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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 'RK'
FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF
THE DEPARTMENT OF COMMUNITIES

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Fiona Doherty QC and Aidan McGowan (instructed by the Law Centre for Northern Ireland) for the applicant
Tony McGleenan QC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the respondents

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SCOFFIELD J

Introduction

[1] By this application, the applicant challenges the method of calculating Universal Credit (UC) for people in receipt of Maternity Allowance (MA). The first respondent is the Department for Communities in Northern Ireland ("the Department"). The second respondent is the Secretary of State for Work and Pensions although, for all intents and purposes, the application was defended by the Department on behalf of both respondents. By virtue of the statutory scheme for which it is responsible, the Department treats MA as unearned income and deducts it in full when calculating an individual's entitlement to UC. In contrast, the Department treats Statutory Maternity Pay (SMP) as earnings and deducts it only partially when calculating entitlement to UC.

[2] The applicant challenges a number of decisions on the part of the Department refusing her application for UC for various months in 2019 (April, May, June and July) and, thereafter, a decision to award her UC at a reduced level (from August 2019 on). These decisions were affected by the Department deducting MA which

was paid to her. Relatedly, the applicant also challenges the refusal of her application for a Sure Start Maternity Grant, which refusal was based on the fact that she was not eligible for UC which is a qualifying benefit for the grant. The core of the applicant's challenge is concerned with a claim of unlawful discrimination contrary to Article 14 ECHR, on the basis that she should not be treated differently from those claiming UC who have been in receipt of SMP rather than, as she has been, in receipt of MA.

[3] The applicant was represented by Ms Doherty QC with Mr McGowan, of counsel; and the respondents were represented by Mr McGleenan QC with Mr McAteer, of counsel. I am grateful to all counsel for their extremely helpful written and oral submissions.

Factual Background

[4] The applicant has an extensive employment history and was continuously engaged in employment from June 2013 until December 2018. In May 2018, the applicant commenced a new job with a recruitment agency and, around that time, left two other jobs (one at a call centre, which she left in April 2018, and one at a bar, which she left in June 2018). She worked in healthcare, through the recruitment agency, from May 2018 until December 2018. At that point she went on maternity leave, having become pregnant shortly after commencing that particular employment. She was not entitled to SMP since, although she had been continuously engaged in employment since June 2013, she had not been employed with the same employer for a continuous period of 26 weeks immediately preceding the fourteenth week before the expected week of confinement. Accordingly, she did not qualify for SMP pursuant to section 160 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992.

[5] As a result, the applicant was required to claim MA, instead of SMP. She applied for MA on 17 November 2018 and received her first payment of MA in early February 2019. Her first payment included back-pay. Thereafter, she received MA every two weeks.

[6] The applicant gave birth to her daughter, her first child, on 26 December 2018. She is a single parent; and her personal circumstances have been outlined in the evidence she has placed before the court. At the end of her maternity leave, in December 2019, the applicant took temporary work in retail; then had a short break before obtaining a job in hospitality; and was then on furlough once lockdown was introduced as a result of the Covid-19 pandemic.

[7] Meanwhile, the applicant made a claim for UC on 2 April 2019 for support with responsibility for a child. The applicant's evidence and submissions set out in some detail the amounts assessed by the Department as payable to her by way of UC in respect of various assessment periods. In respect of the first assessment period (2 April to 1 May 2019), the applicant had a figure deducted which related to

earnings from previous work and then had the full amount of her MA deducted, the latter deduction resulting in an award of nil UC. In the remaining assessment periods which were the subject of evidence, there were no earnings from employment to be taken into account but, in respect of each such period, the full amount of MA which the applicant had received was deducted from the maximum amount of UC which would otherwise have been payable to her. For several of these periods (between May and July 2019) this again resulted in the applicant having the amount of UC payable reduced to nil, so that she was assessed as not being entitled to UC. If, in each of those periods, the applicant had been in receipt of SMP rather than MA, she would have had a deduction made of 63% of the SMP received over and above a work allowance, resulting in her being awarded UC. On the applicant's calculation, she would have received around £395 in UC for each such assessment period. For the fifth such period, in the course of which the applicant's MA came to an end, she was assessed as entitled to a payment of some £165.71.

[8] In remaining assessment periods, after the applicant's MA payments had come to an end and during which she received no such payments, she has been assessed as eligible for £702.74 UC *per* assessment period.

[9] The applicant's calculation was that, in her circumstances, she was paid some £3,602.45 less in UC payments than she would have been paid had she been in receipt of SMP rather than MA. The respondents contend that this estimated loss is overstated and, in a further note provided to the court after the hearing, set out an analysis purporting to demonstrate that the applicant's loss (*inclusive* of the £500 maternity grant discussed below) was £2,034.22. In light of the particularity provided in the respondents' calculations, I tend to the view that its assessment is more likely to be correct. In any event, this need not be determined finally for present purposes. It is clear that the applicant is materially worse off having claimed UC when in receipt of MA than she would have been if she had been in receipt of SMP.

[10] Meanwhile, on 17 April 2019, the applicant also applied for a Sure Start Maternity Grant. This is a one-off tax-free payment of £500 to help towards the cost of maternity and baby items for claimants on a low income and who are in receipt of certain benefits or tax credits, including UC. It can be claimed from 11 weeks before the week the baby is due, or up to 6 months after the baby is born: see regulations 1-6 of the Social Fund Maternity and Funeral Expenses (General) Regulations (Northern Ireland) 2005 and Schedule 4 to the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987. On 19 April 2019 the Department refused the applicant's claim on the basis that she was not receiving a qualifying benefit. A subsequent mandatory reconsideration process also resulted in a refusal of the maternity grant on 20 May 2019. The applicant's case is simply that, if (as her primary case asserts) she *ought* to have been entitled to UC at that time (because her MA should not have been fully deducted from the maximum UC amount payable to her), she would therefore have been in receipt of a qualifying benefit and would have received the maternity grant.

The statutory scheme

[11] The statutory provisions relating to the various benefits and payments mentioned in the factual summary above are detailed and complex. A short overview of only the key provisions for present purposes is provided below.

[12] The establishment of UC and the basic conditions of entitlement are set out in the Welfare Reform (Northern Ireland) Order 2015 ("the 2015 Order"). UC is a single welfare payment designed to replace a range of legacy benefits. It is made up of a standard allowance and a range of extra applicable amounts. A helpful background to the introduction of UC may be found in *R (TP) v Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin), at paras [14]-[25].

[13] The method of calculating UC is set out in the Universal Credit Regulations (Northern Ireland) 2016 ("the UC Regulations"). The relevant regulations for present purposes are principally regulations 23, 55 and 66.

[14] Article 12 of the 2015 Order provides that UC is payable in respect of each complete assessment period within a period of entitlement. Regulation 22 of the UC Regulations provides that an assessment period is a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists.

[15] In calculating UC, Article 13 of the 2015 Order provides that the amount of an award of UC is the balance of the maximum amount (which is the combined total of the standard allowance plus any extra applicable amounts) less certain amounts to be deducted. Amounts to be deducted are set out in regulation 23 of the UC Regulations, under the heading 'Deduction of income and work allowance'. Regulation 23(1)(a) requires deduction of all of the claimant's unearned income; and regulation 23(1)(b) requires deduction of 63% of the claimant's earned income over and above any work allowance specified in the table in regulation 23. Earned income is therefore treated more favourably than unearned income for the purposes of UC assessment; which is in line with the underlying policy objectives of the UC scheme as discussed further below.

[16] Regulation 55(4) sets out a number of benefits which are to be "treated as employed earnings" including statutory sick pay, statutory paternity pay, statutory adoption pay and, at sub-paragraph (b), SMP. In contrast, regulation 66(1) defines "unearned income" and includes a range of benefits, one of which, at regulation 66(1)(b)(viii), is MA. As a result, the UC Regulations require only partial deduction of SMP but require full deduction of MA in calculating the amount of UC payable. It is this discrepancy which is the focus of the present application for judicial review.

Summary of the applicant's case

[17] A central plank of the applicant's case is that the overall aim of SMP and MA is the same (or materially similar), namely to provide a measure of earnings replacement to help a woman who has worked during pregnancy to stop working in the later stages of her pregnancy and in the months after childbirth in the interests of her own and her baby's health and well-being.

[18] In addition, there are other similarities between the two benefits. MA is paid for up to 39 weeks at the standard rate of (now) £151.20 *per* week (or 90% of gross earnings if that is lower). It is paid by the Department. It is not subject to tax or national insurance. SMP is also paid for up to 39 weeks. It is paid at a rate of 90% of gross earnings for the first 6 weeks and thereafter at the standard rate of £151.20 *per* week (or 90% of gross earnings if that is lower). In contrast to MA, SMP is paid by the employer. However, the employer can then claim back payments of SMP which it has made from the government. (If the employer is a small employer, they can claim back 103% of SMP paid, covering the payments plus an extra 3% to cover the employer's national insurance contribution; otherwise, the employer can claim back 92% of SMP paid: see the Statutory Maternity Pay (Compensation of Employers) and Miscellaneous Amendments Regulations (Northern Ireland) 1994.) Unlike MA, SMP is subject to tax and national insurance; but, the applicant observes, if a person is only in receipt of SMP at the standard rate and has no other taxable income, then they will not pay any tax or national insurance as they will be below the relevant thresholds.

[19] The applicant's case was advanced principally by reference to Article 14 ECHR, albeit in two separate ways:

(a) First, it is contended that the applicant has been discriminated against in the conventional sense of having been treated differently to individuals in an analogous situation to her (those individuals being persons in receipt of SMP).

(b) Second, it is contended that the applicant is being discriminated against in the sense set out in *Thlimmenos v Greece* (2000) 31 EHRR 15 ("*Thlimmenos*"), in that she is being treated equivalently to individuals in a relevantly different situation (those individuals in receipt of alternative types of income set out in regulation 66 of the UC Regulations but which, the applicant contends, are to be distinguished from MA).

[20] The applicant submits that there is a breach of Article 14 (in conjunction with Article 8 and/or Article 1 of the First Protocol to the Convention) in that she is treated less favourably than UC claimants in receipt of SMP. On a similar basis she contends that the system operates irrationally, contrary to common law principles. Further arguments deployed in support of these grounds of challenge are set out and discussed below.

The decision in Moore

[21] The applicant acknowledges that an impediment to her case is the decision of the Administrative Court in England and Wales in *Moore v Secretary of State for Work and Pensions* [2020] EWHC 2827 (Admin) ("*Moore*"), in which the court dismissed an application for judicial review of the analogue provisions of legislation applicable in England on the basis that the different treatment of SMP and MA in calculating UC eligibility did not amount to unlawful discrimination. The *Moore* decision was given on 26 October 2020 – after the present applicant had commenced her application for judicial review but before it came on for hearing. Swift J's summary of the issue in para [1] of his judgment in *Moore* makes clear the very significant overlap between the arguments raised in that litigation and in this. The applicant makes three points about the *Moore* case which, she submits, ought (either individually or cumulatively) to be sufficient to permit me to decline to follow it and to reach a contrary conclusion:

(i) The applicant accepts that the first strand of her argument – differential treatment on a prohibited ground – was argued to some degree and rejected in *Moore*. However, she submits that the way in which she puts her claim is different (since she contends that the unlawful discrimination is on the ground of property – which was not advanced in *Moore*) and that, in any event, the decision in *Moore* is incorrect.

(ii) The applicant submits that the second strand of her argument – *Thlimmenos* discrimination – was not advanced or considered in *Moore*, so that the reasoning in that case does not speak to that ground.

(iii) In any event, the applicant observes that decisions of the High Court in England and Wales are of persuasive value only in this jurisdiction; and that I am not bound by that decision and am free simply to reach a different conclusion.

[22] I refer to a number of the conclusions reached by Swift J in *Moore* in the course of the discussion below. It is, of course, correct that I am not bound by that decision but, since it is a recent case addressing the key matters at issue in this application (on essentially the same evidence, as I note below), in a detailed and carefully reasoned judgment, it is entitled to a high degree of respect. If it were a decision of the High Court in this jurisdiction, I ought to follow it unless I were to conclude that it is clearly wrong (on the issues which were addressed in that judgment, recognising that the applicant contends that her case is differently put in this application). I intend to approach the decision in that way although, as appears below, I agree with the conclusion in *Moore* in relation to the key issue of justification in any event.

[23] I am fortified in this by the fact that permission to appeal (PTA) was refused in the *Moore* case, not merely by the judge below but also on a renewed application, after an oral hearing, which was dealt with in a detailed written judgment by two

judges of the Court of Appeal in England and Wales: see [2021] EWCA Civ 970. Singh and Simler LJJ considered that an appeal against Swift J's judgment had no real prospect of success, despite their having sympathy for the circumstances of the claimant in that case. Although a PTA ruling plainly does not carry the same precedent value as a substantive decision of the full Court, the fact that PTA has been refused in *Moore* in a detailed written ruling, applying a low threshold, is another factor relevant to the respect to be paid to, and persuasive value of, the first instance judgment in *Moore*.

The respondents' case

[24] The respondents accept that the applicant's case falls within the ambit of her A1P1 rights but disputes that she is in an analogous position to her comparators; disputes that any differential treatment is on the basis of a protected characteristic; and, in any event, claims that any differential treatment is objectively justified. It contends that this case is not appropriate for a *Thlimmenos*-type analysis on a range of bases and, in the alternative, that any discrimination of this nature is also justified.

[25] The legislative and policy background, and matters contended by the Department to be relevant to justification, are set out in the affidavits of Anne McCleary, a senior civil servant and Director of the Social Security Policy and Legislation Division within the Department; David Higlett, the Team Leader within the Universal Credit Policy Team responsible for the policy relating to unearned income at the Department of Work and Pensions (DWP); and also in the witness statement of Kerstin Parker, the Deputy Director for Universal Credit in DWP, which was filed in the *Moore* case, and which is exhibited to a short affidavit from Ms Parker in these proceedings. In the respondents' submission, the core question for the court is whether making an exception to the pound-for-pound deduction of income for UC purposes in respect of SMP, achieved by designating SMP as an earned-income equivalent, is discriminatory. In this regard, the respondent relies strongly on the fact that treating SMP differently was a conscious policy choice when the UC regime was introduced and, although perhaps not how the scheme would be designed if one was 'starting with a blank sheet', was both considered and deliberate. The justification for the difference in treatment is said to be multi-factorial and not merely one of cost-cutting.

[26] Just as the applicant emphasises the similarities between MA and SMP, the respondents emphasise their differences. They observe that MA and SMP have different statutory origins, entitlement criteria and structure. MA is a (non-taxable) payment, or 'allowance', paid directly by the State to qualifying recipients, with wider qualifying criteria. SMP – which the respondents emphasise as existing in its own right entirely separately from the UC framework – is a form of (taxable) 'statutory pay' (comparable to statutory sick pay and statutory paternity or adoption pay), payable by employers directly to qualifying employees, with different recoupment levels from the State. It is accepted that both benefits are directed towards providing a degree of financial security to recipients and that both are

payable for up to 39 weeks. Nonetheless, the Department avers that there are significant differences between SMP and MA and that the two benefits are, and always have been, structured differently to provide different levels of financial assistance to different sub-cohorts of mothers. The points it emphasises include the following:

(a) SMP is paid by employers; whereas MA is paid by the Department as a benefit. For SMP, the first six weeks are paid at a weekly rate of 90% of average weekly earnings, with no upper limit. The fact that this portion is uncapped demonstrates (the respondents submit) that SMP is more closely directed towards replacing contractual pay (and thereby facilitating continued employment), whereas payment of MA at a capped rate reflects its status as a social security benefit so as to provide a contribution towards an identifiable need. The remaining 33 weeks are paid at the lower of either the standard rate of £151.20 or 90% of average weekly earnings in either case.

(b) Since 1999, any issue in relation to entitlement to SMP is determined by Her Majesty's Revenue and Customs (HMRC); whereas all MA issues are determined by decision-makers in the Department.

(c) Although employers can recoup SMP payments (at differing rates), this is not paid for out of general taxation. Employers usually bear around 10% of the cost of payments and *all* of the burden of administration; in contrast to the costs of MA which are met directly by government.

(d) Although both benefits interact with the labour market (with entitlement being linked to being in work), MA is available to recipients *not* in work when they go on maternity leave but who have sufficient employment prior to the start date. The eligibility criteria are also different, including for example in relation to the self-employed, with the MA eligibility criteria cast more widely in relation to the employment requirements than that for SMP. The SMP eligibility criteria require the claimant to be an employed earner for a continuous period of 26 weeks ending with the week immediately preceding the fourteenth week before the expected week of confinement; whereas the MA eligibility criteria require the claimant only to have been employed or self-employed for at least 26 weeks out of the 52 week period ending 15 weeks before the expected date of confinement (and to have paid 26 national insurance contributions in that 52 week period).

(e) SMP is taxable and subject to national insurance contributions and pension contributions, whereas MA is not.

[27] The Department has explained that earned income (or 'pay', in broad terms) is intentionally treated more favourably than unearned income (or 'non-pay', in broad terms, including social security payments) by reference to the work allowance and tapering method which underpin the UC calculation. This is because, amongst

other scheme objectives, UC is designed to interact with pay in a way that furthers the social policy objective of incentivising work. This distinction is said to be important in furtherance of wider social policy goals. The nub of the respondents' position may perhaps be found in the following passage of its skeleton argument:

> "It is not, and never has been, the objective of the welfare system to provide complete parity of provision simply because of the common fact of pregnancy. There are good reasons for (in general terms) treating (all) statutory pay as earned income/pay and all other income, including benefits, as unearned income. They reflect underlying differences in approach as to the nature of the provisions in question. The incentivisation of work is important. MA assists with living costs during maternity leave and also provides an incentive to move from non-work into work generally. SMP provides a greater incentive to move into more stable employment and substitutes contractual pay."

[28] UC is explained by the respondent as not being designed to provide a complete indemnity against individual needs but as reflecting "a social policy judgement as to what is an appropriate and affordable level of financial contribution to be paid by the State to assist with living costs". The UC calculation is intended to take into account other sources of income (both earned and unearned) but, whereas previous welfare entitlements largely operated on a 'cliff edge' basis, UC seeks to offset other sources of income so as to ensure a level of consistency in payment levels. This is particularly important because 'cliff edges' (where entitlement is withdrawn if a certain income level is reached) can disincentivise work, whereas UC is designed to be gradually withdrawn by means of tapering as earned income increases. Earned income is treated differently from unearned income for UC purposes "because a central policy objective of UC is to incentivise claimants to work (and thereby alleviate for themselves the effects of financial hardship)". In this regard, the respondents contend that the UC scheme operates, and is entitled to operate, using broad categorisations and bright-line rules as regards what is and is not to be treated as earned and unearned income, which the court is not well-placed to seek to reorder.

[29] The Department relies upon the justifications which were advanced and accepted in *Moore*; and submitted that, save for the additional potential of application of the 'parity principle' (referring to the rule of public expenditure that if a devolved administration wishes to adopt a more generous approach to benefits expenditure than that adopted by the Westminster Government it must fund this itself rather than through Annually Managed Expenditure funds allocated by HM Treasury), the justification in this case was "on all fours" with that advanced in *Moore*. That said, in some of his submissions, Mr McGleenan appeared to me to go beyond the strict justification accepted in *Moore* to offer a further justification in this

case: that of further incentivizing *stable* employment (see para [27] above and para [57] below).

Article 14 analysis – direct discrimination

[30] Albeit there is some quibbling over the arithmetic (and, therefore, the precise amount by which the applicant may be worse off than someone in an otherwise identical position who had received SMP rather than MA), it is clear that the applicant is treated differently – and less favourably – than such a person. The question is whether this amounts to unlawful discrimination contrary to Article 14 which, in turn, requires consideration of whether this treatment falls within the ambit of another Convention right; whether it is on the ground of a protected status; whether the comparator is indeed in an analogous situation to the applicant; and, if so, whether the differential treatment can be justified.

Ambit

[31] I accept that the decision that the applicant is not entitled to UC, or is entitled to it only in a reduced amount, is within the ambit of her A1P1 rights, applying the now well-recognised approach set out in *Stec v United Kingdom* (2005) 41 EHRR SE18. The respondents also accept that the applicant's case falls within the ambit of A1P1.

[32] The applicant also submits that, since her claim was for UC for support with responsibility for a child, this constitutes one of the modalities of the exercise of her Article 8 rights, relying *inter alia* on *In Re McLaughlin* [2018] UKSC 48 at paras [17]-[23]; *Re Cox's Application* at first instance, [2020] NIQB 53, at para [92]; *Re O'Donnell's Application* [2020] NICA 36, at para [84]; and also *Moore* (*supra*), at para [15]. The respondents do not accept that the applicant's case falls within the ambit of Article 8. However, in common with the conclusion of Swift J on this issue in *Moore* (on which the respondents otherwise rely), I consider the better view to be that the case *does* fall within the ambit of the applicant's Article 8 rights, given the nature and purpose of the MA payable to the applicant and the potential impact on her ability to remain at home with her child of receiving the lower amount of UC which has been paid to her rather than the higher amount to which she claims to be entitled. I am reinforced in this view by the observations in para [41] of the Supreme Court judgment in *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26 ("*SC*"), discussed further below.

[33] Notwithstanding this, I do not consider that this conclusion alone materially alters the nature of the assessment the court is required to undertake in considering the justification of any differential treatment. Although in principle the engagement of Article 8 "could matter" in relation to justification (see *McLaughlin*, at para [16]), and in certain cases may be "clearly relevant" (see *R (DA & DS) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289, at para [137]), and although this is a case where the best interests of the applicant's child should be taken into account (see para [66] below), the ultimate question for the court remains the same, namely

whether there is an objective and reasonable justification for the difference in treatment judged by whether it pursues a legitimate aim, with a reasonable relationship of proportionality between the aim and the means employed to achieve it. The engagement of Article 8 is a relevant consideration in this assessment but is by no means a trump card.

Status

[34] As to the status on the ground of which the applicant contends she has been unlawfully discriminated against, the applicant frames this as being on grounds of her "property, namely her Maternity Allowance"; or, alternatively, on the basis of her status as being in receipt of MA instead of SMP. This latter status is said to derive from the fact that she has worked for more than one employer during the qualifying period instead of a single employer, which is also contended to be an identifiable characteristic for the purpose of being an 'other status' within the meaning of Article 14. In this regard, the present applicant simplifies the status relied upon as compared with the claimant in *Moore*'s identification of her status as being coterminous with the qualifying criteria for MA: although it essentially amounts to the same thing.

[35] The respondents dispute that any difference in treatment between the applicant and those identified by her as comparators is on the basis of a protected characteristic (or relevant 'other status') for the purpose of Article 14. In particular, they dispute that the applicant's receipt of MA amounts to the ground of 'property' within the meaning of that phrase when mentioned in Article 14 ("without discrimination on any ground such as… property… or other status"). They rely on *Stec v UK* for the proposition that a right to acquire property by way of a social security scheme is not property for the purposes of A1P1. That may be so; but it is not an answer to the applicant's point. She is not relying on her right to *acquire* MA but, rather, on the distinction made in the UC Regulations as to the *source* of property which she has already acquired. Having met the eligibility criteria for MA, she is paid that allowance but (unlike the situation where a woman is paid SMP) the property which she has thereby acquired is held against her.

[36] At the same time, this is not a case where the applicant is challenging the social security scheme merely on the basis that it is means-tested. Such a challenge would of course be ambitious. She is not contending that a UC claimant's means should not be taken into account at all, merely that there should not be discrimination depending upon the *prior source* of a claimant's means. But that is not, in truth, a complaint of discrimination based on property (whether understood as ownership or wealth) but, rather, on the way in which a certain benefit is treated by the interlocking nature of the social security system. It is in reality simply another way of expressing the central plank of the applicant's claim, namely that she is discriminated against on the basis of having been in receipt of MA (rather than SMP) – which is tied back to the qualifying criteria for each.

[37] I would be inclined to accept that the applicant does have an 'other status' within the terms of Article 14 on the basis that she is a recipient of MA rather than SMP (or, put another way, on the basis of her having worked for more than one employer during the qualifying period, rather than a single employer – bearing in mind also that the timing of a woman's pregnancy may not necessarily be something that she can or should be expected to change). A status for the purpose of Article 14 does not have to be permanent and this question has more recently been addressed by giving the concept of 'other status' a broad meaning (see, for instance, Lord Wilson in *DA & DS*, at paras [38]-[39]; Stephens LJ in *O'Donnell* at para [55]; and Lord Reed in *SC* at paras [69]-[71]). The status mentioned above is plainly, in my view, towards the outer limit of Lord Walker's concentric circles as described in *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311.

[38] I reject the respondents' contention that the relevant status is defined solely or entirely by the differential treatment or alleged discrimination complained of and would have less reticence in doing so than did Swift J in *Moore*. The applicant receives less by way of UC payments than a woman in receipt of SMP. The less favourable treatment can clearly be distinguished from the status which gives rise to it. It is true, as Swift J recognised at para [21] of *Moore*, that the status relied on is closely aligned with the *scope* of the treatment complained of but, as he did, I do not consider this a bar to proceeding to consider the question of justification. As I observed in *Re Eccles' Application* [2021] NIQB 111, at para [31], it will be unsurprising in many cases for the status relied upon by the applicant to be closely, and perhaps inextricably, linked to the alleged discrimination where the applicant is obliged to show that the differential treatment is *on the ground of* that status. In the present case, however, I do not consider the applicant's status on which reliance is placed to be *entirely* defined by the alleged discrimination, so as to fall foul of the independent existence criterion.

[39] I accept the respondents' submission that it is telling that no Strasbourg authority in the social security sphere has been identified where Article 14 is engaged by discrimination on the grounds of 'property'. I do not accept that the applicant's position falls within the protected characteristic of 'property' within the meaning of Article 14 or, in any event, that any differential treatment is on the grounds of her property. The treatment arises because of the different way in which she came to be entitled to the payments consisting of her MA, which is on the basis of her status or statuses described at para [37] above.

[40] In any event, even if the differential treatment of which the applicant complains could be said to be on the basis of her property (if the MA payments made to her are properly to be viewed in this way), in the circumstances of this case I would not consider that this required any greater intensity of review in the exercise of the court's supervisory jurisdiction. (Indeed, Ms Doherty in her submissions accepted that, even if this status was engaged, the ultimate analysis may not be any different). The mere fact that a characteristic is mentioned in Article 14 does not, of

itself, render that characteristic a 'suspect' ground in respect of which particularly weighty reasons are required to justified differential treatment.

[41] In *Stec*, albeit considering the issue in a different context, the ECtHR (at para [53]) made clear that an A1P1 right "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 under any such scheme…". It is correct that, where the State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14 (see para [54] of *Stec*). However, social security schemes which are in any way means-tested must inevitably have regard to a person's current means which, on the applicant's case, would amount to discrimination on the grounds of 'property' within the meaning of Article 14. I do not consider the reference to unlawful discrimination on the grounds of property in Article 14 could have much purchase in this field, consistent with the case law of the ECtHR, short of a scheme which made irrational provision when viewed against the aims being pursued.

Analogous situation

[42] The applicant next contends that, as someone in receipt of MA, she was in an analogous situation to someone in receipt of SMP. This is because these different benefits are paid for the same reason, for the same period and at the same rate (save that, for the first six weeks, SMP will be 90% of earnings). The applicant also points out that she had been engaged in employment for the same period as someone in receipt of SMP, except that she was required to claim MA rather than SMP because she did not work for the *same* employer throughout.

[43] The applicant further submits that any differences between MA and SMP are matters of form rather than substance since, albeit SMP is paid by an employer in the first instance, ultimately employers can claim some or all of these payments back from the government (see para [18] above); and, albeit SMP is subject to tax and national insurance whereas MA is not, the level of SMP is such that an individual in receipt of it as their only income will not reach the relevant thresholds for paying tax or national insurance. In addition, the applicant contends that DWP has expressly recognised that recipients of SMP and MA respectively are in a similar situation. In this regard, the applicant relies on a response of 2 October 2018 to a written question in which the Minister of State for Employment stated:

> "As statutory benefits are paid by employers as earned income it was decided that they should be treated as earned income rather than unearned income. However, other benefits paid to meet living costs, such as Maternity Allowance, will continue to be taken fully into account in the UC assessment as they are in the benefits which UC is replacing. Whilst this does result in different treatment to people in a similar situation, the simplification of the

> treatment of earned income in UC is essential to make UC responsive to changes in a claimant's circumstances so that work incentives are maximised."
>
> [underlined emphasis added]

[44] The respondents do not accept that the applicant is in an analogous situation to those with whom she compares herself. For my part, I would accept that the applicant's position *is* sufficiently similar to that of a woman in receipt of SMP to be analogous for the purpose of Article 14. The Ministerial statement referred to above is obviously not determinative of this issue as a matter of law (nor is it likely to have been made with a view to representing any formal concession for Article 14 purposes). However, it expresses the common sense position that there is little difference in the personal situation of a woman leaving work for maternity purposes who claims SMP and a woman leaving work for the same reason who claims MA. The two situations do not have to be identical (see, for instance, para [59] of *O'Donnell*), merely relevantly similar (see *SC*, para [59]); and, focusing on the situation from a practical point of view, in my judgment the situations are relevantly similar. Again, in *Moore*, Swift J also considered these two groups to be analogues (see para [23]).

Justification

[45] The focus of the applicant's submissions was on the question of justification. The key question for the court in this regard was expressed by Lord Reed at para [98] of *SC* in simple terms – albeit a good deal of what followed in his judgment discussed the methodology for answering it – as follows:

> "According to the settled case law of the European court, the question whether there is an "objective and reasonable" justification for a difference in treatment is to be judged by whether it pursues a "legitimate aim" and there is a "reasonable relationship of proportionality" between the aim and the means employed to achieve it: see *Carson* 51 EHRR 13, para 61, cited at para 37 above."

[46] The applicant submitted that, as a matter of Article 14 orthodoxy, the State has a duty to justify the adverse treatment and that, in doing so, it must justify the difference in treatment and not merely the underlying policy. She formally reserved her position on whether the appropriate standard of review was one of 'manifestly without reasonable foundation' (MWRF) in light of the decision of the ECtHR in *JD & A* [2020] HLR 5. However, for the purposes of the hearing it was accepted that this was the approach the Court would adopt on the basis of domestic precedent (albeit that concession must now be viewed in the light of the Supreme Court's judgment in *SC*). The applicant nonetheless submitted that the court should proactively examine whether the foundation identified by the respondents was reasonable and, in doing

so, could appropriately make use of the *Bank Mellat* questions and have regard to breach of international obligations to inform that assessment. The approach urged upon me by the applicant in submissions was that adopted by the Northern Ireland Court of Appeal in *O'Donnell* (*supra*). In addition, the applicant contended that, since she was relying on discrimination on the grounds of property, a status expressly mentioned and protected in Article 14, a more intense level of review was appropriate. As set out above, I do not consider that there is differential treatment on the ground of property as a protected characteristic in Article 14.

[47] A number of the authorities discussed in oral argument have been superseded by, or must now be read in light of, the decision of the UK Supreme Court in *SC*; and further submissions were provided in writing from both parties in relation to this authority (and other recent, significant decisions in relation to Article 14). The decision in *DA & DS* clearly pointed towards the application of the MWRF standard of review in social security benefit cases: see, in particular, Lord Wilson (with whom Lord Hodge agreed at para [124]) at paras [59], [65]-[66]; and Lords Carnwath, Reed and Hughes at para [110]. In *SC*, it was noted that the MWRF approach may not be conclusive as to the assessment of compatibility with Article 14 but is indicative of the width of the margin of appreciation, and hence intensity of review, which is in principle appropriate in the field of welfare benefits (see paras [128]-[129]). Cases concerned with judgments of social and economic policy in the field of welfare benefits are appropriate for low intensity review, so that the judgment of the executive or legislature will generally be respected unless it is MWRF (see paras [158]-[159]). In such cases, the ordinary approach to proportionality will accord the same margin to the decision-maker as the MWRF formulation (see para [161]). Applying this approach, is the difference in treatment with which these proceedings are concerned justified?

[48] As explained above, UC is a means-tested benefit. However, the statutory scheme does not use a pure means test, irrespective of the source of income. Rather, the award of UC is adjusted depending on the type or nature of the individual's alternative income. Thus, some means are taken into account fully – which is designed to maintain work incentives; some means are taken into account only partially – in order to incentivise work; and some means are disregarded completely – in order to ensure provision for specific additional needs. The applicant accepts that the incentivisation of work in appropriate cases (where work is preferable to reliance on the benefits system); making work pay in appropriate cases (so that it is incentivised over reliance on the benefits system); ensuring that specific additional needs are met in appropriate cases; and, generally, simplifying the system where possible are all legitimate aims which the executive is entitled to pursue.

[49] However, the applicant contends that it is not appropriate to draw a distinction between SMP and MA – since they are paid for the same purpose, for the same period and at the same rate (save for the first six weeks of SMP) and in circumstances where the respondent has expressly recognised that women in receipt of SMP and MA are in a similar position.

[50] In the *Moore* case, Swift J considered that the matter to be addressed was why SMP was statutorily treated as a form of earned income when, like MA, it was actually a form of unearned income (see para [26]). Having considered the contemporaneous documents from the time of the development of the policy approach which is now reflected in the statutory scheme, he concluded that the difference in treatment between SMP and MA *was* justified on the basis of a range of considerations relating to the practical workings of the UC system, largely related to the functioning of the Real Time Information (RTI) system through which information in relation to pay is collected and used: see paras [25]-[31] of his judgment, which address this issue in detail. SMP is recorded through this system but, since MA is not payable by employers, it is not. Use of the RTI system was considered to be valuable for a range of reasons, including efficiency but also the avoidance of mis-reporting and fraud. In short, it would have been undesirable and unduly laborious to change the system to separate out SMP from the RTI regime in the same way that MA is dealt with outside this regime.

[51] The applicant complains that there are two "fundamental problems" in the present case with the justification upheld by Swift J. First, it is submitted that the current respondents do not make that case. Rather, the applicant submitted, the Department in these proceedings contended that SMP *does* represent earned income and should be treated as such, not because of operational efficiency but simply because SMP is earnings. Second, the applicant contended that, in any event, the different treatment is not justified by any of the legitimate aims. Whilst it is accepted that the treatment of SMP is rationally connected to the objectives of making work pay in appropriate circumstances and simplifying the system, she does *not* accept that this is so in relation to the different treatment of MA. On the contrary, it is submitted that the treatment of MA is inconsistent both with the aims of UC and undermines the purpose of MA itself. A variety of arguments are made in this regard:

(i) First, it is said that it is not appropriate to incentivise women in receipt of MA to return to work during the maternity period, which directly conflicts with government policy of helping women to stop work for that period.

(ii) Second, it is said that there is in any event no need to incentivise women in receipt of MA to return to work to discourage long-term reliance on benefits to meet basic living costs because MA is paid to replace earnings during maternity for a limited period, such that there is no prospect or possibility of long-term reliance on MA to meet basic living costs.

(iii) Third, it is said that treating MA as unearned income is contrary to the rationale of 'making work pay' because women qualify for MA as a result of their employment record which is (the applicant submits) disregarded by government in treating MA an unearned income.

(iv) The applicant also asserts that taking MA into account only partially or disregarding it in full would not be operationally difficult in any way.

[52] I do not accept the contention contained in the applicant's skeleton argument that the respondents in the present case have not relied upon the same justification as did DWP in the *Moore* case. The respondents' submissions emphasised the same practical issues as were relied upon in *Moore* and maintained the position that use of the RTI system, into which SMP was integrated and from which it would be difficult to separate it out, gave rise to efficiency, cost-effectiveness and reduction of scope for both fraud and error, which was beneficial for a range of purposes including those of taxation. The same documents have been placed before me as were relied upon by the defendant in *Moore.* Referring to one by way of example only, in the briefing document of 8 November 2018 to the Minister for Family Support, Housing and Child Maintenance from officials in DWP expressly addressing the issue of why MA is not considered income, which is exhibited to Ms McCleary's affidavit, it is noted, *inter alia*, that:

> "UC simplified and automated the assessment of earned income using information collected from employers by HMRC through a 'real time earnings' system and shared with DWP. This enables a claimant's UC entitlement to respond quickly to changes in their earnings. As Statutory benefits are paid by employers as earned income and reported through the 'real time earnings' system, they are also treated as earned income rather than unearned income."

[53] This was in addition to a number of other reasons put forward in that briefing paper for the difference in treatment between SMP and MA (including that MA is paid to meet living costs; that MA is taxable whereas SMP is not; and that SMP is treated in common with other statutory forms of pay). Indeed, in oral submissions, Ms Doherty suggested that this operational reason was the *real* reason for the differential treatment, *i.e.* simply one of administrative convenience (which she also contended was *ex post facto*). The documentation provided to the court in evidence from the respondents supports the contention that SMP was considered to be given "relatively generous" treatment on the basis that it would be "operationally difficult" to distinguish between earnings and other items of income paid with earnings and that this was a significant factor in the decision to treat SMP and MA differently at the time when the UC legislation was introduced, which has been replicated in Northern Ireland for similar reasons. As noted above (see para [29]) Mr McGleenan squarely associated the Department's justification in these proceedings with that advanced by its sister Department in *Moore.* Certainly, as the case was presented before me, there is no warrant for the suggestion that the respondents in these proceedings have not relied upon the same justification which held sway in *Moore.*

[54] The applicant then submits that this rationale justifies the measure (that is to say, treating SMP as earnings) but not the *difference in treatment* between SMP and MA. She further submits that the judgment in *Moore* did not correctly address this issue. However, this is in my view an unfair criticism of the reasoning of Swift J. He accepted that there was an element of pragmatism to the Secretary of State's decision to treat SMP as earned income for the reasons discussed above but, significantly, recorded that the reasons that applied to SMP in this regard "have no application" to MA: see para [35] of *Moore*. In short, the difference in treatment was justified because of pre-existing differences in the nature and payment regimes for each benefit. The operational concerns in relation to SMP applied to it but *not* MA. They justified the exception made to the principle of pound-for-pound deduction in relation to SMP (and other statutory forms of pay) but not otherwise. At para [46] of his judgment, Swift J also expressly recorded that he had proceeded on the basis that the defendant in *Moore* needed to justify the difference of treatment. In its PTA decision, the Court of Appeal further rejected the submission made before me that Swift J had treated the reason for designating SMP as earned income as determinative, rather than considering whether the difference in treatment had been justified: see paras [3] and [14]-[19] of the PTA ruling.

[55] Reducing an administrative burden (or promoting operational efficiency) can, in principle be a legitimate aim, as the applicant accepts. Indeed, this is demonstrated by cases such as *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820 (see paras [88]-[91]); *R (Z) v Hackney London Borough Council* [2020] 1 WLR 4327 (see para [85]); and *Re Gallagher* [2020] AC 185 (see paras [48]-[50]) (albeit this is not an Article 14 case), particularly where this arises from the application of a bright line rule or the use of broad or pre-existing categories. Moreover, in para [125] of *SC*, cited by the Court of Appeal as providing "considerable assistance" in para [65] of *Re Cox's Application* [2021] NICA 46, it was noted that for welfare systems to be workable they have to deal in "broad categorisations" which will inevitably affect some people more prejudicially than others. In light of this, it is unsurprising that the State should be entitled to take into account and cater for operational difficulties relating to one benefit without being required to do so for another, separate benefit in a way which would further interfere with the policy objectives of the UC scheme as a whole.

[56] Turning back to the additional points made by the applicant which are summarised at para [51] above, in my view the first of these is misguided. The preferential treatment afforded to recipients of SMP is not designed to incentivise a return to work *during the maternity period* either for recipients of SMP or recipients of MA. The treatment of SMP as earned income is simply designed to incentivise work, over reliance on the benefits system, generally; or, it may be said, to encourage a return to work (with the same employer) *after* the maternity period. In neither case is SMP or MA payable to encourage a woman into work *during* the maternity period: quite the opposite. Nor is a lesser amount of UC available to a recipient of MA in order to encourage her back to work during the maternity period. MA is set at a level which is designed to provide support throughout the maternity period.

However, a broad purpose of the differential treatment as advanced in submissions by Mr McGleenan is to incentivise women to take maternity leave *from long-term employment* over short-term employment; that is to say to make long-term employment more attractive.

[57] The objective of additionally incentivising *stable* employment (through the preferential treatment of SMP over MA) was a further aim identified by the respondent in submissions, including that UC is premised not merely upon the central policy objective of incentivising work but also incentivising "more secure, long-term work". It is fair to say that this aim was not emphasised to any significant degree in the contemporaneous documentation exhibited to the respondents' affidavits. Nonetheless, reference to it is present. For instance, in a briefing note from October 2011, the proposed treatment of SMP was said not only to arise from the RTI issue but also to enhance "the incentive to take and *progress* in work". In addition, this aim is not out of step with the overall policy aims of the UC system, nor the general aim of incentivisation of work which is referred to in the documentation. For instance, in para [29] of *Moore*, Swift J quoted from a 2011 submission in relation to the treatment of SMP in the UC scheme in which it was noted that *part* of the rationale for treating SMP as earnings was "to reinforce the advantage of work". He also recognised, at para [35] of his judgment, that the class of women entitled to SMP is "more closely linked to employment" than those in receipt of MA; and that the contractual relationship between employer and employee in a case of SMP entitlement "promotes the exercise of the employee's right to return to work after maternity". In the PTA ruling, Simler LJ also referred to the argument that SMP provides a greater incentive to move into more stable employment (at para [5]) and, at paras [36]-[37], appears to have accepted that this was a strand of justification on which the defendant was entitled to rely given the scheme's pursuit of the incentivisation of work in broad and general terms. In addition to the operational considerations relating to the use of the RTI system for recording earnings and other items of income paid with earnings, there is therefore a policy basis for providing SMP with more preferential treatment over MA in terms of incentivizing long-term employment.

[58] In relation to the second and third points set out at para [51] above, I accept there to be force in the respondents' submission that these arguments are selective and focus unduly on the nature of MA, rather than the policy objectives of UC which is the benefit in respect of which the applicant alleges unlawful treatment. In this regard, the differences between SMP and MA which the respondents have identified are also significant. They are not sufficient to render the applicant's situation relevantly different for the purpose of assessing whether she is in an analogous situation to a recipient of SMP (see para [44] above); but they are plainly relevant considerations in assessing the justifications advanced by the respondents.

[59] In the premises, I conclude, as the court did in *Moore*, that the respondent has justified the difference in treatment of which the applicant complains in this case. I am satisfied that the aims being pursued by the respondent – namely addressing the

practical issues identified in *Moore*, along with the desire to incentivise stable employment over more sporadic employment – are sufficiently important to justify the differential treatment; and that the difference in treatment is rationally connected those aims. I am further satisfied that there is a reasonable relationship of proportionality between those aims and the means employed to achieve them.

[60] The applicant urged me, in conducting the required proportionality assessment in relation to justification, to do so by reference to the four well-known *Bank Mellat* questions (see *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, at para [74]), on the basis of the approach adopted by the Northern Ireland Court of Appeal in the *O'Donnell* case. In that case Stephens LJ (as he then was) referred to these questions as a "tool or technique" which was appropriate for use in answering the "sole question" as to whether the complainant had demonstrated that the State's reasons for the differential treatment in issue was MWRF (see para [72]). I do not read that judgment as the Court of Appeal laying down a requirement that the *Bank Mellat* questions must be so used. Rather, it was merely indicating that they might be of assistance to the court in structuring its consideration of the ultimate proportionality assessment, depending on the context. In any event, I do not consider that any purported requirement to specifically structure the court's analysis in that way in every Article 14 case would survive the Supreme Court's treatment of this issue in *SC* (with which Lord Stephens agreed), in which the *Bank Mellat* structured analysis was not referenced. That also appears to me to be consistent with the more recent decision of the Northern Ireland Court of Appeal in *Re Cox's Application*, decided after *SC*, in which, again, the *Bank Mellat* analysis did not feature.

[61] In any event, the use of this analysis would not have altered my conclusion. The first two *Bank Mellat* questions are addressed in para [59] above. I also do not consider that a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. 'Levelling down' SMP payments would give rise to the practical difficulties identified and discussed in *Moore* and would also give rise to an undesirable and unprincipled distinction between SMP and other forms of statutory pay. Although the applicant urged me to conclude that 'levelling up' MA payments would be an acceptable, readily achievable and relatively uncostly alternative, that would not serve the aim of advantaging stable employment over more sporadic employment. More significantly however, there is simply an insufficient evidential basis for me to conclude that this is a workable alternative. The applicant relied largely on the government's own figures that there were less than 10,000 households with a MA income stream which were entitled to UC (modelled in 2014/15); but that tells the court very little about the difficulty or cost of amending the UC scheme to treat MA in the same way as SMP. This approach would also further undermine the basic nature of the UC system that other income should be offset, to which the treatment of SMP is a pragmatic exception, in a way which the respondents have assessed as being unacceptable. I should, and do, give the respondents a significant margin of discretion in relation to this issue and pay their view on the matter a significant degree of respect.

[62] I am also conscious of the fact that the applicant's case is a particularly strong one for the present argument to be made because she has been in employment for a continuous period of several years – albeit not in continuous employment with one employer. However, it seems to me that it would be operationally complex to seek to distinguish between cases where this was so and other cases where MA is payable under the present eligibility criteria but in which the same considerations would not arise having regard to the wider eligibility criteria in relation to employment for MA over SMP (see para [26](d) above).

[63] In summary, balancing the severity of the differential treatment on the rights of the applicant and others to whom it applies against the objectives being pursued, I conclude that the differential treatment is proportionate and justified. Again, in reaching this view I respect the respondents' policy choice reflected in the statutory scheme, which I do not consider to be manifestly without reasonable foundation. I bear in mind that the status I have found to be legitimately relied upon by the applicant is not a suspect ground; that the UC scheme is entitled to operate on the basis of broad categorisations, including the pre-existing regimes for SMP and MA payment; and that this is an area of economic and/or social policy in which a low intensity of review is appropriate on the basis of the limitations of the court's institutional competence and constitutional role.

The international conventions relied upon

[64] The applicant also relies upon the provisions of the United Nations Convention on the Rights of the Child (UNCRC) and United Nations Convention on the Elimination of All Forms of Discrimination against Women (UNCEDAW). Breach of such international conventions was said to be relevant to the court's assessment of justification of the impugned measure – going into the balance *against* the differential treatment being justified (see *O'Donnell* at paras [73]-[74], where Stephens LJ said that a decision which is not in substantial compliance with an international obligation "might well but does not inexorably lead to the conclusion" that the decision is MWRF). Ms Doherty accepted that the applicant's reliance on these conventions may not add much but, nonetheless, submitted that they added weight to her submissions on justification. For his part, Mr McGleenan accepted that, if this case was within the ambit of Article 8 rights (as I consider it is: see para [32] above), that opens the door to the consideration of such conventions. However, he submitted that this goes nowhere as these add nothing to the overall analysis. Indeed, that was the conclusion of Swift J in *Moore*, at least in relation to the UNCRC, which he considered at paras [38]-[44] of his judgment, even when taking its role in the analysis at its height under the various approaches he identified in the Supreme Court in *DA & DS*.

[65] The relevance of asserted breaches of unincorporated international treaties in the context of Convention cases, and Article 14 discrimination claims in particular, was returned to in *SC*: see the judgment of Lord Reed at paras [74]-[96]. The

Supreme Court reaffirmed the dualist approach to international law in our constitution, such that domestic courts cannot determine whether the State has violated its obligations under unincorporated international treaties; and underscored that the Human Rights Act 1998 has not changed this position. Thus, it was a "mistaken approach" or "misunderstanding" (including in some recent judgments to the Supreme Court itself) to ask whether an unincorporated convention had been breached in seeking to determine whether differential treatment was or was not justified under Article 14.

[66] In light of the clear statements in the Supreme Court on this issue in *SC*, I need not address the applicant's UNCRC and UNCEDAW arguments in any detail. I have considered them, however, and they would not alter my conclusion on the ultimate Article 14 issue (set out at para [63] above) for the following reasons. I also note that, notwithstanding the approach to unincorporated Conventions in *SC*, it was and is accepted that, in assessing whether differential treatment is justifiable under Article 14 of the Convention taken together with Article 8 in a matter concerning a child, the best interests of the child are a relevant consideration (see para [86] of Lord Reed's judgment in *SC*).

[67] On the applicant's part, the reduced provision of UC during the maternity period is said to be a significant interference with her interest in being able to stop work during the maternity period in the interests of her own and her baby's health and well-being. This is particularly so, it is argued, where "the applicant's work history is at least equivalent to someone in receipt of SMP" and the only reason that she does not qualify for SMP is because she did not work for the same employer throughout the relevant period.

[68] As to reliance on the UNCRC, the applicant prays in aid Articles 2, 3 and 26 of the Convention. Article 3 provides that "in all actions concerning children… the best interests of the child shall be a primary consideration". She submits that, given the direct link with children in this case, the provision of UC in the applicant's circumstances is an action concerning children (as with Widowed Parent's Allowance: see para [40] of Lady Hale's judgment in *McLaughlin*). Article 26 requires state parties to "recognise for every child the right to benefit from social security, including social insurance…"; and Article 2 requires state parties to "respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's… sex [or] property…".

[69] I agree with Swift J's conclusion that, given that a benefits payment of UC including the responsibility for children allowance is available to the applicant – or a payment of MA and/or UC equivalent to the maximum amount for such an award – and in the absence of any case that this is insufficient to discharge the purposes for which it is paid, the provisions of the UNCRC do not impact upon whether or not the decision to treat SMP as earned income is justified. This conclusion was also approved by Simler LJ in the PTA decision at para [32] in relation to not only the

UNCRC but also reliance on UNCEDAW and the Pregnant Worker's Directive. In short, in either case, the applicant will be paid the sum considered adequate by the State to enable her to avail of an appropriate period of maternity leave before returning to work. It is plainly in her daughter's best interests for her to be able to do so; but it does not follow that, merely because a claimant in receipt of SMP may receive a greater sum of money during the maternity period, the applicant's daughter's best interests require her to be paid the same amount. For present purposes, I should proceed on the basis that the State has made adequate provision for the applicant to avail of maternity leave with her daughter.

[70] As to the UNCEDAW, reliance is placed in Article 11(2)(b) which provides that, "In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measures: … to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances." It was contended that this provision is directly breached by the treatment of MA as unearned income, with the consequent loss of UC. However, the applicant is provided with maternity leave with comparable social benefits in the form of MA which, like UC, is designed (at least in part) to meet living expenses during the maternity period. The fact that she is not entitled to the higher rate of UC payable to a woman in receipt of SMP (for the reasons discussed above) does not mean that she has *lost* a social allowance; merely that she has a different entitlement. Had the applicant's case in relation to breach of UNCEDAW been a relevant consideration, which it is not in light of the Supreme Court's approach in SC, I would not have considered that this resulted in any material alteration of the court's proportionality assessment.

Article 14 analysis – Thlimmenos-type discrimination

[71] The applicant also puts her Article 14 case in an alternative way, namely that she is wrongly treated the same as others in respect of whom she is in a relevantly different situation. Much of the applicant's case in this respect – as regards ambit (Article 8 and A1P1), status (property) and justification – overlaps with her conventional Article 14 claim discussed above; and comparatively little time was spent in oral argument advancing this element of the claim. In this strand of argument, however, the relevant comparator is not another woman in receipt of SMP but, rather, another UC claimant in receipt of a *different* type of unearned income under regulation 66 of the UC Regulations (such as jobseeker's allowance (JSA) or employment and support allowance (ESA)). The applicant contends that *no other benefit* in regulation 66 is designed to encourage an individual *not* to work. In addition, in this aspect of her case the applicant relies upon her status as being a woman and a woman on maternity leave.

[72] I do not consider that the applicant can properly rely on her status as a woman or a woman on maternity leave, since that is not the reason for the difference in treatment. A woman in receipt of SMP is also both a woman and a woman on

maternity leave and, yet, is *not* treated in the same way as (for instance) a UC claimant in receipt of JSA. The real status giving rise to the differential treatment is the applicant's status as a woman in receipt of MA (rather than SMP) – which really drives one back to the justification for differential treatment as between those two groups on the applicant's primary case, discussed above.

[73] The applicant notes that she is in receipt of MA precisely in order to allow her to *stop* work for health and welfare reasons of mother and baby. On the other hand, she submits that unearned income is deducted in full from UC entitlement where it is a 'UC equivalent' (*i.e.* paid for the same purpose as UC) but deducted only partially where the other income is earned or equivalent to earnings. She argues that it is wrong to deduct MA in full, since that irrationally treats MA as equivalent to UC. This is because MA and UC are not paid for the same purpose. MA is not means-tested and is not paid to cover basic living costs. Rather, it is to provide a measure of earnings replacement to help a woman stop work in later stages of pregnancy; and is paid regardless of other means.

[74] There is a superficial attraction to the applicant's presentation of her case in this respect. However, it ignores the fact that, like a range of other benefits mentioned in regulation 66, MA is designed (at least in part) to meet basic living costs. That is why a measure of earnings replacement is required for a woman in work to take maternity leave: in order to meet the basic costs of living which she would otherwise be meeting through earnings. Both SMP and MA are expressly not intended to assist with the costs associated with the birth of a new child; and the respondents' position has been clear and consistent that MA is designed to meet living costs, as are other benefits which are treated as unearned income. The applicant's case also ignores the fact that, leaving aside the purpose of MA, it shares many features in common with the other benefits mentioned in regulation 66 in terms of its means of payment and its treatment for tax purposes.

[75] *Thlimmenos* discrimination arguments are sometimes referred to as turning a discrimination claim 'inside out' and looking at it from a different perspective. Often, although not always (depending on the comparator relevant for this purpose), precisely the same justification arguments will be relevant, however the matter is looked at. In my judgment, the applicant's alternative way of presenting her claim does not add materially to the justification arguments already addressed in relation to her direct discrimination claim. It is accepted by the respondent that SMP recipients are treated relatively generously and, to some degree, in a way which is out-of-step with the standard approach in the UC scheme of pound-for-pound deduction of other income. I consider the justification for that to withstand Convention scrutiny for the reasons addressed above. If that is so, the applicant cannot succeed in her claim that it is unjustified for her, as a recipient of MA, to be 'left behind' with the recipients of other social security benefits when compared with the recipients of those benefits. That is a result of the standard approach to pound-for-pound off-setting in the UC scheme (so that the State does not make dual provision for living costs through benefits) to which, for the reasons discussed above,

SMP is rationally and lawfully excepted, but in circumstances where the same considerations do not apply to MA.

[76] Put another way, I do not consider that the applicant and the recipients of other such benefits are in a materially different situation, since the particular practical issues relating to SMP which were the primary driver in its preferential treatment during policy development in relation to UC did not, and do not, apply to them. It is for this reason that Simler LJ in the PTA ruling in *Moore* accepted that treating MA in the same fashion as SMP for UC calculation purposes would be to make an unprincipled distinction between MA and the other benefits mentioned in regulation 66 (see para [39]).

[77] Although the applicant submitted that her *Thlimmenos* argument had not been addressed in *Moore*, it is clear that, when PTA was applied for in that case, that claimant's representatives cast their case as also involving an element of *Thlimmenos*-type discrimination and this was considered by the Court of Appeal: see para [22] of the PTA ruling.

[78] Assuming there is similar treatment in relevantly different circumstances for the purposes of this aspect of the applicant's case, for essentially the same reasons as the differential treatment between the applicant and a recipient of SMP are justified, so too is the absence of differential treatment as between her and the recipient of other benefits specified in regulation 66 justified. The respondent has identified a reasonable foundation for this approach.

Irrationality

[79] Finally, the applicant contends that the differential treatment of SMP and MA in this context is irrational, contrary to common law principles of public law. She submits that it is irrational to regard MA as unearned income when it is secured on the basis of an employment record. The applicant relies on essentially the same argument in respect of her common law claim as she does in relation to her Article 14 claims; noting that "the analysis under the common law is in general equivalent to the analysis under Article 14, save that there is no requirement under the common law for the applicant to establish that the treatment was on grounds of 'other status'". As in *Moore*, it follows from my conclusions on the applicant's Article 14 claims that I do not consider it irrational for the respondent to have adopted the approach which it has in relation to the different treatment of SMP and MA for the purposes of the UC calculation.

Conclusion

[80] It is impossible to leave this case without acknowledging a degree of sympathy for the applicant's circumstances, as did the Court of Appeal in the PTA ruling in *Moore* (see para [47]). From the applicant's perspective, I can quite see why she may feel aggrieved at the lower level of support available to her throughout her

maternity period than a mother who had been continuously employed by the same employer for the qualifying period for SMP. That is partly because, as I observed above, this particular applicant's employment history is impressive, albeit disjointed. It is also in part because, as Mr McGleenan candidly accepted in the course of submissions, the UC scheme was not designed starting with a blank sheet of paper but in a manner whereby it had to integrate with a range of pre-existing benefits and allowances, each of which had their own criteria, structure and payment regimes. However, as the decision of the Supreme Court in *SC* makes abundantly clear, the role of the courts in assessing discrimination claims in this field of social policy is not to correct every grievance for which they might have sympathy or which might appear inequitable. It is to assess the legality of the respondent's approach, allowing it an appropriate margin of appreciation in all the circumstances of the case. For the reasons discussed in detail above, I accept that the respondents have justified the different and more preferential treatment afforded to a mother who met the eligibility criteria for SMP, so as to defeat the claim that that preferential treatment is unlawful.

[81] For the reasons given above, I dismiss the applicant's Article 14 grounds, whether presented as a claim of direct discrimination or as *Thlimmenos*-type discrimination; and further dismiss her common law ground of challenge. That being so, her consequent challenge to the refusal to pay her the Sure Start Maternity Grant must also fail.

[82] I will hear the parties on the issue of costs but provisionally consider there to be no reason to depart from the usual order in such a case, namely that the applicant should bear the respondents' costs (such costs to be taxed in default of agreement) but that, since the applicant is legally assisted, that order should not be enforced without further order of the court; and the applicant's costs should be subject to legal aid taxation.