Neutral Citation Number: [2020] EWHC 2482 (Admin)

Case No: CO/4933/2019

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

Manchester Civil Justice Centre, 1 Bridge Street West
Manchester, M60 9DJ

Date: 23/09/2020

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

THE QUEEN ON THE APPLICATION OF SHEENA CAINE	**Claimant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant**

- -
- -

Tom Royston and Ciara Bartlam (instructed by **Greater Manchester Law Centre**) for the **Claimant**
Claire Palmer (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: **14 July 2020**

- -

Approved Judgment

The Honourable Mr Justice Julian Knowles:

Introduction

1. This claim for judicial review relates to Universal Credit (UC). It challenges as unlawful how the monthly housing costs element of UC is calculated for a tenant who pays those costs on a weekly basis. Specifically, the claim concerns the formulae in [7(2)(a)7(3)(3A)(a)] of Sch 4 of the Universal Credit Regulations 2013 (SI 2013/376) (the UC Regulations). These convert a tenant's weekly housing costs into a monthly amount, which is paid to the claimant towards their housing costs as part of their monthly UC payment. The way in which they do so is said by the Claimant to be unlawful.

2. Kerr J granted permission on 4 March 2020.

3. I held a remote hearing on 14 July 2020. The Claimant was represented by Mr Royston and Ms Bartlam. The Defendant was represented by Ms Palmer. I am grateful to all of them for their oral and written submissions.

4. The issues involved in the claim are fairly technical, but I can describe them shortly by way of introduction as follows. Later I will set out the relevant statutory provisions.

The issues in outline

5. In *R (Johnson) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778, [1], the Court of Appeal said that UC marked:

> "… a fundamental move away from previous policies for supporting the poorest and most vulnerable members of our society. It has been a central platform of the Government's social policy reform agenda since 2010 and will be the most significant welfare reform in the past 70 years. It is intended to make social entitlement provision fairer, more affordable and better able to tackle poverty, worklessness and welfare dependency."

6. UC is a non-contributory, means-tested, predominately working-age, social security benefit. It is assessed and paid in arrears. UC is not a flat rate entitlement but constitutes a payment which may vary from assessment period to assessment period depending on the claimant's circumstances during each month. It is made up of various components, one of which is intended to assist with the recipient's housing costs, namely, rent and service charges.

7. UC is generally paid monthly in respect of every assessment period, which begins with the first day the claimant is entitled to UC (usually the date of claim) and then continues every calendar month thereafter. For example, a claimant who became entitled to UC on 26 January would receive a payment for the assessment period 26 January – 25 February, and then for the period 26 February – 25 March, and so on thereafter for as long as she is eligible.

8. UC is calculated on a household basis. First, the maximum amount is calculated. This comprises a standard allowance, plus additional elements which depend on the claimant's circumstances in respect of things like housing costs; responsibility for children or young persons; being a carer; childcare costs; caring for disabled children; and disability. Deductions are then made from the maximum amount. These might include the claimant's unearned income for that assessment period (eg, other benefits such as Carers Allowance, Maternity Allowance, and contribution based Employment Support Allowance (ESA) and Jobseekers Allowance (JSA) as converted to a monthly amount); a proportion of the claimant's earned income from work; and things such as sanctions, advance payment repayments and third party deductions. The relevant data is collected for each assessment period and this is then automatically used by the Defendant's IT system to perform the UC calculation at the end of that period. The recipient then receives the amount due.

9. There are specific reasons why UC payments are made monthly, which I will come to later when I discuss the Defendant's evidence. However, many tenants, particularly in the social housing sector, pay their housing costs on a weekly basis. The issue therefore arises: how are weekly housing costs to be converted into monthly housing costs for the purposes of the UC calculation? Months are of different lengths, and generally do not match up with weeks. If all months had four weeks, then the calculation would be easy.

10. The solution which the Government adopted, and which Parliament approved in the UC Regulations, was to take the tenant's weekly housing costs figure, multiply it by 52 and then divide the total by 12. In other words, the formula (as set out in [7(2)(a)] of Sch 4 to the UC Regulations) is:

$$M = (W \times 52)/12$$

where M is the UC monthly housing payment, and W is the recipient's actual weekly housing costs liability. I will refer to the figure of 52/12 (or the cognate figures in the discussion which follows) as the 'conversion ratio'.

11. That formula applies in relation to a tenant who is required to pay her housing costs every week of the year. In fact, most tenants in the social housing sector have one or more 'rent free' weeks each year, and there is an adjusted formula in [7(3)(3A)(a)] of Sch 4 to cater for that. If R is the number of rent-free weeks per year, then the monthly payment as part of UC is:

$$M = (W \times (52-R))/12$$

12. Paragraph 7 of Sch 4 also contains formulae for tenants who pay their rent every two weeks or at other periods measured in weeks. The effect of [7(2)] for a tenant who pays her housing costs on a monthly basis is that M is simply her monthly housing costs liability. For a tenant who pays annually, M is the annual cost divided by 12.

13. In his Statement of Facts and Grounds at [9], Mr Royston correctly points out that rather than take each individual payment of rent by a weekly tenant into account as a liability on the specific date it falls due, or make adjustments between individual assessment periods to reflect their slightly differing actual lengths (because calendar

months are of different lengths), paragraph 7 of Sch 4 converts housing costs liability into an *average* figure which is the same in each assessment period. The actual amount of housing costs paid by the tenant during the assessment period may therefore sometimes be higher, and sometimes lower, than that average figure.

14. To illustrate the effect of averaging, suppose a tenant's UC assessment period begins on 1 January and that her weekly housing costs of £100 also fall due on that day. In January, she will make five housing payments (namely on the 1, 8, 15, 22 and 29 of the month), ie a total of £500. In February she will make payments on the 5, 12, 19, and 26 of the month, ie £400. According to the formula in [7(2)(a)]:

$$M = (100 \times 52)/12 = £433.33$$

meaning that in January, M will be less than the amount the tenant has to pay in housing costs, whereas in February it will be more than she is required to pay.

15. Mr Royston does not take issue with the averaging principle but attacks the rationality of the conversion ratio of 52/12 for reasons I will explain in a moment.

16. For completeness, I should point out that M will often be adjusted to take account of other benefits or liabilities (eg deductions for the so-called 'bedroom tax', or as the Defendant would prefer it to be called, 'the spare room subsidy', whereby tenants adjudged to be in bigger properties than they need have an amount deducted from their UC payment). That is the case with regard to the Claimant. Hence, if M_A is the actual housing amount paid as part of UC after such deductions then:

$$M_A \leq M$$

17. I turn to the Claimant's witness statement. She lives in a property owned by One Manchester Ltd, a registered social landlord. She has lived in her home for 20 years and lives there alone. She is a widow, and her son has now moved out. It is a two-bedroom property. As a result, she is subject to the bedroom tax. Her tenancy is a weekly tenancy and her housing costs liability is £76.89 per week. She is currently unable to work because of health issues.

18. The Claimant first made a claim for UC in 2016. She experienced a number of problems with her claim and her payments were stopped for a time, which resulted in her running up rent arrears. She became very short of money and struggled financially. She could not afford anything other than basic food and essentials. Her UC was restored in November 2019. She visited her solicitor and was told that the DWP converts weekly rent payments into monthly payments and that the way they do this means that over the course of a year she will be underpaid by one day in a normal year and two days in a leap year. She says the amount involved, £10.98 a year (£21.96 in a leap year), might not be a lot of money for some people, but is a lot to her, especially as she is having to pay off her rent arrears as well as her ongoing housing costs. She has been awarded a Discretionary Housing Payment (DHP) by the local authority in respect of the bedroom tax; that is paid directly to her landlord.

19. As I have said, Mr Royston attacks the conversion ratio of 52/12 as being inaccurate. He says that it is based on the fiction that a year has 52 weeks, when it does not. A

non-leap year has 365 days, ie, 52 weeks plus one day, and a leap year has 366 days, ie, 52 weeks plus two days. Mr Royston argued that a different formula should have been adopted which did not involve the fiction that a year has 52 weeks, when it does not. For a non-leap year, he suggested the formula should be as follows for a tenant who has to pay housing costs every week:

$$M = (W \times (52 + 1/7))/12$$

$$\text{ie, } M = W \times 365/84,$$

because (52+1/7)/12 (a compound fraction) is 365/84 when expressed as a simple fraction.

20. For a leap year, the Claimant argues the formula should be:

$$M = (W \times (52 + 2/7)/12$$

$$\text{ie, } M = W \times 366/84$$

21. Again, I hope a worked example based on simplified figures will illustrate Mr Royston's argument.

22. Suppose the tenant's weekly housing costs are £70 per week. On the Claimant's approach, that equates to £10 a day, or £3650 per (non-leap) year. Using the formula in [7(2)(a)] of Sch 4, however, she will receive £303.33 per month (ie, (70 x 52)/12), or £3640 per year. Thus, the Claimant argues, there will be a shortfall of £10 (or one day's housing costs) over the course of a year for that tenant.

23. Using the Claimant's suggested formula, the tenant would receive, instead, a UC payment of £304.17 (rounded up to the nearest penny, as per regulation 6) per month. The difference between the two monthly payments is

£304.17 - £303.33 = £0.84, or approximately £10 per year (ie £0.84 x 12 = £10.08)

24. In other words, what the Claimant says is the shortfall would not arise according to her formula.

25. In relation to leap years, the Claimant argued in her Statement of Facts and Grounds at [19]:

> "Even if leap years were not accommodated at all, multiplying by 365 every year would manifestly be superior to the current approach: instead of being wrong every year, it would be right ¾ of the time, and wrong by one day instead of two in leap years, so a shortfall in rent would accrue at a much slower rate."

26. According to the witness statement of Polly Neate, the Chief Executive of the housing charity Shelter, the number of weekly tenants affected is several hundred thousand, which is likely to grow to several million when all those eligible have been transitioned to UC from the legacy benefits it replaces.

27. The Claimant asked her landlord if she could switch to monthly rent payments, however it refused. I accept the Claimant's submission that *if* the formulae in [7(2)(a)(3)(3A)(a)] of Sch 4 give rise to the problem she says that it does (an issue which I will discuss later), then it is not a solution to suggest that tenants could move to monthly rents. That is not something which lies within their power, and the evidence shows that many landlords would not agree to such a change for good reasons.

Statutory and Convention provisions

Domestic law

28. As ever with matters relating to welfare benefits, the statutory provisions in question are complicated. The essentials for the purposes of this case are as follows.

29. Section 11(1) of the Welfare Reform Act 2012 (WRA 2012) requires UC awards to include 'an amount in respect of any liability of a claimant to make payments in respect of the accommodation they occupy as their home.' Section 11(4) requires regulations 'to provide for the determination or calculation of any amount to be included under this section.'

30. The UC Regulations were made under the WRA 2012. They were approved by both Houses of Parliament by positive resolution.

31. Regulation 21(1) defines an 'assessment period' as meaning a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists. In simple terms, therefore, as I have explained, UC is paid monthly on the basis of the amount falling due for payment, calculated according to the Regulations, for that assessment period (the amount of which may differ from period to period). The sub-paragraphs of reg 21 contain other provisions relating to assessment periods but to keep matters simple I will not set them out.

32. Part 4 of the UC Regulations is entitled 'Elements of an award'. Regulations 25 and 26 are entitled 'Housing Costs'. Regulation 26 provides for the amount to be included in an award in respect of an assessment period in which the claimant meets all the conditions specified in reg 25 in relation to such costs (reg 26(1)). Regulation 26(2) provides that Sch 4 has effect in relation to any claimant where the claimant meets all of those conditions. Schedule 4 is entitled 'Housing costs element for renters'.

33. Paragraph 3(1) of Sch 4 defines 'relevant payments' as rent payments and service charge payments. These terms are then defined in paragraphs 3(2) and (3) but it is not necessary to set out the detail.

34. Paragraph 6 sets out the circumstances in which relevant payments are to be taken into account for the purposes of calculating the UC housing costs element referable to them, as required by s 11(1) of the WRA 2012.

35. Paragraph 7 is the key one for the purposes of this case. It provides:

> "7(1) Where any relevant payment is to be taken into account under paragraph 6, the amount of that payment is to be calculated as a monthly amount.
>
> (2) Where the period in respect of which a renter is liable to make a relevant payment is not a month, an amount is to be calculated as the monthly equivalent, so for example -
>
> (a) weekly payments are multiplied by 52 and divided by 12;
>
> …"

36. Hence, it is [7(2)(a)] which specifies the weekly formula that I set out earlier. Other related formulae are specified in the following sub-paragraphs of [7(2)] where the rent is payable on a bi-weekly or other periodic basis however, again, I need not set out the detail.

37. Paragraphs 7(3)(3A)(a) of Sch 4 address the situation where the tenant has rent free weeks. They provide:

> "(3) Where a renter is liable for relevant payments under arrangements that provide for one or more rent free periods, subject to sub-paragraph (3A), the monthly equivalent is to be calculated over 12 months by reference to the total number of relevant payments which the renter is liable to make in that 12 month period.
>
> (3A) Where sub-paragraph (3) applies and the relevant payments in question are -
>
> (a) weekly payments, the total number of weekly payments which the renter is liable to make in any 12 month period shall be calculated by reference to the formula -
>
> 52 - RFP
>
> … where 'RFP' is the number of rent-free periods in the 12-month period in question."

38. Again, there are related formulae where rent is paid on a bi-weekly or other basis.

39. Turning back to my worked example to illustrate how the weekly rent-free formula works, suppose the tenant whose costs are £70 per week has two rent free weeks per year. According to the formula in [7(3)(3A)(a)] her monthly UC payment referable to those costs would then be:

$$M = (70 \times (52 - 2))/12 = £291.67$$

Convention provisions

40. Article 14 of the European Convention on Human Rights (the Convention) 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."

41. Article 1 of Protocol 1 (A1P1) provides:

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

The Claimant's Grounds of Challenge

42. The Claimant argues two grounds of challenge to the formulae used for weekly tenants in [7(2)(a)(3)(3A(a))] of Sch 4:

    a. Firstly, that the formulae are irrational because they mean that a tenant who pays weekly will not have her full housing costs met; because they lack logic; and because they result in unequal treatment of like cases (because monthly tenants with a monthly liability are reimbursed in full whereas tenants with a weekly liability are not). That is Ground 1.

    b. Second, that the formulae breach Article 14 of the Convention when read with A1P1, because they discriminate between tenants who pay their housing costs on a monthly basis, and those like her who pay on a weekly basis and who therefore, she says, suffer a shortfall. She says that being a weekly paying tenant is a 'status' on which she is discriminated against under Article 14. That is Ground 2.

43. The Claimant applied for permission to rely on additional evidence. The Defendant did not object. I grant permission.

The Defendant's evidence

44. The Defendant relies on a witness statement from Joanne Hawkins, its senior policy lead with responsibility for housing within its disability and housing support directorate. She produces a number of exhibits.

45. Summarising the Defendant's case overall, Ms Hawkins said that the Defendant denies that the relevant formulae in Sch 4 to the UC Regulations are either irrational or unlawfully discriminatory under the Convention. She said they reflect a lawful policy decision, and that the Regulations were passed by Parliament after significant debate. She said the Defendant also denies that being a weekly tenant is a status for the purpose of Article 14, or that the UC Regulations have the discriminatory impact which the Claimant asserts.

46. Ms Hawkins acknowledged that while there might be what she called 'a small differential effect' between weekly and monthly tenants over a five/six yearly cycle, whether or not that would occur depended on a number of factors, and the tenant's claim for UC as a whole. Ms Palmer for the Defendant pointed out in argument that many claimants might not be eligible for UC for long enough for this effect to take place because they might return to employment, which is the Government's overall policy goal for welfare recipients. As she put it in [21] of her Skeleton Argument:

> "The loss assumptions wrongly assume full housing costs support for every tenant and wrongly assume continued reliance on housing costs support without end. However, UC is an 'in and out' work benefit designed to encourage claimants to return to the labour market."

47. Returning to Ms Hawkins' evidence, she said that using the Claimant's calculations, there might be a difference of 0.274% a year, or 0.546% of the annual amount in a leap year, than would be received under current arrangements. Ms Hawkins said this small differential had to be considered against the UC system as a whole, the need to have a system that operates for the whole cohort of UC claimants, and the objectives and the legislative policy intent of UC. She said that the Defendant's central contention is that any difference in treatment is small and justifiable.

48. Pausing there, the figure of 0.274% difference is shown by my example above based on £70 per week housing costs. There is a difference of £10 produced by the formula in [7(2)(a)] as compared with the Claimant's suggested formula. £10 is 0.274% of £3650, ie:

$$(10/3650) \times 100 = 0.274\%$$

49. Ms Hawkins said that UC has been the subject of gradual introduction which is expected to be completed in 2024. She said that as it is being rolled out, a 'test and learn' approach has been adopted encompassing regular testing, with changes made where necessary. She said changes are considered against the extent to which amendments are required to the IT system, and whether the change is consistent with overall UC policy and objectives. The costs of change are a factor that is taken into account.

50. Ms Hawkins explained that the political thinking behind UC dates back to 2005. It became a policy objective of the Coalition Government in 2010 and was the subject of a White Paper and various consultations. UC was designed as a measure with a far-reaching social purpose. In particular, it was intended to bring about significant behavioural changes, to incentivise work and increased earnings, and to make the

system simpler and fairer. It was designed to address both the complexity and perverse incentives inherent in the legacy benefit system, which had arisen as a result of its piecemeal development over a number of years. Additional policy objectives include developing a system that was affordable; that rewarded work and developed personal responsibility; that established a fairer relationship between benefit recipients and those who pay for their benefits, including in particular those on low pay; that targeted financial support more efficiently, that supported those in vulnerable circumstances; that established a simpler system for individuals to understand and for the Government to administer; and which was a system that operated for all types of case, straddling in-work and out of work cases.

51. Ms Hawkins also emphasised that UC, like legacy benefits, is not intended to provide an indemnity against all costs arising out of need. Significantly for the present claim, in relation to housing costs, she referred to [28], p19, of Exhibit JH4. That is *Universal Credit: Welfare that Works* (Cm 7957, 2010), the Government's White Paper from November 2010. Paragraph 28 stated:

> "An appropriate amount will be added to the Universal Credit award to help meet the cost of rent and mortgage interest. For those who rent their accommodation, this amount will be similar to the support currently provided through Housing Benefit. The intention is that this support for rent, currently delivered by Local Authorities, will over several years be replaced by Universal Credit."

52. Ms Hawkins said that the components of UC, including the housing costs element, represent the judgement by Parliament as to the amount of money that should be paid in particular circumstances, having regard to the different needs of different categories of claimants and the amount of state resources available. She said that it does not necessarily meet a claimant's full rental costs and service charges in all circumstances with, for example, support limited for those living in accommodation that is larger than required or more expensive than deemed appropriate.

53. Ms Hawkins said that households are expected to manage their own budgets, using their UC payment to meet their living and housing costs. A single payment of benefits enables a household to clearly see the effect of their decisions about work on their total household income and enables claimants to take responsibility for managing their finances and their living arrangements. She said the Government believes that people within a household are best placed to make the money management choices that are most appropriate for them, rather than the State dictating how a family spends its money.

54. After describing how UC works, Ms Hawkins then dealt with monthly assessment periods. She said that in order to understand the Defendant's response to the claim, it was necessary to explain why a monthly assessment period had been chosen by Ministers and then approved by Parliament.

55. Ms Hawkins said that the calculation of UC by reference to fixed monthly assessment periods is a cornerstone of UC policy. All changes that occur in an assessment period are applied to the whole of that period, and each component for which an amount may

be payable is looked at across the period, such as disability; childcare costs; carer's element; conditionality arrangements; earned and unearned income; capital and deductions. Each element of the claim is calculated as a monthly amount (after being converted where necessary) to facilitate the overall calculation.

56. Ms Hawkins said that a calendar monthly basis had been chosen because it was considered to best reflect the most common payment cycles in most people's lives (whether in terms of income, such as salary, or outgoings, such as bill payments). It was decided that the objective of workability and efficiency required the same structure to operate for the whole population and for each part of the calculation of UC, notwithstanding that there are different types of payment cycles (including irregular pay, or weekly, fortnightly or monthly pay) and liability cycles (varying from weekly, four weekly, monthly to annual rent liabilities). She said the Defendant's position was that the calendar month structure reflects the general position in modern working life where individuals, even in more precarious employment, are usually paid monthly. Where claimants are unemployed, monthly assessment and payment of UC creates the discipline of budgeting and managing money on a monthly basis, which is considered to help improve skills which will reduce poverty, for those in work or not. The same approach is applied whether a claimant is employed, unemployed or self-employed. This allows UC to be calculated on the same basis whether a person moves in and out of work, or whether their earnings are composed of mixed employed and self-employed earnings.

57. It is worth setting out here the Secretary of State's evidence about UC in *R (Pantellerisco) and others v Secretary of State* [2020] EWHC 1944 (Admin), as quoted by Garnham J at [20]-[24] of his judgment:

> "Entitlement is assessed by reference to a claimant's circumstances during a monthly assessment period. Recipients usually receive their first UC payment around five weeks after their claim - made up of a one-month assessment period and up to seven days for the payment to reach a claimant's account. Their UC entitlement is then calculated for each assessment period in the same way. Changes in circumstances can therefore be taken into account from month to month.
>
> …
>
> 21. The calculation of UC in each monthly assessment period is a cornerstone of UC policy. All changes that occur in the assessment period are applied to the whole assessment period, and each policy consideration is looked at across the assessment period - such as the inclusion of disability elements, child elements, childcare costs, carer's element, conditionality arrangements, the treatment of income, capital, deductions, etc.
>
> 22. The assessment period is calculated as a calendar month. A calendar monthly basis is used as it is considered to best reflect the most common payment cycles (whether in terms of income, such as salary, or outgoings, such as bill payments).

> 23. The objective of workability and efficiency requires the same structure to operate for the whole population, notwithstanding that there are, of course, different types of payment cycles (such as irregular pay or weekly or lunar monthly pay).
>
> 24. The calendar month structure reflects the general position in modern working life, where individuals, even in more precarious employment, are usually paid monthly. Where claimants are unemployed, monthly assessment and payment of UC creates the discipline of budgeting and managing money on a monthly basis, which is considered to help improve skills which would reduce poverty whether in work or not. The same approach is applied whether a claimant is employed, unemployed or self-employed. This allows UC to be calculated on the same basis whether a person moves in and out of work or whether their earnings are composed of mixed employed and self-employed earnings."

58. Returning to Ms Hawkins' evidence, she said that the assessment period structure was the subject of debate during the passage of the Welfare Reform Bill and the 2012 secondary legislation. She referred to this *Hansard* passage from the speech of Lord Freud, the then Parliamentary Under-Secretary of State, Department for Work and Pensions (Ex JH5, p18, Col 440-441[1]):

> "… I need to make the point about the difference between assessment periods and payment periods, which is important to bear in mind. Currently, existing out-of-work benefits are made on an assessment period of a week, with a fortnightly payment cycle. That is fairly typical. The universal credit benefit represents a new approach focused clearly on work, which encourages out-of-work households to budget on a monthly rather than a fortnightly basis in the belief that it will better prepare people for the reality of working life. The figures have already been used. Currently, 75 per cent of all those in employment and 51 per cent of those earning less than £10,000 a year receive earnings monthly. In addition, monthly direct debits for household bills are often cheaper than more frequent billing options. …… If you separate assessment from payment, the monthly assessment is intended to reduce the burden on claimants and reduce the risk of overpayments compared with a system where benefits are reassessed on a weekly basis, so there is a separation between the assessment period and the payment period."

[1] https://hansard.parliament.uk/Lords/2011-10-10/debates/11101021000096/WelfareReformBill

59. Ms Hawkins said that the Secretary of State decided to use the monthly assessment period as the central component of UC and that, accordingly, all entitlements are calculated on this basis, including the amount of housing support provided. Other periods were considered but resulted in issues regarding entitlement which Ms Hawkins said were considered likely to be detrimental to individuals and to undermine the social policy objectives of UC.

60. Ms Hawkins then addressed what she rightly regards as the main issue arising in this claim, namely, the use of the 52/12 conversion ratio between weekly housing costs and monthly housing costs.

61. She said that in calculating monthly figures from weekly liabilities or income, it was necessary to consider how to undertake the calculation, and whether to take account of occasional '53-week payment years', ie, those years where there are 53 payment days. The issue arises because every year comprises of only 52 full weeks, although a standard year is 365 days (52 weeks and one day), and a leap year is 366 days (52 weeks and two days). Ms Hawkins pointed out that in most years there are only 52 weeks of payments (eg, rent) or income (eg, earnings). She observed that the point at which there is a '53-week payment year' depends entirely on when the year runs from and to, the date of the UC claim, and therefore the assessment period, and the date on which the relevant payment is due. All of these are variable.

62. As a matter of fact, a check on Google shows that the following years up to 2050 have 53 Mondays (the day on which weekly social tenants generally pay their rent): 2024 (leap year); 2029; 2035; 2040 (leap year); 2046.[2] The last year to have 53 Mondays before 2020 was 2018. Ms Hawkins was therefore generally correct to acknowledge that every five or six years, those with weekly liabilities who stay on UC for long enough and who pay for their housing on a Monday will have 53 payments to make.

63. After describing the formulae in [7] of Sch 4 that I set out above, Ms Hawkins said that a weekly tenant generally only has liability to make 52 weekly payments in a year (or 52 less the number of rent-free weeks). It is only in a year where there are 53 payment dates that there is a liability to make 53 payments (or 53 less rent-free weeks).

64. Ms Hawkins then addressed the Claimant's suggestion that, when calculating monthly figures, the weekly figure should be taken, divided by seven (to give a daily rate) and then either (a) multiplied by 365 and divided by 12; or (b) multiplied by 365.25 and divided by 12 (averaging out non-leap and leap years). In response, Ms Hawkins says the Claimant does not in fact have an annual liability for rental payments, but is charged on a weekly basis. Consequently, the amount payable in both examples would lead to an overpayment of housing entitlement in any year where there are 52 payment dates (less any rent-free weeks), as there will be in most years.

65. To illustrate this, suppose the year has 52 payment days and W = £100. The tenant will be required to pay £5200 over the year. But, using the Claimant's suggested method, the tenant would receive:

[2] https://math.stackexchange.com/questions/736688/probability-that-a-year-has-53-mondays.

$$M = (100/7) \times (365/12) = £434.52 \text{ per month,}$$

ie, £5214.29 per year, which is more than their housing costs liability for the year.

66. Ms Hawkins went on to say that the first option suggested by the Claimant would also mean that in a leap year there was one day less, or it would require a further and different formula for leap years. The second option would lead to a number of weekly tenants recovering more in the housing element than they are required to pay in the majority of years. Both formulae would be different to that used in other parts of the UC system. If the other formulae were also changed, there would be a higher deduction made from the overall figure of those with unearned income for example.

67. At [46] of her statement Ms Hawkins said that a policy decision had been made that the system would operate on a 52-week basis, either prior to, or at the point when, the UC Regulations were approved by Parliament in 2013. However, she also added that in the context of the UC Regulations as a whole, this was 'a point of detail', and that officials had been unable to locate written evidence of Ministerial engagement with the precise issue of the formula for converting weekly liabilities prior to the Regulations being introduced. However, she said that it appeared that officials' use of a 52-week year arose as early as April 2012 in respect of the treatment of unearned income. She said that discussions between officials from 16 July 2012 (and possibly before) indicated a preference for the approach of assuming there are 52 weeks in every year. This was on the basis that it was consistent with the treatment of other proposed aspects of UC calculations (namely, weekly unearned income payments) and it would be simpler. Further, Ms Hawkins again emphasised that the housing costs element was intended as a contribution towards a person's housing costs rather than as a full reimbursement of them.

68. She said that the desire to achieve the policy intent of simplicity was also evident in late 2012 when changes were made to the 'live service' IT system, in other words, the original IT system, as it had initially been developed using the approach of multiplying a daily rate by 365 days. However, during the roll out of UC, in accordance with the 'test and learn' approach, it was determined that live service was no longer the most effective way of managing UC claims. It was therefore replaced with a new system referred to as 'full service' into which all existing UC claims were eventually transferred. That system was designed using the 52-week approach, in accordance with policy.

69. Ms Hawkins said that to put into effect the changes requested by the Claimant would require amendments to the IT system. She said that the changes could be made, but not without significant effort and cost.

70. At [48] of her statement Ms Hawkins explained that the 52-week calculation method was applied to conversions of weekly liabilities in a number of areas of UC. These include the conversion of a claimant's unearned income; the benefit cap; transitional element (ie, the amount paid when a person 'migrates' to UC); and the conditionality earnings threshold (ie, the earnings threshold for the claimant to be exempt from work search and availability requirements). In relation to unearned income, regular income payments to a household of a specified type result in reductions in the UC award on a

pound for pound basis. Ms Hawkins said that the effect of using 52 weeks to convert unearned income means that the amount of income deducted from UC in a 12-month period is equal to (or less than) that which is *actually* received. For example, most years have 52 weeks of unearned income, typically paid as 26 fortnightly benefit payments, and when this occurs, if an individual's weekly assessed benefit entitlement were converted by dividing it by seven and multiplying it by 365 before dividing by 12 then, in effect, more would be deducted from the claimant's UC award than she would actually receive.

71. Ms Hawkins said that prior to the pandemic, it was estimated that approximately two million people by 2024/25 would be in receipt of Carers Allowance, Maternity Allowance, and contribution-based ESA and JSA. In Ms Hawkins' view, this demonstrates that the policy approach to converting amounts for the purposes of a UC assessment period are consistent. Whilst in some circumstances this conversion method might lead to additional overall entitlement, in others it might mean that there is a slightly lower entitlement. The current approach also allows those claimants who receive contribution-based ESA and JSA to also receive UC and access to passported benefits, such as free school meals or help with NHS prescription costs, which was not available under the legacy system. Ms Hawkins said that whilst the Claimant in this case focuses on the housing costs element, the approach was considered appropriate for UC as a whole.

72. Ms Hawkins stated that on the system suggested by the Claimant, there would be different formulae for the calculation of different elements of UC which would require explanation to the claimant as to which parts are calculated on a 52 weekly basis and which are calculated on a 365 daily basis. This would run counter to one of the objectives of UC, namely simplification of the welfare system.

73. She said that the legacy system was immensely complicated both in terms of the rules governing the individual benefits and in the interaction between them. For example, even staff operating the system could have difficulty advising a claimant of the impact of increasing their hours of work on their net income because of the complex interaction between the level of their gross earnings and entitlement to working tax credit, housing benefit and council tax benefit.

74. Ms Hawkins said it is important that individuals can understand what they are entitled to, so that they know when they can make a claim and that they are able to challenge an assessment that does not accord with that understanding. It is also important that they understand the impact of increases in earnings, as this aligns with the other key UC objective – incentivising work. Simplification is also necessary to allow for the scheme to be operated efficiently and effectively and understood by both claimants and staff delivering the benefit. It has been recognised that fraud and error in the legacy system was in part derived from poor IT, training and incentives for staff, as administrative staff were not always equipped with the standard of IT or level of training they needed to do their job as effectively as possible and faced a system which promoted other priorities over processing accuracy.

75. Ms Hawkins said that merging six benefits into UC necessarily meant some simplifications had to be made. There were many areas where the different benefits had different rules in relation to the same change in a person's circumstances. For

example, how and when payments were adjusted if someone went into hospital, or was temporarily abroad, or was imprisoned, varied between benefits. UC needed a standard set of rules to govern these eventualities. She said that the way that UC converts weekly amounts into monthly amounts is one of the standard rules that apply across the benefit. It was not considered to be logical to have one set of rules for this conversion in respect of some aspects of the assessment and another rule operating elsewhere. She gave the example that it would not be an aid to understanding entitlement if the Defendant's staff had to explain to a claimant that the Defendant converted her weekly income to a monthly figure using one formula (which, as I have explained, might be to her benefit), but converted her weekly rent using a different one.

76. At [56] onwards Ms Hawkins dealt with the housing costs element of UC. She said the formulae in [7] of Sch 4 relating to weekly payments were adopted for housing calculations for a variety of reasons, including the following: the design principle that UC mimics a wage and provides twelve payments each year (monthly); parity between housing and other elements of UC where that approach had already been adopted, ensuring simplicity and reducing complexity within the system; simplicity of the design of the processing system to only ever recognise 52 weeks in a year; and the intention of simplifying, and improving the efficiency, of housing support including the decision that UC should not alter to take account of particular practices or arrangements which might apply only to certain kinds of tenure.

77. At [58] she said the policy to treat all years as containing 52 weeks when calculating the housing costs element was reaffirmed by Ministers when they agreed to amend the UC Regulations to clarify the provisions concerning rent-free weeks. Ministers were notified in August 2013 that, on the basis of the original policy decision to use 52 weeks in the calculation of the housing costs element, an amendment to the UC Regulations in the context of rent-free weeks was required to expressly align calculations involving rent-free weeks with the 52-week calculation where there are no such weeks. Ministers agreed to the recommendation on 6 September 2013 and regulations were subsequently made amending the UC Regulations.

78. Ms Hawkins expanded on this at [64] of her statement. She said that the way in which rent-free weeks were originally dealt with in the UC Regulations was inconsistent with the policy intention of calculating housing costs on the basis of a 52-week year. The wording relating to tenants with rent-free weeks provided that the calculation should be based on the total number of relevant payments which the renter was liable to make in that 12-month period, which could either be 52 or 53 weeks (less any rent-free weeks) depending on the relevant year and payment cycle.

79. Pausing there, I observe that this was reflected in [7(3)] of Sch 4 as originally enacted, which provided:

> "(3) Where a renter is liable for relevant payments under arrangements that provide for one or more rent free periods, the monthly equivalent is to be calculated over 12 months by reference to the total number of relevant payments which the renter is liable to make in that 12 month period."

80. Ms Hawkins said this provision was inconsistent with the decision not to take account of years with 53 payment dates, and was inconsistent with the revised IT design, which reflected the correct policy intent. This inconsistency was corrected by the Universal Credit and Miscellaneous Amendments Regulations 2014 (SI 2014/597), regulation 2(13)(c) of which inserted a new paragraph 7(3A) into Sch 4 specifying how the monthly figure is to be calculated for a tenant with rent-free weeks. Ms Hawkins said that in their advice to Ministers informing approval of this amendment, officials stated that the policy intention for converting weekly amounts to monthly amounts was to use a 52-week year by default. This was to ensure that the rental calculation provisions fitted with the overall UC design and that they avoided having to reassess cases on the limited occasions when 53 rent-week years occurred (which, as I have explained, occurs roughly every 5 to 6 years). Ms Hawkins said that the advice also highlighted that the 52-week conversion calculation was consistent with the underlying policy intention that UC should not alter to take account of particular practices or arrangements which might apply only to certain kinds of tenure. While the advice recognised that there was an issue with 53 rent-week years, it considered it would be very difficult and costly for entitlement to be calculated on the basis of 53 rent-weeks, requiring an extra £10m per year to adjust rent-free week cases for 53 week years and an extra £40m per year for both rent free and non-rent-free cases. The advice also noted that the issue of 53 rent-week years would be peculiar to rent liabilities which are calculated on a weekly basis.

81. Ms Hawkins then quoted the Explanatory Memorandum accompanying the 2014 Regulations (Exhibit JH6) which explained the amendment as follows:

> "This aligns with the current conversion provisions which apply to cases where a renter does not have any rent or service charge free weeks, and ensures that the rental calculation provisions fit with overall Universal Credit design by avoiding the need to reassess cases on the limited occasions (which occur roughly every 5 to 6 years) when the day on which weekly rent or service charge payments are due occurs 53 times rather than 52 times."

82. At [67] Ms Hawkins dealt with other aspects of housing calculation. She said that in addition to determining an appropriate formula by which to convert non-monthly rental liabilities, the legislation also makes provision for a number of adjustments to the claimant's housing costs to determine their entitlement. She reiterated that the intention was for the housing element to provide a contribution towards a claimant's housing costs rather than compensating the whole of the claimant's costs incurred. So, in the social rented sector, where the accommodation is under-occupied, a standard percentage-rate deduction is applied (the so-called 'bedroom tax'). Other deductions may also be applied, resulting in the actual monthly housing costs payment (ie, M_A) being less than the actual monthly housing costs which the claimant is contractually obliged to pay (M).

83. At [73] Ms Hawkins said that in addition to housing costs support provided through UC, a claimant may also apply for a DHP from their local authority. As I have said, the Claimant is in receipt of this benefit. Ms Hawkins says that since 2011 the Government has provided over £1 billion to local authorities to help support

vulnerable people affected by different welfare reforms. DHPs can be paid to those entitled to Housing Benefit or the housing element of UC who face a shortfall in meeting their housing costs. Ms Hawkins says these payments are very flexible and can be considered where, in the local authority's opinion, further financial assistance towards housing costs is required. There are no prescribed resource tests; local authorities simply have to be satisfied that the person concerned is in need of further financial assistance towards housing costs. The payments are entirely at the local authority's discretion.

84. Ms Hawkins said that UC encourages claimants to take responsibility for their own financial affairs, as the Defendant believes it is important that claimants are able to make the same sorts of decisions as those in work and develop the financial capability to do so. To that end, a UC award (including the housing costs element) is generally paid directly to the claimant, who is expected to manage their own budgets, including paying their own rent.

85. At [77] Ms Hawkins set out the evidence about the Claimant's circumstances which the Defendant holds. She said that the payment to the Claimant's landlord does not meet all of her housing costs, which is made clear on her UC statement. Ms Hawkins said that there had been changes to the Claimant's award since the assessment period ending on 21 November 2019, including that the standard allowance had been increased for all claimants to £409.89 (for a single person) in response to the Covid pandemic. The Claimant's UC award is therefore now higher, although her housing costs component remains the same, as set out in the Defendant's Summary Grounds (namely £275.52 paid directly to her landlord).

86. At [84] Ms Hawkins said that the method of calculating monthly amounts for weekly tenants had been raised by housing stakeholders, such as housing representative bodies, housing associations and local authorities. Specifically, it has been claimed, in a year when 53 payments are due, that all UC claimants with a weekly liability will experience a shortfall of a week's worth of housing support compared to their annual rent charge. She said this view had been supported by a briefing note published by the National Housing Federation (NHF) (Exhibit JH8), and that the issue had also been raised by the Work and Pensions Select Committee. She said that stakeholders had requested that all claimants receive one week's extra housing support in 53-week payment years, eg, 2019/20 and 2023/24. The NHF's briefing note stated in section 2:

> "The 53-week year issue arises every 5 or 6 years as a consequence of the calculation used in Universal Credit to convert weekly rent to a calendar monthly figure. 2019/20 is the first financial year this will happen alongside significant number of tenants in receipt of Universal Credit rather than Housing Benefit. Schedule 4, Part 3 of the Universal Credit 2013 regulations state that to convert a weekly rent figure to monthly figure DWP should multiply by 52 and divide by 12. In a financial year that has 53 weeks a tenant whose rent is charged weekly will not receive enough rent to cover the whole year – he or she will be 1 week short.

> Tenants with rent free weeks will also be affected. The regulations were amended in 2014 to specify that the calculation for cases with rent-free weeks will be 52 minus the number of rent free weeks. This will apply even in years where there are 53 rent weeks. Tenants with monthly tenancies are not affected by this rule and the Universal Credit they receive will be based on the total rent charged for that year.
>
> The issue is one of unfairness across different tenants – the 52 week limit only affects tenants paying rent on a weekly basis – and of people being worse off under Universal Credit compared to Housing Benefit. All that is needed to avoid this is a change in the Universal Credit Regulations so that (a) the numerator is always the number of rental gales in the year (instead of capping it as 52 as at present), and (b) the divisor is always 12 (to arrive at a monthly figure). This would be a slight simplification of the current regulation."

87. Ms Hawkins said she did not accept the NHF's view that there will be a 'shortfall' of one week in the housing financial year 1 April 2019 – 31 March 2020, even though there are 53 Mondays (ie, payment days) in that period. She said that whilst the Defendant recognised that all tenants with a weekly rent liability payable on a Monday between 1 April 2019 (which was a Monday) and 31 March 2020 (the period 1 April - 31 March being, typically, the housing sector's financial year) will have 53 payments due in the financial year 2019/20, that did not mean that all claimants will have been a week's worth of housing support short. That is because there are only 52 Mondays in each of the calendar years 2019 and 2020. For a week's payment to be 'lost' in one year, there would need to be 53 weeks in the calendar year. The fact that a period can be selected in the calendar years 2019 and 2020 which has 53 payment days does not mean (or necessarily mean) that there will be a shortfall. Ms Hawkins said the apparent 'problem' is caused by the impossibility of accurately aligning weekly and monthly payment cycles at all points in time. She says that by selecting a random period, it is possible to show a theoretical shortfall which does not exist in practice.

88. I think Ms Hawkins is right to reject the NHF's view in the simple terms in which it is made. The following illustration, I hope, unpacks her reasoning to demonstrate the point she is making.

89. The calendar year 2019 had 52 Mondays, running from Monday 7 January – Monday 30 December. The calendar year 2020 also has 52 Mondays, running from Monday 6 January – Monday 28 December. The housing financial year 1 April 2019 – 31 March 2020, however, had 53 Mondays.

90. Assuming the tenant's weekly housing costs are £100 per week and ignoring any deductions, then the monthly UC housing payment (M) will be (*per* the formula in [7(2)(a)]):

$$(100 \times 52)/12 = £433.33 \text{ per month}$$

91. This means that over the two calendar years 2019 and 2020, the tenant (provided she remains eligible for UC throughout) will receive £5200 in housing costs each year, ie, exactly the amount of housing liabilities that she has each year (because she has to pay £100 each Monday, and there are 52 Mondays in each calendar year). Hence, even though the financial year 2019 – 2020 has 53 payment days, there is, in fact, no shortfall when the whole period of calendar years 2019 – 2020 is considered. Such a tenant will receive in UC exactly the amount she has to pay in housing costs.

92. In response to concerns raised by stakeholders, Ms Hawkins said that the Defendant has explored the possibility of other methods to minimise this issue, including whether landlords would change weekly tenancy liabilities to monthly ones, in order to prevent the misalignment. This would also help to make it simpler for a claimant who receives a set amount for housing each month, regardless of whether there were four or five rent payment periods within the assessment period. However, the NHF's briefing confirms that:

> "… Weekly tenancies remain the norm in the social sector and while some landlords are moving to monthly tenancies for new tenants under this approach it will take a long time for this to be the majority. It is both unrealistic and unreasonable to expect landlords to move all tenants to monthly tenancies. For existing tenants, a switch from weekly to monthly tenancies would have to be agreed with each affected tenant, by the issuing of fresh tenancies."

93. Ms Hawkins said that she had been provided with a copy of the letter from One Manchester Ltd to the Claimant dated 4 March 2020, which confirmed that they would not move the Claimant to a monthly tenancy. As I have already said, echoing NHF's view, I accept that moving to monthly payments is not a realistic solution if a shortfall problem does indeed exist in relation to weekly tenants.

94. Ms Hawkins said that in 2019 the Department published an article in a landlord engagement newsletter, which highlighted the misalignment outlined above in order to reiterate that not all claimants would face a one-week shortfall as previously alleged (Exhibit JH9). The Department also acknowledged the effect of the calculation was to treat any given year as having 52 whole weeks and that a claimant therefore receives cover for 364 days. The Department indicated it would consider whether this formulation around weekly rents, and potentially other weekly amounts in the UC calculation, should be amended. The Department also confirmed to the Work and Pensions Select Committee that it would assess the impact of making changes to the housing calculation in order to understand how a different formula might operate and the impact on the delivery of UC and departmental expenditure.

95. At [89] Ms Hawkins explained that a number of alternative options had been considered. However, each option for a change of policy would need to be consistent with the aims of UC and be deliverable within the assessment period structure. Any change would require IT build requirements, additional expenditure and changes to regulations. Ms Hawkins said that no decision had been made to make a change, although the matter remained under review as part of the 'test and learn' approach to UC. Ms Hawkins said that, given the current pandemic and the significant increase in

new claim volumes, the Department's priority, and all of its IT build capacity, is focused on processing the claims of the significant number of additional claimants, and ensuring as many payments are made on time as possible.

96. Finally, at [90] onwards Ms Hawkins responded to the Claimant's Grounds of Challenge. She said that the Department does not consider that the relevant formulae in [7] are irrational. The Regulations were not intended to replicate legacy housing benefit provisions, nor for there to be a direct correlation between the amount received and the tenant's liabilities for any week, month, or year. She said that the Department designed a system that is capable of being operated for the entire population and of synthesising information relating to an individual claimant's living circumstances, work status, relationship status and responsibility for any children, as well as their income in any assessment period. The Department decided that the most efficient way of dealing with these categories was to use 52 weeks as the basis for converting weekly amounts to monthly amounts. She said that the UC system was the subject of careful consideration and the system established under the UC Regulations was intended to enable an efficient and workable means of administering benefit payments to a very large number of recipient households.

97. Overall, Ms Hawkins said that the housing costs element forms part of the UC maximum award and provides financial support towards housing costs. The approach adopted ensures parity between housing and other elements of UC where that approach had already been adopted, ensuring simplicity and reducing complexity within the system, which is a core objective of UC. She said it fitted with the overall UC design to recognise that in general a year has 52 weeks, because that avoided the need to reassess cases on the limited occasions (which occur roughly every 5 to 6 years) when the day on which housing costs payments are due occurs 53 times rather than 52 times.

98. Ms Hawkins concluded her statement as follows [94]-[97]:

> "DWP does not accept that being a weekly tenant is a status for the purpose of Article 14. As set out above, it is not accepted that there is a difference as alleged by the Claimant, although it is accepted that there might be a small differential effect of between 0.274% and 0.546% of the annual amount that the Claimant states they should be paid, but only where all other circumstances are entirely equal (existence of rent-free weeks, dependents, non-dependents, spare room subsidy, benefit cap, unearned income). For the Claimant this amounts to approximately £1.07 in each monthly cycle and £12.81 in a calendar year.
>
> 95.However, as explained above the formula is chosen for the reasons set out above and at paragraph 68 of the summary grounds. There is no cliff-edge and this is one part of a calculation made up of various different components. The formula is not alleged to have any particular impact on the basis of any protected characteristic, and the differential amount (if it applies) is a modest amount.

> 96.As explained above, the Claimant's proposals do not in fact address the issue of ensuring complete parity between monthly and weekly tenants, nor do they take account of other types of tenancy or rent-free weeks. An amendment would require IT changes to the UC system, which would incur additional cost and lead to the deprioritisation of other changes which have already been announced. It would also mean that there would be a difference in calculations for monthly amounts within UC, for example a difference in treatment between housing liability and unearned income.
>
> 97.DWP contends that the above amounts to justification for any differential treatment of tenants with weekly liabilities."

Legal principles

Rationality and the UC Regulations

99. Different aspects of the UC Regulations have recently been subjected to rationality challenges in *Johnson*, supra, and *Pantellerisco*, supra.

100. In *Johnson* the Court of Appeal (Underhill VP, Irwin and Rose LJJ) considered a challenge to how the UC Regulations treat a claimant's earned income for each monthly assessment period within that claimant's period of entitlement to UC. The dispute arose because, broadly, the system for identifying the income earned by a claimant in a particular assessment period does not accommodate the fact that people who are usually paid their salary on a particular day each month, such as on the last day of the month, will in fact be paid on a different day if their usual payment date falls on a weekend or bank holiday. In certain circumstances this leads to two monthly salary payments falling within one of the monthly assessment periods applicable for that claimant which in turn can cause their UC payment to vary very significantly (because, as I have explained, earned income affects the amount of UC paid for the assessment period). Rose LJ gave the leading judgment. She referred to the problem as 'the non-banking day salary shift'.

101. These oscillations in income potentially gave rise to the problems which Rose LJ described at [3] of her judgment. She said that although it might be thought that the monthly variations would even themselves out over time, there were two reasons why the Respondents (ie, the benefit claimants) argued that was not a sufficient answer. The first was that the great fluctuations in income each month, aggravated by the fact that UC is paid in arrears, made it very difficult for claimants to budget for their monthly outgoings. This could cause them to incur additional costs such as overdraft fees, high interest payments on short term loans or unpaid bills and, in some instances, court fees to prevent landlords evicting them if they fell behind with their rent.

102. At [54] she referred to the evidence from the Respondents:

> "The effect of these swings in universal credit award and monthly income is described in detail in the witness statements of the Respondents. Ms Johnson states that she finds it impossible to budget for sudden drops in income in the months following an assessment period in which two salary instalments have been counted. She becomes overdrawn at the bank during the month in which the low universal credit award is received. She then incurs interest and bank charges. She expresses her doubts whether she will ever be able to get back on top of her finances and worries that cash flow problems will mean she is unable to pay her rent, jeopardising her tenancy. Ms Woods also says that she feels unable ever to get a foothold on stabilising her finances. She has never previously been so far into her overdraft or unable to pay her rent. She has been forced to attend food banks. Ms Stewart describes how in the months where she receives a reduced universal credit award because she is treated as having received two salary instalments in the preceding assessment period, she does not have enough income to cover her rent and childcare as well as other outgoings."

103. Rose LJ said that claimants affected by this problem irrevocably lose money over the course of a year because they lose the opportunity to receive the work allowance for the assessment period when they appear to have nil income. The work allowance is the amount of salary that a universal credit claimant can earn before their award of benefit is reduced. The evidence described by Rose LJ at [53] made clear that there was not, in fact, the 'cancelling out' effect that might have been thought, at first blush, to occur over a sufficiently long period.

104. The Divisional Court had held that the regulation in question (reg 54 of the UC Regulations) had to be construed so as to refer, for the purposes of earned income, as only applying to that portion of earned income relating to work done in the assessment period in question, leaving out of account any income referable to work done in another assessment period. The Secretary of State appealed this decision, saying that the regulation had to be construed as applying to all earned income *received* in an assessment period, irrespective of the period in which the work was done to which it related.

105. The benefit claimants filed a Respondent's notice in the event the Court of Appeal upheld the Secretary of State's submission, because of the effects which such a construction of the Regulations could produce, which they challenged as irrational. The submission was recorded by Rose LJ at [5] as follows. She said the Respondents argued:

> "… that the result of the SSWP's construction for these claimants and the many thousands of other claimants in the same position is so arbitrary and contrary to the aims of the universal credit reforms that the Regulations should be struck down on grounds of irrationality in so far as they mandate that result."

106. In her judgment at [47] Rose LJ said that:

> "What is alleged to be irrational is the initial and ongoing failure of the SSWP to include in the Regulations a further express adjustment to avoid the consequence of the combination of the non-banking day salary shift and the application of regulation 54 for claimants in the position of the Respondents. [Counsel for the Secretary of State] at the hearing fairly accepted that the consequence of regulation 54 for these Respondents was arbitrary and that there was no policy reason why these particular Respondents should face the difficulties that they describe. The SSWP's case is that a solution has not been devised or implemented because other factors outweigh the desirability of finding an answer to the problem. It is the rationality of that conclusion that is the subject matter of this challenge."

107. At [48] Rose LJ discussed the approach to irrationality in the following terms:

> "The irrationality asserted here is the *Wednesbury* unreasonableness that has been a ground for a public law challenge since the early days of the modern jurisprudence on judicial review. The test was more recently described by the Divisional Court (Leggatt LJ and Carr J) in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649. That case concerned a challenge to the Lord Chancellor's decision to reduce the amount of money made available as legal aid for defending people accused of crimes. The Divisional Court said:
>
> > '98 The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is "so unreasonable that no reasonable authority could ever have come to it": see *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A

> decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. ….'"

108. At [49] Rose LJ approved the following paragraph of the same case:

> "113. We accept that in principle it was open to the Lord Chancellor to adopt a policy response which did not directly correspond to the problem which it was designed to meet. A policy-maker may reasonably decide that the disadvantages of a finely tuned solution to a problem outweigh its advantages and that a broader measure is preferable, even if the broader measure is both over- and under-inclusive in that it catches some cases in which there is no or no significant problem and fails to catch some cases in which the problem occurs. Such an approach is in any event consistent with the nature of the Scheme, which uses criteria such as PPE [pages of prosecution evidence] as proxies for the complexity of cases. It is inherent in the use of such proxies that they will result in under-compensation in some cases. But this does not cause unfairness if it is off-set by over-compensation in other cases. What matters is that overall a reasonable balance is struck."

109. At [50] she said:

> "That, I believe, provides a helpful framework for how to approach irrationality in this case too. We need to consider what are the disadvantages of deciding not to 'fine-tune' the Regulations thereby allowing the non-banking day salary shift problem to persist unresolved; what are the disadvantages of adopting a solution to the non-banking day salary shift problem; would a solution be consistent or inconsistent with the nature of the universal credit regime; and has a reasonable balance been struck by the SSWP - or rather is it possible to say that no reasonable Secretary of State would have struck the balance in the way the SSWP has done in this case ?"

110. At [56] Rose LJ rejected the Secretary of State's argument that oscillations in payment are a central feature of the UC scheme. She said that the oscillations in question were not a response to any change in the Respondents'/claimants' work patterns or family circumstances, but a response only to whether the claimants' regular monthly pay date coincided with the end date of their assessment period so that they sometimes received two monthly wages in one assessment period.

111. At [92] she identified other factors bearing on the question of rationality:

> "Other factors I consider relevant to the rationality of the ongoing decision not to create an exception to allow for the non-banking day salary shift are (a) the size of the cohort affected; (b) the duration of the impact on them; (c) the arbitrary occurrence of the effect and (d) the inconsistency between the effect of the problem and the aims of the universal credit regime."

112. At [59] Rose LJ said that the oscillations in income caused by the relevant UC Regulations were 'perverse' and 'extreme' and that they:

> "… cause considerable hardship and they create perverse incentives affecting a claimant's employment choices, cutting across the policy of the overall scheme."

113. It was common ground that the Regulations in issue were capable of producing stark and unintended consequences. At [68] Rose LJ again noted that the Secretary of State's counsel had not shrunk from descriptions of the effect of the non-banking day salary shift on the Respondents/claimants as 'arbitrary', 'unfortunate' and 'challenging'. At [75] she said:

> "It is inevitable that in any scheme designed to simplify and reduce the cost of delivering benefits there will need to be bright lines. I agree that there will often be hard cases with people falling just on the wrong side of the line where their needs and circumstances are otherwise indistinguishable from those falling just on the right side – the requirement that the claimant be 18 years old is an obvious example. It may well be rational to introduce such a requirement on the ground that the benefits outweigh the disadvantages arising from those bright lines. In my judgment, however, those situations are readily distinguishable from the significant, predictable but arbitrary effects on benefit of a regular monthly salary which frequently falls into different assessment periods because of the non-banking day salary shift."

114. At [107] she said that 'the threshold for establishing irrationality is very high, but it is not insuperable' and concluded the case was:

> "… one of the rare instances where the SSWP's refusal to put in place a solution to this very specific problem is so irrational that I have concluded that the threshold is met because no reasonable SSWP would have struck the balance in that way."

115. The Court thus upheld the Respondents' case on irrationality.

116. Agreeing, Underhill LJ said at [116]:

> "… I regard this as a case which turns on its own very particular circumstances. It has no impact on the lawfulness of the universal credit system more generally."

117. The approach to rationality in *Johnson* was followed in *Pantellerisco*, supra, [47]-[50] in which Garnham J considered a challenge to the application of the benefit cap in the UC Regulations. The case concerned the fact that the claimants were paid on a four weekly cycle (ie they were paid 13 times per year), and the effect that had on their UC payment in a monthly assessment period (of which there are 12 in each year) in which they were treated as having been paid twice in that assessment period. That, in turn, could cause the benefit cap to kick-in, thereby substantially reducing the amount of UC they received for that period (see at [5]-[10]). At [47] the judge described the issue as the 'lunar month problem'.

118. In [10] Garnham J quoted the evidence showing the effect the Regulation in question had had on one of the claimants in one assessment period. That had been to reduce her UC payment from £1862.10 to £1398.87 which, on any view, was a significant drop. The judge gave further details of the effect of the Regulations in question at [52], where it was explained that their effect on the First Claimant had been to reduce her UC by 20% per assessment period because of the interaction between her pay dates and her UC assessment periods.

119. As in *Johnson*, the Regulations at issue in *Pantellerisco* produced a stark 'cliff-edge' problem. At [62] Garnham J said that they produced 'significant, predictable but arbitrary effects'. At [79] he added:

> "The consequence of the lunar month problem is that for 11 months out of 12 the First Claimant's earned income is treated as being her earnings for just 28 days. The result of that is that the benefit cap is applied, and her UC is reduced, by perhaps as much as 20%. As discussed above, the disadvantages of allowing the lunar month problem to persist are manifest and serious."

120. I turn to the methodology adopted by Garnham J in his assessment of the rationality of the Regulations in question. He said at [47]:

> "Following *Johnson* ... the rationality challenge here must be viewed as a *Wednesbury* challenge. The question to be addressed is whether the decision of the Secretary of State, as to the drafting of the Regulations was outside the range of reasonable decisions open to the decision maker."

121. At [50] he said:

> "I deal with the first three issues identified by the Court of Appeal first [in *Johnson*, [50]]. I then address the 'other factors' relevant to the rationality of not creating an exception to which Rose LJ referred at [92]. I then consider the final, and determinative issue; whether it should be concluded that no

> reasonable Secretary of State would have struck the balance in the way that it was struck here. In addressing that last crucial issue, I remind myself that the 'threshold for establishing irrationality is very high, but not insuperable' ([107])."

122. The judgment in *Pantellerisco* was handed down on 20 July 2020, six days after the hearing in the case before me. Although during the hearing both sides referred me to *Johnson*, it seemed to me right to give the parties the opportunity to make submissions on the rationality of the formulae in [7(2)(a), (3) and (3A)(a)] of Sch 4 in light of Garnham J's approach in *Pantellerisco*. Both sides made written submissions, for which I am grateful. Ms Palmer also helpfully informed me that the Secretary of State has requested permission to appeal against Garnham J's judgment. She said that the Secretary of State did not take issue with the learned judge's formulation of the law at [47]-[50], but would submit that he erred in his application of the law to the facts.

Article 14 and A1P1

123. Where it is asserted that a measure is unlawfully discriminatory in breach of Article 14 of the Convention the cases show that there are different ways of analysing what must be demonstrated. There is a useful discussion of the different approaches in the judgment of McAlinden J in *In the Matter of an Application by Lorraine Cox for Leave to Apply for Judicial Review* [2020] NIQB 53, [65]-[71]. However, as I remarked in *R (Harvey) v London Borough of Haringey* [2019] ICR 1059, [94], each analytical route crosses the same bridges and ends up in the same place.

124. In *re McLaughlin* [2018] 1 WLR 4250, [15], Lady Hale said that a claimed violation of Article 14:

> "… raises four questions, although these are not rigidly compartmentalised:
>
> (1) Do the circumstances 'fall within the ambit' of one or more of the Convention rights?
>
> (2) Has there been a difference of treatment between two persons who are in an analogous situation?
>
> (3) Is that difference of treatment on the ground of one of the characteristics listed or 'other status'?
>
> (4) Is there an objective justification for that difference in treatment?"

125. When considering Article 14, it is helpful to keep in mind what Lord Nicholls said in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, [3]:

> "For my part, in company with all your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 does not apply unless

> the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

126. In relation to question (1) of Lady Hale's questions, in *Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123, [35], Henderson LJ said:

> "Any allegation of breach of Article 14 must relate to the 'enjoyment of the rights and freedoms set forth in' the ECHR. This has been interpreted to mean that the complaint must fall within the subject matter, or 'ambit', of another Convention right. It is not necessary to show a breach of some other Convention right, because in that case Article 14 would add nothing. It is enough that the complaint relates to some interest protected by another such right. Since it is now well established that entitlement to a social security benefit is a 'possession' within A1P1, complaints about discrimination in the provision of such benefits fall within the ambit of A1P1: see *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311. It is therefore common ground that the provisions of Article 14 are potentially engaged in the present case."

127. The relevant paragraphs in *RJM*, supra, are to be found in the judgment of Lord Neuberger of Abbotsbury at [23]-[34].

128. More recently, in *R (TD, AD and Reynolds) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618, [21], Singh LJ said:

> "21. It is well established that Article 14 is not freestanding, in other words it does not prohibit all discrimination by the state: it can be invoked only if the subject-matter falls within the ambit of another Convention right. It is also well established, and is common ground in this case, that, so far as material, social security benefits are a form of property (or 'possessions') and therefore fall within the ambit of A1P1. It is accordingly common ground that, in principle, the Appellants are entitled to rely on Article 14, read with A1P1, in this case."

129. It is therefore clear, and it was common ground before me, that the Claimant's entitlement to UC falls within the ambit of A1P1, and she is therefore *prima facie* entitled to rely upon Article 14.

130. There is a helpful discussion of the question of 'status' in Article 14 (see question (3) of Lady Hale's questions) in *Cox*, supra, [73]-[75]:

> "73. It is clear from the language of Article 14 that it does not prohibit all differences in treatment. The discrimination which Article 14 prohibits is 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.' It can be seen from Article 14 that only differences in treatment based on an identifiable characteristic, or 'status' are capable of amounting to discrimination. Article 14 then lists a number of specific grounds which constitute 'status.' These have become known as the 'core' grounds. However, the ECtHR in *Clift v United Kingdom* (application number 7205/07) stated that the list is 'illustrative not exhaustive' as is shown by the words 'any ground such as' and the inclusion of the phrase 'any other status'. It went on to recall, at paragraph [56], that 'the words 'other status' (and *a fortiori* the French '*toute autre situation*') have generally been given a wide meaning.' In *Stott* [*R (Stott) v Secretary of State for Justice* [2018] 3 WLR 1831], the Supreme Court conducted a detailed examination of the meaning of 'other status' in Article 14. Lady Black who delivered the comprehensive leading judgment observed that at paragraph [56] of *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 the ECtHR set out a passage about status in relation to which courts return repeatedly. The passage is as follows:
>
> > 'The court first points out that article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other.'
>
> 74. This has become known as the *Kjeldsen* test of looking for a 'personal characteristic' by which persons or groups of persons are distinguishable from each other. At paragraphs [56] and [63] of *Stott*, Lady Black identified the following position in relation to 'other status' from the jurisprudence of the House of Lords and the Supreme Court which is also to be found in the jurisprudence of the ECtHR:
>
> > '(i) The possible grounds for discrimination under Article 14 were not unlimited but a generous meaning ought to be given to 'other status.'

> (ii) The *Kjeldsen* test of looking for a 'personal characteristic' by which persons or groups of persons were distinguishable from each other was to be applied.
>
> (iii) Personal characteristics need not be innate, and the fact that a characteristic was a matter of personal choice did not rule it out as a possible 'other status.''
>
> 75. At paragraph [39] in *DA & DS R* [*R* (*DA and others) v Secretary of State for Work and Pensions (Shelter Children's Legal Services and others intervening)* [2019] 1 WLR 3289] Lord Wilson commenting on the detailed examination of the meaning of 'other status' in Article 14 in *Stott* stated that in 'the event all members of the court other than Lord Carnwath JSC confirmed (in *Stott*) that its meaning was broad ….' Lord Carnwath at paragraph [108] of his judgment in *DA & DS* acknowledged that the majority in *Stott* had 'adopted a relatively broad view of the concept of 'status.' Lord Hodge at paragraph [126] in *DA & DS* stated that 'the boundaries of 'other status' in Article 14 is a subject on which there is, as yet, little clarity."

131. Question (4), that of justification, and the appropriate test, has received a considerable amount of judicial consideration. After some divergence of view, it has now been authoritatively determined by the Supreme Court that in the context of welfare benefits the test to be applied is whether the difference in treatment produced by the measure in question is 'manifestly without reasonable foundation': *DA*, supra, [65], approving *Humphreys v HM Revenue and Customs Commissioners* [2012] 1 WLR 1545, [20]-[22]. Where the Government puts forward reasons for having countenanced adverse treatment produced by a measure in the field of welfare benefits, it establishes justification for the measure unless the complainants can demonstrate that it was manifestly without reasonable foundation.

132. *DA* concerned the revised welfare benefit cap imposed following amendments made to the Welfare Reform Act 2012 and the Housing Benefit Regulations 2006 (SI 2006/213) by the Welfare Reform and Work Act 2016 and the Benefit Cap (Housing Benefit and Universal Credit) (Amendment) Regulations 2016 (SI 2016/909). The legislation established certain exceptions to the benefit cap which were challenged as being discriminatory against single parents of young children who fell outside the exceptions and so were subject to the cap. It was argued the measures in question violated Article 14 read with Article 8 of and/or A1P1 of the Convention. At [65]-[66] Lord Wilson said:

> "65. … there still remains - clear authority both in the *Humphreys* case [2012] 1 WLR 1545 and in the bedroom tax case [*R(MA and others) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2016] 1 WLR 4550] for the proposition that, at any rate in relation to the Government's need to justify what would

> otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it.
>
> 66. How does the criterion of whether the adverse treatment was manifestly without reasonable foundation fit together with the burden on the state to establish justification, explained in para 50 above? For the phraseology of the criterion demonstrates that it is something for the complainant, rather than for the state, to establish. The rationalisation has to be that, when the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable.

133. In *TD*, supra, Singh LJ said at [64]-[65]:

> "64. It is important also to note what Lord Wilson said at para 66, where he emphasised that the court will 'proactively examine whether the foundation is reasonable'. This is consistent with what was said in the two cases cited by Lord Wilson, that there should be 'careful scrutiny' of the reasons advanced by way of justification: see *Humphreys*, at para 22 (Lady Hale JSC); and *MA* (the bedroom tax case), at para 30 (Lord Toulson JSC).
>
> 65. I would also note what was said by Leggatt LJ, as he then was, in *R (C) v Secretary of State for Work and Pensions* [2019] 1 WLR 5687, a case decided shortly before *DA* at para. 89:
>
> > "Although it is not immediately obvious how the 'manifestly without reasonable foundation' test relates to the assessment of proportionality that the court must undertake, the explanation may be that the court is required to ask whether the difference in treatment is manifestly disproportionate to the legitimate aim. This would accord with the statement of the European Court in *Blecic v Croatia* (2005) 41 EHRR 13, para 65, that it will accept the judgment of the domestic authorities in socio-economic matters 'unless that judgment is manifestly without reasonable foundation, *that is,*

> *unless the measure employed is manifestly disproportionate to the legitimate aim pursued'* (emphasis added). It also reflects how the Supreme Court applied the test in the recent case of *In re McLaughlin* [2018] 1 WLR 4250, paras 38–39 (Baroness Hale PSC) and para 83 (Lord Hodge JSC)."

134. In *MA*, supra, Lord Toulson, with whom the other members of the Court agreed, said:

> "32. The fundamental reason for applying the manifestly without reasonable foundation test in cases about inequality in welfare systems was given by the Grand Chamber of the European Court of Human Rights in [*Stec v United Kingdom* (2006) 43 EHRR 47, para 52]. Choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities."

135. For completeness, I note the discussion in *Cox*, supra, [78]-[86], about whether the 'manifestly without reasonable foundation' test has been called into question by subsequent Strasbourg jurisprudence, and in particular the decision of the First Chamber in *JD and A v United Kingdom* [2019] ECHR 753 (24 October 2019), [87]-[89], delivered five months after the judgment in *DA*, supra. *DA* was referred to by the European Court at [44].

136. Pursuant to the duty in s 2 of the Human Rights Act 1998 I have taken account of the judgment in *JD* but, like McAlinden J in *Cox*, I am unpersuaded that it provides a sufficiently firm basis to depart from the clear and unequivocal statement of principle by Lord Wilson in *DA*, supra, [65]. Like him, I am fortified in this conclusion by the judgment of McCloskey LJ in *Stach v Department for Communities and another* [2020] NICA 4, [74]:

> "Lords Carnwath and Hodge, in separate majority judgments [in *DA*], concurred with Lord Wilson's endorsement of the test of manifestly without reasonable foundation. As Lords Reed and Hughes agreed with Lord Carnwath, it follows that this test was endorsed by five of the seven members of the Court. In passing, the very recent consideration of this issue by a Chamber of the ECtHR, in *JD and A v United Kingdom* (Applications Nos 32949/17 and 34614/17), a 5/2 majority decision, did not feature in the parties' arguments. The majority confined the 'manifestly without reasonable foundation' test to contexts where '... an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality' (at [88]). As the robust joint dissenting judgment demonstrates this may prove controversial and will, predictably, feature in future decisions of the UKSC and the Grand Chamber. Our decision in this case is made in a context shaped by section 3(1) of the Human Rights Act and the doctrine of precedent whereby this court is bound by the decision in *DA*."

137. Assuming the other *McLaughlin* conditions are satisfied, therefore, the question for me is whether the difference in treatment produced by the formulae in [7(2)(a)(3)(3A(a)] between weekly and monthly tenants is manifestly without reasonable foundation. I emphasise that the focus is on the *difference in treatment* which the measures in question produce, not the foundation of the formulae themselves. This was made clear by Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 AC 68, [68]:

> "What has to be justified is not the measure in issue but the difference in treatment between one person or group and another."

138. There has been discussion in the case law of the relationship between the 'manifestly without reasonable foundation' test, and the test for proportionality set out by Lord Reed in *Bank Mellat v HM Treasury (No 2)*, [2014] AC 700, [74], which has become the *locus classicus* on this topic. In *R (C) v Secretary of State for Work and Pensions* [2019] 1 WLR 5687, a case decided shortly before *DA*, Leggatt LJ (as he then was) said at [89]:

> "Although it is not immediately obvious how the 'manifestly without reasonable foundation' test relates to the assessment of proportionality that the court must undertake, the explanation may be that the court is required to ask whether the difference in treatment is manifestly disproportionate to the legitimate aim. This would accord with the statement of the European Court in *Blecic v Croatia* (2005) 41 EHRR 13, para 65, that it will accept the judgment of the domestic authorities in socio-economic matters 'unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued' (emphasis added). It also reflects how the Supreme Court applied the test in the recent case of *In re McLaughlin* [2018] 1 WLR 4250, paras 38–39 (Baroness Hale PSC) and para 83 (Lord Hodge JSC)."

139. In *Cox*, supra, McAlinden J said at [91] that in applying the manifestly without reasonable test he would consider whether the difference in treatment is manifestly disproportionate to the legitimate aim pursued. I respectfully agree that that is a helpful approach.

The parties' submissions

The Claimant's submissions

Ground 1: irrationality

140. On behalf of the Claimant, Mr Royston said that the Claimant's argument could be simplified to the proposition that the Government's choice of 52/12 as the conversion ratio for weekly tenants produces inaccurate and wrong figures for UC housing costs.

That is because there are in fact at least 365 days in any 12-month period, and not 52 weeks (ie, 364 days). As a result, the conversion ratios prescribed in [7(2)(a)] and [7(3)(3A(a))] of Sch 4 are irrational and/or discriminatory in violation of Article 14 of the Convention, read with A1P1.

141. Mr Royston did not challenge the averaging method adopted in the Regulations. He accepted that averaging was a practical and sensible approach. He also accepted that underpayments in one month and overpayments in another month (see my example above) would, in principle, balance out for a weekly tenant over a long enough period. Instead, he focussed his attack on the conversion ratios which the Regulations use in [7]. He said they lead to someone like the Claimant, who is a weekly tenant, having their housing support not covering their full rent, when it would cover the full rent of, for example, monthly or annual tenants in an otherwise identical position. As I have said, [7(2)] of Sch 4 provides that the monthly payment, M, for a tenant who pays her rent monthly is that monthly payment, whilst [7(2)(d)] provides that for someone who pays annually, M is that annual figure divided by 12.

142. He said the formulae in [7(2)(a)(3)(3A)(a)] treat every month as being one twelfth of a 52.0 week period (ie 364 days). But in reality, all twelve-month periods contain 52 1/7 weeks (365 days), unless they include a 29 February, in which case they contain 52 2/7 weeks (366 days). No twelve-month period contains only 364 days. Hence the Defendant's calculation method is incorrect and leads to a shortfall of one day's rent, or two in a leap year. For those on low incomes, this was significant. Mr Royston submitted that the Claimant ought to be entitled, because of her low income, to have her full housing costs liability met by UC.

143. He said there was no reason for the Regulations to calculate the length of an average month incorrectly. Mr Royston emphasised Ms Hawkins' acceptance that in some circumstances there might be a differential between what a weekly tenant would receive and what they owed (see her witness statement at [66], where she said any such differential would be small). He also relied on [49] of the Defendant's Summary Grounds of Resistance, where it accepted that the shortfall adds up to about a week every five or six years. Hence, he said in respect of long UC claims, because the conversion ratio is set too low, all claimants with long claims will end up being underpaid.

144. Mr Royston said the actual, correct, conversion ratios are (52 + 1/7)/12 (in a non-leap year) and (52 + 2/7)/12 in a leap year.

145. Alternatively, averaging these ratios over non-leap and leap years produces a conversion ratio of

$$(52 + 5/28)/12,$$
$$\text{or } (1461/28)/12$$

146. Mr Royston submitted that there was no practical or administrative reason to choose 52/12, as opposed to what he said were the proper and accurate ratios. UC is a fully computerised system which could easily have been programmed with the correct numbers. Changes could be made now at one-off cost.

147. Mr Royston also said that the choice of conversion ratio in [7(2)(a)(3)(3A)(a)] had not been a considered decision and fastened on [46] of Ms Hawkins' statement, where she said that officials had not been able to locate evidence of ministerial engagement with the detailed question of conversion ratios.

148. Summarising his irrationality attack, Mr Royston said the formulae were irrational because the conversion ratio lacked logic and because it resulted in like cases (ie weekly v monthly tenants) being treated unequally.

149. In his post-*Pantellerisco* submissions, Mr Royston re-iterated that the formulae in [7] of Sch 4 create a problem which requires a solution from the Secretary of State. He said that the problem is that one day's rent a year (two days in a leap year) are not covered by UC, so that over a five/six yearly cycle there will be a shortfall of one week's rental liability. He said the 'fine-tuning' (in Rose LJ's words) required is a more precise calculation of the relationship between the lengths of a month and a week than the current approximation, based on 12 months equalling 52.0 weeks.

150. In relation to the factors identified in *Johnson*, supra, and *Pantellerisco*, supra, Mr Royston submitted as follows. On the disadvantages of allowing the conversion ratio problem to persist unresolved, he said the shortfall would grow over time and would in practice be inescapable. In relation to the disadvantages of adopting a solution to the conversion ratio problem he said there were none: there was no evidence of any extra cost or a significantly increased administrative burden. He said the fully automated IT system which administers UC could be re-programmed to use correct conversion ratios. He said that there would be no loss of simplicity in using such ratios. In contrast, leaving tenants to accumulate arrears where their full housing costs are supposedly being met by UC has a genuine potential to confuse, and to bring the system into disrepute.

151. Mr Royston also submitted that a solution along the lines he suggested would not merely be consistent with the universal credit regime, but would promote its overall operation. He pointed to the Defendant's evidence that UC was intended to make the benefits system fairer and more affordable. He said the disparity between weekly and (for example) monthly tenants was not fair. He said that the Defendant had not suggested that there is anything about a weekly tenant which makes them *prima facie* deserving of less financial support than others. Being a lunar-paid employee, or not being paid at weekends, or being a weekly tenant, are *all* statuses rationally unrelated to whether a person should receive more, or less, means-tested state benefits than a comparator.

152. In relation to remedy, Mr Royston said I should quash the irrational week:month conversion ratios in [7(2)(a), (3) and (3A)(a)] of Sch 4 to the UC Regulations.

Ground 2: Article 14/A1P1

153. I turn to Ground 2, the Claimant's Convention challenge. Mr Royston said that a four-fold analysis was required in relation to Article 14. The first stage is to ask whether the facts fall within the ambit of one or more of the Convention rights. He said, correctly, that the Defendant accepted that issues concerning welfare benefits

fall within the ambit of A1P1. That concession is obviously right, as I have already indicated.

154. The next question is whether there is a difference in treatment in respect of that right between the complainant and others put forward for comparison. As to this Mr Royston relied on what he said was the Defendant's concession in [8] of Ms Hawkins' witness statement that there might be a small differential effect between weekly and monthly tenants over a five- or six-year cycle.

155. Mr Royston said that the real issues between the parties, in deciding whether the formulae in [7] are unlawfully discriminatory in breach of Article 14, were whether:

a. the differential treatment is on the ground of an 'other status' recognised by Article 14; and

b. the different treatment is justified, in other words, whether it is manifestly without reasonable foundation.

156. As to status, he submitted that being a weekly tenant qualifies as an 'other status' for the purposes of Article 14. He relied on cases which establish that 'other status' in Article 14 has been widely interpreted: see eg *Stevenson*, supra, [36]-[41], [50] (having been in receipt of income support prior to 5 January 2009); *JT v First-Tier Tribunal* [2019] 1 WLR 1313, [71]-[72] (cohabiting with an assailant); *R (Stott) v Secretary of State for Justice* [2020] AC 51, [23]-[26], [75] (being a prisoner subject to an extended determinate sentence).

157. In light of this generally broad approach, Mr Royston submitted that being a weekly tenant easily qualified as an 'other status' for the purposes of Article 14.

158. In relation to the fourth stage, and the question whether the measure in question is manifestly without reasonable foundation, Mr Royston said (rightly) that it was for the Defendant to demonstrate a legitimate aim for the purposes of justification under Article 14: *R (Steinfeld) v Secretary of State for International Development* [2020] AC 1, [42]. In order to be legitimate, 'the aim must address the perpetration of the unequal treatment... the aim must be intrinsically linked to the discriminatory treatment'; see *TD*, supra, [85].

159. He also emphasised [66] of Lord Wilson's judgment in *DA*, supra, and the need for the Court to 'proactively examine' the effect of the measure in question. Mr Royston submitted the differential treatment of weekly tenants, in comparison with, eg, annual tenants or monthly tenants, is unjustified and thus breaches Article 14, fundamentally for the same reasons that it is irrational at common law.

160. Mr Royston said that the Defendant had not put forward any aim which addresses the perpetration of the unequal treatment, explaining why it is necessary for weekly tenants to lose out from the choice of conversion ratio while others do not. He again emphasised the point that, at least in its Summary Grounds of Resistance at [68], the Defendant had referred to the legitimate aim behind the averaging principle, unchallenged by the Claimant, but not the conversion ratio which he submitted does not appear to have been properly considered.

161. He argued that there is a manifest lack of justification for subsidising less of a person's rent where they are liable to pay it weekly than where they are liable to pay it monthly. The only reason for the treatment is that the UC Regulations employ an incorrect approach to the mathematical relationship between a month and a week.

162. Hence, the Claimant invited me to quash the formulae in [7(2)(a)(3)(3A)(a)] on the ground they are incompatible with Article 14 read with A1P1.

The Defendant's submissions

Ground 1: irrationality

163. On behalf of the Defendant, Ms Palmer submitted that the Claimant's central argument that the Defendant has used the 'wrong' conversion ratio was premised on the suggestion that there is a 'correct' ratio that should have been/be adopted. She said that the Claimant had not been able to set out a straightforward ratio and instead relies upon alternatives. These either require a formula that changes dependent upon whether the calculation is done in a leap year or would lead to an over-recovery (even on the Claimant's case) in non-leap years.

164. In response to the Claimant's attack on the formulae in [7(2)(a)(3)(3A)(a)] as lacking logic and producing arbitrary disparity, Ms Palmer emphasised that any such consideration must be in the context that the threshold for an irrationality challenge is a high one, and that this case is not an appeal on the merits.

165. She said that the Defendant denied that the formulae used in [7] of Sch 4 are wrong or incorrect. She said that across the UC Regulations the Government, and Parliament, has used a common method of calculation based on the number of whole weeks in a year (which is 52) and which, save for the limited occasions on which there are 53 payment dates, is the same number of payments that a UC claimant with a weekly tenancy will be required to make.

166. Ms Palmer disputed Mr Royston's submission that no active consideration had been given to the selection of 52/12 as the conversion ratio. She said that although, as Ms Hawkins admitted, no evidence of *ministerial* engagement had been found when the UC Regulations were initially introduced, the matter had been considered *by officials* in the overall design of the UC Regulations and when the formula for rent-free periods was amended in 2014 to align with the method of calculation in [7(2)(a)] of Sch 4. On that occasion the matter had been considered by Ministers when the recommendation for the amendment had been made by officials.

167. In particular, in relation to differential treatment, Ms Palmer said that the question was whether any differential treatment afforded to different persons or different cases was without good reason. In assessing good reason, the Court needed to consider that a policy-maker may reasonably decide that the disadvantages of a finely-tuned solution outweigh its advantages and that a broader measure is preferable: *Law Society*, supra, [98], cited with approval in *Johnson*, supra, [48]. In other words, she said the question for me is whether it is possible to say that no reasonable Secretary of State would

have struck the balance in the way the Secretary of State did in this case: *Johnson*, supra, [50].

168. Ms Palmer said that the Defendant's formula was rational and justified because it converts a tenant's weekly rental liability to an average monthly amount premised on the common understanding that a year has 52 weeks and that, in the majority of years, a tenant with a weekly housing costs liability will indeed have 52 payment dates. She said that to the extent that any issue arises, the impact is limited and is explicable and justified by the advantages of the overall UC system as explained in Ms Hawkins' evidence and her explanation for the rationale for using 52 weeks across UC as a whole, including (for example), in relation to the calculation of unearned income, where it might operate to a claimant's benefit by producing a smaller reduction in UC for unearned income than the income actually received by the claimant over the year.

169. Ms Palmer said that the assessment of the rationality of the measures in question requires consideration of the system as a whole, including the use of a monthly assessment period, the consequential necessity of converting non-monthly payments, and the system's policy objectives which include encouraging work and having a system that operates for the whole cohort, and is relatively simple/consistent.

170. Ms Palmer said that it was important to recognise that UC was not designed to provide an indemnity for all costs arising out of need, including housing costs. The design of the scheme was an exercise of judgment by the Executive and then by Parliament as to the amount of money a person should receive having regard to the different needs of different categories of claimants and the amount of state resources available. She emphasised, by reference to [24]-[25] of Ms Hawkins' witness statement, that a claimant has no entitlement to full reimbursement of housing costs, and can therefore have no reasonable expectation that UC will operate as to provide such a benefit. The Claimant's claim (and the evidence relied upon) is wrongly premised upon the view that the full rental liability *must* be met by the housing allowance. Ms Palmer said that premise was incorrect.

171. Ms Palmer said that the Defendant believed that the point had arisen at this time because the majority of social rented sector tenants pay their rent on a Monday and the 2019/2020 rent charging year had 53 Mondays, and therefore there were 53 payment dates (less any rent-free weeks) over that time. In response, she relied on Ms Hawkins' evidence that, in fact, for many tenants, no issue will arise because the calendar years 2019 and 2020 each have 52 payment days, and so the fact that the rent charging year from 1 April 2019 – 31 March 2020 has 53 payment days does not, or not necessarily, result in any shortfall (see above). But she said that the Defendant was nonetheless considering the matter as part of its 'test and learn' approach, although any change would have to be consistent with the overall policy and objectives of UC. Here, Ms Palmer was drawing a distinction with *Johnson*, supra, where, as Rose LJ recorded in her judgment at [47] the Secretary of State had positively refused to enact a solution to the problem in issue.

172. Ms Palmer made a number of observations about the Claimant's evidence, but her fundamental point was that it was of limited assistance given the nature of the challenge to [7] of Sch 4 and the way in which the issues have been framed. Ms

Palmer said that the Claimant's case is either sound in law, whatever her own precise situation, or it is not.

173. Ms Palmer submitted that the Claimant has fallen short of showing that the formulae in [7(2)(a)(3)(3A)(a)] of Sch 4 for weekly tenants are irrational and that no reasonable decision maker could have struck the balance as set out in the relevant provisions. She said the Defendant was rationally entitled to design the system in this way and to calculate the housing allowance component of UC using a calculated monthly rental figure which is a simplified average of a claimant's weekly rental liability based on a notional 52 week year. She said that any difference in outcome compared to monthly tenants was small and objectively justified for the reasons given by Ms Hawkins.

174. Returning to her argument that the Claimant's case was premised on there being a 'correct' ratio, Ms Palmer pointed out the lack of consensus even among housing providers as to the right approach, and said this showed that the Defendant's choice was not irrational. For example, Exhibit KC/6 is a letter from Newcastle City Council to the Chair of the House of Commons Work and Pensions Committee. It suggested two alternatives. First, amend the calculation in 53 week rent years to 'weekly rent x 53 divided by 12', Alternatively, amend the entire calculation to 'weekly rent x 52.14 divided by 12'. Islington Council (KC/8) disagreed with the decision to use monthly assessment periods and suggested the solution was for the Defendant to 'abandon their strict, arbitrary rules' and to 'acknowledge the number of weeks within the year and calculate rent entitlement in this way'. It did not suggest a formula.

175. Ms Palmer said that given the Gregorian calendar, with 12 months containing between 28 and 31 days, years containing 365 or 366 days (and commonly recognised as having 52 weeks), any system that requires a conversion between weekly and monthly (or other periodic payments) would give rise to some issue of averaging and that perfect alignment between weeks and months is impossible. She referred back to Ms Hawkins' evidence that averaging out the extra days over four years in the way suggested by the Claimant (ie, so that the conversion ratio of (52 + 5/28)/12, or (1461/28)/12 is used) would lead to tenants with a weekly liability receiving more than tenants with a monthly liability.

176. This can be illustrated by an example. Take a year in which there are 52 weekly payment dates (as there are in 2020). There are two tenants. The annual rent for each is £5200. The weekly tenant will pay £100 per week housing costs. On the Claimant's suggested 'averaging' formula the weekly tenant would receive:

$$M = 100 \times (52 + 5/28)/12 = £434.82, \text{ or } £5217.86 \text{ over the year,}$$

ie, more than their housing costs liability.

177. However, the monthly tenant would simply receive:

$$M = 5200/12 = £433.33, \text{ or } £5200 \text{ over the year}$$

178. Thus, the averaging formula could give rise to some tenants receiving a housing UC payment that exceeded their actual liability. Ms Palmer said that if that were to occur

then monthly tenants could argue that their status as monthly tenants meant they were being treated less favourably.

179. Ms Palmer said that it was not correct that the use of the conversion ratios in [7] of Sch 4 was not a considered decision. She referred to [46]-[49], [57]-[58] and [62-[66] of Ms Hawkins' witness statement, where the issue was dealt with. The point Ms Palmer made is that although no written evidence had been located of engagement by *Ministers* with the question of conversion ratios, the issue *had* been actively considered by officials in the design of UC and a deliberate choice made, both in [7(2)(a)] as originally enacted, and also in the amendments to the UC Regulations which inserted the formula in [7(3A)(a)] for rent-free weeks based on a 52 week year.

180. Ms Palmer also disputed the Claimant's submissions that changes could be made to the IT system at little cost. She said the Claimant's contentions about the computer system were wrong. The computer system was designed on the basis of the Regulations (including the relevant provisions) and the approach of using a 52-week year consistently across the Regulations. In support, she pointed to Ms Hawkins' witness statement at [13] ('Any change to the IT system, whether as suggested by the Claimant or otherwise, requires work being undertaken and cost and affects the ability to make other proposed changes including the timeframe in which they can take place') and [89] ('Any change would require IT build requirements, additional expenditure and changes to regulations'). This was especially the case during the current pandemic. Ms Palmer therefore said the Defendant did not accept that the cost of any change would be either modest or one off.

181. Ms Palmer made the forensic point that it appeared that the Claimant accepts that the Defendant could reasonably have adopted 52 1/7 weeks and ignored leap years and that such an approach would not be irrational or discriminatory. However, that would still give rise (on the Claimant's case) to a differential effect, albeit less. That appears to suggest that the Claimant accepts that some difference can be justified.

182. Overall, Ms Palmer said that the Defendant had been entitled to strike the balance as it did when designing the UC system and when drafting [7] of Sch 4 and that it cannot be said that no reasonable Secretary of State would have opted for the relevant formulae in [7]. To the extent there is a difference between weekly and monthly tenants, or between the figures produced by [7] and the figures produced by the Claimant's suggested conversion ratios, the small difference in treatment is a relevant factor in striking that balance. Accordingly, the relevant parts of the Regulations are not irrational, and this basis for the Claimant's claim should be rejected. Further, she submitted that the matter is not so-clear cut as to have demanded a response to date, and that the Defendant's approach of testing and learning, in consultation where necessary with stakeholders, was a reasonable one in the circumstances.

183. In her post-*Pantellerisco* submissions Ms Palmer re-iterated that the central question was whether it was possible to say that no reasonable Secretary of State would have struck the balance in the way the Secretary of State did in the formulae in Sch 4.

184. Ms Palmer drew a distinction with *Johnson*, supra, and *Pantellerisco*, supra, in that she said that the principal focus of the Claimant's case was that the relevant formulae are irrational, rather than the Secretary of State's failure to enact a solution. She said

that unlike in those cases, there is no evidence of the Regulations having produced 'cliff-edge', stark or arbitrary consequences for the Claimant. She said that although the Defendant accepted that there *could* be a differential in treatment between some tenants with a weekly liability and those with a monthly liability over a long enough period, the impact was small and far from the sort of severe consequences which occurred in the two earlier cases. She said in the present case there was no evidence of actual hardship being caused by the formulae in question, again unlike in the two earlier cases, where there was real evidence of hardship being caused by the way in which the Regulations operated and which had not been intended.

185. Further, unlike in *Johnson*, supra, she reiterated that the Secretary of State has *not* concluded that no amendments should be made, rather it remains a matter under consideration. Ms Palmer said that the Defendant's primary position is that the Court does not need to embark upon a detailed consideration of the remainder of the *Johnson*/*Pantellerisco* questions. The Defendant's case was, and remains, that the Regulations as enacted are rational for the reasons set out in Ms Hawkins' evidence, and for the reasons I have summarised.

186. As to the three issues referred to at [50] of *Pantellerisco* and identified in *Johnson* at [50], in summary, Ms Palmer said that where there is more discretion in the 'solution' (as here) then it is not straightforward to apply *Johnson*. In particular, she said that one of the Defendant's submissions is that there is no one solution that addresses the problem. The submissions on disadvantages of the respective positions should be considered in that regard.

187. She said disadvantages of not fine-tuning the Regulations (therefore allowing the 'problem' to persist unresolved) are limited, and she emphasised the small differential impact (ie, the 0.274% point and the five/six year cycle points she made earlier).

188. She also pointed out that any difficulty in a tenant being subject to a shortfall could be addressed by the tenant applying for a DHP. There was no similar 'safety net' available to ameliorate the effects on the claimants in *Johnson* and *Pantellerisco*.

189. She said the disadvantages of adopting a solution to any problem which does exist are significant, in that there is no one or obvious solution; any changes would require IT expenditure which, on Ms Hawkins' evidence, would be significant; and, on the formulae suggested by the Claimant could lead to overpayments to weekly tenants but not monthly tenants.

190. Ms Palmer said that in both *Johnson* and *Pantellerisco*, the Court had concluded that the problems produced by the Regulations were inconsistent with a fundamental aim of incentivising work, and therefore a solution would be consistent. There is no such inconsistency with that policy aim here. She said any proposed solution would be inconsistent with the aims of UC, particularly of simplicity and consistency.

191. Further, Ms Palmer highlighted that in *Johnson* Underhill LJ had made clear that it was a decision on its particular facts (see [86] and [116]). Accordingly, the relevant parts of the Regulations are not irrational, and the Claimant's claim should be dismissed.

Ground 2: Article 14/A1P1

192. In relation to Ground 2 (Article 14/A1P1), Ms Palmer accepted that decisions on social security and welfare benefits fall within the ambit of A1P1.

193. The Defendant also agreed with the Claimant that the test for justification is whether the Defendant's decision is one that is manifestly without reasonable foundation: *DA*, supra, [55]-[66]. Ms Palmer emphasised that this is an objective test, and she argued that the Court should give significant weight to the Secretary of State and Parliament's decisions on matters of social policy and where the balance should be struck. Further, the fact that the Secretary of State and Parliament had expressly considered the matter is a relevant factor, and the Court will be aware of the need to exercise restraint, especially where the matters in issue were under active consideration by the Defendant.

194. Ms Palmer said that the Court would need to consider what difference there is in treatment between a person with the relevant status (if so found, and however defined) and the comparator and the reasons for this, and whether the measure employed is manifestly disproportionate to the aim pursued.

195. Ms Palmer pointed out that discrimination on what are often called 'suspect' grounds (ie, sex, race, sexual orientation and religion) requires particularly strong justification: see eg *AL(Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, [29]; *R(RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] 1 AC 311, [5]. However, she said if having a weekly tenancy is an 'other status' for the purposes of Article 14, then it is at the outer limit of what Lord Reed in *RJM*, supra, [5], described as the 'concentric circles' of personal characteristics. She relied on his statement in the same paragraph that:

> "The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

196. As to whether a weekly tenant is, in fact, an 'other status' for the purposes of Article 14, Ms Palmer acknowledged that there is a relatively broad definition of what comprise a status. In considering whether the 'other status' test is met, the Court should concentrate on what somebody is, rather than what he is doing or what is being done to him: *DA*, supra, [39]. She did not press the point strongly but maintained the Defendant's formal position that being a weekly tenant is not a status for the purposes of Article 14: Skeleton Argument, [56]. She said that the Claimant's case was that every weekly tenant is treated differently to monthly tenants as a consequence of the legislation. If that is correct, then it is a status that is defined by the alleged discrimination. She also said that the payment period of a tenancy is not something that is personal to an individual, rather it is dependent upon the tenancy agreement in question and is capable of being varied either by moving property or if a landlord were to accept the request.

197. Ultimately, Ms Palmer said that any difference in treatment (or effect) for weekly tenants that could amount to discrimination on the grounds of status is plainly

justified. This is a case falling at the far edge of the concentric circles, and any difference in treatment could be easily justified. She said that the Defendant's UC policy aims and objectives (as summarised in Ms Hawkins' evidence) are all legitimate aims and the relatively small differential effect (where it arises) is proportionate.

198. In essence, Ms Palmer said I did not need to consider too closely whether having a weekly tenancy is a status capable of protection under Article 14, or the extent to which there is any particular difference between weekly tenants and relevant comparators because even if both of these questions are answered in the Claimant's favour the difference in treatment is not manifestly without reasonable foundation.

199. For these reasons, Ms Palmer said I should reject the second ground of challenge and dismiss the claim.

Discussion

Ground 1: irrationality

200. Following *Johnson*, supra, at [46]-[50] and *Pantellerisco*, supra, [47], the rationality challenge here must be viewed as a *Wednesbury* challenge. The question to be addressed is whether the decision of the Secretary of State, as to the drafting of the relevant paragraphs in Sch 4 to the Regulations, and her response thereafter, was outside the range of reasonable decisions open to a decision maker. The particular decision in issue here was the choice of 52/12 in [7(2)(a)] and the cognate adjusted rent-free week formula in [7(3(3A)(a)] and the failure to date (as the Claimant would have it) to amend the Regulations so that they use her suggested conversion ratios.

201. The assessment of rationality is to be carried out according to the methodology in *Johnson*, supra, [50], and *Pantellerisco*, supra, [47]-[50] and having regard to the factors there set out.

Do the formulae in [7(2)(a)] and [7(3) and (3A(a))] create a problem requiring a solution ?

202. In *Johnson*, supra, and *Pantellerisco*, supra, it was clear that the regulations in question were capable of operating, and had operated, to produce stark and arbitrary effects, to the disadvantage of the claimants. There was ample evidence of these, some of which I have already quoted. Indeed, as I have set out, in *Johnson* the Secretary of State accepted that this was so, but sought to justify these consequences as a necessary part of how UC operated, and declined to enact a solution.

203. Ms Palmer submitted, in contrast, there is no problem caused by the formulae in [7(2)(a)(3)(3A)(a)] and that they do not, and have not, produced the sort of 'cliff edge' effect described in the two earlier cases and that in any event the matter was actively being considered by the Defendant, so that overall the Defendant's response was not *Wednesbury* unreasonable.

204. It therefore seems to me the first question that I have to consider is whether the formulae in [7(2)(a)(3)(3A)(a)] of the UC Regulations produce a problem in the same way, so as to require consideration of whether those formulae, coupled with the

Secretary of State's failure (thus far) to provide for a solution, is irrational. If there is no problem, then there is no need to search for a solution. Equally, if the impact of the formulae – in other words, whether or not there is a problem has not yet been determined - then the Secretary of State's 'test and learn' approach and her continued active consideration of the problem has much to commend it and is less likely to be characterizable as irrational.

205. In my judgment the regulations in issue in this case cannot be said to have produced such stark and arbitrary effects as the Regulations did in the two earlier cases. In other words, despite Mr Royston's submissions, I remain unpersuaded that the formulae do in fact create a problem requiring a solution.

206. It seems to me that the fundamental flaw in the Claimant's case is the premise that the UC Regulations should operate so as to fully reimburse a tenant's housing costs and because they may not do that (depending on a particular tenant's circumstances), they are irrational. But as Ms Palmer rightly pointed out, and Ms Hawkins made clear, the premise of the Claimant's argument is not correct. The UC Regulations were not intended or designed to reimburse a tenant for every penny she spends on housing costs, but were only intended to provide a contribution towards them. The relevant Regulations operate as they were intended to operate, namely, to provide a payment towards a tenant's housing costs in a simple and easily calculable way that is consistent with how monthly conversions are carried out across the UC Regulations in a variety of different contexts.

207. Paragraph 7 of Sch 4 comes nowhere near to producing the serious, arbitrary and cliff-edge consequences that the impugned Regulations in *Johnson*, supra, and *Pantellerisco*, supra, produced. As I explained earlier, on one conversion ratio suggested by the Claimant, a tenant whose housing costs were £70 per week (which the Claimant's roughly are: as I have said, her weekly housing liability is £76.89), would be £10 per year worse off, or 0.274%, than she would be using one of her suggested formulae. I am fully alive to the point that for the Claimant, and many others in receipt of UC, every penny counts. But even keeping that firmly in mind it is impossible to characterise such a small difference as representing the sort of serious or extreme 'problem' which compels a solution in the way the impugned Regulations did in *Johnson*, supra, and *Pantellerisco*, supra, which had produced very serious difficulties for claimants.

208. The Claimant's evidence demonstrates that she has got into rent arrears, but that was because her UC was stopped for reasons unconnected with the issues before me. There is another point to be derived from the Claimant's evidence. She explains at [13] that she also receives a DHP in respect of the bedroom tax (which is deducted from her UC payment). The full extent of this benefit or its eligibility criteria were not explored in any detail before me, and I cannot therefore place too much weight on it, however its existence is a further reason – even assuming [7] in its current form may lead to a small shortfall over a number of years – for concluding that there are measures which do exist to attenuate its impact. There was no such safety net in either *Johnson* or *Pantellerisco*.

209. It follows that, unlike in those cases, I do not consider that there needs to be an enquiry about whether there needs to be 'fine-tuning', and whether the Secretary of

State's failure to make changes was reasonably open to her. As I read the Claimant's evidence, she is concerned about some supposed shortfall in the future; there is no evidence that to date the formulae in [7] have had deleterious effects upon her. She fell into rent arrears not because of the method of calculating her monthly housing payment, but because payment of her UC was interrupted for other reasons.

210. This conclusion strongly supports the Defendant's case that the formulae in question are not irrational.

Rationality more broadly

211. Further, I accept the rationale for choosing a 52/12 conversion ratio was a reasonable and rational one for all of the reasons given by Ms Hawkins, which I set out at length earlier and will not repeat. It promotes consistency and simplicity and reflects the reality that in most years, tenants will have 52 payments to make.

212. I accept Ms Hawkins evidence that, to the extent there is a difference in the amounts paid to a monthly tenant as compared with a weekly tenant over a sufficiently long period, then the amounts involved are small. Even on the preferred method of calculation advanced by the Claimant (based on notional daily rate for housing costs), the difference, as I have shown, is just 0.274%. As I have said, I readily understand how difficult budgeting can be for many of those on UC, but on any view that figure cannot be described as such a significant difference as to render the formulae irrational.

213. Even in the case of a tenant whose housing costs exceed the amount they receive in a given year in housing UC, then the answer, as Ms Hawkins explained, is that they would be expected to budget appropriately, in the same way that any person receiving a monthly salary must budget for some sudden unexpected bill. Part of the rationale of UC is to instil the discipline of budgeting on a monthly cycle into those who receive it, so that their finances mimic the payment and expenditure cycle of those in work.

214. There was much debate on paper and during the hearing about the conversion ratio in [7] and, as I have said, that is where Mr Royston focussed his rationality attack. The starting point is that Mr Royston did not dispute the averaging principle and the essential methodology of applying *a* conversion ratio to weekly housing costs so as to produce an average monthly housing costs figure which, depending on the exact circumstances, may be more or less than the tenant's liability. He accepted that averaging was legitimate and that it reflects one of the essential purposes of the UC scheme, which is to provide monthly payments so as to allow recipients to budget as they would do if they were in work and receiving a monthly salary. This point is made in [36]-[39] of Ms Hawkins' witness statement:

> "36. The assessment period is calculated as a calendar month. A calendar monthly basis is used as it is considered to best reflect the most common payment cycles (whether in terms of income, such as salary, or outgoings, such as bill payments).

> 37. The objective of workability and efficiency requires the same structure to operate for the whole population and for each part of the calculation of UC, notwithstanding that there are, of course, different types of payment cycles (including irregular pay or weekly, fortnightly or monthly pay) and liability cycles (varying from weekly, four weekly, monthly to annual rent liabilities).
>
> 38. The calendar month structure reflects the general position in modern working life, where individuals, even in more precarious employment, are usually paid monthly (of those on Tax Credits, 57% are paid monthly and 12% are paid 4-weekly). Where claimants are unemployed, monthly assessment and payment of UC creates the discipline of budgeting and managing money on a monthly basis, which is considered to help improve skills which would reduce poverty whether in work or not. The same approach is applied whether a claimant is employed, unemployed or self-employed. This allows UC to be calculated on the same basis whether a person moves in and out of work or whether their earnings are composed of mixed employed and self-employed earnings.
>
> 39. The assessment period structure was the subject of debate through the passage of the Welfare Reform 2011 Bill and the 2012 secondary legislation."

215. In his Skeleton Argument, Mr Royston put forward different alternative conversion ratios based upon non-leap years, leap years and an averaged-out ratio combining both over a four-year cycle. Also, as Ms Palmer pointed out in her Skeleton Argument at [37], and as I have described, there are a number of other suggested ratios or different methods of calculation from different councils in the exhibits to Kathleen Cosgrove's witness statement. In light of this evidence, and the possible different approaches to the conversion problem between weeks and months, I consider that Ms Palmer was right to submit there is room for reasonable debate about what conversion ratio is appropriate and that this substantially weakens the argument that the choice made by the Defendant was outside the range of reasonable responses.

216. The question is *not* whether there was a better solution than that chosen by the Government and approved by Parliament in [7] of Sch 4. During the hearing I raised with counsel the mathematical concept of 'best fit', whereby the mathematical modeller attempts to devise an equation or a graph which most closely, but perhaps not perfectly, replicates a data set, usually gathered by empirical observation. Whilst the analogy is not perfect, in a sense, that is what the Government was trying to do when it devised this aspect of the UC Regulations. It was attempting to construct a mathematically based system in the Regulations (the equation) which would achieve, perhaps imperfectly, its policy goals in relation to housing costs (the data set). The question for me is whether, in light of that data set, the equation it chose is irrational. In my judgment, given the diverse range of views on what is obviously a difficult problem, it is impossible to characterise the choice which the Secretary of State made in [7] of Sch 4 as irrational. I respectfully consider that the same idea was being

conveyed by Rose LJ in *Johnson*, supra, when she referred to a policy maker being able to choose '… a broader measure … even if the broader measure is both over- and under-inclusive in that it catches some cases in which there is no or no significant problem and fails to catch some cases in which the problem occurs.' The way in which monthly equivalent housing costs can be calculated is an issue on which reasonable minds can, and plainly do, differ and there is more than one permissible approach.

217. Mr Royston was wrong to say that the conversion ratio in [7] had been chosen without any real thought being given to the issue, or that it was illogical. The reasons for the choice of that conversion ratio are explained in the evidence of Ms Hawkins at [46]-[49], [57]-[58], and [62]-[66] of her witness statement, as I summarised earlier. Officials actively considered the issue in the original design of the UC Regulations, and then again when they tendered advice to Ministers in the drafting of the 2014 amendments regarding rent-free weeks. Nor do I accept his argument that the formulae result in like cases (ie monthly v weekly tenants) being treated meaningfully differently. As I have ventured to explain, any difference is small and whether or not it will occur will depend on a number of factors which vary from tenant to tenant. The formulae in Sch 4 establish, in my judgment, the sort of bright-line that is tolerable where workable rules have to be devised in pursuit of social policy: see *Johnson*, supra, [75].

Other matters

218. These conclusions are sufficient to dispose of the Claimant's rationality challenge. However, for completeness I will go on to consider the other factors that were considered in *Johnson*, supra, and *Pantellerisco*, supra.

219. Here, I broadly accept the submissions which Ms Palmer made in writing following the hearing. In this case the Defendant has not refused to 'fine-tune' the Regulations but is actively studying the issue. In view of my conclusion that there is no, or no clear, evidence of any 'cliff edge' effects flowing from [7(2)(a)(3)(3A)(a)], that, it seems to me is a rational response which fully answers the questions posed in these two cases. On the question of what are the disadvantages of deciding not to fine-tune the Regulations thereby allowing any problem to persist unresolved, I accept there are few disadvantages for the reasons I have given and because of the absence of any evidence of potentially harmful effects for tenants. On the other hand, I accept Ms Hawkins' evidence that to adopt a solution as proposed by the Claimant would have significant cost consequences and would divert resources away from the hugely increased demand for UC caused by the COVID pandemic. In relation to issues such as the size of the cohort affected and the duration of impact on claimants, I accept that many weekly tenants will have their rent calculated in accordance with the formulae in [7(2)(a)(3)(3A)(a)], but there is an absence of evidence about how many would be adversely affected because, as Ms Hawkins explained, that depends upon a range of factors. I do accept, as the Defendant accepts, that there could be significant numbers. However, the duration of impact on the claimants cannot readily be determined. It would depend, for example, in part, on how long a claimant receives UC for. As for the determinative issue (see *Johnson* at [50]) and the question where the balance has been struck, for the reasons I set out earlier I do not consider the formulae in [7(2)(a)(3)(3A)(a)] in their current form, coupled with the Defendant's ongoing review of the

position, represents a response which is outwith the range of responses of a reasonable decision maker.

220. As for the 'other factors' referred to in *Johnson* at [92], the problem was considered and rejected when the Regulations were adopted and considered again at the time of the amendment to the Regulations in 2014. The Defendant does acknowledge, as I have said, that a significant proportion of weekly tenants on UC might be affected by the formulae in question, but points out that it does not affect all such tenants, only arises once in a five or six year period, and other circumstances (such as the benefit cap, other occupants, or the claimant's income) may mean that it arises to a lesser extent, or simply does not arise at all. To the extent that there might be a problem (contrary to my conclusions above), and there is an inconsistency between the formulae in [7(2)(3)(3A)] and the UC scheme overall, then this is something which the Defendant is currently considering and for the reasons I have given that response is not irrational.

221. For all of these reasons, I reject the Claimant's first ground of challenge to the formulae in [7(2)(a)(3)(3A)(a)] of Sch 4.

Ground 2: Article 14 and A1P1 of the Convention

222. I can take this ground of challenge more shortly.

223. As I have said, the Defendant accepted (rightly) that welfare benefits fall within the ambit of A1P1 and thus that the Claimant, in principle, is entitled to rely on Article 14. The Defendant also accepts that there could in certain circumstances be a difference in treatment between a weekly tenant and, for example, a monthly tenant. I am prepared to assume in the Claimant's favour that, having regard to the broad approach in the cases to the question of 'status' in Article 14, that being a weekly tenant is such a status. The question is whether the difference in treatment is manifestly without reasonable foundation, or as I explained earlier, whether the difference in treatment is manifestly disproportionate to the legitimate aim pursued. It is for the Defendant to justify the difference in treatment.

224. I have carefully considered this question and concluded that any difference in treatment is not manifestly disproportionate to the legitimate aims pursued by the formulae in [7]. As I have explained, any difference is very small, and may not occur at all for many weekly tenants. Whether or not it will do so depends on a range of factors. The conversion ratio of 52/12 pursues a number of legitimate aims, as Ms Hawkins explained, including consistency with other UC Regulations; simplicity; ease of explanation; that it matches the actual number of payments which most weekly tenants will make in most years. Added to these factors are that UC was not intended to provide full reimbursement for tenants, and DHPs exist for those who may get into difficulty.

225. I therefore reject the Claimant's Convention arguments.

Conclusions

226. For these reasons, despite the manifest skill with which Mr Royston and Ms Bartlam prepared and presented the Claimant's case, this application for judicial review is dismissed.