Secretary of State for Work and Pensions** v **JA
[2024] UKUT 52 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001286-UOTH**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Secretary of State for Work and Pensions

Appellant

- v –

JA

Respondent

Before: Upper Tribunal Judge Church

Hearing date: 29 June 2023

Representation:

Appellant: Mr Denis Edwards of counsel, instructed by the Government Legal Department

Respondent: Mr Tom Royston of counsel, instructed by Mr Elliot Kent and Ms Sophie Earnshaw of Shelter

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.
The decision of the First-tier Tribunal made on 8 April 2022 did not involve any material error of law. It is upheld.

REASONS FOR DECISION

What this case is about

1. This appeal is about the intersection between Universal Credit and Housing Benefit. It is about what happens to the transitional protections enjoyed by a claimant who has migrated from a legacy benefit to Universal Credit when they move from a type of accommodation funded by a local authority by way of Housing Benefit (in this case, specified accommodation) and which does not attract the Housing Costs Element of Universal Credit, to another type of accommodation (in this case,

mainstream rented accommodation), which is funded by the Housing Costs Element of Universal Credit.

2. Universal Credit was introduced by the Welfare Reform Act 2012 (the **"2012 Act"**). It replaced six of the main means-tested legacy benefits (Child Tax Credit, Working Tax Credit, Housing Benefit, Income Support, income-based Jobseeker's Allowance and income-related Employment and Support Allowance), combining them into a single monthly payment.

3. There are two ways a claimant could transition from legacy benefits to Universal Credit. If a claimant experiences a change in circumstances which would have required them to make a new claim for any of the six legacy benefits which Universal Credit replaces (such as moving home to a new local authority, becoming a full-time carer, having a child or becoming too ill to work), they will transition to Universal Credit as what the Secretary of State calls a 'natural migrator'. If no such change of circumstances triggers natural migration, a claimant will in due course transition to Universal Credit as what the Secretary of State calls a 'managed migrator'. This occurs on receipt of a migration notice from the Department for Work and Pensions which notifies the claimant that the legacy benefits to which they are entitled are to terminate and invites them to make an application for Universal Credit.

4. The crux of the appeal is:

   (a) whether the operation of regulation 55(2) of the Universal Credit (Transitional Provisions) Regulations 2014 (the **"Transitional Regulations"**) to erode the Claimant's transitional protection in its entirety in these circumstances involved an unlawful breach of the Claimant's rights under Article 14, read with Article 1 Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the **"Convention"**); and

   (b) whether the First-tier Tribunal judge who determined the Claimant's appeal in respect of her entitlement was right to disapply that regulation.

5. There are no factual issues between the parties. The only issues raised by this appeal are questions of law.

The agreed facts

6. From 10 November 2016 until 10 June 2018 the Claimant was in receipt of income-related Employment and Support Allowance (**"ESA"**) with the Severe Disability Premium (**"SDP"**).

7. On 11 June 2018 the Claimant made a claim for Universal Credit as a 'natural migrator'. This was triggered by her moving home from one local authority to another.

8. On 11 September 2019 the Secretary of State decided that the Claimant was entitled to Transitional SDP of £285 for each full assessment period between 11 June 2018 and 11 September 2019, and thereafter each month (pursuant to Schedule 2 to the 2014 Regulations, inserted by the Universal Credit (Managed Migration Pilot and Misc. Amendments) Regulations 2019 (the **"Transitional Protection Regulations"**).

9. On 14 September 2020 the Claimant moved again, this time from mainstream accommodation into specified accommodation.

10. On 18 September 2020 the Claimant notified the Department for Work and Pensions (**"DWP"**) of her move to specified accommodation, which amounted to a relevant change of circumstances.

11. On 13 October 2020 (**"Conversion Day"**) the Secretary of State converted the Transitional SDP Amount to a transitional element which would be included within the Claimant's monthly Universal Credit award, rather than paid as a standalone payment (the **"Transitional Element"**). The Transitional Element was £285 per month.

12. On 18 May 2021 the Claimant moved out of her specified accommodation into mainstream rented accommodation, which represented another relevant change of circumstances. The Claimant notified the move to the DWP on 22 June 2021.

13. On 11 July 2021 the Secretary of State decided that, as a result of the Claimant's move, the Claimant was now entitled once again to a Housing Costs Element in her award of Universal Credit to cover her monthly rental and service charge. As a consequence, the Claimant's award of the Transitional Element of Universal Credit was reduced to nil, in accordance with regulation 55 of the 2014 Regulations (the **"SoS Decision"**), because the additional amount awarded for the Housing Costs Element (£369.37) exceeded the amount of the Transitional Element (which was £285 per month).

The procedural chronology in brief

14. The Claimant appealed the SoS Decision to the First-tier Tribunal.

15. On 8 April 2022 Judge Paul Johnson, sitting in the First-tier Tribunal (Social Entitlement Chamber), allowed the Claimant's appeal against the SoS Decision on the basis that the erosion of the Claimant's Transitional Element of Universal Credit to nil required by regulation 55 of the Transitional Regulations was unlawfully discriminatory against the Claimant, and regulation 55 should therefore be disapplied (the **"FtT Decision"**).

16. The Secretary of State disagreed with the FtT Decision and applied for permission to appeal to the Upper Tribunal. On 14 July 2022 the First-tier Tribunal granted permission to appeal. The Secretary of State made an application to amend his grounds of appeal, which I granted on 8 February 2023.

The decision under appeal

17. In a succinct statement of reasons, having set out his findings of fact and the positions of the parties, Judge Johnson set out his reasons for allowing the Claimant's appeal as follows:

> "21. On the basis of the decision in *TP and AR* and the other authorities cited, the Tribunal accepted that the implementation arrangements for Universal Credit, including the availability (or not) of transitional protection, fell within the ambit of a convention right. Indeed, the respondent had not contested this point.
>
> 22. The [Claimant's] Representative submitted that she "has an 'other status' as someone with a transitional element based on her severe disability premium, included in her Universal Credit award calculation and who has moved from specified accommodation to mainstream rented accommodation". The Tribunal agreed that this was the case.
>
> 23. Furthermore, "Claimant and person who has been treated differently are in analogous situations. [The Claimant] has been treated differently compared to

someone ("person 1"), also receiving Universal Credit Transitional Severe Disability Premium, who moves from mainstream rented accommodation to another cheaper mainstream rented property. The Tribunal accepted this as fact.

24. It was explained that "[The Claimant] has moved from a more expensive to less expensive rented property, and in doing so eroded her transitional element in its entirety. In contrast person 1 would, because they are moving between mainstream rented properties, experience no erosion of the same element. This difference in treatment occurs even though, like [the Claimant], person 1 is moving to accommodation which was cheaper than their previous accommodation. Therefore it is only because [the Claimant's] housing costs were previously met via [H]ousing [B]enefit and are now met by Universal Credit that her transitional element has been eroded: this factor causes her Universal Credit maximum amount to increase despite the fact her overall amount of benefit entitlement has decreased (i.e. Housing Benefit plus Universal Credit before her move are less than Universal Credit including Housing Costs Element would be in new property)."

25. "[The Claimant] has not moved to accommodation with rent which is either the same, or more expensive than, her previous property. However, it is instructive to compare the difference in treatment as compared to person 1 in these situations:

> (a) if [the Claimant] had moved to a mainstream property with rent at the same level her transitional element would erode by the full amount of the Universal Credit Housing Costs Element, in most cases eroding the transitional element entirely. If person 1 were to move to a property with the same rent they would not see any erosion in their transitional element.
>
> (b) If [the Claimant] were to move to a mainstream property with higher rent, then her transitional element would erode by the full amount of the Universal Credit Housing Costs Element, in most cases eroding the transitional element entirely. In contrast, if person 1 were to move to more expensive accommodation, then their transitional element would only erode by the difference between the Universal Credit Housing Costs Element for the old property and the Universal Credit Housing Costs Element for the new, more expensive, property."

26. On that basis it was argued that the Appellant has also been treated differently to someone ('person 2') receiving Universal Credit transitional element who moved from specified or temporary accommodation to another property which is also specified or temporary accommodation. Person 2's transitional element would not be affected at all by moving to a new home – regardless of whether or not the rent was more or less than at the previous accommodation.

27. The Tribunal acknowledged this analysis and found that that [sic] the [Claimant] had been treated differently and less favourably than the hypothetical comparators 'person 1' and 'person 2'.

28. The Representative addressed the question as to whether the difference in treatment could be objectively justified, stating that "[the Claimant] is unaware of any justification for the differential treatment, and the Secretary of State for

> Work and Pensions has not attempted to provide justification. Indeed, they state in their Mandatory Reconsideration decision (at page 71) "I must clarify that there is no dispute that the above sequence of events represents circumstances largely outside of your control".
>
> 29. They point out, it is "important to bear in mind that what has to be justified is not the underlying policy behind the erosion of the transitional element but rather the difference in treatment in [the Claimant's] case (see *TD and others v SSWP* [2020] EWCA Civ 618 at [85]). The Tribunal concurred with this view.
>
> 30. Finally, the [Claimant's] Representative addressed the question of remedy, stating that the remedy is to disapply provisions to avoid a discriminatory outcome. Inter alia, it is stated, "In *RR v SSWP* [2019] UKSC 52 the Supreme Court held that a tribunal must, where it is possible to do so, disregard a provision of subordinate legislation which results in a breach of a right under the European Court [sic] of Human Rights."
>
> 31. The Tribunal agreed that the appropriate remedy was to disapply the legislation giving rise to the discriminatory outcome. As the Tribunal did not have sufficient information before it to calculate the appropriate award of Universal Credit it directed that the Secretary of State must calculate the [Claimant's] Universal Credit award to include the Transitional Element as is [sic] it have [sic] not been eroded by the inclusion of the Housing Costs Element from 11/05/2021.
>
> 32. The appeal was allowed. The decision of the Secretary of State was set aside."

The Secretary of State's grounds of appeal (as amended)

18. The Secretary of State's grounds of appeal were that the First-tier Tribunal's Decision involved material errors of law because:

> (1) the circumstances of the two hypothetical comparators identified by the First-tier Tribunal judge as 'person 1' and 'person 2' are not analogous to the Claimant's circumstances, because while the Claimant saw the inclusion of a housing element because the type of accommodation, and subsequently her liability for paying rent, changed there was no indication that either 'person 1' or 'person 2' would have seen a relevant increase in the amount of their Universal Credit awards, and in any case, neither 'person 1' nor 'person 2' appears to have moved from one type of accommodation to another with a different liability for paying rent (**"Ground 1"**).
>
> (2) regulation 55 of the Transitional Regulations applies equally to the Claimant and to 'person 1' and 'person 2', so there is no differential treatment (**"Ground 2"**),
>
> (3) being a person "who moves from mainstream rented accommodation to another cheaper mainstream rented property" was not properly an "other status" for the purposes of Article 14 read with Article 1 of Protocol 1 of the Convention (**"Ground 3"**), and
>
> (4) the First-tier Tribunal failed to consider, or erred in its approach to considering, whether any discrimination contrary to the Claimant's Convention

rights arising from the SoS Decision and/or regulation 55 of the Transitional Regulations was objectively justifiable (**"Ground 4"**).

The legislative framework

19. Universal Credit was introduced by the 2012 Act to replace six legacy benefits, including income related ESA.

20. Subject to qualifying conditions, an award of a legacy benefit could include an amount in respect of disability (for example, the SDP). An award of Universal Credit includes, among other things, a standard allowance and an amount for housing costs.

21. Section 1 of the 2012 Act provides:

> "**1 Universal Credit**
> (1) A benefit known as universal credit is payable in accordance with this Part.
> (2) Universal credit may, subject as follows, be awarded to-
> (a) an individual who is not a member of a couple (a "single person"), or
> (b) members of a couple jointly.
> (3) An award of universal credit is, subject as follows, calculated by reference to-
> (a) a standard allowance,
> (b) an amount for responsibility for children or young persons,
> (c) an amount for housing, and
> (d) amounts for other particular needs or circumstances."

22. The first set of regulations made under section 12 of the 2012 Act were the Universal Credit Regulations 2013 (the **"2013 Regulations"**). The 2013 Regulations did not replicate the features of the legacy benefits precisely. In particular, despite intensive lobbying and, despite amendments being tabled in the House of Lords with a view to replicating the legacy premiums in respect of disability such as the SDP and the Enhanced Disability Premium (**"EDP"**), the 2013 Regulations as made did not replicate such disability premiums.

23. The Transitional Regulations provided that where a person who is, or has been, in receipt of Housing Benefit from one local authority area moves to another local authority area, they can no longer apply for Housing Benefit from that second local authority but instead must apply to the DWP for Universal Credit which would include a housing element and an element corresponding to the legacy income related benefit, but they would not be entitled to any disability premium.

24. However, payments in respect of certain types of accommodation ("specified accommodation" and "temporary accommodation") were carved out from the definition of "rent payments" in Schedule 1 to the 2013 Regulations (see paragraphs 2 and 3(h)), so that they would not be covered by the Housing Costs Element of Universal Credit. Instead, claimants living in such accommodation would continue to receive Housing Benefit in respect of their liability to rent and service charge.

25. The term "specified accommodation" is defined in Schedule 1 to the 2013 Regulations as follows:

"Specified Accommodation

3A.— (1) The accommodation referred to in paragraph 3(h) is accommodation to which one or more of the following sub-paragraphs applies.

(2) This sub-paragraph applies to accommodation which is exempt accommodation.

(3) This sub-paragraph applies to accommodation—

(a) which is provided by a relevant body;

(b) into which the claimant has been admitted in order to meet a need for care, support or supervision; and

(c) where the claimant receives care, support or supervision.

(4) This sub-paragraph applies to accommodation which—

(a) is provided by a local authority or a relevant body to the claimant because the claimant has left the home as a result of domestic violence; and

(b) consists of a building, or part of a building, which is used wholly or mainly for the non-permanent accommodation of persons who have left their homes as a result of domestic violence.

(5) This sub-paragraph applies to accommodation—

(a) which would be a hostel within the meaning of paragraph 29(10) (renters excepted form shared accommodation) of Schedule 4 (housing costs element for renters) but for it being owned or managed by a local authority; and

(b) where the claimant receives care, support or supervision.

(6) In this paragraph—

"domestic violence" has the meaning given in regulation 98 (victims of domestic violence);

"relevant body" means a—

(a) council for a county in England for each part of which there is a district council;

(b) housing association;

(c) registered charity; or

(d) voluntary organisation."

26. The Universal Credit scheme was the subject of a discrimination challenge under Article 14 read with Article 1 of the First Protocol of the Convention in *R (TP and AR) v SSWP* [2018] EWHC 1474 (Admin) (***"TP1"***). The claimants attacked both the failure of the 2013 Regulations to provide for an additional payment as part of the Universal Credit for those who were previously eligible for SDP or EDP and the absence of transitional protection as part of the implementation arrangements.

27. The High Court decided that the decision not to replicate the legacy premiums was objectively justifiable. However, it considered the differential treatment of claimants who, having previously received additional disability premiums, transfer to

Universal Credit as 'natural migrators' on moving to a new local authority area and experience a reduction in their benefits on the one hand, and those who do not experience a reduction on the other.

28. In *TP1* Lewis J said:

> "113. The 2013 Regulations establishing [U]niversal [C]redit do not involve discrimination contrary to Article 14 ECHR in so far as they do not include any element which corresponds to the additional disability premiums payable under the previous regime. Any differential treatment between different groups is objectively justifiable.
> 114. The implementing arrangements do at present give rise to unlawful discrimination contrary to Article 14 ECHR read with Article 1 of the First Protocol to the ECHR. There is a differential treatment between the group of persons who were in receipt of additional disability premiums (the SDP and EDP) and who transferred to [U]niversal [C]redit on moving to a different local housing authority area and so receive less money by way of income related support than they previously received and the group of persons in receipt of SDP and EDP and suffer no loss of income. That differential treatment is based on status. That differential treatment has not been objectively justified at present. A declaration will be granted that there is unlawful discrimination. The Defendant will then be able to determine how to rectify the unlawful discrimination."

29. The High Court's decision in *TP1* was later confirmed by the Court of Appeal (see *TP, AR & SXC) v SSWP* [2020] EWCA Civ 37 (***"TP (CA)"*** and, together with *TP1* and *TP3* (defined in paragraph 61 below), the ***"TP cases"***)).

30. In response to these decisions, the Transitional Regulations were amended by the Transitional Protection Regulations to award transitional SDP amounts to those who met specified criteria.

31. These new transitional amounts were not designed to last indefinitely, but rather they would be subject to erosion over time as a claimant's Universal Credit award increased and they would, in due course, erode to nothing. I'll refer to this as the **"erosion principle"**. The operation of erosion is provided for in regulation 55 of the Transitional Regulations.

32. At the relevant time for the purposes of the Claimant's claim (i.e. 18 May 2021) Schedule 2 to the Transitional Regulations (as amended) read, so far as applicable:

> **"Schedule 2 – Claimants previously entitled to a severe disability premium**
> 1. This Schedule applies to an award of universal credit where the following conditions are met in respect of the claimant…
> 2. The first condition is that the award was not made as a consequence of the claimant becoming a member of a couple where the other member was already entitled to an award of universal credit.
> 3. The second condition is that the claimant –
> (a) Was entitled (or was a member of a couple the other member of which was entitled) to an award of income support, income-based jobseeker's allowance or income-related employment and support allowance that included a severe disability premium

within the month immediately preceding the first day of the award of universal credit; and

(b) Continued to satisfy the conditions for eligibility for a severe disability premium up to and including the first day of that award.

4. Where this Schedule applies (subject to paragraphs 6 and 7), a transitional SDP element is to be included in the calculation of the award and the amount of that element is to be treated, for the purposes of section 8 of the Act, as if it were an additional amount to be included in the maximum amount under section 8(2) before the deduction of income under section 8(3).
5. The amount of the transitional SDP element in the first assessment period is-
   (a) In the case of a single claimant-
      (i) £120, if the LCWRA element is included in the award, or
      (ii) £285, if the LCWRA element is not included in the award;
6. In respect of the second and each subsequent assessment period, regulation 55(2) (adjustment where other elements increase), regulation 56 (circumstances in which transitional protection ceases) and regulation 57 (application of transitional protection to a subsequent award) are to apply in relation to the transitional SDP element as if it were a transitional element in respect of which the amount calculated in accordance with paragraph 5 was the initial amount.

…"

33. At the relevant time, and so far as relevant, regulation 55 of the Transitional Regulations provided:

> **"The transitional element – initial amount and adjustment where other elements increase**
>
> **55.-**(1) The initial amount of the transitional element is—
>
> (a) if the indicative UC amount is greater than nil, the amount by which the total legacy amount exceeds the indicative UC amount; or
>
> (b) if the indicative UC amount is nil, the total legacy amount plus any amount by which the income which fell to be deducted in accordance with section 8(3) of the Act exceeded the maximum amount.
>
> (2) The amount of the transitional element to be included in the calculation of an award is—
>
> (a) for the first assessment period, the initial amount;
> (b) for the second assessment period, the initial amount reduced by the sum of any relevant increases in that assessment period;
> (c) *for the third and each subsequent assessment period, the amount that was included for the previous assessment period reduced by the sum of any relevant increases* (as in sub-paragraph (b)).

> (3) *If the amount of the transitional element is reduced to nil in any assessment period, a transitional element is not to apply in the calculation of the award for any subsequent assessment period.*
>
> (4) *A "relevant increase" is…an increase in any of the amounts that are included in the maximum amount under sections 9 to 12 of the Act* (including any of those amounts that is included for the first time)….
> …."
> (my emphasis)

34. In this case, the Claimant received SDP as part of her award of income related ESA (with the work-related activity component) prior to her migration to Universal Credit.

The Convention

35. The Convention rights relevant to this appeal are Article 14 and Article 1 of the First Protocol. They provide:

> "**Article 14 – Prohibition of discrimination**
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
> "**The First Protocol - Article 1 – Protection of property**
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

The Human Rights Act 1998

36. The Human Rights Act 1998 (**"HRA 1998"**) provides, so far as relevant:

> **3 – Interpretation of legislation.**
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
> …
> **6 - Acts of public authorities.**
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
> (2) Subsection (1) does not apply to an act if-
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
> (3) In this section "public authority" includes-
> (a) a court or tribunal … "

The oral hearing

37. At the oral hearing of the appeal I had the benefit of hearing extremely well thought out submissions from both Mr Edwards, for the Secretary of State, and Mr

Royston for the Claimant. I am grateful to them for the clear way in which they made their arguments, which they did at an impressive pace which allowed us to complete the hearing notwithstanding an ambitious listing slot.

The Secretary of State's submissions in summary

Context

38. Mr Edwards said that this appeal had to be viewed against the backdrop of Parliament's decision to abolish legacy benefits and replace them with Universal Credit, while carving out payments in respect of liability to rent and service charges for specified accommodation from the Universal Credit scheme so that vulnerable people like the Claimant would continue to receive Housing Benefit from their local authority.

39. Mr Edwards said there were important and complicated reasons for that decision, and he cautioned the Upper Tribunal against any attempt to unravel it.

40. Mr Edwards highlighted that in *TP1* and *TP (CA)* the courts had decided that the decision not to include SDP in the Universal Credit arrangements was *not* discriminatory or, if it was, the difference in treatment was justifiable (see *TP1* at [72]-[73] per Lewis J and *TP (CA)* at [198]). This was because, as is well established, states are entitled to re-arrange their social security systems to reflect their priorities, changing social conditions and the scarcity of public resources, and there is no Convention right to social security entitlements always remaining the same.

41. However, what the courts in *TP1* and *TP (CA)* found to be unlawful was the scheme's failure to protect claimants moving from one local authority area to another from the shock of a "cliff-edge" loss of income upon migration to Universal Credit, which was resolved with the introduction of the amendments to the 2014 Regulations which provided for transitional protection.

The erosion principle

42. The Secretary of State's case is that it was always central to the scheme for transitional protection that the protection would erode over time in line with increases in an award of Universal Credit or its elements (other than that relating to childcare) so that all awards of Universal Credit to all claimants would eventually align. The Secretary of State says that this is what regulation 55, quite lawfully and properly, does.

43. Mr Edwards explained his client's position with the analogy of a railway line: there was a 'main line' for all claimants, whether joining Universal Credit by way of 'natural' or 'managed' migration. This main line didn't include SDP or EDP. However, because of the 'cliff edge' problem identified in *TP1*, Parliament accepted that it was necessary to create a 'branch line', extending transitional protection to natural migrators. This would only be for a limited time, and the branch line would at some point (by way of erosion) re-join the main line.

44. Mr Edwards characterised the Claimant's Article 14 arguments as an attack on the erosion principle and on the terms on which Parliament decided that erosion should occur: the Claimant was seeking to lay down new track on the branch line so that what was always intended only as transitional protection could continue indefinitely.

45. This, he said, was impermissible: the Claimant's complaint was essentially a dispute about where Parliament had drawn the lines of the transitional arrangements, arguing that Parliament should have drawn them elsewhere, or that the Upper Tribunal should now do so.

'Other status'

46. The Secretary of State maintained that, while the term "other status" in Article 14 was broadly interpreted both by Strasbourg and the domestic courts, it was not unbounded. While he accepted that "other status" can include a person's place of residence and a difference in treatment arising from moving from one local authority area to another, it did not necessarily follow that all differences in treatment arising from a person's place of residence can amount to a "status", and some degree of permanence was required. Mr Edwards submitted that the First-tier Tribunal erred in law when it found the Claimant had an "other status".

Comparators, differential treatment and justification

47. Mr Edwards argued that the Claimant's "person 1" and "person 2" comparators were misconceived. This is because, while the erosion principle applies to the Claimant because there was a change to the type of her accommodation (from supported to private rented accommodation), such a change applied to neither person 1 nor person 2.

48. The true comparison, Mr Edwards proposed, was between someone who receives Housing Benefit while living in supported accommodation on the one hand, and someone who does not receive Housing Benefit because they live in another type of rented accommodation on the other, because this comparison raises the objectives of the difference in treatment.

49. Regulation 55, and the erosion principle, applies equally to all of them, but its application results in different outcomes: in the Claimant's case the erosion occurs because she moved between different types of accommodation and her liability to pay rent changed. Person 1 may also experience erosion (depending on whether they experience any "relevant increase" in their Universal Credit award) because they receive the Housing Costs Element, but person 2 would not experience erosion for so long as they continue to receive Housing Benefit because Housing Benefit is carved out from the Universal Credit scheme. There was, therefore, no relevant difference in treatment between the Claimant and persons 1 or 2 which engages Article 14.

50. The Secretary of State maintains that if, contrary to his primary case, the application of the erosion principle did result in a breach of the Claimant's Convention rights, any such breach was clearly justified, and the First-tier Tribunal erred in law because it failed to address the issue of justification or erred in its approach to justification.

51. Mr Edwards said the different outcomes described above were the result of difficult legislative choices made by Parliament in a sensitive area of social policy and were a proportionate means of achieving legitimate policy aims, and it is well-established that the legislature has a wide margin of appreciation in such matters, and a low intensity of review is appropriate.

52. The issue for the Upper Tribunal, Mr Edwards said, was whether the justification for the policy of carving Housing Benefit out of the Universal Credit scheme, which results in those who move between different types of accommodation with different liability to pay rent being treated differently from those who stay in the same type of accommodation, is "manifestly without foundation", rather than any higher standard. He said that this was especially so given that the entitlements in question were always intended to provide transitional protection only, and not a permanent benefit.

53. He said the erosion principle manifestly has a reasonable foundation: it is included in *transitional* arrangements which were designed to avoid the cliff-edge income loss which concerned the courts in *TP1 and TP (CA)*, in which the lawfulness of the underlying Universal Credit scheme was upheld.

Remedy

54. The First-tier Tribunal, having found an unlawful breach of the Claimant's Convention rights, disapplied the erosion provided for in regulation 55 in respect of the Claimant in reliance on *RR v Secretary of State for Work and Pensions* [2019] UKSC 52. This, says Mr Edwards, was an inappropriate remedy because it was not possible to disregard the offending provision. This is because it is not clear how the statutory scheme can be applied without it. The only proper remedy (should this tribunal find an unlawful breach of the Claimant's Convention rights) was, he said, a declaration of incompatibility.

The Claimant's submissions in summary

'Other status'

55. My Royston, for the Claimant, maintained that the FtT Decision involved no error of law and should be confirmed. He said that the Secretary of State's position on status was asserted rather than argued, and that it is contradicted by his acceptance (in the mandatory reconsideration decision) that the circumstances of the move were outside the Claimant's control. He said that the *TP Cases* provide considerable support to the Claimant's cases on status, and that the First-tier Tribunal's conclusions on status were consistent with a long line of authority.

Comparators, differential treatment and justification

56. Mr Royston highlighted the broad approach to comparability in the authorities and maintained that the comparators identified by the First-tier Tribunal were appropriate in this case, rejecting the distinction on the basis of a supposed difference in "liability for paying rent" that the Secretary of State makes. He argued that the treatment of the Claimant, whose entire Transitional Element was wiped out upon her migration to Universal Credit notwithstanding her not receiving any actual increase in benefit, was wholly different from the position of any claimant not sharing her status, who would experience erosion only gradually and where they enjoyed an increase in income.

57. It is for the Secretary of State to establish justification. Mr Royston says that he has not even attempted to do so, and in an any event he would not be able to because there is no evidence that the effect experienced by the Claimant and those sharing her status was considered when the relevant regulations were introduced. He argued that the treatment complained of is inconsistent with the main policy purpose behind the legislation, and as such the discriminatory effect can't be a proportionate means of achieving a legitimate aim.

Alternative basis of appeal

58. Mr Royston argued further that the Claimant's case can also be analysed on the same basis as the *TP Cases*, because had the Claimant not moved local authority area (which was what triggered her initial 'natural migration' into the Universal Credit scheme), she would still be on legacy benefits now and would not have experienced any loss of benefit. The reasoning set out in the *TP Cases* in relation to the lack of justification for the differential treatment of those who transition to Universal Credit upon moving from one local authority to another, therefore applies equally here.

Discussion and analysis

Proper approach

59. The duty of the state under Article 14 of the Convention is to "secure" equal enjoyment of Convention rights without discrimination on grounds of status unless objective justification is shown for denying equal enjoyment of the underlying rights.

60. In the case of *In Re Brewster* [2017] UKSC 8, Lord Kerr JSC (giving the judgment of the Court said at [48]) that the "duty to secure rights calls for a more proactive role than the requirement to respect rights."

61. Holgate J provided a helpful and succinct summary of the proper approach to an Article 14 complaint in *R (TP) v Secretary of State for Work and Pensions* [2022] EWHC 123 (Admin)(***"TP3"***):

> "100. A1P1 does not require the creation of any particular system of welfare benefits, nor does it dictate the type or amount of such benefits. But where a state creates a system of welfare benefits it must do so in a manner compatible with Article 14 (*Stec v United Kingdom* (2006) 43 EHRR 47 at [53] and Lewis J in *TP 1* at [55]).
>
> 101. In order to determine whether a measure is incompatible with Article 14 it is necessary to address four questions:-
>
> (1) Do the circumstances fall within the ambit of one or more Convention rights?
>
> (2) Have the claimants been treated less favourably than a class of persons whose situation is "relevantly similar" or who are in an "analogous situation"?
>
> (3) Is that difference in treatment on the ground of one of the characteristics listed in Article 14 or an "other status"?
>
> (4) Is there an objective and reasonable justification for that difference in treatment?
>
> These questions are not rigidly compartmentalised (*In re McLaughlin* [2018] 1 WLR 4250 at [15]; SC at [37]; *Salvato* at [24]). Where the first three questions are answered yes, the burden switches to the defendant to justify the difference in treatment."

62. This approach was rehearsed by Simler LJ recently in *T v Secretary of State for Work and Pensions* [2023] EWCA Civ 24 at [38]:

> "(1) does the alleged discrimination concern the enjoyment of a Convention right, such as article 1, Protocol 1 or article 8?
> (2) has the claimant been treated less favourably than a similarly situated group of people?
> (3) is the difference in treatment on the ground of a "status" recognised under article 14?
> (4) is there an objective and reasonable justification for the difference in treatment?"

63. The exercise of identifying comparators in analogous situations in the context of a discrimination claim is a way of assessing whether like cases have been treated differently for some unjustified status-based reason, such that the state has failed to "secure" equal enjoyment of underlying Convention rights on grounds of status.

64. The question of whether situations are relevantly comparable so as to require the same treatment (or the converse of that) cannot be neatly separated from the question

of whether differences in treatment, or treating those whose situations are relevantly different the same, are justified.

65. Mr Royston cited *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, in which Lord Nicholls of Birkenhead said (at [3]) that he favoured an approach to discrimination cases of keeping the formulation of the issues as simple and non-technical as possible, and that while in some cases there may be "such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous",

> "where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

66. This overlap between the exercises of assessing whether cases are in a "similar situation" and whether the difference in treatment is justified was also noted by Baroness Hale in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 at [24] that:

> "…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."

67. Mr Edwards referred me to *R (T) v Secretary of State for Work and Pensions* [2022] EWHC 351 (Admin), in which Swift J reviewed the authorities and concluded that a holistic approach was called for:

> "As is obvious from the authorities, any discrimination claim can contain a range of what can be described as moving parts – for example the closeness of the analogy that exists, the extent of the difference in treatment, and so on. In many instances, discrimination claims are better decided considering all these matters as part of a single exercise that includes justification, rather than taking each in turn as one of a series of discrete preconditions standing in the way of the need for any justification. In most instances the issue will not simply be whether some distinction can be drawn between the claimant and his comparator, but whether any distinction is a relevant distinction. This can require consideration of all evidence, including what is said by way of justification."

68. Both parties agreed that it was appropriate for me to take such a "holistic" approach, which is what I have decided to do.

Ambit

69. Article 14 does not presuppose that there has been a breach of one of the substantive Convention rights. As Lady Hale pointed out in *In re McLaughlin* [2018] 1 WLR 4250 at [26]: "otherwise it would add nothing to their protection", but it is necessary that the facts fall "within the ambit" of one or more of those.

70. The Secretary of State's grounds of appeal did not challenge ambit, and at the hearing Mr Edwards clarified that the Secretary of State accepted that the denial of a social security benefit falls within the ambit of the protection of property in Article 1 of Protocol 1. I am satisfied that the First-tier Tribunal judge made no error in deciding that the discrimination alleged by the Claimant concerned the enjoyment of her Convention rights and was within the ambit of Article 1 Protocol 1.

'Other status'

71. The term "other status" in Article 14 is understood broadly by both the Strasbourg and domestic courts, but it is not unbounded.

72. I was referred to a long line of authority that recognises the very broad scope to be given to the status requirement (see *Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123 at [36]-[41]; *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 WLR 1831 at [13]-[81]; *SK and LL v Secretary of State for Work and Pensions* [2020] UKUT 145 (AAC) at [71]-[80]; *R (TD) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618 at [42]; *R (SH) v Norfolk County* Council [2020] EWHC 3436 (Admin), [2021] PTSR 969 at [62]; *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 at [69]-[71]).

73. In *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 Lady Hale suggested (at [26]) that the proper approach to "other status":

> "[i]n general…concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to change."

74. In *R (RJM) v SSWP* [2009] AC 311 Lord Neuberger commended the approach of focusing on "what somebody is, rather than what he is doing or what is being done to him" (see Lord Neuberger at [45]).

75. However, in *Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123 (at [41] the Court of Appeal held that status is not limited to a "personal" characteristic, but rather it could include any "identifiable" characteristic.

76. *Carson v UK* (2010) 51 EHRR 13 established that "other status" can include a person's place of residence, and in *TP1* it was decided that a difference in treatment arising from moving residence from one local authority to another could also establish a "status".

77. It doesn't necessarily follow, though, that *every* difference in treatment arising from a person's place of residence can amount to a "status". Mr Edwards argued that a change in accommodation lacked the element of permanence implicit in "status" (Lord Neuberger's "what someone is" rather than what is done to them), saying that the move could well prove temporary. He suggested that the Claimant's status is established by her underlying vulnerability as a disabled person, rather than by the type of accommodation she lives in.

78. I don't agree. There is nothing in domestic or Strasbourg case law to say that a status can't be composite in nature. In *SK and LL v Secretary of State for Work and Pensions* [2020] UKUT 145 (AAC) which dealt with the lawfulness of the rule that Sure Start Maternity Grants were only available in respect of a household's first child, I rejected the Secretary of State's argument that claimant SK's claimed status as a "refugee with pre-flight children who gave birth to their first post-flight child" was a "subset of a subset". I didn't accept the Secretary of State's argument that SK's true status was that of someone who "has no baby items but doesn't qualify for a grant", which was simply a description of the discrimination being claimed, and therefore didn't qualify as a "status" for the purposes of an Article 14 claim. I accepted that SK had a combined status that was directly linked to two personal characteristics of refugee status and motherhood/birth (both being statuses enjoying specific protection under international law).

79. Similarly, the status accepted by the High Court in *TP1* and confirmed by the Court of Appeal in *TP (CA)* was a combined status of "persons who were in receipt of additional disability premiums (the SDP and EDP) and who transferred to Universal Credit on moving to a different local housing authority area" (see *TP1* at [114]).

80. The only difference between the status of the claimants in *TP1* and the Claimant's status is that in *TP1* the move was from one local authority to another, while in this case the Claimant's move was from specified accommodation to mainstream accommodation.

81. Mr Edwards, for the Secretary of State, invoked what Rose LJ (as she then was) said about the limits to finding status based on residence in *TP1 (CA)*:

> "210. I doubt that the status of "being a person who lives in a street beginning with the letter A" is an "other status" for the purpose of Article 14. That is so even though the fact that a person lives in Appleby Road is a fact that exists "independently" of such a transitional regime and pre-exists the legislative instrument which causes adverse consequences to flow from that fact where none flowed before."

82. Mr Edwards argued that the type of accommodation that a person lives in is more properly analogous to the street in which they live than a place of "residence" in the wider sense, and so is insufficient to establish "status" and the First-tier Tribunal erred in law when it accepted that the Claimant had an "other status" which arose from being a person in receipt of a Transitional Element of Universal Credit "who moves from mainstream rented accommodation to another cheaper mainstream rented property".

83. However, the passage quoted in the preceding paragraph is a misstatement of what the First-tier Tribunal found: the "other status" which the First-tier Tribunal identified was that of "someone with a transitional element based on her severe disability premium, included in her Universal Credit award calculation and who has moved *from specified accommodation to mainstream rented accommodation*" (see [22] of the FtT statement of reasons) (my emphasis).

84. The misstatement is perhaps telling. Unlike a move from one mainstream rented property to another, a move between specified accommodation and mainstream accommodation is unlikely to be simply a matter of choice. That is because both specified accommodation and temporary accommodation (defined in paragraphs 3A-3B of Schedule 1 to the Universal Credit Regulations 2013) is specialist accommodation designed to meet the particular needs of residents (either by reason of their disability or by reason of their being a victim of domestic violence). As such, a move which involves a change in *type* of accommodation is much more likely to be driven by the mover's needs which relate to their personal or identifiable characteristics (as a severely disabled person or as a victim of domestic violence) than a move from one mainstream rented property to another.

85. It is instructive to examine Rose LJ's reasoning in the paragraphs that follow the passage quoted in paragraph [81] above. In [211] she explained her reasons for finding the requirement for "status" to be satisfied in the cases of TP and AR:

> "… I start from the proposition that the 'very purpose' of A1P1 combined with Article 14 is to prevent people from being arbitrarily deprived of their possessions – in this case of their entitlement to the amount of benefit to which they were entitled under the legacy benefit regime – in a way which

> discriminates against them. The effect of the substantial drop in income on these severely disabled benefits recipients is particularly harsh because of their particular needs and vulnerabilities. As Ms Young acknowledged … people with severe disabilities are less likely to move house than other people because they are less able to cope with the disruption that causes. I would add that they are less likely to move to live a considerable distance away from the familiar amenities and support networks they will have had in place in their former home. Their particular vulnerabilities mean that they are at a considerable disadvantage if it becomes necessary, as it became for TP and AR, for them to move to a new area. That disadvantage is exacerbated if the move is accompanied by a substantial drop in income. It is that characteristic of severely disabled people that, in my judgment, means that a severely disabled person who has moved across a local authority boundary has an 'other status' for the purpose of Article 14 as compared with a severely disabled person who has not."

86. While Rose LJ expressed some "hesitation" in concluding that the requirement for "status" was satisfied in the case before her, the Claimant's case for having a "status" is considerably stronger than the cases of TP and AR, because the Claimant's move between specified accommodation and mainstream accommodation was more closely related to her personal or identifiable characteristics and her status as a severely disabled person.

87. A move into, or out of, specified accommodation (or temporary accommodation) from, or to, mainstream accommodation is likely to be triggered by changes in the person's circumstances. This would include whether they satisfy the criteria for such accommodation which typically provides significant additional support at a commensurately higher cost when compared to mainstream accommodation. Such a move cannot properly be characterised as simply a matter of choice.

88. By contrast, a move from mainstream rented accommodation in one local authority to the same type of accommodation in another authority (as in the cases of both TP and AR) could occur due to any number of reasons which may be unrelated to the mover's personal or identifiable characteristics. Rose LJ was influenced by the particular disadvantages that a severely disabled person would experience if they were to move "a considerable distance away from the familiar amenities and support networks they will have had in place in their former home", disadvantages which she said would be exacerbated by a substantial drop in income.

89. The Claimant's move from specified accommodation to mainstream accommodation would necessarily have involved a reduction in the support available to her, and so the considerations that Rose LJ identified also apply equally here.

90. For these reasons, and because the long line of authority to which I was referred and which is listed in paragraph [72] above, I am satisfied that the First-tier Tribunal was entitled to find that the Claimant had an "other status" for the purposes of Article 14 as "someone with a transitional element based on her severe disability premium, included in her Universal Credit award calculation and who has moved from specified accommodation to mainstream rented accommodation".

Comparators, differential treatment and justification

91. The First-tier Tribunal decided that the Claimant:

> "has been treated differently [as a person moving from specified accommodation to mainstream accommodation] compared to someone … who moves from mainstream rented accommodation to another cheaper mainstream rented property"
> (see [23] of the FtT statement of reasons).

92. That is clearly the case, because the calculation that was made upon the relevant change of circumstances (the Claimant moving from specified to mainstream accommodation) took into account her new entitlement (i.e. to the Housing Costs Element of Universal Credit in the amount of £366.37 per month) but it ignored what she had lost in terms of her entitlement to Housing Benefit (in the amount of £613.12 per month). This resulted in the Claimant losing the entirety of her £285 per month Transitional Element of Universal Credit in one fell swoop. By contrast, the calculation for a claimant who moves from mainstream rented accommodation to another cheaper mainstream rented property would take into account both the gain and the loss experienced, so they would experience no erosion at all. For example, moving from a mainstream property with a monthly rent of £500 to another mainstream property with a rent of £400, they would be treated as having experienced no "relevant increase" because the gain of £400 per month was cancelled out by the loss of the £500 per month, and so any Transitional Element award would be unaffected. Similarly, claimants moving from one specified accommodation setting to another would be treated as experiencing "no relevant increase", as would claimants moving from mainstream rental accommodation to specified accommodation. The *only* category treated as experiencing a "relevant increase" to the full extent of their award of Housing Costs Element is those moving from either specified or temporary accommodation into mainstream rental accommodation.

93. The Secretary of State doesn't accept the applicability of the "person 1" and "person 2" comparators identified by the First-tier Tribunal, pointing out that the essence of these comparators was that each had either *always* been in receipt of Housing Benefit or had *never* been in receipt of Housing Benefit. By contrast, the Claimant received the Housing Costs Element of Universal Credit upon migration, then had a period of receiving Housing Benefit when she moved into specified accommodation (upon which change of circumstances her entitlement to the Housing Costs Element ceased), and then received the Housing Costs Element again upon her second change of circumstances when she moved into mainstream rented accommodation, and ceased to be entitled to Housing Benefit.

94. Mr Edwards proposed different comparators: someone who receives Housing Benefit because they are in specified accommodation on the one hand, and someone who does not receive Housing Benefit because they are in a different type of rented accommodation on the other.

95. I find the Secretary of State's position somewhat puzzling. While I agree that the difference in the respective positions of the First-tier Tribunal's "person 1", "person 2" and the Claimant are as he described (and as I have summarised above), I don't see why this makes the First-tier Tribunal's choice of comparators inapposite. Rather, it is this very difference that highlights the difficulty with which we are concerned. That is what makes the choice of comparators apposite.

96. In *Re McLaughlin* [2018] UKSC 48, [2018] WLR 4250 Baroness Hale explained:

> "26. It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the two persons that they are not in an analogous situation. The factors linking the claim to [the substantive article at issue] are also relevant to this question…"

97. The factors that link this claim with the substantive ECHR article at issue are the same ones that Rose LJ identified in *TP (CA)*, and quoted above:

> "211 … the 'very purpose' of A1P1 combined with Article 14 is to prevent people being arbitrarily deprived of their possessions … in a way which discriminates against them. The effect of the substantial drop in income on these severely disabled benefits recipients is particularly harsh because of their particular needs and vulnerabilities …"

98. The Secretary of State argued that the Claimant's comparators incurred "a different liability for paying rent attendant on the move between the accommodation", but there is nothing inherent in the nature of a tenancy or license of "specified" accommodation that makes this so, and it is unclear why it would render their situation incomparable if it there was such a difference. The real difference seems to be that specified accommodation is funded through Housing Benefit administered by the local authority, while the Housing Costs Element of Universal Credit is funded centrally.

99. The Secretary of State hasn't persuaded me that the mere change from one category of accommodation to another inherently makes the situations of the Claimant and comparators 1 and 2 incomparable. This is the kind of "unduly technical" distinction that was rejected in *TP (CA)*, and I reject it here. As Mr Royston observed, if every difference made situations incomparable there would be no comparators for anything.

100. Mr Edwards encouraged me to assess the issues of comparators, differential treatment and justification against the backdrop of the rationale for Parliament's policy decisions:

(1) to erode the transitional protections provided to prevent sudden "cliff" losses to vulnerable claimants,
(2) to carve Housing Benefit out of the Universal Credit scheme,
(3) to keep specified accommodation within Housing Benefit so that its higher costs wouldn't be caught by the 'benefit cap' calculation and because local authority social services teams were best placed to assess claimants' needs, and
(4) to disregard receipt of Housing Benefit for the purpose of calculating entitlement to Universal Credit.

101. He warned me that these were "polycentric policy matters" that were properly for the legislature to decide, and were not amenable to be reconsidered by the courts or tribunals. He reminded me that when Parliament makes changes to the law 'bright line' rules will often be introduced in the interests of predictability and legal certainty, citing Lord Bingham's words in *R (Animal Defenders International) v Secretary of State for Culture, Media and* Sport [2008] UKHL 15 at [33]:

> "… legislation cannot be framed so as to address particular cases. It must lay down general rules … A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard

> cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial."

102. He also referred me to the dissenting judgment of Lords Reed and Sumption JJSC in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 at [93], urging restraint in interfering with the choices made by those who are democratically accountable.

103. I accept that it is well-established that Parliament has a wide discretion in deciding where to draw such lines, and I must accept that it is all the more so where the legislation in question takes the form of transitional regulations.

104. I note, however, that the provisions with which we are concerned are comprised in a statutory instrument introduced by way of "negative procedure". If primary legislation which has been debated in Parliament and voted upon is at the top end of the scale in terms of the restraint required, legislation such as this must be at the bottom end of the scale, and so a lesser degree of restraint is appropriate.

105. The Secretary of State maintained that the Claimant did not experience any relevant difference in treatment compared with person 1 and person 2 that might engage Article 14, because regulation 55 of the 2014 Regulations applies equally to all these cases, just with different results.

106. However, there is a very important difference in the way that erosion applies to the Claimant and anyone sharing her status on the one hand, and those who do not share that status on the other. Where Universal Credit claimants who do not share the Claimant's status experience erosion of their transitional protection it is because *the benefit they receive has gone up* (whether by way of annual uprating, an increase in their housing costs, or a new or increased entitlement to some other element). Despite experiencing erosion, they receive no less benefit. Rather they experience *less of an increase in benefit* than they would have done without erosion. This is the way that erosion is supposed to work. There is a clue in the heading to regulation 55 of the Transitional Regulations (as amended): "The transitional element – initial amount and adjustment *where other elements increase*" (my emphasis).

107. In the case of the Claimant and those sharing her status, however, the erosion occurs despite there being *no increase in their benefit entitlement at all*. Indeed, in the Claimant's case there was a *significant reduction* in her benefit in respect of rent and service charge of £246.75 due to her moving out of specialist accommodation into much cheaper mainstream accommodation.

108. Mr Edwards characterised the Claimant's case as an attack on the erosion principle. That is certainly not how Mr Royston presented it. Indeed, he said that to the contrary the Claimant accepts the principle of erosion. He says that erosion should apply to the Claimant and those of her status, just as it does to other claimants, but he maintains that the Claimant's loss of her Transitional Element is not properly characterised as 'erosion'. I agree.

109. The loss of transitional protection experienced by the Claimant on moving from specified accommodation (or temporary accommodation as defined in paragraph 3B of Schedule 1 to the 2013 Regulations) to mainstream accommodation is not incremental and gradual, but sudden and total. The regulations apply to expose the Claimant and her cohort of vulnerable people with disabilities to precisely the "cliff-edge" income loss that the High Court found to be unlawful in *TP1*, and which the

Transitional Protection Regulations were introduced to remedy. Further, the elimination of the transitional protection occurs in circumstances where there is no increase in the Claimant's benefit, so it is inconsistent with the "erosion principle". It is, in Mr Royston's words, a "cuckoo in the nest".

110. I am satisfied that the treatment complained of amounts to discrimination on the basis of the Claimant's "other status". That leads to the question whether such treatment is justified, which was the subject of the Secretary of State's fourth ground of appeal.

111. The fourth ground of appeal asserts that the First-tier Tribunal erred in law in its approach to considering, "or failing to consider", that any discrimination contrary to the Claimant's Convention rights arising from the Secretary of State's decision and/or regulation 55 of the 2014 Regulations, was objectively justified.

112. Taking the "failing to consider" reference first, it is clear from what the First-tier judge said in his statement of reasons that he did consider the issue:

> "28. The Representative addressed the question as to whether the difference in treatment could be objectively justified, stating that, "[the Claimant] is unaware of any justification for the differential treatment and the Secretary of State for Work and Pensions has not attempted to provide justification. Indeed, they state in their Mandatory Reconsideration decision (at page 71) "I must clarify that there is no dispute that the above sequence of events represents circumstances largely outside of your control."

113. This explanation is admittedly brief, but it must be read in context. I note that the First-tier Tribunal judge made case management directions inviting the parties to make sequential submissions and listed the appeal for an oral hearing. The Secretary of State declined to make further submissions and seemingly chose not to be represented at the oral hearing (which was listed as a telephone hearing). It was for the Secretary of State to demonstrate justification, not for the Claimant to show that there was none. In the absence of submissions or evidence on justification there perhaps wasn't much more to be said by the judge.

114. In the proceedings before the Upper Tribunal there was an oral hearing, and both parties were represented. By way of justification, Mr Edwards cited Parliament's clear decision to reform the benefits system, and to do so in a way which did not replicate all that had gone before. It decided not to replicate certain of the premiums included in the legacy benefits except to the extent of transitional protections, and it decided that those protections would erode over time with increases in benefits.

115. This is just where Parliament chose to draw the line, Mr Edwards explained. That decision was not manifestly without foundation, and so it should be respected. To the extent that there was less favourable treatment on a discriminatory basis it was justified because Parliament was entitled to reform benefits and there was no right to benefits staying the same.

116. However, what must be justified is "the difference in treatment; it is not enough to show that the underlying policy is justified" (see *TD and others v SSWP* [2020] EWCA Civ 618 at [57] per Singh LJ).

117. The Secretary of State offered no evidence to show that the potentially discriminatory effect on the Claimant and those sharing her status was considered

before the relevant legislation was made law, or that any thought was given to how this effect could be mitigated.

118. The Secretary of State has not explained why, to achieve the legitimate aims identified by Mr Edwards, it is necessary that those in the Claimant's position should not be afforded the same protection from cliff-edge loss that the High Court held to be necessary in *TP1* to protect those who experience such a loss as a result of a move from one local authority to another triggering a transition from a legacy benefit into Universal Credit.

119. The administration of social security benefits is a very complicated business, and this is relevant to an assessment of the proportionality of measures which have a discriminatory effect. However, no evidence was adduced to demonstrate that it would be administratively complicated, burdensome or costly to identify those who share the Claimant's status and to treat them in a way which does not subject them to a cliff-edge income loss, for instance by applying erosion only in circumstances where the claimant enjoys an increase in benefit payments.

120. Mr Edwards maintained that the proper standard of review was "manifestly without reasonable foundation". Mr Royston said that, given the absence of any evidence that the question of the impact on those sharing the Claimant's status was even considered, there should be a somewhat more exacting standard.

121. In the circumstances, it doesn't matter which standard I apply. I acknowledge the wide margin of appreciation given to legislative or executive judgments on matters of social and economic policy, such as the administration of social security benefits (see Lord Sales JSC in *R (Z) v Hackney LBC* [2020] UKSC 40 at [107]-[110]). However, I remain unpersuaded that the less favourable treatment accorded to the Claimant and those of her status was a proportionate means of achieving a legitimate aim (even on a "manifestly without reasonable foundation" basis). It is not sufficient that there was a reasonable foundation to the erosion principle itself.

122. Further, I consider that such treatment ran *counter* to the policy objective behind the Transitional Regulations (as amended by the Transitional Protection Regulations). Their purpose was to provide for transitional protection to natural migrators who had been in receipt of SDP or EDP prior to transitioning to Universal Credit, and eroding that protection as the claimant experiences increases in their benefits. Far from furthering that policy objective, the policy objective is positively frustrated by the way that regulation 55 eliminates the Claimant's entitlement to the Transitional Element in its entirety in circumstances which the Secretary of State concedes are largely beyond her control, and where she experiences no increase in the benefits she receives.

123. In *TP1* Lewis J concluded:

> "88 … the material before the court does not establish that the Transitional Regulations as they stand strike a fair balance between the interests of the individual and the interests of the community in bringing about a phased transition to [U]niversal [C]redit…"

124. The same applies in this case to the Transitional Regulations as amended. For all of these reasons, Ground 4 also fails.

Conclusions

125. Judge Johnson's decision that the application of Schedule 2 and regulation 55 of the Transitional Regulations (as amended) in the way that the Secretary of State

applied it resulted in unlawful discrimination against the Claimant in breach of section 6 of the HRA 1998 and Article 14 of the Convention involved no material error of law.

126. Given what I have decided I do not consider it necessary to deal with Mr Royston's alternative analysis summarised in [58] above.

127. Having found a breach of the Claimant's Convention rights Judge Johnson decided that the appropriate remedy was to disapply the offending provision of secondary legislation and to set the SoS Decision aside on the basis that the Claimant's Universal Credit award should be recalculated to include the Transitional Element as if it had not been reduced to nil by the award of the Housing Costs Element from 11 May 2021.

128. In his skeleton argument Mr Edwards argued that the First-tier Tribunal's remedy was inappropriate. He argued that it was not possible simply to disregard the offending provision because it is central to the statutory scheme, and it isn't clear how the statutory scheme can be applied without it.

129. Remedy was not challenged by the Secretary of State in his amended grounds of appeal, and Mr Royston argued that it was an abuse of process for it to be pursued. In any event I am not at all persuaded by the Secretary of State's case on this point. It is predicated on his case that the appeal is an attack both on the erosion principle and on the transitional relief provided by the Transitional Protection Regulations remaining transitional in nature. It is neither. Disapplying the provisions to the extent that they discriminate unlawfully against the Claimant and those sharing her status does not require a wholesale unpicking of the Universal Credit scheme. Erosion can still occur, and the transitional protections can be eroded to nothing as claimants enjoy increases in their benefit. What cannot occur is the unfair stripping away of all transitional protection in one fell swoop when a claimant's circumstances change such that they need to move between specified accommodation which is funded via Housing Benefit and non-specified accommodation which attracts the Housing Costs Element of Universal Credit.

130. The judge's decision on disposal was consistent with the Supreme Court's decision in *RR v SSWP* [2019] UKSC 52, which was binding upon him. He was entitled to dispose of the appeal in the way that he did.

131. For the reasons I have explained each of the Secretary of State's grounds of appeal fails. I am not persuaded that the FtT Decision involved any material error of law.

132. I therefore dismiss this appeal and confirm the FtT Decision.

Judge Thomas Church
Judge of the Upper Tribunal
Authorised for issue on 19 February 2024
Corrected on 4 July 2024