PR v Secretary of State for Work and Pensions (UC)
[2023] UKUT 290 (AAC)

IN THE UPPER TRIBUNAL **UT ref: UA-2022-000330-ULCW**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

PR

Appellant

- v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 29 November 2023
Decided after an oral hearing on 1 June 2023

Representation Julia Smyth of counsel for the appellant
Matt Lewin of counsel for the Secretary of State

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 7 October 2021 under case number SC914/21/00111 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and give the decision the First-tier Tribunal ought to have made. That decision is to set aside the Secretary of State's decision of 2 November 2020 and substitute for it a decision that the appellant is entitled to have the limited capability for work related activity element included in her award of Universal Credit from 18 October 2020.

REASONS FOR DECISION

Introduction

1. Two issues arise on this appeal.

2. The **first issue** is whether the relevant legislation that prevented the appellant being awarded the limited capability for work related activity element ("LCWRA element") for the first three months from the date of her claim for Universal Credit breached her rights under Article 14 of the European Convention on

Human Rights ("ECHR") when read with Article 1 of the First Protocol to the ECHR ("A1P1"), as enacted in Great Britain under the Human Rights Act 1998. The relevant legislation is regulation 28 of the Universal Credit Regulations 2013 ("the UC Regs").

3. It is important to emphasise that the only point between the parties under this first issue, and thus the only point for me to decide under the first issue, is whether the appellant's circumstances come within the ambit of A1P1. If the ambit question is settled in favour of the appellant, the Secretary of State accepts that regulation 28 of the UC Regs discriminates against the appellant in a way that cannot be justified, and he concedes as a result that the relevant legislation has to be disapplied in the appellant's case: per *RR v SSWP* [2019] UKSC 52; [2019] 1 WLR 6430.

4. The **second issue** is whether the time for claiming should be extended back to 18 October 2020 under regulation 26 of the UC Regs.

5. In order to understand why these issues arise and are of importance it is necessary to sketch in the relevant factual background. Before doing so I need to address the key failure on the part of the First-tier Tribunal.

The First-tier Tribunal's failure

6. It is common ground between the parties, common ground with which I agree, that the First-tier Tribunal's decision of 7 October 2021 ("the tribunal") should be set aside for error of law on the basis of its failure to engage in any proper sense with the human rights argument made to it.

7. The appellant had set out a quite detailed and clearly articulated argument to the tribunal that to apply the three month waiting period before she was paid the LWCRA element discriminated against her contrary to Article 14 of the ECHR. Moreover, she asked the tribunal, if it found in her on the discrimination argument, to disapply the offending secondary legislation based on the decision on the Supreme Court's decision in *RR*.

8. This argument was set out in the appellant's ground of appeal against the Secretary of State's decision of 26 March 2021. It was her sole ground of appeal. The argument was later expanded upon in a nine page submission to the tribunal of 18 May 2021. By that stage the (main) discrimination argument was supplemented by short additional argument arguing for backdating of the universal credit award to the date her employment and support allowance expired to allow "continuous LCRWA under the transitional provisions".

9. The appellant's appeal was refused by the tribunal on 7 October 2021. The tribunal's reason for its decision extend over four complete pages and thirty seven paragraphs. The closing sentence in paragraph seven of the tribunal's says that the reasons explain why the appeal was refused. That is simply an inaccurate statement in respect of why the human rights argument did not succeed. No reasons are given to explain *why* the tribunal rejected the human

rights arguments and the several steps within it. All the reasons say on the human rights argument are as follows:

> "24. The application of the relevant period under Regulation 28 UC Regs 2013 to [the appellant's] award is not discriminatory and does not contravene her rights under the European Convention on Human Rights."
>
> 33. In reaching its decision the Tribunal considered all of the evidence , representations and case law. The Tribunal also considered the equal treatment bench book.
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> 37. [The appellant] has the determination of limited capability for work and work related activity from the date of claim to UC but the element cannot be included until 26.01.21. The Tribunal considered the evidence together with the case law in respect of the representations made relating to equal treatment, discrimination, notification of the expiry of ESA and back-dating of the UC award."

10. Even ignoring the requirement imposed on the First-tier Tribunal by section 6(1) and (3)(a) of the Human Rights Act 1998 not "to act in a way which is incompatible with a Convention right", which places a concomitant duty on a First-tier Tribunal when asked to do so to work out whether the decision it makes on an appeal will breach an appellant's rights under the ECHR, this refusing is woefully inadequate. In truth, it is non-existent on the human rights argument. The duty to provide adequate reasons for the tribunal's decision involved the tribunal explaining its reasoning on the principal issues that arose on the appeal: see, if it is needed, paragraph [36] of *South Bucks DC v Porter* (No.2) [2004] UKHL 33; [2004] 1 WLR 1953. There is no doubt that a (if not *the*) principal issue on the appeal to the tribunal in this case was the human rights argument. The novelty or difficulty of such an argument, and lack of assistance at that stage from the Secretary of State, did not absolve the tribunal from dealing with that argument in substance and explaining why (which is the result of the tribunal's decision) the argument did not assist the appellant. Indeed, section 6 of the Human Rights Act 1998 placed an additional obligation on the tribunal to deal properly with this argument. The tribunal's wholesale failure to do so was an abnegation of its judicial duty. I have, accordingly, no hesitation in setting aside the tribunal's decision as being given in error of law.

Factual background

11. The appellant, who was born on 18 October 1954, has a number of serious and longstanding health problems. From 6 August 2014 she was awarded Employment and Support Allowance ("ESA"), with the 'support component'. This award was based on her having both limited capability for work ("LCW") and limited capability for work-related activity ("LCWRA"). The ESA award included the couple rate standard allowance because the appellant's partner lived with her. It is not disputed that at all material times the appellant's partner has been below pension age and has been her carer. The appellant also

receives the enhanced rate of the daily living and mobility components of the Personal Independence Payment, which awards reflect the severe nature of her disabilities.

12. The critical issues on this appeal arise from when the appellant reached her pensionable (or retirement) age. For the appellant, this was on 18 October 2020. As a result of her reaching her pensionable age, the appellant ceased to be entitled to ESA: see section 1(3)(c) of the Welfare Reform Act 2007. Her last day of entitlement to ESA was 17 October 2020[1].

13. In a letter dated 22 October 2020, which was a Thursday and several days after the appellant had reached her pensionable age and had ceased to be entitled to ESA, the Secretary of State wrote to the appellant to tell her that she was not entitled to ESA from (and including) 18 October 2020. The letter (wrongly) stated that she should claim retirement pension instead of ESA. That was not, in fact, accurate in the appellant's case because her partner was below pension age. Given the appellant and her partner were what is sometimes termed a "mixed-aged couple", they were entitled instead to make a joint claim for Universal Credit, which they did on Monday 26 October 2020. They could not claim the means-tested benefit state pension credit as mixed-aged couples are precluded from doing so: see section 4(1A) State Pension Credit Act 2002.

14. It is the appellant's case, which I accept, that the earliest she would have received the Secretary of State's letter was on Saturday 24 October 2020, and she may not in fact have received it until Monday 26 October 2020. Moreover, I further accept, and I do not think this was disputed, that the appellant did not receive any notice from Secretary of State *before* she reached her pensionable age informing her that she would no longer be eligible for ESA and advising her to make a claim instead for a different benefit.

15. On the 26 October 2020 claim for Universal Credit it was accepted, indeed decided, that the appellant's disabilities and limitations are such that she had LCW and LCWRA from that date. However, in reliance on regulation 28 of the UC Regs, the LCWRA element was only awarded with effect from 26 January 2021 (i.e. three months after the claim). It is whether regulation 28 lawfully (in human rights terms) imposed such a three monthly delay before the LCWRA element became payable which lies at the heart of the first, and main, issue on this appeal.

Relevant legislation

16. Section 1(1) of the Welfare Reform Act 2012 ("WRA") sets out that a "benefit known as universal credit is payable in accordance this Part".

[1] There are some circumstances in which a "mixed-age couple" may have continued to be entitled to ESA, but none of those circumstances applied to the appellant.

17. Section 1(3)(d) of the same Act provides that "an award of universal credit is, subject as follows, calculated by reference to….(d) amounts for other particular needs or circumstances". It is section 1(3)(d), read with section 12(2)(b) of the same Act, which enables a universal credit award to include the LCWRA element.

18. Section 7 of the WRA deals with "assessment periods". It provides, insofar as is material, as follows:

> "**Basis of awards**
> 7.-(1) Universal Credit is payable in respect of each complete assessment period within a period of entitlement.
> (2) In this Part an "assessment period" is a period of a prescribed duration.
> (3) Regulations may make provision –
> (a) about when an assessment period is to start;
> (4) In subsection (1) "period of entitlement" means a period during which entitlement to universal credit subsists.

19. Section 12 of the WRA, insofar as is relevant, is in the following terms:

> "**Other particular needs or circumstances**
> 12.-(1) The calculation of an award of universal credit is to include amounts in respect of such particular needs or circumstances of a claimant as may be prescribed.
> (2) The needs or circumstances prescribed under subsection (1) may include –
> (b) the fact that a claimant has limited capability for work and work-related activity; …
> (3) Regulations are to specify, or provide for the determination or calculation of, any amount to be included under subsection (1).
> (4) Regulations may –
> (a) provide for inclusion of an amount under this section in the calculation of an award of universal credit –
> (i) to end at a prescribed time, or
> (ii) not to start until a prescribed time;
> (b) provide for the manner in which a claimant's needs or circumstances are to be determined."

It is section 12(4)(a)(ii) which provides the statutory authority for regulation 28(1) of the UC Regs and authorises the three monthly delay before the LCWRA element may become payable. However, as we shall see, it does not require that the three month delay must apply in all cases or in all circumstances.

20. Regulation 21(1) of the UC Regs defines an "assessment period" as:

> "a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists."

21. The key provisions concerning the LCWRA element and from when it may be paid in an award of Universal Credit are found in regulations 27 and 28 of the UC Regs. These provided at the material time, and insofar as is relevant, as follows:

> "**Award to include LCWRA element**
> 27.— (1) An award of universal credit is to include an amount in respect of the fact that a claimant has limited capability for work and work-related activity ("the LCWRA element").
> (2) The amount of that element is given in the table in regulation 36.
> (3) Whether a claimant has limited capability for work and work-related activity is determined in accordance with Part 5.
> (4) In the case of joint claimants, where each of them has limited capability for work and work-related activity, the award is only to include one LCWRA element.
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> **Period for which the LCWRA element is not to be included**
> 28.—(1) An award of universal credit is not to include the LCWRA element until the beginning of the assessment period that follows the assessment period in which the relevant period ends.
> (2) The relevant period is the period of three months beginning with—
> (a) if regulation 41(2) applies (claimant with monthly earnings equal to or above the relevant threshold) the date on which the award of universal credit commences or, if later, the date on which the claimant applies for the LCWRA element to be included in the award; or
> (b) in any other case, the first day on which the claimant provides evidence of their having limited capability for work in accordance with the Medical Evidence Regulations.
> (3) But where, in the circumstances referred to in paragraph (4), there has been a previous award of universal credit—
> (a) if the previous award included the LCWRA element, paragraph (1) does not apply; and
> (b) if the relevant period in relation to that award has begun but not ended, the relevant period ends on the date it would have ended in relation to the previous award.
> (4) The circumstances are where—
> (a) immediately before the award commences, the previous award has ceased because the claimant ceased to be a member of a couple or became a member of a couple; or
> (b) within the six months before the award commences, the previous award has ceased because the financial condition in section 5(1)(b) (or, if it was a joint claim, section 5(2)(b)) of the Act was not met.
> (5) Paragraph (1) also does not apply if—
> (a) the claimant is terminally ill; or
> (b) the claimant—
> (i) is entitled to an employment and support allowance that includes the support component, or

(ii) was so entitled on the day before the award of universal credit commenced and has ceased to be so entitled by virtue of section 1A of the Welfare Reform Act 2007 (duration of contributory allowance)."

22. In this case, the appellant submitted a medical certificate with her claim on 26 October 2020 and, therefore, by regulation 28(2)(b) of the UC Regs the three month period before the LWCRA element could be included in the award ended on 26 January 2021.

23. It can be seen from the terms of regulation 28(3) to (5) of the UC Regs, that the three month delay before the LCWRA element is included in the Universal Credit award will not apply in certain circumstances.

24. The 'three month delay rule' (as I shall call it, the Secretary of State refers to it as a 'relevant period requirement') is therefore not an absolute one. Nor, as I have already noted, is it required by the WRA. All section 12(4)(a)(ii) of the WRA provides for is a power for regulations delaying the start of the LCWRA element being included in award to be made. But the exercise of that power must be conducted (by the Secretary of State) lawfully and in accordance with human rights law.

25. Further provisions also disapply the effect of regulation 28(1) of the UC Regs. These provisions appear in the Universal Credit (Transitional Provisions) Regulations 2014. As the name of the regulations suggests, these regulations deal with the transition or move from the old legacy benefits (e.g. 'old style' ESA) to the Universal Credit regime. Regulation 19 of these regulations provided at the material time, again insofar as is material to this appeal, as follows:

"**Transition from old style ESA**
19.- (1) This regulation applies where—
(a) an award of universal credit is made to a claimant who was entitled to old style ESA on the date on which the claim for universal credit was made or treated as made ("the relevant date"); and
(b) on or before the relevant date it had been determined that the claimant had limited capability for work or limited capability for work-related activity (within the meaning of Part 1 of the 2007 Act)…..

(4) Where, on or before the relevant date, it had been determined that the claimant had limited capability for work-related activity (within the meaning of Part 1 of the 2007 Act) or was treated as having limited capability for work-related activity —
(a) regulation 27(3) of the Universal Credit Regulations does not apply;
(b) the claimant is to be treated as having limited capability for work and work-related activity for the purposes of regulation 27(1)(b) of those Regulations and section 19(2)(a) of the Act; …
(5) Unless the assessment phase applied and had not ended at the relevant date, in relation to a claimant who is treated as having limited

> capability for work and work-related activity under paragraph (4) (4)(b)—
> (a) regulation 28 of the Universal Credit Regulations does not apply; and
> (b) the LCWRA element is (subject to the provisions of Part 4 of the Universal Credit Regulations) to be included in the award of universal credit with effect from the beginning of the first assessment period….."

Regulation 21 of the Universal Credit (Transitional Provisions) Regulations 2014 also disapplies regulation 28 of the UC Regs in cases where a claimant was entitled to national insurance credits on the basis of their having LCW or LCW and LCWRA. Importantly, however, the effect of regulation 3(1) of the Social Security (Credits) Regulations 1975 is that entitlement to such credits only arises if a person is of working-age (i.e. is under pensionable age).

26. Pausing at this point, the above exceptions to the three month delay rule are designed to ensure that, putting matters generally, a claimant who has recently been accepted to have LCWRA will not need to serve a three month waiting period for the LCWRA element to be included in his or her Universal Credit award. Such claimants will include those who moved from ESA to Universal Credit and those making a new claim for Universal Credit having previously claimed it.

27. However, it was common ground before me that the appellant, whose ESA award ended because she reached her pensionable age and then subsequently switched to claim Universal Credit because she was part of a couple, could not benefit from any of these exceptions to the three month delay rule. This is because her award of ESA ended before the Universal Credit claim was made. Moreover, she could not qualify for national insurance credits (as she had reached her pensionable age), and this was her first award of Universal Credit and she was not terminally ill.

28. To tease this point out a little further, because it may not be immediately obvious, regulation 19(1)(a) of Universal Credit (Transitional Provisions) Regulations 2014 could not have been satisfied on the day the appellant claimed Universal Credit on 26 October 2020 because by then she was of state pension age and so could not have been "entitled to old style ESA on the date on which the claim for universal credit was made" given the terms of section 1(3)(c) of the Welfare Reform Act 2007.

29. It is in this context that the discrimination argument arises in this appeal. It does so absent any consideration of 'backdating' of the Universal Credit claim and whether the appellant could be "treated" as having claimed Universal Credit on the 18 October 2020, the day after her entitlement to ESA ended. However, as the 'backdating' arises later in this decision, I set out the key statutory provision concerning it here. This is found in regulation 26 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 ("the UC C&P Regs") and provided, at the material time, insofar as is relevant, as follows:

"**Time within which a claim for universal credit is to be made**
26.-(1) Subject to the following provisions of this regulation, a claim for universal credit must be made on the first day of the period in respect of which the claim is made.
(2) Where the claim for universal credit is not made within the time specified in paragraph (1), the Secretary of State is to extend the time for claiming it, subject to a maximum extension of one month, to the date on which the claim is made, if—
(a) any one or more of the circumstances specified in paragraph (3) applies or has applied to the claimant; and
(b) as a result of that circumstance or those circumstances the claimant could not reasonably have been expected to make
the claim earlier.
(3) The circumstances referred to in paragraph (2) are—
(a) the claimant was previously in receipt of a jobseeker's allowance or an employment and support allowance and notification of expiry of entitlement to that benefit was not sent to the claimant before the date that the claimant's entitlement expired;
(b) the claimant has a disability;
(c) the claimant has supplied the Secretary of State with medical evidence that satisfies the Secretary of State that the claimant had an illness that prevented the claimant from making a claim;
(d) the claimant was unable to make a claim in writing by means of an electronic communication used in accordance with Schedule 2 because the official computer system was inoperative…"

30. Although the decision is under appeal to the Court of Appeal, for the purposes of this appeal the parties accepted that I was bound to follow the three-judge panel's decision on regulation 26 and 'backdating' in *AM v SSWP* (UC) [2022] UKUT 242 (AAC). The effect of the decision in *AM* is that no identifiable claim for 'backdating' had to have been made by the appellant on 26 October 2020. Whether the time for claiming Universal Credit should be extended to an earlier date involves deciding (my having set aside the tribunal's decision and not preserved any of its findings on this issue) whether one or more of the circumstances in regulation 26(3) applied and regulation 26(2)(b) was satisfied.

Discussion and conclusion

Discrimination

31. It is worth emphasising again that the Secretary of State accepts the appellant succeeds on all stages of her Article 14 and A1P1 discrimination argument save for one. The sole area of contention concerns the ambit of A1P1. However, ambit aside, the Secretary of State accepts that the appellant is being discriminated against on the basis of her age by there not being an exception to the three month delay rule found in regulation 28(1) of the UC Regs to cover her age and circumstances.

32. The Supreme Court's decision in *R(SC) v SSWP* [2021] UKSC 26; [2022] AC 223 is now the definitive starting point in UK case law for consideration of Article 14 arguments, in social security cases at least. The general approach is summarised by Lord Reed at paragraph [37] of *SC* as follows:

> " The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* (2010) 51 EHRR 13, para 61 ("Carson"). For the sake of clarity, it is worth breaking down that paragraph into four propositions:
>
> (1) "The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14."
> (2) "Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations."
>
> (3) "Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."
>
> (4) "The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background."

33. Age is accepted as the relevant 'status' under Article 14 in this case. A person of working age (i.e. not pensionable age) who moves from ESA to Universal Credit would be covered by regulations 19 or 21 of the Universal Credit (Transitional Provisions) Regulations 2014 and would, as a result, receive the LCWRA element immediately in their award of Universal Credit. This is so even if that working age person had a gap between the end of their ESA award and the date of their Universal Credit claim (thus mirroring the facts of this case) because that person would have been credited and thus protected by regulation 21 of the Universal Credit (Transitional Provisions) Regulations 2014. I therefore accept that there is no factor, other than being either above or below state pensionable age at the point of the claim for Universal Credit, which distinguishes the appellant from the younger comparator.

34. It is also not disputed that the appellant is in a "relevantly similar situation" to the person under state pensionable age who is moving from ESA to Universal Credit and who has been accepted as having LCWRA under their ESA award.

35. Moreover, the Secretary of State concedes there is no justification for the difference in treatment between the appellant's position and the person under pensionable age who is otherwise in the same situation as the appellant, or at

least he has not advanced any justification for the difference in treatment. The Secretary of State argues that the purpose of the three month delay rule is to establish that the claimant has a long-term illness. The rule is intended to be the equivalent of the 13-week assessment phase found in the ESA scheme: see sections 2(2)(a) and 24(2) of the Welfare Reform Act 2007 and, for example, regulation 4(1) of the Employment and Support Allowance Regulations 2008. However, the Secretary of State accepts that the appellant has a long-term illness and that that has been the case from the outset of her claim for Universal Credit. Given this, the appellant argues with some force, though it is unnecessary for her to do so given the Secretary of State's stance, that the very short gap between the ending of her ESA award and the start of her Universal Credit award cannot possibly justify her being required to serve a three month waiting period.

36. Furthermore, the Secretary of State further accepts, if the ambit argument goes against him, that the remedy which respects the appellant's human rights is, following *RR*, to disapply regulation 28(1) of the UC Regs and the three month delay rule which it contains on the appellant's claim for Universal Credit of 26 October 2020. I turn therefore to' ambit'.

37. The correct approach to 'ambit' was also addressed in *SC* at paragraphs [39] to [43]. It does not involve showing a breach of the substantive Convention right (here A1P1) but is a wider test: see for example Judge Bratza's concurring opinion in *Adami v Malta* [2007] 44 EHRR 3 at paragraph [17]. It is difficult to delineate on an *a priori* basis the precise boundaries of the width of this test. In *M v SSWP* [2006] UKHL 11; [2006] 2 AC 91 (*R(CS) 4/06*), however, the House of Lords rejected an argument that a tenuous link with the substantive Convention right would be sufficient: see paragraph [60] in particular.

38. The substantive Convention right in this case is A1P1. It provides that:

> "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.*"*

39. The seminal decision on whether social security benefits constitute 'possessions' for the purpose of A1P1 and Article 14 of the ECHR is the admissibility decision of the Grand Chamber of the European Court of Human Rights in *Stec v United Kingdom* (2005) 41 EHRR SE 18. Given the arguments of the parties, it is necessary to set out a large part of the Grand Chamber's decision in *Stec* (ignoring in places some of the citations) .

> "*ii. The approach to be applied henceforth*
>
> 46. Against this background, it is necessary to examine afresh the question whether a claim to a non-contributory welfare benefit should attract the protection of Article 1 of Protocol No. 1. Since the Convention is first and foremost a system for the protection of human

rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally, and must interpret and apply the Convention in a manner which renders its rights practical and effective, not theoretical and illusory.

47. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions. It is noteworthy in this respect that, in its case-law on the applicability of Article 6 § 1, the Court originally held that claims regarding only welfare benefits which formed part of contributory schemes were, because of the similarity to private insurance schemes, sufficiently personal and economic to constitute the subject-matter of disputes for "the determination of civil rights". However, in the *Salesi v. Italy*, Article 6 § 1 was held also to apply to a dispute over entitlement to a non-contributory welfare benefit, the Court emphasising that the applicant had an assertable right, of an individual and economic nature, to social benefits. It thus abandoned the comparison with private insurance schemes and the requirement for a form of "contract" between the individual and the State. In *Schuler-Zgraggen v. Switzerland,* (judgment of 24 June 1993, Series A no. 263, § 46), the Court held that:

> "... the development in the law ... and the principle of equality of treatment warrant taking the view that today the general rule is that Article 6 § 1 does apply in the field of social insurance, including even welfare assistance".

48. It is in the interests of the coherence of the Convention as a whole that the autonomous concept of "possessions" in Article 1 of Protocol No. 1 should be interpreted in a way which is consistent with the concept of pecuniary rights under Article 6 § 1. It is moreover important to adopt an interpretation of Article 1 of Protocol No. 1 which avoids inequalities of treatment based on distinctions which, at the present day, appear illogical or unsustainable.

49. The Court's approach to Article 1 of Protocol No. 1 should reflect the reality of the way in which welfare provision is currently organised within the Member States of the Council of Europe. It is clear that within those States, and within most individual States, there exists a wide range of social security benefits designed to confer entitlements which arise as of right. Benefits are funded in a large variety of ways: some are paid for by contributions to a specific fund; some depend on a claimant's contribution record; many are paid for out of general taxation on the basis of a statutorily defined status…. Given the variety of funding methods, and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of Protocol No. 1. Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants

under this latter type of system also contribute to its financing, through the payment of tax.

50. 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.

51. 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.

52. 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.

53. It must, nonetheless, be emphasised that the principles, most recently summarised in *Kopecky v. Slovakia*, 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. 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.

54. 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. 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."

40. I am not sure it is necessarily helpful to try and dissociate one part from other parts of this reasoning in *Stec*. However, both parties rely on what is said in the concluding paragraph 54 of *Stec* in support of their respective cases concerning whether the appellant's case, and in particular her complaint about the three month delay rule applying to her, comes within the ambit of her right to Universal Credit.

41. The appellant's case is that a legally enforceable right to receive a welfare benefit is a possession for the purposes of A1P1. Moreover, she emphasises that the paragraph 54 'test' from *Stec* is whether, but for the condition of entitlement about which the applicant complains, the applicant would have a right to receive the benefit in question. She argues further, founding on the closing words in paragraph 46 of *Stec* that it is not surprising that the test should have been cast in the way it was in paragraph 54 of *Stec* given rights under the Convention must be effective rather than theoretical and illusory. Therefore, if an applicant had a theoretical entitlement to a benefit but was not actually entitled to receive it, they should enjoy the protection of Article 14 if subject to discriminatory treatment. Moreover, the appellant posits an example to test the Secretary of State's thesis that where the rule is about the timing and mechanism of payment of a benefit it does not come within the ambit of A1P1. If this were the case, the appellant argues, a state could introduce into its social security legislation a rule that all adults meeting specified conditions are to be entitled to a particular benefit but only men meeting those conditions are to receive the benefit for the first six months of their claims for the benefit whereas women will only be paid the benefit from the period six months after they make their claims. That such manifestly discriminatory legislation would escape scrutiny under Article 14 and A1P1 of the ECHR shows, so the appellant argues, the flaw in the Secretary of State's argument.

42. The Secretary of State places his emphasis, instead, on the use of the phrase "condition of entitlement" in paragraph 54 of *Stec*. He argues, in short, that the three month delay rule is not a "condition of entitlement*"* to Universal Credit within the meaning of the *Stec* test. It is instead a matter which relates to "the mechanism and timing of payment*"* of the LCWRA element. He relies for this distinction and the final quoted wording on *obiter* comments made by Lady Justice Andrews in paragraphs [42] to [43] of *R(Salvato) v SSWP* [2021] EWCA Civ 1482; [2022] PTSR 366. The Secretary of State argues that the three month delay rule, as I have called it, in regulation 28(1) of the UC regs derives from section 12(4)(b)(ii) of the WRA12, which enables secondary legislation to "provide for inclusion of an amount under this section in the calculation of an award of universal credit … not to start until a prescribed time*"* which shows, he argues, that a decision has already been in made in principle that the LCWRA element will be included in the Universal Credit award. Therefore, regulation 28(1) of the UC Regs goes to timing rather than entitlement. Moreover, the three month delay rule in regulation 28(1) is calculated on the assumption that a decision on entitlement has already been made. Once that three month delay has ended, the LCWRA element begins in

payment without the need for any further assessment. And the fact that the appellant had previously been assessed as having LCWRA for the purposes of her ESA award was not relevant due to the break in between her award of ESA ending and her UC claim being made. Had there been no break in claim, she would have been able to carry over her LCWRA status to her Universal Credit claim. However, as there was a break in claim, a fresh determination of her capability for work was required.

43. I prefer the appellant's argument and am not persuaded by the Secretary of State's argument.

44. First, I do not consider that the phrase "the condition of entitlement about which the applicant complains" used by the Court in paragraph 54 of *Stec* was intended to ascribe a narrow or technical legal meaning to "condition of entitlement", in the sense of it only applying where the rule in question is, or is described as, a condition of entitlement to benefit, when determining whether an alleged discriminatory rule comes within the ambit of A1P1. In my judgment, the correct approach is to identify the substantive effect of the alleged discriminatory rule on the claimant receiving their entitlement to the benefit in issue.

45. This is supported by *R(RJM) v SSWP* [2008] UKHL 63; [2009] 1 AC 311. There was no question in that case that RJM was entitled to income support under section 124 of the Social Security Contributions and Benefits Act 1992 ("SSCBA"). The issue was, per section 124(4) of the SSCBA, where RJM was entitled to income support, what the amount of that entitlement should be in terms of his "applicable amount". This 'amount' issue was dealt with in the delegated legislation in RJM's case in regulation 21(1) of, and Schedule 7 to, the Income Support (General) Regulations 1987 ("the IS Regs"). It is noteworthy that regulation 21(1) of those Regulations was in terms of the amount to be included in a claimant's applicable amount was that set out in the circumstances provided for in Schedule 7. RJM's argument was that the provision in paragraph 6 of Schedule 7 to the IS Regs that a "claimant without accommodation" would only have the single person's allowance and no disability premium included in his entitlement to income support discriminated against him contrary to Article 14 read with A1 P1 of the ECHR. In those circumstances, and having reviewed the above decision in *Stec*, the House of Lords concluded (at paragraph [34] of *RJM*) "that, as disability premium is part of the UK's social welfare system, RJM does have a sufficient "possession" to bring his claim within A1P1".

46. Although the structure of the income support benefit system in *RJM* is not on all fours with the system for recognising a person having LCWRA in the Universal Credit system, in my judgment the same reasoning as expressed in paragraph 34 of *RJM* applies to the issue of 'ambit' in this appeal. The appellant was entitled to Universal Credit on her claim for that benefit on 26 October 2020, that entitlement includes the LCWRA element if the claimant has LCWRA, but the appellant was being denied receipt of that LWCRA element for three months because of regulation 28(1) of the UC Regs when others in relevantly similar situations who were not of pensionable age received

that LCWRA element immediately. Reading regulations 27 and 28 of the UC Regs together, shows, in my judgment, at least for the purposes of the 'ambit' of A1P1 following *Stec* and *RJM*, that the appellant was in substance not entitled to the LCWRA element for the first three months of her claim for Universal Credit. Regulation 27(1)'s effect is that the LCWRA element is to be included if a claimant has LCWRA. Regulation 28(1) then provides that that element is not to be included for the first three months of the award of Universal Credit. Given that the LCWRA element is not at any stage retrospectively awarded for that initial three month period, the substantive effect of these provisions, in my judgment, is that the appellant was not entitled to the LCWRA element for the first three months of her Universal Credit award.

47. Like RJM, as the LCWRA element is part of the UK's social security system, in my judgment the appellant has a sufficient 'possession' in respect of that element to bring her case within the ambit of A1P1.

48. This conclusion accords with what Lord Justice Leggat (as he then was) said about ambit in relation to Article 14 and A1P1 when the *SC* case was in the Court of Appeal ([2019] EWCA Civ 615; [2019] 1 WLR 5687), where he said at paragraph [50]:

> "applying the test of whether, but for that condition, SC….would have had a right, enforceable under domestic law, to receive the benefit in question, the answer is plainly "yes"".

49. The focus here, as the appellant argues, is on *receipt* of the benefit (or a part of it). In doing so, the concern is rightly in my judgment on the effect of the alleged discriminatory rule rather than some theoretical construct about entitlement. To apply the 'Leggatt *SC*' test of whether but for the alleged (indeed accepted) discriminatory rule in regulation 28(1) of the UC Rules, the appellant would have a right enforceable under domestic law to receive the LCWRA element at the outset of her 26 October 2020 claim for Universal Credit, the answer in my judgment must be "Yes".

50. I will deal with the *obiter* comments in *Salvato* in a moment, but I would reject as unreal the Secretary of State's argument that regulation 28(1) of the Universal Credit is only concerned with the mechanism and timing of payment of the LCWRA element. The practical effect of regulation 28(1) of the UC Regs is that someone in the appellant's situation will never receive the LCWRA element for the first 13 weeks of their Universal Credit claim. It is not a deferred entitlement to that element after 13 weeks as no back payment is made for that element after the 13 weeks has expired. The three month waiting period in regulation 28(1) of the UC Regs effectively (in terms of receipt of the sum recognising the appellant's LCWRA) defers entitlement to the LCWRA element for the first three months of the award of Universal Credit. Contrary to an argument made at least at one stage by the Secretary of State, the appellant was not entitled to payment of the LCWRA element for the period in dispute, nor would she ever be under regulation 28(1).

51. Nor in my judgment does anything in section 12(4)(a)(ii) of the WRA affect this conclusion. The language there - of providing for the inclusion of an amount in the calculation of an award of universal credit not to start until a prescribed time - when taken in the wider statutory context of that section as a whole is much more about the entitlement under an award of Universal Credit than just the timing of the payment of such an entitlement. It is therefore close to the language in issue in *RJM* which was held to be sufficient to amount to a "possession" for the purpose of coming with the ambit of A1P1.

52. Second, *Salvato*, even if highly persuasive *obiter*, is plainly distinguishable. The rule in dispute in *Salvato* concerned the timing of reimbursement for childcare costs once certain evidential requirements had been met under the 'proof of payment' rule. As Lady Justice Andrews put it at paragraph 7 of *Salvato* the case was "not about a rule concerning qualification for entitlement to a particular welfare benefit, or limiting the recoverable amount, but rather, about the mechanism adopted for payment of an element of the benefit, as part of their UC award, to someone who is entitled in principle to claim it" (my underlining added for emphasis). It is important, however, to understand the context for these remarks. This, as Mr Justice Chamberlain explained in *Salvato* in the High Court, was that the effect of the relevant regulations was that a claimant was entitled to be paid the child care element as part of their Universal Credit award only if they have already paid the child care charges **and** could show they had done so under the proof of payment rule, rather than having merely incurred those charges. This meant that claimants had to find ways of paying the child care charges out of their own funds and then wait to be reimbursed several weeks later.

53. There was therefore no question that the appellant in *Salvato* was entitled to receive payment of those costs for the period they had in fact been incurred. The complaint was that she ought to be entitled to receive that payment in advance of paying the provider instead of being reimbursed for it afterwards and having met the evidential test in the proof of payment rule. That factual circumstance, which is merely about the timing of the payment of entitlement on evidencing that part of the entitlement condition has been met (in respect of the child care charges), has no read across to this case. This is because in this case the operation of regulation 28(1) of the UC Regs means that the appellant simply has no entitlement to receive the LCWRA element for the first three months of her award of Universal Credit. Regulation 28(1) is not an evidential rule concerned with proving entitlement at some later stage. It has been accepted from the outset of her Universal Credit claim that the appellant has LCWRA. What regulation 28(1) denies her is payment of the LCWRA element to reflect her LCWRA for the first three months of her claim. *Salvato* on the other hand does not concern a situation where the Secretary of State refused to pay childcare costs incurred during the first three months for when those costs were incurred.

54. It is in the above context that the remarks made in *Salvato* about distinguishing between the *Stec* paragraph 54 'entitlement' and the mechanism adopted for payment of an element of the benefit arose. Seen from that proper context, however, it has no application to the first issue that arises in this appeal.

55. The result of all of the above is that regulation 28(1) (and insofar as it is necessary regulation 28(2)) of the UC Regs discriminated against the appellant contrary to her rights under Article 14 when read with A1P1 of the ECHR. The offending (part of) regulation 28 must therefore be disapplied. The result of this, given the terms of regulation 27(1) of the UC Regs, is that the appellant's award of Universal Credit had to include the LCWRA element from and including 26 October 2020.

"Backdating"

56. The above result leaves only the period from 18 October to 26 October 2020 in issue on this appeal.

57. It is necessary, if the conditions in regulation 26(2) and (3) of the UC (C&P) Regs are met, to 'backdate' the claim to 18 October 2020 to ensure that the beginning of the Universal Credit award follows on immediately from the ending of the ESA award.

58. The appellant accepts that regulation 26(3)(a) of the UC (C&P) Regs, on which she principally relies, cannot enable the date of her Universal Credit claim to be 'backdated' to any day prior to when her ESA award ended. It is accepted, therefore, that she cannot bring herself within the protection of regulation 19(1)(a) of the Universal Credit (Transitional Provisions) Regulations 2014 because that requires entitlement to ESA to have existed on the day Universal Credit was claimed. Hence the focus is on extending the claim back to be treated as having been made on 18 October 2020.

59. I am satisfied on the evidence and arguments before me that regulation 26(2) and (3)(a) of the UC (C&P) Regs are satisfied that as a result the Universal Credit must be treated as having been made at least as far back as 18 October 2020. My reasons for so concluding can be stated briefly.

60. The appellant was not in receipt of a letter stating her ESA was ending any earlier than 24 October 2020 and quite possibly not until two days later on 26 October 2020. On that basis it seems to me that regulation 26(3)(a) of the UC (C&P) Regs is satisfied.

61. This then brings regulation 26(2) of the UC (C&P) Regs into issue and whether the appellant, as a result of not being told her ESA award was about to end or had in fact ended, could reasonably have been expected to claim Universal Credit before 26 October 2020. In my judgment she could not reasonably have been expected to do so in circumstances where she was only made aware either on the day she claimed Universal Credit or the Saturday two days before that her ESA award had in fact ended. The premise of regulation 26(3)(a) is that claimants will be told in advance that their award of (here) ESA will end on a future date and thus enable them to claim any alternative before, or at least on the day after, the ESA award ends. The appellant in this case could only have reasonably made her claim for Universal Credit once she knew her ESA had ended. At the earliest that was on 24 October 2020 and more realistically

was on the Monday following, on 26 October 2020. It was not in my judgment and in these circumstances reasonable to expect her to have made an advance claim for Universal Credit in the knowledge her ESA might be about to end as she would have needed to know the exact date her ESA was to end and in any event I accept the (uncontroverted) evidence given on her behalf that the online claim system for Universal Credit does not, or at least did not in October 2020, allow a claimant to specify a future date from which they wish a claim to commence.

62. I do not consider that anything in the tribunal's reasoning affects or alters this conclusion. I have set aside the tribunal's decision and am deciding the first instance appeal entirely afresh. I am not therefore bound by any of the tribunal's reasoning and am deciding the appeal on the evidence before me. Moreover, and in any event, what the tribunal set out in paragraphs 16 and 27 of its reasons, on which the Secretary of State relies, does not undermine the above findings I have made concerning 'backdating'. All paragraphs 16 and 27 show is that the appellant was advised she would be able to make a claim for Universal Credit *when* her ESA award ended. That 'when' only became apparent to the appellant when she received the letter on 24 or 26 October 2020. And nothing else in the tribunal's reasons fixes the appellant with the knowledge her ESA had in fact ended before she received that letter.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 29 November 2023