Neutral Citation Number: [2026] UKUT 178 (AAC)
Appeal No. UA-2024-000834-IS

IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

RULE 14 ORDER: It is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the Appellant in these proceedings. *Failure to comply with this order may be contempt of court and could lead to a fine, imprisonment or other sanction*

Between:

WML

Appellant

and

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge West

Hearing Date: 8 October 2025
Further Submissions: 20 October 2025, 3 November 2025
Decision Date: 6 May 2026

Representation: Mr Tom Royston and Ms Alexa Thompson, counsel, for the Appellant (instructed by Citizens Advice Gateshead), acting pro bono

Mr Tim Johnston, counsel, for the Respondent (instructed by the Government Legal Department)

On Appeal from:

Tribunal:	First-tier Tribunal (Social Entitlement Chamber)
Tribunal Venue:	Newcastle-Upon-Tyne
Tribunal Case No:	SC337/22/00070
Panel:	Judge McGarr
Tribunal Hearing Date:	8/1/2024

SUMMARY OF DECISION

Income Support (IS) - Severe Disability Premium (SDP) - procedure for supersession of benefits decision under Social Security Act 1998 and Social Security and Child Support (Decisions and Appeals) Regulations 1999, specifically the supersession of an award of IS on the basis that claimant has subsequently become entitled to SDP - whether, on the facts and on a proper construction of regulations 6 and 7, the case fell within regulation 6(2)(a) (change of circumstances when non-dependant son moved out of the house) or regulation 6(2)(e) (claimant subsequently became in receipt of a relevant benefit) – whether, if the claimant fell outside regulation 6(2)(e), regulations 6 and 7 breached Article 14 of the European Convention on Human Rights ("the ECHR"), read in conjunction with Article 1 of the First Protocol ("A1P1") to the Convention

Keyword Names: **19 Income support and state pension credit**
19.1 Applicable amounts
19.5 Other: income support

Please note that the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and the Reasons of the Judge follow.

DECISION

The decision of the First-tier Tribunal sitting at Newcastle-Upon-Tyne dated 8 January 2024 under file reference SC337/22/00070 involves a material error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

The matter is remade to the same effect. The claimant was not entitled to Income Support with the Severe Disability Premium whether from and including 12 March 2017 or from and including 20 December 2019 and in either case to and including 11 February 2022.

This decision is made under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This is an appeal, with my permission, against the decision of the First-tier Tribunal sitting at Newcastle-Upon-Tyne on 8 January 2024.

2. I shall refer to the appellant hereafter as "the claimant". The respondent is the Secretary of State for Work and Pensions. I shall refer to him hereafter as "the Secretary of State". I shall refer to the tribunal which sat on 8 January 2024 as "the Tribunal".

3. This case concerns the procedure for supersession of a benefits decision under the Social Security Act 1998 ("the 1998 Act") and the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("the 1999 Regulations"), specifically the supersession of an award of income support ("IS") on the basis that a claimant has subsequently become entitled to the severe disability premium ("SDP").

4. There are two questions which fall for decision. First, whether, on the facts and on a proper construction of regulations 6 and 7, the case falls within regulation 6(2)(a) (change of circumstances when non-dependant son moved out of the house) or regulation 6(2)(e) (claimant subsequently became in receipt of a relevant benefit). Secondly, whether, if the claimant falls outside regulation 6(2)(e), regulations 6 and 7 breached Article 14 of the European Convention on Human Rights ("the ECHR"), read in conjunction with Article 1 of the First Protocol ("A1P1") to the Convention.

The History of the Claim

5. The claimant appealed against the decision of 5 July 2022 that she was entitled to IS with the SDP from and including 12 February 2022, but not before that date. The decision was subsequently reconsidered, but not revised, on 16 August 2022. She appealed against that decision on 19 August 2022.

6. The matter ultimately came before the Tribunal on 8 January 2024 (an earlier decision on 9 May 2023 having been set aside because of the absence of a recording of the proceedings) when the claimant appeared in person with her representative, Mr Grigoriou of Citizens Advice Gateshead, and gave oral evidence. A presenting officer appeared by videolink. The appeal was refused.

7. The Tribunal found that the claimant was not entitled to IS with the SDP from and including 20 December 2019 to and including 11 February 2022.

8. She was refused permission to appeal on 31 May 2024 and applied to the Upper Tribunal for permission to appeal on 14 June 2024. On 26 July 2024 I directed an oral hearing of the application for permission to appeal, which I heard in Newcastle-upon-Tyne on 12 November 2024 when the claimant and Mr Grigoriou appeared before me. On 13 November 2024 and 12 December 2024 I acceded to the claimant's application and granted her permission to appeal on both of her then grounds of appeal.

9. The matter came before me on 8 October 2025 when the claimant was represented by Mr Tom Royston and Ms Alexa Thompson, both of counsel. The Secretary of State was represented by Mr Tim Johnston of counsel. I am indebted to all three of them for their excellent written and oral submissions.

10. As explained in more detail below, it was necessary to direct the submission of further written sequential submissions. The claimant's additional written submission was submitted on 20 October 2025 and the Secretary of State's submission in response on 3 November 2025.

11. The first ground of appeal, as originally formulated, was that regulation 6(2)(ee) provided a ground for supersession on the basis that sub-paragraphs (a) to (c) and (d)(ii) of regulation 3(7ZA) applied in that:

(a) sub-paragraph (a) was satisfied as the Secretary of State made a decision in 2016 awarding IS to the claimant;

(b) sub-paragraph (b) was met because her son E was for a period a non-dependant;

(c) sub-paragraph (c) was met because E's presence prevented an SDP from being included at the time of the IS award;

(d) sub-paragraph (d)(ii) was met because the award of PIP to E was, on the Secretary of State's state of knowledge, such that an SDP would become applicable to the claimant.

12. The second ground of appeal was that the Tribunal erred by failing to decide that the Secretary of State's decision should be superseded to the effect that the claimant was entitled to SDP during the period from and including 12 March 2017 to and including 11 February 2022 because a decision to that effect was necessary to give effect to her rights under Article 14 and A1P1 of the ECHR.

Background Facts

13. On 11 March 2013 the claimant's son E turned 18.

14. In mid-2016 the claimant received an award of IS. She also received an award of Personal Independence Payment ("PIP") with the daily living component. That was a "qualifying benefit" for the purposes of SDP eligibility. The award of IS was made on 27 July 2016 with effect from 19 July 2016. The award of PIP was made on 9 August 2016 with effect from 4 May 2016. Thus the award of IS and the award of PIP straddled each other. It was not the usual case of one award being made in, say, one year and commencing in that year and then the second award of a different benefit being made in the second year and commencing in that second year. Here the claim for IS was made first in time and the claim for PIP second in time, but the award of PIP was backdated to a time earlier than the commencement of the award of IS. Thus, in terms of the ultimate chronology, the sequence of events was (i) 4 May 2016: backdated award on PIP (ii) 19 July 2016: backdated award of IS (iii) 27 July 2016: claim for IS (iv) 9 August 2016: claim for PIP.

15. At the time when she was awarded IS and PIP, the claimant lived with her husband (who also received PIP), her now adult son E and her then-minor daughter A. The claimant would have been eligible for SDP but for the presence in her home of E, who was a non-dependant. That is because it was a condition of eligibility for an SDP that the claimant must not have had a person living with her who was an adult, but who was not in receipt of a qualifying benefit. Neither the presence of her husband nor her daughter precluded an award of an SDP because one was in receipt of PIP, a qualifying benefit, and the other was a child. By contrast, E was an adult who was not in receipt of a qualifying benefit, so his presence *did* block her entitlement to SDP.

16. On either 9 or 12 March 2017 (it matters not which, although the parties were content to proceed on the basis of the latter date) E moved out of the claimant's house. It is agreed between the parties that, as a result of E's departure, the claimant met the necessary conditions for SDP. However, the Tribunal found, as a question of fact, that she did not at that time notify the Secretary of State of E's departure. That is not in dispute. E's departure was not in fact notified until 5 years later. The legal question raised by this appeal concerns the consequences which follow from that non-notification.

17. From 12 May 2017, E (living elsewhere) was in receipt of PIP (the award was not in fact made until 11 April 2022, but was backdated to the earlier 12 May 2017 date). Since PIP is a qualifying benefit for SDP purposes, in consequence, had E continued to reside in the claimant's house at that time and been in receipt of a qualifying benefit, the claimant would have become eligible for SDP. As it was, E was no longer residing with the claimant, so that he was no longer a non-dependant and his benefit status was now not relevant for the purposes of the statutory scheme.

18. A turned 18 on 20 December 2019. On 12 February 2022, her partner moved into the family home. He was a non-dependant who did not receive a qualifying disability benefit, with the effect that from that point onwards the claimant once again had a non-dependant living with her, so that her eligibility for SDP came to an end (again that is not in dispute).

19. Before the Tribunal the Appellant argued that she had been entitled to SDP between either 12 March 2017 or 19 December 2019 (the precise position is unclear) to 11 February 2022 and that the supersession was effective throughout those dates. However, the Tribunal found that there never was an effective supersession because, while the claimant fulfilled the eligibility conditions during that period, her failure to notify prevented the supersession from becoming effective. She now submits that the Upper Tribunal should find the supersession to have been effective from the date of E's departure from the family home on 12 March 2017. The fact that E was not, however, in receipt of PIP until 12 May 2017 (as backdated on 11 April 2022) now recedes into the background in the light of the abandonment of the original first ground of appeal.

The Tribunal's Decision

20. The Tribunal refused the appeal and upheld the Secretary of State's decision of 5 July 2022 and held that the claimant was not entitled to the SDP for the period from and including 20 December 2019 to and including 11 February 2022 on the basis that she had not shown good cause why she failed to report a change of circumstances relating to her household for that period.

21. At no point did the Tribunal direct itself to consider the statutory basis for supersession of an earlier decision contained within s. 10 of the 1998 Act or the 1999 Regulations. Instead it considered in detail whether the claimant had demonstrated a "good cause" for failing to notify the Secretary of State of a relevant change of circumstances. It heard evidence from her on her ability to respond to correspondence, assessed the deliberateness of her decision not to report the change and even considered whether she had attempted to deceive the benefit office by failing to mention an advantageous change (although it found that there was no such deception).

22. It was, however, common ground before me that, by adopting that approach, the Tribunal fell into error in that the reasons for failing to notify are not relevant to determining whether there is a ground for supersession and from what date a supersession can take effect in accordance with the 1999 Regulations. It is not therefore relevant to set out the Tribunal's legal reasoning at any length in this decision since both sides agree that it was erroneous.

23. The claimant's position was that, if she were right that regulation 6(2)(e) applied to her circumstances and provided her with a ground of supersession, the Tribunal's approach involved material errors which prevented her entitlement to SDP from being reflected by a superseding decision with the effective date determined in accordance with regulation 7(7).

24. By contrast, the Secretary of State's position was that, on a proper construction of the relevant law, no entitlement to SDP ever became effective. Therefore, any error of law in the Tribunal's reasoning did not alter the outcome of the hearing and the appeal should be refused.

The Revised Grounds of Appeal

25. At the beginning of the hearing, however, Mr Royston abandoned his first ground of appeal as originally formulated and sought to rely on a different ground of appeal, not based on regulation 6(2)(ee), but instead on regulation 6(2)(e) of the 1999 Regulations. He continued to rely on his second ground of appeal.

26. Mr Johnston initially objected to the late attempt to argue a different ground of appeal, for which permission had not been given, although ultimately his position on instructions was that he was content for the new point to be taken and he was able to deal with the matter at the hearing. I admitted the new ground of appeal *de bene esse* at the hearing and heard argument about it, although reserving my decision on its admissibility until the completion of my judgment. Given that the Secretary of State did not ultimately object to the new ground of appeal and was able to deal with it both orally on the day and in writing, to the extent necessary I am prepared to grant permission for it to be admitted. Nevertheless, given that the new ground had been raised only at the outset of the hearing before me and although both counsel addressed me on the point, somewhat on the hoof but nonetheless fluently, it was necessary to direct the production of sequential additional submissions. The claimant provided hers on 20 October 2025 and the Secretary of State his in response on 3 November 2025.

The Statutory Framework

IS and SDP

27. A person in receipt of IS will be entitled to have an SDP included in the applicable amount of his weekly award if the conditions set out in paragraph 13, Schedule 2 of the Income Support (General) Regulations 1987 ("the 1987 Regulations") are satisfied:

> **"13 Severe Disability Premium**
> (1) The condition is that the claimant is a severely disabled person.
>
> (2) For the purposes of sub-paragraph (1), a claimant shall be treated as being a severely disabled person if, and only if—

(a) in the case of a single claimant […] or a claimant who is treated as having no partner in consequence of sub-paragraph (2A)—

(i) he is in receipt of […] the daily living component of personal independence payment at the standard or enhanced rate in accordance with section 78(3) of the 2012 Act, and

(ii) subject to sub-paragraph (3), he has no non-dependants aged 18 or over normally residing with him or with whom he is normally residing, and

(iii) no person is entitled to, and in receipt of, a carer's allowance under section 70 of the Contributions and Benefits Act or carer support payment or has an award of universal credit which includes the carer element in respect of caring for him;

(b) in the case of a claimant who has a partner—

(i) he is in receipt of … the daily living component of personal independence payment at the standard or enhanced rate in accordance with section 78(3) of the 2012 Act …; and

(ii) his partner is also in receipt of such an allowance …; and

(iii) subject to sub-paragraph (3), he has no non-dependants aged 18 or over normally residing with him … and … a person is entitled to, and in receipt of, a carer's allowance or carer support payment or has an award of universal credit which includes the carer element in respect of caring for only one of the couple or … no person is entitled to, and in receipt of, such an allowance or payment or has such an award of universal credit in respect of caring for either member of the couple …

[…]

(3) For the purposes of sub-paragraph … (2)(b)(iii) no account shall be taken of—

(a) a person receiving […] the daily living component of personal independence payment at the standard or enhanced rate in accordance with section 78(3) of the 2012 Act […]

(b) …

(c) subject to sub-paragraph (4), a person who joins the claimant's household for the first time in order to care for the claimant or his partner and immediately before so joining the

> claimant or his partner was treated as a severely disabled person; or
>
> (d) a person who is severely sight impaired or blind or treated as severely sight impaired or blind within the meaning of paragraph 12(1)(a)(iii) and (2)".

28. Therefore, in accordance with regulation 13(3), a person is not counted as a non-dependant if he is in receipt of a qualifying benefit specified in regulation 13(3)(a), joins the household to care for one member of the couple, or is severely sight impaired or classed as blind.

29. Regulation 3(1) defines who is classed as a non-dependant as including anyone who normally lives with the claimant and does not come within an exempted category:

> **"Definition of non-dependant**
> 3(1) In these Regulations, "non-dependant" means any person, except someone to whom paragraph (2), (2A) or (2B) applies, who normally resides with a claimant or with whom a claimant normally resides.
>
> (2) This paragraph applies to—
>
> (a) any member of the claimant's family;
>
> (b) a child or young person who is living with the claimant but who is not a member of his household by virtue of regulation 16 (circumstances in which a person is to be treated as being or not being a member of the household)".

Decisions, revision and supersession

30. The Social Security Act 1998 provides that

> "**8 Decisions by Secretary of State**
>
> (2) Where at any time a claim for a relevant benefit is decided by the Secretary of State—
>
> (a) the claim shall not be regarded as subsisting after that time; and

> (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time".

31. A decision awarding IS, made under s.8 of the 1998 Act, can be superseded in accordance with s.10, if a ground for supersession specified in regulation 6(2) of the 1999 Regulations is made out

> **"10 Decisions superseding earlier decisions**
> (1) Subject to subsection (3) ... below, the following, namely—
>
> (a) any decision of the Secretary of State under section 8 above or this section, whether as originally made or as revised under section 9 above; ...
>
> (aa) any decision under this Chapter of an appeal tribunal or a Commissioner; and
>
> (b) any decision under this Chapter of the First-tier Tribunal or any decision of the Upper Tribunal which relates to any such decision,
>
> may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on his own initiative.
>
> (2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.
>
> (3) Regulations may prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under this section.
>
> …
>
> (5) Subject to subsection (6) and section 27 below, a decision under this section shall take effect as from the date on which it is made or, where applicable, the date on which the application was made.
>
> (6) Regulations may provide that, in prescribed cases or circumstances, a decision under this section shall take effect as from such other date as may be prescribed".

32. By virtue of s.10(2) Parliament has, therefore, largely placed the burden on applicants seeking supersession to raise matters and put them in issue before the Secretary of State if they wish them to be considered. However, there are certain exceptions to that starting point, set out below.

33. Regulation 6(2) of the 1999 Regulations provides that a decision under s. 10 of the Act "may be made … on the basis that the decision to be superseded" falls into one of a number of categories which are listed in regulation 6(2)(a)-(u), of which (a) and (e) are ultimately relevant for present purposes (although I also include (ee), which formed the basis of the first ground of appeal as originally formulated):

> **"6 Supersession of decisions**
> (1) Subject to the following provisions of this regulation, for the purposes of section 10, the cases and circumstances in which a decision may be superseded under that section are set out in paragraphs (2) to (4).
>
> (2) A decision under section 10 may be made on the Secretary of State's or the Board's own initiative or on an application made for the purpose on the basis that the decision to be superseded—
>
> (a) is one in respect of which—
>
> (i) there has been a relevant change of circumstances since the decision had effect … or
>
> […]
>
> (e) is a decision where–
>
> (i) the claimant has been awarded entitlement to a relevant benefit; and
>
> (ii) subsequent to the first day of the period to which that entitlement relates, the claimant or a member of his family becomes entitled to another relevant benefit or an increase in the rate of another relevant benefit […];
>
> (ee) is an original award within the meaning of regulation 3(7ZA) and sub-paragraphs (a) to (c) and (d)(ii) of regulation 3(7ZA) apply but not sub-paragraph (d)(i) …"

34. Although the argument based on regulation 6(2)(ee) was not pursued at the hearing, for the sake of completeness I add the relevant provisions of regulation 3(7ZA):

> "(a) the Secretary of State makes a decision under section 8 or 10 awarding income support … to a claimant ("the original award");
>
> (b) the claimant has a non-dependant within the meaning of regulation 3 of the Income Support Regulations … ("the non-dependant");
>
> (c) but for the non-dependant–
>
> (i) a severe disability premium would be applicable to the claimant under regulation 17(1)(d) of the Income Support Regulations …; or
>
> (ii) […]; and
>
> (d) after the original award the non-dependant is awarded benefit which–
>
> (i) …
>
> (ii) is such that a severe disability premium becomes applicable to the claimant under paragraph 13(3)(a) of Schedule 2 to the Income Support Regulations …
>
> the Secretary of State may revise the original award".

35. Accordingly, these provisions contemplate that a supersession decision to award SDP may be made inter alia where any of the following occurs after the original award is made:

(a) there has been a relevant change of circumstances (regulation 6(2)(a)(i));

(b) a claimant is awarded an entitlement to a relevant benefit, or the claimant or her family member becomes entitled to a relevant benefit or an increase in the rate of a relevant benefit (regulation 6(2)(e)); or

(c) the claimant has a non-dependant, but for whom the claimant would have been eligible for SDP at the time of the original award and that non-dependant is subsequently awarded a qualifying benefit (which is not backdated to a date before the original award) (regulation 6(2)(ee)).

36. Where regulations 6(2)(a), 6(2)(e) or (ee) apply such that a decision awarding benefit can be superseded, regulation 7 determines the effective date from which that supersession can take effect:

> **"7 Date from which a decision superseded under section 10 takes effect**
>
> […]
>
> (2) Where a decision under section 10 is made on the ground that there has been, or it is anticipated that there will be, a relevant change of circumstances since the decision had effect or, in the case of an advance award, since the decision was made, the decision under section 10 shall take effect—
>
> (a) from the date the change occurred or, where the change does not have effect until a later date, from the first date on which such effect occurs where–
>
> (i) the decision is advantageous to the claimant; and
>
> (ii) the change was notified to an appropriate office within one month of the change occurring or within such longer period as may be allowed under regulation 8 for the claimant's failure to notify the change on an earlier date; and
>
> (iii) head (i) of sub-paragraph (c) shall be omitted.
>
> (b) where the decision is advantageous to the claimant and the change was notified to an appropriate office more than one month after the change occurred or after the expiry of any such longer period as may have been allowed under regulation 8—
>
> (i) in the case of a claimant who is in receipt of income support … and benefit is paid in arrears, from the beginning of the benefit week in which the notification was made;
>
> (ii) in the case of a claimant who is in receipt of income support … and benefit is paid in advance and the date of

notification is the first day of a benefit week from that date and otherwise, from the beginning of the benefit week following the week in which the notification was made; or

(iii) in any other case, the date of notification of the relevant change of circumstances …

(bb) where the decision is advantageous to the claimant and is made on the Secretary of State's own initiative—

(i) except where paragraph (ii) applies, from the beginning of the benefit week in which the Secretary of State commenced action with a view to supersession; or

(ii) in the case of a claimant who is in receipt of income support, jobseeker's allowance or state pension credit where benefit is paid in advance and the Secretary of State commenced action with a view to supersession on a day which was not the first day of the benefit week, from the beginning of the benefit week following the week in which the Secretary of State commenced such action;

(bc) where—

(i) the claimant is a disabled person or a disabled person's partner;

(ii) the decision is advantageous to the claimant; and

(iii) the decision is made in connection with the cessation of payment of a carer's allowance or carer support payment relating to that disabled person, the day after the last day for which carer's allowance or carer support payment was paid to a person other than the claimant or the claimant's partner …

…

(7) A decision which is superseded in accordance with regulation 6(2)(e) or (ee) shall be superseded—

(a) subject to sub-paragraph (b), from the date on which entitlement arises to the other relevant benefit […] referred to in regulation 6(2)(e)(ii) or (ee) or to an increase in the rate of that other relevant benefit […]; or

(b) where the claimant or his partner—

(i) is not a severely disabled person for the purposes of section 135(5) of the Contributions and Benefits Act (the applicable amount) […]

> (ii) by virtue of his having
>
> (aa) a non-dependant as defined by regulation 3 of the Income Support Regulations […]; or
>
> (bb) […],
>
> at the date the superseded decision would, but for this sub-paragraph, have had effect,
>
> from the date on which the claimant or his partner ceased to have a non-dependant or person residing with him or from the date on which the presence of that person was first ignored".

The ECHR

37. Article 14 of the ECHR provides that

> "**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".

38. Article 1 to the First Protocol ("A1P1") provides that

> "**Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

39. Since I have just set out the statutory framework, it will assist the reader if I now set out my conclusions on the overall framework of the interrelationship between the regulation 6 provisions and the concomitant regulation 7 provisions rather than postponing them until I deal with Ground 1 as now amended by Mr Royston. In so

doing I accept the submissions to that effect on Mr Johnston on behalf of the Secretary of State. The effective date is different depending on which regulation 6 ground for supersession (otherwise referred to as the relevant "trigger") applies. That is crucial to the operation of the statutory regime. The effective date varies in relation to each ground of supersession because Parliament has made a series of policy decisions which strike a balance between, on the one hand, efficiency and accuracy in supersession decisions and, on the other, fairness to claimants. Mr Royston deprecated Mr Johnston's use of the words "trigger" and "rolling trigger" a glosses on the statutory words, but in my judgment they are apt metaphors for the effect of the regulation 6 provisions (the relevant ground for supersession pursuant to s.10) on the corresponding provision of regulation 7 (the date from which a decision superseded under s.10 takes effect).

40. The effect of the Regulations is that regulation 7(2) is "paired" with regulation 6(2)(a). It applies where the ground for supersession is a change of circumstances:

(a) where the change of circumstances is advantageous to the claimant, regulations 7(2)(a) and (b) provide that the effective date is: (a) the date of change where it is notified to the Secretary of State within one month or (b) from the beginning of the week when the change was notified thereafter.

(b) Parliament's logic, when making this provision is clear. The Secretary of State will not ordinarily know that a change of circumstances has taken place. He does not have the resources to keep under review and monitor factual matters such as who is residing in a claimant's home. Claimants, on the other hand, are aware of their own circumstances and can fairly be expected to notify the Secretary of State of any changes related to them if they wish to benefit from an improved benefit entitlement. That mirrors the wording of s. 10(2) of the 1998 Act, which provides that the Secretary of State need not consider matters which were not raised by the applicant and which he did not consider of his own initiative.

(c) that approach is underscored by the different approach taken in relation to those provisions of regulation 7(2) which do not rely on notification to trigger the effective date. For example, regulations 7(2)(bb) and (bc) offer examples of cases in which

the Secretary of State is already aware of the relevant change of circumstances, for other reasons. Under regulation 7(2)(bb), there is no need to notify because the supersession decision is made of the Secretary of State's own initiative. Likewise, the obligation to notify is not engaged under regulation (bc) where the decision is made in connection with the cessation of payment of carer's allowance. In such cases, it is not necessary to require the claimant to notify the Secretary of State: he is already aware of the situation.

41. By contrast, regulation 7(7) is "paired" with regulations 6(2)(e) and (ee). Where regulation 6(2)(e) or (ee) applies, therefore, no notification is required. That follows and mirrors the logic set out above. In both cases the Secretary of State is aware of the triggering event: he has himself made a relevant change to the entitlements of the claimant or a family member. In such cases, the obligation to notify does not arise.

The Authorities

42. Those conclusions are supported by the authorities. In ***Wood v Secretary of State for Work and Pensions*** [2003] EWCA Civ 53 the Court of Appeal examined the relationship between a decision under s. 10 of the Act and the grounds for supersession in regulation 6(2) of the 1999 Regulations. The Court explained that

> "19. Since it is common ground that for an earlier award to be altered by a decision under section 10 there must be a finding in fact of one of the criteria for the making of such a decision - such as for instance a relevant change of circumstances - it is perhaps unnecessary to highlight other considerations which point in the same direction. However, it is still relevant to observe, in the light of the background to Mr Wood's case, three matters. The first is the opening language of regulation 6 itself. This provides -
>
> > "(1) Subject to the following provisions of this regulation, for the purposes of section 10, the cases and circumstances in which a decision may be superseded under that section are set out in paragraphs (2) to (4).
> >
> > (2) A decision under section 10 may be made on the Secretary of State's or the Board's own initiative or on an application made for the purpose on the basis that the decision to be superseded -

> (a) is one in respect of which -
>
> (i) there has been a relevant change of circumstances since the decision was made."
>
> 20. It is common ground, and Ms Lieven expressly accepts on behalf of the Secretary of State, and in my judgment correctly so, that the words "on the basis of" follow on from the words "A decision under section 10 may be made", so that the intervening words could have been expressed in parentheses. That to my mind makes it clear that without a finding of one of the stated criteria, such as the very first one mentioned in paragraph (2)(a)(i), a decision under section 10 which supersedes an earlier decision may not be made.

43. It went on to hold at [49] per Rix LJ that a supersession decision under s. 10 requires one of the grounds to be established

> " … Unless one of those criteria has been established, and, I would suggest, forms the basis of the new superseding decision, a section 10 decision superseding an earlier decision can not even be made."

44. Thus the supersession decision and the regulation 6(2) ground on which it is based are tightly linked. Put another way, the event which gives rise to the regulation 6(2) ground determines which provision of regulation 7 should apply.

45. Applying that logic to the supersession of housing benefit and universal credit entitlements, Upper Tribunal Judge Butler recently held that in ***Secretary of State for Work and Pensions v SC and another*** [2025] UKUT 299 (AAC) at [191]:

> "As explained by the majority of the Court of Appeal in *Wood*, (a) a supersession decision alters and replaces an existing decision, (b) the ground for supersession specified in the regulations must be satisfied before the power to supersede can be used, and (c) the existing decision can only be altered in a way that follows from what has been established … As Mr Howell put it, the outcome decision must flow from the supersession ground relied upon."

46. In that case, a supersession decision arising out of the claimant's departure from the United Kingdom took effect from that point at [209-212]:

> "209. At the hearing, Mr Williams argued that closed period supersession decisions are made using a single supersession decision. Decision A awards a claimant UC or HB for an indefinite period. Decision B is the supersession decision changing decision A. The relevant change of circumstances is that the claimant is not going to meet the entitlement conditions for a fixed and known period of time. Mr Williams argued that if this is identified as the relevant change of circumstances, the supersession (giving non-entitlement) only operates for that fixed period.
>
> 210. I agree with Mr Howell that the relevant change of circumstances allowing MJ and SC's UC or HB award to be superseded, was not that they would be abroad for a fixed period, but the fact that the length and circumstances of their absences meant they could not be treated as still present in Great Britain (or have their absences disregarded).
>
> 211. This was a relevant change because it meant each claimant no longer met a condition of entitlement to their benefit. It did not matter that they would, or might, meet that entitlement condition again at a future point. Nor did it matter that the future point was more clearly identifiable in their cases than a claimant who goes abroad and does not know when they will return.
>
> 212. Applying the principles established in *Wood*, what Mr Williams argued for as the outcome decision - a current period of non-entitlement followed by a future period of entitlement - would not flow from the supersession ground on which he relied. The supersession ground of relevant change of circumstances therefore does not authorise changing MJ and SC's benefit awards in the way Mr Williams argued."

47. The leading authority on this issue, in the specific context of the regulations in issue on this appeal, is the judgment of Upper Tribunal Judge Hemingway in ***CPC/2634/2015***. Given its centrality in the argument before me, it is right that I should set out the decision at some length. The facts are not summarised clearly in one place, but in simple terms: (a) the appellant began to receive a qualifying benefit which would have entitled her to SDP; (b) that would ordinarily have been a supersession event under regulation 6(2)(e); (c) however, at the point in time at which she began to receive that qualifying benefit, she had a non-dependant (her adult son) living with her; (d) the non-dependant son later moved out, but that fact was not notified to the Secretary of State.

48. The appellant recognised that she could not take the benefit of regulation 6(2)(a) and the fact that the non-dependant had moved out, because that change had not been notified. As a result, she argued that she was entitled to rely on an event which predated the departure as the relevant supersession event: the regulation 6(2)(e) effective date. In short, she wished to rely on a prior event (her receipt of a qualifying benefit) to date her entitlement from the day of departure (this was because this was the relevant "special supersession rules" (viz, regulation 6(2)(e) and regulation 7(7)) and the appellant argued that she was entitled to take advantage of the "most advantageous" rule which might apply to her (at [16]). Judge Hemingway stated at [22]

> "It seems to me that in fact the key issue, or certainly a key issue, for me to decide is whether it can be said that the supersession was or should have been made under regulation 6(2)(a) or 6(2)(e) or, perhaps, both."

49. He held that the appropriate supersession provision was regulation 6(2)(a), since the basis of the supersession was one in respect of which there had been a change of circumstances, that change being the son's departure, so that the decision took effect as provided for in regulation 7(2). The question was then whether regulation 6(2)(e) might also have been applicable. It was certainly true that the appellant had been awarded entitlement to a relevant benefit and that she had subsequently been awarded entitlement to another relevant benefit, so "at first blush", both provisions appeared to be applicable. That, however, was not in line with the opening words of regulation 6(2). As he explained at [23]

> "By way of reminder, regulation 6(2) makes provision for a supersession to take place on the Secretary of State's own initiative (not the position here) or: "on an application made for the purpose on the basis that the decision to be superseded …" prior to setting out the various options including those contained at regulation 6(2)(a)(i) and to 6(2)(e). It seems to me that the use of the term "on the basis" ties the application to the ground relied upon and the circumstance leading directly to the arising of the ground. Put another way, and to use Mr Cooper's word, there must be a trigger to enable a supersession to take place and the trigger determines which is the applicable ground or grounds. In this case the trigger was not the appellant establishing entitlement to a second relevant benefit. It was the

departure of the adult son from the family home. Had he not departed there would not have been grounds for supersession. So, the supersession was made and, on the facts, could only have been properly made under regulation 6(2)(a)(i). I can see that there is a degree of overlap between the two sub-paragraphs in the sense that the acquiring of a second benefit where there is not a non-dependant in the household could be regarded both as a relevant change of circumstances whilst also falling with the scope of 6(2)(e) and that would mean, in appropriate cases, backdating might be permissible under regulation 7(7) even though regulation 6(2)(a) was one of the two sub-paragraphs which had application. However, that is not the situation here. I am fortified in my view, although I would have reached the same view without it, by what was indicated by the Tribunal of Commissioners in *R(IB) 2/04*. At paragraph 10(4) the Tribunal of Commissioners said this:

> "It was common ground between Mr Drabble and Miss Lieven - and in our judgment rightly so - that the decision of the Court of Appeal in *Wood v. The Secretary of State for Work and Pensions* [2003] EWCA Civ 53 (reported as *R(DLA) 1/03*) is authority for the propositions that:
>
> (a) there can be no supersession under section 10 unless one of the grounds for supersession specified in regulation 6 is actually found to exist, and
>
> (b) the ground which is found to exist must form the basis of the supersession in the sense that the original decision can only be altered in a way which follows from that ground."

50. Judge Hemingway continued (with emphasis added):

> "24. Applying that to the instant case and the particular facts and the sequence of events arising in it, *the original decision which has been superseded was and could only have been altered as a result of the change of circumstance which was the son leaving. So, it could only have been altered in a way which followed from ground 6(2)(a)(i) arising. There could not have been any alteration following the circumstances envisaged in 6(2)(e) because on the facts of this case the establishment of entitlement to the second benefit did not, of itself, give rise to any potential entitlement to the severe disability premium bearing in mind the then ongoing presence of the non-dependant son. The position then, it seems to me, is that with respect to backdating, the only applicable provision is regulation 7(2). That, of course, relates to a supersession on the grounds of an actual (as in this case) or an anticipated*

> *relevant change of circumstances. Since the decision to supersede was advantageous to the claimant and since, as is not disputed, the change of circumstances was notified to the respondent more than one month after the change occurred, then regulation 7(2)(b)(i) has application. Regulation 7(7) has no application because the supersession was not carried out under regulation 6(2)(e) or (ee).*
>
> 25. Mr Khan, as noted, had contended that regulation 7(7)(b) must have some purpose and that it would have no purpose if backdating was not permissible to the date of entitlement to the second benefit even where supersession had actually been triggered by a later departure of a non-dependant.
>
> 26. Regulation 7(7) seems to me, in some respects, to be a difficult provision and perhaps even an imperfectly or unclearly drafted one. However, ultimately, since I am accepting Mr Cooper's argument that the supersession, on the facts of this case, could only have been carried out under regulation 6(2)(a)(i), regulation 7(7)(b) can have no application."

51. Whilst ***CPC/2634/2015*** concerned regulation 6(2)(e) rather than regulation 6(2)(ee) (on which the claimant is not now relying), I am satisfied that Judge Hemingway's reasoning applies generally in relation to supersession under the 1999 Regulations:

(a) the first step is to identify the "trigger" for the supersession decision (for the purposes of regulation 6(2)).

(b) once the appropriate ground in regulation 6(2) has been identified, the appropriate regulation 7 provision which is "paired" with it must apply when determining the effective date.

(c) where the relevant trigger is the departure from the home of a non-dependant, that trigger is a "relevant change of circumstances" within the meaning of regulation 6(2)(a)(i). As a result, the applicable rules determining the effective date are those in regulation 7(2).

(d) an attempt to rely on circumstances which pre-dated that relevant change of circumstances was rejected.

52. Judge Hemingway noted at [23] that there might be circumstances in which both regulation 6(2)(a) and regulation 6(2)(e) are triggered simultaneously (in which case backdating under regulation 7(7) might be possible), but that did not arise on the facts of the case.

53. The Secretary of State also noted, for the sake of completeness, the case of ***BB v Secretary of State for Work and Pensions*** [2017] UKUT 280. (The claimant did not rely on it for the purposes of regulation 6(2)(ee), but did for the purposes of regulation 6(2)(e) and I refer to it again in that context below in relation to Ground 1 as amended). In that case Upper Tribunal Judge Mesher suggested obiter that he might have reached a different conclusion. ***BB*** concerned a claimant with an entitlement to a relevant benefit. Her husband moved out five years before she notified that change to the Secretary of State. She attempted to argue that the annual uprating of her benefits fell within regulation 6(2)(e)(ii), with the result that each annual increase was a supersession event which could form the basis for backdating. Judge Mesher disagreed at [16]. He concluded at [12] that, if he had found that she had been able to get within the terms of regulation 6(2)(e)

> "the identification of that ground of supersession would authorise the supersession process with effect from the effective date, in which process the decision-maker or a tribunal would be required to consider all the evidence as to all the elements of potential entitlement in determining afresh what decision to make as from that effective date."

54. He continued at [12] that

> "That conclusion is in my judgment in line with the approach of the three-judge panel of the Upper Tribunal in paragraph 70 of *FN v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 670 (AAC), now reported as [2016] AACR 24, and with my decisions in *KB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 537 (AAC) and *DS v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 538 (AAC), to be reported as [2017] AACR 19. In so far as the approach in *CPC/2634/2015* is inconsistent with the principles set out in those decisions I prefer not to follow it. Since I conclude below that the claimant cannot get within the terms of regulation 6(2)(e) I am not going to burden this decision with any further

> discussion of the point, but the Secretary of State may wish to take it into account in future cases."

55. The Secretary of State submitted that that case did not help the claimant. Judge Hemingway in ***CPC/2634/2015*** did not decide that there could never be two different supersession events (one after the other). He simply found that the relevant trigger was the son's departure. Likewise in ***BB***, if there had been a separate and later supersession event which met all the requirements of the 1999 Regulations, that would have given rise to a further effective date. ***BB*** is like the instant case because, as in ***BB***, the claimant is not able to show that a second supersession event occurred at all (for the purposes of the statutory regime).

56. Mr Royston accepted that, in order to succeed, he had to persuade me that the decision in ***CPC/2634/2015*** was wrong and that it should not be followed. I am however, satisfied that the decision was rightly decided and that I should follow it. It follows and is consistent with the decision of the Court of Appeal in ***Wood*** (by which I am certainly bound). Judge Hemingway was fortified in his view by what was indicated by the Tribunal of Commissioners in ***R(IB) 2/04***. It is true that in that case the Tribunal of Commissioners said at paragraph 10(4) that it was common ground that the decision of the Court of Appeal in ***Wood*** was authority for the propositions that (a) there can be no supersession under s.10 unless one of the grounds for supersession specified in regulation 6 is actually found to exist and (b) the ground which is found to exist must form the basis of the supersession in the sense that the original decision can only be altered in a way which follows from that ground, but I am also satisfied that counsel were right to make common cause on that issue. Judge Hemingway's decision is also consistent with the reasoning of Judge Butler in ***CS***.

57. That I should follow Judge Hemingway's decision is not outweighed by the doubts of Judge Mesher in ***BB*** at [12] since he said no more than

> "In so far as the approach in *CPC/2634/2015* is inconsistent with the principles set out in those decisions I prefer not to follow it"

but the point did not arise for decision as he went on to say that

> "Since I conclude below that the claimant cannot get within the terms of regulation 6(2)(e) I am not going to burden this decision with any further discussion of the point, but the Secretary of State may wish to take it into account in future cases."

58. Mr Royston submitted that there were two further reasons why the decision of Judge Hemingway should not be followed, one that it ran counter to the Decision Makers' Guide and the other that it ran counter to the decision of the Upper Tribunal in ***HR v Wakefield MDC*** [2009] UKUT 72 (AAC) and he referred to what Judge Hemingway had said at [13]

> "It was contended, though, that the Decision Makers Guide at paragraph 04354 (set out above) supported the proposition that "special" as the representative chose to call them, rules would apply with respect to the effective date of the supersession such that the effective date would be the date the son left the appellant's home notwithstanding the late notification (that is to say notification outwith the one month referred to in the regulations set out above) of that change of circumstances. Mr Khan had seen support for his arguments in what was said in a decision of the Upper Tribunal in *HR v Wakefield MDC* [2009] UKUT 72 (AAC)."

There is, however, nothing in that point. The Decision Makers' Guide is no more than what it says, guidance. It is not a definitive exposition of the meaning of legislation. The decision in ***HR*** was distinguished by the Tribunal at first instance and was found not to provide any assistance since it dealt with the housing benefit regime and, whilst there was superficial comparison with the 1999 Regulations, the machinery for backdating was not the same and the Judge therefore declined to take that decision into account.

The Claimant's Submissions

Ground 1

59. The claimant had made submissions in her skeleton argument, as well as orally at the hearing, about how the 1999 Regulations would treat a "comparator" who

claimed and was awarded IS in one year, then claimed and was awarded PIP the following year. Her argument was that such a comparator, otherwise in the same position as her (i.e. (i) at the time of the PIP award a non-dependant blocked entitlement to an SDP, (ii) the non-dependant later left, (iii) the non-dependant's departure was not timeously notified, but instead comes to light much later), would be able to rely on regulation 6(2)(e), read with regulation 7(2)(b), to have an IS award retrospectively superseded to include a SDP.

60. The new point taken by the claimant the hearing was that the timings of the decisions taken on her IS and PIP claims actually allowed her to rely on regulation 6(2)(e) in exactly the same way as the notional comparator.

61. If she were correct about the treatment of the comparator, and correct about her new point, she would win. That would make it unnecessary to address whether differential treatment would be unlawfully discriminatory (ground 2 of her appeal). For the avoidance of doubt, in the event that her new point was rejected, Ground 2 is maintained in the alternative.

62. Regulation 6(2)(e) prescribes a ground for supersession where:

> "... the decision to be superseded—
>
> ...
>
> (e) is a decision where—
>
> (i) the claimant has been awarded entitlement to a relevant benefit; and
>
> (ii) subsequent to the first day of the period to which that entitlement relates, the claimant or a member of his family becomes entitled to ... another relevant benefit ...
>
> …".

63. Both conditions are satisfied in the claimant's case:

(a) regulation 6(2)(e)(i) was satisfied, because the decision to be superseded was an award on 27 July 2016 of entitlement to IS, a "relevant benefit";

(b) regulation 6(2)(e)(ii) was satisfied, because:

(i) "the first day of the period to which that entitlement relates" was 19 July 2016;

(ii) the day on which she "becomes entitled to" PIP was the award decision date, 6 August 2016;

(iii) 6 August 2016 was "subsequent to" 19 July 2016.

(iv) PIP was "another relevant benefit".

Linguistically appropriate

64. The contrary argument would be that a person "becomes entitled to" a benefit from the effective start date of the award period, regardless of the date of the decision awarding it (in the claimant's case, her PIP award covered the period from 4 May 2016, a date which is obviously not "subsequent to" 19 July 2016). That would be a strained linguistic reading and should be rejected. "Becomes entitled to" must naturally be referring to the award decision date rather than the effective start date of the award period, at least in cases where the award is retrospective.

Purposively appropriate

65. The claimant's interpretation was the only way to give regulation 6(2)(e) sensible effect. (She understood the Secretary of State to be suggesting orally that her interpretation might have implications for other parts of the 1999 Regulations. She did not understand what implications are meant, so could not usefully make submissions on that topic.) Its purpose was to allow for supersessions of decisions where a person became entitled to a second benefit which was capable of altering entitlement to the first. Whether supersession would be needed would (save in cases of error) generally turn on whether the PIP decision was taken before or after the IS decision, not on the commencement date of the award period:

(a) a PIP decision taken before an IS decision could in principle have been taken account of in the original IS decision;

(b) in contrast, A's PIP entitlement, only determined in August 2016, could not have been taken account of by the IS decision maker in June or July 2016.

66. The start date of a PIP award was potentially important to when a supersession of an IS award resulting from the PIP took effect (see regulation 7(7)), but not to whether a regulation 6(2)(e) ground to supersede arose. That turned on whether the PIP decision post-dated the IS.

Appropriate within context of wider social security system

67. Linking the words "becomes entitled to" to the date of the decision (rather than the beginning of the award period) was also harmonious with the focus on decisions in social security adjudication generally. The benefits system was a "decision-based system": ***Secretary of State for Work and Pensions v JL*** [2011] UKUT 293 (AAC), [2012] AACR 14 at [52]. The structure of the 1998 Act focussed on the dates of decisions as key to determinations of entitlement: e.g. s.8(2)(b) and see similarly the importance placed on the decision in ***BB*** at [15]:

> "... head (ii) [of reg.6(2)(e)] applies only where the other relevant benefit or an increase of it has been awarded. An award in that sense is something that can only stem from a decision by the Secretary of State or by a First-tier Tribunal or the Upper Tribunal or some higher court on appeal..."

Conclusion

68. The claimant satisfied regulation 6(2)(e). The date from which an SDP could be awarded therefore fell to be determined in accordance with regulation 7(7).

Ground 2

69. The Tribunal erred by failing to decide that the Secretary of State's decision should be superseded to the effect that A was entitled to SDP during the 2017-22

period because a decision to that effect was necessary to give effect to her rights under Article 14 and A1P1 of the ECHR.

Ambit

70. Regulations governing SDP entitlement within IS fell within the ambit of A1P1, see by analogy ***Stec v UK (Admissibility)*** (2005) 41 EHRR SE18 and ***R (RJM) v Secretary of State for Work and Pensions*** [2008] UKHL 63, [2009] 1 AC 311.

Status

71. A was entitled to income support from 27 June 2016. She was entitled to PIP from 4 May 2016. So she was a person whose PIP entitlement commenced before her IS entitlement.

72. The Secretary of State's initial response to the appeal asserted that she had failed to show that the difference in treatment was on the ground of a protected status, stating

> "[…] it would seem that the difference in treatment is between a disabled person whose non-dependant has left the household and a disabled person whose non-dependant has remained in the household but has now been awarded a disability benefit himself."

73. The Secretary of State was not correct: the claimant relied on the status of a person whose PIP award commenced before (rather than after) her IS award. That was a relevant status for the purposes of Article 14, which prohibited unjustified differences in treatment based on an identifiable, objective or personal characteristic, or "status", by which individuals or groups were distinguishable from each other. The words "other status" had a wide meaning and their interpretation was not limited to characteristics which were personal in the sense that they were innate or inherent, see e.g. ***Mathieson v Secretary of State for Work and Pensions*** [2015] UKSC 47, [2015] 1 WLR 3250, at [19-23], ***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], ***R (SH) v Norfolk County***

Council [2020] EWHC 3436, [2021] PTSR 969 at [62] and see in particular ***R (SC) v Secretary of State for Work and Pensions*** [2021] UKSC 26, [2022] AC 223:

> "[69] … Leggatt LJ agreed with the judge that, in article 14, the words from "on any ground such as" to "or other status" (para 36 above) were intended to add something to the requirement of discrimination. It followed that status could not be defined solely by the difference in treatment complained of: it must be possible to identify a ground for the difference in treatment in terms of a characteristic which was not merely a description of the difference in treatment itself. On the other hand, he also observed that there seemed to be no reason to impose a requirement that the status should exist independently, in the sense of having social or legal importance for other purposes or in other contexts than the difference in treatment complained of. In that regard, Leggatt LJ referred to some illustrations in the European and domestic case law, such as the judgment of the European court in *Paulik v Slovakia* 46 EHRR 10, where "there was no suggestion that the distinction relied upon had any relevance outside the applicant's complaint but this did not prevent the court from finding a violation of article 14" (*Clift v United Kingdom (Application No 7205/07*) (unreported) given 13 July 2010, para 60)."

74. Being a person whose PIP award commenced before her IS award was a characteristic by which an individual was distinguishable from a person whose PIP award commenced after her IS award.

75. The Secretary of State submitted that the status relied upon was something that was "done to" a person, rather than something which a person "is" or alternatively that it was no more than a description of the statutory scheme. That submission should be rejected:

(a) in view of the decision of the Supreme Court in ***SC*** (at [69], cited above) an "other status" for the purposes of Article 14 did not need to have independent or freestanding application beyond the difference in treatment complained of;

(b) the status relied upon concerned something which the claimant was, not merely something "done to" her. She was a claimant of IS and PIP. The circumstances of

her applications for benefit were not things which merely happened to her. The timings of her applications therefore attached to her personally;

(c) the circumstances of a person's application for PIP concerned personal characteristics, namely, her disability. The status relied upon concerned the point at which a disabled person took action to claim a benefit to meet disability related financial need.

Difference in treatment is between groups in analogous situation

Comparator is person awarded PIP and IS in different order

76. The claimant asserted that the relevant difference in treatment was based on her status as a person whose PIP award commenced before her IS award, because she was refused SDP on the basis that she did not notify the Secretary of State when her son E moved out.

77. She submitted that, if she had been receiving IS and had then been awarded PIP and then E had moved out, and she had not timeously notified his move, regulation 6(2)(e) of the 1999 Regulations would apply and her award could be retrospectively superseded in full for the 2017-22 period:

(a) the decision to be superseded would be "a decision where… the claimant has been awarded entitlement to a relevant benefit': regulation 6(2)(e)(i);

(b) "subsequent to the first day of the period to which that entitlement relates, the claimant or a member of his family" would have become "entitled to another relevant benefit": regulation 6(2)(e)(ii);

(c) the effective date of supersession would accordingly be "the date on which the claimant or his partner ceased to have a non-dependant or person residing with him": regulation 7(7)(b).

78. The Secretary of State rejected this analysis, arguing that "the supersession decision and the regulation 6(2) ground on which it is based are tightly linked". But there is a tight link between a person becoming entitled to PIP and qualifying for the

SDP; the PIP entitlement was an essential condition. The fact that a PIP recipient might at the time be disqualified by the presence of a non-dependant did not affect the necessity of the PIP condition; it merely affected the date from which the supersession would be effective. To the extent that ***CPC/2634/2015*** (doubted in ***BB*** at [12]) held otherwise, it is wrongly decided and should not be followed. (I have dealt with that matter above and concluded that ***CPC/2634/2015*** was rightly decided and that I should follow it.)

Comparators sufficiently similar to be analogous

79. The purpose of considering whether situations were "analogous" was to assist in deciding whether like cases had been treated differently for some unjustified status-based reason, so that the state had failed (in the language of Article 14) to "secure" equal enjoyment of underlying Convention rights on grounds of status; or whether there had, on analysis, been proved to be some relevant difference of situation or policy imperative which justified treating apparently similar situations differently.

80. Thus the question of whether situations were relevantly comparable so as to require identical treatment could not be neatly separated from the question of whether differences in treatment were justified. As observed in ***AL (Serbia) v Secretary of State for the Home Department*** [2008] UKHL 42, [2008] 1 WLR 1434 at [23-24] and [28], in cases which engaged Article 14 of the ECHR, the issue of whether situations were "analogous" overlapped with questions of whether the circumstances of comparator groups were sufficiently relevantly similar to require differences in their treatment to be justified. In contrast with the approach under domestic discrimination law:

> "[24] …the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether "differences in otherwise similar situations justify a different treatment"."

81. In order to avoid the "arid" exercise of identifying a precise comparator, the question of whether cases were in a "similar situation" was in practice properly addressed as part of the question of justification with which it overlapped, see e.g. ***R***

(Carson) v Secretary of State for Work & Pensions [2005] UKHL 37, [2006] 1 AC 173 at [3] (cited in ***AL*** at [24]).

82. The Secretary of State argued that Parliament had "carefully distinguished" between situations in which the qualifying trigger was a change of circumstances and the award of qualifying benefit. However, that argument rested on the assumption that only one qualifying trigger might be potentially applicable to a claimant's particular circumstances. The claimant's position was that there were two qualifying triggers potentially applicable in her case: first, the departure of her son from the household; and second, her award of PIP. Her argument was that it was only because she made her applications for benefits in one order rather than another that her award of PIP did not, in fact, act as a trigger for supersession in accordance with regulation 6(2)(e).

83. It was therefore wrong to say that "irrespective of the order in which the two benefits are received" the trigger was the departure of the non-dependant. As above, if the claimant had made her benefits applications in a different order, so that she was awarded IS and then PIP, she would have had two qualifying triggers applicable to her circumstances.

84. This meant:

(a) both categories of person would fall within regulation 6(2)(a) on the basis that the subsequent departure of the non-dependant would be a relevant change of circumstances;

(b) however, a person who claimed PIP after her income support claim would also be able to satisfy another ground of supersession in regulation 6(2)(e), on the basis that an award of a qualifying benefit became applicable to her.

85. Someone in the claimant's position could only establish that one ground of supersession was met, simply because she first received IS after PIP. That meant that she lost out on the ability to come within regulation 6(2)(e) and therefore to

supersede with effect from the date on which E moved out in accordance with regulation 7(7).

86. In view of the above, it was hardly the case that the sole trigger was the departure of the non-dependant. For a person who was in the same position as the claimant but for the ordering of the benefits claims, more than one ground of supersession would be applicable such that there would be two applicable "triggers".

87. The correct approach to be taken where multiple grounds of supersession might be applicable could be seen in the cases of ***DS*** and ***OL***.

88. In ***DS v Secretary of State for Work and Pensions*** [2016] UKUT 538 (AAC), [2017] AACR 19, Upper Tribunal Judge Mesher considered the basis on which a decision about entitlement to PIP could be superseded under equivalent provisions in the UC, PIP, JSA, and ESA (D&A) Regulations 2013 and the date from which the supersession decision took effect. In that case, the claimant's PIP award was superseded following a further consultation with a healthcare professional, as it was decided that he no longer met the conditions for entitlement. Like the instant case, it could therefore be seen that the supersession was commenced at the Secretary of State's initiative rather than resulting from any application by the claimant.

89. The Upper Tribunal noted that the potential grounds of supersession applicable in PIP included relevant changes of circumstances (in accordance with regulation 23(1)) and the receipt of medical evidence or the existence of a negative determination (per regulation 26(1)(a)). Of course, which of those grounds was applicable would determine the date on which the supersession became effective (at [14]). In that case, as in the instant appeal, multiple grounds of supersession were potentially applicable.

90. On that issue, Judge Mesher, rejecting the Secretary of State's argument that regulation 26(1)(a) should be considered to provide a ground of supersession "of last resort" in cases where no other ground could be made out, stated:

> "[15] … In my view, all grounds of supersession can apply in so far as the conditions they contain are made out, without any artificial rules to try to make them mutually exclusive. So far as decisions that are advantageous to the claimant go, there is then no difficulty in applying a general principle that the claimant should be able to take the benefit of whatever ground gives the most advantage. So far as decisions that are not advantageous to the claimant are concerned, which will in the great majority of cases be supersessions carried out at the Secretary of State's own initiative, I do not see why the same principle cannot apply. The Secretary of State is entitled to rely on whatever of the grounds of supersession that are made out that result in what he says is the correct position being applied for the longest period."

91. The Upper Tribunal proceeded to hold that, where multiple grounds of supersession might apply, if the Secretary of State chose to rely on the simpler ground of change of circumstances (where the supersession was on his initiative) and was content for the superseding effect to take effect from the date it was made, he was entitled to do so. However, a tribunal "'would always" retain the discretion under s.12(8)(a) of the 1998 Act to consider regulation 23(1) if its potential application was "clearly apparent" in a case where the Secretary of State had only relied on regulation 26(1)(a) (at [15]). It therefore followed that a claimant could still take the benefit of the most advantageous ground even if a superseding decision was made on the basis of a different ground of supersession.

92. Similarly, in ***OL v Secretary of State for Work and Pensions*** [2018] UKUT 135 (AAC), the claimant was in receipt of contributory-based ESA. He was awarded PIP from October 2013, the result of which was that he became entitled to income-related ESA; however he did not inform those responsible for administering the benefit until November 2016. He sought to be awarded an SDP. His case potentially fell within both regulation 6(2)(a) and regulation 6(2)(e). The Secretary of State conceded that regulation 6(2)(e) ought to have applied to him, with which the Upper Tribunal agreed.

93. In view of ***DS*** and ***OL***, it was therefore wrong to say that "'irrespective of the order in which the two benefits were received" the trigger was the departure of the non-dependant. Indeed, if the claimant had made her benefits applications

differently, so that she applied for IS and then PIP, she would have had two qualifying triggers applicable to her circumstances. In light of the approaches taken by the Upper Tribunal in ***DS*** and ***OL***, moving away from the decision in ***CPC/2634/2015***, that would have meant that she could take the benefit of the more advantageous ground which applied to her circumstances. As such, she would therefore have been able to demonstrate that the ground for supersession in regulation 6(2)(e) was made out, with the effective date of that supersession determined in accordance with regulation 7(7).

94. In summary, the groups were analogous because:

(a) both groups were comprised of claimants entitled to both IS and PIP;

(b) both persons were disabled persons whom Parliament had recognised were deserving of receiving an additional amount in their income-related benefit to reflect their greater needs as severely disabled persons;

(c) the differential timing of their IS and PIP awards was happenstance.

Differential treatment has not been justified by the Secretary of State

95. The Upper Tribunal should find that the Secretary of State had not justified the differential treatment.

The Secretary of State has not provided any evidence in justification

96. Until his skeleton argument the Secretary of State had not even attempted to address justification. He had still put no evidence before the Upper Tribunal offering a justification for the differential treatment. That was not good enough. He enjoyed a considerable margin of appreciation in demonstrating that discriminatory treatment was justified, but it must still be demonstrated. The Upper Tribunal pointed this out at an early stage in proceedings.

Nuanced approach required to standard of scrutiny

97. The Secretary of State invited the Upper Tribunal simply to consider whether the treatment is "manifestly without reasonable foundation". Lord Reed's analysis in ***SC*** showed that a more nuanced approach was required:

> "[161] … rather than trying to arrive at a precise definition of the ambit of the "manifestly without reasonable foundation" formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows, as the Court of Appeal noted in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department (National Residential Landlords Association intervening)* [2020] EWCA Civ 542; [2021] 1 WLR 1151 and *R (Delve) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199; [2021] ICR 236, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the "manifestly without reasonable foundation" formulation in circumstances where a particularly wide margin is appropriate."

98. An important factor narrowing the margin in this case was that there was no suggestion (certainly no evidence) that the distinction which the claimant drew was considered by the Secretary of State: indeed, he said that the distinction did not exist. That was a relevant factor: see e.g. ***Secretary of State for Defence v Elias*** [2006] EWCA Civ 1293, [2006] WLR 3213 at [176].

Effect on A considerable; impact on the Secretary of State minimal

99. The amount of income which A has lost was very significant to her.

100. There was no evidence that it would be impractical to equalise the differential treatment complained of.

Remedy

101. In ***RR v Secretary of State for Work and Pensions*** [2019] UKSC 52, [2019] 1 WLR 6430 the Supreme Court held that there was nothing unconstitutional about

a tribunal disapplying a provision of subordinate legislation which would result in acting incompatibly with an ECHR right where necessary to do so to be compliant with the HRA 1998.

102. The Secretary of State had not suggested that such an approach would be impossible here, but had not set out his position on precisely how he would submit that should work. If the claimant's appeal succeeded, the Upper Tribunal was invited to direct written submissions (agreed if possible) on the form of remedy.

The Secretary of State's Submissions

Ground 1

103. On the morning of the hearing, the claimant identified a new argument, the gravamen of which was that the facts of this case were such that she did not need to demonstrate (for the purposes of Ground 2) that she was in a relevantly similar position to a person who was treated more advantageously than she was. Her new Ground of Appeal was that she was in the position of that comparator, with the effect that she took the benefit of regulation 6(2)(e) of the 1999 Regulations.

104. The Secretary of State submitted that that new Ground of Appeal was wrong. The new Ground turned on the suggestion that the words "entitled" and "entitlement" should have a different meaning in regulation 6(2)(e)(ii) and regulation 7(7) of the Regulations. That was contrary to common sense, contrary to authority and mangled the ordinary meaning of the words.

105. The words "becomes entitled to" did not bear the meaning attributed to them by the claimant. The Secretary of State made three submissions in relation to that issue.

106. First, the claimant paid almost no regard to regulation 7(7), which was the provision with which regulation 6(2)(e) was "paired". That provided:

> "A decision which is superseded in accordance with regulation 6(2)(e) … shall be superseded –

> (a) subject to sub-paragraph (b), from the date on which entitlement arises to the other relevant benefit… referred to in regulation 6(2)(e)(ii) …"

107. The relevant background was as follows:

(a) it was common ground before the Upper Tribunal that where a claimant was awarded a second relevant benefit – and that award was backdated to a point in time prior to the award decision – the entitlement to SDP ran from that backdated start date and not from the date of the decision that the claimant was entitled to a second relevant benefit. That was affirmed, albeit obliquely, in the supplementary skeleton argument.

(b) there was a strong presumption of statutory interpretation that the same word – used at more than one place in the same statute – would be given the same meaning. As Lord Hodge, Lady Rose and Lady Simler (with whom Lord Reed and Lord Lloyd-Jones agreed) noted in ***For Women Scotland Ltd v Scottish Ministers*** [2025] UKSC 16 at [13], there was a presumption "[T]hat a word has the same meaning throughout the Act when used more than once in the same statute…"

108. In order to succeed, the claimant must persuade the Upper Tribunal that the words "from the date on which an entitlement arises" referred to the date on which a decision to award a benefit was made (regulation 6(2)(e)) and "becomes entitled to" referred to the date from which the benefit ran, which might be backdated (regulation 7(7)(a)). That was a marked departure from the interpretative presumption set out above (which was particularly powerful in this case because the words were used in "paired" provisions which Parliament intended to operate together).

109. That was not sustainable. At the very least in this pair of provisions, the word "entitled/entitlement" referred to the date from which the claimant was *eligible* to a benefit. It did not refer to the date on which a *decision was taken* as regards that eligibility. (Given the very considerable breadth of the 1999 Regulations, let alone the entire body of social security legislation, the Secretary of State could not and did not need to go so far as to demonstrate that the words had the same meaning in all potentially connected contexts. Nonetheless, he noted that the distinction between

a “decision” and “entitlement” was also clear in regulation 3 of the 1999 Regulations, which provided, where relevant, “Where a decision as to a claimant's entitlement to a disablement pension…” at regulation 3(7A) - and see to the same effect 3(7B) and 3(7C). That language clearly distinguished between the decision and the entitlement, which might refer to a different point in time.)

110. For the avoidance of doubt, the above reference to the date of eligibility did not refer to the date on which all the preconditions for a potential award arose. It might well be that all the preconditions for an award arose, but the relevant circumstances were not notified to the Secretary of State, with the result that the claimant was not eligible to the relevant benefit until a later point. The simple and unavoidable point was that the words “entitled/entitlement” did not mean the same thing as the date of the decision.

111. Second, the claimant’s proposed construction ran contrary to the natural meaning of the words “becomes entitled to.” The natural and obvious meaning of those words was that they described the date from which a claimant was eligible to receive a benefit and not the moment at which a decision was taken.

112. Third, if the claimant were correct as to the meaning of regulation 6(2)(e), that would have important consequences for regulation 7(7). Her construction would be highly unfavourable for many claimants. The Secretary of State’s current practice was to backdate SDP to the date on which the person was eligible to receive the second relevant benefit (understood as the date on which she was entitled to it). If, as the claimant contended, the proper meaning of the word “entitled” in regulation 6(2)(e) was that it referred to the date of a decision, the same would apply to regulation 7(7). That would be highly disadvantageous to claimants. Taking the example of a claimant who received her first relevant benefit on day one, and on day 300 a decision was taken to award her a second benefit, which was backdated to day 50. On the Secretary of State’s approach, SDP should be awarded from day 50. If “entitled” and “entitlement” referred to the date of decision, it should be awarded from day 300: the date on which the decision was taken that she was entitled to another relevant benefit. Amongst other adverse consequences, that would mean

that any delay on the part of the Secretary of State in taking a decision would operate to the disadvantage of the claimant.

113. That outcome was unavoidable unless the claimant could identify a proper basis for displacing the strong presumption that the words “entitled” and “entitlement” had the same meaning in the two paired provisions. None was set out in the claimant’s supplemental submissions.

114. The claimant advanced four reasons in support of her new Ground of Appeal. None was persuasive.

115. First, it was said that the “natural meaning” of “becomes entitled to” referred to the date on which an award decision was made, not the date from which the person was entitled to receive that benefit.

116. That point went against the claimant. The natural meaning of “subsequent to the first day of the period to which that entitlement relates, the claimant or a member of his family becomes entitled to ... another relevant benefit ...” referred not to the moment at which a decision was taken, but rather the moment from which the claimant was entitled to – or was eligible to receive – the benefit. Mindful of the fact that there might be a considerable gap between the date of decision and the date from which eligibility ran, Parliament had chosen the word “entitled” for the purpose of specifying that the date of decision or award was not the relevant reference point. Had Parliament intended the words to have the meaning given to them by the claimant, it would have said “subsequent to the decision in relation to the first relevant benefit, a decision is taken to award the claimant or a member of his family... another relevant benefit...” It did not.

117. Second, regulation 6(2)(e) should be given a “purposive reading”, because that was the only way to give it “sensible effect”. That was in large part a retread of the claimant’s argument under Ground 2: it rested on the assertion that the order in which the benefits were awarded was dispositive. That was not correct for all the reasons already set out by the Secretary of State in response to Ground 2 of the appeal (as to which see below). Whatever the order in which the decisions were

taken (and irrespective of which relevant benefit was awarded in which order), the trigger was an entitlement to another relevant benefit. That was reinforced by the reasoning of the Upper Tribunal in ***SC***, where Judge Butler held at [211] that "it did not matter that they would, or might, meet that entitlement condition again at a future point." The power to supersede arose where the stated criteria were met; it was not an ongoing power that must be kept under review, waiting for a "relevant change of circumstances" (the wording in regulation 6(2)(a)).

118. The claimant's difficulty was that, at the point in time at which the trigger was engaged, she had a non-dependant living with her. As a result, she was not eligible to receive SDP. The claimant conceded at the hearing that she could not take the benefit of regulation 6(2)(ee), when she abandoned Ground 1. For similar and connected reasons she could not take the benefit of regulation 6(2)(e). This was a case which fell within regulation 6(2)(a) and regulation 6(2)(e) could not be triggered in the manner which the claimant suggested.

119. Third, it was said that the claimant's construction was consistent with the logic of the wider social security system, which was focused on "decisions". That point was already addressed above. Decisions played a key part in the social security system. No entitlement could arise without a decision by the Secretary of State. However, that did not mean that entitlement and the decision were the same thing. It was a familiar feature of the regime that an individual might be entitled to a benefit from a date which differed from the date of decision (and indeed from the date on which all the preconditions for eligibility arose because they were not notified to the Secretary of State at the appropriate point in time). Parliament used the words "entitled/ entitlement" to denote that difference.

120. Fourth, the claimant relied on ***BB*** at [15]. That authority went against her. The issue in that case was whether an annual uprating in a benefit fell within the scope of regulation 6(2)(e). The Upper Tribunal found that an uprating was not an award which took effect by virtue of a decision of the Secretary of State. That case concerned whether a decision had been taken at all. It did not concern whether the words "becomes entitled to" referred to the date of decision or the date of eligibility. In any event, the Upper Tribunal did affirm the principle of statutory interpretation

that terms "should be interpreted consistently" at [15], the central difficulty in the claimant's case under the "new" Ground for the reasons set out above.

121. The Secretary of State therefore invited the Upper Tribunal to dismiss the new Ground of Appeal alongside the existing grounds.

Ground 2

122. In ***R(Stott) v Secretary of State for Justice*** [2018] UKSC 59, [2020] AC 51 at [8] the Supreme Court established that four requirements must be satisfied in order to make out a breach of Article 14:

(a) first, the circumstances fell within the ambit of a Convention right;

(b) second, the difference in treatment was on the ground of one of the characteristics listed in Article 14 or "other status";

(c) third, the claimant and the person who had been treated differently were in analogous situations; and

(d) fourth, there was no objective justification for the different treatment.

123. The following principles might be distilled from the jurisprudence:

(a) "Other status" was a broadly construed concept. However, it was not limitless, per Lady Black in ***Stott*** at [56]. An "other status" was ordinarily a personal characteristic of the individual in question. In ***AL (Serbia) v Secretary of State for the Home Department*** [2008] 1 WLR 1434 Baroness Hale held at [26] that "other status" "in general … concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to change" and Lord Neuberger in ***R (RJM) v Secretary of State for Work and Pensions*** [2008] UKHL 63, [2009] 1 AC 311 similarly considered at [45] that the appropriate approach was to focus on "what somebody is, rather than what he is doing or what is being done to him".

(b) Consistent with the above, the courts have rejected "other statuses", where those statuses were purely a creature of the statutory framework itself. In ***R (HC) v Secretary of State for Work and Pensions*** [2017] UKSC 73, [2019] AC 845 at [31] the Supreme Court rejected a submission that being a ***Zambrano*** carer constituted an "other status":

> "So far as concerns her *Zambrano* status, that is a creation of European law, and such differences of treatment as there are, as compared to other categories of resident, do no more than reflect the law by which the status is created."

(c) However, an "other status" did not have to rest on a personal characteristic in all cases and it might derive from the manner in which a person had been treated (see ***Application No 7205 Clift v UK*** (2010) and the discussion in ***Stott*** at [72] – [75]). For example, being a member of a household which contained more than two children (or being a child of such a household) was an "other status" for the purposes of Article 14 (per Leggatt LJ in ***R(C) v Secretary of State for Work and Pensions*** [2019] 1 WLR 5687 at [76])

(d) In such cases, where the status was a reflection of "what people do, or… what happens to them", the court's standard of review was less intensive (per Lord Walker in ***RJM*** at [5]). Taking the example above of a family with two children, that was a status which "lies on the outer periphery" (at [78]) and was not a classification "which requires particularly convincing or weighty reasons to justify making it a ground for treating people differently."

124. As to the third requirement of an "analogous situation", the claimant must demonstrate whether "having regard to the particular nature of [her] complaint, [she] was in a relatively similar situation to others treated differently": ***Clift v UK*** at [66]. Not all differences in treatment were relevant for the purposes of Article 14. As Lord Reed explained in ***R (SC) v Secretary of State for Work and Pensions and others*** [2021] UKSC 26, [2021] 3 WLR 428 at [59], the relevant question was "whether there is a material difference between them as regards the aims of the measure in question". The question of whether the situations were analogous would in practice often be related to the question of whether the measure was objectively justified.

125. As to objective justification, it was well-established that public authorities enjoyed a broad margin of discretion in respect of social welfare measures, given that such decisions involved consideration of measures of economic or social strategy which the executive was better placed to determine than the judiciary. Courts would be "very slow to intervene" in such decisions: ***R(Salvato) v Secretary of State for Work and Pensions*** [2021] EWCA Civ 1482, [2022] PTSR 366 at [34]. In such cases "the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation": ***R(SC)*** at [158].

126. It was not easy to follow the claimant's argument under Article 14: the two arguments set out in the Amended Grounds and the subsequent submissions were (or at least might be) different.

127. Taking the position in the Amended Grounds first, the claimant argued that, if the Upper Tribunal found against her on the statutory construction ground, it was obliged to disapply regulation 6(2)(e) by way of conforming interpretation. The Secretary of State understood the logic of that submission to be as follows:

(a) if a claimant had an award of PIP which began after her IS award (but she was not eligible for SDP due to the presence of a non-dependant), the award of PIP engaged regulation 6(2)(e) and therefore the effective date provisions in regulation 7(7)(b). That meant, after the non-dependant subsequently moved out, that the effective date would be the date of the non-dependant's departure, regardless of whether notification had taken place.

(b) however, if a claimant (as in this case) had an award of PIP which began before there was an award of IS, she did not fall within the terms of regulation 6(2)(e). In that case, if she was not eligible for SPD as a result of the presence of a non-dependant and that non-dependant subsequently moved out, the claimant would be limited to reliance on regulation 6(2)(a) and accordingly the less beneficial effective date provisions in regulation 7(2).

(c) that was accordingly a difference in treatment on the basis of "being a person whose PIP award commenced after her income support award", which was said to be a relevant other status within the meaning of Article 14 of the ECHR.

(d) IS was a possession for the purposes of A1P1 of the ECHR, so that it was said the "ambit" test was satisfied and Article 14 was engaged.

(e) there was no justification for that difference in treatment.

128. In her original formulation of her ground of appeal, although it was not longer relied on, the claimant suggested that that inconsistency could be remedied by "disapplying in regulation 6(2)(ee) the final "(i)" – so that the problem with not meeting (ii) does not arise." That was understood to be a suggestion that 6(2)(ee) should read: "is an original award within the meaning of regulation 3(7ZA) and sub-paragraphs (a) to (c) of regulation 3(7ZA) apply but not sub-paragraph (d)". For the avoidance of doubt, that would not remedy the purported difference in treatment. It would simply provide for the conditions in which a non-dependent would be prevented from receiving SDP, but not the means by which a supersession would arise.

129. More fundamentally, the claimant's construction of the statutory scheme was wrong. In any event, the second, third and fourth ***Stott*** requirements were not made out on the claimant's case.

The statutory scheme

130. The difference in treatment relied on by the claimant was between a person who received IS first and then PIP and a person who received PIP first and the IS (both of whom were initially not eligible to receive SDP because of the presence of a non-dependant). The claimant's case rested on a purported difference in treatment of those two persons: one had her SDP automatically backdated to the date of departure of the non-dependent and the other did not.

131. The Secretary of State did not agree with that construction of the statutory scheme:

(a) the proper approach was set out above: irrespective of the order in which the two benefits were received, when a non-dependant moved out the "trigger" was that departure and that engaged regulation 6(2)(a). That was consistent with the reasoning in ***CPC***. Accordingly, that ground of appeal failed at the first hurdle because both categories of person were treated the same: they both fell within regulation 6(2)(a). There was no difference in the backdating as it applied to the two different hypothetical claimants.

(b) the claimant might be seeking to rely on another difference, not described in her Grounds. It was correct to say that an award of SDP might be backdated to the date on which a non-dependant departed in one limited scenario: (a) a severely disabled person was awarded IS (without SDP because she had a non-dependant living with her); (b) the non-dependant left; (c) the claimant was then awarded PIP which was backdated to a date after the award of IS, but before the non-dependant left. In that scenario the award of SDP would be dated from the date of departure because it could not be backdated to a point before the non-dependant left. As to that:

(1) it was not clear at all that that was the difference in treatment relied on by the claimant.

(2) these were not the facts of the claimant's case. The reason that backdating was different in this scenario was because the order of events was different. The claimant was awarded PIP at a point in time when she did not have a dependant. The only question then became to what date should it be backdated?

(3) third, the difference did not follow from the order in which the benefits were awarded. It followed from the fact that the qualifying benefit was awarded when the person in question had no non-dependant. That engaged a different trigger, amongst those established by Parliament. Parliament had carefully distinguished between a situation in which the "trigger" was a change of circumstances (regulation 6(2)(a)) and the award of a qualifying benefit (regulation 6(2)(e)). Any difference in outcome in that scenario followed from that difference, which was at the heart of the statutory scheme.

(c) the critical difference in treatment on the facts of this case was as between the situation where: (a) a non-dependant became in receipt of a relevant benefit while still living in the property and (b) a non-dependant became in receipt of a relevant benefit after leaving the property. The claimant had not challenged that difference in treatment (and rightly so). Indeed, she accepted that these persons were not in a relevantly similar situation.

132. The claimant's confusion was demonstrated by her analysis of the purpose of regulation 6(2)(ee), although that was no longer relied on. She asserted that the purpose of that provision was to "equalize the position between claimants whose award of PIP started before and after an income support award." That was not correct. Regulation 6(2)(ee) was indifferent to that issue; it was targeted at another issue altogether. That was reflected in the Explanatory Memorandum cited in the Appellant's Reply:

> "Currently, an Income Support (IS) claimant who has a non-dependant in their household who is in receipt of certain benefits (known as a "qualifying benefit") can be awarded the severe disability premium (SDP). There is no problem if the non-dependent is in receipt of the qualifying benefit at the time of the IS claim. However, a problem arises when the non-dependent is waiting for his benefit claim to be decided. It means the IS has to be paid without the SDP. When the claim is finally decided, the Decision Maker needs to be able to increase the IS from the date that the nondependent receives his benefit. If this is from the date from which Income Support was first awarded, then the Decision Maker must be able to revise that decision from the same date. The amendments in Regulation 2(2)(a), 2(4)(b) and 2(5)(c) will allow this to be done."

133. Accordingly, the purpose of regulation 6(2)(ee) was to address a situation where a non-dependant prevented the receipt of SDP but the non-dependant was "waiting for his benefit claim to be decided." It remedied a different problem which followed from the potential delay in determining the non-dependant's claim (and potentially the non-dependant's failure to inform the IS claimant that he has now become in receipt of his own benefit). If the non-dependant later received a benefit which was backdated to a point before the primary claimant began to receive IS, the IS should be uprated to take account of SDP from that point. Regulation 6(2)(ee)

said nothing about the order in which the original claimant began to receive IS and/or PIP.

134. Three things followed from this:

(a) the claimant was wrong about Parliament's intention. Parliament had not demonstrated an intention to level out all differences of treatment in this arena. Rather regulation 6(2)(ee) addressed a narrow and specific situation which had emerged under regulation 6(2)(e), whereby a non-dependant would prevent the receipt of SDP because the non-dependant did not yet have a decision in relation to his PIP, but that decision was subsequently backdated prior to the date on which SDP would have begun.

(b) Parliament was certainly not attempting to remedy the apparent difference in treatment relied on by the claimant. It fulfilled a different function.

(c) In any event, this was not a regulation 6(2)(ee) case: E's benefits claim was not backdated to the point at which the claimant's IS began.

135. It might be that the claimant was advancing a new difference in treatment (not previously relied on) concerning the point in time at which the non-dependant applied for his qualifying benefit. With respect, the claimant's reasoning was difficult to follow here. To the extent that it was understood:

(a) the claimant was not entitled to advance a new case in Reply.

(b) more importantly, that was not a relevant difference in this case in any event. The difference in treatment in this case, if there were one at all, was between a primary recipient whose non-dependent began to receive a qualifying benefit while still living in the household and a scenario where that non-dependent began to receive a qualifying benefit after he had moved out and ceased to be a non-dependent at all. That was the reason why the statutory scheme prevented the claimant from receiving backdated SDP. But she accepted that that was not a relevantly analogous situation.

For that reason, the Article 14 argument did not get off the ground. What followed was agued out of an abundance of caution, in light of the above.

Other status

136. Assuming in the claimant's favour that the statutory scheme treated differently someone whose PIP commenced before her IS (as opposed to the other way round), that was not an "other status" for the purposes of Article 14. The relative dates on which the awards of PIP and IS were made was not a status which was personal to the claimant; it was, to adopt the terminology used by Lord Neuberger in ***RJM***, a paradigmatic example of something which was done to a person rather than something which a person was.

137. The claimant relied on the finding in ***Stevenson v Secretary of State for Work and Pensions*** [2017] EWCA CIV 2123 [47]-[51]. That case did not assist her for two reasons:

(a) first, ***Stevenson*** concerned a difference in treatment which arose out of a hard deadline in the statutory scheme: those who applied before or after a certain date were entitled to £100k/200k of support. That was not like this case. Awards of IS and PIP might change and also be awarded retrospectively. The status in ***Stevenson*** therefore satisfied the test proposed by Lady Hale in ***AL (Serbia)***, but the status proposed by the claimant did not.

(b) second, having or not having a right to a welfare benefit in any particular order was not a status. That was consistent with the Supreme Court's conclusion that being a ***Zambrano*** carer was not an "other status" in ***R (HC)***. That was simply a description of the statutory regime and how it operated: welfare schemes routinely gave rise to different outcomes - that was the very nature of such schemes.

138. Alternatively, if this were a status at all, differential treatment on the basis of a status which was no more than a description of the statutory scheme was subject to the lowest possible standard of review for the purposes of the proportionality analysis (in line with the reasoning of Lord Walker in ***RJM***). The burden on the Secretary of State to justify the difference was very limited.

Analogous situation

139. Further or alternatively, persons in the claimant's group (whose PIP commenced before their IS) and persons in the comparator group (whose PIP commenced after their IS) were not in an analogous situation.

140. SDP was a payment which was added to a claimant's IS (or other income-based benefit). The relevance of PIP was that it was a qualifying benefit which acted as evidence of a claimant's disability and might indicate that a claimant had become eligible for SDP. It was understandable that where a claimant was already in receipt of IS and later received an award of PIP, that might cause the Secretary of State to re-evaluate a claimant's eligibility for SDP. In the course of doing so, he might conduct inquiries into inter alia whether there are non-dependants in the relevant claimant's home.

141. That was different from the situation of persons, such as the claimant, whose PIP commenced before their IS. In relation to those persons, the Secretary of State would already have considered their PIP entitlement, for the purposes of determining their SDP eligibility, at the point of making the IS award.

142. It followed that there was a material difference between the two groups as regards the aims and logic of the supersession provisions.

143. To the extent that the difference complained of was the difference between a claimant whose non-dependant began to receive a qualifying benefit before or after that non-dependant had left the house, they are obviously not analogous situations. The claimant accepted that; she was right to do so:

(a) in the former case, the Secretary of State made a new award to a third party (non-dependent) whom he knew was resident at the same location as the primary claimant. It was not surprising that that would trigger a backdating to the date on which the non-dependent received the relevant benefit.

(b) in the latter case, the award was made to a person who lived at a different address and was not a non-dependant at the relevant time. The situation was not relevantly similar.

144. To the extent that the claimant complained of the difference identified above, the difference was well-justified. The trigger in the two scenarios was different: in one it was the notification of the fact that a non-dependant had moved out; in the other it was the award of PIP (backdated to a point before the non-dependant moved out). The entire statutory regime rested on a careful balance between scenarios in which the burden lay on the claimant to notify and the Secretary of State could fairly be expected already to know of the relevant situation. The situations were not factually analogous.

Justification

145. Any difference in treatment was in any event objectively justified. The starting point was that (i) courts should only rarely disturb the executive's judgment with respect to social security matters; (ii) it was the very nature of social security schemes that they produced different outcomes in different cases and (iii) any difference in treatment was not on the basis of a personal or "suspect" differentiation but one which was closely related to and followed directly from the legislative regime. The Secretary of State enjoyed an extremely wide margin of appreciation.

146. To the extent that the difference complained of was between a person who received IS first and then PIP, as opposed to PIP first and then IS (and the Upper Tribunal concluded contrary to the above, that that gave rise to a different outcome), that outcome would be justified in any event:

(a) the supersession regime was carefully calibrated to ensure that the Secretary of State was informed promptly of any changes to claimants' circumstances which could entitle them to SDP (of which the Secretary of State was not reasonably likely to gain awareness independently) while also preventing the imposition of unduly onerous obligations on claimants. That was in pursuit of the legitimate aims of facilitating the efficient conduct of the welfare benefits regime and ensuring predictability of public spending.

(b) it was more likely that the Secretary of State would be unaware of a claimant's newly arisen SDP entitlement where that claimant was awarded PIP before she was awarded IS and a non-dependant subsequently moved out of the home because there was no occasion for SDP entitlement to be re-examined following the grant of IS. In such circumstances, the Secretary of State would therefore be dependent on notification of a non-dependant's departure in order to update a claimant's award accordingly. By way of contrast, where PIP was awarded after IS, that would trigger a reconsideration of SDP entitlement at that later point. Accordingly, insofar as regulations 6 and 7 of the 1999 Regulations disadvantaged claimants such as the claimant by tying the effective date to notification, that was a proportionate means of achieving this legitimate aim and in any event did not come close to the "'manifestly without reasonable foundation" threshold.

147. To the extent that the difference in treatment was that identified above, the difference was readily justified for the reasons already given. A claimant whose non-dependant moved out before an award of PIP (albeit backdated) was not in a relevantly similar situation to a claimant whose non-dependant moved out after an award of PIP. The difference followed from Parliament's careful balancing of the obligations to inform and to take decisions in light of the available information.

148. For these reasons the Secretary of State submitted that the Upper Tribunal should refuse the appeal.

Analysis

Ground 1

149. Mr Royston accepted the proposition that, if the claimant could rely on more than one ground of supersession, she could choose whichever was the more advantageous to her, but he accepted that if she came only within regulation 6(2)(a) rather than within 6(2)(e) then she lost. Mr Johnston likewise accepted the proposition that a claimant could rely on the more advantageous of two grounds, but asserted that in this case the claimant only came within the former provision and that the ground of appeal, even as reformulated, fell to be dismissed.

150. The claimant's argument is predicated on the basis that regulation 6(2)(e)(ii) was satisfied, because:

(i) "the first day of the period to which that entitlement relates" (to IS) was 19 July 2016;

(ii) the day on which she "becomes entitled to" PIP (which was "another relevant benefit") was the award decision date, 6 August 2016, which was "subsequent to" 19 July 2016.

151. To succeed on that argument, she must succeed in showing that said that the words "becomes entitled to" refer to the date on which an award *decision* was made, not the date from which the person is *eligible or entitled* to receive that benefit.

152. That conclusion is said to be linguistically appropriate. In my judgment, however, it is Mr Johnston who is right that the natural meaning of the words "subsequent to the first day of the period to which that entitlement relates, the claimant or a member of his family becomes entitled to ... another relevant benefit ..." is that they refer not to the moment at which a decision is taken, but rather the moment from which the claimant is entitled (or is eligible) to receive the benefit. Given that there may be a significant gap between the date of decision and the date from which eligibility ran, the Parliamentary choice of the word "entitled" for the purpose of specifying that it is not the date of decision or award which is the relevant reference point. If it had been intended that the words should have the meaning ascribed to them by the claimant, it would have been easy to substitute the formulation "subsequent to the decision in relation to the first relevant benefit, a decision is taken to award the claimant or a member of his family ... another relevant benefit ...", but that form of words was not chosen.

153. Moreover, the claimant's submission does not deal adequately with the effect of regulation 7(7), which is the provision with which regulation 6(2)(e) is "paired" and which provides that

> "A decision which is superseded in accordance with regulation 6(2)(e) … shall be superseded –
>
> (a) subject to sub-paragraph (b), from the date on which entitlement arises to the other relevant benefit… referred to in regulation 6(2)(e)(ii) …"

154. It appeared to be common ground before me that where a claimant is awarded a second relevant benefit and that award is backdated to a point in time prior to the award decision, the entitlement to SDP runs from that backdated start date and not from the date of the decision that the claimant was entitled to a second relevant benefit.

155. Thus to succeed, the claimant must persuade me that the words "from the date on which an entitlement arises" refer to the date on which a decision to award a benefit was made (regulation 6(2)(e)) and that the words "becomes entitled to" refer to the date from which the benefit ran, which might be backdated (regulation 7(7)(a)). That is a significant departure from the presumption that the same word used in more than one place in the same statute will be given the same meaning, which has particular force in this case because the words are used in "paired" provisions which Parliament intended to operate together.

156. I agree with Mr Johnston that that argument is not sustainable. At the very least in this pair of provisions, the words "entitled" and "entitlement" must, consistently, refer to the date from which the claimant was *eligible* to receive a benefit. They do not refer to the date on which a *decision is taken* with regard to that eligibility. The use of the phrase "the date on which entitlement arises" in regulation 7(7)(a) also supports the Secretary of State's contention. The use of the word "arises" in relation to entitlement more naturally refers to the date from which the claimant was eligible to receive a benefit rather than the date on which a later decision is taken with regard to that eligibility which has already "arisen".

157. In this context it is worthy of note that the draftsman was well aware of the distinction between a "decision" and an "entitlement" since regulation 3 makes clear the distinction

> "(7A) Where *a decision as to a claimant's entitlement* to a disablement pension under section 103 of the Contributions and Benefits Act is revised by the Secretary of State, or changed on appeal, *a decision of the Secretary of State as to the claimant's entitlement* to reduced earnings allowance under paragraph 11 or 12 of Schedule 7 to that Act may be revised at any time provided that the revised decision is more advantageous to the claimant than the original decision.
>
> (7B) A *decision* under regulation 22A of the Income Support Regulations (reduction in applicable amount where the claimant is appealing against a decision which embodies a determination that he is not incapable of work) may be revised if the appeal is successful or lapses.
>
> (7C) Where a *person's entitlement to income support is terminated because of a determination* that he is not incapable of work and the decision which embodies that determination is revised or he subsequently appeals the decision which embodies that determination and is entitled to income support under regulation 22A of the Income Support Regulations, the *decision to terminate entitlement* may be revised."

158. As Mr Johnston rightly said, the date of eligibility does not refer to the date on which all the preconditions for a potential award arise. It might well be that all the preconditions for an award arise, but if the relevant circumstances are not notified to the Secretary of State, the claimant is not eligible to the relevant benefit until a later point in time.

159. Secondly, the claimant submitted that her interpretation was the only way to give regulation 6(2)(e) sensible effect since its purpose was to allow for supersession of decisions where a person became entitled to a second benefit which was capable of altering entitlement to the first and whether supersession would be needed would generally turn on whether the PIP decision was taken before or after the IS decision, not on the commencement date of the period of the award.

160. However, I accept Mr Johnston's submission that that argument rests on the assertion that it is the order in which the benefits were awarded which is dispositive. I deal with this in more detail when I consider Ground 2 below. Whatever the order in which the decisions were taken (and irrespective of which relevant benefit was awarded and in which order), the trigger was an entitlement to another relevant

benefit. That is consistent with and supported by the reasoning of Judge Butler in ***SC***, where she held at [211] that "it did not matter that they would, or might, meet that entitlement condition again at a future point."

161. The power to supersede arises where the stated criteria are met; it is not an ongoing power which must be kept under review, awaiting a "relevant change of circumstances" (which is the wording in regulation 6(2)(a)). The trigger in regulation 6(2)(e) is not a "rolling" trigger which goes on, remaining potentially effective, until circumstances change. Regulation 7(7), with which regulation 6(2)(e) is "paired" by virtue of the opening words of regulation 7(7), is a backwards looking provision. It is not a provision which rolls forward and prospectively in tandem with a rolling trigger of regulation 6(2)(e). Mr Royston submitted that Mr Johnston's construction would require the word "instantly" to be read into regulation 6(2)(e), but I do not accept that it requires any additional wording to be read into regulation 6(2)(e). What it does require is for regulation 6(2)(e) to be read together with and in the light of regulation 7(7).

162. Mr Johnston hit the nail on the head when he said that the claimant's fundamental difficulty was that, at the point in time at which the trigger was engaged, she had a non-dependant living with her and as a result she was not eligible to receive SDP. Just as she could not succeed on regulation 6(2)(ee), which she abandoned at the outset of the oral hearing, she could not take the benefit of regulation 6(2)(e) either. A claimant cannot come back after 5 years and seek to rely on the terms of regulation 6(2)(e). That does not render regulation 7(7) otiose. It simply provides for a different case. Indeed, as Mr Johnston submitted, if the claimant were correct, it would be regulation 6(2)(a) which would be rendered otiose because it would not matter whether a change of circumstances was notified or not because the claimant could come back years after the event and take advantage of regulation 6(2)(e) instead.

163. In short, this was a case which falls within regulation 6(2)(a) and regulation 6(2)(e) cannot be triggered in the manner which the claimant suggested. I accept, as did Mr Johnston, that if a claimant had the choice of two triggers, it is open to her

pull whichever is the more advantageous to her, but that choice did nor arise on the facts of this case. Only regulation 6(2)(a) was triggered by the facts of this case.

164. Mr Royston's third submission in favour of his new Ground 1 was that linking the words "becomes entitled to" to the date of the decision (rather than the beginning of the period of the award) was also harmonious with the focus on decisions in social security adjudication generally, which was a "decision-based system": ***Secretary of State for Work and Pensions v JL*** [2011] UKUT 293 (AAC), [2012] AACR 14 at [52]. The structure of the 1998 Act focussed on the dates of decisions as key to determinations of entitlement, for example in s.s.8(2)(b)

165. I agree with Mr Royston that decisions play a key part in the social security system and that, axiomatically, no entitlement can arise without a decision by the Secretary of State, but that does not mean that the entitlement to a benefit and the decision to award it are the same thing. As Mr Johnston submitted, it is a familiar feature of the social security regime that an individual might be entitled to a benefit from a date which differed from the date of decision (and indeed from the date on which all the preconditions for eligibility arose because they were not notified to the Secretary of State at the appropriate point in time). The Parliamentary use of the words "entitled" and "entitlement" denotes that difference.

166. I did not hear from Mr Royston any rebuttal of the point made by the Secretary of State (see paragraph 112 above) about the unfavourable effect of the claimant's contention on a number of claimants if there was any delay on the part of the Secretary of State in taking a decision since any such delay would work to the disadvantage of such claimants.

167. Finally, I do not consider that Mr Royston can draw any support in this context from the decision of Judge Mesher in ***BB***. The issue in that case was whether an annual uprating in a benefit fell within the scope of regulation 6(2)(e). Judge Mesher held that an uprating was not an award which took effect by virtue of a decision of the Secretary of State.

168. In other words, the point at issue was whether a decision had been taken at all. It did not concern whether the words "becomes entitled to" referred to the date of decision or the date of eligibility. It was in that context that he said

> "15. Although the language of regulation 3(7) is not absolutely crystal clear, it seems to me that the "award" in sub-paragraph (b) covers both an award of a relevant benefit and an award of an increase in the rate of such a benefit. Now, regulations 3 on revision and 6 on supersession are meant to operate in harmony, revision covering cases where the "original decision" is to be changed from the outset of the period it covered, with there having to be a supersession if the change is to operate from some later date. That finds expression in the provision in regulation 6(4) that in general a decision that may be revised under regulation 3 cannot be superseded under regulation 6 and in the provisions enabling the Secretary of State to treat as application for a revision as an application for a supersession and vice versa. Thus there is in my judgment some degree of presumption that, when two provisions in regulations 3 and 6 respectively are two sides of the same coin or at least intended to operate in tandem, their terms should be interpreted consistently. Since regulation 3(7) applies only where the other relevant benefit or an increase of it is awarded, in my judgment the ambiguous words of regulation 6(2)(e) are to be interpreted in the same way, so that head (ii) applies only where the other relevant benefit or an increase of it has been awarded. An award in that sense is something that can only stem from a decision by the Secretary of State or by a First-tier Tribunal or the Upper Tribunal or some higher court on appeal. The up-rating of benefits by an order under section 150 of the Social Security Administration Act 1992 does not take effect through any decision of the Secretary of State under section 8 or 10 of the Social Security Act 1998. It takes effect by the force of the order and the enabling legislation itself and so in my judgment does not fall within the terms of regulation 6(2)(e). By contrast, an award of a higher rate of the care component of DLA than formerly in effect, whether through supersession or on a renewal claim, would fall within its terms."
>
> 16. Thus, the result is that the claimant in the circumstances of the present case cannot get within the terms of regulation 6(2)(e) of the Decisions and Appeals Regulations and can only rely on the ground of supersession for relevant change of circumstances. I have considered what has been said by and on behalf of the claimant about when regulation 6(2)(e) can produce "backdating" of SDP. However, the circumstances of the examples put forward are not the same as those of the present case. The existence of those examples does not alter

> my conclusion above. Nor can it be altered if I agreed with the claimant that she is just as deserving of receiving the benefit that she could have received over the missing five years as some of those who can take advantage of the "backdating" rules. I can only consider the circumstances of the present case as they actually are and apply the legislation in what in my judgment is its proper meaning."

169. Seen in that context, the words relied on by the claimant that

> "... head (ii) [of reg.6(2)(e)] applies only where the other relevant benefit or an increase of it has been awarded. An award in that sense is something that can only stem from a decision by the Secretary of State or by a First-tier Tribunal or the Upper Tribunal or some higher court on appeal ..."

do not bear the weight which Mr Royston seeks to place on them.

170. Judge Mesher thus disagreed with the claimant's contention in that case at [16]. He concluded at [12] that, if he had found that she had been able to get within the terms of regulation 6(2)(e)

> "the identification of that ground of supersession would authorise the supersession process with effect from the effective date, in which process the decision-maker or a tribunal would be required to consider all the evidence as to all the elements of potential entitlement in determining afresh what decision to make as from that effective date."

171. Thus, in ***BB***, if there had been a separate and later supersession event which met all the requirements of the 1999 Regulations, that would have given rise to a further effective date. ***BB*** is therefore similar to the instant case because in neither case is the claimant able to show that a second supersession event occurred at all.

172. In summary, the only ground for supersession was that based on a change of circumstances under regulation 6(2)(a). That was a change of circumstances which could and should have been notified, but it was not. That is not a harsh rule; the change of circumstances could easily have been notified. It is right and proportionate to require notification to the Secretary of State to obtain an increase in the relevant benefit. The quid pro quo for the more advantageous outcome is the obligation to

notify the changed circumstances so as to trigger the increase in the relevant benefit. If the change of circumstances is advantageous, it should be notified.

173. Given that the only ground for supersession was that based on a change of circumstances under regulation 6(2)(a), I do not need to consider further the decisions in ***DS*** and ***OL***.

174. ***DS*** is directed to the question of the situation where there is more than one ground of supersession. In that case, as Judge Mesher explained at [15]

> " … In my view, all grounds of supersession can apply in so far as the conditions they contain are made out, without any artificial rules to try to make them mutually exclusive. So far as decisions that are advantageous to the claimant go, there is then no difficulty in applying a general principle that the claimant should be able to take the benefit of whatever ground gives the most advantage. So far as decisions that are not advantageous to the claimant are concerned, which will in the great majority of cases be supersessions carried out at the Secretary of State's own initiative, I do not see why the same principle cannot apply. The Secretary of State is entitled to rely on whatever of the grounds of supersession that are made out that result in what he says is the correct position being applied for the longest period. But if the Secretary of State chooses to rely on the simpler ground of supersession in regulation 26(1)(a), without going to all the bother of investigating and thinking about what the claimant should or should not have realised needed to be notified in the past, and is content for the superseding decision to take effect from the date on which it is made, I do not see why on appeal a tribunal should be obliged to consider all the elements of and under regulation 23(1) on relevant change of circumstances first."

175. That is not this case. In any event, as I remarked in argument, the decision in ***OL*** does not take matters any further in that it was based on a concession and was dealt with very briefly by Judge Wikeley in accepting that concession.

176. Although it is a mark of the ingenuity of Mr Royston as an advocate (no doubt ably assisted by Ms Thompson) that he was able so seamlessly to change horses at the starting gate and rely on a different but adjacent ground of supersession, I am satisfied that it does not get him to the winning post any more than his previous

reliance on regulation 6(2)(ee) would have done. The short point is that the Secretary of State did not know of the change or circumstances and he was not notified of it when he could easily (and should) have been. I therefore dismiss the appeal on the substituted Ground 1.

Ground 2

177. As to the comparator, Mr Royston candidly accepted that if he failed on the construction of regulation 6(2)(e), the claimant lost on both construction and the comparator point, regardless of the discrimination argument under Ground 2. Since I have found against the claimant on the construction argument, it must follow that she also fails on the comparator argument and that is sufficient to dispose of Ground 2 of the appeal. In deference to the arguments which have been addressed to me, however, I shall set out my conclusions on those matters, albeit more briefly than I would otherwise have done if Mr Royston had succeeded on the comparator point.

Ambit

178. It was common ground before me that the circumstances fell within the ambit of a Convention right and I need say so more about that aspect of Ground 2.

Status

179. Notwithstanding the width of the decision in ***Clift***, status is not something which can be waved through on the nod. The words in Article 14 are to be given a generous meaning, but they are not open-ended, see ***Stott*** at [81] and ***R(SC)*** at [69]. Not every situation gives rise to a status. The question of status must be determined holistically by considering the situation as whole, see ***Stott*** at [75]. Where the difference arises from the rule itself, that is a factor which is relevant to the determination of the question whether there is a status for the purpose of the ECHR. In the case of matters such as prison release schemes, it is clear that there needs to be very careful scrutiny of differential early release schemes, lest they run counter to the very purpose of Article 5, as Lady Black explained at [81].

180. In this case, by contrast, the status relied upon is that of a social entitlement claimant who receives benefits in a particular order. It is a status arising solely by the difference in the treatment of which complaint is made. That is not at the heart

of a Convention right, whether Article 14 or A1P1. It is intrinsically different from the situation of a 2 child or a 3 child family. Indeed, as Mr Johnston observed, if the claimant were right, it was difficult to see why virtually every line of social entitlement legislation should not give rise to a status for the purpose of the ECHR.

181. The question of status is not an open-ended rule, but nor is it a hard-edged rule. Nevertheless, in my judgment, this case falls on the other side of the line. The claimant in this case is nearer the situation of a ***Zambrano*** carer (see Lord Carnwath at [31] of that decision) than that of a parent with 2 or 3 children.

182. In summary, having or not having a right to a welfare benefit in any particular order is not a status. That is consistent with the Supreme Court's conclusion that being a ***Zambrano*** carer is not an "other status" in ***R (HC)*** at [31]

> "So far as concerns her *Zambrano* status, that is a creation of European law, and such differences of treatment as there are, as compared to other categories of resident, do no more than reflect the law by which the status is created."

183. That was simply a description of the statutory regime and how it operated. Mr Johnston is right in my judgment that welfare schemes routinely give rise to different outcomes; that is their very nature, but that does not on the facts of this case give rise to a status for ECHR purposes.

184. Mr Royston sought to rely on the decision of the Court of Appeal in ***Stevenson***. In that case the Court of Appeal held that

> "47. There is clearly a difference in treatment between disabled persons who claimed income support before 5 January 2009, and those who first claimed it on or after that date. The former are subject to the £100,000 limit on the value of the loan for which interest can be paid under the SMI scheme, whereas the latter have the benefit of the £200,000 cap. If Fiona had claimed income support for the first time after 5 January 2009, she would have been entitled to SMI on the full value of the loan which she took out in December of that year, namely £128,100. The only difference between her position and that of another disabled person who can take advantage of the £200,000 cap is the date of her claim for income support.

48. Against this background, Mr Buley submits that the date on which a claim for income support is made is plainly a characteristic "by which … groups of persons are distinguishable from each other" (*AL (Serbia)* at [9], per Lord Hope of Craighead). The cut off date was deliberately chosen by Parliament as the criterion for differentiating between different groups, which is precisely why justification is required. Accordingly, he submits, differential treatment by reference to the date on which a claim for income support was made is discrimination on grounds of a "status" under Article 14.

49. Mr Buley further submits that income support is paid to meet a person's subsistence needs, and the date on which a person first claims it will reflect the date on which the need for such support arose. Once such a claim has been made, it cannot later be undone, in the sense that the making of the claim is a matter of historical fact. Furthermore, although an able bodied claimant is unable to make a claim for SMI in respect of a loan taken out while on income support, the SMI scheme deliberately permits disabled claimants to take out a qualifying loan after they claim income support. Apart from the temporal limit in the 2008 Regulations, the date of the claim for income support has no relevance for a disabled claimant. The temporal limit thus creates a characteristic separating two identifiable groups among the disabled: those whose claim for income support was made before 5 January 2009, and those who first claimed income support on or after that date. The date of claim is therefore a personal characteristic by which groups of persons are distinguishable from each other.

50. In my view, these submissions are well founded, and Ms Leventhal on behalf of the Secretary of State wisely spent little time arguing the contrary, although she did not concede the point. She argued that the date when a benefits claim is first made is objective, and not referable to disability as such, or to any innate characteristic of a disabled person. She said there was no existing reported case where a time limit of this nature had been treated as determinative of status. Those submissions may be true as far as they go, but they do not meet the point that the test applied by the European court now extends to a difference of treatment based on an identifiable characteristic, as well as purely personal characteristics. I have already described the recent trend in the jurisprudence of the Strasbourg court, which was recognised by the Supreme Court in *Mathieson* and has greatly reduced, if not almost eliminated, the need to establish status as a separate requirement once a difference in treatment falling within the potential scope of Article 14 has been alleged. Applying this broader test, I see no reason to doubt that Fiona has a relevant

> status for Article 14 purposes in her capacity as a disabled person who first claimed income support before 5 January 2009, and was thereby prevented from taking advantage of the new £200,000 cap."

185. As I apparent from [47] that case concerned a difference in treatment which arose out of a hard deadline in the statutory scheme:

> "47. There is clearly a difference in treatment between disabled persons who claimed income support before 5 January 2009, and those who first claimed it on or after that date. The former are subject to the £100,000 limit on the value of the loan for which interest can be paid under the SMI scheme, whereas the latter have the benefit of the £200,000 cap … The only difference between her position and that of another disabled person who can take advantage of the £200,000 cap is the date of her claim for income support."

186. This case is a different one: there is no hard edge. An award of IS or an award of PIP might change over time and might also be awarded retrospectively. I accept that the status in ***Stevenson*** therefore satisfied the test proposed by Lady Hale in ***AL (Serbia)***, but the status proposed here by the claimant is significantly different.

187. I also accept Mr Johnston's argument that, on the assumption that the claimant's situation is such as to impart to her as status, any differential treatment on the basis of a status which is no more than a description of the statutory scheme is subject to the lowest possible standard of review for the purposes of the proportionality analysis. That is in line with the reasoning of Lord Walker in ***RJM*** where he said (with emphasis added)

> "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) 1EHRR 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 *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, paras 20-35."

188. The burden on the Secretary of State to justify the difference in treatment is therefore very limited. I shall return to that matter below.

Difference in Treatment

189. With the abandonment of reliance on regulation 6(2)(ee), the difference in treatment on which the claimant now relies is that there is a difference in treatment arising out of the order in which the award of the relevant benefits is made. I am, however, satisfied that the Secretary of State is correct in his criticism of that proposition for two reasons:

(1) the difference in treatment does not arise out of the order in which the relevant benefits are awarded; regulation 6(2)(e) is neutral on that question

(2) regulation 7(7) has a different purpose altogether. Nothing turns on the order in which each relevant benefit was awarded. What matters is when the non-dependant left the property, not the order in which each of the benefits was awarded.

190. Mr Johnston proffered four scenarios, of which the first two were

(1) award of IS when non-dependant present; non-dependant leaves, the departure is notified, an award of PIP is then made. SDP is then backdated to the beginning of the eligibility for PIP (or, if later, to the date on which the non-dependant leaves). Those facts engage regulation 6(2)(e) and regulation 7(7) and the award is backdated to the date of eligibility for PIP (or, if later, to the date on which the non-dependant leaves)

(2) award of PIP when non-dependant present; non-dependant leaves, the departure of the non-dependant is not notified, an award of IS is then made. Those facts engage regulation 6(2)(e) and regulation 7(7) and the award is backdated to the date of eligibility for IS (or, if later, to the date on which the non-dependant leaves).

191. The order in these scenarios was award 1, departure, award 2. Neither of those scenarios was this case. However, the legislation works in exactly the same way, regardless of the order of the awards. If the backdating would otherwise be to a point in time before the departure of the non-dependant, regulation 7(7) has the effect that the backdating will be limited to the date of the departure and not earlier.

192. He then proffered two further alternative scenarios:

(3) award of PIP when non-dependant present, then award of IS, non-dependant leaves, the departure of the non-dependant is not notified. SDP dates from the date of subsequent notification as a matter of policy, on the basis that if a change of circumstances is advantageous, it should be notified

(4) award of IS when non-dependant present, then award of PIP, non-dependant leaves, the departure of the non-dependant is not notified. Again SDP dates from date of subsequent notification.

193. The order in these scenarios was award 1, award 2, departure. Scenario 3 is a variation of this case. Scenario 4 repeats the facts of the instant case.

194. There are two pairs of scenarios. Under both the award is dated the same way irrespective of the order in which the benefits are awarded.

195. There a difference in treatment, but not the difference in treatment of which the claimant complains. The difference arises out of the date on which the non-dependant left the property rather than the date on which, or the order in which, the relevant benefits were awarded.

Analogous Situation

196. In ***R(SC)*** Lord Reed said

> "59 It is also necessary to bear in mind that not all differences in treatment are relevant for the purposes of article 14. The difference is only relevant, for the purpose of assessing whether there has been discrimination, if the claimant is comparing himself with others who are in a relevantly similar situation. An assessment of whether situations are relevantly similar generally depends on whether there is a material difference between them as regards the aims of the measure in question."

197. Assuming that the difference in treatment of which the claimant now complains is relevant for the purposes of Article 14, I do not accept that persons in her group (whose PIP commences before their IS) and persons in the comparator group (whose PIP commences after their IS) are in an analogous situation and I agree with Mr Johnston's submissions on that point, namely that SDP is a payment which is added to a claimant's IS (or other income-based benefit). The relevance of PIP is that it is a qualifying benefit which acts as evidence of a claimant's disability and may indicate that a claimant has become eligible for SDP. It is understandable that where a claimant is already in receipt of IS and later receives an award of PIP, that may cause the Secretary of State to re-evaluate a claimant's eligibility for SDP. In the course of doing so, he may conduct inquiries into inter alia whether there are non-dependants in the relevant claimant's home.

198. That is different from the situation of persons such as the claimant, whose PIP commenced before her IS. In relation to those persons, the Secretary of State will already have considered their PIP entitlement for the purposes of determining their SDP eligibility, at the point of making the IS award.

199. It follows that there is a material difference between the two groups as regards the aims and logic of the supersession provisions.

200. It was common ground that the questions of analogous situation and justification blend into each other.

201. To the extent that the claimant complains of the difference in treatment as to the order in which the relevant benefit were awarded, the difference is well-justified. The trigger in the two scenarios is different: in one it is the notification of the fact that a non-dependant has moved out; in the other it is the award of PIP (backdated to a point at which the non-dependant moved out). The statutory regime rests on a balance between scenarios in which on the one hand the burden lies on the claimant to notify the Secretary of State and on the other those in which the Secretary of State can fairly be expected already to know of the relevant situation. The two situations are not factually or relevantly analogous.

Justification

202. As for the criticism that the Secretary of State had not produced any evidence which went to justification, Mr Johnston had two answers. In the first place he asserted that there was no difference in treatment so that the question of justification did not arise in the first place. He also made the point that, even if the Secretary of State had produced evidence as to the justification of the statutory scheme, it would have addressed regulation 6(2)(ee), on which the claimant was originally relying, rather than regulation 6(2)(e), which was raised for the first time at the hearing and the claimant would have been no further forward. The Secretary of State could hardly be criticised given that he was shooting at a moving target and the target at which he was and would have been aiming was withdrawn at the very last moment.

203. As I have explained above, and on the assumption that status is made out in this case, the fact that any differential treatment on the basis of a status which is no more than a description of the statutory scheme means that it is subject to the lowest possible standard of review for the purposes of the proportionality analysis.

204. I also bear in mind what Lord Reed said in ***R(SC)*** at [158-162]

"158. … it is appropriate that the approach which this court has adopted since *Humphreys* [2012] 1 WLR 1545 should be modified in order to reflect the nuanced nature of the judgment which is required, following the jurisprudence of the European court. In the light of that jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a suspect ground is to be justified …

159 It is therefore important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant. As was recognised in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 and *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311, the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification.
162. It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in *JD* [2020] HLR 5, para 11:

> "Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts."

> In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented, at para 10:
>
> > "Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated."

205. Thus, as Mr Johnston submitted, the starting point is that (i) courts should only rarely disturb the executive's judgment with respect to social security matters, (ii) it was the very nature of social security schemes that they produce different outcomes in different cases and (iii) any difference in treatment not on the basis of a personal or "suspect" differentiation, but one which was closely related to and followed directly from the legislative regime, means that the Secretary of State enjoys an very wide margin of appreciation.

206. To the extent that the difference of which complaint is made is between a person who receives IS first and then PIP, as opposed to PIP first and then IS, that difference in treatment would be justified in that:

(a) the supersession regime is designed to ensure that the Secretary of State is informed promptly of any changes in circumstances which could entitle a claimant to an advantage in the form of SDP. The Secretary of State is not reasonably likely to know of such a change of circumstances independently. At the same time the

obligation to notify him is not unduly onerous. That pursues the legitimate aim of facilitating the efficient conduct of the benefits regime.

(b) it is more likely that the Secretary of State will be unaware of a claimant's newly arisen SDP entitlement where that claimant is awarded PIP before she is awarded IS and a non-dependant subsequently moves out of the home because there is no occasion for SDP entitlement to be re-examined following the grant of IS. In such circumstances, the Secretary of State will therefore be dependent on notification of a non-dependant's departure in order to update a claimant's award. By way of contrast, where PIP was awarded after IS, that will trigger a reconsideration of SDP entitlement at that point. So, insofar as regulations 6 and 7 of the 1999 Regulations disadvantage claimants such as the claimant by tying the effective date to notification, that is a proportionate means of achieving such a legitimate aim and in any event does not come close to either the manifestly without reasonable foundation or the proportionality threshold.

207. To the extent that the difference in treatment is that identified above, the difference is readily justified for the reasons already given. A claimant whose non-dependant moves out before an award of PIP (albeit backdated) is not in a relevantly similar situation to a claimant whose non-dependant moves out after an award of PIP. The difference follows from Parliament's balancing of the obligations to inform the Secretary of State (not an onerous obligation) and to take decisions in light of that notified information.

208. For these reasons I am not satisfied that the treatment is manifestly without reasonable foundation or that there is any difference on the facts of this case between that test and the analysis of Lord Reed in ***SC*** at [161] that a wide margin of appreciation is appropriate. As he said in that paragraph, the ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker, a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows, he continued, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the

"manifestly without reasonable foundation" formulation in circumstances where a particularly wide margin is appropriate.

209. Notwithstanding Mr Royston's eloquent criticisms, I find it impossible to say that these objectives set out above fall outside the wide margin of discretion allowed to national governments in this field.

Conclusion

210. The Secretary of State's position was that any error of law in the Tribunal's reasoning did not alter the outcome of the hearing and the appeal should be refused. It seems to me, however, that so material an error as the Tribunal made requires the decision to be set aside, even though the decision should be remade to the same effect.

211. The decision of the First-tier Tribunal sitting at Newcastle-Upon-Tyne dated 8 January 2024 under file reference SC337/22/00070 involves a material error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

212. The matter is remade to the same effect. The claimant was not entitled to Income Support with the Severe Disability Premium whether from and including 12 March 2017 or from and including 20 December 2019 and in either case to and including 11 February 2022.

Mark West
Judge of the Upper Tribunal
Authorised for issue on 6 May 2026