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2019/116363

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY LORRAINE COX FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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McALINDEN J

Introduction

[1] The applicant, Ms Lorraine Cox, is challenging the requirement enshrined in legislation that claimants who apply for Universal Credit (UC) and Personal Independence Payment (PIP) on grounds of terminal illness must demonstrate that death can reasonably be expected within six months. The hearing of the application proceeded by way of a rolled-up hearing on 18 and 19 June 2020 with the legal representatives present in Court. Ms Quinlivan QC led Mr Aidan Magowan for the applicant, instructed by the Law Centre (Northern Ireland). Dr McGleenan QC led Mr McAteer for the respondents, the Department for Communities and the Secretary of State for Work and Pensions, instructed by the Departmental Solicitor's Office and the Crown Solicitor's Office. I am indebted to counsel for the quality of their oral and written submissions and I am indebted to the former Attorney General, Mr Larkin QC for his written submissions on the Order 120 RCJ matters.

[2] This application concerns the provisions of Article 87(4) of the Welfare Reform (Northern Ireland) Order 2015 ("the 2015 Order") which is secondary Westminster legislation made under the Northern Ireland (Welfare Reform) Act 2015 which made provision for the implementation of, inter alia, the Universal Credit and Personal Independence Payment benefits systems in Northern Ireland. The application also concerns the provisions of Regulation 2 and Schedule 9, paragraph 1 of the Universal Credit Regulations (Northern Ireland) 2016 ("the 2016 Regulations"). In these proceedings, the applicant contends these provisions, insofar as they require claimants who apply for Universal Credit (UC) and Personal Independence Payment (PIP) on grounds of terminal illness to demonstrate that death can reasonably be expected within six months, are incompatible with her rights under

European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), read with Article 8 ECHR and/or Article 1 of the First Protocol to the Convention ("A1P1").

The Facts

[3] The applicant, now aged 40 years, is a divorced woman with three children now aged 7, 12 and 14 years. She previously worked as a self-employed beautician, before taking up firstly full-time and then part-time employment in an administrative capacity for a haulage company.

[4] In either August or September 2018, the applicant who had been under medical investigation for some time, was given a definitive diagnosis of Motor Neurone Disease (amyotrophic lateral sclerosis). It is hard to imagine a more devastating diagnosis for a single mother of three young children. This illness is a progressive neurological condition for which there is no effective treatment or cure. The progression of the illness is unpredictable but it would seem that 50% of those individuals diagnosed with the condition die within three years of diagnosis. In relation to the applicant's prognosis, it would seem that at the time of diagnosis, she was given an estimated life expectancy of between two to five years and she was advised that as her illness progressed, her loss of motor function would become more severe and her concomitant care and mobility needs would increase.

[5] On 7 March 2018, when the applicant was under medical investigation in respect of neurological symptomology, the applicant made an application for PIP, the successor benefit to Disability Living Allowance (DLA). This benefit is a non-means tested, non-contributory benefit which is intended to assist claimants meet some of the extra costs arising from having a long-term health condition that is expected to last for twelve months or longer. Just like the benefit it replaced, PIP has care and mobility components. In order to claim the benefit, the applicant was required to complete a detailed application form and this form invited the applicant to give details of her medical condition, any ongoing treatment and medication and to provide detailed information on how her medical condition affected how she was able to carry out day-to-day activities.

[6] These day-to-day activities included food preparation, eating and drinking, managing treatments, washing and bathing, toileting, dressing and undressing, communicating, reading, mixing with other people, making decisions about money, going out and moving around. Without going into her personal details, it is clear from a perusal of the completed form in this case that the applicant was required to divulge personal information about her functional abilities and the impairment of these abilities, her level of dependence on others (including the need for help with personal self-care), and the impact her illness was having on her and her family. In her initial application, the applicant described her condition as "Motor Neurone Disease ongoing investigations."

[7] On 25 July 2018 the applicant was informed in writing that her application had been assessed and it was adjudged that she was not entitled to PIP. On 9 August 2018, the applicant applied for this decision to be reconsidered and on 16 November 2018 she was awarded the standard (as opposed to the enhanced) rate for help with daily living from 7 March 2018 (the date of the initial application) up to 3 July 2021. It is worthy of note that there is presently £29 per week of a difference between the standard rate and the enhanced rate for help with daily living. The applicant lodged an appeal with the Tribunal seeking to establish her entitlement to the enhanced rate and this appeal was unsuccessful on 3 April 2019 with the Tribunal upholding the applicant's entitlement to the standard rate.

[8] The applicant then sought a supersession of her PIP claim and was required to attend for a further assessment. On 9 April 2019, the applicant notified the Department for Communities of a change in her condition and on 10 May 2019, she stated that her condition was Motor Neurone Disease fully diagnosed. On 10 September 2019, it was determined that the applicant was entitled to the standard rate for help with daily living component from 10 September 2019 up to 1 January 2022. On 5 November 2019, the Department was notified of a change in the applicant's condition and the applicant sought a mandatory reconsideration of her case on 12 November 2019. On 24 November 2019, the applicant was awarded the enhanced rate of PIP for help with daily living and the standard rate for help with mobility from 9 April 2019 to 1 January 2022.

[9] On 19 February 2020 in response to the notification of a change in the applicant's condition which had been made on 5 November 2019, the applicant was assessed as being entitled to the enhanced rate of PIP for help with daily living and the enhanced rate of PIP for help with mobility. This is the maximum amount payable under the PIP regime and this award was backdated to 5 November 2019.

[10] In summary, in respect of the application for PIP; following her initial application on 7 March 2018 and as a result of availing of internal review and external appeal procedures, the applicant has been paid the following rates of PIP:

(a) From 7 March 2018, the standard rate PIP for help with daily living up to 8 April 2019;

(b) From 9 April 2019, the enhanced rate of PIP for help with daily living and the standard rate of PIP for mobility up to 4 November 2019; and

(c) From 5 November 2019, the enhanced rate of PIP for help with daily living and the enhanced rate of PIP for help with mobility.

[11] The payment of PIP is ordinarily dependent upon an applicant being able to establish functional impairment impacting upon the ability to perform activities of daily living and the ability to mobilise. It is ordinarily necessary for an applicant to demonstrate that such impairments and needs have been in existence for at least three

months and are likely to persist for at least a further nine months. However, a claimant who comes within the ambit of the Special Rules on Terminal Illness ("SRTI") is immediately and automatically entitled to the enhanced rate of the daily living component of PIP. There is no requirement for an assessment of functional impairment and increased needs in respect of the activities of daily living. These impairments and needs are assumed to exist. Further, there is no qualifying period.

[12] In order to avail of the SRTI provisions, a claimant is required to submit a Form DS 1500 which has to be completed by a medical practitioner. If that medical practitioner is able to certify that the claimant is suffering from a progressive illness/disease and that in consequence of that illness/disease, death can reasonably be expected within six months, then the claimant will be deemed to be suffering from a terminal illness for the purposes of the legislation and the SRTI provisions referred to above will apply. If an individual with such a diagnosis and prognosis does survive for longer than six months, there is no statutory provision mandating a review of his/her entitlement to PIP. However, it would appear that due to the fact that a significant number of such claimants are surviving for periods well in excess of six months, an administrative practice has developed whereby a review of the entitlement of such claimants to PIP is conducted if they are still alive after three years.

[13] On 16 January 2020 the Department received a Form DS 1500 completed by the applicant's Consultant Neurologist, Dr Colette Donaghy, FRCP, based in Altnagelvin Area Hospital. This form indicated that the applicant had a diagnosis of Motor Neurone Disease with a date of diagnosis of 14 September 2018. Her condition was described as "Manometric presentation of Amyotrophic Lateral Sclerosis". The form indicated that the applicant was being treated with Riluzole, a drug which marginally slows down the progression of the disease. Upon receipt of the form, Mr Alaistair Tallis, a Departmental medical assessor, raised a query as to why the form did not contain any information on prognosis. As a result, Mr Tallis contacted Dr Donaghy, FRCP, by telephone on 21 January 2020 in order to obtain further information on the applicant's prognosis. Dr Donaghy, FRCP, advised Mr Tallis that she had completed the DS 1500 form on advice from her Motor Neurone Disease nursing colleagues who had advised her that in the case of patients diagnosed with this condition, the requirement for death to reasonably be expected within six months no longer applied.

[14] Mr Tallis informed Dr Donaghy, FRCP, that he was unaware of this development and that he would check whether this was correct and return to her. He then spoke to Dr Shah Faisal, the medical director for Capita, who advised him that the six-month survival estimate still applied and, in the case of Motor Neurone Disease, was usually founded on the patient's presentation and symptoms such as bulbar symptoms and respiratory issues. Mr Tallis then contacted Dr Donaghy, FRCP, again and relayed this information to her. Dr Donaghy, FRCP, then informed Mr Tallis that she did not feel that the applicant would meet this criterion and, on that basis, she had incorrectly completed the DS 1500 form. Mr Tallis then made a note that "based on the balance of medical probability and advice, it is likely that she is not terminally ill under the prescribed definition at the present time."

[15] Going back somewhat in time, the applicant made an application for UC on 4 March 2019 on the basis that her symptoms were such that she had a limited ability to work. In her application form, the applicant cited a definitive diagnosis of Motor Neurone Disease and stated that she had been given a prognosis of between two to five years. The applicant had applied for UC on the basis that she then had a firm diagnosis of a terminal illness but on 5 March 2019 the Department made a determination that in the applicant's case, the conditions in respect of terminal illness were not satisfied. As a result of this determination, the applicant was required to search for work and attempt to participate in work related activity for a set period as a pre-requisite to being entitled to an assessment of whether she had a limited capability for work.

[16] Despite having been given a definitive diagnosis of Motor Neurone Disease in either August or September 2018, the applicant was required to search for work and attend work search reviews with a work coach between 20 March 2019 and 25 June, 2019. On 4 April 2019, the Department decided that the applicant was entitled to UC and paid her £931 per month for the period between 4 March 2019 and 3 September 2019. The applicant was then assessed as having limited capability for work and work related activity ("LCWRA") and this increased her monthly payments from £931 to £1,267 per month and this increase was due to the inclusion of the LCWRA component. The applicant was deemed to have moved into the LCWRA group from 4 June 2019 (three months after her application for UC) and, therefore, the increase was back-dated to that date.

[17] If the applicant had been deemed to meet the criterion of terminally ill (death reasonably expected to occur within six months) when she first applied for UC, she would have immediately been deemed to have limited capability for work and work related activity and would have received this component of UC immediately instead of having to prove her entitlement by establishing functional impairment through the process outlined above. Even when she proved her entitlement by establishing functional impairment, her entitlement could not be back-dated to the time of her application but could only be back-dated to three months after the date of her application. By reason solely as a result of her inability to satisfy the above criterion, the applicant was, therefore, denied this benefit for three calendar months and this resulted in a loss of £1,008.

[18] In summary, in relation to UC, the applicant made an application for UC on 4 March 2019. She was assessed as being entitled to UC and received payments of £931 per calendar month for the period between 4 March 2019 and 3 June 2019. She subsequently received payments of £1,267 per calendar month for the period of 4 June, 2019 to date and these payments include the LCWRA component.

The respondents' evidence as to the legislative history and policy behind Article 87(4) of the Welfare Reform (Northern Ireland) Order 2015 and Regulation 2 and

Schedule 9, paragraph 1 of the Universal Credit Regulations (Northern Ireland) 2016

[19] Prior to discussing the evidence adduced on behalf of the respondents in relation to the legislative history and policy behind these provisions, it is appropriate to set out the provisions themselves.

[20] Art 87(4) of the 2015 Order provides as follows:

> "For the purposes of this Article a person is "terminally ill" at any time if at that time the person suffers from a progressive disease and the person's death in consequence of that disease can reasonably be expected within 6 months."

[21] Reg 2 of the 2016 Regulations provides as follows:

> ""terminally ill" means suffering from a progressive disease where death in consequence of that disease can reasonably be expected within 6 months;"

[22] In order to put this definition in context, it is important to consider the provisions of Regulation 41 which define LCWRA and Schedule 9 to the Regulations. Regulation 41 provides as follows:

> "**PART 5 CAPABILITY FOR WORK OR WORK-RELATED ACTIVITY**
>
> **Limited capability for work and work-related activity**
>
> 41.—(1) A claimant has limited capability for work and work-related activity if—
>
> (a) it has been determined that—
>
> (i) the claimant has limited capability for work and work-related activity on the basis of an assessment under this Part, or
>
> (ii) the claimant has limited capability for work-related activity on the basis of an assessment under Part 5 of the ESA Regulations, or

(b) the claimant is to be treated as having limited capability for work and work-related activity (see paragraph (5)).

(2) A claimant has limited capability for work and work-related activity on the basis of an assessment under this Part if, by reason of the claimant's physical or mental condition—

(a) at least one of the descriptors set out in Schedule 7 applies to the claimant,

(b) the claimant's capability for work and work-related activity is limited, and

(c) the limitation is such that it is not reasonable to require that claimant to undertake such activity.

(3) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 7, it is a condition that the claimant's incapability to perform the activity arises—

(a) in respect of descriptors 1 to 8, 15(a), 15(b), 16(a) and 16(b)—

(i) from a specific bodily disease or disablement, or

(ii) as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement, or

(b) in respect of descriptors 9 to 14, 15(c), 15(d), 16(c) and 16(d)—

(i) from a specific mental illness or disablement, or

(ii) as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.

(4) A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or, as the case may be, on the majority of the occasions on which the claimant undertakes or attempts to undertake the activity described by that descriptor.

(5) Subject to paragraph (6), a claimant is to be treated as having limited capability for work and work-related activity if any of the circumstances set out in Schedule 9 applies."

[23] It is unnecessary to set out the provisions of Schedule 7 in this judgment but, in passing, it is appropriate to comment that the descriptors set out in Schedule 7 broadly cover the same activities of daily living as are set out in paragraph [6] of this judgment. It is, however, important to set out the provisions of Schedule 9 to the Regulations. Schedule 9 provides as follows:

"***SCHEDULE 9***

Circumstances in which a claimant is to be treated as having limited capability for work and work-related activity

Terminal illness

1. The claimant is terminally ill.

Pregnancy

2. The claimant is a pregnant woman and there is a serious risk of damage to her health or to the health of her unborn child if she does not refrain from work and work-related activity.

Receiving treatment for cancer

3. The claimant is—

(a) receiving treatment for cancer by way of chemotherapy or radiotherapy;

(b) likely to receive such treatment within 6 months after the date of the determination of capability for work and work-related activity; or

(c) recovering from such treatment,

and the Department is satisfied that the claimant should be treated as having limited capability for work and work-related activity.

Risk to self or others

4. The claimant is suffering from a specific illness, disease or disablement by reason of which there would be a substantial risk to the physical or mental health of any person were the claimant found not to have limited capability for work and work-related activity.

Disabled and over the age for state pension credit

5. The claimant has reached the qualifying age for state pension credit and is entitled to attendance allowance, the care component of disability living allowance at the highest rate or the daily living component of personal independence payment at the enhanced rate."

[24] It can be readily seen that in the context of UC, "terminal illness" is only one of five potentially overlapping categories describing conditions where a claimant is deemed to have a limited capacity for work or work related activities.

[25] Turning then to the legislative history and policy behind these provisions, the respondents relied on the Affidavit evidence of Ms Anne McCleary, the Director of the Social Security Policy and Legislation Division within the Department for Communities, and Ms Kirstin Parker, a senior civil servant employed by the Department for Work and Pensions. In addition to this Affidavit evidence, Dr McGleenan QC also provided the Court with a one page document entitled "Legislative History of the SRTI" which very helpfully summarised the legislative history of the special rules for terminal illness and the policy debates and consultation processes that have taken place and are continuing to take place in relation to these rules. He also provided the Court with the Explanatory Memorandum to the Welfare Reform (Northern Ireland) Order 2015 which explains why the Westminster Parliament finished up legislating on matters of welfare benefits in Northern Ireland when this matter was a matter of legislative competence devolved to the Northern Ireland Executive and Assembly.

[26] I do not intend to further lengthen what will inevitably be a lengthy judgment with a detailed account of what transpired to bring about this situation but, in summary, the attempt to bring about welfare reform in Northern Ireland to largely mirror the reforms that had been implemented in GB by the provisions of the Welfare Reform Act 2012 failed when the Petition of Concern mechanism was utilised in the Northern Ireland Assembly to prevent the Welfare Reform Bill passing through the Assembly at its final stage on 26 May 2015. Thereafter, as part of "A Fresh Start: The Stormont Agreement and Implementation Plan" published on 17 November, 2015, the Northern Ireland Executive agreed that the Westminster Parliament should legislate (with the consent of the Northern Ireland Assembly) to make provisions on welfare

reform, including those structural reforms included in the Welfare Reform Act 2012, in Northern Ireland. In furtherance of this agreement, the Westminster Parliament enacted the Northern Ireland (Welfare Reform) Act 2015 and the Welfare Reform (Northern Ireland) Order 2015 ("the 2015 Order").

[27] In addition to making provisions on welfare reform, including those in the Welfare Reform Act 2012, for Northern Ireland, the 2015 Order made provision for agreed welfare related administrative flexibilities and top-ups which would apply only to Northern Ireland. In the Fresh Start agreement, the Northern Ireland Executive agreed to allocate a total of £585 million from Executive funds over four years to "top-up" the UK welfare arrangements in Northern Ireland with a review of these arrangements planned in 2018-2019. This review did not take place due to the collapse of the Executive in January 2017 but the "welfare mitigation measures" initially incorporated in the 2015 Order were extended during the hiatus and when that hiatus came to an end at the start of this year, the "New Decade New Approach" Agreement, entered into between the Northern Ireland parties on 9 January 2020, saw agreement for the Executive to further extend the "welfare mitigation measures" beyond their expiry date in March 2020.

[28] In this context, it is important to note that Section 87 of the Northern Ireland Act 1998 places a statutory duty on the Minister for Social Development and the Secretary of State for Work and Pensions to consult with one another with a view to securing a single social security system for the UK. Section 88 of the 1998 Act makes provision for financial adjustments to support the maintenance of these parity arrangements. The 2015 Order attempts to ensure that these parity arrangements are preserved by containing provisions that allow for Executive funded top-up provisions to be made.

[29] Having regard to the contents of the Affidavits of Ms McCleary and Ms Parker which together with the exhibits ran to 1,623 pages, it is clear that when legislation was enacted in 1971 making provision for the payment of attendance allowance (a non-means tested universal disability benefit for people who had a serious or debilitating illness or condition who required personal care), there was a statutory qualifying period of six months before this benefit could be paid. The rationale behind this was that the benefit was intended to help with the care needs of those who required care in the longer term.

[30] One of the obvious difficulties with this qualifying period was that it meant that those unfortunate individuals with progressively disabling diseases or conditions that were also life limiting to the extent that they were unlikely to survive for six months would not receive any attendance allowance if they died within six months of applying for the benefit. In a very real sense, the benefit was not available to those who, perhaps, needed it most.

[31] In the lead up to the enactment of the Social Security Act 1990, this difficulty was highlighted in the UK government's independent Social Security Advisory

Committee's ("SSAC") report "Benefits for Disabled People: A Strategy for Change" published in November 1988 and in a further report published by the SSAC in May 1989 entitled "Attendance Allowance and Terminal Care: A Benefit Too Late".

[32] The SSAC recommendation was that terminally ill patients should become entitled to attendance allowance immediately and that the process of assessment should be streamlined. Crucially, it was also the recommendation of the SSAC that the definition of terminal illness then set out in DHSS Circular HC (87)4 should be adopted for the purposes of determining whether a claimant could obtain immediate access to benefits. This Circular stated that "a terminally ill patient is one whose death is certain and not too far distant, and for whom treatment has changed from curative to palliative."

[33] It is quite clear from the House of Lords debates on various dates between 22 June 1989 and 11 June 1990 on the Social Security Bills then progressing through their various stages in both Houses of Parliament that the government readily accepted that some mechanism should be found to enable terminally ill claimants to immediately avail of attendance allowance but there was considerable debate over how terminal illness should be defined. Many who positively advocated for legislative recognition of the special position of those who were suffering from a terminal illness wished to see the adoption of the definition set out in paragraph [32] above. However, it is clear that the government had concerns about the cost implications of adopting what was seen as an open-ended definition.

[34] In the spring of 1990 the government formulated a definition of terminal illness which included the key characteristics now seen in the present legislative provisions. The intention of the government was to ensure that "people who suffer from a progressive disease and for whom death in consequence can reasonably be expected within six months will be able to qualify for attendance allowance without having to satisfy the normal six-month qualifying period." See House of Lords debate on the Social Security Bill on 20 April 1990, Lord Henley, column 235. During the passage of the Bill through the House of Lords, it was suggested that the definition could be changed to refer to a significant risk of death rather than a reasonable expectation. This proposal was rejected on the basis that it was more likely to lead to "questions of degree". See House of Lords debate on the Social Security Bill on 21 May 1990, Lord Henley, column 617. A further proposed amendment to define terminal illness as suffering from a "severe progressive and incurable disease" where "life expectancy is short" was also rejected on the basis that the proposed amended definition would widen the scope for payments to be made and make it difficult for claims to be adjudicated. See House of Lords debate on the Social Security Bill on 11 June 1990, Lord Henley, column 617. In rejecting these proposed amendments, the government did undertake to study how the provision worked in practice and to keep the issue of the definition of terminal illness under review. Under Section 1 of the Social Security Act 1990, the definition became enshrined in legislation as Section 35(2C)(a) of the Social Security Act 1975 and this definition was subsequently used without alteration

in subsequent consolidating legislation. See Section 66(2) of the Social Security Contributions and Benefits Act 1992.

[35] The next significant development occurred in 2004, the Minister for Disabled People invited another independent advisory body known as the DLA Advisory Board to conduct a review into the working of the SRTI arrangements. The conclusion of this review/study was that the "current procedures generally work well. The provisions play an important part in ensuring that the benefit gets to people at a time of their greatest need in a prompt and efficient way." However, the review/study did reveal that under the SRTI that had then been in place for over fourteen years, some 31,500 people had been in receipt of benefits under the special rules for more than three years. It was suggested that some form of review mechanism should be developed to deal with this issue.

[36] In 2010, the Department of Work and Pensions undertook a wide-ranging public consultation on the reform of Disability Living Allowance. The government indicated at the outset that it saw the need to maintain the SRTI framework but there were concerns expressed about the appropriateness of paying higher rates of benefit unconditionally to claimants who survive well beyond their six months' life expectancy. I note that concern about this issue had prompted the introduction in September 2006 of a formal review for all SRTI cases after three years to ascertain whether the award entitlement was still appropriate. The data gathered from the reviews that had taken place indicated that only 14% of SRTI claimants remained on DLA after three years and that out of that cohort, 44% saw their original reward decreased or removed entirely upon re-assessment and 43% still remained within the definition of terminal illness.

[37] The government also indicated during the course of that consultation exercise that representations had previously been made promoting the amendment of the SRTI rules to allow a wider range of claimants to avail of the rules. However, it is clear that the government's position at that time was that any such change would increase annual managed expenditure considerably and that such calls for change would be resisted. The government's view was that the wider range of claimants were not prejudiced by the six-month stipulation as they could apply for the benefits in the normal manner and undergo the normal assessment process. In the public consultation document relating to the reform of DLA the government was keen to set out what would stay the same following the implementation of the reforms. A specific assurance was given that the government would "continue to support those in the most difficult circumstances by maintaining special rules for people who are terminally ill. Claims submitted under these rules will be fast tracked to provide financial support as quickly as possible."

[38] During this consultation process, the Motor Neurone Disease Association availed of the opportunity to submit a detailed response in February 2011. Among a number of issues raised, the Association highlighted what it viewed as the inadequacy of the SRTI framework for people with Motor Neurone Disease. It argued for the

expansion of the SRTI framework so that a reasonable expectation of death within twelve months as opposed to six months was incorporated in the definition of a terminal illness.

[39] The SSAC also provided a response to the consultation and its response included the following: "SSAC agrees that the special rules…should continue….we consider that the special rules, whereby a terminally ill person (under the meaning of the legislation) is automatically entitled to DLA should continue. In addition, there are some conditions which we think should trigger automatic entitlement, including tetraplegia and being deaf-blind."

[40] The government response to this consultation process was published in April 2011 and it highlighted the fact that a total of 5,505 responses were received during the consultation process. The government response included the following:

> "The majority of respondents said that the special rules currently in place for people that are terminally ill worked well and should remain the same….We will retain the special rules for individuals who are terminally ill, providing a fast track service to the enhanced rate of the daily living component, and removing the requirement for them to undergo assessment or to meet the required Qualifying Period…..Respondents were split on whether some health conditions or impairments should receive automatic entitlement to the benefit….We acknowledge that there is a difference of opinion on this issue. However, we do not think it right that we should judge people purely on the type of health condition or impairment they have, labelling individuals in this way, and making blanket decisions about benefit entitlement."

[41] The government response concluded with the following expression of clear intent in relation to the new Personal Independence Payment benefit. It is "intended to support people with long-term health conditions and disabilities. A qualifying period of six months helps us to achieve this. If allows time for a clearer and more informed understanding of an individual's needs and prognosis. This will enable us to ensure that the benefit is targeted most appropriately…The process for terminally ill people, known as 'special rules', will remain the same as now. People who are terminally ill will continue to be exempt from the Qualifying Period and the Prospective Test." This clear expression of intent saw unaltered expression in the provisions of the Section 82(4) of the Welfare Reform Act 2012, Regulation 2, Regulation 5(a) of and paragraph 1 of Schedule 9 to the Universal Credit Regulations 2013. These provisions did not extend to Northern Ireland but practically identical provisions were enacted by the Westminster Parliament with the agreement of the Northern Ireland Executive and the consent of the Northern Ireland Assembly by means of Article 87(4) of the Welfare Reform (Northern Ireland) Order 2015 and

Regulation 2 and Schedule 9, paragraph 1 of the Universal Credit Regulations (Northern Ireland) 2016.

[42] Article 85 of the 2015 Order constructed a statutory framework for the assessment of a benefit claimant's ability to carry out daily living activities and mobility activities. Article 94 of the 2015 Order imposed a duty on the Department for Communities to lay before the Assembly an independent report on the operation of assessments under Article 85 within two to four years of the first Regulations made under Article 85 coming into operation. This review was conducted under the chairmanship of Mr Walter Rader and the resulting report is dated June 2018.

[43] Recommendation 6 set out in the Summary of Review Recommendations was an unequivocal endorsement of the submissions of those interest groups who had been advocating for a change in the SRTI framework. It reads:

> "That the clinical judgment of a medical practitioner, indicating that the claimant has a terminal illness, should be sufficient to allow the special rules to apply. The 6 months life expectancy criterion should be removed."

[44] Chapter 4, paragraph 69(a) of the report reveals that of 90,520 decisions made on the entitlement to PIP in Northern Ireland only 960 (1%) were made under the SRTI. Chapter 6, paragraphs 136 to 138 deal with the SRTI. The following passage is informative of the reasoning behind the recommendation set out above:

> "The Review has listened carefully to the concerns expressed regarding the application of special rules, and the impact the diagnosis of a terminal illness can have. The Review is of the opinion that the determining factor, as to how these sensitive cases are processed, should be the provision of a clinical judgment indicating a terminal condition. This should be sufficient to allow for special rules to be applied…This will lessen pressure, stress and anxiety on claimants and their families at what is an already difficult time."

[45] The Department for Communities produced an interim response to the Rader Report in November 2018. With specific regard to recommendation 6 set out above the Department responded in the following manner:

> "The special rules for the terminally ill in disability benefits provide important support to people who have only a short time to live. The provision in PIP mirrors the provision that has been in place in Attendance Allowance and DLA since the 1990s. These arrangements were consulted on with stakeholders back in 2010, both in

> Great Britain and Northern Ireland, as part of the reform of DLA and development of the rules for PIP.
>
> The Westminster government response to the consultation at that time noted that a majority of respondents indicated that the special rules currently in place worked well and should remain the same.
>
> Under the statutory framework provided for in the Northern Ireland Act 1998 social security law in Northern Ireland is maintained in parity with provision brought forward by DWP in Great Britain, unless the Executive and Assembly determine otherwise. While the Department acknowledges the opinion of the reviewer, it will be for incoming Ministers to determine if they wish to initiate any review of the current arrangements in place for the special rules in Northern Ireland, taking account of the position in Great Britain."

[46] The All Party Parliamentary Group For Terminal Illness subsequently carried out an inquiry into the operation of the SRTI and, in July 2019, produced a report entitled "Six Months To Live?" in which it addressed issues including the challenges posed by the current definition of terminal illness for clinicians and the impacts of the current definition on terminally ill people before making some specific recommendations on the SRTI.

[47] A number of key points can be gleaned from the executive summary of this report. Between April 2013 and April 2018, 17,000 died while waiting for a decision on their PIP claim. Terminally ill people whose doctors cannot make the prognosis of a reasonable expectation of death within six months must face the standard benefits application process resulting in them waiting longer before decisions and payments are made and being subjected to capability assessments and work search requirements. The "six-month rule" was introduced into law in 1990 to exempt terminally ill people from the six-month qualifying period for the Attendance Allowance. It was not initially intended to be a wider definition of terminal illness and the timescale has no clinical meaning in most cases. However, the definition has subsequently been extended to new benefits and today also applies to Universal Credit, Personal Independence Payments and Employment and Support Allowance, as well as the Attendance Allowance.

[48] The report goes on to state that in 1990, many terminally ill people were unlikely to survive for six months after receiving a terminal diagnosis. However, today, the advances in treatment and diagnosis mean that many more people are living with terminal illness for longer; more people are surviving cancer and many conditions that were considered terminal when the law was introduced are no longer considered to be terminal. Further, the six-month rule also wrongly assumes that life expectancy can

always be accurately predicted, and it is very challenging for clinicians to estimate how long someone has left to live. Studies have shown that the accuracy of such predictions ranges from 78% to just 23%. Crucially, for present purposes the report stated that "in the case of rarer and less well-understood conditions such as Motor Neurone Disease, it can be impossible." The report also concluded that clinicians' interpretations of the law also vary significantly, and many believe they will be held accountable if their prediction turns out to be wrong. It is, therefore, unsurprising that nearly a third of GPs say they have never signed a DS 1500 form to support a Special Rules benefits application for a condition other than cancer.

[49] The All Party Parliamentary Group ("APPG") concluded that under the current law, patients' access depends on the attitude of their doctor, and many terminally ill people are excluded if they are likely to be living with terminal illness for more than six months or the prognosis of their condition is hard to predict. Terminally ill people who claim via the normal benefits rules face a process that is extremely burdensome and time consuming for somebody living with the emotional and physical impact of a terminal diagnosis. Forced to go through assessments and inappropriate work-focused interviews, many are turned down or awarded benefits at the lower rate. They must then wait weeks or even months before receiving their first payment, potentially with no other source of financial support if their condition means they cannot work, often leading to significant stress and financial difficulties.

[50] The APPG opined that the assumption that people with terminal illnesses will need support only for a matter of months until they die is outdated and does not reflect the modern reality of many terminal conditions, where people can live and need ongoing support for several years with conditions that cause progressive debility over time. Even where a clinician has signed a DS 1500, in some cases the Department for Work & Pensions challenges their judgment and rejects the evidence they provide. This can mean that non-specialist assessors are overruling the judgment of clinicians who have first-hand knowledge of a patient's condition and prognosis.

[51] In a stark conclusion, the APPG firmly stated that the current legal definition of terminal illness, with its "six-month rule", is unfit for purpose. It is outdated, arbitrary and not based on clinical reality. The following passage encapsulates the views of the Committee:

> "It is ironic that this measure, originally designed to help terminally ill people avoid a long wait to qualify for benefits has, in practice, become a barrier to access for many people with terminal conditions.
>
> Clinicians, social and palliative care workers and medical experts all recommended to the APPG that it should be changed.

> In Scotland, the Social Security (Scotland) Act 2018 has amended the law to recognise a person as terminally ill where it is the clinical judgment of a medical practitioner that they have a progressive disease that can be reasonably expected to cause their death, without an arbitrary timescale.
>
> The Scottish government is consulting on new guidance for clinicians on relevant clinical factors to consider and information to support them making this clinical judgment process; it is not expected that every person with a progressive condition that may cause their death will automatically be entitled to access the Special Rules as soon as this diagnosis is made.
>
> This approach better reflects the clinical reality of terminal illness and advances in prognostication over the last three decades – however, it will create a "two tier" benefits system in Scotland and inconsistency across the UK as only Personal Independence Payments and Attendance Allowance are devolved.
>
> The UK government must take steps to make the definition of terminal illness in the benefits system fit for the 21st century and equalise the law across the UK."

[52] The unanimous recommendation of the APPG was that the definition of terminal illness in UK law should be amended so that a person is regarded as having a terminal illness if it is the clinical judgment of a registered medical practitioner or clinical nurse specialist that they have a progressive disease that can reasonably be expected to cause the individual's death. The APPG also recommended that the Department should adopt a light-touch review of benefit awards under the Special Rules for Terminal Illness only after 10 years, with the Department only contacting the claimant's General Practitioner to confirm that their diagnosis and prognosis remain the same, thus ending the practice of non-specialist Departmental assessors challenging and rejecting the medical evidence provided by clinicians in a DS 1500 form to support a benefit claim under the Special Rules.

[53] Following the publication of this report, the Secretary of State for Work and Pensions in GB announced that she had asked her Department to set up an "honest and in-depth evaluation" of how the benefits system supports people nearing the end of their lives and those with severe conditions. The review which is ongoing will encompass hearing directly from claimants and charities about their first-hand experience, considering international evidence to find out what works elsewhere and reviewing the current arrangements to better understand how the SRTI and the Severe Conditions processes operate and perform. The Department for Communities is

working closely with the Department for Work and Pensions to ensure that the experiences of stakeholders in Northern Ireland are fed into the review. A stakeholder workshop was held by the Department for Work and Pensions in London in late October 2019 and a similar event was held in Northern Ireland in December 2019. An online survey was conducted in which medical practitioners were invited to comment on the working of the SRTI.

[54] The Affidavit of Ms Parker at paragraph [84] informs the Court that the findings of this evaluation are currently being worked through and will be provided to the relevant Ministers in due course. It is then anticipated that the Ministers will either take a decision regarding whether or not to amend the SRTI or will commission further work to assist them in making a decision. In the event that Ministers decide to proceed with reform of the current rules, this will need clearance from the Home Affairs Cabinet Committee, after which it will be necessary to amend both primary and secondary legislation.

[55] This analysis of the genesis and development of the SRTI is important both in terms of setting the present rules in their historical context and, as will be discussed later, in forming part of the overall picture in which any justification argument put forward by the respondents can be assessed and evaluated. One relevant matter which was not really addressed in any detail in the significant volume of material provided to the Court was the rationale behind the decision of the Scottish government to change the SRTI in respect of benefit entitlement in Scotland. Neither the applicant nor, more importantly, the respondents were able to provide the Court with any information which would explain the rationale behind the decision of the Scottish government's decision. The legislative provisions which are still prospective are contained in the Social Security (Scotland) Act 2018. Schedule 5 deals with eligibility for the Scottish benefit "Disability Assistance" which will replace DLA and PIP in Scotland. Paragraphs [2] and [3] of Schedule 5 provide as follows:

> "(2) …regulations must provide that an individual is to be regarded as having a terminal illness for the purpose of determining entitlement to disability assistance if, having had regard to the guidance mentioned in sub-paragraph (3), it is the clinical judgement of a registered medical practitioner that the individual has a progressive disease that can reasonably be expected to cause the individual's death.
>
> (3) The Chief Medical Officer of the Scottish Administration is— (a) following consultation with registered medical practitioners, to prepare and from time to time revise, and (b) to make publicly available by such means as the Chief Medical Officer considers appropriate, guidance that sets out when a progressive disease can reasonably be expected to cause an individual's death for

> the purpose of determining entitlement to disability assistance."

[56] If it becomes necessary, I will comment further on the whole issue of justification in a subsequent part of this judgment. At this stage, it is clear from the Affidavit evidence provided to the Court by the respondents (Ms Parker, paragraph [72]) that it is the respondents' case that the readily identifiable policy rationale and aim of the present SRTI is as follows:

> "the current rules provide a clear and specific definition of terminal illness which ensures that those closest to death are given immediate access to PIP and the LCWRA element of UC. The definition safeguards public funds by avoiding an open ended definition which would apply to vastly more people than currently qualify, whilst also providing a clear threshold against which the medical practitioners can assess claimants. The rules have operated well in practice and have not, until recently, led to significant pressure for reform."

[57] It is clear that the respondents' joint case is that "the current rules have a clear and reasonable foundation, which is borne out by the number of years for which the rules have operated without challenge."

The grounds of challenge

[58] The essential ground of challenge is that the SRTI are discriminatory from the perspective of an individual who has been diagnosed as suffering from a terminal illness but it is not possible for a clinician to state that the reasonable expectation is that the individual will be dead within six months either because it is impossible to estimate life expectancy because of the nature of the condition suffered by the individual or the individual's expected life expectancy is greater than six months.

The Order 53 statement, the Notice of Devolution Issue (Order 120, rule 3) and the Notice that the court is considering potential incompatibility under the HRA 1998 (Order 121, rule 2)

[59] The Order 53 statement is dated 6 December 2019. The applicant is challenging the decision of the Department for Communities in refusing to award the applicant a PIP on grounds of terminal illness, despite her having a terminal illness and requiring the applicant instead to apply for PIP via the standard route which required her to undergo assessment and which awarded her only the standard rate of the daily living component (instead of the enhanced rate guaranteed under the special rules for

terminal illness). The applicant is challenging the failure of the Department for Communities and/or the Secretary of State for Work and Pensions to read Article 87(4) of the Welfare Reform (Northern Ireland) Order 2015 compatibly with the applicant's Convention rights so as to award the applicant PIP on grounds of terminal illness.

[60] The applicant is challenging the decision of the Department for Communities in refusing to award the applicant the LCWRA component of UC on grounds of terminal illness because she failed to demonstrate that her death can reasonably be expected within six months, despite the fact that the applicant has a terminal illness and requiring her instead to claim the LCWRA component of UC via the standard route which required her to undergo a three month assessment process and required her to participate in work-related activity and attend a Work Capability Assessment before awarding her the LWCRA component of UC. The applicant also challenges the failure of the Department for Communities and/or the Secretary of State for Work and Pensions to read Regulation 2 and Schedule 9, Para 1 of the Universal Credit Regulations (Northern Ireland) 2016 compatibly with the applicant's Convention rights so as to award the applicant the LCWRA component of UC on grounds of terminal illness.

[61] The relief sought by the applicant includes:

(a) declarations that the decisions referred to in paragraphs [58] and [59] above are unlawful and incompatible with the applicant's rights under Article 1 Protocol 1 ECHR read alone or in conjunction with Article 14 ECHR; and/or Article 8 ECHR read alone or in conjunction with Article 14 ECHR, and are therefore contrary to Section 6 of the Human Rights Act 1998;

(b) declarations that the Department for Communities ought to have read Article 87(4) of the Welfare Reform (Northern Ireland) Order 2015 and Regulation 2 and Schedule 9, Para 1 of the Universal Credit Regulations (Northern Ireland) 2016 in a manner compatible with the applicant's rights under Article 1 Protocol 1 ECHR read alone or in conjunction with Article 14 ECHR; and/or Article 8 ECHR read alone or in conjunction with Article 14 ECHR, and the failure to do so is in breach of Section 3 and/or Section 6 of the Human Rights Act 1998;

(c) declarations that Article 87(4) of the Welfare Reform (Northern Ireland) Order 2015 and Regulation 2 and Schedule 9, Para 1 of the Universal Credit Regulations (Northern Ireland) 2016 are incompatible with the applicant's rights under Article 1 Protocol 1 ECHR read alone or in conjunction with Article 14 ECHR; and/or Article 8 ECHR read alone or in conjunction with Article 14 ECHR;

(d) declarations that the decisions of the Department for Communities not to award the Applicant with PIP and the LCWRA component of UC on grounds

of terminal illness breach the common law principle of equality and are irrational;

(e) an order of mandamus requiring the Department to award the applicant PIP at the enhanced rate of the Daily Living Component; and

(f) damages.

[62] On 17 April 2020 the applicant submitted a draft devolution issue notice under Order 120 ("the devolution notice") and a draft notice that the court was considering incompatibility under the HRA 1998 under Order 121 ("the potential incompatibility notice"). These drafts were considered by me and, thereafter, the court office issued the two notices which were served on the respondents, the Executive Office, the Secretary of State for Northern Ireland and the Attorney General for Northern Ireland on 17 April 2020. The devolution notice was, in addition served, on the Advocate General on the same date. The Attorney General entered an appearance to the devolution notice and provided his summary of legal argument under Order 120, rule 4 dated 20 May 2020.

[63] I am grateful to the Attorney General for his very erudite summary of the legal issues. Following the provision of the same, I convened a review hearing to ascertain the views of the applicant and the respondents in respect of the recommendations made by the Attorney General. The Attorney General indicated in advance of the hearing that he did not consider it necessary to present any additional oral submissions to the Court. Upon hearing the oral submissions of the applicant and the respondents, I indicated that I was not minded to either invite the Attorney General to require the devolution issues which arise before me to be referred directly to the Supreme Court under Schedule 10, paragraph (3) to the Northern Ireland Act 1998 or to adjourn this matter to await the decision of the UK Supreme Court in *SC and Others v Secretary of State for Work and Pensions* which is scheduled to be heard by the UK Supreme Court between 20 to 22 October 2020, on the basis that it was by no means certain that the issue of how the case of *JD and A v United Kingdom* (application nos. 32949/17 and 34614/17) (judgment became final on 24 February 2020) impacts on the approach to justification would arise in the *SC* appeal before the UK Supreme Court but, more importantly, the applicant in this case is a young woman with a terminal diagnosis and delaying the matter further would not be appropriate.

[64] In relation to the devolution notice issued in this case, paragraph 1(b) of Schedule 10 to the Northern Ireland Act 1998 provides that "in this Schedule "devolution issue" means: "… (b) a question whether a purported or proposed exercise of a function by a Minister or Northern Ireland department is, or would be, invalid by reason of Section 24; …." Section 24 (1) of the Northern Ireland Act 1998 provides that a "Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act — (a) is incompatible with any of the Convention rights; …." Although the Welfare Reform (Northern Ireland) Order 2015 is secondary legislation

enacted by the Westminster Parliament and the Universal Credit Regulations (Northern Ireland) 2016 are regulations made by the Secretary of State for Northern Ireland under powers conferred by the Welfare Reform (Northern Ireland) Order 2015, it is, under the complicated arrangements that exist in respect of welfare benefits in Northern Ireland, the task of the Department for Communities to either make or refuse to make an award of PIP and/or UC to the applicant on the grounds of terminal illness and it is the refusal to do so which is the subject of the "devolution notice".

Article 14 ECHR Legal Principles

[65] Article 14, prohibition of discrimination:

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

The Article 14 questions

[66] How is a Court to determine whether any particular course of conduct or inactivity gives rise to a breach of Article 14? In her judgment in *Re McLaughlin* [2018] 1 WLR 4250 at paragraph [15] Lady Hale stated:

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

[67] This formulation of the Article 14 questions by Lady Hale in *McLaughlin* was part of a majority judgment with which three members of the Court explicitly agreed, and upon which Lord Hodge in the minority relied at paragraph [61]. In the subsequent UK Supreme Court decision of *R (Stott) v Secretary of State for Justice* [2018] 3 WLR 1831, Lady Black at paragraph [8] and Lady Hale at paragraph [207] provided

slightly contrasting formulations of the four questions. Lady Black stated that in order to establish that different treatment amounts to a violation of Article 14, it is necessary to establish four elements:

> "(a) the circumstances must fall within the ambit of a Convention right;
>
> (b) the difference in treatment must have been on the ground of one of the characteristics listed in Article 14 or "other status";
>
> (c) the applicant and the person who has been treated differently must be in analogous situations;
>
> (d) objective justification for the different treatment will be lacking."

[68] The most recent Supreme Court authority on Article 14 is *R(DA and DS) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289. None of the Justices set out the four questions except Lady Hale who at paragraph [136] stated:

> "In deciding complaints under Article 14, four questions arise:
>
> (i) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights?
>
> (ii) Does the ground upon which the complainants have been treated differently from others constitute a "status"?
>
> (iii) Have they been treated differently from other people not sharing that status who are similarly situated or, alternatively, have they been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs?
>
> (iv) Does that difference or similarity in treatment have an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear "a reasonable relationship of proportionality" to the aims sought to be realised (see *Stec v United Kingdom* (2006) 43 EHRR 1017, para 51)?"

[69] Stephens LJ delivering the judgment of the Northern Ireland Court of Appeal in the recent case of *Marina Lennon v Department of Social Development* [2020] NICA 15 made the following useful observations:

> "We recognise that the different formulations of the questions are largely semantic. Ordinarily and subject to that qualification we consider that the most appropriate formulation is that applied by Lady Hale in *McLaughlin* at paragraph [15] given that three other members of the court agreed with her judgment and also that there is nothing in *Stott* or *DA & DS* to cast doubt on its applicability. However, there is a degree of latitude and we consider that it was appropriate for the judge to formulate the questions in the way that she did so as to assist in the determination of the Article 14 issue. For our part we consider that Lady Black's formulation at paragraph [8] of *Stott* presents the most appropriate tool for the determination of the issues in this particular case and those are the questions that we will address. We will refer to those questions as 'the *Stott* questions.'"

[70] In arguing this case, both Senior Counsel for the applicant and Senior Counsel for the respondents approached the matter of the Article 14 questions by generally adopting the language of Lady Hale in *McLaughlin* and addressing the questions in the order also suggested by Lady Hale in that case. Having considered the matter of the sequencing of the questions, I consider it more appropriate for me to consider the questions in the order suggested by Lady Black in *Stott* at paragraph [8] of her judgment. In this judgment I will address the Article 14 questions in that manner but before I do so, I remind myself of the guidance issued by Lord Nicholls of Birkenhead at paragraph [3] of *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 A.C. 173 where he stated:

> "For my part, in company with all your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the

> court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

[71] I intend to follow the above approach which was pithily summarised by Stephens LJ in paragraph [43] of *Marina Lennon*. Questions (1) and (2) of the four *Stott* questions are prerequisites. Question (3) which relates to "analogous situations" may be so obvious that the difference in treatment withstands scrutiny on that ground alone. If it is not so clear, then a different approach is called for which is consideration of question (4). I intend to proceed on the basis that in considering question (3) unless the answer is obvious that there is no analogous situation, I will proceed to consider question (4). Before addressing the substance of the present case, I consider it important to say something about the four issues of ambit, status, analogous situation and justification.

Ambit

[72] In *M v SOSWP* [2006] UKHL 11, Lord Nicholls at para [14] gave useful guidance about the issue of ambit. He stated that:

> "the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the substantive article, the more readily will it be regarded as within the ambit of that article; and vice versa."

At paragraph [16] of *McLaughlin* Lady Hale stated that:

> "Article 14 does not presuppose that there has been a breach of one of the substantive Convention rights, for otherwise it would add nothing to their protection, but it is necessary that the facts fall "within the ambit" of one or more of those: see eg *Inze v Austria* (1987) 10 EHRR 394, para 36."

It is clear that ambit is relevant to the question of an analogous situation and to justification.

Status

[73] It is clear from the language of Article 14 that it does not prohibit all differences in treatment. The discrimination which Article 14 prohibits is discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." It can be seen from Article 14 that only differences in treatment based on an

identifiable characteristic, or "status" are capable of amounting to discrimination. Article 14 then lists a number of specific grounds which constitute "status." These have become known as the "core" grounds. However, the ECtHR in *Clift v United Kingdom* (application number 7205/07) stated that the list is "illustrative not exhaustive" as is shown by the words "any ground such as" and the inclusion of the phrase "any other status". It went on to recall, at paragraph [56], that "the words 'other status' (and a fortiori the French 'toute autre situation') have generally been given a wide meaning." In *Stott,* the Supreme Court conducted a detailed examination of the meaning of "other status" in Article 14. Lady Black who delivered the comprehensive leading judgment observed that at paragraph [56] of *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 the ECtHR set out a passage about status in relation to which courts return repeatedly. The passage is as follows:

> "The court first points out that article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other."

[74] This has become known as the *Kjeldsen* test of looking for a "personal characteristic" by which persons or groups of persons are distinguishable from each other. At paragraphs [56] and [63] of *Stott,* Lady Black identified the following position in relation to "other status" from the jurisprudence of the House of Lords and the Supreme Court which is also to be found in the jurisprudence of the ECtHR:

> "(i) The possible grounds for discrimination under Article 14 were not unlimited but a generous meaning ought to be given to "other status."
>
> (ii) The *Kjeldsen* test of looking for a "personal characteristic" by which persons or groups of persons were distinguishable from each other was to be applied.
>
> (iii) Personal characteristics need not be innate, and the fact that a characteristic was a matter of personal choice did not rule it out as a possible "other status."

[75] At paragraph [39] in *DA & DS* Lord Wilson commenting on the detailed examination of the meaning of "other status" in Article 14 in *Stott* stated that in "the event all members of the court other than Lord Carnwath JSC confirmed (in *Stott*) that its meaning was broad …." Lord Carnwath at paragraph [108] of his judgment in *DA & DS* acknowledged that the majority in *Stott* had "adopted a relatively broad view of the concept of "status." Lord Hodge at paragraph [126] in *DA & DS* stated that "the

boundaries of "other status" in Article 14 is a subject on which there is, as yet, little clarity."

Analogous situation

[765] It is clear from the case law that what is required is that the applicant should demonstrate that, having regard to the particular nature of the complaint, her situation was "analogous, or relevantly similar" to the person who is treated differently. It need not be identical.

The impact of the nature of the status on justification

[776] It would appear from the case law that the nature of an individual's status influences the standard of review. This can be traced back to the judgment of Lord Walker at paragraph [5] in *R(RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 with whom Lord Hope, Lord Rodger, and, on this point, Lord Neuberger, agreed. Lord Walker stated that:

> "'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…."

[787] Support for the proposition that the nature of the status influences the standard of review is contained in the judgment of Lord Neuberger at paragraph [56] in *RJM* where he stated that the court should be very slow to substitute its own view on justification, "especially as the discrimination is not on one of the express, or primary grounds". Lord Mance at paragraph [14] also stated that the discrimination in RJM was not on one of the core-protected or "suspect" grounds; rather, it was by reference to the fact that they were homeless. In *DA & DS* the Supreme Court was concerned with the lawfulness of provisions relating to the revised benefits cap, limiting the total amount of benefits payable in one claim. It was argued that the cap discriminated against a variety of claimants, including lone parents with children under five years old, lone parents with children under two years old, and the children in such family units. Lord Carnwath, with whom Lords Reed and Hughes agreed, explained at paragraph [121] that "although I have accepted that the various groups identified by the claimants can be regarded as meeting the "status" requirement for the purposes of Article 14, they are far from the "core" grounds to which special protection is given under that Article, and in relation to which the court should be especially slow to substitute its view for that of the executive."

Justification

[798] In *A v Secretary of State for the Home Department* [2005] 2 AC 68 Lord Bingham of Cornhill stated in paragraph [68]: "What has to be justified is not the measure in issue but the difference in treatment between one person or group and another." The focus in relation to justification should not be on policy foundations underlying Article 87(4) of the Welfare Reform (Northern Ireland) Order 2015 and Regulation 2 and Schedule 9, paragraph 1 of the Universal Credit Regulations (Northern Ireland) 2016 but rather on the difference in treatment brought about by those provisions.

[8079] In *DA & DS* at paragraph [65] Lord Wilson, having carefully reviewed all the relevant authorities, stated:

> "… in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it."

He went on to state at paragraph [66]:

> "when the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court

> will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."

[8180] The sentence "Let there be no future doubt about it" has not altogether achieved the result that Lord Wilson had hoped for. The applicability of the manifestly without reasonable foundation ("MWRF") test where welfare measures are concerned has been called into question by the first chamber decision of the ECtHR in the case of *J D and A v United Kingdom* (applications nos. 32949/17 and 34614/17). At paragraph [83] the Court stated that:

> "For the purposes of Article 14, a difference of treatment based on a prohibited ground is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see *Mazurek v France*, no. 34406/97, §§ 46 and 48, ECHR 2000-II)."

[8281] For present purposes, the relevant passage of the judgment of the First Section sitting as a Chamber is paragraphs [87] to [89] inclusive. In this section of the judgment, the Court firmly disavows the use of the MWRF test in a case involving Art 1 of Protocol 1 and Article 14 except where the provision which is being analysed is a transitional measure designed to correct historic inequalities. It is worthwhile setting out this passage in full:

> "87. In the context of Article 1 of Protocol 1 alone, the Court has often held that in matters concerning, for example, general measures of economic or social strategy, the States usually enjoy a wide margin of appreciation under the Convention (see *Fábián*, cited above, §115; *Hämäläinen v Finland* [GC], no. 37359/09, §109, ECHR 2014; *Andrejeva*, cited above, §83). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".
>
> 88. However, as the Court has stressed in the context of Article 14 in conjunction with Article 1 Protocol 1, although the margin of appreciation in the context of general

measures of economic or social policy is, in principle, wide, such measures must nevertheless be implemented in a manner that does not violate the prohibition of discrimination as set out in the Convention and complies with the requirement of proportionality (see *Fábián*, cited above, § 115, with further references). Thus, even a wide margin in the sphere of economic or social policy does not justify the adoption of laws or practices that would violate the prohibition of discrimination. Hence, in that context the Court has limited its acceptance to respect the legislature's policy choice as not "manifestly without reasonable foundation" to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality (see Stec and Others, cited above, §§61-66; *Runkee and White*, cited above, §§40-41 and *British Gurkha Welfare Society and Others v the United Kingdom*, no. 44818/11, 81, 15 September 2016).

89. Outside the context of transitional measures designed to correct historic inequalities, the Court has held that given the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is considerably reduced (see *Glor v Switzerland*, no. 13444/04, §84, ECHR 2009), and that because of the particular vulnerability of persons with disabilities such treatment would require very weighty reasons to be justified (see *Guberina*, cited above, §73). The Court has also considered that as the advancement of gender equality is today a major goal in the member States of the Council of Europe, very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention (*Konstantin Markin v Russia* [GC], no. 30078/06, §127, ECHR 2012)."

[832] Under Section 2 of the Human Rights Act 1998, a UK court, when determining a question which has arisen in connection with a Convention right, must take account of any relevant ECtHR judgment. In the case of *R v Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant)* [2004] HL 26, Lord Bingham provided valuable guidance as to how this provision should be applied by the courts:

"20. In determining the present question, the House is required by Section 2(1) of the Human Rights Act 1998 to

> take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, paragraph 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by Section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under Section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

[843] Having studied some of the ECtHR authorities which were relied upon by the Court in the second portion of the *JD and A* judgment quoted above, I am far from convinced that they support the proposition that the use of the MWRF test in a case involving Art 1 of Protocol 1 and Article 14 is inappropriate except where the provision which is being analysed is a transitional measure designed to correct historic inequalities. By way of example, the case of *Hämäläinen v Finland* was not a case involving Article 1 of Protocol 1. It was a case brought by a transsexual in Finland who claimed under Articles 8 and 14 of the Convention that her right to private and family life had been violated when the full recognition of her new gender was made conditional on the transformation of her marriage into a registered partnership. The Court's general statement of principle set out in paragraph [109] is instructive and it does not support the propositions set out in paragraphs [88] and [89] of *JA and A*:

> "109. On the one hand, the Court has held repeatedly that differences based on gender or sexual orientation require particularly serious reasons by way of justification (see *Smith and Grady v the United Kingdom*, nos. 33985/96 and 33986/96, §90, ECHR 1999-VI; *L. and V. v Austria*, nos. 39392/98 and 39829/98, §45, ECHR 2003-I; *Karner v Austria,* no. 40016/98, §37, ECHR 2003-IX; *Konstantin Markin v Russia*[GC], no. 30078/06, §127, ECHR 2012; *X and*

Others v Austria [GC], no. 19010/07, §99, ECHR 2013; and *Vallianatos and Others*, cited above, §77). On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy, for example (see, for instance, *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §52, ECHR 2006-VI). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see *Petrovic v. Austria*, 27 March 1998, §38, *Reports* 1998-II)."

[854] The case of *Stec and Others v United Kingdom* was a case in which Mrs Stec alleged that her transfer of Reduced Earnings Allowance onto Retirement Allowance at the female retirement age of 60 was discriminatory, in breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. Again, the Grand Chamber provided general guidance on matters of principle in the following passage:

"50. The applicants complained of a difference in treatment on the basis of sex, which falls within the non-exhaustive list of prohibited grounds of discrimination in Article 14.

51. Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, pp. 34-35, §10, Series A no. 6, and *Thlimmenos v. Greece* [GC], no. 34369/97, §44, ECHR 2000-IV). A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Van Raalte v. the Netherlands*, 21 February 1997, §39, *Reports of Judgments and Decisions* 1997-I).

> 52. The scope of this margin will vary according to the circumstances, the subject matter and the background (see *Petrovic v. Austria*, 27 March 1998, §38, *Reports* 1998-II). As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention (see *Van Raalte*, cited above, §39, and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, §67, Series A no. 263). On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see, for example, *James and Others v. the United Kingdom*, 21 February 1986, §46, Series A no. 98, and *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, §80, *Reports* 1997-VII). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (ibid.).
>
> 53. Finally, since the applicants complain about inequalities in a welfare system, the Court underlines that Article 1 of Protocol No. 1 does not include a right to acquire property. It places no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see the admissibility decision in the present case, §§ 54-55, ECHR 2005-X)."

[865] It is clear from the above passage that there is nothing in *Stec* to support the proposition that in Article 14 cases, the MWRF test is only applicable in cases where the state is taking corrective measures to correct historic inequalities

[876] I have strong doubts about whether the decision of *JD and A* represents a clear and consistent line of authority on the appropriate use of the MWRF test and, in the circumstances, I do not consider that I should apply this decision of the ECtHR to the facts of the present case, having regard to the unequivocal terms of the ratio in *DA and DS*. I am further comforted in the correctness of this approach by the judgment of

McCloskey LJ in the case of *Stach v DfC and DWP* [2020] NICA 4 at paragraph [74] where he stated:

> "[74] Lords Carnwath and Hodge, in separate majority judgments, concurred with Lord Wilson's endorsement of the test of manifestly without reasonable foundation. As Lords Reed and Hughes agreed with Lord Carnwath, it follows that this test was endorsed by five of the seven members of the Court. In passing, the very recent consideration of this issue by a Chamber of the ECtHR, in *JD & A v The United Kingdom* (Applications Nos 32949/17 and 34614/17), a 5/2 majority decision, did not feature in the parties' arguments. The majority confined the "manifestly without reasonable foundation" test to contexts where "... an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality" (at [88]). As the robust joint dissenting judgment demonstrates this may prove controversial and will, predictably, feature in future decisions of the UKSC and the Grand Chamber. Our decision in this case is made in a context shaped by Section 3(1) of the Human Rights Act and the doctrine of precedent whereby this court is bound by the decision in DA."

[887] Having determined that the appropriate test to apply is the MWRF test, it is necessary to determine what this test actually means and, in particular, whether the fact that Lord Wilson in *DA and DS* was adamant that this was the sole question to pose when assessing the issue of justification, whether the *Bank Mellat No 2* [2013] UKSC 39 proportionality test or any constituent part of it has any role to play in assessing whether the government's stated justification is manifestly without reasonable foundation.

[898] The relevant passage in Bank Mellat No 2 is contained in the judgment of Lord Reed at paragraph [74]:

> "The judgment of Dickson CJ in Oakes provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in Oakes can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the

> limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in De Freitas, and the fourth reflects the additional observation made in Huang. I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

[90~~89~~] In the context of the present case, where one is dealing with the issue of justification of different treatment, one has to bear in mind what precisely has to be justified. What has to be justified in this discrimination case, if that stage is reached, is not the measure itself but the difference in treatment between applicant and another person brought about by the implementation of the measure in the applicant's case. Therefore, given that the four criteria of the *Bank Mellat No 2* test specifically refer to the measure, it would seem that if the *Bank Mellat No 2* proportionality test is to play any role in the MWRF analysis, it will require some modification to be relevant and readily applicable. Having regard to the language used in the four criteria, it is difficult to see how the formulation of the *Bank Mellat No 2* test can be adapted to account for the change in focus from the measure to the differential treatment resulting from the measure. Yet it is quite clear from the caselaw of the ECtHR that a difference in treatment will be regarded as discriminatory "if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised." It is impossible to escape the conclusion that even in a case where the MWRF analysis is appropriate the question of proportionality comes into play and so it should. It would be difficult to stand over an analysis which on the one hand concluded that the means employed was manifestly disproportionate in its impact having regard to the aim sought to be realised and at the same time conclude that the difference in treatment was not manifestly without foundation.

[91~~0~~] The English Court of Appeal recently grappled with this issue in the case of *TD, AD and Patricia Reynolds v Department for Work and Pensions* [2020] EWCA Civ 618 (judgment delivered on 12 May 2020). The approach adopted by Singh LJ is interesting and this approach does allow for a consideration of the proportionality of the impact of the measure when analysing whether it is manifestly without reasonable foundation. I set out paragraphs [63] to [65] of Singh LJ's judgment:

"[63] It was common ground before us that the applicable test in law is whether the difference in treatment is "manifestly without reasonable foundation": see *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289, at para. 65. In that passage Lord Wilson JSC said:

> "… there was—and there still remains—clear authority both in the *Humphreys* case [2012] 1 WLR 1545 and in the bedroom tax case [2016] 1 WLR 4550 for the proposition that, in any rate in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it."

[64] It is important also to note what Lord Wilson said at para. [66], where he emphasised that the court will "proactively examine whether the foundation is reasonable". This is consistent with what was said in the two cases cited by Lord Wilson, that there should be "careful scrutiny" of the reasons advanced by way of justification: see *Humphreys*, at para. 22 (Lady Hale JSC); and MA (the bedroom tax case), at para. 30 (Lord Toulson JSC).

[65] I would also note what was said by Leggatt LJ, as he then was, in *R (C) v Secretary of State for Work and Pensions* [2019] 1 WLR 5687, a case decided shortly before *DA*, at para [89]:

> 'Although it is not immediately obvious how the 'manifestly without reasonable foundation' test relates to the assessment of proportionality that the court must undertake, the explanation may be that the court is required to ask whether the difference in treatment is manifestly disproportionate to the legitimate aim. This would accord with the statement of the European Court in *Blecic v Croatia* (2005) 41 EHRR 13, para 65, that it will accept the judgment of the domestic authorities in socio-economic matters 'unless that judgment is manifestly without reasonable foundation, that

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

[921] If and when it comes to the assessment of the justification put forward by the respondents for the difference in treatment in this case, I shall apply the MWRF test and in applying that test I shall consider whether the difference in treatment is manifestly disproportionate to the legitimate aim pursued. I turn now to consider the four *Stott* questions.

The *Stott* questions

Whether the circumstances fall within the ambit of one or more Convention rights

[932] In relation to the first *Stott* question as to whether the circumstances "fall within the ambit" of one or more Convention rights, the respondents accept that the circumstances in this case fall within the ambit of Article 1 of Protocol 1 of ECHR but not within the ambit of Article 8. However, it is clear that one of the obvious purposes of the benefits in question in these proceedings is to provide a terminally ill patient with some financial support so that his or her remaining time can be that bit more tolerable. If the intent and purpose of the benefits are to ameliorate some of the functional deficits resulting from the terminal illness then this has the potential to impact positively on family and private life in its broad sense. Further, there is some force in the argument that the intrusive nature of the assessment process which the applicant had to undergo to prove her entitlement to the benefits in question impacted upon her family life and enquired into her personal life in such a manner as to fall within the broad compass of Article 8. For the reasons set out by Lady Hale at paragraph [137] of her judgment in *DA and DS,* I consider that the circumstances of this case do fall within the ambit of Article 8 as well as Article 1 of Protocol 1:

> "There is nowadays no doubt that entitlement to state benefits, even non-contributory means-tested benefits, is property for the purpose of …A1P1, which protects property rights. … as Lord Wilson JSC explains (para 36), benefits which enable a family to enjoy "a home life underpinned by a degree of stability, practical as well as emotional, and thus the financial resources adequate to meet basic needs, in particular for accommodation, warmth, food and clothing" are clearly one of the ways ("modalities") whereby the state manifests its respect for family life and therefore fall within the ambit of Article 8:

see *Petrovic v Austria* (1998) 33 EHRR 14 and *Okpisz v Germany* (2005) 42 EHRR 32."

[943] Just as in *DA and DS,* the provision of such non-contributory benefits to terminally ill individuals in this case is one of the ways ("modalities") in which the state manifests its respect of family life. This determination in relation to ambit feeds into the how the court proceeds to deal with the issues of analogous situation and justification, if and when consideration of the latter issue becomes necessary. In this regard, I rely on the passage of Lady Hale's judgment in *McLaughlin* at paragraph [16] where she stated that whether the circumstances fell within the ambit of more than one Convention right "could matter, in relation both to whether the claimant and her children are in an analogous situation to a surviving spouse or civil partner and their children and to the justification for the difference in treatment between them." I also rely upon the following brief passage from Lady Hale's judgment in *DA and DS* at paragraph [137] where she stated the following:

> "That we are concerned here, not only with the right to property, but also with the right to respect for family life is clearly relevant to the issue of justification."

Whether the difference in treatment was on the ground of one of the characteristics listed in Article 14 or "other status"

[954] The applicant contends that her status derives from the fact that she is suffering from a terminal illness with an unpredictable prognosis or trajectory. On the basis of the entirety of the evidence, I find the assertions in respect of status insofar as they are based upon the existence of an unpredictable prognosis or trajectory to be flawed on account of the fact that, at least to some extent, it is clear that the prognosis can be predicted over the short term, in that death is not reasonably to be expected within six months. The difference in treatment in this case is not due to the fact that the applicant has an indelible personal characteristic which in her case is that she is terminally ill. The difference in treatment is not because she is suffering from an untreatable and incurable disease that will in all likelihood claim her life well before she would otherwise have died, if she had not developed this disease, and that palliative and supportive measures are the only measures available to her. The difference in treatment is because she has been placed by the benefits legislation in a subset of those individuals suffering from a terminal illness and that subset comprises of terminally ill individuals in respect of whom the reasonable expectation is that they will survive for more than six months.

[965] If the intrinsic condition, the indelible characteristic, of terminal illness was the basis for the different treatment then this would clearly constitute "other status" and, in terms of the concentric circle analysis referred to above, it is hard to imagine a status which travels on a tighter and closer orbit around the listed core status issues than the status of terminal illness. The sensitivities of such a diagnosis and the emotion turmoil engendered by such a diagnosis are close to if not on a par with the sensitivities

attached to and the emotions engendered by the specifically listed status matters in Article 14. This conclusion would have a bearing on the intensity of the scrutiny which has to be applied to the justification arguments put forward by the respondent, if that stage is reached.

[976] However, the only logical status that can be attributed to the applicant for the purposes of Article 14 on the facts of this case is the status of a person with a terminal illness with a reasonable expectation of a life expectancy of more than six months, irrespective of whether it is predicable beyond that stage. Given that the assessment of the predictability of death resulting from a diagnosed and established terminal illness is dependent to a large extent on the nature and stage of progression of the illness and the underlying condition of the patient, I am prepared to accept that this assessment is dependent upon and takes account of certain personal and intrinsic characteristics possessed by the patient and, in those circumstances, for the purposes of this case, I am prepared to conclude that in the context of a person suffering from a terminal illness, the reasonable expectation of surviving for more than six months constitutes "other status" for the purposes of Article 14 but the orbital position of that "other status" is for obvious reasons not particularly close to the core status matters specifically listed in Article 14 and this does have a bearing on the intensity of the scrutiny which has to be applied to the justification arguments put forward by the respondent, if that stage is reached. For the avoidance of doubt, the answer to the second *Stott* question is that the difference in treatment was on the ground of "other status" within Article 14.

Is the applicant and the person who has been treated differently in analogous situations?

[987] The respondents strongly argue that this question has a simple and straightforward answer in the negative. They argue that those individuals with a terminal diagnosis and who are reasonably expected to die within six months (group (a)) are not in an analogous situation as those who have a terminal diagnosis but are not expected to die within six months (group (b)). The two groups are, indeed, treated differently in terms of being able to access certain benefits. The rationale behind that difference is that the benefits in question are to ameliorate the impact of certain functional deficits (the ability to engage in activities of daily living, the ability to mobilise and the ability to engage in work and work related activities) resulting from the terminal illness. These benefits are normally only paid after a qualifying period and following an assessment process which is designed to establish that the functional deficits exist. Group (a) is treated differently from group (b) in the sense that there is no qualifying period and they are not required to undergo a detailed assessment process (in essence, they are deemed to suffer from the functional deficits) because to impose a qualifying period and to require those in group (a) to undergo an assessment process would mean that many of them would be dead before they were paid any benefits. In essence, because of the qualification conditions for the benefits, the two groups are not analogous and, indeed, to ensure that those in group (a) have a

meaningful entitlement to the benefits in question, they have to be treated differently from those in group (b).

[998] Superficially, there is much to recommend this argument but on closer analysis, I consider it to be somewhat flawed. Firstly, as stated in paragraph [75] above, what is required is that the applicant should demonstrate that, having regard to the particular nature of the complaint, her situation was "analogous, or relevantly similar" to the person who is treated differently. It need not be identical. Secondly, and more importantly, when ascertaining whether one group is in an analogous situation to another one must take into account the realities of their situations and one should have regard to the empirical evidence that demonstrates what those realities are.

[10099] The statistical evidence contained within the material provided to the Court by the respondents clearly and unequivocally demonstrates that of those individuals who gained immediate access to the benefits because they had ~~receive~~ received a diagnosis of a terminal illness with a reasonable expectation of death within six months, 14% were still alive and in receipt of benefits three years from first receiving benefits. For those claimants who initially received benefits because of a diagnosis of terminal illness with the reasonable expectation of death within six months, their entitlement of benefits does not stop if they survive beyond the six-month period. Further, they are not required to undergo any assessment process if they survive beyond six months. It is only those who are still alive at three years who are required to undergo some form of re-assessment. The analogous groups in this case are not groups (a) and (b) as described in paragraph [97] above. Instead, and more realistically, the analogous groups are: group (b) those who have a terminal diagnosis but are not expected to die within six months and those individuals with a terminal diagnosis and who are reasonably expected to die within six months but who survive beyond that six month period (a subset of group (a)). These groups are clearly analogous. All members have a terminal diagnosis; all are or are reasonably expected to be alive six months after the relevant medical opinion was provided or the certification of the DS 1500 occurred and yet the two groups are clearly treated differently in ways bearing upon Article 8 and Article 1 of Protocol 1 in that, in the case of those in the subset of group (a) who survive for more than six months, wide-ranging functional impairment is still deemed be present in their cases and no qualifying period is applied even retrospectively, whereas those in group (b) are only entitled to the benefits, if functional impairment is demonstrated, taking into account a qualifying period. Therefore, the third *Stott* question is answered in the following manner. The applicant and the person who has been treated differently are in analogous situations for the purposes of Article 14.

Whether objective justification for the different treatment is lacking

[1010] The justification relied upon by the respondents in this case is encapsulated in paragraph [72] of Ms Parker's Affidavit. The respondents claim justification on the basis that the current rules provide a clear and specific definition of terminal illness

that ensures that those closest to death are given immediate access to PIP and the LCWRA element of UC. The definition safeguards public funds by avoiding an open-ended definition which could apply to vastly more people than currently qualify, whilst providing a clear threshold against which medical practitioners can assess claimants. These rules have operated well in practice and have not, until recently, led to significant pressure for reform. As such, the respondents consider that the current rules have a clear and reasonable foundation, which is borne out by the number of years for which the rules have operated without challenge.

[1021] If this Court was restricted to simply looking at the legislative measures which are the subject of challenge in this case, it would be very easy for the Court to conclude that the measure did clearly pursue a legitimate objective and that the measure was rationally connected to the objective. If the Court was just confined to looking at the measure itself, having regard to the justification put forward in the preceding paragraph, it would be very difficult to conclude that the manifestly without reasonable foundation test was met in order to reject the respondents' justification arguments. However, as has been explained at paragraph [78] above, what has to be justified is not the measure in issue but the difference in treatment between one person or group and another. The focus in relation to justification should not be on policy foundations underlying Article 87(4) of the Welfare Reform (Northern Ireland) Order 2015 and Regulation 2 and Schedule 9, paragraph 1 of the Universal Credit Regulations (Northern Ireland) 2016 but rather on the difference in treatment brought about by those provisions.

[1032] I have carefully analysed all the evidence put forward by the respondents in order to evaluate their arguments in relation to justification and I can find nothing to justify or indeed explain why those individuals who have a terminal diagnosis but are not expected to die within six months and those individuals with a terminal diagnosis and who are reasonably expected to die within six months but who survive beyond that six month period are treated differently. As described above, in the case of those with a terminal diagnosis who were given immediate access to benefits because death was reasonably to be expected within six months but who survive longer than that six month period, wide-ranging functional impairment is still deemed be present in their cases and no qualifying period is applied even retrospectively. Whereas, in the case of those individuals, including this applicant, with a terminal diagnosis who are reasonably expected to live for more than six months, entitlement to the benefits is conditional upon demonstrating functional impairment and fulfilling a qualifying period.

[1043] By peeling back all the layers of apparent complexity and looking at the matters at the heart of this case, one is able to reach the following findings and conclusions. If a claimant had made a claim for PIP and had been able to avail of the SRTI in August/September 2018, that claimant would have immediately received the enhanced rate of PIP for activities of daily living and would have continued to do so even if that claimant survived beyond six months with no assessment of functional deficit and no form of qualifying period.

[1054] This applicant applied for PIP on 7 March 2018. She was diagnosed as suffering from Motor Neurone Disease, a devastating terminal illness, in August/September 2018. However, it was not until 9 April 2019 that she was deemed to be entitled to receive the enhanced rate of PIP for activities of daily living. Upon careful scrutiny of all the evidence, I can find no evidence, justification or rationale to explain why the applicant was not deemed to be entitled to the enhanced rate of PIP for activities of daily living from the date when her terminal diagnosis was confirmed. This difference in treatment is manifestly without reasonable justification and is, therefore, in breach of Article 14 ECHR in conjunction with Article 8 and Article 1 of Protocol 1.

[1065] If a claimant had made a claim for UC and had been able to avail of the SRTI in August/September 2018, that claimant would have immediately received the UC including the LCWRA component of UC and would have continued to do so even if that claimant survived beyond six months with no assessment of functional deficit and no form of qualifying period.

[1076] This applicant was diagnosed as suffering from Motor Neurone Disease in August/September 2018. She subsequently applied for UC on 4 March 2019. However, it was not until 4 June 2019 that she was deemed to be entitled to receive the LCWRA component of UC. Again, upon careful scrutiny of all the evidence, I can find no evidence, justification or rationale to explain why the applicant was not deemed to be entitled to the LCWRA component of UC from the date on which she made her claim for UC. This difference in treatment is manifestly without reasonable justification and is, therefore, in breach of Article 14 ECHR in conjunction with Article 8 and Article 1 of Protocol 1. In this rolled-up hearing, leave is, therefore, granted and to the extent indicated above, the applicant succeeds in her application for judicial review.

[1087] In light of what has been said above, I do not propose to say anything about the claim of breach of the common law principle of equality. In relation to the applicant's claims that her Art 1 Protocol 1 rights have been breached, I consider that the respondents are right when they argue that there is no enforceable right under Article 1 of Protocol 1 to receive a social security payment of any kind. The only right to receive such a payment arises where the terms of the social security scheme as fixed by the State are met. In this instance the rules set by the State were properly applied and the applicant has received that which the rules dictate she should have received. That is the end of the matter subject only to the discrimination issues already addressed above. As set out in *Stec* at paragraph [53]:

> "53. Finally, since the applicants complain about inequalities in a welfare system, the Court underlines that art 1 of Protocol No 1 does not include a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount

> of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with art 14 of the Convention (see the admissibility decision in the present case, at paras 54-55, ECHR 2005 ...)."

[10~~98~~] The argument that the necessity to undergo an assessment process relating to functional ability in order to establish entitlement to benefits that are intended to ameliorate the impact of functional impairment resulting from illness or injury, is in breach of Article 8, in the absence of any evidence of a grossly and disproportionately intrusive assessment process, is simply a non-starter and the applicant identified no case in which any court has found Article 8 to be engaged or breached in a case in this context. The claims for substantive breaches of Article 1 of Protocol 1 and Article 8 ECHR are, therefore, dismissed.

Whether the relevant provisions can be read and given effect in a way which is compatible with the Convention rights

[11009] Turning now to have regard to the provisions of Section 3 of the Human Rights Act 1998. This issue was not addressed by the parties in their written or oral submissions which were provided to the Court in the lead up to and during the substantive hearing, as it was considered appropriate for the Court to deliver its judgment on the merits of this application and, thereafter, to adjourn the matter to allow the parties to consider the Court's judgment and to provide the Court with further submissions on the question of appropriate remedies, including the application of Section 3. The Court delivered its substantive judgment on 7 July, 2020 and, following a review of the matter on 24 September, 2020, the matter was listed for hearing on the issue of the appropriate remedies on 19 October, 2020. I am very grateful to parties' legal teams for their industry in providing the Court with such helpful further written submissions; on behalf of the applicant dated 28 September, 2020 and on behalf of the respondents dated 9 October, 2020.

[1110] Having carefully considered the wording and purpose of the specific legislative provisions in question in this case and having taken full account of the helpful and comprehensive supplementary written submissions provided by the parties, as expanded in their oral submissions on 19th October, 2020, I am now persuaded and, indeed, convinced that it is not possible to read and give effect to the relevant provisions in a way which would only address and remedy the specific differences in treatment that I have found to exist and which I have adjudged to be in breach of Article 14 ECHR in conjunction with Article 8 and Article 1 of Protocol 1.

[1121] In her carefully reasoned submissions, Ms Quinlivan QC, on behalf of the applicant proposes that Article 87(4) of the Welfare Reform (NI) Order 2015, which defines "terminally ill", be read down (pursuant to Section 3 of the Human Rights Act 1998) as follows: "For the purposes of this Article a person is "terminally ill" at any time if at that time the person suffers from a progressive disease and the person's

death in consequence of that disease can reasonably be expected ~~within 6 months~~." The applicant also proposes that Regulation 2 and Schedule 9, Paragraph 1 of the Universal Credit Regulations (NI) 2016 be similarly read down to remove the words "within 6 months".

[1132] It is clear that to read down the legislative provisions in such a manner would have the effect of addressing the unlawful difference in treatment identified by the Court but it is equally clear that such a reading down would have a much wider impact and would have the inevitable effect of addressing differences in treatment which the Court did not find to be unlawful and which the legislature has specifically and repeatedly promoted by means of these or similar provisions. It would be constitutionally impermissible for the Court to read down the relevant legislative provisions in such a manner. Such an approach would encroach upon the constitutional competence of the legislature and usurp the proper role and function of the legislature in that such an approach presumes that there is only one potential response to the Court's judgment, and it, in effect, removes from the democratically elected legislature the opportunity to gather and analyse the necessary information, to debate the various options and proposals and to make a fully informed and publicly scrutinised decision as to how to best respond to the judgment in light of a proper appreciation of the consequences of the various potential responses.

[1143] I fully acknowledge that, as was stated by Lord Bingham in *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264, para 28, [2005] 1 All ER 237, the interpretative obligation under Section 3 is very strong and far reaching and in an appropriate case "might require the Court to depart from the legislative intention of Parliament." If it were possible to read down the provisions in such a manner as would address and only address the unlawful difference in treatment identified by the Court and not capture differences in treatment specifically promoted by the legislature which were not found to be unlawful by the Court, I would readily do so, even though that meant departing from the legislative intention of Parliament. However, it is simply not possible to achieve this goal in this instance.

[1154] The limits of the Section 3 interpretative obligation were considered by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 and the parties are *ad idem* as to the principles at play. They were summarised by Treacy J in the case of *HM* [2015] NIJB 234 at paragraph [53] of his judgment:

> [53] In brief, the limits of the interpretive Section 3 obligation include where the interpretation contended for 'goes against the grain of the legislation' / is contrary to some fundamental aspect of the legislation or where it would create some far-ranging practical effects which would be outwith the competency of the judiciary."

[1165] It is important to have regard to the careful use of the word "include" by Treacy J. The three situations described in paragraph [53] of his judgment are examples of the limits of the interpretative Section 3 obligation; they do not exhaustively define the

limits to be placed on that obligation. Without making any specific finding as to whether the interpretation contended for by the applicant "goes against the grain of the legislation" and/or "is contrary to some fundamental aspect of the legislation", I am convinced that this interpretation would effect important changes to the meaning and import of the legislative provisions which go well beyond that which are necessary to address and remedy the unlawful difference in treatment found by the Court. In doing so, this interpretation could be said to "create some far-ranging practical effects which would be outwith the competency of the judiciary."

[1176] In the context of the interpretative Section 3 obligation, there is no great difficulty in devising a form of wording which addresses and remedies the unlawful difference in treatment found to exist in this case. In my judgment, an insurmountable difficulty does arise when one attempts to devise a form of wording which is limited to the capture of the unlawful difference in treatment and at the same time does not address and indeed capture other differences in treatment which have not been found to be unlawful and which have been specifically promoted by the legislature. The inability to devise a form of wording which addresses and remedies the unlawful difference in treatment but at the same time does not engage or impact upon other differences in treatment not adjudged to be unlawful and which are specifically promoted by the legislation is another example of the limits of the interpretative Section 3 obligation. I consider that this approach is entirely consistent with the approach adopted by the Northern Ireland Court of Appeal in the case of *O'Donnell* [2020] NICA 36 at paragraphs [101] and [102].

[1187] In describing this insurmountable difficulty as another example of the limits of the interpretative Section 3 obligation, the Court has careful regard to the present context of this case and the ~~ongong~~ ongoing executive and legislative consideration of the SRTI provisions both at Westminster and Stormont. The provisions are already the subject of ongoing review and the Court has the assurance of Senior Counsel for the respondents that the outcome of this litigation and all relevant findings are something which will be considered and addressed within that review. This is clearly not a situation where there is no prospect of timely executive and legislative action to address the unlawful difference in treatment identified by the Court.

[1198] Consequent upon the finding that it is not possible to read and give effect to the relevant provisions in a way which would only address and remedy the specific differences in treatment that I have found to exist and which I have adjudged to be in breach of Article 14 ECHR in conjunction with Article 8 and Article 1 of Protocol 1, the Court has to consider whether any form of declaration is necessary or whether the judgment should be allowed to speak for itself.

[12019] The applicant now accepts that the Court cannot make a Declaration of Incompatibility in this case as originally contended for. However, Ms Quinlivan QC on behalf of the applicant now argues that the Court should formally grant a Declaration to the effect that the respondents must disregard the impugned subordinate legislation in the event that the Court concludes that the legislation

cannot be interpreted or given effect in a manner compatible with the applicant's Convention rights by disregarding the phrase "within 6 months". She skilfully argues that the Court "should make it expressly clear that this is the impact of the judgment in order to ensure certainty for public authorities and for those impacted by the judgment".

[1210] By means of this argument the applicant seeks to achieve by way of a declaration that which has been held to be impermissible by way of interpretation under Section 3 of the Human Rights Act 1998 and for the reasons set out above that argument must also fail.

[1221] I am satisfied that the Court's judgment expressed in clear terms should speak for itself. It is for the other constitutionally independent arms of the state to give effect to this judgment. I do not consider that a specific declaration is necessary in this case. However, if a specific declaration was necessary, I would be minded to follow the guidance contained in the English Court of Appeal case of *R (on the application of TD, AD and Patricia Reynolds) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618 at paragraphs [92] to [94], where Singh LJ stated:

> "[92] I have come to the conclusion, that in the present context, the difference in treatment was manifestly disproportionate in its impact on these Appellants having regard to the legitimate aim which the respondent sought to achieve. It was therefore manifestly without reasonable foundation.
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> [93] I would therefore grant a declaration that these Appellants' rights under Article 14 have been violated. That is similar to the remedy which the European Court of Human Rights usually grants to a successful applicant, when it pronounces that the applicant's Convention rights have been violated. It is also the remedy which Lewis J granted in *TP (No. 1)* in a decision which was upheld by this Court.
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> [94] It will be a matter for the Secretary of State to decide how to respond to a declaration by this Court that there has been a violation of these Appellants' rights under Article 14. That may or may not lead to a scheme being designed which benefits other people, who are not before this Court, but the design of any such scheme will in the first instance be for the Secretary of State, although it must be done in a way which is lawful, including by reference to the Convention rights."

Whether an award of damages is necessary to afford just satisfaction

[1232] I now turn to consider the issue of whether just satisfaction requires the making of an award of damages for non-pecuniary loss in this case in accordance with Section 8 of the Human Rights Act 1998. Again, the legal principles which the Court

has to apply in determining this issue are largely agreed by the parties. The Court of Appeal in *Jordan* [2019] NICA 61 summarised the legal position as follows:

> "[19] The application of the principles on the award of damages for breach of Convention rights was considered by the House of Lords in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14. That was a case where the issue arose in the context of Article 6 breaches but the House was able to give general guidance:
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> > (i) Domestic courts when exercising their power to award damages under Section 8 should not apply domestic scales of damages.
> >
> > (ii) Damages did not need ordinarily to be awarded to encourage high standards of compliance by member states since they are already bound in international law to perform their duties under the Convention in good faith.
> >
> > (iii) The court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made and it follows that an award of damages should be just and appropriate.
> >
> > (iv) Section 8(4) of the HRA required a domestic court to take into account the principles applied by the ECHR under Article 41 not only in determining whether to award damages but also in determining the amount of the award.
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> [20] *Greenfield* was considered in *R (Faulkner and Sturnham) v Secretary of State for Justice and Another* [2013] UKSC 23 which was a case concerned with breaches of Article 5. Lord Reed, giving the majority judgment, provided some further guidance at [39]:
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> > "Three conclusions can be drawn from this discussion. First, at the present stage of the development of the remedy of damages under Section 8 of the 1998 Act, courts should be guided, following *Greenfield*, primarily by any clear and consistent practice of the European court. Secondly, it should be borne in mind that awards by the European court reflect the real value of money in the country in question. The most reliable guidance as to the quantum of awards under Section 8 will therefore be awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living. Thirdly, courts should resolve disputed issues of fact in the

> usual way even if the European court, in similar circumstances, would not do so.""

[1243] In addition to the cases of *Jordan, Greenfield* and *Faulkner and Sturnham*, I have been referred to the first instance decision in *Jordan* [2014] NIQB 14, *DSD, NBV v Commissioner for the Metropolis* [2015] 1 WLR 1833; *Alseran and others v Ministry of Defence* [2018] 3 WLR 95 95; and *R(on behalf of SXC) v Secretary of State for Work and Pensions* [2019] EWHC 2774. These cases helpfully analyse the circumstances in which compensation may properly be awarded under the Human Rights Act 1998, and look at the approach taken by the European Court of Human Rights to awards of compensation. I have found the cases of *DSD* and *Alseran* particularly helpful for the statement and discussion of the general principles identified therein which are set out by Leggatt J at paragraphs [908] to [916] of *Alseran*. There is some degree of overlap with the principles enunciated by the Northern Ireland Court of Appeal in *Jordan* but it is still worthwhile setting out the relevant passage of the *Alseran* judgment in full.

> "908. The practice of the European Court in dealing with just satisfaction claims is outlined in a Practice Direction issued by the President of the Court on 28 March 2007. It has also been considered in several English cases including *D v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB), [2015] 1 WLR 1833, where the judgment of Green J contains a helpful discussion at paras 16-41. For present purposes, eight relevant principles can be identified.
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> 909. First, the award of just satisfaction is not an automatic consequence of a finding that there has been a violation of a Convention right. The Court may decide that, for some heads of alleged prejudice, the finding of a violation constitutes in itself sufficient just satisfaction without there being any call to afford financial compensation or that there are reasons of equity to award less than the value of the actual damage sustained, or even not to make any award at all: see Practice Direction, paras 1-2.
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> 910. Second, before the Court will award financial compensation, a clear causal link must be established between the damage claimed and a violation found by the Court: see Practice Direction, paras 7-8. As stated in *Kingsley v United Kingdom* (2002) EHRR 10 at para 40: "The Court recalls that it is well established that the principle underlying the provision of just satisfaction for a breach of Article 6 is that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements … The Court will award monetary compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, since the state cannot be required to pay damages in respect of losses for which it is not responsible."

911. Third, where it is shown that the violation has caused "pecuniary damage" (i.e. financial loss) to the applicant, the Court will normally award the full amount of the loss as just satisfaction: see Practice Direction, paras 10-12. As stated in para 10 of the Practice Direction: "The principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, in a position in which he or she would have been had the violation found not taken place, in other words, restitutio in integrum."

912. Fourth, it is also the practice of the Court to award financial compensation for "non-pecuniary damage", such as mental or physical suffering, where the existence of such damage is established: see Practice Direction, paras 13-14. If the Court considers that a monetary award is necessary, the Practice Direction states that it will make an assessment "on an equitable basis, having regard to the standards which emerge from its case law": see para 14. The case law of the European Court shows that awards for mental suffering are by no means confined to cases where there is medical evidence that the applicant has suffered psychological harm and that compensation may be awarded for injury to feelings variously described as distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life or powerlessness. The case law also shows that the Court will often be ready to infer from the nature of the violation that such injury to feelings has been suffered. Applicants who wish to be compensated for non-pecuniary damage are invited by the Court to specify a sum which in their view would be equitable: see Practice Direction, para 15.

913. Fifth, the purpose of an award under Article 41 is to compensate the applicant and not to punish the state responsible for the violation. Hence it is not the practice of the Court to award punitive or exemplary damages: see Practice Direction, para 9.

914. Sixth, in deciding what, if any, award is necessary to afford just satisfaction, the Court does not consider only the loss or damage actually sustained by the applicant but takes into account the "overall context" in which the breach of a Convention right occurred in deciding what is just and equitable in all the circumstances of the case. This may require account to be taken of moral injury. As stated by the Grand Chamber in *Varnava v Turkey* [2009] ECHR 1313 at para 224, in some situations "the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further." The Court further explained: "Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the

> Court's role to function akin to a domestic tort mechanism in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned." See also *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, para 114.
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> 915. Seventh, as part of the overall context, the Court may take account of the state's conduct. Thus, in *Anufrijeva v Southwark London BC* [2003] EWCA Civ 1406, [2004] QB 1124, para 68, the Court of Appeal noted that, as well as the seriousness of the violation, the manner in which the violation took place may be taken into account. This is similar to the English law concept of aggravated damages discussed earlier.
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> 916. Eighth, the Court also takes account of the applicant's conduct and may find reasons in equity to award less that the full value of the actual damage sustained or even not to make any award at all. This may be the case if, for example, the situation complained of or the amount of damage is due to the applicant's own fault: see Practice Direction, para 2. A striking example is the case of *McCann v United Kingdom* (1995) 21 EHRR 97, in which the European Court found that the killing of IRA gunmen in Gibraltar by British soldiers involved a breach of Article 2 but declined to make any award under Article 41 "having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar" (see para 219)."

[1254] I agree with Leggatt J when he opined at paragraphs [919] to [922] of *Alseran* that any attempt to glean guidance from the size of awards made by the European Court in individual cases is rendered problematic by the fact that the European Court is dealing with cases from 47 different countries and in its awards it takes account of the local economic circumstances of the respondent state. Further, except for cases involving breach of Article 6, the Court has not sought to establish scales of awards for particular types of case. The Court hardly ever refers to amounts which it has awarded previously in other cases and, when awarding compensation for non-pecuniary damage, generally gives little or no explanation of how it has arrived at a particular figure. The Court's approach is to assess the award of non-pecuniary compensation on an "equitable basis" by reference to such sum as the applicant requests and what the Court thinks fair, having regard to the particular facts and circumstances of the

individual case. Most of the Court's decisions are not intended to have any precedential effect.

[1265] As stated above, the *Greenfield* and *Sturnham* decisions confirm that domestic Courts, when exercising their power to award damages under Section 8 of the Human Rights Act 1998, are not bound to apply domestic scales of damages but that does not mean that such scales may not be highly relevant to the computation of such an award. There will be cases where the violation of the Convention right also constitutes a common law or statutory tort and there will be other cases where the violation does not have an analogue in domestic law. As a matter of principle, where such an analogue exists, a victim who is being compensated under Section 8 of the Human Rights Act 1998 should not receive less compensation for the harm suffered to that which would be awarded in a tort action. In support of this proposition, it must be remembered that it is the practice of the European Court to take into account domestic scales of damages. Paragraph 3 of the Court's Practice Direction states that when making an award under Article 41, the Court "may decide to take guidance from domestic standards", though it is "never bound by them". The Grand Chamber in *Z v United Kingdom* (2001) 34 EHRR 97 at paras 120 and 131, described the rates of compensation applied in domestic cases as "relevant" but "not decisive".

[1276] It should also be remembered that in the *Greenfield* case [2005] UKHL 14, [2005] 1 WLR 673, at para 9, Lord Bingham approved the observations of Lord Woolf MR giving the judgment of the Court of Appeal in *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124, where he stated at paras 52–53 that: "the remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations … Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance." In other words, for an award of damages to be appropriate it must be established that such an award is necessary to provide just satisfaction.

[1287] In many cases where breaches of Convention rights are alleged, the claimant is seeking an order to compel a public body to take or refrain from taking action or to quash an administrative decision of a public body. There are other cases, however, where the claimant is not seeking an essentially public law remedy of this kind and which fall into the category where the violation of the Convention right has an outcome for the claimant which constitutes or is akin to a common law or statutory tort. In these cases, where the violation alleged is not continuing but is purely historic, the concern is self-evidently not to bring the infringement of the claimant's human rights to an end as the infringement has already ended. In these cases, the only remedy which the court can provide is an award of damages to compensate the claimant for the injury caused by the infringement. The question of compensation is therefore of primary, if not sole, importance. To decline to award damages, or to make an award which affords only partial reparation, would be to deny the claimant an effective remedy, contrary to principle and to the UK's obligation under Article 13 of the

Convention to afford an effective remedy to everyone whose Convention rights are violated.

[1298] I note that in the recent case of *SXC*, a Universal Credit transition arrangements case, Swift J refused to make an award of compensation where a breach of Article 14 had been established. At paragraphs [12] and [13], Swift J stated as follows:

> [12] In some circumstances a claim under the Human Rights Act 1998 is the vehicle to vindicate rights equivalent to those recognised in private law. The circumstances of *Alseran* and *D* are examples of such a situation (see per Leggatt J in *Alseran* at paragraph [933]). In such instances, compensation may be the primary if not sole way in which just satisfaction can be afforded for the breach of Convention rights. But the present claim is not of that nature. Rather, the circumstances of this claim are a classic example of an instance where the Human Rights Act is relied on for the purposes of a purely public law challenge. The claim was brought on the premise that when Regulations 3(7) and 3(8) of the Original Regulations were given effect, they would fail to ensure lawful treatment of a class of persons including SXC who had already migrated to Universal Credit. The central objective in this case was to quash the secondary legislation on transitional payments, and require the Secretary of State to think again. The New Regulations have made new provision for transitional payments. Overall, this claim is indistinguishable from the overwhelming majority of public law claims in which one or the other of the remedies specified in Section 29 of the Senior Courts Act 1981 is sought, and in which the grant of that remedy is sufficient to address the wrong alleged. In this case, those remedies are sufficient also to provide just satisfaction for the breach of Convention rights that has occurred."
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> [13] Further, the specific claim of discrimination made by *SXC* – a claim of discrimination on grounds of "other status" – does not correspond to any recognised private law wrong. Discrimination contrary to the provisions of the Equality Act 2010 is properly described as a statutory tort, but the protected characteristics under that Act do not extend to the circumstances relied on by SXC in these proceedings as the reasons for the less favourable treatment afforded to her. This does not necessarily rule out the possibility that just satisfaction could include an award of damages, but such cases are likely to be more rare than common."

[13029] It is interesting to note that Swift J distinguished the judgments of the European Court of Human Rights in *Willis v United Kingdom* [2002] 35 EHRR 21; *Wellar v Hungary* (Application No. 44399/05, judgment 31 March 2009); and *Ribac v Slovenia* (Application No. 57101/01, judgment 5 December 2017). He acknowledged that these

are all cases where claims based on discriminatory exclusion from welfare benefits resulted in decisions ordering payment of compensation for financial loss: in *Willis*, a widower had not been paid benefits that would have been paid to a widow in like circumstances; in *Wellar*, a maternity benefit paid to support persons raising new born children, had not been paid to the father of new born children; and in *Ribac*, a state pension was not paid on grounds of nationality. In each instance the European Court of Human Rights awarded compensation for financial loss based on the value of the benefits that had been claimed but not paid to the applicant. Swift J did not consider that these cases provided a guide to what was required as just satisfaction in the *SXC* case, because in that case there has been no comparable historic failure to pay a benefit.

[1310] In the liability judgment in *SXC,* [2019] EWHC 1116 (Admin), Swift J had found a breach of Article 14 on the basis that "no sufficient explanation had been provided for the difference" in treatment between two groups of claimants. It was not part of his conclusion in the liability judgment that the only lawful outcome was for the benefits' system to treat the two groups in the same manner. As it was no part of his conclusion in the liability judgment that parity of treatment between the two groups was required to render the treatment of *SXC* convention compliant, he could see no basis for making an award of compensation to *SXC* equating to the difference in benefits paid to the two groups. In essence, *SXC* had failed to establish that she had has suffered any financial loss as a result of the discrimination she experienced.

[1321] For the same reasons, Swift J refused to make an award of compensation for non-financial loss. However, he did go on to consider what would have been the appropriate level of award if an award of compensation for non-financial loss had been necessary to afford just satisfaction to the claimant.

[1332] It is also interesting to note that Swift J in *SXC* and Leggatt J in *Alseran* both made reference to the guidelines set out by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318; guidelines which are also used in this jurisdiction in employment cases where awards of damages are made by Tribunals for injury to feelings as opposed to psychiatric injury in *inter alia* discrimination cases. See for example *Nesbitt v The Pallett Centre* [2019] NICA 67. Mummery LJ in the Vento case at paragraphs [65] and [66] stated as follows:

> "[65] Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.
> i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race…Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

[66] There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case."

[1343] The *Vento* bands have been updated since 2003 and if one considers paragraph 8 of the judgment of Sales LJ in *Durrant v Chief Constable of Avon and Somerset Constabulary* [2018] IRLR 263, the bands have now increased to £800 to £8,400, £8,400 to £25,200 and £25,200 to £42,000 for claims initiated after 11 September, 2017. It is also clear from the judgment of Leggatt J in *Alseran* that the *Vento* scales have been used as guidance for awards of damages for non-financial loss under the Human Rights Act 1998.

[1354] Having conducted this review of the relevant domestic jurisprudence, it is important to always have regard to the general approach of the ECtHR to the awarding of damages for breach of Convention rights as is exemplified in the Grand Chamber decision of *Al-Jedda v United Kingdom* (2011) 53 EHRR 23 at paragraph [114]:

"The Court recalls that it is not its role under Article 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage".

[1365] Turning now to the facts of the present case; the first important matter to note is that the applicant is not now at any pecuniary loss or disadvantage as the respondents have now made two ex gratia payments to the applicant in the sum of £2,102.70 in respect of the SRTI claim and a further payment of £18,183.13 in recognition of the fact that she ought for a period to have been in receipt of Employment and Support Allowance rather than Universal Credit. ~~£18,183.13 in respect of Universal Credit and £2,102.70 in respect of the SRTI claim.~~ These payments are specifically described as ex gratia payments to ensure that they do not in any way affect the applicant's entitlement to benefits. This description is, therefore, no reflection

of the respondents' attitude to the judgment of the Court and is simply a mechanism collaboratively designed by the parties to protect the applicant's interests.

[137~~6~~] There is no question of an award of compensation being necessary to address any outstanding pecuniary loss. The question which remains to be addressed is whether an award of compensation is necessary to provide just satisfaction for any non-pecuniary loss suffered by the applicant. The first matter to be addressed is to identify any injury which the claimant has suffered as a result of the relevant breach of her Convention rights. In performing this exercise, I have kept in mind the second of the eight principles applied by the European Court set out at paragraph [123] above; that is to say, the requirement of a clear causal link between the damage claimed and the violation found by the Court.

[138~~7~~] The injury which the applicant alleges she has suffered is the upset, distress, annoyance, inconvenience, worry and humiliation flowing from the requirement (a) to demonstrate functional deficits and (b) to attempt to obtain employment in order to receive benefits even though she was in receipt of a diagnosis of a terminal illness. It is important to highlight a number of pertinent issues relevant to the applicant's claim. Firstly, it is plainly obvious that given the personal circumstances of the applicant, a diagnosis of a terminal illness would naturally engender severe and prolonged upset, distress and worry and would render the applicant psychologically vulnerable to suffer a more intense reaction to other psychological stressors which she subsequently experienced.

[139~~8~~] Secondly, even in the absence of supportive independent expert psychiatric evidence, the Court can confidently conclude that having to go through the processes of demonstrating functional deficits and attempting to obtain work in order to obtain benefits would, in the case of a young single mother with young children who had received a diagnosis of a terminal illness, have caused annoyance, inconvenience, some humiliation and would have occasioned additional upset, distress and worry over and above that resulting from the diagnosis of a terminal illness.

[140~~39~~] Thirdly, the Court must be alive to the issue of causation and must take account of the nature of the unlawful difference in treatment found in this case. Given ~~In~~ that the unjustified difference in treatment that was found to exist between those with a diagnosis of a terminal illness who were expected to survive longer than six months post diagnosis and those with a diagnosis of a terminal illness who were not expected to survive longer than six months post diagnosis but who were in fact alive after six months, it is clear that the only injury which is causally linked to the unlawful discrimination in this case is the injury resulting from having to go through the processes of demonstrating functional deficits and attempting to obtain work in order to obtain benefits in the period starting six months after her diagnosis of terminal illness. Any such injury suffered before this time is not related to an unlawful difference in treatment. However, it is clear from the chronology set out in paragraphs [3] to [18] of this judgment and the applicant's affidavit evidence that even after February/March, 2019, the relevant injury was still being inflicted and this remained

the case for a number of months. In summary, I am satisfied on the balance of probabilities that the applicant did suffer upset, distress, annoyance, inconvenience, worry and humiliation to a material degree directly as a result of the difference in treatment which has been determined to constitute unlawful discrimination in breach of Article 14.

[1410] Although the primary purpose of this litigation was to effect a change in the manner in which certain individuals with a terminal diagnosis were treated for the purposes of entitlement to benefits and, in that sense, it is very much a classic public law challenge; although the discrimination identified in this instance does not have a common law or statutory analogue tort; and although the applicant is not now at a pecuniary loss; I take into account the fact that the ex gratia payments made to the applicant made no provision for the upset, distress, annoyance, inconvenience, worry and humiliation occasioned by the unlawful difference in treatment inflicted in this case and I also have regard to the intensely personal and emotive issues which form the backdrop to this case and how the unlawful difference in treatment of the applicant personally and intimately impinged upon the applicant who was at that stage having to cope with and come to terms with a diagnosis of terminal illness. In all the circumstances of this case, I am convinced that it is an appropriate case in which to make an award of compensation for non-pecuniary loss because it is necessary to do so in order to afford the applicant just satisfaction.

[1421] Having come to this conclusion, I consider it appropriate, in principle, to ~~be~~ have regard to and be guided by the updated *Vento* scales set out in paragraphs [132] and [133] above, without, of course, being bound by these scales. Although the unlawful treatment was of some duration and was not as such an isolated or one-off occurrence, I am firmly of the opinion that this case sits comfortably in the third and lowest band of case, slightly above its mid-range point (£5,000). Following the four-stage process described by Leggatt J at paragraphs [937] to [948] of *Alseran*, I move to stage three and I pose the following question to myself. Having assessed the damages with due regard being paid to the guidance set out in *Vento*, is it necessary to depart from or adjust this sum, having regard to wider considerations of what is just and equitable in all the circumstances of the case? Having given the matter careful consideration, I see no reason which would render it necessary to depart from or adjust this sum. The fourth and final stage of my assessment involves me posing a further question in the following terms. Is there any reason to think that the sum of money arrived at by this process is significantly more or less generous that the amount which the European Court could be expected to award if the domestic courts were to provide no redress and the claimant were then to seek just satisfaction from the European Court of Human Rights?

[143141] In their helpful and erudite skeleton arguments, Ms Quinlivan QC and Dr McGleenan QC directed my attention to the ECtHR cases of *JD & A* [2019] ECHR 753; *Kiyutin v Russia* 2011 ECHR 2700/10; *Sahin v Germany* [2003] ECHR 30943/96; *Guberina v Croatia* (23682/13); *Koua Poirrez v France* [2003] ECHR 40892/98; and *Ribac v Slovenia* (Application No. 57101/01, judgment 5 December 2017). Having considered these

decisions and the judgments of the European Court referred to earlier in this judgment, I am satisfied that the amount of compensation for non-pecuniary loss arrived at in this case is neither significantly more nor less generous than the amount that the European Court could be expected to award. In the circumstances, I make an award of damages £5,000 against both respondents, jointly and severally.

[1442] I award the applicant the costs of this application. As the applicant is legally aided, I make an order for taxation of the applicant's costs under the second schedule.