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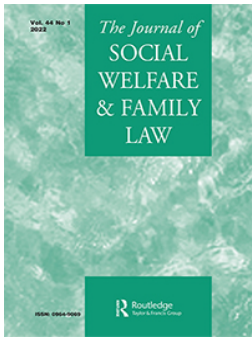
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## 'Legacy benefits' and the Universal Credit uplift: justified discrimination in the COVID-19 social security response

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## 'Legacy benefits' and the Universal Credit uplift: justified discrimination in the COVID-19 social security response

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**KEYWORDS** Universal Credit; legacy benefits; discrimination; COVID-19; proportionality

As the social security system creaked under the weight of the COVID-19 pandemic in 2020, a key dividing line emerged in the Secretary of State for Work & Pensions' response. Characterised by Harris *et al.* (2020) as the 'two-tier claimant hierarchy', emergency increases in social security provision as the pandemic hit were targeted at those who had lost full-time work because of the pandemic, not those already in receipt of working-age benefits. Nowhere is this more apparent than in the '£20 uplift' in Universal Credit (UC). In April 2020, the Government temporarily increased the 'standard allowance' in UC – the only benefit those newly out of work can claim – by £1,040 per year. However, they did not increase the 'personal allowance' in any so-called legacy benefits: payments such as Job-seekers Allowance, Employment and Support Allowance, Income Support and Working Tax Credit, which will eventually be replaced by UC. Although new claims for these legacy benefits are no longer possible, around 1.8 million people were claiming these payments when the pandemic began and, as a result, did not receive the uplift.

The judgement in *R (On the Application Of) T & Ors v Secretary of State for Work And Pensions* [2022] EWHC 351 (Admin) interrogates the rationale for this 'two-tier claimant hierarchy' (Harris *et al.* 2020). The five claimants in this case were all in receipt of a legacy benefit and argued that the failure to uplift their payments was unlawfully discriminatory under Article 14 ECHR (prohibition of discrimination), taken with either Article 8 (the right to respect for the home) or A1P1 (the right to property). As the Secretary of State conceded that social security provision falls squarely under A1P1 – and neither side argued it would make any difference to the remaining issues whether A1P1 or Article 8 was the engaged right (para. 17) – the focus turned to whether there was discrimination against the claimants and, if so, if it could be justified.

The first issue raises a significant question: can claimants in receipt of one social security payment (here, legacy benefits) be considered in a sufficiently analogous position to recipients of another (here, UC)? The Secretary of State argued that two separate benefits could not be compared in this way and, moreover, only one element of these particular benefits is relevant (i.e. the 'standard allowance' in UC and the 'personal allowance' in legacy benefits). It was not possible therefore, they argued, to allege discrimination between persons entitled to different benefits. The court dismissed these arguments, underscoring that the positions of the claimants and their comparator need

‘not be precisely analogous’ (para. 19). Instead, the court should consider whether ‘any such distinction is a relevant distinction’ given the complexity of the social security scheme as a whole (para. 20). Here, claimants were still receiving an analogous payment: support for their basic, subsistence-level needs via the standard allowance or personal allowance. No such ‘relevant distinction’ was present.

Turning to the kind of discrimination at issue, the court rejected the argument from the claimants that receipt of legacy benefits could be considered an ‘other status’ within Article 14, giving rise to a claim of *direct* discrimination (para. 23–24). Instead, the court accepted that *indirect* discrimination existed on the grounds of disability. Put simply, a far greater proportion of those in receipt of legacy benefits have a disability when compared to those in receipt of UC. Failing to uplift the former was therefore indirectly discriminatory against disabled people (para. 25).

The Secretary of State had more success on the question of justification. Here, the court provides early evidence of the impact Lord Reed’s judgement in *R. (on the application of SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 will have on the courts’ assessment of whether discrimination is justified in the social security context. Echoing Lord Reed’s judgement throughout, in *T & Ors* the court moves away from applying a mechanistic ‘manifestly without reasonable foundation’ test, instead approaching ‘the justification question considering all relevant circumstances’ (para. 29).

On the one hand, Mr Justice Swift underscores that ‘clear and substantial justification’ is required. He then goes to address the ‘counterweights’ to this: that it is indirect, rather than direct, discrimination at issue; and that the Secretary of State took this policy decision in the throes of the ‘acute circumstances’ of the COVID-19 pandemic response (para. 29). As is so often the case with proportionality assessments, this leads to somewhat of a black box of judicial reasoning in the judgement, without clear delineation between questions of aim, rational connection and means. In concluding that ‘the difference in treatment . . . was justified’, the most important factor appears to be the Court’s endorsement of the Secretary of State’s aim to support claimants newly out of work via her focus on UC. Those who had lost their job as a result of the pandemic would need to ‘adjust to a loss of income’ (para. 31), whereas those on legacy benefits were already on a low income anyway.

I argue there are two principal problems with this conclusion. First, the ‘personal allowance’ under legacy benefits and the ‘standard allowance’ under UC are both subsistence-level benefits. Their purpose is not to shoulder a shock to income or replace lost earnings, but instead to meet very basic needs to avoid destitution (see Hirsch 2021). This is not just well-recognised in social security scholarship, but also is frequently endorsed by the courts – not least in Lady Hale’s analysis of Income Support as being ‘set at the officially prescribed subsistence level’ (*Humphreys v Revenue and Customs Comrs* [2012] UKSC 18) or Lord Wilson’s reference to the same benefit as ‘up to, but not beyond, subsistence level’ (*Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47). Indeed, in the very white paper that outlines the UC scheme, *Welfare that Works*, the Government underscores that:

The personal amount is the basic building block of Universal Credit as it is in existing benefits. The purpose of the personal amount is to provide for basic living costs. It will broadly reflect the current structure of personal allowances in Income Support, Jobseeker’s Allowance and the assessment phase of Employment and Support Allowance, with single people and couples getting different rates (Department for Work & Pensions 2010, para.19, emphasis added).

To increase one subsistence-level benefit but not another is to fail to recognise that hardships caused by the pandemic are common to recipients of both.

Second, many recipients of legacy benefits faced falls in income as a result of the pandemic in much the same way that new UC claimants did. For instance, many recipients of legacy benefits work part-time and have had their hours reduced, or have found it harder to increase their working hours. It could even be argued that new UC recipients are *better* able to meet the costs associated with the pandemic than existing legacy claimants, as claimants newly out of work are far more likely to have savings (Joseph Rowntree Foundation 2020).

Throughout the court's assessment of justification, it is clear that Lord Reed's judgement in *SC* is ringing in Swift J's ears. He concludes by echoing Lord Reed's closing remarks, that 'any court adjudicating on a discrimination challenge must be astute to identify the permissible limit of political discretion' (para. 38). It is not enough, with the 'benefit of hindsight', to 'pick holes in the strict logic of the decisions taken' – instead 'a sensible margin of discretion must be permitted' (para. 38). For a judgement that underscores the necessity of considering 'all relevant circumstances' in the justification exercise (para. 29), the narrow focus on the Secretary of State's aim to support claimants newly out of work – without engagement with the evidence that was before the court undermining the logic of this assertion – is perhaps surprising. Writing about the decision in *SC* in this journal, Campbell notes that Lord Reed's judgement may in practice lead to 'little meaningful difference' in the way that courts approach the justification of discrimination in social security cases (Campbell 2021). The court's narrow approach in *T & Ors* suggests that many of the problems that characterised the much-derided 'manifestly without reasonable foundation' test may still live on in challenges post *SC*.

## Disclosure statement

The author submitted a witness statement as part of the appeal in this case.

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