

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

RETIREMENT PENSION

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 13 December 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference AR/547/18/82/O.
2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

Background

3. The appellant claimed state retirement pension (RP) from the Department for Communities (the Department) on 28 September 2017. She had attained pensionable age on 6 May 2015. It had been her intention to obtain an increase in the rate of her RP by deferring her claim. On 27 October 2017 the Department notified the appellant that she was entitled to RP from and including 3 August 2016. However, the Department decided that, because the appellant had been in receipt of widow's benefit (WB) during the relevant period, the rate of her RP would not increase due to deferment.
4. On 6 September 2017 the appellant repaid the sum of £3,976.53 to the Department, representing WB paid to her after 6 May 2015 and declared that she relinquished her entitlement to WB. She then requested a reconsideration of the Department's decision of 27 October 2017, and the original decision awarding RP without an increment was reconsidered by the Department, but not revised. She appealed.

5. The appeal was heard by a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal disallowed the appeal, opining that the appellant should be entitled to reclaim the repaid WB for the period from 6 May 2015, as this had been repaid by her on the basis of erroneous information provided by the Department. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 29 April 2019. The appellant made an application for leave to appeal from the tribunal's decision, but this was refused by the LQM by a determination issued on 5 June 2019. On 18 June 2019 the appellant made an application to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant, represented by Mr Black of Law Centre NI, submits that the tribunal has erred in law on the grounds that:
 - (i) it misdirected itself in law by holding that the appellant could not relinquish an award of benefit (in this case WB);
 - (ii) its decision violated the appellant's right to property under Article 1 or Protocol 1 of the European Convention on Human Rights (ECHR).
7. The Department was invited to make observations on the appellant's grounds. Mr Smith of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had not erred in law as alleged and indicated that the Department opposed the application.
8. Mr Black responded on 11 November 2019, additionally submitting that the tribunal had breached the appellant's rights under Art 14 of the ECHR in conjunction with Article 1 or Protocol 1, submitting evidence in the form of statistical data on bereavement support payments and male-female mortality. This new ground was raised for the first time some four months after the expiry of the time limit for making an application for leave to appeal.
9. Mr Wood responded to the new submission on behalf of the Department. He did not take issue with the lateness of the new ground raised, but submitted that the Department had not violated any rights under the ECHR and that, if it had, this was lawful and proportionate. Mr Black made a further response on behalf of the appellant on 23 December 2019, addressing the Department's arguments on justification. On 10 January 2020 Mr Smith in turn responded for the Department.

Legislation

10. For a person attaining pensionable age on 6 May 2015, the relevant provisions governing entitlement to RP are found at sections 43 to 55 of the Social Security Contributions and Benefits (NI) Act 1992 (the 1992 Act). In particular, section 54 makes provision for regulations permitting deferment of entitlement as follows:

“54.—(1) Regulations may provide that in the case of a person of any prescribed description who—

(a) has become entitled to a Category A or Category B retirement pension; and

(b) elects in such manner and in accordance with such conditions as may be prescribed that the regulations shall apply in his case,

this Part of this Act shall have effect as if that person had not become entitled to such a retirement pension or to a shared additional pension.

(2) Regulations under subsection (1) above may make such modifications of the provisions of this Part of this Act, or of those of Chapter II of Part II of the Social Security (Northern Ireland) Order 1998 as those provisions apply in a case where a person makes an election under the regulations, as may appear to the Department necessary or expedient.

Section 55 gives effect to deferment with reference to the more detailed provisions in Schedule 5, as follows:

55.—(1) Where a person's entitlement to a Category A or Category B retirement pension is deferred, Schedule 5 to this Act has effect.

(2) In that Schedule—

paragraph A1 makes provision enabling an election to be made where the pensioner's entitlement is deferred

paragraphs 1 to 3 make provision about increasing pension where the pensioner's entitlement is deferred

...

(3) For the purposes of this Act a person's entitlement to a Category A or Category B retirement pension is deferred if and so long as that person—

(a) does not become entitled to that pension by reason only of not satisfying the conditions of section 1 of the Administration Act (entitlement to benefit dependent on claim), or

(b) in consequence of an election under section 54(1) above, falls to be treated as not having become entitled to that pension,

and, in relation to any such pension, "period of deferment" shall be construed accordingly".

11. Further provisions relating to the deferment of RP appeared in the Social Security (Widows Benefit and Retirement Pension) Regulations (NI) 1979 (the 1979 Regulations). These have the effect of preventing the advantages of deferment where the claimant continued to receive one of a number of specified benefits. By regulation 4 of the 1979 Regulations:

4.-(1) For the purposes of paragraph 2 of Schedule 1 to the Pensions Order a day shall be treated as a day of increment in relation to any person if it is a day in that person's period of deferment, other than a Sunday, in respect of which-

(a) ...

(b) that person had not received any of the following benefits-

(i) any benefit under Chapters I and II of Part II of the Act other than child's special allowance, attendance allowance, disability living allowance and guardian's allowance; or

(ii) graduated retirement benefit where that person's period of deferment ended on or before 5th April 2006; or

(iii) an unemployability supplement; or

(iv) state pension credit under section 1 of the State Pension Credit Act 2002; and

...

12. A further provision raised by the parties that had potential relevance was regulation 11 of the State Pension Regulations (NI) 2015 (the 2015 Regulations). This applies to RP under the Pensions Act (NI) 2015 (the 2015 Act), and similarly provides:

11.—(1) In the circumstances set out in paragraph (2), a day does not count in determining a number of whole weeks for the purposes of section 17(3) of the Act.

(2) The circumstances mentioned in paragraph (1) are where the day is— (a) a day on which the person whose entitlement to a state pension under Part 1 of the Act is deferred has received any of the following benefits—

...

(v) a widow's pension under section 39 of the Contributions and Benefits Act rate of widowed mother's allowance and widow's pension);

...

The tribunal's decision

13. The LQM has prepared a statement of reasons for the tribunal's decision. From this, under the heading "Documents considered", it merely records that it had before it the "Appeal papers". I observe that, for the purpose of giving assurance that relevant submissions or evidence have not been overlooked, a statement of reasons should ideally record a fuller description of the documents that a tribunal had before it. Such a succinct description might give rise to doubt as to whether the tribunal has taken account of all the submissions of the parties.
14. However, I have requested access to a copy of the tribunal file. From it, I am reassured that all relevant documents have been considered. In particular, I can see that the tribunal had a Departmental submission dated 1 February 2018, including correspondence on voluntary relinquishment of WB from 6 May 2015 to 1 August 2017, a receipt for a WB repayment of £3,976.53, and a declaration relinquishing WB and various decisions. The tribunal had a second undated (but circa early April 2018) Departmental submission, submitting that WB branch should not have permitted the appellant to relinquish her claim to WB, exhibiting legislation and GB Commissioner's decision CJSJA/3979/1999, and submitting that it should return the repaid benefit to her. The tribunal had received a brief written submission in response from the appellant dated 3 May 2018, relying on CJSJA/3979/1999, as endorsed in CJSJA/1322/2001 and CDLA/1589/2005. It had a third Departmental submission dated 12 June 2018 attaching evidence, including a transcript of the appellant's conversation with a Departmental helpline, and further legislation, along with a copy of Commissioner's decision CJSJA/1332/2001. It had then received a further written response from

the appellant dated 10 September 2018, relying on human rights grounds. In addition, I can see that the appellant attended the hearing and gave oral evidence. The Department was represented by Mr Moran.

15. The tribunal found that the appellant had intended to defer claiming RP from 6 May 2015 and did not claim it until 28 September 2017. The Department had refused the payment of a deferred rate of RP on the basis that the appellant had been receiving WB throughout the period. The appellant had repaid the WB, relinquishing her WB entitlement for the period 5 May 2015 to 1 August 2017. However, the Department submitted that this did not affect the entitlement to RP and that an award could not be relinquished retrospectively. The tribunal confirmed this decision.

Submissions and hearing

16. I held an oral hearing of the application. In the conditions resulting from Covid-19, the hearing was conducted by video link. Mr Black of Law Centre (NI) appeared for the appellant. Mr Donnan of DMS appeared for the Department. I am grateful to each of them for their submissions.

Retrospective repayment ground

17. Mr Black principally submitted that the tribunal erred in law by holding that it was not possible for the appellant to relinquish an award of benefit retrospectively.
18. Mr Black referred to regulation 11(2)(a) of the 2015 Regulations. He observed that days which are not included in determining the period of deferral include a day on which the person whose entitlement to a state pension is deferred has received WB. He submits that because the appellant repaid her WB in full, she should be treated as not having received WB during this period and therefore should be entitled to full RP deferment.
19. He relied for support on Great Britain Commissioner's decision *CJSA 3979/1999* in which Commissioner Mesher stated:

"If a claimant unequivocally says that he wishes his claim to stop at the current date or that he wishes to withdraw his claim for the future, why should that not be given effect? Some regard should be had for the autonomy of claimants ... I conclude that even where there is a current award of benefit, a claimant may still withdraw a claim on a prospective basis."

20. Mr Black submitted that *CJSA 3979/1999* was endorsed in *CJSA 1332/2001* and *CDLA 1589/2005*, and that in *CJSA 1332/2001* the Commissioner commented:

“I record that I can see no reason why a claimant should not be allowed to surrender an award of benefit. In the case of most benefits, an award can only be made if a claim has been made. Whether or not that claim survives once an award has been made, the award is still dependent on the claimant’s continuing willingness to receive it.”

21. While accepting that there is nothing specific in these decisions referring to a right to retrospective surrender, he submitted that it would be “illogical” not to also include that right. He submitted that the Department have the right to pursue repayment of overpayments from claimants whom they have deemed, retrospectively, to not have an entitlement to a certain social security benefit or when a mistake has been made regarding determination or calculation of a claimant’s entitlement. Mr Black submitted that there was no difference in principle with applying entitlement to benefits retrospectively to claimants after they have gone through appeal or reconsideration processes to rectify mistakes or errors in awards.
22. He further referred to Departmental Guidance on people who mistakenly claim Universal Credit (UC), in breach of the Severe Disability Premium Gateway Regulations. While accepting that the precise circumstances and benefits involved are different from the present case, he submitted that the Department has no issue with allowing the retrospective relinquishing of a claim to UC, having that claim terminated and having previous legacy benefits reinstated, particularly if it is in the claimant’s financial interests.
23. Mr Donnan responded on behalf of the Department. He outlined the relevant legislation and submitted that days for which the claimant received payment of another specified benefit do not count as days of increments in respect of the deferment period. He relied alternatively and additionally on regulation 4(1)(b) of the 1979 Regulations and/or Regulation 11(2)(a) of the 2015 Regulations. He submitted that WB was a specified benefit for the purposes of those regulations.
24. Mr Donnan submitted that the relinquishment of benefit is not specifically provided for in legislation but is treated as a change of circumstances pursuant to regulation 6(2)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (the Decisions and Appeals Regulations). The effective date of a supersession decision is determined in accordance with Article 11 of the Social Security (NI) Order 1998 (the 1998 Order) and takes effect from the date on which the decision is made (Article 11(5)) or from a date in the future if that is the preferred date of relinquishment. The latter situation does not arise.

25. He observed that, while the GB Commissioners' decisions relied upon by the appellant allow that it is possible for a benefit claimant to relinquish entitlement to benefit, Commissioner Mesher's decision in *CJSA/3979/1999* was given in terms of the relinquishment to benefit from a current or future date, and Commissioner Jacobs' decision in *CJSA/1332/2001* found that the relinquishment had not been properly made. He submitted that neither decision was an authority for the principle of relinquishing entitlement to benefit for a past period and could not be interpreted as such, and that the tribunal had not erred in its consideration of this case law when reaching the decision that it made.
26. Consequently, he submitted that the tribunal had not erred in upholding the decision that the appellant was entitled to RP from 3 August 2016 but not entitled to an increment due to deferral of her RP claim from the date of reaching pensionable age.

Human rights grounds

27. Mr Black further submitted that the Department had violated the appellant's rights under Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR) and alternatively Art.14 together with Article 1 of Protocol 1 of the ECHR.
28. He submitted that the refusal of the Department to make a full deferred award of RP was in potential violation of the appellant's rights to property. He submitted that "the benefits to which the appellant is entitled" were property rights falling within the protection of Article 1 of Protocol 1, citing *Stec v United Kingdom* (65731/01) (2006) 43 EHRR 47, and *Carson v United Kingdom* (2010) 51 EHRR 13. He submitted that the Department had also not shown how it would be either proportional or in the national or public interest to derogate from these rights.
29. He further submitted that the actions of the Department potentially constituted indirect discrimination on grounds of sex under Article 14 of the ECHR in conjunction with Article 1 of Protocol 1. He observed that the principle of 'indirect discrimination' had been considered and set out by the European Court of Human Rights in *D.H. and Others v. the Czech Republic* (57325/00) (2007).
30. He submitted that both receipt of WB and deferral of RP will disproportionately affect women. He submitted that the Institute and Faculty of Actuaries, which calculates life expectancy on behalf of the UK pension industry, expects men aged 65 to die at 86.9 years while women who reach 65 are likely to die at 89.2 years (relying on material from the Office of National Statistics). He submitted that women who successfully defer their state pension will more likely enjoy their higher RP rate for longer.

31. Based on the above he submitted that women, such as the appellant, will be more likely to fall foul of mistakenly continuing to receive WB whilst also seeking to defer RP. He further submitted that losing access to additional RP will disproportionately negatively affect women as they are more likely to live longer and so enjoy more of the additional RP rate that a deferral confers. He submitted that the refusal of the tribunal to allow the appellant to retrospectively relinquish WB in order to benefit from an increased deferred RP disproportionately affects and discriminates against women and so violates Article 14 in conjunction with Article 1 Protocol 1 of the ECHR.
32. In response to this submission, Mr Donnan submitted that States are not obliged by the ECHR to provide social security benefits, referring to reported Commissioner's decision *R1/07(IB)*. Mr Donnan submitted that as there is no inbuilt Convention right to benefits it follows that the State is free to choose the conditions of entitlement, by way of domestic legislation, to any benefits that it does choose to provide. Likewise, the State is free to legislate for how any benefit is to be paid. The Department accepts that the payment of social security benefit can be treated as a possession, if a claimant satisfies the conditions of domestic legislation and that Article 1 of Protocol 1 may therefore be engaged.
33. Whereas the Department accepted that the payment of a social security benefit may be treated as a possession, Mr Donnan submitted that in the appellant's circumstances, she was advised correctly by the Department how to proceed with her WB and RP in March 2015. She did not contact the relevant branch at the time to relinquish her award from May 2015, when her deferral period would have commenced. She continued to receive WB during the deferral period which meant that, under regulation 4(1)(b) of the 1979 Regulations and/or regulation 11(2)(a) of the 2015 Regulations, those days should not be included in determining the period of deferral.
34. He submitted that, as the appellant was not entitled to deferred RP, there had been no breach of Article 1 Protocol 1 by not making a deferred award. Therefore there was no breach to be justified in the national/public interest. However, Mr Donnan did accept that Article 1 Protocol 1 was breached with regards to the entitlement of WB when the appellant was advised that she could relinquish her award for a past period and repay monies already paid. The Department submitted that the appellant was ill-advised and this interfered with her entitlement to a benefit already awarded.
35. The Department acknowledged the appellant's evidence that women aged 65 are expected to live for 2.3 years longer than men at the same stage of their lives and will therefore enjoy a higher rate of RP for longer. However, Mr Donnan submitted that that the RP scheme and the reasoning behind the subsequent introduction of Bereavement Support was intended to end a period of asymmetry and bring entitlement to

bereavement benefits to both men and women of all ages, marital status and sexuality.

36. He submitted that regulation 11 of the 2015 Regulations provides that if a claimant was in receipt of one of a number of state benefits, he or she could not benefit from deferment of their RP. He submitted that the list of benefits provided in regulation 11 was provided with the legitimate aim of preventing a double payment of benefit. A claimant should not be able to receive WB (or other overlapping benefit) whilst simultaneously deferring their entitlement to RP and later availing of an increased pension award. He submitted that this was a “legitimate aim” as referenced in paragraph 51 of *Stec*, and was justified, rational and struck a fair balance.

Post-hearing submissions

37. As there had been changes in the legislation in force in the relevant period between May 2015 and September 2017, I sought clarification from the parties as to which legislation governed the appellant’s case at the material time. Specifically, the 2015 Regulations had come into operation on 6 April 2016. In the light of that, I asked what legislative provision/s govern the effect of receipt of WB on the potential financial advantage gained by deferment of RP throughout the period from 6 May 2015 to 27 October 2017.
38. Mr Donnan submitted that for the period from 6 May 2015 to 5 April 2016, regulation 4(1)(b) of the 1979 Regulations had effect. From 6 April 2016, he submitted, regulation 11(2)(a) of the 2015 Regulations came into effect. He noted that the legislative provisions had changed, but that a common factor across both of those pieces of legislation was that a claimant cannot have a day of deferment for any day in which they are receiving a specified benefit.
39. Mr Black’s submission indicated that the 2015 Regulations were the effective provisions. In either event, the parties did not identify any relevant difference between the 1979 and the 2015 provisions that would affect the outcome of the proceedings.

Assessment

40. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
41. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.

42. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
43. I am satisfied that the application raises an arguable point of law and I grant leave to appeal.

Background facts

44. The facts are not in dispute I summarise them as follows. Under Schedule 2 of the Pensions (NI) Order 1995 (the 1995 Order) the appellant - having been born between 6 October 1952 and 5 November 1952 - was due to reach pensionable age on 06 May 2015. She was then in receipt of WB. She contacted the Department by telephone on 31 March 2015 to discuss her benefit situation. A transcript of the call shows that the appellant was informed by the Department of the consequences and obligations of certain benefits options. In particular, she was advised that if she claimed RP, the Department would notify the WB branch of her claim and that she would have no net financial gain. She was advised that, if she deferred claiming RP, she would have to give up WB and to contact the WB branch herself, in order to receive an increment on her RP.
45. The Appellant decided to defer claiming RP. However, she was confused and did not also contact the WB branch to relinquish her claim to WB. In consequence, she continued to receive WB. As a result she did not accrue an entitlement to increased RP due to the deferral of her claim. She did not realise the consequence of this until she claimed RP in September 2017. The Department advised her that she did not qualify for an increment.
46. The appellant was then advised to contact the WB branch. She attempted to relinquish her entitlement to WB retrospectively. The Department accepted a payment of £3,976.53 representing the amount of WB received for the period from 05 May 2015 to 01 August 2017. However, on further consideration the Department decided that the repayment did not alter the appellant's past entitlement under the relevant legislation. The Department's decision was upheld by the tribunal.

General legislative background

47. Before addressing the submissions of the parties, it may be useful briefly to address the general legislation governing entitlement to benefit in the situation arising in this case. The context, starting with article 123 and Schedule 2 to the 1995 Order, is the gradual equalisation of pension ages for men and women over time. Historically, a woman born before 6

April 1950 attained pensionable age at age 60, whereas a man born before 6 December 1953 attained pensionable age at 65. The 1995 Order sought to achieve equalisation of pension age at 65 by a target date in 2020, by increasing a woman's pensionable age depending on their date of her birth.

48. A further measure changed the policy. Under the Pensions Act (NI) 2008 (the 2008 Act), the equalised pensionable age for men and women was increased to 66 on a phased basis between 2024 and 2026. Further changes by the Pensions Act (NI) 2012 accelerated the timetable for incremental change in women's pensionable ages, with the outcome that the equalisation of pension age at 65 was achieved by November 2018, rather than 2020.
49. The appellant was entitled to WB under section 38 of the Social Security Contributions and Benefits Act (NI) 1992 (the 1992 Act). Under section 38(2) as initially enacted, WB entitlement ceases upon reaching the age of 65. The appellant's WB entitlement was set to cease on 5 November 2017.
50. The current form of section 38(2) does not refer to reaching age 65, but rather "pensionable age". This amendment was made by paragraph 37 of Schedule 1 to the 2008 Act. However, the substitution of the words "pensionable age" in section 38(2) did not have effect before 6 December 2018, by virtue of section 11(3) of that Act. In other words, until pensionable age was finally equalised for all women at age 65, entitlement to WB continued until age 65. I will return to the significance of this below.
51. In the meantime, the appellant became entitled to RP upon attaining pensionable age, which in her case (under Schedule 2 to the 1995 Order) was from 6 May 2015. Because her pensionable age was some 18 months below the age of 65, as observed above, by section 55 and Schedule 5 to the 1992 Act she could defer entitlement to RP, with the effect of securing an increased rate of RP or a lump sum.
52. By regulation 4 of the 1979 Regulations, as amended, a day can be a day of increment in relation to any person only if it is a day in the period of deferment in respect of which that person had not received certain other benefits. When the 1979 Regulations were made, the primary legislation establishing social security benefits was the Social Security (NI) Order 1975, and they make reference to its structure. I will not delve into the archaeology of the 1975 Act and its successor - the 1992 Act - as it is not in dispute that the references in the 1979 Regulations include WB.
53. Stepping back momentarily, it can be seen that provision is made in the Social Security (Overlapping Benefits) Regulations (NI) 1979 to make an adjustment where two or more benefits are payable under Parts II and III

of the 1992 Act. In effect the claimant receives only the higher of the two benefits. WB and RP are overlapping benefits. However, a claimant who deferred claiming RP would still be entitled to receive an overlapping benefit. The purpose of regulation 4 is to prevent a claimant from having a material gain of both the overlapping benefit which would not have been paid due to receiving RP, and the deferred increment of RP.

54. The parties each make reference to the 2015 Regulations, which came into effect on 6 April 2016. These make similar provision to the 1979 Regulations in respect of WB. I sought clarification at hearing and in a post-hearing direction as to whether the 2015 Regulations have any relevance to the present case. Mr Donnan submitted, as I understand it, that the 1979 Regulations applied to the appellant for the period from 5 May 2015 to 5 April 2016 and the 2015 Regulations for the remaining period to 27 October 2017. Mr Black, as I understood him, submitted that the 2015 Regulations applied throughout.
55. I do not accept either submission. It is my understanding that the 1979 Regulations apply to RP under the 1992 Act, whereas the 2015 Regulations apply to RP under the 2015 Act. The 2015 Act does not apply to a person who reaches pensionable age before 6 April 2016. It seems to me that the appellant's claim to RP, since she attained pensionable age on 5 May 2015, is governed solely by the 1992 Act and therefore by the 1979 Regulations alone. Therefore, I do not consider the 2015 Regulations to be relevant.
56. However, if I am wrong about that, it appears to me that there are only minor differences between the two provisions. Regulation 4 of the 1979 Regulations refers to a day in respect of which a person has not received WB, whereas regulation 11 of the 2015 Regulations refers to a day on which the person has received WB. It seems that there is little practical difference, and the parties did not seek to distinguish the position under the two sets of regulations, as the appellant had received WB both on and in respect of the days in the relevant period.
57. The essential question before the tribunal was whether the appellant, by repaying an amount of money equivalent to the WB she had received from 5 May 2015 to 1 August 2017, brought her circumstances within regulation 4 or regulation 11 above. There are questions both of fact and adjudication procedure involved that require more exploration.

Relevant case law

58. Mr Black relied on CJSA/3979/1999 and related cases. In CJSA/3979/1999 GB Commissioner Mesher addressed a situation where a JSA claimant had withdrawn his claim in the course of an interview with a fraud investigation officer. His subsequent fresh claim a month later was refused on the basis that "you do not want to claim [JSA] any more". Commissioner Mesher's analysis of the situation was that the withdrawal

of the claim was a relevant change of circumstances, because the basis on which any award of benefit could rest (i.e. a claim) had been removed. He considered that a question that might arise in cases such as the one he was considering was whether there was any factor, such as duress, which deprived the withdrawal of the claim of its apparent effect.

59. Mr Black further relied on CJS/1332/2001. In that case GB Commissioner Jacobs acknowledged that a legislative change had occurred since CJS/3979/1999, but said at paragraphs 6-10:

6. In *CJS/3979/1999*, paragraph 24, Mr Commissioner Mesher decided that it was possible to withdraw a claim in respect of a future period and that the withdrawal had to be given effect by a decision of an adjudication officer. *CJS/3979/1999* was made under the former review and revision procedures. Under those procedures, the claim was considered to continue running throughout the period of the award: see the decision of the Tribunal of Commissioners in *R(S) 2/98*.

7. In paragraph 26 of his decision, the Commissioner emphasised that the withdrawal had to be unequivocal and free of any factor that deprived it of its apparent effect. The Secretary of State now accepts that the evidence shows the claimant was misled about the need for a home visit. So, on the basis of *CJS/3979/1999*, the claimant's withdrawal of her claim was ineffective.

8. However, I cannot simply apply that decision, because the Commissioner's reasoning has been undermined. Under section 8(2)(a) of the Social Security Act 1998 a claim no longer subsists once it has been adjudicated on. So, the Commissioner's conclusion needs to be reconsidered.

9. The Secretary of State submits that, assuming that *CJS/3979/1999* was correctly decided under the former law, the consequence of section 8(2)(a) is that its reasoning is no longer valid and its conclusion can no longer stand. On that basis, the claimant's award of jobseeker's allowance was not terminated and there was no need for her to make a new claim in order to re-establish entitlement to a jobseeker's allowance.

10. Since the claimant's withdrawal is ineffective whether or not the conclusion in *CJS/3979/1999* remains good law, it is not necessary for me to reach a decision on this issue. However, I record that I can see no reason why a claimant should not be allowed to surrender an award of

benefit. In the case of most benefits, an award can only be made if a claim has been made. Whether or not that claim survives once an award has been made, the award is still dependent on the claimant's continuing willingness to receive it. I cannot understand the Secretary of State's reluctance to accept that conclusion.

60. The reference by Commissioner Jacobs to section 8(2)(a) in the GB legislation is to the equivalent of article 9(2)(a) of the Social Security (NI) Order 1998. This provides that:

“(2) Where a claim for a relevant benefit is decided by the Department –

(a) the claim shall not be regarded as subsisting after that time, and

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

61. The Secretary of State's view articulated in CJSJA/1332/2001 that CJSJA/3979/1999 was no longer good law was presumably reached on the premise that if a claim, once decided, was no longer subsisting under section 8(2)(a), it could not be withdrawn. If it could not be withdrawn, then there could be no relevant change of circumstances based on withdrawal. Accordingly, there would be no grounds for supersession. Commissioner Jacobs doubted the correctness of that, albeit *obiter*.

Supersession and regulation 4 of the 1979 Regulations

62. Agreeing with Commissioner Jacobs' instinctive view, my own interpretation of article 9(2)(a) is that it addresses solely claims that have been disallowed. I base this on the reference to making a “further claim” in article 9(2)(b). I consider that article 9(2) is linked to the constraint placed on tribunals under article 13(8)(b), and to a policy intention that post-claim or – on appeal - post-decision changes in circumstances should not be taken into account in decision-making.

63. The 1998 Order introduced supersession and revision, both ways of changing an existing award following a successful claim, with the implication that article 9(2) had no direct relevance to such claims. The alternative interpretation would mean that there is no way for a claimant to withdraw a claim once it has been decided favourably. However, that would be inconsistent with other aspects of the benefits system. In order to bring about circumstances such as the withdrawal of a WB claim so as to benefit from deferment of RP, article 9(2) cannot apply to all claims successful or otherwise, but only to unsuccessful claims.

64. In the ordinary course of events, a claimant in the position of the appellant could withdraw her WB claim and defer RP, with the aim of achieving an increased award or a lump sum. In order to end the WB award before the age of 65, the Department would have to supersede on the basis of relevant change of circumstances, namely that the claimant had withdrawn the claim. Otherwise, the award of WB would continue until age 65, when it would be superseded on the basis of the relevant change of circumstances that the claimant no longer satisfied the condition of entitlement in section 38(2).
65. That is not the situation in the present case, however. Whereas she had received advice from the Department about her options, the appellant misunderstood the situation. She did not seek to withdraw her WB claim from 6 May 2015, as was necessary in order to benefit from an increase in RP due to deferment. She therefore received WB from 6 May 2015 to 1 September 2017. When she understood that a mistake had been made, the appellant repaid the WB for the relevant period.
66. The consequence of the repayment may well be that there has been a relevant change of circumstances, namely that the appellant had withdrawn her WB claim and repaid the WB paid to her. This would give grounds for a supersession of the decision awarding WB under regulation 6(2) of the Decisions and Appeals Regulations. The date from which any such supersession would have effect, by article 11(5) of the 1998 Order is the date on which it is made or, where applicable, the date on which the application was made. However, article 11(5) is subject to regulations made under article 11(6), and the exceptions to the general rule are prescribed by regulation 7 of the Decisions and Appeals Regulations.
67. The impact of this is that a supersession application and subsequent decision made in September 2017 on the basis of the appellant seeking to withdraw her WB claim would only have effect from September 2017. It could only have retrospective effect if it fell within an exception provided for in regulation 7. However, Mr Donnan submitted that no relevant provision in regulation 7 assisted the appellant, and Mr Black did not point to any that might.
68. Mr Black sought to argue the case without direct reference to the rules governing adjudication. He referred to regulation 11 of the 2015 Regulations, submitting that the retrospective payment of WB had the effect that each day from 6 May 2015 to September 2017 was no longer a day on which the appellant received WB. However, that submission is neither factually or legally correct. Firstly, the appellant actually received WB throughout the period in question. That she later repaid it does not alter that factual circumstance. Secondly, her attempt to relinquish payment would have led to a supersession taking effect only from the date on which her circumstances changed. As supersession could only take effect upon the appellant withdrawing her claim in September 2017, she would have remained legally entitled to receive WB throughout the period from May 2015 to September 2017.

69. I do not find a direct analogy between the appellant's case and the GB Commissioners' decisions relied upon, or with the situation Mr Black pointed to in relation to UC.
70. The consequence of this is that throughout the relevant period, whether it is regulation 4 of the 1979 Regulations or regulation 11 of the 2015 Regulations that applies, the appellant cannot bring about the circumstances that would entitle her to an increment upon deferring her RP claim simply by repaying the WB paid to her. Therefore, I must disallow her appeal on this ground.

Human rights grounds

71. Mr Black sought to rely upon Article 1 or Protocol 1 to the ECHR and Article 14 together with Article 1 or Protocol 1 to submit that the above conclusion would breach the ECHR appellant's rights. His submission on Article 1 of Protocol 1 – as I understand it – is that the Department's action in declining to allow the appellant to surrender her WB retrospectively could be considered a violation of her rights to property.
72. His additional and alternative submission on Article 1 of Protocol 1 + Article 14 – as I understand it – was that the Department's action in declining to allow the appellant to surrender her WB retrospectively was discriminatory because the appellant is a woman, on the basis that women both live longer and are more likely to be widowed, and therefore a woman making the error that the appellant made would be more likely to be prejudiced in the way that the appellant was than a male comparator.
73. Article 1 of Protocol 1 provides:

Protection of property

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

74. It is not disputed that in *Stec v UK* (2005) 41 EHRR 295, the Grand Chamber of the European Court of Human Rights held that, while there is no general right to welfare benefits to be derived from Article 1 of Protocol 1, a welfare right under domestic law is a possession.
75. In the present case the appellant was entitled to WB when she became simultaneously entitled to RP. As WB was an overlapping benefit with RP, she stood to have no net financial advantage once RP was awarded, since only the higher of the two benefits would be paid. As someone

entitled to RP, she had the right to defer her entitlement to RP, which would lead to an incremental increase in the rate of RP (or to receive a lump sum) when she eventually claimed it.

76. UK government policy, implemented through the 1979 Regulations and the 2015 Regulations, was that a claimant who deferred RP, and who was also receiving a benefit which was an overlapping benefit with RP, would not be entitled to an incremental increase or a lump sum. The appellant sought advice from the Department, who advised her that, in order to benefit from an increment or lump sum, she would have to relinquish her WB claim by contacting the relevant branch. Therefore, by giving up an existing possession – her entitlement to WB – the appellant might have acquired a higher rate of deferred RP.
77. The appellant did not follow the Department's advice at the material time prior to May 2015, but seeks to do it retrospectively in September 2017. I have found above that this course of action was not possible due to the structure of benefit adjudication provided for by the 1998 Order and the Decisions and Appeals Regulations 1999. The first question arising from this, it appears to me, is whether the right to relinquish WB (and thereby potentially gain an increment of RP) is a possession for the purposes of Article 1 of Protocol 1.
78. It is axiomatic that Article 1 of Protocol 1 does not give rise to any right to receive a social security benefit. In the admissibility decision in *Stec v UK* (Applications 65731/01 and 65900/01, 6 July 2005), the Grand Chamber of the ECtHR nevertheless held at paragraphs 51-55:

51. In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid—subject to the fulfilment of the conditions of eligibility—as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.

52. Finally, and in response to the Government's contention, the Court considers that to hold that a right to a non-contributory benefit falls within the scope of Article 1 of Protocol No. 1 no more renders otiose the provisions of the Social Charter than to reach the same conclusion in respect of a contributory benefit. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against

such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 26).

53. In conclusion, therefore, if any distinction can still be said to exist in the case-law between contributory and non-contributory benefits for the purposes of the applicability of Article 1 of Protocol No. 1, there is no ground to justify the continued drawing of such a distinction.

54. It must, nonetheless, be emphasised that the principles, most recently summarised in *Kopeccky v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX, which apply generally in cases under Article 1 of Protocol No. 1, are equally relevant when it comes to welfare benefits. In particular, the Article does not create 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 (see, *mutatis mutandis*, *Kopeccky* [GC], § 35(d)). If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit—whether conditional or not on the prior payment of contributions—that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (*ibid.*).

55. In cases, such as the present, concerning a complaint under Article 14 in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question (see *Gaygusuz*, and *Willis*, also cited above, § 34). Although Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14.

79. Further, in *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, the ECtHR held:

82. The applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his “possessions” within the meaning of this provision.

83. The Court notes that, according to the established case-law of the Convention organs, “possessions” can be “existing possessions” or assets, including claims, in respect of which the applicant can argue that he has at least a “legitimate expectation” of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a “possession” within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see the recapitulation of the relevant principles in *Malhous*, decision cited above, with further references, in particular to the Commission’s case-law).

80. The appellant in the present case enjoyed the right to payment of WB. Upon reaching pensionable age, she had the option of relinquishing the right to WB and of deferring her RP claim, in order to attain a higher rate of RP. Had she relinquished WB at that time, she would have had a legitimate expectation of payment of the enhanced rate of RP and a resulting property right.
81. However, I consider that the circumstances in the present case are significant. I have sympathy for the appellant’s position. Nevertheless, the impediment to the appellant receiving an increment to her RP was not any action of the Department, but rather the failure of the appellant herself to relinquish her WB at the material time. The right to an increment under RP was entirely conditional on the fact of relinquishment. The appellant was made aware of this, as can be seen from the transcript of the telephone call she made to the Department. On my understanding of the facts, I consider that the appellant did not fulfil a condition necessary for her right to an increment to occur.
82. When seeking to relinquish her claim to WB retrospectively, the appellant repaid the WB that had been paid to her. Mr Donnan submits that the Department should not have taken receipt of this repayment and should in turn repay it to the appellant. In the sense that the Department should return the WB to the appellant, I agree with that submission as the appellant should retain property rights in the amount of WB she had received. However, it does not seem to me that the actions of the Department can change the position regarding the potential right of the appellant to an increment of RP.
83. On the facts of the present case, viewed in the light of the ECtHR case law, I conclude that the appellant had no legitimate expectation to

entitlement to a rate of RP which included an increment due to deferral. Any right she might have had to an increment for the period from May 2015 to September 2017 was conditional on her taking steps to relinquish her WB in line with the statutory requirements. Her failure to do that meant that she had no property right for the purpose of Article 1 of Protocol 1. I consider that her submission under Article 1 of Protocol 1 must fail.

Article 1 of Protocol 1 + Article 14

84. Mr Black had advanced an alternative submission. Although it was advanced at a late date, the Department has not objected to me addressing the ground. His submission is that the appellant has been unlawfully discriminated against by the actions of the Department on the basis of her sex, combined with Article 1 Protocol 1.
85. Assuming for a moment that the situation comes within the ambit of the right to peaceful enjoyment of possessions, I will first consider the submissions on whether Article 14 is engaged. Article 14 provides as follows:

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act 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.

86. Mr Black submits that WB and deferred RP are disproportionately paid to women, referring to benefit statistics and life expectancy figures. He submits that women, such as the appellant, will be more likely to “fall foul of continuing to receive” WB while also seeking to defer their state pension. He submits that refusal to allow claimants in the position of the appellant to retrospectively relinquish WB in order to benefit from increased RP disproportionately discriminates against women, and so violates Article 14 in conjunction with Article 1 Protocol 1 of the ECHR.
87. Mr Woods for the Department had accepted that the statistics submitted by Mr Black could give rise to the presumption of indirect discrimination in terms of the disproportional payment of Bereavement Support Payment to women and the increase in a deferred RP award to women. He then proceeded to address issues of justification, submitting that the provision made by regulation 11 of the 2015 Regulations was justified.
88. I would take a step back from both submissions. It appears to me that the challenge is to regulation 4 of the 1979 Regulations, in the context of general adjudication regulations. What regulation 4 does is to prevent accrual of a right to an increment where a claimant defers an RP claim, but nevertheless continues to receive a benefit specified in that

regulation. The specified benefits are, broadly speaking, overlapping benefits which cannot be paid alongside RP, and the evident purpose is to prevent a claimant effectively receiving a benefit that he or she would not otherwise be entitled to receive under the Overlapping Benefits Regulations, but for deferring RP.

89. While Mr Black provides statistics tending to show that women may be disproportionately affected by regulation 4, WB is only one of the relevant benefits. Others include severe disablement allowance, incapacity benefit, carer's allowance and unemployability supplement. It may well be that claimants in this general group of benefits are predominantly made up of women. For example, it might be reasonable to assume that women are disproportionately represented among carer's allowance claimants. However, I have no statistics to verify that assumption.
90. What is more certain is the gender composition of the group entitled to defer RP claims below the age of 65. As discussed above, the problem arises in this particular case because the appellant was below the age of 65, but had also reached pensionable age before 65. Even though she was in receipt of WB below the age of 65, she could nevertheless claim RP and had the alternative to defer her RP claim. To do that, she would also have needed to relinquish her WB.
91. The gist of the appellant's case is that she has been discriminated against because she was not permitted to relinquish her WB claim for the period between attaining pensionable age and the age of 65, when her entitlement to WB would cease. Mr Black submits that this disproportionately affects women. However, the actuality is that it only affects women. Bereavement benefits would not be payable to a man after pensionable age.
92. The appellant was born between 6th October 1952 to 5th November 1952, and her pensionable age was reached at approximately 63 and a half years. Pensionable age for a comparable man born before 6 December 1953 would not be reached until the age of 65. A man, therefore, can only defer pension entitlement after age 65 at the earliest. Whereas the appellant as a WB claimant had the advantage of being able to defer RP prior to reaching the age of 65, she did not do that.
93. Mr Black, as I understand his submission, says that because women are in the position of being able to elect to defer RP, while still entitled to an overlapping benefit, they are disproportionately likely to fall into the situation of not relinquishing the claim to the overlapping benefit. His unspoken implication is that men in the same group are less unfavourably affected. However, only women can be affected by the requirement in regulation 4 to relinquish an overlapping benefit.
94. Moreover, that is not exactly the group that the appellant falls into. She was perfectly entitled to relinquish WB at the material time. Her particular status is that she falls into the group of women who could have chosen to relinquish an overlapping benefit at the time that was most advantageous, but who did not exercise that choice at the relevant time.

The comparator group can only be women who could have chosen to relinquish WB at the material time and did so.

95. Discrimination as submitted could only occur where there is less favourable treatment on the basis of sex. There is no link between the appellant's failure to take action and her sex. There is no link between characteristics of individuals affected by the rule generally and a gender group that would render this treatment indirectly discriminatory (*DH v Czech Republic*). There is similarly no basis for arguing that despite the application of the general adjudication rules, due to her status as a woman the appellant should have been treated differently (*Thlimmenos v Greece*).
96. Even if it could be argued that, despite me holding that Article 1 of Protocol 1 was not engaged, the issue nevertheless came within the ambit of Article 1 of Protocol 1, I do not accept that the applicant has an arguable case that she was discriminated against because of her sex.
97. For all the reasons above, I do not accept that the tribunal has erred in law and I disallow the appeal.
98. In these circumstances, I would expect the Department to repay the sum of money representing a backdated relinquishment of WB to the appellant, as she remains entitled to that sum throughout the relevant period.

(signed): O Stockman

Commissioner

15 December 2020