IN THE UPPER TRIBUNAL **Case No.** CPIP/2980/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr Justice Charles, Chamber President
Upper Tribunal Judge Rowland
Upper Tribunal Judge Wright

The claimant was represented by Mr Brendan McGurk of counsel and Dr Christopher Strothers, solicitor, of Arnold & Porter (UK) LLP.

The Secretary of State was represented by Mr Tim Buley of counsel, instructed by the Government Legal Department.

Decision: The claimant's appeal is dismissed

REASONS FOR DECISION

1. This is an appeal, brought by the claimant, against a decision of the First-tier Tribunal dated 10 July 2015 whereby it dismissed the claimant's appeal against a decision of the Secretary of State dated 7 November 2014, as revised on 19 January 2015, to the effect that the claimant's award of disability living allowance ("DLA") comprised of the lower rate of the mobility component and the lowest rate of the care component terminated on 9 December 2014 and she was entitled to personal independence payment ("PIP") comprised of the enhanced rate of the daily living component from 10 December 2014. The appeal raises an important issue as to the legality of the Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI 2013/387) (the "Transitional Regulations").

Background

2. Part 4 of the Welfare Reform Act 2012 (*i.e.*, sections 77 to 95) introduces PIP and provides for the abolition of DLA which is payable under the Social Security Contributions and Benefits Act 1992. The benefits are both payable to those with long-term disabilities and the intention is obviously that PIP will replace DLA. There are structural similarities between the benefits, but also major differences in the tests for entitlement.

3. Entitlement to both benefits is generally subject to the relevant level of disablement having been present for at least three months and to it being expected to last for a lengthy period – six months in the case of DLA and nine months in the case of PIP. Both benefits are subject to the requirement in section 1 of the Social Security Administration Act 1992 that there has been a claim and the benefits are also both subject to the same adjudication regime under the Social Security Act 1998. There is no provision for backdating a claim for either benefit. Thus there is no entitlement before the date of the claim and both an initial claim and an

application for supersession under section 10 of the 1998 Act on the ground of change of circumstances are, subject to the three-month qualifying period, generally effective from the date of 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 circumstances earlier, from the date of the change. The mere provision of information often implies an application for supersession and so the legislation applicable in respect of each benefit expressly provides that notification of a change of circumstances may be treated as such an application.

4. Each benefit consists of two components, a care component and a mobility component in the case of DLA and a daily living component and a mobility component in the case of PIP. The care component of DLA is payable at three rates but the mobility component of DLA and both components of PIP are payable at two rates. The daily living component of PIP is paid at the same rates as the two highest rates of the care component (£81.30 pw and £54.45 pw at the material time in 2014) and the mobility component rates are the same for both benefits (£56.75 pw and £21.55 pw at the material time). The lowest rate of the care component of DLA (£21.55 pw at the material time) is therefore effectively being abolished. Moreover, the grounds upon which a claimant may be entitled to either component of PIP are wholly different from the conditions for entitlement to either component of DLA.

5. The proposal to replace DLA with PIP was originally taken by the Government in 2010. At that time, there were 3.2 million recipients of DLA, of whom 1.8 million were aged at least 16 but under 65, and thus regarded in the Government's terminology as of "working age", a number then expected to increase to 2.2 million by 2016/17. One reason given by the Government for the introduction PIP is that it is intended to be better focused on the more seriously disabled than DLA, but it is also an avowed purpose of the new scheme that it should reduce public expenditure. It was expected that the number of claimants would be reduced and that £2,240,000,000 pa would be saved once those of working age were transferred to the PIP régime.

6. Plainly it would have been impractical to introduce PIP and abolish DLA for all claimants of working age at the same time when each claimant would need a new individual assessment of his or her entitlement to the new benefit. Accordingly, the new legislation is being brought into force gradually. Section 150 of the 2012 Act provides for Part 4 to be brought into force by commencement order and further provides that such an order may appoint different days for different purposes and different days for different areas. Most of the provisions in the 2012 Act relating to PIP were brought into force in parts of the North of England from 8 April 2013 and they were brought into force for the rest of Great Britain from 10 June 2013, subject in both cases to provision made by the Transitional Regulations, through which the process of transferring claimants from DLA to PIP is being managed.

The Transitional Regulations

7. Section 93 of the 2012 Act provides –

> "**93.–**(1) Regulations may make such provision as the Secretary of State considers necessary or expedient in connection with the coming into force of any provision of this Part.
> (2) Schedule 10 (transitional provision for introduction of personal independence payment) has effect."

Paragraph 1(1) of Schedule 10 provides that –

> "Regulations under section 93 may in particular make provision for the purposes of, or in connection with, replacing disability living allowance with personal independence payment."

Paragraphs 2 to 4 of the Schedule provide that such provision includes a number of specified matters. It is not necessary to set them out and neither is it necessary to set out section 94 which makes provision as to the way that regulation-making powers in Part 4 of the Act must, or may, be exercised.

8. The Transitional Regulations have the effect that those who were aged 65 or over on 8 April 2013 cannot claim PIP and neither can any person who is under 16. They also have the effect that no-one who is entitled to claim PIP may claim DLA, although until 27 October 2013 there was an exception for those with fixed-term awards of DLA which were due to expire before the end of February 2014.

9. From 28 October 2013, the process began of transferring those of working age entitled to DLA to the PIP régime. 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 they have failed to claim PIP despite having been given a further opportunity to do.

10. Regulation 3 of the Transitional Regulations provided at the material time –

> "**Invitations to persons entitled to disability living allowance to claim personal independence payment**
> **3.**—(1) At any time after 27th 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 8th April 2013, was 65 or over.
> (3) Subject to paragraphs (3A) and (4), the Secretary of State must send a notification under paragraph (1) to a DLA entitled person who reaches 16 after 27th October 2013 as soon as reasonably practicable after the person reaches that age.
> (3A) …
> (4) …
> (5) Subject to paragraph (5A), where, after 27th 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."

The terms "change of circumstances" which appears in regulation 3(5) and "relevant date" which appears in regulation 3(5A) are defined in regulation 2(1) –

> ""change of circumstances" means a change of circumstances which a person might reasonably have been expected to know might affect the continuance of that person's entitlement to disability living allowance (by ending entitlement to one component or both components or resulting in entitlement to one or both components being at a different rate);"
>
> ""relevant date" means the date, specified by the Secretary of State in relation to any category of DLA entitled person, from which the Secretary of State is satisfied that satisfactory arrangements will be in place to assess the entitlement of persons in that category to personal independence payment".

11. As the reference in regulation 3(5)(b) to "a claim for personal independence payment under regulation 4" suggests, a DLA entitled person aged at least 16 but under 65 may make a claim for PIP voluntarily without being invited to do so under regulation 3(1). Such a person is, by virtue of regulation 2(1), known as "a voluntary transfer claimant". The term "transfer claimant" refers both to a person who has made a claim in response to a notification under regulation 3(1) and to a voluntary transfer claimant.

12. At the material time, regulation 17 provided –

"**Procedure following and consequences of determination of claim for personal independence payment**
17.—(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, …, 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) ….
(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."

13. Regulation 20 provided –

"**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 (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."

The facts of this case

14. The claimant 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. It is not clear when she was first awarded DLA but she certainly had an

award of the lowest rate of the care component and the lower rate of the mobility component from 8 January 2012. It is stated in the Secretary of State's submission to the First-tier Tribunal that she notified the Secretary of State of a change of circumstances and was therefore invited to claim PIP, which she did by telephone on 15 May 2014. The Secretary of State has no record of what information the claimant provided when notifying the change of circumstances but the claimant's representative before the First-tier Tribunal, Mr Nisar Ali, a welfare rights officer of Sandwell Metropolitan Borough Council, stated that she had applied for supersession of her award of DLA because her condition had deteriorated. The claimant was asked to complete a PIP2 form, which was received by the Secretary of State on 2 June 2014. The only document relating to DLA he provided to the health care professional was a factual report from the claimant's GP dating from when she had made a claim for DLA in 2006. A face-to-face consultation with the health care professional took place at the claimant's home on 18 September 2014. In the light of the health care professional's advice, the Secretary of State notified the claimant on 11 November 2014 that she was not entitled to PIP and that her award of DLA would terminate on 9 December 2014.

15. With the support of her GP, the claimant asked for what the Secretary of State calls "reconsideration" but, at least in this case, was technically revision under section 9 of the 1998 Act. On 20 January 2015, the Secretary of State informed the claimant that she was entitled to the enhanced rate of the daily living component of PIP from 10 December 2014 but was not entitled to the mobility component.

16. With the support of Mr Ali, the claimant appealed to the First-tier Tribunal under section 12 of the 1998 Act on the ground that the award should have been effective from the date of claim on 15 May 2014. The Secretary of State resisted the appeal on the ground that the award was rightly made from 10 December 2014 under regulation 17(2) of the Transitional Regulations. Mr Ali replied to the effect that the legislation was discriminatory in breach of Article 14 of the European Convention of Human Rights, taken with Article 1 of Protocol 1. The First-tier Tribunal dismissed the claimant's appeal, stating that she "suffered no hardship, as she moved from DLA to PIP without enduring any loss of payment for the entire period".

17. The First-tier Tribunal therefore seems to have been under a misapprehension as to the nature of the claimant's case. She had been entitled to only £43.10 pw while in receipt of DLA but was entitled to £81.30 pw PIP. The difference was £38.20 pw, amounting to some £1,100 in total over the period of almost 30 weeks in issue, quite apart from the impact there would have been on her entitlement to income-related employment and support allowance during that period. The claimant'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. In any event, the claimant now appeals, with permission granted by Upper Tribunal Judge Rowland following an oral hearing and a further round of written submissions in the course of which the parties' main arguments have been refined.

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

18. Before turning to those arguments, it is necessary to consider an issue as to the construction of the Transitional Regulations that arose during the course of the hearing before us as a result of the Chamber President asking what regulation 20(2)(b) of the Transitional Regulations meant and what its purpose was. It is the Secretary of State's case that the Transitional Regulations have the effect, in the circumstances of this case, (a) that the claimant's notification of the change in her circumstances was, by virtue of regulation 20(2)(a) and (5), not treated as an application for supersession of the award of DLA as it otherwise would have been, (b) that it led to her being invited under regulation 3(5) to make a claim for PIP and (c) that, following the determination of the claim, the award of DLA terminated in accordance with regulation 17(1)(b) and the award of PIP started on the following day by virtue of regulation 17(2)(a). Until the hearing, that approach to the construction of the Regulations was not challenged by the claimant. At first sight, therefore, regulation 20(2)(b) merely has the effect that the notification of the change of circumstances which is not to be taken into account in relation to DLA should instead be taken into account in the determination of the claim for PIP. However, as the Secretary of State conceded, it is not obviously necessary to have a provision to that effect and the reference to regulation 38 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380) seems a little odd if that is the only effect intended.

19. Regulation 38 of the Claims and Payments Regulations provides –

> "**Evidence and information in connection with an award**
> **38.**—(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) ….
> (3) ….
> (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.
> (5) A notification of any change of circumstances under paragraph (4) must be given—
> (a) in writing or by telephone (unless the Secretary of State determines in any case that notice must be given in a particular way or to accept notice given otherwise than in writing or by telephone); or
> (b) in writing if in any class of case the Secretary of State requires written notice (unless the Secretary of State determines in any case to accept notice given otherwise than in writing),
> and must be sent or delivered to, or received at, the appropriate office.
> …"

20. The point having been raised, Dr Strothers submitted that it was necessary to give regulation 20(2)(b) of the Transitional Regulations some effective meaning and that the reference to regulation 38 of the Claims and Payments Regulations shows that what the Transitional Regulations do is treat the DLA award as a PIP award so that the application for supersession takes effect as such and regulation 17, which applies only to claims, does not apply. The result is that, if favourable to the claimant, the decision on the supersession takes effect from the date of the application by virtue of section 10(5) of the 1998 Act as such applications normally do.

21. Ingenious as that argument is, we do not accept it. The reference to regulation 3(5) in paragraph (5) of regulation 20 (which Dr Strothers rightly suggested ought logically to precede paragraphs (3) and (4)) shows that the draftsman was well aware of the relationship between the two regulations and, if the draftsman had intended the approach suggested by Dr Strothers, he or she would have qualified regulation 3(5) and not required a person who, by notifying a change of circumstances, was implicitly applying for a supersession to make a claim to which regulation 17 would apply. In any event, we can see no reason why the draftsman should have wished to create such a complicated device, when altering the date from which an award was effective on a claim triggered by a notification of a change of circumstances in certain cases would have been so much simpler had he or she wished to ensure that such a claim took effect from the date of claim. In our judgment, the Transitional Regulations have the effect contended for by the Secretary of State, unless they are partly to be disapplied in the light of the arguments considered below.

22. We remain uncertain as to the thinking behind regulation 20(2)(b) but, to the extent that the language echoes that of the definition of "change of circumstances" in regulation 2(1), it may simply have been for the purpose of ensuring that the information was regarded as having been provided for PIP purposes even though originally provided for DLA purposes, unnecessary as such an express provision might have been. In particular, old medical reports supplied in connection with a claim for DLA may be considered relevant and taken into account on a claim for PIP, as was done in this case, and regulation 20(2)(b) may be intended to ensure that, where such material is taken into account, a claimant is not penalised by way of a civil penalty or prosecution if he or she does not include in the PIP claim form information given when notifying at the times covered by paragraphs (3) to (5) a relevant change of circumstances that has occurred since the medical report was written.

23. Whatever the exact purpose of the provision, we observe that it is likely to be undermined if, as in this case, the Secretary of State does not keep a record of the information provided as to the change of circumstances.

The main arguments in summary

24. The claimant's principal argument, advanced on her behalf primarily by Mr McGurk, is that the Transitional Regulations result in discrimination that is unlawful

by virtue of Article 14 of the European Convention on Human Rights, taken with Article 1 of Protocol 1. Article 14 provides –

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

25. The difference in treatment that gives rise to the complaint of discrimination arises from regulation 17(2) which has the effect that a claim for PIP made by a person who is entitled to DLA is effective from a date some weeks after it is made, whereas a claim for PIP made by anyone else is generally effective from the date of claim and an application for supersession of an award of DLA is also generally effective from the date of the application.

26. It is now accepted by the claimant that regulation 17(2) works to the advantage of those claimants of DLA whose entitlement to PIP is less than their entitlement to DLA ("PIP losers") or whose entitlement to PIP is the same as their entitlement to DLA ("PIP neutrals"). Those who are disadvantaged are those who, like the claimant, are entitled to a greater amount of PIP than their former entitlement to DLA ("PIP winners"). The claimant also accepts that, if regulation 17(2) were to be disapplied in any case, it would be necessary also to disapply regulation 17(1)(b) and terminate the award of DLA from the day before the PIP award became effective, so that arrears of PIP would be reduced by the amount of DLA paid before the PIP award was implemented.

27. The claimant therefore advances her primary argument on discrimination by reference to all PIP winners and compares them to successful new PIP claimants.

28. An alternative argument on discrimination is advanced by the clamant by reference to a narrower class of PIP winners (the "Narrower Class" of PIP winners), namely those PIP winners who, not only claimed PIP following an invitation issued as a result of having notified the Secretary of State of a change of circumstances relating to their awards of DLA (see regulation 3(5)), but also would have been awarded more DLA had their awards been superseded in the light of the change of circumstances. The claimant submits that, had she been assessed for DLA when she claimed PIP, she would have secured entitlement to the middle rate of the care component instead of the lowest rate, an increase of £32.90 pw. This is not much less than the £38.20 pw that she has lost on her primary case. The Secretary of State does not concede that the claimant would have qualified for the middle rate of the care component, but he accepts that it is possible that she would have done so in the light of his findings when PIP was awarded and so that it is possible that she is in the Narrower Class of PIP winners.

29. In respect of both of the claimant's discrimination arguments, the Secretary of State accepts that the case falls within the scope of Article 1 of Protocol 1 but submits that the difference of treatment is not contrary to Article 14 for two reasons. First, he submits that it is not on the ground of "status" and secondly he submits that it is anyway justified.

30. As a further argument in respect of the Narrower Class of PIP winners, the claimant submits that the Transitional Regulations are *ultra vires* to the extent that the combined effect of regulation 17(2) and regulation 20(2)(a) is that a claimant entitled to DLA whose disablement has got worse is unable during the time taken to make a PIP assessment to secure the amount of benefit appropriate to his or her needs under either the DLA régime by way of supersession for change of circumstances of the DLA decision or the PIP régime. This is a rationality argument. It is submitted that the effect of the legislation goes further than is permitted by section 93(1) of the 2012 Act, as it could not rationally be regarded as either necessary or expedient in connection with the coming into force of the provisions of Part 4 of that Act.

31. The Secretary of State argues that he was entitled to regard the Transitional Regulations as necessary and expedient, advancing much the same arguments as he advances for justifying the difference in treatment in relation to the discrimination claim.

32. There is also a substantial dispute between the parties as to whether the Upper Tribunal can give effective relief in this case even if the claimant succeeds in showing that the Regulations give rise to unlawful discrimination or are otherwise *ultra vires*. Had the claimant succeeded as regards either of those other issues, we would have sought further argument on the question of remedy.

Discrimination – the proper approach to the questions of status and comparators

33. The first issue argued before us was whether the difference of treatment between DLA entitled PIP winners and successful claimants of PIP who were not previously entitled to DLA was on a ground outlawed by article 14. The Secretary of State makes the simple point that if both the claimant and the comparator are equally disabled, the ground upon which they are treated differently cannot be disability. The claimant, on the other hand, refers to *Mathieson v Secretary of State for Work and Pension* [2015] UKSC 47 and argues that it does not matter that the comparator is also disabled; the relevant status is still being a disabled person.

34. *Mathieson* was decided against the background of earlier cases of which three are of particular significance. In *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 WLR 1434 at [21] *et seq.*, Baroness Hale of Richmond, with whom the other members of the House agreed, identified "[s]everal important points" about Article 14. First, it is different from the Fourteenth Amendment to the United States' constitution because it applies only to matters within the ambit of the Convention, a point that is not in issue in the present case. Secondly, it is also different from United Kingdom anti-discrimination laws and, in particular –

> "24. … the Classic Strasbourg statements of 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'. …"

She continued –

> 26. Thirdly, of course, the difference of treatment has to be on a prohibited ground. Article 14 does not purport to challenge all possible classifications and distinctions made by the law or government policy. The list of prohibited grounds is long and open-ended, but it must be there for a purpose and cannot therefore be endless: see *R (S) v Chief Constable of the South Yorkshire Police Force* [2004] 1 WLR 2196; and further in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484. In general, the list concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to change. …"

35. In *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311, the House of Lords built upon the foundations laid by Lady Hale. The leading speech was given by Lord Neuberger of Abbotsbury but he and the other members of the House also agreed with additional observations made by Lord Walker of Gestingthorpe –

> "5. The other point on which I would comment is the expression "personal characteristics" used by the European Court of Human Rights in *Kjeldsen, Busk, Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, and repeated in some later cases. "Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). 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. There is an illuminating discussion of these points (contrasting Strasbourg jurisprudence with the American approach to the Fourteenth Amendment) in the speech of Baroness Hale of Richmond in *A L (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434, paras 20-35."

36. In *Clift,* mentioned by Lady Hale in *AL (Serbia)*, Lord Bingham of Cornhill had said in the House of Lords –

> "I do not think that a personal characteristic can be defined by the differential treatment of which a person complains. But here Mr Clift does not complain of the

> sentence passed upon him, but of being denied a definitive Parole Board recommendation. Is his classification as a prisoner serving a determinate sentence of 15 years or more (but less than life) a personal characteristic? I find it difficult to apply so elusive a test. But I would incline to regard a life sentence as an acquired personal characteristic and a lifer as having an "other status", and it is hard to see why the classification of Mr Clift, based on the length of his sentence and not the nature of his offences, should be differently regarded."

37. Nonetheless he had declined to find in favour of Mr Clift on the ground that the idea that a personal characteristic could be acquired had not been explicitly or impliedly authorised by the Strasbourg jurisprudence. Mr Clift took his case to the European Court of Human Rights. In *Clift v United Kingdom* (application No 7205/07), the Court decided in his favour, saying –

> "59. The Court therefore considers it clear that while it has consistently referred to the need for a distinction based on a "personal" characteristic in order to engage Article 14, as the above review of its case-law demonstrates, the protection conferred by that Article is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent. Accordingly, even if, as the Government contended, a *ejusdem generis* construction were appropriate in the present case, this would not necessarily preclude the distinction upon which the applicant relies.
>
> 60. … The question whether there is a difference of treatment based on a personal *or identifiable* characteristic … is … to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective …" (our emphasis)

38. This expansion in the understanding of the phrase "personal characteristic" suggests that it is probably unhelpful to place too much weight on the use of the word "status" in the English version of the Convention. Moreover, the words "such as" precede "or other status" as well as the specific examples listed in Article 14 and, as has been noted in many of the cases, in the French version the words are "ou toute autre situation". These considerations in our view accord with Baroness Hale's description of the list as open-ended, and it seems likely that she had an *ejusdem generis* construction in mind when she said that it was not endless.

39. This all leads to the question, which Lord Neuberger left open in *RJM* at [41], "whether, and if so when, it may be appropriate in some cases not to consider the 'status' issue as an entirely self-contained question". Is it better, as Baroness Hale appears to suggest, to consider justification first on the basis that, if there appears to be no satisfactory justification for a difference of treatment, it will become clear whether the lack of justification is due to the difference being based on a personal characteristic or status?

40. *Mathieson* concerned a child, Cameron, who was severely disabled and was entitled to DLA. He was admitted to hospital and his stay exceeded 84 days, whereupon payment of DLA was suspended. He challenged the legislation having that effect. As in the present case, the Secretary of State argued first that any

difference of treatment was not based on a status and secondly that it was in any event justified.

41. Lord Wilson said –

> "19. … Mr Mathieson argues that Cameron's status on 6 October 2010 was that of a severely disabled child who was in need of lengthy in-patient hospital treatment and that, in comparison with a severely disabled child who was not in need of lengthy in-patient hospital treatment, application to Cameron of the 84-day rule discriminated against him contrary to article 14. Any such comparator would need to be a severely disabled child because otherwise he would not be entitled to DLA at all. But disability has degrees of severity and the suggested comparator could presumably be a child with a disability of severity either equal to, or indeed lesser than, that of the child in need of lengthy in-patient hospital treatment.
>
> 20. At first sight Mr Mathieson's contention appears contrived. Does it pass muster? …"

Having considered *AL (Serbia)*, *RJM* and *Clift v United Kingdom*, he decided that it did.

> "23. Decisions both in our courts and in the ECtHR therefore combine to lead me to the confident conclusion that, as a severely disabled child in need of lengthy in-patient hospital treatment, Cameron had a status falling within the grounds of discrimination prohibited by article 14. Disability is a prohibited ground (*Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117). Why should discrimination (if such it be) between disabled persons with different needs engage article 14 any less than discrimination between a disabled person and an able-bodied person? Whether, as in Cameron's case, the person is born disabled or whether he becomes disabled, his disability is or becomes innate; and insofar as in the *RJM* case Lord Walker seems to have had three circles in mind, Cameron's case falls either within the narrowest of them or at least within the one in the middle."

42. Lord Mance said –

> "60. … To my mind, a child hospitalised free of charge (essentially in a NHS, rather than private, hospital) for a period longer than 84 days can be regarded as having a different status to that of a child not so hospitalised. …"

Lady Hale agreed only with Lord Wilson but Lord Clarke and Lord Reed agreed with both Lord Wilson and Lord Mance and on this issue we are satisfied that there was no significant difference in their approaches. The status of Cameron was as a disabled child who required hospital treatment such that he would lose entitlement to DLA under the legislation then in force and the comparator was a disabled child who did not require such hospital treatment. The difference in treatment was due to the difference in that status.

43. In the present case, it is clear that DLA entitled PIP claimants are treated differently from new PIP claimants. Whether or not it is in itself a personal or identifiable characteristic for the purposes of considering whether there has been discrimination in breach of Article 14, being in receipt of DLA obviously reflects the

fact that a claimant is severely disabled and, perhaps more importantly in the present case (because this is what distinguishes DLA entitled claimants of PIP from new claimants), the fact that he or she has been severely disabled for some time. It seems to us that, following *Mathieson*, even if being entitled to DLA is not in itself a personal or identifiable characteristic, it opens the door for an argument that a status can be based on the length of time during which persons have been so disabled that they are entitled to benefit. The identification of the status giving rise to the difference in treatment may seem contrived on this approach, but *Mathieson* shows that that may not be a bar to its success.

44. On the other hand, if the Secretary of State satisfies us that the difference in treatment is justified, the question whether it was due to a status becomes academic.
45. A similar point arises in relation to the question whether the situation of DLA entitled PIP claimants is sufficiently analogous to that of new PIP claimants to require the difference of treatment to be justified. We agree with the Secretary of State that the second point Baroness Hale made about Article 14 in *AL (Serbia)* (see paragraph 34 above) makes it unnecessary to identify an exact, or sufficiently exact, comparator as a free-standing question. Indeed, in our judgment, *all* the issues raised by Article 14 – whether there is a difference of treatment of people in analogous situations, whether such a difference of treatment is on a suspect ground and, if so, whether it can be justified – are inter-related. That is not to say that the identification of an exact, or sufficiently exact, comparator is not a necessary part of the identification of the difference of treatment that is claimed to be on a prohibited ground or a ground that has not been adequately justified. Such an exercise was carried out in *Mathieson* in the context of answering the Secretary of State's contention that the difference in treatment was not based on a relevant status. However, arguments on justification may well demonstrate that a claimed comparator is not in a truly analogous situation, and therefore that the difference in treatment is not actually due to a personal or other identifiable characteristic of the claimant at all, and we agree with the Secretary of State that matters that do not directly affect either the claimant or the identified comparator may be relevant to the question of justification. Moreover, as with status, it is not actually necessary for a tribunal to decide whether the claimed comparator is in an analogous situation if the tribunal is satisfied that the claimed difference in treatment is in any event justified,

46. In these circumstances, we consider it easiest and perhaps necessary, in the present case, to consider the Secretary of State's arguments on justification in relation to the claimant's primary case before saying anything further about status or comparators.

Discrimination – justification in relation to the claimant's primary case, advanced by reference to all PIP winners

47. In *Stec v United Kingdom* [2006] 43 EHRR 1017, it was held –

> "51. … A difference of treatment is … discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means

> employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment …"

The same point has been made domestically in many other cases (see, for example, *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545, at paragraphs [15] to [21]) and has recently been affirmed by the Supreme Court in *R. (Rutherford and others) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 WLR 4550, and it is not controversial in the present case.

48. We have been provided with witness statements from two senior officials in the Department of Work and Pensions who explain the thinking behind both the 2012 Act and the Transitional Regulations which, it is submitted by the Secretary of State, show that there were legitimate aims that have been pursued through proportionate means. Mr Philip Joseph addresses general benefit policy. Mr Bill Hughes addresses operational policy.

49. We have already mentioned that one avowed purpose of the 2012 Act was to save money. Thus, it is not surprising that it was expected that there would be more PIP losers than there would be PIP winners, although the average amount lost by PIP losers and the average amount won by PIP winners would also be a factor. Mr Joseph records that, in January 2012, it was expected that 24% of DLA claimants would be PIP losers who were not entitled to any PIP at all, 27% would be PIP losers who would nonetheless be entitled to some PIP, 22% would be PIP neutrals and 27% would be PIP winners. (A later forecast in December 2012 produced different figures – 26%, 29%, 15% and 29% respectively – and we are told that current figures are different again, but these differences do not materially affect the arguments in this case.) In respect of the last three of those groups – those who would be entitled to PIP – it was an important consideration that they should remain entitled to DLA while being assessed for PIP. In respect of the first two groups – PIP losers – it was an additional consideration that they should remain entitled to DLA for a further four weeks to soften the "cliff edge". That therefore is part of the thinking behind regulation 17(1)(b) and (2) of the Transitional Regulations, which fix the date for the termination of DLA and the commencement of any award of PIP.

50. The main reasons behind those considerations are fairly obvious. It would have been theoretically possible to terminate payments of DLA and then carry out the assessments for PIP and that would have saved more money. However, that would have left claimants without either DLA or PIP during the period of the assessment (as in the case of new claimants) even though 76% of them could expect to be entitled to PIP at the end of the process and would have received a payment of arrears. That in turn would have given rise to discontent and so the administrative cost in dealing with complaints. Moreover, PIP losers would need to time to adjust to the possibility, and then certainty, that their income would be reduced – substantially in some cases – and we are told that that is one reason for the four-week run on period, although another was the operational advantage of having sufficient time properly to terminate the DLA award and then start the PIP one.

51. Alternatively, it would theoretically have been possible to continue payments of DLA during the period of the assessment and then, if the restrictions on the recovery of overpayments under section 71 of the Social Security Administration Act 1992 were disapplied or modified, to seek to recover payments or parts of payments from PIP losers. However, that would have been obviously unattractive, giving rise to a great deal of discontent among claimants and a substantial administrative cost even in cases where recovery was realistically possible.

52. It is therefore accepted by the claimant that the provisions for terminating an award of DLA and awarding PIP from a date four weeks after the decision on PIP entitlement was made are justified in relation to PIP losers and PIP neutrals. However, it is submitted that the provisions are not justified in relation to PIP winners and that there is no reason why PIP winners should be treated in exactly the same way as PIP losers and PIP neutrals. Obviously, the argument for maintaining payments of DLA during the period of assessment would have been as desirable for them as for other claimants. Moreover, of course, at the beginning of the process, PIP winners could not be distinguished from PIP losers and PIP neutrals, but it is submitted that, once the outcome of the assessment was known, it would be possible to award PIP from the date of claim and offset the DLA paid when calculating the arrears due and that the Regulations should have been so designed so that PIP winners were not treated differently from successful PIP claimants who had not been previously entitled to PIP.

53. The Secretary of State submits that he was justified in not taking that approach both on practical grounds and on financial grounds. He does not suggest that it would be wholly impractical to make PIP awards for PIP winners effective from the date of claim and to set off the relevant amount of DLA, but it is submitted that the operation would not be completely straightforward because it could not be automated due to the new PIP computer system not being linked to the old DLA computer system. This would give rise to some administrative cost. However, the greater financial cost would be the cost of paying the arrears of PIP to PIP winners, albeit reduced by the setting off of DLA, which would represent a substantial reduction during the transitional period in the financial savings sought as a result of the implementation of the 2012 Act.

54. The claimant does not deny that backdating awards for PIP winners would give rise to additional public expenditure, but it is submitted that that additional expenditure is not relevant because it is the cost of the practice that is claimed to be discriminatory. In any event, the claimant submits that the Secretary of State overstates his case on both types of ground. We will consider both these issues in more detail below. It is sufficient in relation to the claimant's primary case to state that it is clear that backdating PIP awards for PIP winners would result in some additional administrative expense in addition to the cost of the payment of arrears which would itself be substantial on any footing.

55. As regards PIP winners other than those within the Narrower Class of PIP winners, and so most PIP winners, we consider that the legislation is clearly justified and that the claimant's primary case under Article 14 fails to get off the ground,

partly because it overlooks the implications of the fact that these Transitional Regulations are made to assist with the implementation of the 2012 Act and partly because most DLA entitled claimants of PIP are not in a situation that is truly analogous to that of a new PIP claimant.

56. It is not disputed that it would have been impractical for the 2012 Act to be brought into force for all the relevant 1.8 million DLA claimants at the same time, given that there would have to be individual PIP assessments for each of them (albeit that some could be done without a medical consultation), not to mention the fact that new claims for PIP by those not entitled to DLA arrive at the rate of about 8,000 per week and also require individual assessments. Although the 2012 Act makes provision for it to be brought into force by a series of commencement orders, there is no reason in principle why the gradual transition should not be managed through regulations making transitional provision, particularly given the width of the powers conferred by sections 93 and 94 of the 2012 Act. That is what the Transitional Regulations in this case achieve. It is therefore a legitimate effect of the Transitional Regulations 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.

57. The Transitional Regulations happen to allow any DLA entitled claimant of working age who wishes to do so to initiate the transfer, but such a claimant cannot have any reasonable expectation that the transfer in his or her case will in fact take place on any particular date. Indeed, had it been practical to do so, it is difficult to see any legal reason why the Secretary of State should not have chosen to transfer all PIP losers before any PIP winners so as to maximise the financial savings, although there might have been a political cost in doing so. There can certainly 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. Moreover, the Secretary of State has financial reasons for doing so, both because of the lower administrative cost and because back-dating awards for PIP winners would obviously 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.

58. This tends to show that PIP winners who are not in the Narrower Class are not in a position analogous to a new PIP claimant. It is important to note that for those not affected by the 2012 Act coming into force, a claimant to DLA under a fixed term award and making a renewal claim is not in a position directly analogous to that of a new DLA claimant and is not treated in exactly the same way. Any renewal claim can be made in advance and so does not take effect from the date of claim in the way that an initial claim generally does. Instead it is treated as having been made on, and so takes effect from, the day after the end of the existing award. This generally ensures that payments continue during the period of re-assessment. The Transitional Regulations achieve a similar effect for PIP winners, as well as for PIP losers and PIP neutrals. (A renewal claim that justified an award at a different rate from the existing award might reveal information justifying a supersession of the existing award before it came to an end, but that is a different situation analogous to

that of those in the Narrower Class of PIP winners. It would not necessarily do so because a difference of view as to the appropriate award does not necessarily give grounds for supersession – see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 (reported as R(DLA) 6/01)).

59. In any event, we are satisfied that for PIP winners other than those in the Narrower Class the difference of treatment is justified and therefore does not amount to discrimination. However, we consider that further considerations arise in respect of the Narrower Class of PIP winners.

Proper exercise of the regulation-making powers under the 2012 Act in relation to the Narrower Class of PIP winners

60. We turn to consider this alternative argument before returning to the Article 14 arguments and addressing justification in relation to the Narrower Class of PIP winners. It is a rationality argument and the points made on it are also relevant to the issues relating to justification.

61. As we have explained, the Narrower Class of PIP winners are those PIP winners 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 of 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 combined effect of regulation 17(2) and regulation 20(2)(a) is that such a claimant is unable during the time taken to make a PIP assessment to secure the amount of benefit appropriate to his or her needs under either the DLA regime, by way of supersession for change of circumstances of the DLA decision, or the PIP regime, by way of a back-dated PIP award. The amount of additional DLA they would have received on supersession would not necessarily been the same as the amount by which their award of PIP exceeded their award of DLA and they could not have complained had they received only the lesser of the two amounts, but they can legitimately feel hard done by because they received neither of those amounts.

62. The validity of the legislation depends entirely on whether it falls within the scope of section 93(1). The question is therefore whether the Secretary of State can reasonably have regarded it as "necessary or expedient in connection with the coming into force of this Part [of the 2012 Act]". Those are very wide words, but they do require the Secretary of State to provide at least some justification for a provision that is capable of preventing a claimant from receiving part of the benefit to which he or she would have been entitled under legislation replaced by the 2012 Act for a period before he or she can become entitled to benefit under that Act.

63. The Secretary of State argues that regulation 20(2)(a) is justified because one of the aims of the Transitional Regulations was to ensure that it would be unnecessary to make any further assessments for DLA purposes for any claimant aged at least 16 and who was, on 8 April 2013, aged under 65. Any assessments in respect of such claimants would be for PIP only. The reasons for this are addressed in Mr Hughes' witness statement.

64. First, he points out that supersession may be adverse to a claimant, rather than favourable, and that the result of notifying a change of circumstances may not always be the one the claimant anticipates. Thus, a claimant's reporting a worsening in his or her condition may trigger a new assessment that results in a supersession that reduces entitlement rather than increases it. Secondly, notifying a change of circumstances may raise the question whether there should be a supersession but seldom answers it. It would have been necessary to ask claimants who had notified a change of circumstances to provide further information in addition to that required for the PIP assessment. Thirdly, it would be difficult to justify treating differently those who notified a change of circumstances before being invited to claim PIP and those who did so subsequently or on their PIP claim – i.e., between those within the scope of regulation 20(5) and those within the scope of regulation 20(3) and (4) – and, indeed, it would be difficult to justify not giving all DLA entitled PIP claimants a specific opportunity to provide information that might result in their existing awards being superseded. That would require each of them to complete a 40-page DLA form as well as a 35-page PIP form, when most of them would not gain any advantage from doing so. Fourthly, it would therefore be necessary to carry out a DLA assessment for all DLA entitled PIP claimants, which would give rise to substantial cost in staff time and to delay in individual cases and to the whole transfer programme. The cost, Mr Hughes argues, would have been wholly disproportionate to the benefit received. He estimates that the additional DLA that might have been received over the whole 5-year transfer period by those DLA claimants who would have gained as a result of such a process would have been £28 million but that the cost of the process would have been £52 million. There would also be complications arising from the possibility that a DLA supersession might not be effective for the whole of the period potentially in issue and, of course, there would be further applications for revision and appeals.

65. An alternative approach that would have avoided the need for any DLA assessments would have been to make provision in regulation 17 for the backdating of the awards of all PIP winners to the date of claim. Mr Hughes advanced an operational argument for not taking that approach, based on the difficulties that would ensue as a result of off-setting DLA paid in respect of the relevant period, and Mr Joseph advanced a financial argument.

66. Mr Hughes says –

> "9. … Due to the limitations of the computer systems, backdating calculations would have to been carried out manually, thereby creating a vast amount of additional clerical work and admitting risks that manual error would bring. Having a common simple transparent system for the transfer of DLA claimants onto the correct level of PIP would reduce the strain on PIP operations. In order to succeed in keeping within the available constraints of staffing numbers, to keep within budget and to ensure correctness of outcome, it was necessary to keep the operational strain to a reasonable limit. The current system of applying the 28 day run on everyone has established a level playing field for all PIP transfer claimants."

As regards PIP winners, he explains what would be required.

> "The decision maker would make an award of PIP. Then PIPCS would liaise with DLACS and close down the DLA award 28 days later. The decision maker would then make a manual amendment to the decision notice (a) stating that PIP would start from the ate of claim and that DLA would end on the date 28 days following the next payday, and (b) making reference to the amount and type of arrears that would be made. … A further potential complication could arise here if the claimant goes into hospital or has any other payability issues during the overlapping period. Any backdating calculation would also have to take the payability issues into account. Finally after all complications were identified and taken into account, the decision maker would have to calculate the arrears of PIP and clerically offset those arrears against the amount of DLA that had in fact been paid over the same period, then clerically make the payment adjustment, manually pay the arrears and send a written notification explaining the offset to the claimant."

He adds that the calculation could be further complicated because it might involve individual days as well as complete weeks. Doing all this manually would, he argues, have created staffing issues and slowed down the whole transfer process with a consequent loss of savings from the implementation of the 2012 Act. Moreover, running a different operational system for PIP winners from that for PIP losers and PIP neutrals would have "created much additional operational strain for the Department".

67. Mr Joseph argues that backdating PIP awards for PIP winners only would have reduced the savings that could properly have been anticipated from implementing the 2012 Act. In his first witness statement, he said that on "recent estimates", the reduction across the whole transition period would be £320 million. As explained below, he now says that the correct figure is £645 million. For the reasons given above, backdating awards of PIP for PIP losers and PIP neutrals, having stopped DLA payments at the beginning of the assessment period, in order to balance the figures was not considered a possible policy.

68. The claimant does not seriously dispute that carrying out DLA assessments would have been disproportionate and impractical, but it is disputed that backdating PIP awards would be either disproportionately difficult in practice or disproportionately expensive.

69. In our judgment, the Secretary of State succeeds on the rationality argument.

70. We accept that carrying out DLA assessments was not a realistic option for the reasons given by Mr Hughes. Even if a process could have been devised that resulted only in DLA reassessments for PIP winners, it seems to us that the Secretary of State was clearly entitled to consider that it would have been disproportionately time consuming and expensive to administer, quite apart from the extra burden it would have placed on claimants, the majority of whom would not have gained.

71. In relation to backdating PIP awards, we see no reason to doubt that it would have been impossible to arrange for the PIP and DLA computer systems to interact so as to produce the calculation automatically but we are not altogether convinced that, taken by itself, that could have been a sufficient reason for not backdating PIP

awards so as to ensure that any claimants who would otherwise have been prejudiced by not being able to apply for supersession of their DLA awards during the PIP assessment period were adequately protected.

72. However, we are quite satisfied that the Secretary of State was entitled to have regard to the cost of backdating the awards of all PIP winners, given first that, in the absence of DLA assessments, it was not possible to identify those in the Narrower Class so that a substantial part of the back-dated payments would go to claimants who would not in fact have been entitled to more DLA had there been a supersession and secondly that he had powerful reasons for giving priority in the design of the transition to the needs of PIP losers and PIP neutrals.

73. We accept that there is scope for argument about the cost of backdating awards for all PIP winners if PIP losers are transferred to the new régime only four weeks after the PIP assessment but, whatever the correct total figure, it is obvious that, it is in the hundreds of millions of pounds. We also accept that the fact that that figure is large merely reflects the number of claimants affected and the extent to which they are affected. But the important point is that the figure inevitably includes the cost of back-dating awards to PIP winners who would not have been entitled to a higher amount of DLA on supersession. It is legitimate for the Secretary of State to take into account the further and unavoidable cost of backdating PIP for those PIP winners who would not have been entitled to an increased amount of DLA had they applied for supersession. We do not have an estimate for the proportion of PIP winners who would have been entitled to a higher amount of DLA on supersession. We accept Mr Hughes' point that it would be difficult to justify treating differently those PIP winners in the Narrower Class, as defined for the purposes of this case, and those other PIP winners who would have been entitled to a higher amount of DLA on supersession but who notified the relevant change of circumstances after being invited to claim PIP but, even if the definition is widened and the proportion were as high as a third (which we consider improbable), the Secretary of State would clearly have been entitled to regard the total cost of backdating awards for all PIP winners to be disproportionate.

74. Moreover, it seems to us to have been capable of being a material consideration that DLA and PIP are both payable only to those expected to be disabled for a substantial period, so that equally disabled people may not be eligible because their disability is expected to be for a relatively short period, and that they are not aimed at meeting a precise expense in the way that, say, housing benefit is. An element of rough justice may therefore be more tolerable in this area than it might be in other areas of social security provision.

75. In these circumstances, we are satisfied that the Secretary of State could reasonably conclude that it was necessary or, at least, expedient for regulations 17(2) and 20(2)(a) of the Transitional Regulations to have the effect that they do.

Discrimination - justification in relation to the claimant's alternative case, advanced by reference to the Narrower Class of PIP winners

76. As we have suggested above, it is arguable that the legislation gives rise to unequal treatment based on the length of time for which a person has been severely disabled. It seems to us that the Narrower Class of PIP winners are in a situation more analogous to that of successful new PIP claimants than to that of other DLA entitled PIP winners. Not only are both the Narrower Class of PIP winners and new PIP claimants severely disabled and qualified for PIP but also, assuming they were receiving the correct amount of DLA or were correctly receiving no DLA, as the case may be, they have both relatively recently become more disabled than they were before and are seeking the amount of benefit appropriate to the new level of their disabilities. However, even if that is so, we are satisfied that the legislation is justified.

77. The arguments on justification are essentially the same as the rationality arguments, save that the claimant relies on the additional argument that cost is not material at all. Although it was not in the bundle of authorities for the hearing, Mr McGurk mentioned during the hearing *O'Brien v Ministry of Justice* [2013] UKSC 6; [2013] 1 WLR 522, in which the Supreme Court said –

> "69. … the European cases clearly establish that a Member State may decide for itself how much it will spend upon its benefits system, or presumably upon its justice system, or indeed upon any other area of social policy. But within that system, the choices it makes must be consistent with the principles of equal treatment and non-discrimination. A discriminatory rule or practice can only be justified by reference to a legitimate aim other than the simple saving of cost. …"

78. However, it is to be noted that the "European cases" mentioned were decisions of the Court of Justice of the European Union rather than decisions of the European Court of Human Rights. Care needs to be taken in seeking directly to apply what was said in *O'Brien* to justification under Article 14. The attempt to do so in *R. (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1149 was dealt with by Lord Reed in his consideration of whether the social security regulations there in issue pursued a legitimate aim

> "63. The next question is whether the Regulations pursue a legitimate aim. In my view that cannot be doubted. They pursue, in the first place, the aim of securing the economic well-being of the country, as the Secretary of State explained to the Parliamentary Joint Committee on Human Rights, and as is evident from the legislative history since the policy of reducing expenditure on benefits was first announced in June 2010. A judgment was made, following the election of a new Government in May 2010, that the current level of expenditure on benefits was unaffordable. The imposition of a cap on benefits was one of many measures designed to reduce that expenditure, or at least to constrain its further growth. It was argued on behalf of the appellants that savings in public expenditure could never constitute a legitimate aim of measures which had a discriminatory effect, but that submission is inconsistent with the approach adopted by the European court in the cases mentioned in para 10. It is also inconsistent with the acceptance of the economic well-being of the country as a legitimate aim of interferences with Convention rights under the second paragraphs of articles 8 to 11, and under A1P1. An interpretation of the Convention which permitted the economic well-being of the country to constitute a legitimate aim in relation to interferences with the substantive

> Convention rights, but not as a legitimate aim in relation to the ancillary obligation to secure the enjoyment of those rights without discrimination, would lack coherence.
>
> 64. In relation to the case of *Ministry of Justice (formerly Department for Constitutional Affairs) v O'Brien (Council of Immigration Judges intervening)* [2013] UKSC 6; [2013] 1 WLR 522, para 69, on which the appellants relied, I would observe that acceptance that savings in public expenditure can constitute a legitimate aim for the purposes of article 14 does not entail that that aim will in itself constitute a justification for discriminatory treatment. As I have explained, the question whether a discriminatory measure is justifiable depends not only upon its having a legitimate aim but also upon there being a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

79. In this case too, we have no doubt that the Transitional Regulations are pursuing a legitimate aim, and the contrary was not argued before us. That aim was part of the more general aim of moving to PIP so as to reduce public expenditure and better focus social security benefits on the more seriously disabled, but more specifically to ensure an effective and manageable transition from DLA to PIP for DLA claimants and one which protected the claimants' entitlement to DLA until the transition had been completed.

80. That then leaves the question whether the Transitional Regulations maintain a reasonable relationship of proportionality between the means employed and the aims sought to be realised. We have no hesitation in concluding that they do for the same reasons that we consider that the relevant provisions were rationally regarded as necessary or expedient. Here, claimants in the Narrower Class of PIP winners are caught in what is a hugely complex transition from one benefit to another (where the saving of cost is a permissible aim) in the course of which many other claimants are expected legitimately to lose entitlement to some or all of the benefit they received. The design of the transition is deliberately aimed at protecting PIP losers and PIP neutrals, who would be treated less favourably than they are under the Transitional Regulations if PIP replaced DLA from the date of claim, and we are satisfied that the protection of those claimants is a legitimate aim. In those circumstances, regard may be had to whether the cost of protecting also those who might have benefited from a DLA supersession would be disproportionate if the Government's aims are to be pursued. We are satisfied that it would be, because it would been disproportionate and so impractical to identify those who might have benefited from a DLA supersession and make the necessary payments only to them.

Delay in adjudication

81. If the claimant would have been entitled to the middle rate of DLA during the period between her notification of her change of circumstances and the commencement of her award of PIP, she has lost a not inconsiderable amount of money as a result of the Transitional Regulations. However, one reason was the length of time taken to decide whether she was entitled to PIP, so that the period between the making of her claim and the date from which the award of PIP was made effective was about twice the projected average figure. That seems to have been common in 2014. The legality of such delays was challenged in *R. (C and W)*

v Secretary of State for Work and Pensions [2015] EWHC 1607 (Admin). Patterson J found the delays of 14 months and 10 months respectively in the cases before her to be not only unacceptable but also unlawful. This issue is not before us in relation to the present claimant. We merely observe that the particular position of those claimants whose condition has deteriorated such that they might have qualified for an increase in the award of DLA but for the Transitional Regulations appears not to have been raised in *C and W*, where neither claimant was entitled to DLA.

Accuracy of statistics

82. Immediately before the hearing, it became clear to Mr Buley that the figure of £320 million given by Mr Joseph in his witness statement as the cost over the whole transition period of backdating claims for PIP winners might be inaccurate. An error was identified and we were informed. Following the hearing, a further error emerged and Mr Joseph made a further statement, explaining what the true figure was and how the wrong figure had been given and apologising for the two errors that had been made.

83. We accept that the errors were inadvertent. They were caused by a lack of communication between Mr Joseph and the analysts providing the information. One error was in respect of the period to which the figure of £320 million related. It had been based on a calculation in respect of only the part of the transition period that remained at the date of the calculation, rather than the whole period from the beginning. The other was the omission of the cost of the four-week run on period, which needed to be added to the time taken to make the PIP decision. Each of these errors resulted in the figure being less than it should have been with the consequence that it therefore did not assist the Secretary of State's case and so clearly was not deliberate. The Secretary of State nonetheless rightly recognises that it is a matter of considerable concern that there were errors in evidence submitted to the Upper Tribunal by his department.

84. The errors would not have occurred if Mr Joseph had been more precise in his instructions to the analysts as to the periods for which he wanted calculations to be made. Indeed, his original statement included the erroneous estimate based on unpublished figures that we were not then given for the proportion of PIP losers to PIP winners, while providing us with earlier published estimates of the proportion of PIP losers and PIP winners. This use of figures relating to different periods is liable to make accurate analysis difficult. If figures given in evidence in legal proceedings are important, they are likely to be questioned and inconsistencies exposed. Mr McGurk and Dr Strothers are right to point out that if the Department had given them the underlying calculations for figures mentioned at the permission hearing, for which they had asked before Mr Joseph's statement was provided, the errors would probably have been spotted then. Care needs to be taken.

85. We accept Mr Joseph's apology and we hope that this sort of error is not made again in evidence provided by the Department for Work and Pensions.

Mr Justice Charles
Chamber President

Mark Rowland

Stewart Wright

17 January 2017