any event, this approach would make any difference to the result.

107. The question then is whether the MIF, in particular, because it applies to GSE claimants and not to employed or unemployed claimants, is MWRF. As I have said in paragraph 103, above, a work requirement and an IT amount to a practical and objective tool for influencing the behaviour of employed claimants. Their combined effects are visible and can be measured. The differences between claimants which flow from their decisions to be employed or self-employed mean that a work requirement and an IT cannot produce the same effects for self-employed claimants. The imposition of a work requirement on a self-employed claimant would not necessarily make his business more profitable, which is what is at issue.

108. The MIF, however, is such a mechanism. Its effect coheres with the aims I have described, because it encourages self-employed claimants who are in GSE and who wish to claim UC, but whose enterprises consistently generate low profits, to think carefully about whether they should continue to be in GSE. The MIF encourages such

thought because its effect is to treat a self-employed claimant as generating profits equivalent to what he would earn from employment at the NMW, whether or not he in fact generates such profits. It encourages a rational claimant in that position to ask whether continuing in GSE is in his own best interests, and whether he should take up employment instead, or change the balance of his activities between self-employment and employment so that, while continuing to be self-employed, self-employment is no longer his main employment, with the result that he would cease to be in GSE for the purposes of the scheme, and be subject to work requirements instead.

109. The decisions in *DA* and in *Langford* mean that I do not need to consider expressly or seoerately whether the MIF lacks a rational connection to the stated policy objective, or whether the MIF fails to strike a fair balance. I will do so briefly, nonetheless.

110. Ms Monaghan accepts that if the Regulations allowed a claimant to relinquish GSE, there would be a rational connection between the policy and the MIF (skeleton argument, paragraphs 37). She submits that the Regulations do not do so, because the Claimant asked to be treated as not in GSE and the Secretary of State refused. She suggests that the only way in which the Claimant could cease to be in GSE would be to give up the gainful work she is doing and to become unemployed. I do not consider that that is a correct construction of the Regulations. If the Claimant chose to cease treating her self-employment as her main employment, she could continue with her business, and, instead, seek to earn more from employment. If she did that, she would cease to be in GSE, could increase her income, and reduce her dependence on benefits.

111. Ms Monaghan submits that the MIF does not strike a fair balance because it is more draconian than the regime of sanctions which applies to the unemployed, and to employed claimants. I do not consider that this is an apt comparison, largely for the reasons given in paragraphs 102 and 103, above. Sanctions have been designed to reinforce the work requirements, by punishing claimants who do not comply with them. The imposition of work requirements in the case of self-employed claimants would not be effective, or have measurable results. The method for influencing their behaviour which the Secretary of State has chosen (a method foreseen in the White Paper, authorised by primary legislation, and produced in secondary legislation with the highest level of Parliamentary scrutiny) is, for that reason, different. I do not consider that the Secretary of State in making regulation 62 has failed to strike a fair balance. A hardship payment is only available where a sanction has been imposed if the claimant has taken steps to remedy the breach of requirements for which the sanction was imposed.

The significance of regulation 99(6)

112. I now consider whether regulation 99(6) shows that this reasoning is wrong, and that the MIF is MWRF. Ms Monaghan submitted in her post-hearing note that the Secretary of State's rationale for the MIF was that there was a quid pro quo for it, that is, a 'unique exemption from conditionality'.

113. She further submitted that there were two flaws in the MIF, one of which was revealed by regulation 99(6).

    i. The failure to allow people in GSE to escape the MIF by accepting WRR is a significant flaw in the rationale for the MIF. The Secretary of State was

wrong to imply in her post-hearing note that GSE claimants could not comply with conditions.

ii. The effect of regulation 99(6) is that employed claimants are exempt from 'the core aspects of conditionality' as soon as they earn at least £78.10 per week. People who are in GSE are subjected to a 'particularly perverse incentive' to stop their gainful self-employment.

114. There is no one 'right' answer to the question whether, and if so, to what extent, taxpayers should subsidise the activities of those who choose to be self-employed. It is up to Parliament and to the Secretary of State to decide whether, and if so, to what extent, to subsidise them, by paying them UC. Parliament and the Secretary of State could have decided not to subsidise the self-employed at all. Having decided that some subsidy is appropriate, it was, again, for Parliament and for the Secretary of State to decide how and in what circumstances that subsidy should be available. GSE is a key concept in the design of that system of subsidy. Again, the definition of GSE is a matter for Parliament and for the Secretary of State in designing the UC scheme. The scheme is not just a scheme for allotting subsidy; it is also avowedly a scheme for influencing behaviour. There is no good reason why, since there are, as I have explained, significant legal and practical differences between employment and self-employment, Parliament and the Secretary of State should be required to treat the employed and the self-employed similarly, either in the extent to which they should be subsidised, or in the way in which the UC scheme is designed to influence their behaviour. As I have already said, one of the purposes of the MIF is to influence behaviour and to ensure that the taxpayer does not subsidise unprofitable businesses in the long term by encouraging claimants to think hard about whether it is sensible to carry on with such a business as their main employment, rather than switching to a more profitable business or to full-time employment. This part of Ms Monaghan's submission apparently involves a suggestion that it is better for a person in minimally profitable self-employment to carry on with that minimally profitable self-employment and to spend 25 hours a week looking for work, rather than actually working and earning money. More fundamentally, it describes the aim of the MIF inaccurately. The aim of the MIF is not just to be a substitute or 'quid pro quo' for WRR; it is to influence the behaviour of those in minimally profitable self-employment.

115. It is up to the Claimant to decide whether she wishes to be in GSE (as that concept is defined in regulation 64 (see paragraph 31, above)) and/or in employment. In order not be in GSE, she could organise her affairs so that she did not carry on her business as her 'main employment'. The Secretary of State's decision that the claimant is GSE has recently been upheld by the independent FTT. Ms Monaghan is wrong to suggest that the scheme is flawed because it does not permit the Claimant to escape the MIF by opting to accept all the WRR. The Claimant has chosen to make self-employment her main activity. That is why, under the current design of the scheme, she is subject to the MIF, and not subject to the WRR. She is not subject to the WRR precisely in order to enable her to focus on her self-employment and to make it pay. She could just as well choose to make employment her main activity; if she did so, and continued her self-employment as a side line, she would no longer be subject to the MIF, and, provided that she met her IT, would not be subject to WRR either. Ms Monaghan's first submission is a plea for a differently designed scheme. I do not consider that it shows that the MIF is MWRF.

116. I turn to Ms Monaghan's submission about regulation 99(6). The effect of regulation 99(6) is that some employed claimants who earn less than their IT (and, therefore, less than the MIF), but more than the amounts stipulated in regulation 99(6), are subject to some, but not to all, the WRR. I do not accept that this creates a perverse incentive to give up GSE in general. It might create an incentive to give up minimally profitable GSE for a person, like the Claimant, who also has some employed earnings; but it is more likely to create an incentive for such a person (if she is rational) to give up minimally profitable self-employment and to take on more employment. The Claimant's exemption from 'conditionality' in the months in which she earns more than £338.43 is not theoretical; it is real. It is not a consequence, however, of the level of her employed earnings, but of her GSE. That is what exempts her from all, and not just from some, of the WRR. If she were not in GSE, but in employment, and earning those amounts, she would, by contrast be subject to some of the WRR.

117. Ms Monaghan's third supplementary written submission is that regulation 99(6) is not temporary. This is a riposte to Mr Cornwell's account, in his post-hearing note, of the rationale for, and evolution of, regulation 99(6). She contends that there is nothing in the express terms of regulation 99(6) to show that it is temporary. That is true. I nonetheless accept Mr Cornwell's account, which, in short, is that regulation 99(6) was introduced in order to establish less onerous WRR for employees earning less than the threshold in regulation 90, but more than the amount of JSA, and that a pilot scheme was then introduced by the Universal Credit (Work-related Requirements) In-work Pilot Scheme and Amendment Regulations 2015 (2015 SI No 18) in order to see whether that less onerous regime, or the full WRR, produced better results with this group of employees. Even if the scheme established by regulation 99(6) is not temporary, I do not consider that its existence, in relation to a low-earning group of employees, begins to show that the MIF, for people in minimally profitable self-employment, is MWRF.

118. For these reasons, I reject the submission that the existence of regulation 99 shows, either of itself, or cumulatively with other factors, that the MIF is MWRF.

Rationality at common law

119. Ms Monaghan submits that the Secretary of State was not under a duty to introduce the MIF; the WRA only gave the Secretary of State power to make regulations providing for a mechanism such as the MIF. The primary policy and object of the statutory scheme is to make work pay, and to simplify the existing system by providing one payment instead of many. Regulation 62 fails to promote that policy because it makes a claimant who is in GSE on a low income and who is looking for further work worse off than she would be if she gave up her existing work, causes the benefit amounts for children and for housing costs to be reduced or eliminated by reference to the conduct of the main claimant and makes a person in self-employment, even when earning the living wage in full-time work, worse off than an employed person.

120. There are two flaws in these arguments. First, Ms Monaghan's description of the statutory purposes is too narrow. The legislative purposes, as the White Paper, the presence in the WRA of paragraph 4 of Schedule 1, and the express language of regulation 62 show, also include, among others, the reduction of fraud and error, and the introduction of a MIF to provide incentives to those reporting low levels of profits from self-employment to think carefully about whether they should continue to be GSE.

The aim is not to encourage a claimant in unprofitable self-employment to give up all employment, but rather, to give up that unprofitable self-employment as his main employment, and to look for better paid work.

121. Second, a premise of these arguments is that the Claimant should be permitted to stay in GSE, even though it is minimally profitable, and should continue to be subsidised in that activity, as she was by the WTC system. As Lewis J explained in *R (TP) v Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin), [2019] PTSR 238 at paragraph 68, claimants are not entitled to the same level of support, paid on the same conditions as they were under the old system, in circumstances where the Government's clear policy aim was radically to reform that system.

122. The Regulations were subject to the highest level of Parliamentary scrutiny. They are part of a policy which, as Ms Parker explains, has been developed over some time, and with the help of various contributors. They deal with matters of social policy, and with the allocation of taxpayers' money. Ms Parker explains the careful development of, and the rationale for, the policies underlying UC in her witness statements. In those circumstances, the threshold of irrationality is high. I am not satisfied that it has been reached.

Section 149 of the Equality Act 2010

123. It is clear from the EIA, the IA, and from Ms Parker's evidence, that the Secretary of State took a deliberate policy decision formally to assess the impact of the scheme as a whole, and not to assess the impact of each component of that scheme. The scheme is complicated, and its various components interact with one another. One of its primary aims is to influence behaviour, by giving claimants incentives either to enter employment, or to take up self-employment, but only where self-employment enables them to be self-sufficient in the long term.

124. Ms Monaghan submits, as I have said, that the Secretary of State did not know what the equality implications of the MIF were, and so failed to have the necessary due regard to the relevant equality needs. She relied on an annex to an unpublished note to ministers from March 2012, which is said to show that lone parents (and therefore women) are the largest group of 'very significant losers' under the MIF. This annex is a table appended to a note which was prepared for the Secretary of State, in order to enable the Secretary of State to understand the policy for self-employed claimants, that is, the MIF. The table on which she relies shows a range of effects on lone parents, single claimants with no children, and couples with children. I do not consider, that taken as a whole, the table does show that lone parents lose most from the MIF, as it is necessary to look at the range of effects across each group. But even if it did show this, the note was prepared for the Secretary of State, so she was aware of this impact.

125. I consider that, in the light of the complexity of the overall scheme, the Secretary of State had the necessary due regard by adopting the approach which she did to the formal assessment of the impact of the scheme as a whole, and by taking into account, for what it was worth, the table on which Ms Monaghan relies. I would have reached that conclusion in the absence of the table.

126. I consider that this ground is arguable, so give permission for it to be argued.

Conclusion

127. For those reasons, I dismiss this application for judicial review.

i. The circumstances of this claim are within the ambit of article 8 and I have assumed of A1P1.

ii. Self-employment is a status for the purposes of article 14.

iii. The MIF results in a difference in treatment between the self-employed and the employed.

iv. They are not, however, in relevantly analogous circumstances.

v. The difference in treatment, is, any event, not MWRF.

vi. The MIF is not irrational at common law.

vii. The Secretary of State complied with section 149 of the 2010 Act in designing the UC scheme.