

[2019] AACR 15
(Worley v Secretary for Work and Pensions
[2019] EWCA Civ 15)

CA (Senior President of Tribunals, Jackson and Sharp LJJ)
31 January 2019

CPIP/2980/2013

**Transfer from Disability Living Allowance to Personal Independence Payments -
whether the Personal Independence Payments award can be back-dated to date of claim
– whether the Transitional Provision Regulations are discriminatory under Article 14
ECHR**

The appellant was receiving disability living allowance (DLA). She notified the Secretary of State of a change of circumstances and was invited to claim personal independence payment (PIP), which she did by telephone on 15 May 2014. The claim for PIP was refused on 11 November 2014 and the appellant was told that, as a result, her award of DLA would end on 9 December 2014. Upon reconsideration, however, the Secretary of State decided, on 20 January 2015, that the appellant was entitled to the enhanced rate of the daily living component of PIP from 10 December 2014. The appellant appealed to the First-tier Tribunal (F-tT) on the ground that the award should have been effective from the date of claim on 15 May 2014. She complained on the appeal that, whereas generally a person making a claim or applying for supersession of an existing award would be awarded the appropriate benefit from the date of the claim or application for supersession, as a DLA entitled person subject to the Personal Independence Payment (Transitional Provisions) Regulations 2013 SI 2013/387 (the TP Regs), she was treated less favourably and deprived of over £1,000. The F-tT dismissed the appeal. The appellant appealed to the Upper Tribunal (UT), which also dismissed the appeal. The appellant appealed to the Court of Appeal on two grounds: (1) the UT erred in the interpretation of regulations 20 and 17 of the TP Regs; and (2) the UT erred in failing to identify the correct comparator before moving to consider objective justification under Article 14 of the European Convention on Human Rights (ECHR).

Held, dismissing the appeal, that:

1. the UT was right in its interpretation of the TP Regs. It was agreed that the appellant was a ‘transfer claimant’ under the TP Regs’. Regulation 17, however, is clear and applies to all ‘transfer claimants’. There is no subset of ‘transfer claimants’, like the claimant, of ‘change of circumstances claimants’, to whom regulation 17 does not apply. If that had been the intention regulation 3(5) of the TP Regs would have been qualified regulation 3(5) of the TP Regs so as not to require a person who was implicitly applying for a supersession to make a claim to which regulation 17 would apply. Further, regulation 17 does not cross-refer to regulation 20(2)(b), which would be expected if regulation 20(2)(b) was intended to override regulation 17, and it strains the plain language of regulation 17 to create a subset of claimants. It matters not that this correct interpretation of the TP Regs may render regulation 20 of little significance (paragraph 24 to 30);

2. the UT’s approach to Article 14 of the ECHR was consistent with Strasbourg jurisprudence and domestic case law. An overly rigid approach to Article 14 is to be avoided. The two key questions to ask were: what are the reasons for the differences in treatment and do they amount to objective and reasonable justification? The UT did identify a comparator, new PIP claimants, but focused its analysis on whether the difference in treatment between DLA entitled persons and new PIP claimants was justified (paragraphs 31 to 34); and

3. the appellant’s reformulation of her case in the Court of Appeal, so as to make the comparator the narrower class of successful PIP supersession claimants, did not affect the result. The Secretary of State had objectively justified the difference in treatment provided for in the Regulations. An important feature of the TP Regs in respect of this justification was about providing certainty to all claimants, whether they are ultimately winners or losers, about their income for the assessment period while transferring from DLA to PIP. The Secretary of State had a legitimate aim in treating DLA entitled persons who notify a change of circumstances differently to new PIP claimants, who are not already in receipt of a benefit (paragraphs 44 to 48).

DECISION OF THE COURT OF APPEAL

Mr B McGurk & Mr C Stothers (instructed by Freshfield Brockhaus Deringer LLP) for the Appellant

Mr T Buley (instructed by Government Legal Department) for the Respondent

Approved Judgment

Senior President of Tribunals:

Introduction

1. This is an appeal against the decision of the Upper Tribunal (Administrative Appeals Chamber) ('UT') made on 17 January 2017. Permission to appeal was granted by Lewison LJ on 2 February 2018. The issue in this case is whether the appellant's personal independence payment ('PIP') award can be back-dated to the date on which she notified the Secretary of State for Work and Pensions of her claim. Although the issue can be simply stated it has significant implications for those with long term disabilities whose welfare is dependent upon benefits paid by the state.

2. Although the arguments are relatively straightforward, given the relative complexity of the provisions relied upon I shall indicate at the beginning of my judgment that I would dismiss this appeal for the reasons I now set out.

Background

3. The welfare reforms that give rise to this case are set out in the UT's judgment at paragraphs [2] to [6] which I gratefully adopt. In summary:

a) Part 4 of the Welfare Reform Act 2012 introduces the PIP regime and provides for the abolition of disability living allowance ('DLA') which is payable under the Social Security Contributions and Benefits Act 1992. Both benefits are payable to those with long-term disabilities and the intention was for PIP to replace DLA.

b) Both benefits are subject to the same adjudication regime under the Social Security Act 1998. There is no provision for backdating a claim for either benefit. An application for supersession under section 10 of the 1998 Act on the ground of a change of circumstance is, subject to the three-month qualifying period, generally effective from the date of the claim or of the application for supersession as the case may be, whereas an adverse supersession is generally effective either from the date of supersession or, if the claimant could reasonably have been expected to disclose the change of circumstance earlier, from the date of the change.

c) One of the stated purposes of introducing PIP was to reduce public expenditure. The Government expected that the number of claimants would be

reduced and that £2.24 Bn pa would be saved once those of working age were transferred over to PIP.

d) Transitional Provisions Regulations manage the transfer of claimants from DLA to PIP. From 28 October 2013, the process began of transferring to the PIP regime those of working age entitled to DLA. This is generally achieved by inviting the person entitled to DLA (known as a 'DLA entitled person') to claim PIP and then terminating the award of DLA either when the claim for PIP is determined or after there has been a failure to claim PIP despite having been given a further opportunity to do so.

4. The facts of this case are set out in the UT's judgment at paragraphs [14] to [17] which I shall also adopt. In summary:

a) The appellant suffers from depression, agoraphobia, hypertension and also some restriction in the movement of three fingers of her right hand as the result of an accident. She was entitled to £43.10 per week while in receipt of DLA.

b) The appellant notified the Secretary of State of a change of circumstances and was invited to claim PIP, which she did by telephone on 15 May 2014. Following a face-to-face consultation with the health care professional the Secretary of State notified the appellant on 11 November 2014 that she was not entitled to PIP and that her award of DLA would terminate on 9 December 2014. The appellant asked for reconsideration of the decision and on 20 January 2015, the Secretary of State informed the appellant that she was entitled to the enhanced rate of daily living component of PIP in the sum of £81.30 per week from 10 December 2014.

c) The appellant appealed to the First-tier Tribunal ('F-tT') under section 12 of the *Social Security Act 1998* on the ground that the award should have been effective from the date of the claim on 15 May 2014. The appellant's complaint was that, whereas generally a claimant making a claim or applying for a supersession would be awarded the appropriate benefit from the date of the claim or application, as a DLA entitled person subject to the Transitional Regulations, she was treated less favourably and deprived of a significant amount of money ([£81.30 - 43.10] x 30 weeks = £1,146).

d) The F-tT dismissed the appeal. The appellant appealed to the UT, which also dismissed the appeal.

The Regulations

5. There are three sets of Regulations that are relevant. They are lengthy in nature and for that reason I shall attach to this judgment the version of each relevant regulation that was in force at the time. They are the Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI 2013/387), the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380) and the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381).

Grounds of appeal

6. The appellant has two grounds of appeal:
 - i. The UT erred in its interpretation of regulation 20 and regulation 17 of the Transitional Provisions Regulations.
 - ii. The UT erred in failing to identify and determine the correct comparator before moving to the question of objective justification under Article 14 of the European Convention on Human Rights ('ECHR').

The decision appealed

The meaning and effect of regulation 20(2)(b)

7. The UT rejected the appellant's submission that regulation 20(2)(b) of the Transitional Provisions Regulations when read together with regulation 38 of the Claims and Payments Regulations treats the DLA award as a PIP award. Had the appellant been right, the application for supersession would have taken effect as if it was a PIP award (in this case from the date of the claim) and the 28-day rule provided for by regulation 17 would not apply. The UT held that if this had been the draftsman's intent, the draftsman would have qualified regulation 3(5) and not required a person to make a claim to which regulation 17 applies, when by notifying a change of circumstances that person was implicitly applying for supersession.

Discrimination under Article 14 ECHR

8. The UT noted that the appellant accepted that the provisions for terminating an award of DLA and awarding PIP from the date 28 days after the decision on PIP entitlement is justified in relation to PIP losers (whose PIP is less than their entitlement under DLA) and PIP neutrals (whose entitlement is the same). The issue is whether the provisions are justified in relation to PIP winners (whose entitlement under PIP is higher than their entitlement under DLA). The UT noted that there would be an administrative cost in backdating PIP awards for PIP winners in addition to the cost of the payment of the arrears which itself would be substantial.
9. The UT held that the difference in treatment was justified and that as regards PIP winners the aim of the legislation is justified. A legitimate effect of the Transitional Provisions Regulations, given the enormity of the task, is that DLA entitled claimants will be transferred to PIP on different dates and to that extent will be treated differently from one another. That provides a *prima facie* justification for fixing the date of transfer for a DLA entitled person who is a PIP winner on a different date from that fixed for a new PIP claimant.
10. The UT held that there can be no objection to the Secretary of State fixing the date of transfer for most PIP winners in the same manner as for other DLA entitled claimants of PIP, rather than on the date fixed for new PIP claimants. The Secretary of State had financial reasons for doing so, both because of the lower administrative cost and because back-dating awards for PIP winners would reduce the savings that are a legitimate aim of the 2012 Act,

particularly as the effective transfer date for PIP losers is not being back-dated. This, it was said, tends to show that PIP winners are not in the position analogous to a new PIP claimant.

11. The UT went on to consider a narrower class of PIP winners who are those who not only claimed PIP following an invitation issued under regulation 3(5) as a result of having notified the Secretary of State of a change in circumstances relating to their awards of DLA, but also would have been awarded more DLA had their awards been superseded in the light of the change of circumstances. The UT concluded that the narrower class of PIP winners were in a more analogous position to successful new PIP claimants. Not only are both types of claimants severely disabled and qualify for PIP but they have both relatively recently become more disabled than they were and are seeking the amount of benefit appropriate to their new level of their disabilities.

12. The UT was satisfied that even for the narrower class of PIP winners the legislation was justified. The UT held that general aims to reduce public expenditure and better focus social security benefits on the more seriously disabled were legitimate. The more specific aims to ensure an effective and manageable transition from DLA to PIP for DLA claimants and to protect the claimants' entitlement to DLA until the transition was completed were also held to be legitimate.

13. The UT held there was proportionality between the aims and the means employed to pursue them because the transition aimed at protecting all those who would lose out when being transferred from DLA to PIP and it would be disproportionate and impractical to identify those who might have benefited from a DLA supersession and make the necessary payments only to them.

Ground one

14. It is convenient to take each ground of the appeal separately. Ground one is a question of statutory interpretation of the regulations.

15. The appellant submits that ordinarily benefit claimants who notify the Secretary of State of a change of circumstances resulting in an increased entitlement to their existing benefit have their benefit decision superseded from the date of the change of circumstances or (if the date of notification is more than one month later) from the date of notification. That was the case under DLA and is the case under PIP. There is no challenge to this proposition for the purposes of the subject matter of this appeal and I need not set out the statutory provisions that lead to that conclusion because nothing turns on them.

16. The Secretary of State submits that this is not the case when individuals with valid supersession claims are transitioning from DLA to PIP. She submits that regulation 17 applies to 'transfer claimants' transitioning from DLA to PIP and that precludes backdating of claims because the regulation sets the date of payment of PIP 28 days after the decision about entitlement to PIP is made.

17. The appellant submits that the Secretary of State is in error in treating the appellant as a 'transfer claimant' to whom regulation 17 applies. The appellant submits that she is a 'change of circumstances claimant' which is a subset of 'transfer claimants' to whom regulation 20 applies. The purpose of regulation 20(2)(b) is, she says, to enable all DLA entitled persons notifying a change of circumstances to be treated as if they were PIP

supersession claimants. ‘Change of circumstance claimants’ are, therefore, to be treated differently from other ‘transfer claimants’.

18. The appellant submits that regulation 20(2)(b) is accordingly a deeming provision that treats a DLA supersession claim “as if it were” a PIP supersession claim. Regulation 20 states that the notification of a change in circumstances, “*must be treated in all respects as if it was a notification under paragraph (4) of regulation 38 (evidence and information in connection with an award) of the Claims and Payments regulation of a change of circumstances which the person might reasonably be expected to know might affect the continuance of entitlement to personal independence payment.*” It is submitted that the words ‘*in all respects*’ are important given the content of regulation 38(4) of the Claims and Payments Regulations.

19. Regulation 38(4) of the Claims and Payments Regulations obliges a person awarded PIP to notify the Secretary of State of any change of circumstances that she might reasonably be expected to know might affect the continuance of entitlement to PIP, the amount of PIP awarded or the payment of PIP. It is relied upon in determining the date of supersession in regulation 35 and Schedule 1, Part 2 of the Decisions and Appeals Regulations. The appellant submits that the words “*continuance of entitlement to personal independence payment*” support the submission that once a DLA claimant notifies a change of circumstances, regulation 20(2)(b) requires that they be treated as if they were already entitled to PIP.

20. The UT, having accepted that the appellant fell within regulation 20(5) of the Transitional Provisions Regulations, erred in concluding that nevertheless the appellant fell to be governed by regulation 17. This conclusion, it is said, would render regulation 20(2)(b) unnecessary.

21. The appellant submits that her interpretation of the regulations does not undermine the ‘cliff edge’ protection intended by regulation 17. Only ‘change of circumstance claimants’ are taken outside of regulation 17. This is a small proportion of those being transferred from DLA to PIP. It is not just a change in law that affects their entitlement but a change in fact. If the change of circumstance is for the better then ordinarily such claimants are entitled to the higher rate up to the date of the decision reducing (or removing) the entitlement to the benefit. The claimants would not require the higher rate payment for an additional 28 days because their situation has improved. If, however, the person’s ‘change of circumstances’ are for the worse, then it is right that an enhanced entitlement is backdated to the time when the claimant’s needs in fact became greater.

Formulation

22. The parties agree that the appellant satisfies the definition of ‘transfer claimant’ in regulation 2(1) of the Transitional Provisions Regulations. A ‘transfer claimant’ is “*a notified person who claimed personal independence payment in response to a notification sent by the Secretary of State under regulation 3(1)...*”. The appellant notified the Secretary of State of a change in her circumstances and she, under regulation 3(1), notified her that she should make a claim for PIP, as regulation 3(5) requires him to do. In response to this notification the appellant made a claim for PIP. This puts the appellant clearly within the definition of a ‘transfer claimant’.

23. The question then is whether ‘transfer claimants’ are one group who are all to be treated in the same way or, as is submitted by the appellant, a group who include a subset of claimants who are ‘change of circumstance claimants’ who are to be treated differently because regulation 17 does not apply to them. If regulation 17 does not apply, their claims would be treated as supersession claims under regulation 20 which the appellant says has the effect that a claimant, if entitled to PIP, would receive their award from the date on which they made their claim for PIP.

24. I have come to the conclusion that the UT was right in its interpretation of the Regulations. It is accepted that the appellant is a ‘transfer claimant’ and in my judgment regulation 17 is clear. It applies to all ‘transfer claimants’. Regulation 3(5) requires the Secretary of State to notify a person in the appellant’s position, under regulation 3(1) that they must make a claim for PIP. Regulation 3(5) accordingly brings a person in the appellant’s position (notifying the Secretary of State of a change of circumstances) within the definition of a ‘transfer claimant’.

25. As the UT recognised, if the draftsman had intended people in the appellant’s position to be a subset, treated differently to other ‘transfer claimants’, he would have qualified regulation 3(5) and not required a person who was implicitly applying for supersession to make a claim to which regulation 17 would apply.

26. Further, there is no cross-reference to regulation 20(2)(b) in regulation 17. If regulation 20(2)(b) was intended to override regulation 17, I would expect to see some explicit acknowledgement of this in the Regulations. It strains the plain language of regulation 17 to create a subset of claimants that can only be identified by cross-referencing two clauses in two different sets of Regulations and thereby inferring an intended effect. There is no need to do that given the plain language of regulation 17.

27. In my judgment it matters not that if the appellant’s interpretation of the regulations is rejected regulation 20 has little significance. All that regulation 20 seems to provide is that when a person notifies the Secretary of State of a change of circumstances the Regulations relating to a DLA decision superseding an earlier DLA decision will not apply and the notification will be taken as satisfying the requirement of notifying the Secretary of State of a change of circumstances for the purposes of PIP. It may be unnecessary for a claimant to notify the Secretary of State of a change in her circumstances for the purposes of adjusting her benefit entitlement before an assessment to determine her entitlement to PIP has taken place, but it is too great a leap to conclude from that proposition that regulation 20 has a different purpose not supported by the language of the Regulations viewed as a whole.

28. The reference to Regulation 38(4) of Claims and Payments Regulations makes it clear that by notifying a change of circumstances for DLA, the claimant has thereby discharged any obligation to do so for the purposes of PIP. Regulation 20(2)(b) is included for the avoidance of doubt by making something implicit in the Regulation explicit. The appellant’s skeleton argument does not attempt to explain how the language of these provisions bears in anyway upon the date from which a PIP award should take effect.

29. Finally, the appellant’s argument undermines the “cliff-edge” protection. Putting to one side the assertion that ‘change of circumstance claimants’ is a very small subset, a change in factual circumstances complicates the assessment and increases the uncertainty for

claimants. People deemed to be better off are equally in need of the certainty of maintaining their benefit for 28 days after the decision in relation to PIP is made.

30. The UT was correct in rejecting the interpretation of the Regulations argued for by the appellant. I would dismiss ground one of this appeal.

Ground two

31. The appellant originally submitted in writing that the UT erred in failing to adopt the structured approach to Article 14 ECHR set out in *Michalak v London Borough of Wandsworth* [2002] EWCA Civ 271 [2003] 1 WLR 617. Specifically, it was submitted that the UT erred in not identifying the correct comparator before proceeding to the question of objective justification. In oral submissions the argument from *Michalak* was not pursued and it was acknowledged that later case law, which I need only summarise has moved away from an overly structured approach.

32. The appellant did however maintain that the Transitional Provision Regulations are discriminatory under Article 14 ECHR when taken together with Article 1 of Protocol 1 because they treat her less favourably than an otherwise similar claimant who makes a new claim for PIP without having previously claimed DLA.

33. Dealing first with the approach to be taken. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 at [134] Baroness Hale said that a “rigidly formulaic approach is to be avoided”. In *R (Carson) v SSWP* [2005] UKHL 37; [2006] 1 AC 173 at [3] Lord Nicholls said that “The essential question is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny... 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.” And in *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 at [23] Baroness Hale said “... the law requires that their circumstances are the same or not materially different from one another.” And at [24]: “... the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether “differences in otherwise similar situations justify a different treatment”.” To put it in simple terms: what are the reasons for the differences in treatment and do they amount to objective and reasonable justification?

34. The approach set out in the case law was that adopted by the UT and no serious submission has been made to the contrary. The UT did identify a comparator, new PIP claimants, but focused its analysis on whether the difference in treatment between DLA entitled persons and new PIP claimants was justified. That approach is consistent with the Strasbourg jurisprudence and with the domestic case law that I have summarised above.

35. The appellant submits that whether or not the general approach of the UT was correct, the comparator should have been a successful PIP supersession claimant in an analogous position to the appellant. She submits that the UT erred in treating all ‘change of circumstance claimants’ (that is, including PIP losers and PIP neutrals) as comparators. She submits that it is the appellant’s less favourable treatment in comparison with a PIP supersession claimant that calls for objective justification. If the UT had used the correct

comparator the justifications relied on by the Secretary of State could not have been accepted.

36. That calls for further analysis. The appellant asks the court to consider three aspects of the purported justification while keeping the principal complaint in mind. Those aspects are i) avoiding the cliff edge, ii) practical difficulties, and iii) cost. I shall take each in turn.

37. As to avoiding the cliff edge: the appellant says that in relation to claimants who have had a change in condition, it is their condition and potentially their needs that have changed such that persons could reasonably anticipate a change of benefit entitlement (in either direction) as a result of that change. Those whose conditions have improved can expect a reduction in benefit anyway so no cliff-edge protection is needed. Those whose conditions have deteriorated and have had their supersession claims allowed will not need cliff edge protection. If the person's benefit is reduced the reduction only takes place from the point of determination (this always having been a risk in any supersession claim). The cliff edge rationale could only apply to PIP losers but they are not the relevant comparator. The UT erred in relying on the treatment of PIP losers to justify the treatment of PIP winners.

38. As to practical difficulties: the appellant says that the UT relied, by way of objective justification, on the fact that different DLA claimants will be transferred to PIP on different dates as providing a *prima facie* justification for fixing the date of transfer for a DLA entitled person who is a PIP winner on a different date from that fixed for a new PIP claimant. She submits that she did not complain about different dates of transfer. She accepts that there needed to be a phased transition given the number of transitioning claimants but maintains that this should not have determined the date from which her claim was paid to her disadvantage, and that is it is not a justification in fact.

39. As to cost saving: the UT accepted that the cost of backdating would be in the hundreds of millions of pounds sterling. The appellant submits that this justification is flawed. A discriminatory rule of practice can only be justified by reference to a legitimate aim other than the simple saving of cost. In any event, the appellant says that the Secretary of State has wildly overstated the cost to the public purse of backdating claims for people in the appellant's position. It is submitted that on the Secretary of State's figures only 1.4 per cent of all DLA entitled persons who will receive more by way of PIP than DLA will fall to be considered under regulation 20(5).

40. The Secretary of State submits that the transitional scheme as a whole, and the 28 day rule, is manifestly objectively justified in relation to any difference in treatment between 'transfer claimants' and new PIP claimants. The whole point of the Transitional Provisions Regulations is to address the difference in starting points between DLA entitled persons who have a DLA award on which they are likely to place financial reliance, and new PIP claimants who have no such award, and where the transitional scheme operates for a limited period of time precisely so that, at the end of the process, both groups are subject to the same rules under PIP, accordingly there are limits to the extent to which comparison between these groups is meaningful.

41. The difference in situations and the policy aims of the transitional scheme, including the protection of PIP losers from the cliff-edge, are such that it was objectively justifiable to subject transfer claimants as a whole to the 28 day rule. The Secretary of State submits there was absence of suitable alternatives which do not either (a) defeat the policy aim of avoiding

the cliff-edge, (b) give advantages to transfer claimants which are not more generous than for new PIP claimants and/or (c) have unacceptable costs implications.

Formulation

42. I note that the appellant presents a narrower argument before this court than the argument put to the UT. Before the UT she submitted that all PIP winners should benefit from backdating. In her skeleton argument she now argues that only a sub- group of transfer claimants who have notified a change of circumstances should have their claims backdated.

43. It is perhaps important to reflect that in considering justification in the context of social security benefits, a court will only find that a measure lacks a legitimate aim or is disproportionate to that aim if it concludes that the justification advanced by the Secretary of State is “manifestly without reasonable foundation” (see, for example Baroness Hale in *Humphreys v HMRC* [2012] UKSC 18 [2012]; 1 WLR 1545 at 1552 and Lord Wilson JSC in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250 at [23] to [27] inclusive). It is legitimate for policies to use ‘bright lines’. In drawing up a policy, it may be impossible to do perfect justice to everyone affected but the court will subject justification to the most careful scrutiny. The appellant did not disagree with the approach described in the authorities that I have identified.

44. In my judgment the Secretary of State has objectively justified the difference in treatment that is provided for in the Regulations. The appellant submits that cliff- edge protection offered to ‘transfer claimants’ who are entitled to less money under PIP than DLA (PIP losers) cannot be used to justify the treatment of the claimant because she was a PIP winner. I am not persuaded by this submission. The Transfer Provisions Regulations apply to all DLA entitled persons whether they be PIP winners or PIP losers. It is correct that at the end of the process PIP winners are left worse off financially than they would be if their entitlement was backdated. However, as the Secretary of State submits, the cliff-edge justification is not just about the end of the process. It is about providing certainty to all claimants, whether or not they are ultimately winners or losers, about their income for the assessment period.

45. Moreover, the appellant submits that those who notify the Secretary of State of a change of circumstances do not need cliff-edge protection, whether they are PIP winners or losers, because their change in factual circumstances should lead them to reasonably anticipate a change in benefit entitlement. This, as the Secretary of State notes, is only true if, for DLA entitled persons who notify a change of circumstances, the dominant relevant factor in whether their benefit entitlement will go up or down is that their factual circumstances have altered.

46. PIP made major changes to the criteria governing the award of benefit. It could be the change of law or the change of factual circumstances that affect the benefit awarded. Even for DLA entitled persons who notify a change of circumstances there is a need to provide certainty by providing cliff-edge protection. Accordingly, I agree that the Secretary of State had a legitimate aim in treating DLA entitled persons who notify a change of circumstances differently to new PIP claimants, who are not already in receipt of a benefit.

47. Before this court, the Secretary of State has not submitted that her case rests largely on practical concerns or that is that this factor provides a sufficient justification in itself. The practical concerns were an additional factor, relevant to the overall proportionality of the Transitional Provisions Regulations scheme. I agree that the UT was entitled to take them into account when assessing the overall justification in the difference of treatment.

48. One of the patent aims of introducing PIP was to save public expenditure. Before this court, the Secretary of State accepts there are limits to which cost-savings in and of themselves can be a legitimate aim to justify the discriminatory effect of a measure. The Secretary of State submits that her aim in introducing the Transitional Provisions Regulations was not solely to save costs. It is accepted that the 28-day rule was also introduced to give cliff-edge protection to those already entitled to DLA. Again, in that context the general aim to reduce public expenditure is a factor that can be taken into consideration.

49. I have therefore come to the conclusion that the UT was correct in its approach to the Article 14 ECHR question. The appellant has not undermined the justifications advanced by the Secretary of State that were accepted by the UT. I would dismiss ground two of the appeal.

Conclusion

50. For the reasons that I have given, I would dismiss this appeal.

Lord Justice Peter Jackson:

51. I agree.

Lady Justice Sharp:

52. I also agree.

Appendix to the Judgments:

The Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI 2013/387)

Regulation 2

“transfer claimant” means a person who is either-

- (a) A notified person who has claimed personal independence payment in response to a notification sent by the Secretary of State under regulation 3(1), or
- (b) ...

Regulation 3

Invitations to persons entitled to disability living allowance to claim personal independence payment

(1) At any time after 27 October 2013, the Secretary of State may by written notification invite a DLA entitled person to make a claim for personal independence payment.

(2) The Secretary of State must not send a notification under paragraph (1) to any person who, on 8 April 2013, was 65 or over.

(3) The Secretary of State must send a notification under paragraph (1) to a DLA entitled person who reaches 16 after 27 October 2013 as soon as reasonably practicable after the person reaches that age.

(3A) Paragraph 3 does not apply unless

- (a) the Secretary of State has specified a relevant date which applies in the case of the DLA entitled person, and
- (b) that person reaches 16 on or after that relevant date.

(4) Paragraph (3) does not apply to a DLA entitled person whose entitlement, on the day that the person reaches 16, is on the basis that the person is terminally ill within the meaning given by subsection (2) of section 66 (attendance allowance for the terminally ill) of the 1992 Act.

(5) Where, after 27 October 2013, a DLA entitled person who has neither

- (a) been sent a notification under paragraph (1), nor
- (b) made a claim for personal independence payment under regulation 4, notifies the Secretary of State of a change of circumstances other than a change to which paragraph (6) applies, the Secretary of State must, as soon as reasonably practicable, send the person a notification under paragraph (1).

(5A) Paragraph (5) does not apply unless –

- (a) the Secretary of State has specified a relevant date which applies in the case of the DLA entitled person, and
- (b) that person notifies the Secretary of State of the change of circumstances on or after that relevant date.

(6) This paragraph applies to a change of circumstances where the change notified is that the DLA entitled person is to become or has become absent, whether temporarily or permanently, from Great Britain.

Regulation 17

Procedure following and consequences of determination of claim for personal independence payment

- (1) Upon an assessment determination being made on a claim by a transfer claimant—
- (a) the Secretary of State must, as soon as practicable, send the claimant written notification of the outcome of the determination, and
 - (b) the claimant's entitlement to disability living allowance shall terminate, except where paragraph (2) of regulation 13 applies to the claimant, on the last day of the period of 28 days starting with the first pay day after the making of the determination.
- (2) Where the outcome of an assessment determination is an award in respect of either or both components of personal independence payment, the claimant's entitlement to personal independence payment starts with effect from the day immediately following—
- (a) the day referred to in paragraph (1)(b),
 - or
 - (b) where paragraph (2) of regulation 13 applies to the claimant, the day immediately after that on which the claimant's entitlement to disability living allowance terminated under regulation 13(1).
- (3) The notification referred to in paragraph (1) must state—
- (a)... the day on which the claimant's entitlement to disability living allowance will terminate in accordance with paragraph (1)(b), and
 - (b) if personal independence payment is awarded, the day on which the claimant's entitlement to personal independence payment starts in accordance with paragraph (2).
- (4) This paragraph applies to a person—
- (a) whose claim for disability living allowance was refused,
 - (b) who claimed personal independence payment after that refusal, and
 - (c) who, as a result of the determination of legal proceedings initiated under the 1998 Act in relation to that refusal, becomes entitled, after the assessment determination, to disability living allowance.
- (5) The entitlement of a person to whom paragraph (4) applies to disability living allowance shall terminate—
- (a) where personal independence payment is awarded, on the day before that on which the person becomes entitled to personal independence payment, and
 - (b) where personal independence payment is not awarded, on the last day of the period of 28 days starting with the first pay day after the making of the assessment determination.”

Regulation 20

Notifications of change of circumstances

20.— (1) This regulation applies where—

(a) a person notifies the Secretary of State of a change of circumstances, and

(b) paragraph (3), (4) or (5) applies. (2) If this regulation applies—

(a) the notification shall not be regarded as relating to disability living allowance and accordingly neither section 10(1) (decisions superseding earlier decisions) nor any other provision of the 1998 Act shall apply, and

(b) the notification to the Secretary of State must be treated in all respects as if it were a notification under paragraph (4) of regulation 38 (evidence and information in connection with an award) of the Claims and Payments regulations of a change of circumstances which the person might reasonably be expected to know might affect the continuance of entitlement to personal independence payment.

(3) This paragraph applies where a notified person notifies the Secretary of State of a change of circumstances before the person makes a claim for personal independence payment.

(4) This paragraph applies where a transfer claimant notifies the Secretary of State of a change of circumstances.

(5) This paragraph applies where a DLA entitled person notifies the Secretary of State of a change of circumstances and, as a result, the Secretary of State is required by regulation 3(5) to send a notification under regulation 3(1) inviting the person to claim personal independence payment.

(6) Paragraphs (3) and (4) do not apply where the change of circumstances notified is that the notified person or the transfer claimant, as the case may be, is to become or has become absent, whether temporarily or permanently, from Great Britain.”

Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380)

Part 3 Evidence, information and notification of changes of circumstance

Regulation 38

Evidence and information in connection with an award

(1) This regulation, apart from paragraph (7), applies to any person entitled to benefit, other than a jobseeker’s allowance, and any other person by whom, or on whose behalf, payments by way of such a benefit are receivable.

(2) Subject to regulation 8 of the Personal Independence Payment Regulations, a person to whom this regulation applies must supply in such manner as the Secretary of State may determine and within the period applicable under Regulation 45(4)(a) of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 such

information or evidence as the Secretary of State may require for determining whether a decision on the award of benefit should be revised under section 9 of the social Security Act 1998 or superseded under section 10 of that Act.

(3) A person to whom this regulation applies must supply in such manner and at such times as the Secretary of State may determine such information or evidence as the Secretary of State may require in connection with payment of the benefit awarded.

(4) A person to whom this regulation applies must notify the Secretary of State of any change of circumstances which the person might reasonably be expected to know might affect –

(a) the continuance of entitlement to benefit; (b) the amount of benefit awarded;

or

(c) the payment of benefit,

as soon as reasonably practicable after the change occurs.

Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381)
Regulation

35.- Effective dates: Secretary of State decisions

(1) Schedule 1 (effective dates for superseding decisions made on the ground of a change of circumstances) makes provision for the date from which a superseding decision takes effect where there has been, or it is anticipated that there will be, a relevant change of circumstances since the earlier decision took effect.

[.....]

38.- Correction of accidental errors

[...]

(4) In calculating the time within which an application may be made under regulation 5 (revision on any grounds) for a decision to be revised, no account is to be taken of any day falling before the day on which notice of the correction was given.