

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**UNIVERSAL CREDIT**

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 6 July 2022

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is an application by a claimant for leave to appeal from the decision of a tribunal with reference BE/9163/22/05/U.
2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

**REASONS**

**Background**

3. The issue in this case is whether a tribunal erred in law by holding that the appellant was not entitled to universal credit (UC) on the basis that he should be deemed not to be in Northern Ireland.
4. The appellant is a Cambodian national who claimed UC from 25 November 2021. His partner had previously been awarded UC as a single claimant from 26 December 2020. Following his claim, the appellant became part of a joint claim with his partner. On 1 December 2021 the Department decided that he was not entitled to UC as he did not satisfy the habitual residence test and was a person subject to immigration control. The appellant requested a reconsideration, submitting further evidence. On 29 December 2021 the decision was reconsidered by the Department but not revised. The appellant appealed but waived the right to an oral hearing of his appeal.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal disallowed the appeal. The appellant requested a statement of reasons for the tribunal's decision, and this was issued on 20 October 2022. The appellant applied to the LQM of tribunal for leave to appeal to the Social Security Commissioner. The salaried LQM refused the application by a determination issued on 5 January 2023. On 30 January 2023 the appellant applied to a Social Security Commissioner for leave to appeal.

### **Grounds**

6. The appellant submits that the tribunal has erred in law on the basis that:
  - (i) It found that his partner was not a qualified person as a jobseeker, worker or self-employed person, self-sufficient person, or student, but she had just given birth and fell into the "no work commitments group";
  - (ii) Its decision discriminated against the appellant's partner on the basis that she was a woman contrary to section 17 of the Equality Act 2010;
  - (iii) Had his partner been a man and not been pregnant she would have been a jobseeker and therefore a "qualified person of NI".
7. The Department was invited to make observations on the appellant's grounds. Mr Gorman 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 did not support the application.

### **The tribunal's decision**

8. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission and scheduled documents within it, and a letter from the appellant and his partner received on 14 June 2022. As the appellant had waived his right to an oral hearing, there was no oral evidence. The LQM observed that the facts were not in dispute, that the case involved a technical legal matter only and considered that it was appropriate to proceed by way of a hearing on the papers.
9. On the basis of the evidence before her, she found that the appellant's partner was "a person of Northern Ireland" who, prior to her single claim to UC had been living in Cambodia from December 2019 to December 2020 with the appellant. She found that at the date of claim the appellant, a Cambodian national, had an EU family permit from 7 August 2021 to 7 February 2022 to join his partner in the UK, a confirmation of his application dated 16 September 2021 to the Home Office under the

EU Settlement Scheme and that he was in employment for 35 hours per week. She found that the appellant's partner was not a "qualified person" under EU law. As she was not a qualified person, the appellant could not derive a right to reside from her and fell to be treated as "not being in Northern Ireland" at the date of decision. She therefore disallowed the appeal.

### **Relevant legislation**

10. The basic conditions of entitlement to UC are set out in Article 9 of the Welfare Reform (NI) Order 2015. These provide, so far as relevant:

#### Basic conditions

9.— (1) For the purposes of Article 8, a person meets the basic conditions who—

- (a) is at least 18 years old,
- (b) has not reached the qualifying age for state pension credit,
- (c) is in Northern Ireland,
- (d) is not receiving education, and
- (e) has accepted a claimant commitment.

...

(5) For the basic condition in paragraph (1)(c) regulations may—

- (a) specify circumstances in which a person is to be treated as being or not being in Northern Ireland;
- (b) specify circumstances in which temporary absence from Northern Ireland is disregarded;
- (c) modify the application of this Part in relation to a person not in Northern Ireland who is by virtue of sub-paragraph (b) entitled to universal credit.

...

11. The relevant conditions of entitlement are expanded upon in Regulation 9 of the UC Regulations (NI) 2016 (the UC Regulations). As of June 2023, due largely to legal changes arising from Brexit, this single regulation had been amended no fewer than 23 times from its commencement. At the date of decision (which was 1 December 2021) it provided:

## Persons treated as not being in Northern Ireland

9.— (1) For the purposes of determining whether a person meets the basic condition to be in Northern Ireland, except where a person falls within paragraph (4), a person is to be treated as not being in Northern Ireland if the person is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.

(2) A person must not be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless the person has a right to reside in one of those places.

(3) For the purposes of paragraph (2), a right to reside does not include a right which exists by virtue of, or in accordance with—

(a) regulation 13 of the EEA Regulations;

(b) regulation 14 of the EEA Regulations, but only in cases where the right exists under that regulation because the person is—

(i) a qualified person for the purposes of regulation 6(1) of those Regulations as a jobseeker, or

(ii) a family member (within the meaning of regulation 7 of those Regulations) of such a jobseeker,

(c) regulation 16 of the EEA Regulations, but only in cases where the right exists under that regulation because the person satisfies the criteria in regulation 16(5) of those Regulations, or

(d) a person having been granted limited leave to enter, or remain in, the United Kingdom under the Immigration Act 1971 by virtue of —

(i) Appendix EU to the immigration rules made under section 3(2) of that Act,

(ii) being a person with a Zambrano right to reside as defined in Annex 1 of Appendix EU to the immigration rules made under section 3(2) of that Act, or

(iii) having arrived in the United Kingdom with an entry clearance that was granted under Appendix EU (Family Permit) to the immigration rules made under Section 3(2) of that Act.

(3A) Paragraph 3(d)(i) does not apply to a person who—

(a) has a right to reside granted by virtue of being a family member of a relevant person of Northern Ireland; and

(b) would have a right to reside under the EEA Regulations if the relevant person of Northern Ireland were an EEA national, provided that the right to reside does not fall within paragraph (3)(a) or (c).

(4) A person falls within this paragraph if the person is—

(a) a qualified person for the purposes of regulation 6 of the EEA Regulations as a worker or a self-employed person,

(b) a family member of a person referred to in sub-paragraph (a),

(c) a person who has a right to reside permanently in the United Kingdom by virtue of regulation 15(1)(c), (d) or (e) of the EEA Regulations,

(ca) a family member of a relevant person of Northern Ireland, with a right to reside which falls within paragraph (3)(d)(i), provided that the relevant person of Northern Ireland falls within paragraph (4)(a), or would do so but for the fact that they are not an EEA national,

(cb) a frontier worker within the meaning of regulation 3 of the Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020,

(cc) a family member, of a person referred to in sub-paragraph (cb), who has been granted limited leave to enter, or remain in, the United Kingdom by virtue of Appendix EU to the immigration rules made under section 3(2) of the Immigration Act 1971,

(d) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967,

(e) a person who has been granted, or who is deemed to have been granted, leave outside the rules made under section 3(2) of the Immigration Act 1971

(f) a person who has humanitarian protection granted under those rules, or

(g) a person who is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 and who is in the United Kingdom as a result of their deportation, expulsion, or other removal by compulsion of law from another country to the United Kingdom.

(5) In this regulation—

“EEA national” has the same meaning given in regulation 2(1) of the EEA Regulations.

“family member” has the same meaning given in regulation 7(1)(a), (b) or (c) of the EEA Regulations, except that regulation 7(4) does not apply for the purposes of paragraphs (3A) and 4(ca),

“relevant person of Northern Ireland” has the meaning given in Annex 1 of Appendix EU to the immigration rules made under section 3(2) of the Immigration Act 1971.

12. The reference to “EEA Regulations” in regulation 9 is a reference to the Immigration (EEA) Regulations 2016 as amended.

### **Submissions**

13. The appellant observes that the present case involves a joint UC claim for himself along with his partner. He submits that his partner – a person of Northern Ireland – was not deemed to be a qualified person under the legislation as she was not a jobseeker, a worker, a self-employed person, a self-sufficient person, or a student. Her status for the purposes of UC – as she had given birth to a child who was still under the age of 1 – was within the “no work commitments group”.
14. The submission advanced by the appellant was that his partner had been discriminated against contrary to section 17 of the Equality Act 2010 for being a woman and having a child. He submitted that by section 17, “a person discriminates against a woman if he treats her unfavourably because of a pregnancy of hers”.
15. It was further submitted that – had the partner been an unemployed man and still the partner of the appellant, he would have qualified for UC. It was submitted that the reason for disallowing the claim was that the partner had been pregnant and had a baby.
16. Mr Gorman for the Department responded that the Equality Act 2010 did not apply in Northern Ireland, referring to section 217 that sets out the extent of that legislation. The appellant in turn accepted this but referred to section 75 of the Northern Ireland Act 1998 and placed general reliance upon that provision.
17. Mr Gorman in turn responded. He observed that the appellant had not particularised how section 75 might apply to him and referred to regulation 9 of the UC Regulations. He contended that even if the gender positions were reversed, it would not be of assistance to the appellant. This was because a jobseeker was a category excluded under regulation 9(3)(b)(ii) and he would not have been able to rely on the partner’s possible status as a jobseeker.

## **Assessment**

18. 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.
19. 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.
20. 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.
21. The issue in the present case involves no dispute of fact but is entirely based upon issues of law. Although Great Britain legislation has been relied upon, which is not applicable here, there is a broad Northern Ireland equivalent to that legislation. A novel issue of law arises and on this basis, I accept that an arguable case has been presented and I grant leave to appeal.
22. The principal question of law in this case is whether the appellant was “in Northern Ireland” for the purpose of Article 9 of the Welfare Reform (NI) Order 2015 at the date of his claim and the resulting Departmental decision. This is not a question of whether he was physically present in Northern Ireland, but rather where he fell under the UC Regulations that specify circumstances in which a person is to be treated as being or not being in Northern Ireland. Regulation 9 is the particular regulation that addresses these questions.

### **Regulation 9**

23. Regulation 9 is a complex regulation that consists of six paragraphs. By paragraph (1) it deems a person who is not habitually resident in the United Kingdom, Channel Islands, Isle of Man or Republic of Ireland as not being in Northern Ireland, with the exception of those people falling within paragraph (4). By paragraph (2) it precludes a person from being treated as habitually resident in the United Kingdom, Channel Islands, Isle of Man or Republic of Ireland unless they have a right to reside in one of those places. By paragraph (3) it qualifies the expression “right to reside” to exclude some particular categories of right to reside. By paragraph (3A) it reverses the exclusion of one of the categories in paragraph (3) in two categories of circumstance. By paragraph (4) it lists the categories of exception relevant to paragraph (1). By paragraph (5) it offers definitions relevant to the rest of the regulation.

24. The appellant entered the United Kingdom on 4 September 2021. He had valid entry clearance by way of an EU Settlement Scheme (Family Permit). My understanding is that he applied for entry clearance as a joining family member of a relevant sponsor who was a “relevant person of Northern Ireland”. Broadly speaking, “a person of Northern Ireland” is a British, Irish, or dual British and Irish citizen who was born in Northern Ireland and who, at the time of their birth, had at least one parent who held British, Irish or dual citizenship. It is not disputed that the appellant was the partner in a durable relationship of a person of Northern Ireland. The appellant claimed UC as a member of a couple with his partner from 26 October 2021.
25. The Department decided that he did not satisfy the habitual residence test. In its submission to the tribunal, the Department explains that the appellant could not be considered habitually resident unless he had a right to reside. It referred to the exclusion of certain rights to reside for that purpose, submitting that he must be the family member of a person with a right to reside. As his partner had recently given birth at the relevant dates and was not a worker, it reasoned that she was not a qualified person, and that the appellant was excluded from entitlement.
26. Regulation 9 of the UC Regulations, as noted above, is complex. The key requirement set by regulation 9(1) is that to be “in Northern Ireland” a person must be habitually resident in the United Kingdom, Channel Islands, Isle of Man or Republic of Ireland. This requirement is subject to exceptions provided in regulation 9(4). Most of the exceptions clearly do not apply. One exception that has possible relevance at first sight is where the person is a “family member” of a relevant person of Northern Ireland, and has leave to enter the UK under Appendix EU of the Immigration Rules, where the person of Northern Ireland is a qualified person under regulation 6 of the EEA Regulations, or would be, but for the fact of not being an EEA national.
27. In this context, however, “family member” has the meaning given in regulation 7(1) of the EEA Regulations. This is restricted to A’s spouse or civil partner; A’s direct descendants, or the direct descendants of A’s spouse or civil partner who are either (i) aged under 21; or (ii) dependants of A, or of A’s spouse or civil partner; and to dependent direct relatives in A’s ascending line, or in that of A’s spouse or civil partner. The appellant is not a “family member” in this context but would be an “extended family member” under the definition in regulation 8(5) of the EEA regulations as a partner in a durable relationship, who is not a civil partner. It appears to me that regulation 9(4) has no application, therefore.
28. Returning to regulation 9(1), in order to be habitually resident, the appellant must satisfy the requirement under regulation 9(2) that he has a right to reside in the United Kingdom, Channel Islands, Isle of Man or Republic of Ireland. However, paragraph 9(3) further excludes certain categories of right to reside from the scope of paragraph 9(2). By



paragraph 3(d), this excludes a person having been granted limited leave to enter or remain in the United Kingdom under the Immigration Act 1971 by virtue of (i) Appendix EU to the immigration rules made under section 3(2) of that Act; (ii) *Zambrano* rights – which do not arise here; or (iii) having arrived in the United Kingdom with an entry clearance that was granted under Appendix EU (Family Permit) to the immigration rules under section 3(2) of that Act. I understand that the appellant was granted entry clearance under the Appendix EU (Family Permit) - or regulation 9(3)(d)(iii) - route and that he does not have a right to reside on that basis. Because he was granted entry clearance under the regulation 9(3)(d)(iii) route, as opposed to under the regulation 9(3)(d)(i) route, the exceptions provided for in paragraph 9(3A) do not apply. Therefore, I do not see any basis in law for the appellant claiming to have a right to reside in the UK.

### Discrimination

29. In the grounds advanced to me, the appellant submits that his partner was discriminated against on the grounds of her gender contrary to section 17 of the Equality Act 2010. As submitted by Mr Gorman, I accept that the Equality Act does not extend to Northern Ireland in any relevant way for the purposes of this appeal. A similar provision applying in the context of work and vocational training is Article 5A of the Sex Discrimination Order 1976. However, unlike section 17, it appears to me that this does not extend to non-work situations.
30. Reliance is instead placed on section 75 of the Northern Ireland Act 1998. This requires public authorities to have due regard to the need to promote equality of opportunity and good relations in respect of religious belief, political opinion, gender, race, disability, age, marital status, dependants, and sexual orientation. I do not consider that it gives rise to an individual right that is justiciable in proceedings such as the present appeal.
31. However, entirely hypothetically and assuming for the purposes of discussion only that it does give rise to individual rights, I do not consider that it could assist the appellant. In general, discrimination has to be grounded on a protected characteristic of the person claiming discrimination – such as gender, race, or disability. In essence the decision against the appellant in this case is due to his immigration status in the UK. That is not a protected characteristic.
32. His claim for UC was made on 25 November 2021 and was a joint claim along with his partner. She had recently given birth on 28 June 2021. In the original submissions in the case, it was submitted that she was discriminated against for having a child under the age of 1. The appellant's partner had been a single UC claimant from 26 December 2020. She continued to receive UC in her own right, but subject to reduction due to the appellant's earned income being taken into account in her assessment. I accept that she experienced a detriment as a

consequence of the decision affecting the appellant. She characterised this as indirect discrimination.

33. However, it is not indirect discrimination. Indirect discrimination occurs when a characteristic not directly based on gender is relied upon to make a decision that affects disproportionately more persons in a protected group. So, for example, if women in general have statistically lower heights than men, and a rule is introduced to preclude persons under a particular height from certain jobs or services, that could be indirect discrimination. It is not enough that the appellant's partner is indirectly affected by a decision affecting the appellant to establish that she is discriminated against due to pregnancy or gender.
34. The appellant submitted that if the roles were reversed, where his partner was the female claimant and he was a person from Northern Ireland and a jobseeker, she would be entitled to UC, submitting that this indicated discrimination. However, I accept Mr Gorman's submissions on this point. Were the couple's exact circumstances to be swapped around, the male partner could be a jobseeker. However, the status of jobseeker would not enable a female employed partner who had entry clearance by way of an EU Settlement Scheme (Family Permit) to bypass the obstacle presented by the operation of regulation 9(3)(b)(ii). I reject the appellant's submission that the decision refusing UC has involved any form of discrimination.
35. For these reasons, I must dismiss the appeal.

(signed): O Stockman

Commissioner

2 October 2023