Neutral Citation Number: [2020] EWHC 2817 (Admin)

Case No: CO/2223/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2020

Before:

MR JUSTICE SWIFT

- -

Between

THE QUEEN
on the application of

CC **Claimant**

- and –

(1) H. M. TREASURY
(2) SECRETARY OF STATE FOR WORK AND PENSIONS **Defendants**

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Mr Stephen Broach and Ms Alice Irving (instructed by Bindmans LLP) for the **Claimant**
Mr Julian Milford QC, Ms Heather Emmerson and Mr Ben Mitchell (instructed by Government Legal Department) for the **Defendant**

Hearing date: 6th October 2020

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Approved Judgment

MR JUSTICE SWIFT:

A. Introduction

1. The Claimant applies for permission to amend her Claim Form and Statement of Facts and Grounds. There are two Application Notices: the first dated 4 September 2020 concerns the Statement of Facts and Grounds; the second, dated 15 September 2020, concerns the Claim Form itself.

2. The claim was filed on 19 June 2020 and issued on 22 June 2020. Section 3 of the Claim Form identified the decision to be challenged as "The decision not to increase the rate of Carer's Allowance". The claim is directed both to the Secretary of State for Work and Pensions and to HM Treasury. In this judgment, simply for sake of convenience, I will refer to the Defendants collectively as "the Secretary of State" save where it is necessary to distinguish between them. The factual premise of the Claimant's claim as originally pleaded was that while in response to the circumstances created by the COVID-19 pandemic, the standard allowance element of Universal Credit had been raised by £20.00 per week (see regulation 3 of the Social Security (Coronavirus) (Further Measures) Regulations 2020 ("the Further Measures Regulations"), and while assistance had been provided to workers via payments to employers under the Job Retention Scheme ("the JRS"), and to self-employed persons by payments under the Self-Employment Income Support Scheme ("the SEISS"), no additional assistance had been provided specifically to persons entitled to receive Carer's Allowance.

3. The conditions for entitlement to Carer's Allowance are set out in section 70(1) of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act"). The allowance is payable for each day that the benefits claimant (a) is regularly and substantially engaged in providing care for a severely disabled person; and (b) is not in gainful employment. A further requirement is that the carer must be either a relative of the disabled person as defined in regulations made under the 1992 Act, or fall within some other category of person also prescribed in such regulations. Carer's Allowance is not means-tested. The amount payable is specified in primary legislation: see section 70(9) of and Schedule 4, Part III paragraph 4 to the 1992 Act. Section 150 of the Social Security Administration Act 1992 provides a mechanism by which the amount payable is reconsidered each year. In each tax year the Secretary of State for Work and Pensions must review the amount payable to determine whether the benefit has retained its value in relation to the general level of prices in Great Britain. If it appears to her that "the general level of prices is greater at the end of the period under review than it was at the beginning of that period", she is required to lay before Parliament a draft uprating order which increases the amount payable by way of Carer's Allowance by an amount not less than "the percentage by which the general level of prices is greater at the end of the period than it was at the beginning".

4. By Order made on 28 July 2020, Linden J granted permission to apply for judicial review. On 21 August 2020 the Secretary of State filed Detailed Grounds of Defence. Those Grounds made a point not contained in the Summary Grounds of Defence, nor drawn to Linden J's attention at the permission stage. The point was that because the rate of Carer's Allowance is set in primary legislation it was not open to the Secretary of State to increase that rate; such a decision had to be a matter for Parliament. This prompted the Claimant's first Application Notice, filed on 4 September 2020. The

Claimant recognised that her challenge that the Defendants had acted unlawfully by failing to increase the rate of Carer's Allowance could not succeed.

5. The combined effect of the 4 September 2020 Application Notice and the further Application Notice filed on 15 September 2020 is that the Claimant seeks permission to amend her claim to challenge a different decision, described as "The decision not to increase financial support to recipients of Carer's Allowance who do not receive Universal Credit as part of the financial support measures introduced due to the COVID-19 pandemic". In substance this application to amend is a request to start a challenge directed to a different decision. For this reason, I approach the application for permission to amend in the same way as I would approach an application for permission to apply for judicial review: if the proposed new claim is arguable, I will grant permission to amend; if it is not I will refuse permission. The parties agree this is the correct approach. The application to amend was listed for a day's hearing and was fully argued by counsel for both sides. Both sides have provided detailed witness statements and exhibits and skeleton arguments.

6. The Claimant is the mother of four children. The eldest is 19 years old; her other children are aged 11 and 9 years old. She is a single parent. She meets the conditions for payment of Carer's Allowance because of the circumstances of each of her three oldest children. Other benefits are also paid in respect to those three children. The Claimant has her own health problems and meets the conditions for entitlement to Severe Disability Premium ("SDP"). Because she is entitled to receive SDP, she is in a cohort of benefits claimants who have not yet been moved into the Universal Credit system. For this reason, she remains in receipt of Income Support as well as other benefits outside the Universal Credit system and which will in due course be replaced by the Universal Credit system (referred to by the Secretary of State as "legacy benefits").

7. The proposed amended claim is to the affect that given the increase in the Universal Credit standard allowance, and the introduction of the JRS and the SEISS, it was unlawful for the Secretary of State not to arrange to make an additional payment to persons who meet the criteria for Carer's Allowance but who do not receive Universal Credit. The Claimant excludes those in receipt of Universal Credit because of the increase made by the Further Measures Regulations to the standard allowance (of approximately £20.00 per week). This exception seems to lack a little in logic: (a) since the standard allowance is paid to all who receive Universal Credit, payment does not depend on the existence of carer's responsibilities; and (b) because if a person is in receipt of Universal Credit and has responsibilities as a carer those responsibilities are recognised and provided for by a further allowance ("the carer element" – see section 12 of the Welfare Reform Act 2012 and regulation 29 of the Universal Credit Regulations 2013). However, Mr Broach, counsel for the Claimant explains the exception on the pragmatic ground that even though the Further Measures Regulations made no change to the carer element of Universal Credit, if a person who receives Carer's Allowance also receives Universal Credit they have had the benefit of the £20.00 increase to the standard allowance. He submits that the Secretary of State should have made provision for an additional £20.00 per week also to have been paid to all others who qualify for Carer's Allowance and that such payment should continue for the same period as the increase to the Universal Credit standard allowance under the Further Measures Regulations (which is until the end of

the 2020-21 tax year). He submits that this failure comprises unlawful discrimination contrary to the Claimant's Convention rights (ECHR Article 8 and/or Article 1 of Protocol 1, read together with Article 14), and is irrational at common law.

B. Decision

8. I am not satisfied the Claimant's claim is arguable, and for that reason I refuse the application for permission to amend.

9. The primary submission made by counsel for the Secretary of State, Julian Milford QC, is that notwithstanding the proposed reformulation of the claim to change its target from the failure to increase the value of Carer's Allowance to a failure to make an additional payment to persons who meet the conditions for payment of Carer's Allowance (save for those who receive Universal Credit), it remains the case that it lies beyond the Secretary of State's legal powers to make the payment claimed. He relies on the judgment of the House of Lords in *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513. The context for that case was provisions in the Criminal Justice Act 1988 which contained a criminal injuries compensation scheme. Those provisions had been enacted but not commenced. Under the 1988 Act, power of commencement lay with the Home Secretary. In 1993 the Home Secretary announced that the statutory scheme would not be commenced and that instead, in exercise of common law powers, he would establish a new non-statutory scheme of tariff payments. That decision prompted a challenge that the proposed exercise of common law powers would be unlawful. The challenge succeeded. The House of Lords concluded that the Home Secretary's power under the 1988 Act to set the commencement date for the statutory compensation scheme placed him under a duty to consider whether or not to exercise that power and appoint a commencement date. Lord Nicholls (at pages 575H to 576B of the report) stated as follows:

> "This statutory duty is not devoid of practical consequence. By definition, the continuing existence of this duty has an impact on the Secretary of State's freedom of action. Since the legislature has imposed this duty on him, it necessarily follows that the executive cannot exercise the prerogative in a manner, or for a purpose, inconsistent with the Secretary of State continuing to perform this duty. The executive cannot exercise the prerogative power in a way which would derogate from the due fulfilment of a statutory duty. To that extent, the exercise of the prerogative power is curtailed so long as the statutory duty continues to exist. Any exercise of the prerogative power in an inconsistent manner, or for an inconsistent purpose, would be an abuse of power and subject to the remedies afforded by judicial review."

10. The Secretary of State submits, and I accept, that the present case is *a fortiori*. The proposed amended claim comes to this: that persons who meet the criteria at section 70(1) of the 1992 Act should receive an additional payment above and beyond the Carer's Allowance paid to them. The purpose of that payment is to reflect the cost to them of providing care to those in respect of whom the Carer's Allowance is payable. What is fatal to the Claimant's proposed new claim is that the amount to be paid to persons that meet the criteria at section 70(1) of the 1992 Act for the purpose of

providing care is expressly set in Schedule 4 to the 1992 Act. The only power that the Secretary of State has to change the amount payable is the uprating power at section 150 of the Social Security Administration Act 1992. Any other increase must be a matter for Parliament.

11. On the facts of the *Fire Brigades Union* case where the statutory scheme had not been commenced, the House of Lords concluded that any exercise by the Home Secretary of common law powers had to be consistent with the duty arising under the 1988 Act to consider whether or not to set the date for commencement of the scheme for compensation contained in the 1998 Act. The position in the present case is one step beyond. The 1992 Act sets the parameters for payments to persons who meet the section 70(1) criteria, so far as such payments are made for the purpose of addressing their caring responsibilities. To this extent, common law powers that the Secretary of State may have previously possessed for that purpose to that group of persons, have ceased to exist. The ground for making payments to those who meet the criteria at section 70(1) of the 1992 Act in respect of their caring responsibilities is covered by the provisions of the 1992 Act. There is no relevant common law power that remains for the Secretary of State to exercise. This conclusion applied to the Claimant's original claim, and it applies equally to the proposed new claim. It makes no difference that the proposed new claim is made on the premise that an additional payment should be made to those who meet the section 70(1) criteria, save for those who also receive Universal Credit. The exclusion of those who receive Universal Credit is no more than a tactical or perhaps cosmetic device; it says nothing about the nature or purpose of the payment the Claimant claims should be made, which is the matter that is determinative of the Secretary of State's *vires* argument.

12. Mr Broach sought to meet the *vires* argument in a number of ways. First, he submitted that when the 1992 Act was made the circumstances caused by the COVID-19 pandemic, which he rightly described as exceptional, could not have been anticipated. It follows – so his submission goes – that it is at least arguable that the Secretary of State retains a common law power to act in these present and exceptional circumstances. I do not agree this is arguable. The COVID-19 pandemic has presented and continues to present an exceptional set of circumstances for government to meet. Yet I see no purpose in considering whether as at 1992 when the Social Security Contributions and Benefits Act was passed, Parliament should be taken to have had in mind the present exceptional circumstances. That inquiry is arid and misses the point. What matters is the proper meaning of the words used in the statutory scheme in issue understood as a matter of ordinary language and in accordance with received canons of construction. There is no principle of statutory construction that assists the Claimant's submission. The notion that, notwithstanding provisions such as those in the 1992 Act which are in issue in this case, the Secretary of State retains common law powers which could be used in "exceptional circumstances" to top-up a statutory scheme for payment is entirely unruly. Not the least because the notion of what circumstances might count as "exceptional" could not be known with any acceptable degree of certainty. I can see no principled basis either for an argument that the statutory provisions (such as those in issue in this case contained in the 1992 Act) should be construed more narrowly in "exceptional" as opposed to "normal" times, or for an argument that any statutory scheme should be approached on the basis that it permits the executive some form of reserved common law power to act if "exceptional" circumstances arise. As to the meaning of the

language enacted in the 1992 Act (or for that matter in the Social Security Administration Act 1992), no part of Mr Broach's submission suggested that there was anything particular in the provisions about Carer's Allowance that pointed to the continued existence or reservation of any common law power. His submission was generic and would have the consequence that in every instance where a statutory scheme covered ground, ministers would still retain common law power to act outside the scheme in exceptional circumstances. The scope of such a principle would be breath-taking and would significantly rebalance the respective powers of Parliament and the executive. It makes no difference that the specific outcome sought in this case by the Claimant, that more money should be available to support those who care for severely disabled relatives, would be considered by many to be benign.

13. Mr Broach's second submission was that the power to make provision for additional payments to carers lay in section 76 of the Coronavirus Act 2020. Section 76 provides as follows:

> "**76. HMRC functions**
>
> Her Majesty's Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease."

I do not consider this provision can assist the Claimant's proposed case, even arguably. Section 76 is concerned with the functions of Her Majesty's Revenue and Customs ("HMRC") which would otherwise be limited to those set out in the Commissioners for Revenue and Customs Act 2005. However, the premise of section 76 of the Coronavirus Act must be that any direction given will concern a function already within the *vires* of the Treasury. Thus, any attempt to rely on section 76 leads the Claimant back to the point that power to make payment of the sort that she contends should have been made is addressed and covered by the 1992 Act. The Treasury could not, in reliance on section 76 of the Coronavirus Act direct HMRC to make additional payments to those who meet the criteria at section 70(1) of the 1992 Act in respect of their caring responsibilities; what such payments should be is addressed exclusively by the provisions of the 1992 Act and section 150 of the Social Security Administration Act 1992. It is not possible to read section 76 of the Coronavirus Act as conferring some form of new and unlimited power on the Treasury that exists regardless of all other primary legislation. In my view section 76 says nothing that is new about the Treasury's powers, save in respect only of its power to give direction to HMRC.

14. Thirdly, Mr Broach made brief submissions by reference to the HM Treasury document published in July 2013 "Managing Public Money". The material part of that document refers to the PAC Concordat 1932, an agreement reached between the Public Accounts Committee of the House of Commons and the Treasury ("the Concordat"). The Concordat does not purport to describe the existence of any executive power, but only to describe circumstances in which public funds will be available to meet the cost of the exercise of the executive powers which are otherwise available. Thus, neither the Treasury document nor the Concordat provides a source of power that would enable the Secretary of State (or for that matter the Treasury) to make the payment claimed by the Claimant through her proposed amended claim.

15. For all these reasons the proposed amended claim is not properly arguable. The Claimant's contention is that the failure to provide for additional payments for those entitled to Carer's Allowance is either in breach of her Convention Rights or irrational at common law. Since it is not arguable that the Secretary of State has the power to make such payments, it must follow both that the human rights claim must fail by reason of section 6(2)(a) of the Human Rights Act 1998, and that failure to make such payments cannot be unlawful at common law.

16. In light of the conclusion I have reached on the issue of *vires*, I will deal with the other points raised by the claim much more briefly.

17. As an alternative to her submission based on section 6(2)(a) of the Human Rights Act, the Secretary of State further submitted that even if in principle there was power at common law to make payments as claimed by the Claimant, a defence to the Convention rights claim arose by section 6(2)(b) of the Human Rights Act. I agree with this submission. The application of section 6(2)(b) was considered by the House of Lords in *R(Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681. Section 6(2)(b) is, so far as concerns the purposes of the present case, concerned with actions taken to "give effect to or enforce" a provision in primary legislation. Not making payments to carers in respect of their provision of care in excess of the payments provided for in the 1992 Act is such a decision. In *Hooper*, which concerned provisions in the 1992 Act which provided for payments to widows but not to widowers, Lord Nicholls stated as follows at paragraph 6 of his speech:

> "Clearly, in making payments to widows the Secretary of State was giving effect to section 36 and 37 of the Social Security Contributions and Benefits Act 1992. Likewise, in not making corresponding payments to widowers the Secretary of State was giving effect to those statutory provisions. Section 36 and 37 make provision for payments to widows alone. If the Secretary of State were asked "Why are you not making similar payments to widowers?" he would have answered: "Because the statute provides these payments should be made to widows and makes no provision for payments to widowers." The fact that the Secretary of State could lawfully have made corresponding payments to widowers does not detract from the crucial fact that in declining to pay widowers he was "giving effect" to the statute."

The same observations apply equally in the circumstances of this case. As explained by Lord Hoffmann in his speech in the same case (at paragraph 51), the consequence of section 6(2)(b) is that "… a public authority is not obliged to subvert the intention of Parliament by treating itself as under a duty to neutralise the effect of … legislation".

18. Lastly, I turn to the specifics of the discrimination claim and the rationality challenge. The discrimination claim is brought as a claim of sex discrimination and a claim of discrimination on grounds of other status. The other status relied on is that of (a) meeting the requirements in section 70(1)(a) of the 1992 Act for entitlement to Carer's Allowance; but (b) not being in receipt of Universal Credit. For the purposes of this permission application I will assume that the "other status" asserted by the

Claimant is a relevant other status for the purposes of an article 14 claim. The Claimant relies on a range of different comparators: a person in receipt of Universal Credit including the carers element who also meets the criteria for entitlement to Carers Allowance; a worker who has been put on furlough by her employer because during lockdown she had additional child care responsibilities[1]; a self-employed person who receives assistance under the SEISS. For the purposes of considering whether the proposed amended claim is arguable I have assumed that the Claimant's case covers both a claim of direct discrimination and a claim of indirect discrimination.

19. I am not satisfied that the discrimination claims are properly arguable. Regardless of whether the claim is considered as an "other status" case or as a claim of sex discrimination, the comparators are not in analogous positions to the Claimant. Regulation 3 of the Further Measures Regulations only increased the Universal Credit standard allowance. No increase was made to the carer's element of Universal Credit. Moreover, unlike Carer's Allowance, Universal Credit is a means-tested benefit. The JRS exists to support employers by incentivising them to retain employees rather than make early decisions on redundancy. Even if the scheme is considered from the point of view of those employed by participating employers, they are not in an analogous position to the Claimant. The same conclusion applies to those who have benefited from the SEISS, which provides a level of income replacement for qualifying self-employed persons.

20. Claims of discrimination, whether direct or indirect discrimination, are only viable if the Claimant and the comparators she identifies are in analogous positions. Where that requirement is not met there is no workable benchmark by which to assess either whether there has been relevant less favourable treatment (direct discrimination) or whether the application of a single standard to the Claimant and her comparators has disadvantaged the Claimant (a claim of indirect discrimination).

21. Nor is it reasonably arguable that the absence of a decision to make additional payments to those such as the Claimant, (who receive Carer's Allowance but not Universal Credit), while at the same time increasing the standard allowance part of Universal Credit, introducing the JRS, and introducing the SEISS, was on account of sex. The Claimant contends that a high proportion of those who receive Carer's Allowance are women, whereas the proportion of those who receive Universal Credit who are men and women are relatively similar. For present purposes I assume that is so. I will further assume that the same could be said in respect of the groups who have benefited from the JRS and the SEISS. However, this point alone falls some way short of establishing a viable discrimination claim (i.e., a situation in which, absent explanation, a court could on a balance of probabilities conclude that there had been discrimination).

22. The Secretary of State relies on two detailed witness statements by Mark Knight. He is employed in the position of Carer's Policy Lead in the Department for Work and Pensions. My conclusion that there is no arguable claim of discrimination, whether

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1 Although the Claimant describes the comparator in this way I cannot see that the reason why the worker was put on furlough is in any way to the point. The material matter must be that the worker has been furloughed, and for that reason indirectly benefits from her employer's participation in the JRS.

on the ground of sex or on the other status ground, is put beyond doubt by Mr Knight's evidence. I will not in this short judgment, attempt to do justice to the detail contained in his witness statements. However, what is very clear is that as at March 2020 the Government faced unprecedented circumstances in which, because of restrictions that would be imposed to address the spread of COVID-19, many people were likely to suffer a significant drop in income. Some might need to have resort to Universal Credit for the first time. Many other groups in society would also suffer hardship in consequence of restrictions that had been imposed. I entirely accept the Claimant's evidence that the restrictions caused her expenditure to increase. However, as Mr Knight explains the resources available to the Government were finite and an order of priorities was required. The Government's choice was to direct support to certain groups likely to suffer a loss of income. This included those who by reason of a reduction in their earnings might be first-time claimants for Universal Credit. The same objective also explains the thinking behind the JRS and the SEISS. In light of that explanation it is not arguable that these decisions resulted in unlawful discrimination against the Claimant either on grounds of her sex or because she was a person in receipt of Carer's Allowance.

23. The rationality challenge is unarguable for the same reasons. An application for judicial review is not an appeal against the merits of a decision but a test of its legality. The choices made by the Secretary of State that are under scrutiny in this case were well within the scope of judgment lawfully available to her.

C. Disposal

24. For these reasons I refuse the Claimant's application to amend the Claim Form and Grounds. The practical consequence is that the Claimant's claim for judicial review is now at an end. I invite counsel to make submissions in writing on all consequential matters, including the order to be made in respect of the proceedings.