AT v SSWP (UC)
[2023] UKUT 148 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000858-UOTH**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

A.T.

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 27 June 2023
Decided on consideration of the papers

Representation:
Appellant: Durham Welfare Rights
Respondent: Mr Tom Cockroft of Counsel, instructed by GLD on behalf of Decision Making and Appeals, DWP

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal made on 12 April 2022 under number SC292/21/00044 does not involve any error of law (section 11 of the Tribunals, Courts and Enforcement Act 2007).

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, there is to be no disclosure or publication of any matter likely to lead members of the public to identify the Appellant or her daughters without the permission of a judge of the Upper Tribunal. Breach of this order may constitute contempt of court and be punishable by a fine or imprisonment.

REASONS

Introduction

1. This appeal concerns the operation of the two-child limit in the context of a claim for universal credit (UC).

2. In particular, the appeal concerns the exceptions to the UC two-child limit and the way in which these exceptions apply to the order in which children are born.

A summary of the law

3. Statute provides that the UC child element "is to be available in respect of a maximum of two persons who are either children or qualifying young persons for whom a claimant is responsible" (section 10(1A) of the Welfare Reform Act 2012, as inserted by section 14 of the Welfare Reform and Work Act 2016, section 14). The Universal Credit Regulations 2013 (SI 2013/376) then provide for certain exceptions to the two-child limit (see regulations 24A-24B and Schedule 12). These include children who are the result of "non-consensual conception" (Schedule 12, paragraph 5). However, in broad terms families can benefit from these exceptions only where the relevant child is the third or subsequent child.

A summary of the facts

4. In the instant case, the claimant's two oldest children were both conceived in coercive relationships with two different men, with each such relationship being characterised by domestic violence. The claimant's third child was born in a stable, non-abusive relationship but could not benefit from any of the exceptions to the two-child limit.

The background in more detail

5. The Appellant has three daughters. In this decision they are referred to as Daughter A, Daughter B and Daughter C respectively (in descending order of age, so Daughter A is the eldest). A, B and C are not their actual initials because using their true initials might enable 'jigsaw identification' when pieced together with other bits of information. I make a rule 14 Order to protect the privacy of both the Appellant and her children.

6. Daughter A was conceived in an abusive relationship (including threats to kill such that the Appellant's first partner served a sentence of imprisonment for domestic abuse). She was taken into local authority care and placed away from the family. Daughter B was also born into a coercive and abusive relationship but with a different partner. Daughter C was conceived in a stable, non-coercive and non-abusive relationship with a third male partner.

7. When the Appellant first claimed UC, she had only Daughter B living with her, in respect of whom she received the UC child element. Daughter C was conceived at a time when the Appellant did not think there was any prospect that Daughter A would ever be returned to her. After Daughter C was born, her UC award was adjusted to include payment for both those children (B and C). Some six months later the council's social services department decided to end Daughter A's placement elsewhere and to return Daughter A to live with the Appellant and her two half-siblings.

8. At the date of the relevant decision by the Department for Work and Pensions (8 January 2021), Daughter A was aged 14, Daughter B was 3 years old and the baby Daughter C was just 9 months old.

9. None of these facts are in dispute.

The UC decision by the Department for Work and Pensions

10. Having been notified that the claimant now had all three of her daughters living with her, the Department now decided that the UC child element was not payable in respect of the youngest, Daughter C. As the decision letter explained:

> Universal credit only offers support for two children unless an exception applies … The order of children in your household is established by reference to the date of birth of each child, taking the earliest date first. As [Daughter A and Daughter B] have the earliest birth dates, child element would be payable for them. The exception in this case would therefore need to apply in reference to [Daughter C].
>
> We have considered the evidence you provided and have determined that you do not meet an exception in reference to [Daughter C]. Therefore, we can only award the child element for your two eldest children, [Daughter A and Daughter B].

11. This explanation highlights the underlying policy choice in the operation of the two-child limit. The UC scheme could perhaps have provided that any child who was the result of non-consensual conception should not 'count towards' the two-child limit. But it did not adopt such a solution. Instead, and in broad terms, the ordering or sequencing rule means that children must be considered in chronological order to see if any relevant exemption applies to the third or subsequent child or children.

The First-tier Tribunal's decision

12. The First-tier Tribunal dismissed the claimant's appeal on 12 April 2022. The material paragraphs of its decision notice read as follows:

> 3. The Supreme Court in the decision *SC & Ors v SSWP* [2021] UKSC 26 confirmed that the two child limit provisions contained in the Welfare Reform Act 2012 and the Universal Credit Regulations 2013 were not in breach of Articles 8, 12 and 14 of the European Convention on Human Rights as given effect by the Human Rights Act 1998.
>
> 4. The Tribunal considers that it is bound to apply the regulations as a result, and that regulations 24A, 24A(1)(za) [and] 24B have been correctly applied by the decision maker on the facts of this case. The appellant's argument that these regulations are irrational and or in breach of Article 14 is a matter to be decided by a superior court if those grounds exist.

13. The First-tier Tribunal subsequently issued an impressively thorough statement of reasons that expanded on that brief explanation. The statement of reasons concluded as follows:

> 26. The Tribunal notes the contention that if either [Daughter A, B or C] had not been the appellant's natural child then the Child Element would have been payable but that is not the situation in this case, all three children are

> the appellant's natural children albeit that [Daughters A and B] are the result of an abusive relationship. Having regard to the Supreme Court judgment referred to, the Tribunal considers that the regulations as drafted and approved by Parliament and as confirmed by the Supreme Court as being compatible with Articles 8 and 14 have been correctly applied by the Decision Maker in respect of the agreed facts of this case and the decision is correct.

The Upper Tribunal proceedings

14. The Appellant's notice of appeal to the Upper Tribunal argued that "the unintended consequence of the oldest child's return to the family home was that [Daughter C] 'became' the appellant's third child, and so fell foul of the 'two child limit'." It further contended that

> Since the eldest child is the most recent one to join the family unit, the rape exemption should be applied to her as the 'third' child and this can be done by disapplying reg.24B(1) (in so far as it requires the eldest child to be treated as the first child): to do otherwise is irrational.

15. The notice of appeal concluded as follows:

> The appellant is a survivor of domestic abuse. Her two eldest children were conceived in two abusive, coercive relationships. Both the perpetrators would now, in theory, be free to form new family units, and have two children each, and both be entitled to the child element of UC for their children. The victim, on the other hand, is told after conceiving two children in abusive relationships, that she must consider if she can afford to have a third child in a loving stable relationship. This outcome is discriminatory and unconscionable.

16. When granting permission to appeal, I observed as follows:

> I am giving permission to appeal but not without some serious hesitation given the Supreme Court's decision in *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26. However, it may be that the specific issue that arises in this case was not before the Supreme Court in *SC*. That said, the Supreme Court's conclusions at para 200ff seem to rule out any claim based on discrimination.

17. The Secretary of State's representative resists the appeal, by way of a written submission drafted by Mr Tom Cockroft of counsel (dated 29 November 2022). The Appellant's representative initially intimated that Durham Welfare Rights had no further observations to make (e-mail dated 26 January 2023). She then requested (e-mail 1 February 2023) an extension to seek further advice. Two such extensions were granted by Upper Tribunal registrars (dated 3 February 2023 and 28 February 2023). The Appellant's representative then indicated there was indeed no further submission to be made (email dated 24 May 2023). In the circumstances I consider it in accord with the overriding objective to proceed to a decision 'on the papers'.

The legislation

18. Section 10 of the Welfare Reform Act 2012 (as amended) provides thus:

> **Responsibility for children and young persons**

> **10. –** (1) The calculation of an award of universal credit is to include an amount for each child or qualifying young person for whom a claimant is responsible.
>
> (1A) But the amount mentioned in subsection (1) is to be available in respect of a maximum of two persons who are either children or qualifying young persons for whom a claimant is responsible.
>
> (2) Regulations may make provision for the inclusion of an additional amount for each child or qualifying young person for whom a claimant is responsible who is disabled.
>
> (3) Regulations are to specify, or provide for the calculation of, amounts to be included under subsection (1) or (2).
>
> (4) Regulations may provide for exceptions to subsection (1) or (1A).
>
> (5) In this Part, "qualifying young person" means a person of a prescribed description.

19. Regulation 24(1) of the Universal Credit Regulations 2013 then provides that the UC child element is included in any UC award "for each child or qualifying young person for whom a claimant is responsible", cross-referring to the cash amounts listed in the table in regulation 36. However, the inclusion of the UC child element "for each child" is subject to the two-child limit and its exceptions, which are given effect to by regulation 24A. As amended, this reads as follows:

> **Availability of the child element where maximum exceeded**
>
> **24A.**—(1) Where a claimant is responsible for more than two children or qualifying young persons, the amount mentioned in section 10(1) of the Act is to be available in respect of—
>
> (za) any child or qualifying young person in relation to whom an exception applies in the circumstances set out in—
>
> (i) paragraph 3 (adoptions) or paragraph 4 (non-parental caring arrangements) of Schedule 12; or
>
> (ii) paragraph 6 of Schedule 12 by virtue of an exception under paragraph 3 of that Schedule having applied in relation to a previous award;
>
> (a) the first and second children or qualifying young persons in the claimant's household; and
>
> (b) the third and any subsequent child or qualifying young person in the claimant's household if—
>
> (i) the child or qualifying young person is transitionally protected; or
>
> (ii) an exception applies in relation to that child or qualifying young person in the circumstances set out in paragraph 2 (multiple births), paragraph 5 (non-consensual conception) or, except where sub-paragraph (za)(ii) applies, paragraph 6 (continuation of existing exception in a subsequent award) of Schedule 12.

(2) A reference in paragraph (1) to a child or qualifying young person being the first, second, third or subsequent child or qualifying young person in the claimant's household is a reference to the position of that child or qualifying young person in the order determined in accordance with regulation 24B.

(3) A child or qualifying young person is transitionally protected if the child or qualifying young person was born before 6th April 2017.

20. Regulation 24B (as amended) further provides as follows:

Order of children and qualifying young persons

24B.—(1) Subject to paragraphs (2) and (2A), the order of children or qualifying young persons in a claimant's household is to be determined by reference to the date of birth of each child or qualifying young person for whom the claimant is responsible, taking the earliest date first.

(2) In a case where—

(a) the date in relation to two or more children or qualifying young persons for whom the claimant is responsible (as determined under paragraph (1)) is the same date;...

(b) . . .

the order of those children or qualifying young persons (as between themselves only) in the claimant's household is the order determined by the Secretary of State that ensures that the amount mentioned in section 10(1) of the Act is available in respect of the greatest number of children or qualifying young persons.

(2A) Any child or qualifying young person to whom regulation 24A(1)(za) applies is to be disregarded when determining the order of children and qualifying young persons under this regulation.

(3) In this regulation and Schedule 12, "claimant" means a single claimant or either of joint claimants.

The case law

21. Reference has already been made to the Supreme Court's decision in *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26. That case concerned the two-child limit in the context of child tax credit (CTC), but the reasoning of the Supreme Court applies equally to the same rule in the UC scheme. The principal challenge to the two-child limit in that case involved two human rights grounds. The first was that the rule was incompatible with the claimants' Convention rights to respect for their private and family lives (ECHR, article 8) and to marry and found a family (ECHR, article 12). The second was that the two-child limit involved unlawful discrimination, contrary to ECHR article 14 read with article 8 and article 1 of the First Protocol.

22. Neither of these grounds of appeal succeeded at any level. As to the former, the Supreme Court held that the two-child limit did not engage ECHR article 8 ([24]-[33]) and that ECHR article 12 had no application ([34]-[35]). As to the latter, the Supreme Court accepted that the evidence raised a presumption of discrimination on the grounds of gender ([36]-[54]). However, the Supreme Court found both that the measure had an objective and reasonable

justification, notwithstanding its greater impact on women, and that the differential treatment of children living in households with more than two children was justifiable ([186]-[209]). Notably, the Supreme Court ruled as follows (emphasis added):

> 206. It is also pointed out that a couple may decide to have a third or subsequent child at a time when they reasonably believe that they will be able to support the child out of their own resources, only for some misfortune to render them dependent on welfare benefits. However, there are, as explained in para 9 above, a variety of benefits payable to families with children which provide protection against risks of that kind. How far the welfare system should go to protect families against the vicissitudes of life is a matter on which opinions in our society differ greatly, and of which Parliament is the best judge. It is also pointed out that some pregnancies are unplanned. However, an exception exists under the legislation for pregnancies which result from non-consensual sex: see para 8 above. Beyond that, to create an exception for unplanned pregnancies, resulting for example from casual relationships or from the failure of contraceptive measures, would appear to be completely impractical: how would such exceptions be applied in practice? **This is an example of a situation in which it is legitimate for the legislature to adopt a general rule, even if it may have unfortunate consequences in some individual cases: as was observed in *Carson*, para 62, any welfare system, to be workable, may have to use broad categorisations.**

23. There was, however, one (albeit narrow) respect in which the challenge to the two-child limit succeeded at first instance before Ouseley J ([2018] EWHC 864 (Admin); [2018] 1 WLR 5425). The successful challenge was to the rationality of restricting certain exemptions to the two-child limit to children born in chronological order. As originally enacted, the effect of the two-child limit was that where a third child was born into a family which already had an adoptive child or a “non-parental caring arrangement” (kinship) child, the third child would not be eligible for benefit. The High Court concluded that the ordering provisions were unlawful insofar as they applied to adopted and kinship children. Ouseley J observed as follows:

> **Issue 6: The ordering of the cared for child exception**
>
> 215. The issue here relates to the 2017 Regulations and not to the primary legislation: Mr Drabble contends that the exception in relation to a child cared for by the family is perverse because the availability of CTC for a third child depends on whether the third child was born before or after the family began to care for the second child. Mr Higlett suggests the justification that, because the cared for child is not to be treated as of any less value than a natural child of the family, and the family, caring for a child, should face the same choice about a third child as would a family not in receipt of CTC, the sequencing provision is rational and justifiable in domestic public law terms.
>
> 216. I do not accept that. I do not think that in so far as it was seriously considered, there is any rational justification for a parent's decision, about whether to have a child of their own, to be affected by whether that decision was made before or after another decision, as to whether they

> should care for someone else's child, which could need to be made quite independently of a decision about having their own children. The purpose of the exception is to encourage, or at least to avoid discouraging, a family from looking after a child who would otherwise be in local authority care, with the disadvantages to the child over family care which that can entail, and the public expenditure it can require. The choice which the family is being asked to make has a very different and indeed opposite purpose in relation to public expenditure, from that which is part of the principal thinking behind the two child provision. It is not rationally connected to the purposes of the legislation, and indeed it is in conflict with them. The perversity of the provision is well-illustrated by CC's evidence that HMRC advised her that a device was at hand whereby the two child provision could be circumvented, and in a way which CC and CD rejected, in the best interests of the cared for child. HMRC disputes giving any such advice, though seemingly not that the device would work.
>
> 217. It is not the exception itself which is unlawful but the sequencing or ordering part of it. …

24. There was no further cross-appeal on this point by the Secretary of State, who remedied the position with regulation 3 of the Universal Credit and Jobseeker's Allowance (Miscellaneous Amendments) Regulations 2018 (SI 2018/1129), inserting regulation 24A(1)(za) and amending both regulation 24A(1)(b)(ii) and regulation 24B. These amendments amended the regulations governing UC so as to exempt adopted and kinship children from the ordering provisions, which otherwise remained intact.

25. As the learned commentary in Mesher, Royston and Wikeley observes at p.246 (*Social Security Legislation 2022/23 Vol II – Universal Credit, State Pension Credit and the Social Fund* (but, I hasten to add, not a passage for which I am responsible)):

> However, that litigation, and the amending regulations, did not address the situation of households whose first or second child is the result of non-consensual conception or multiple birth. Those households benefit from exceptions only where the relevant child is the third or subsequent child, a situation which is capable of generating striking results. For example, a childless woman who was raped and consequently gave birth to twins would not receive benefit for any voluntarily conceived children she might subsequently bear.

26. The Appellant's case might be considered to be not materially different to the hypothetical in the commentary cited above.

Analysis

27. The starting point must be the acceptance that the First-tier Tribunal, in finding that Daughter C was not eligible for the UC child element, correctly applied the terms of the legislative text as it is currently drafted.

28. The Appellant's representative submits that the ordering provision (regulation 24B) should be disapplied so as to permit daughter A to be treated as the third child and so eligible to claim the benefit of the exception from the two-child limit. In that way the claimant would be then entitled to the UC child element for each of her three daughters. However, there would appear to be only two possible

routes to obtaining an order for the disapplication of regulation 24B: a human rights challenge or a judicial review.

29. The prospects of any successful human rights challenge have been comprehensively closed off by the Supreme Court's decision in *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26, for the reasons summarised above. As such, the instant case may well be "an example of a situation in which it is legitimate for the legislature to adopt a general rule, even if it may have unfortunate consequences in some individual cases" ([206]).

30. A judicial review challenge, alleging irrationality in the terms of the ordering provision, might well have a more promising prospect of success. It was self-evidently in Daughter A's best interests to be reunited with her mother, and returning her to the family home would also entail a substantial overall saving to the public purse in the form of social services expenditure. Furthermore, the distinction made in the Universal Credit Regulations 2013 between natural and non-natural children might not withstand close scrutiny on judicial review – as the notice of appeal argues:

> It would be a ludicrous outcome if the appellant, having conceived [Daughter C] at a time when she only had one other child living with her and so fully entitled to the child element for [Daughter C] had been dissuaded from re-uniting her family on financial grounds and had to leave her daughter in care, with the extra expense to the public purse, but could have adopted an unconnected child, and therefore been entitled to the child element of UC for three children. This is surely the opposite of what was intended by the policy in question and is clearly not in the best interest of [Daughter A]. The purpose of the two child policy, as stated, was to promote '*overall family stability'*. It is hard to see how leaving the appellant's oldest child in care would achieve this aim.

31. However, these are not judicial review proceedings and the Upper Tribunal's jurisdiction is in any event limited in that regard.

32. It follows that neither potential challenge to the First-tier Tribunal's decision can succeed.

Conclusion

33. I therefore conclude that the decision of the First-tier Tribunal does not involve any error of law. My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 27 June 2023