Case No: UA-2022-000041-USTA

IN THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

ON APPEAL FROM THE FIRST-TIER TRIBUNAL (SOCIAL ENTITLEMENT CHAMBER)

Before :

UPPER TRIBUNAL JUDGE JACOBS
UPPER TRIBUNAL JUDGE WIKELEY
UPPER TRIBUNAL JUDGE WRIGHT

A. M.

Appellant

and

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Tom Royston (instructed by **Child Poverty Action Group**) for AM
Jack Holborn (instructed by **Government Legal Department**) for the Defendant

Hearing dates: 15 & 16 June 2022
Decision date: 1 September 2022

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 25 March 2021 under case number SC314/20/00689 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 we set that decision aside and remit the case to be reconsidered by a fresh tribunal, at an oral hearing, and in accordance with the law as set out below.

REASONS

Glossary

We use the following abbreviations in these reasons:

'UC' for Universal Credit

'CPAG' for the Child Poverty Action Group

'DWP' for the Department for Work and Pensions

'the Administration Act' for the Social Security Administration Act 1992

'the 1998 Act' for the Social Security Act 1998

'the 2013 Regulations' for the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380)

'the 1987 Regulations' for the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1967)

'the 1981 Regulations' for the Supplementary Benefit (Claims and Payments) Regulations 1981

Introduction

1. The issue at the heart of this appeal may in ordinary language be said to concern the basis on which entitlement to UC can be 'backdated' under regulation 26 of the 2013 Regulations. 'Backdating' is the language the First-tier Tribunal used in its decision and it is language both parties have used in their submissions on this appeal. However, the 'backdating' of a claim is not something with which the language of the legislation is strictly concerned, and it is the legislative language we have to grapple with on this appeal. Instead, the legislation identifies particular circumstances where the Secretary of State is obliged to extend the time for claiming UC, by up to one month, back from the date on which the claim was in fact made.

2. The particular issue with which we are concerned is not about any of those identified circumstances but rather whether there needs to be a claim (either explicit or implicit) made to extend the time for claiming UC.

3. The Appellant's primary case is that there is no requirement, on making a UC claim, to indicate the date from which the claimant wants an award to begin (indeed, there

is no question on the on-line UC claim form that asks if the benefit is being claimed for any earlier period). Rather, the Appellant contends, the start date of any entitlement to UC is a question of fact for the decision-maker to determine when making their decision on the claim.

4. The Secretary of State for Work and Pensions, on the other hand, submits that the statutory framework requires a claimant (explicitly or implicitly) to make a claim for UC covering the one month period prior to the date on which the claim for UC is in fact made. Such a 'retrospective' claim must be made either at the time the UC claim is in fact made or, at the latest, before the decision awarding UC is made. The Secretary of State further contends that such a claim for UC cannot be made retrospectively after the date of the UC awarding decision. The appellant agrees with the Secretary of State on this very last point, although he does not accept that such a 'retrospective' claim needs to be made.

5. Both the Appellant (supported by CPAG) and the Respondent agree that this appeal raises a matter of wide applicability and importance. A decision on a claim for UC will usually be made one month after that claim. By that point in time the effect of section 8(2) of the 1998 Act would mean that a claim covering the one month period prior to the date on which UC claim was made would be needed, if no such claim had already been made and if an explicit (or implicit) claim covering that one month period is required. However, no such 'retrospective' claim could ever be effective in such circumstances as extending that claim by the maximum one-month extension provided for in regulation 26 would only cover the period for which a claim had already been made. In other words, the provisions in regulation 26 are only of significant benefit if they can operate at the time when the claim for UC is first made. This, accordingly, focuses attention on what needs to be claimed (or does not need to be claimed) when the claim for UC is in fact made. We understand that the answer on this issue has resulted in divergent approaches being taken by different First-tier Tribunals. Mrs Justice Farbey, the Chamber President, accordingly directed that the appeal be heard by a three-judge panel as raising a point of law of special difficulty.

6. We held an oral hearing of the appeal at the Rolls Building on 15 and 16 June 2022. We heard argument for the Appellant from Mr Tom Royston of counsel, instructed by CPAG, and for the Respondent from Mr Jack Holborn of counsel, instructed by the Government Legal Department. We are grateful to them for their written and oral submissions just as we are grateful to those sitting behind them, who complied with a tight timetable to get this appeal ready for hearing.

7. Although we have expressed our reasoning differently, with Upper Tribunal Judges Wikeley and Wright joining in one set of reasons and Upper Tribunal Judge Jacobs preferring to express his reasoning somewhat differently, we are all agreed in the result. That result is that the appeal should be allowed. The First-tier Tribunal erred in law in holding that the appellant, when he made his claim for UC, had to identify the period from which he wished to claim UC. The legislation imposes no such requirement. The period for which the UC claim was made was one issue for the Secretary of State's decision maker to decide when deciding the claim. It is an issue the appellant was then able to then raise on the appeal he made against the

Secretary of State's decision on the claim, the appellant having first sought 'mandatory reconsideration of that decision.

8. We will turn shortly to our reasons for so deciding this appeal. However, we first set out the relevant factual and legislative background to the appeal and rehearse in a little more detail the parties' submissions on the appeal.

The background facts and chronology

9. The background facts and the chronology of the Appellant's claim for UC are not in dispute. The Appellant is a young man, born on 16 February 2000, with autism and a severe learning disability. His mother now acts as his Appointee for benefit purposes (although no such appointment for UC purposes had been made as at the date of his UC claim). The parents' entitlement to child tax credit in respect of their son ceased when he reached the age of 20 on 16 February 2020. At that point the Appellant had no independent source of income.

10. On 16 March 2020 the Appellant's father made contact with the DWP to make a claim for UC on his son's behalf. Some basic details were taken and – given the COVID-19 pandemic – the Appellant's father was offered a telephone appointment. This was followed by three further telephone calls to confirm details of the claim. In none of either the original call or the follow-up calls was there any discussion of the start date for the claim. The Appellant's father did not raise the matter and the DWP call-handlers did not inquire about it.

11. On 16 April 2020 a DWP decision-maker awarded the Appellant UC with effect from 16 March 2020, being the date of the initial claim. On 9 July 2020 a decision-maker made a further decision to add the limited capability for work related activity element to the award of benefit (with effect from 16 June 2020, i.e. after the standard 3-month waiting period).

12. On 23 July 2020 the Appellant's mother argued that his UC award should have commenced with effect from 16 February 2020, being the date on which the parents' entitlement to child tax credit ceased (Child Tax Credit Regulations 2002 (SI 2002/2007), regulation 5(1)). This was (by chance) exactly a month before the actual claim for UC had been made. It is also agreed that this was the first time that the claim for UC being extended to an earlier date had been raised as an issue. Mr Holborn advised us that the Secretary of State had accepted that the mother's application was both a request that the decision of 16 April 2020 be reconsidered and a fresh late claim for UC for the earlier period.

13. On 3 August 2020 a DWP decision-maker refused the request that the claim be extended by one month. This was on the basis that the request had been made outside the one-month time limit by which the time for claiming could be extended and, in any event, the request had been made after the claim for UC had been determined. The Appellant's parents challenged this decision on his behalf on 1 September 2020.

14. On 11 November 2020 the Secretary of State carried out a reconsideration decision which resulted in no change. The Appellant then appealed to the First-tier Tribunal.

It was not disputed before us that that appeal involved, inter alia, a valid appeal against the 16 April 2020 decision to (only) award the appellant UC from 16 March 2020. This follows from the Secretary of State's concession that the 23 July 2020 representations made on behalf of the Appellant had been accepted, amongst other things, as a valid request for mandatory reconsideration of her decision of 16 April 2020.

15. On 25 March 2021 the First-tier Tribunal dismissed the Appellant's appeal. It concluded "that the Appellant's claim for Universal Credit cannot be backdated prior to the 16th of March 2020, the date of claim" (statement of reasons at paragraph [1]), essentially accepting the arguments advanced by the Secretary of State in her response to the appeal (which were, in summary, those given on 3 August 2020).

The legislative framework

16. The starting point must be the primary legislation. Regulations made under the primary legislation have to be interpreted, if possible, to bring them within the available enabling powers: *Raymond v Honey* [1983] AC 1. Both parties argued that the relevant enabling power is found in section 1(1)(a) of the Administration Act. This provides as follows:

> **Entitlement to benefit dependent on claim**
>
> **1.—**(1) Except in such cases as may be prescribed, and subject to the following provisions of this section and to section 3 below, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied—
>
> (a) he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations under this Part of this Act; or
>
> (b) he is treated by virtue of such regulations as making a claim for it.

17. The expression "any benefit" in section 1(1) includes UC (see section 1(4)(za), as inserted by the Welfare Reform Act 2012).

18. Although neither party sought to rely on it, we consider that section 5(1) of the Administration Act may be equally important in providing the *vires* for regulation 26 of the UC Regs. Section 5(1)(a) is in very similar terms to section 1(1)(a). Section 5(1) provides, insofar as is relevant, as follows:

> **"5**.-(1) Regulations may provide-
>
> (a) for requiring a claim for benefit to which this section applies to be made by such person, in such manner and within such time as may be prescribed;
>
> (b) for treating such a claim made in such circumstances as may be prescribed as having been made at such date earlier or later than that at which it is made as may be prescribed;

(c) for permitting such a claim to be made, or treated as if made, for a period wholly or partly after the date on which it is made…**"**

UC is also a benefit to which section 5(1) applies – see section 5(2)(za) of the same Act.

19. It was not suggested to us by either party that any other regulation-making powers are relevant on this appeal and that coincides with our own understanding of the relevant statutory provisions. Schedule 1 to the 2013 Regulations states that, amongst other statutory provisions, the powers in sections 1(1) and 5(1)(a),(b) and (c) of the Administration Act were used to make the 2013 Regulations. A regulation may be authorised by more than one enabling power: see *Payabi v Armstel Shipping Corporation* [1992] QB 907 at 924 and *Stafford and Banks v Chief Adjudication Officer* [2001] UKHL 33; [2011] 1 WLR 1411 at paragraph [43]. Given this, the focus of the parties' arguments before us and the similarities in the language used in sections 1(1)(a) and 5(1)(a) of the Administration Act, we consider we need go no further in identifying the *vires* for regulation 26 than concluding that it is one, or both, of sections 1(1)(a) and 5(1)(a) of the Administration Act.

20. It may be that section 1 is concerned, as its heading would suggest, with ensuring that entitlement to benefit is dependent on claim being made for that benefit (thus continuing the legislative reversal of the House of Lords' decision in *Insurance Officer v McCaffrey* [1984] 1 WLR 1353), whereas section 5's focus, as its heading would suggest, is on the providing the enabling powers for regulations to be made governing claims for and payments of benefit. It would certainly appear to be the case that the *vires* for regulation 36 of the 2013 Regulations is only found in section 5(1)(c) of the Administration Act.

21. The central requirement in both sections 1(1)(a) and 5(1)(a) is that a claim for any benefit, and so a claim for UC, must be made "in the [or such] manner, and within the [or such] time, [as may be] prescribed" in regulations.

22. As to "the manner … prescribed" for the purpose of claiming UC, regulation 8 of the 2013 Regulations requires claims to be made on-line, albeit in exceptional cases (as in the instant case) the Secretary of State may permit a claim to be made by telephone (see further *GDC v Secretary of State for Work and Pensions* [2020] UKUT 108 (AAC); [2020] AACR 24). Regulation 10 of the 2013 Regs then provides that where an online claim for UC is made, "the date on which the claim is made is the date on which the claim is received at an appropriate office": per regulation 10(1)(a).

23. The prescribed basis for a claim for UC being made "within the [or such] time [as may be] prescribed" is found in regulation 26 of the 2013 Regulations. This provides (as amended, and omitting paragraphs (4) and (5) which are immaterial for present purposes):

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;

[...]

(f) where—

(i) the Secretary of State decides not to award universal credit to members of a couple jointly because one of the couple does not meet the basic condition in section 4(1)(e) of the 2012 Act;

(ii) they cease to be a couple; and

(iii) the person who did meet the basic condition in section 4(1)(e) makes a further claim as a single person;

(g) where—

(i) an award of universal credit to joint claimants has been terminated because one of the couple does not meet the basic condition in section 4(1)(e) of the 2012 Act;

(ii) they cease to be a couple; and

(iii) the person who did meet the basic condition in section 4(1)(e) makes a further claim as a single person.

24. The present appeal essentially concerns an exercise in statutory construction as to the meaning and inter-relationship of regulation 26(1) and (2) in the light of sections 1(1)(a) and 5(1)(a) of the Administration Act.

25. However, that exercise in statutory construction also has to take account of section 8 of the 1998 Act. This is the statutory provision which imposes the obligation on the Secretary of State to decide the claim for any relevant benefit (including UC). Section 8 provides, insofar as is relevant, as follows:

> "8.-(1) Subject to the provisions of this Chapter, it shall be for the Secretary of State-
>
> (a) to decide any claim for a relevant benefit;…..
>
> (2) Where at any time a claim a claim for a relevant benefit is decided by the Secretary of State-
>
> (a) the claim shall not be regarded as subsisting after that time; and
>
> (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time…"
>
> (Section 8(3)(aa) of the 1998 Act provides that the above provisions in section 8 apply to UC.)

26. There are two other provisions of the 2013 Regulations which we should mention.

27. Regulation 30 provides:

> **Amendment of claim**
>
> **30.—**(1) A person who has made a claim for benefit may amend it at any time before a determination has been made on the claim by notice in writing received at an appropriate office, by telephone call to a telephone number specified by the Secretary of State or in such other manner as the Secretary of State may decide or accept.
>
> (2) Any claim amended in accordance with paragraph (1) may be treated as if it had been so amended in the first instance.

28. Regulation 36(1) further provides:

Duration of awards

36.—(1) A claim for universal credit is to be treated as made for an indefinite period and any award of universal credit on that claim is to be made for an indefinite period.

The parties' principal submissions on the appeal

29. Mr Royston, for the Appellant, set out three headline submissions.

30. First, Mr Royston's primary submission, as outlined above, was that there is no requirement, on making a UC claim, to indicate the date from which the claimant wants an award to begin. Rather, he contended, the start date of any entitlement to UC is a question of fact for the decision-maker to determine when making their decision on the claim (in much the same way as any other issue of fact has to be determined, e.g. whether the claimant is in Great Britain and the amount of any income they may have). As such it is simply one of the building blocks of the Secretary of State's decision on the claim under section 8 of the 1998 Act, subject to the possibility of revision (section 9) or appeal (section 12). In short, all the claimant needs to say is "I claim UC"; there is no warrant for requiring the claimant to specify "I claim UC from such-and-such a date", as there is no statutory authority for any such requirement.

31. Secondly, and in the alternative, and if there is indeed a requirement to specify a start date when making a claim for UC, then Mr Royston argued that a claimant should be taken as applying for the maximum possible entitlement to benefit and so that date is to be taken to be one month before the date of claim. This was principally because there was no way for claimants to indicate, when making an on-line claim, when they wanted an award to begin (or to supply evidence as to how the criteria in regulation 26(2) and (3) of the 2013 Regulations were met). It is fair to say Mr Royston's submissions in this regard developed in the course of oral argument. Mr Royston later reframed this submission in terms of a rebuttable presumption that the claim covers the one month period before the date of claim.

32. Thirdly, and in the further alternative, and if the start date for a UC claim must be identified on a case-by-case basis, Mr Royston contended that in the circumstances of the Appellant's case the Secretary of State in any event possessed sufficient information about the facts to determine that the claim was intended to be made in respect of a period commencing one month before the date of claim.

33. Mr Holborn, for the Secretary of State, resisted the appeal. His core submission was that a claim for UC is not automatically in respect of all entitlement, both retrospective and prospective. Section 1(1) of the Administration Act, in effect, prevents entitlement to UC without a claim being made in the prescribed manner and so entitlement to UC is not automatic. Further, regulation 26(1) of the 2013 Regulations states the general rule in respect of time by reference to "the first day of the period in respect of which the claim is made". The clear import of this rule is that the period for which a claim for benefit is made must be specified (either expressly or by implication). As such, identifying "the first day of the period" for the purposes of regulation 26(1) is an essential element of the claim. Identifying such

a date is also an essential element of the exception under regulation 26(2), as otherwise there would be no benchmark against which to "extend the time for claiming it".

34. Mr Holborn further submitted that the analysis he advocated was the only logical approach to the construction of regulation 26. If a claim were to be automatically made in respect of all potential entitlements there would be considerable consequences in terms of the investigations decision-makers would have to carry out in order to explore the full extent of claimants' potential awards. In addition, construing an automatic entitlement would be inconsistent with the clear intention of the Administration Act that the burden was on claimants to claim benefits. Moreover, an examination of the various formulations of the relevant provisions in the 1981 Regulations, the 1987 Regulations and now the 2013 Regulations revealed only minor structural and terminological differences. As such the decision of the Tribunal of Commissioners in *R(SB) 9/84* – in essence that a claim for supplementary benefit was made for the present and for the future but not for a past period – remained good authority under the UC regime and in particular regulation 26.

The rules in their historical context

35. Mr Holborn thus invited us to apply the decision of the Tribunal of Commissioners in the reported decision *R(SB) 9/84* whilst Mr Royston submitted that we did not need to follow it. Here we simply chart the changes in the secondary legislation and their interpretation in the associated Commissioners' case law. We return later to consider the significance of *R(SB) 9/84* in the context of the present appeal.

36. The Tribunal of Commissioners was concerned with the construction of regulation 5 of the 1981 Regulations. So far as is material, this provided as follows:

> **Time for claiming pension or allowance**
>
> **5.—**(1) Subject to paragraph (2), a claim for a pension or allowance shall be made no later than the first day of the period in respect of which it is made.
>
> (2) Where a claim for a pension or allowance is made in respect of a period earlier than the day on which it is made, it shall be treated as if it had been made—
>
> (a) where in any case the claimant proves that throughout that period there was good cause for failure to make the claim before the day on which it was made, on the first day of that period.

37. According to the headnote of *R(SB) 9/84*, "it is not incumbent upon the supplementary benefit officer to investigate the possibility of a retrospective award in all cases, but only in cases where the claim specifically states that it is made in respect of an earlier period or the question of backdating is raised by or on behalf of the claimant before the supplementary benefit officer determines the claim". The Tribunal of Commissioners explained its reasoning as follows (with underlining as in the original text):

11. (2) *Does the claim as presented require to be expressly made for a prior period?*

    It was pointed out by the Commissioner in case CSB/150/82, paragraph 12, (to be reported as R(SB) 56/83) that no specific provision is made in supplementary benefit claim forms for a claimant to state the starting date of his claim so as to make it clear if in any case a claim is intended to be retrospective as well as prospective. In paragraph 13 of that decision the Commissioner appears to suggest that it will suffice for a claimant merely to claim supplementary benefit and that the onus will then be upon the supplementary benefit officer in investigating the claim to consider whether a retrospective award may be appropriate. If that is the Commissioner's view we disagree with it. In our opinion it is necessary to give some content to the words in regulation 5(2) of the Claims and Payments Regulations: "Where a claim . . . is made in respect of a period earlier than the day on which it is made,". That requirement will obviously be satisfied if the claim as presented specifically states that it is made in respect of an earlier period. In our opinion however it will suffice to meet that requirement if in connection with the investigation of a claim the issue of back-dating is raised by or on behalf of the claimant before the supplementary benefit officer makes his determination upon the claim. In the assessment of entitlement to supplementary benefit upon a comparison of a claimant's requirements and resources the emphasis of the statutory provisions is in our opinion upon the present and the future rather than the past. For this reason, as well as the specific words of regulation 5(2) referred to above, we consider that the investigation of a possible retrospective award cannot be regarded as forming part of the enquiry incumbent in all cases upon a benefit officer in dealing with a claim in the same way as does the consideration of a claimant's possible entitlement to various additional requirements which may be appropriate in the assessment of his weekly entitlement.

38. Supplementary benefit was replaced by income support with effect from April 1988. As part of this process, the 1981 Regulations were superseded (not using that term in its technical sense) by the 1987 Regulations. As originally enacted, regulation 19 of those regulations provided:

    Time for claiming benefit

    19.—(1) Subject to the provisions of Schedule 5 the prescribed time for claiming any benefit specified in column (1) of Schedule 4 shall be the appropriate time specified opposite that benefit in column (2) of that Schedule.

    (2) Where the claimant proves that there was good cause, throughout the period from the expiry of the prescribed time for making the claim, for the failure to claim a benefit specified in column (1) of Schedule 4 before the date on which the claim was made the prescribed time shall, subject to section 165A of the Social Security Act 1975 (12 months limit on entitlement before the date of claim) and paragraphs (4) and (5), be extended to the date on which the claim is made.

39. Paragraph 6 of Schedule 4 to the 1987 Regulations further specified that the time for claiming income support was “The first day of the period in respect of which the claim is made”.

40. The construction of regulation 19 of the 1987 Regulations was considered by Mr Commissioner Mesher in unreported case *CIS/371/1993* at paragraph 14:

> … In 1991, section 165A(l) of the Social Security Act 1975 provided that "no person shall be entitled to any benefit unless in addition to any other conditions relating to that benefit being satisfied . . . he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations" under the Social Security Act 1966. Regulation 19(1) of the Social Security (Claims and Payments) Regulations 1987 ("the Claims and Payments Regulations") provides that the prescribed time for claiming any benefit is that specified in Schedule 4. Paragraph 6 of Schedule 4 to the Regulations prescribes the time for claiming income support as the "first day of the period in respect of which the claim is made". Thus in order to decide whether a claim is made within the prescribed time so as to satisfy section 165A(1) one must determine the period in respect of which the claim was made. A claim form for income support, as completed, by the claimant and signed on 6 April 1991, does not contain any specific provision for a claimant to state the date from which he wishes to claim benefit. In paragraph 11 of R(SB) 9/84 the Tribunal of Commissioners made the same observation about a supplementary benefit claim form and held that such a claim was made for a period earlier than the day on which it was made only if it specifically stated that it was made for such a period or if the issue of backdating was raised by or on behalf of the claimant before a determination was made on the claim. Although that conclusion was partly based on the wording of the Supplementary Benefit (Claims and Payments) Regulations 1980, which is not reproduced in the current regulations, it was also based on the fact that the emphasis of the statutory provisions on the assessment of entitlement to supplementary benefit upon a comparison of requirements and resources was on the present and the future rather than the past. That factor applies equally to the statutory provisions on income support. I consider that a claim for income support can only be regarded as made for a period earlier than the date on which it is made on the same basis. …

41. Mr Commissioner Mesher accordingly carried forward and applied the principles of *R(SB) 9/84*, relating to claims for supplementary benefit, to the provisions governing claims for income support under the 1987 Regulations. However, the contrary view was expressed by Mr Commissioner Howell QC in another unreported decision, *CIS/14082/96*:

> 13…In my judgment, a claim made in general terms (“This is my claim for income support” page 27) under regulations drawing no distinction between prospective and retrospective claims, is to be taken as a claim for all the benefit to which the claimant is by law entitled, including where the circumstances indicate and justify it, a retrospective award for any period within that for which the prescribed time for claiming may be extended cf R(SB) 56/83 para 13. The claims and payments regulations cited above which apply to this claim for income support contain nothing to suggest that backdated benefit should be the

subject of a specific separate claim, unlike the Housing Benefit (General) Regulations 1987 SI No 1971 in point in *R v Housing Benefit Review Board* (unrep, CA. 22 July 1996) under which the Court of Appeal accepted that a normal claim was prospective only, and also unlike those formerly applying to supplementary benefit, which caused a tribunal of Commissioners to make a qualification on what was said in R(SB) 56/83, in case R(SB) 9/84 para 11.

42. We were taken to other decisions of single commissioners but none of them advanced the analyses of Commissioners Mesher or Howell any further.

The reasons of Judges Wikeley and Wright for allowing the appeal

43. We address first the proper construction of sections 1 and 5 of the Administration Act and regulation 26 of the 2013 Regulations respectively.

The proper construction of sections 1 and 5 of the Administration Act

44. Mr Royston submitted that there is no requirement in the primary legislation governing entitlement to UC for a claimant to specify the start date of any award in their claim. We agree with that proposition.

45. The Welfare Reform Act 2012 lays down the substantive conditions of entitlement to UC. It makes no mention of claims other than to stipulate that a claim can only be made either by a single person or by a couple (section 2).

46. So far as procedural matters are concerned, section 1(1) of the Administration Act, as we have already seen, stipulates that entitlement is dependent upon the person making a claim "in the manner and within the time prescribed". Neither of these qualifiers seeks to prescribe the contents of the claim for benefit itself. The "manner … prescribed" relates to the format of the claim (here electronic or telephonic). The requirement that the claim is made "within the time prescribed" is an objective test which focuses on the date the claim is made by reference to the relevant time limits. It does not contain any prescription requiring the claimant to identify the date from which entitlement is sought. The regulation-making power in section 5(1)(a) of the Administration Act takes one no further forward. It simply enables regulations to be made requiring a claim for benefit "to be made…. in such manner and within such time as may be prescribed". Likewise, this provides no statutory cover for any requirement governing the *contents* of a claim. Furthermore, the definition of "claim" in section 191 of the Administration Act (which is construed by reference to the definition of "claimant") does not require that a claim is made in respect of a period.

47. It follows that the primary legislation, and in particular sections 1 and 5 of the Administration Act, does not impose any requirement that a claim for UC should specify a point in time from which an award of benefit is being sought. It necessarily follows – subject to any such requirement lawfully being imposed by way of secondary legislation (and that secondary legislation cannot be cast in wider terms than the enabling provisions allow) – that the date from which entitlement to UC is sought is a determination made in the course of deciding the claim, rather than a constitutive part of the claim itself. As Mr Royston put it in the course of oral argument, statute does not impose a requirement to make the period of a UC claim

a "primordial part of the statutory concept of a claim". Accordingly, the start date is simply one matter amongst many others for the Secretary of State's decision-maker to determine when making a decision on a claim under section 8 of the 1998 Act.

The proper construction of regulation 26 of the 2013 Regulations

48. Mr Royston further submitted that there is no requirement in the secondary legislation governing entitlement to UC for a claimant to specify the start date of any award in their claim. We agree with that proposition too.

49. In this context the proper construction of regulation 26(1) and (2) of the 2013 Regulations is undoubtedly central to the resolution of this appeal. Given their importance, we remind ourselves here of the terms of those provisions:

> **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.

50. Mr Holborn's core submission was that it was the "clear implication" of regulation 26(1) that the period for which a claim for UC is made must be specified by the claimant (whether expressly or by implication). He contended that this followed from the requirement to identify "the first day of the period in respect of which the claim is made". Accordingly, he argued, identifying "the first day of the period" was an essential element of the claim under the general rule in regulation 26(1).

51. We disagree with that approach for three main reasons.

52. The first is that regulation 26 is concerned, as the heading states, with the "Time within which a claim for universal credit is to be made". It is not concerned with the contents of a claim for UC.

53. The second is that while regulation 26(1) plainly assumes that the Secretary of State's decision-maker must at some point establish "the period in respect of which the claim is made", that does not create a requirement that the claim must itself

have intended or identified any period. As Mr Royston submitted, the terms of regulation 26 are entirely consistent, both conceptually and practically, with the relevant "period" being identified by the decision-maker in the course of determining the claim.

54. The third is that, as noted above, there is no primary legislation that we can identify that empowers the prescription of such a requirement. A stipulation to specify the start date for a UC claim is neither a requirement to make a claim in a prescribed manner nor to make a claim within a prescribed time. Rather, it is a requirement about the contents of a claim, a matter which is not addressed by sections 1 or 5 of the Administration Act.

55. We also observe that the drafting of the statutory language in regulation 26 is less than pellucid. As Mr Holborn readily and frankly acknowledged, his reading of the provision only works if the past tense of the verb "make" is used in two quite different senses in regulation 26(1). He contended that the first "made" (as in "a claim for universal credit must be made…") is used in the sense of the physical act of submitting a claim for UC. In contrast, on his reading, the second "made" (as in "… on the first day of the period in respect of which the claim is made") is used in the sense of marking the date from which entitlement of any UC award is sought. We see no reason why "made" is not used in both instances in its primary meaning (in the claims context) of "submitted".

56. The above construction of regulation 26(1) makes sense both within the terms of the relevant enabling provisions but also when read together with regulation 26(2). On our construction, whether the claim was "made on the first day of the period in respect of which the claim is made" becomes an objective question for the decision maker to answer in order to determine whether the opening words of regulation 26(2) apply. It is only if the claim is *not* made within the time specified in regulation 26(1) that the requirement imposed on the Secretary of State to extend the time for claiming UC (if the conditions in regulation 26(2)(a) and (b) are satisfied) arises. We find it difficult to make sense of regulation 26(1) and the opening clause of regulation 26(2) requiring an explicit (or obviously implicit) claim to be made for the one month period prior to the actual date of claim where (a) by definition that one month period will already have passed by the time the claim for UC is actually made, and (b) the language of regulation 26(1) and (2) is couched in terms when the claim "is" made. The language of regulation 26 certainly does not provide the "clear implication" for which the Secretary of State contends.

57. It follows that legislation has not made it a requirement of a UC claim that the claim itself specifies a date from which entitlement is sought. It follows, as a matter of statutory construction, that identifying the date from which entitlement is sought is a determination to be made by the Secretary of State in the course of deciding the claim rather than a constitutive part of the claim itself. We now consider whether the case law leads us to a different conclusion.

Does *R(SB) 9/84* point to a different conclusion?

58. *R(SB) 9/84* is a decision of a Tribunal of three Social Security Commissioners. As such it is the equivalent of a decision of a three-judge panel of the Upper Tribunal

in the post-Tribunals, Courts and Enforcement Act 2007 world. Under the doctrine of precedent that applies in this Chamber of the Upper Tribunal a three-judge panel will generally follow the decision of another three-judge panel or of a Tribunal of Commissioners unless satisfied that the decision in question was wrong (see reported decision *R(U) 4/88* at paragraphs 5-17).

59. As noted above, the Tribunal of Commissioners in *R(SB) 9/84* held that a claim for supplementary benefit was concerned with the claimant's present and prospective (rather than retrospective) entitlement: "In the assessment of entitlement to supplementary benefit upon a comparison of a claimant's requirements and resources the emphasis of the statutory provisions is in our opinion upon the present and the future rather than the past" (at paragraph 11).

60. In summary, Mr Holborn submitted that the reformulations in the statutory language between regulation 5 of the 1981 Regulations (in issue in *R(SB) 9/84*) and regulation 26 of the 2013 Regulations (in issue in the present appeal) are not material. The constant thread has been a general rule in paragraph (1) followed by an exception in paragraph (2). Any changes in the wording, he said, simply reflected the different frameworks of the various benefits schemes and did not point to any change in substance. As such, he argued, in construing regulation 26 of the 2013 Regulations we should follow the same approach as the Tribunal of Commissioners had adopted in *R(SB) 9/84* to regulation 5 of the 1981 Regulations.

61. Self-evidently *R(SB) 9/84* is not a direct authority on how to construe the UC scheme. Mr Holborn's submission can only proceed by way of analogy. We conclude that this proposed analogy does not hold good. Rather, we accept Mr Royston's submission that there are important contextual differences between the supplementary benefit scheme on the one hand and the UC regime on the other.

62. The first, and in our judgment the most important, difference is that the draughtsperson has used different language in regulation 26(1) and (2) of the 2013 Regulations when compared with regulation 5(1) and (2) of the 1981 Regulations. The draughtsperson can be taken to have known about the different language used in regulation 5(1) and (2) and what it had been construed as meaning in *R(SB)9/84* but did not adopt the same language in regulation 26(1) and (2). Had the draughtsperson intended to obtain the same result in regulation 26 of the 2013 Regulations as had been held to obtain in regulation 5 of the 1981 Regulations, we cannot see why they could not have adopted the clearer language that had been used previously. And, for the reasons we have already given, the language of regulation 26(1) and (2) of, the 2013 Regulations is not clearly to the effect for which the Secretary of State contends.

63. The second difference, which may just be a subset of our first point, is that regulation 5(2) of the 1981 Regulations contemplated a separate and a wholly retrospective claim, whereas regulation 26(1) and (2) of the 2013 Regulations envisage only a single claim that can encompass both past and future entitlement.

64. The third difference is that entitlement to supplementary benefit accrued on a daily basis going forward, whereas a claimant's entitlement to UC is necessarily assessed retrospectively. The UC scheme is structured such that a claimant's

entitlement to benefit for the first assessment period (in other words, the first month) can only be calculated at the end of that month. In that important sense the UC scheme is always backwards-looking, in contrast to the focus on the present and prospective entitlements inherent in the supplementary benefit system.

65. The fourth difference is that the supplementary benefit scheme included much more generous arrangements for potentially backdating entitlement to benefit. The scheme provided for entitlement to be backdated for a period of up to a year, subject only to a requirement of showing "good cause", a term which was left undefined by legislation. As a result, if an award of supplementary benefit was effective only from the date of claim, there was ample scope in appropriate cases to make a second retrospective claim for a potentially extensive past period. In contrast, the UC scheme is much more restrictive. In what Mr Royston described as "a rather neat irony", the combined effect of the fact that UC entitlement decisions are not made until (at least) one month after the date of claim taken with the one-month backdating limit means that for all practical purposes there is no scope to make a backdating request once the entitlement decision has been made (see regulation 30 of the 2013 Regulations). In addition, the open-textured terminology of "good cause" has been replaced by a series of narrowly defined exceptions (see regulation 26(3)).

66. The fifth difference relates to important changes in the decision-making structures for social security benefits. Under the arrangements in place at the time of the supplementary benefit system, backdating was in one sense more difficult. If a person had filled in a claim form and it was reasonable to draw the inference that the claim was made from the date of claim only, then an error of law on the part of the adjudication officer had to be identified in order to permit review of that decision (see unreported Commissioner's decision *CIS/7621/1999* at paragraphs 14-16). That particular complication has been swept away under the changes instigated by the 1998 Act. The power to revise is no longer hamstrung by such a technicality.

67. The combined and cumulative effect of these factors is such that we do not consider it safe to apply the same approach as the Tribunal of Commissioners laid down in *R(SB) 9/84* to the circumstances of the present case. In addition, there is nothing in *R(SB) 9/84* that addresses the problem of the absence of any enabling power in the Administration Act to require the start date for entitlement to benefit to be specified in a UC claim.

68. For completeness we should also deal briefly with the second plank of Mr Royston's submission that we should not follow the approach laid down in *R(SB) 9/84* in the UC context. Mr Royston further submitted that *R(SB) 9/84* was inconsistent with later and higher authority in the form of *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372 and *Novitskaya v Brent LBC* [2009] EWCA Civ 1260; [2010] AACR 6 and so on that basis should not be followed. We were not persuaded by this secondary submission. The principles laid down in *Kerr* were already "well established in Commissioners' jurisprudence" (*R(H) 3/05* at paragraph 79) and in any event, and on its facts, *Kerr* concerned information that was outwith the claimant's knowledge. Moreover, the principles in *Novitskaya* may assist on what is meant by a defective claim but have little if any purchase in the context of

the UC regime more generally: see *GDC v Secretary of State for Work and Pensions* [2020] UKUT 108 (AAC); [2020] AACR 24 at paragraphs 56-65.

The relevance of the Secretary of State's system for claiming Universal Credit

69. It is not in dispute that the standard on-line UC claim form does not include any question asking applicants about the date from which they want any award of benefit to commence. It is equally true that there is no free text box on the claim form with an open invitation to add 'anything else that you may wish to tell us'. As Mr Royston put it in oral argument, a claimant cannot scribble a request for backdating on the edge of an on-line claim form in the same way as could be done on a paper form. We agree, however, with Mr Holborn that as a matter of principle the meaning of the relevant statutory provisions cannot be altered by virtue of the administrative steps the Secretary of State takes to implement those provisions.

Conclusion

70. For these reasons, the appeal is allowed and the decision of the First-tier Tribunal dated 25 March 2021 is set aside. The First-tier Tribunal erred in law in holding that the "Appellant's claim for Universal Credit cannot be backdated (sic) prior to the 16th of March 2020, the date of claim" because "the request to backdate it had been made after the claim had been determined and [because] the period in dispute was made outside the one-month absolute time-period". The error of law was to hold that the appellant as a matter of law had to make a claim in which he identified the period from which he wished to claim UC. For the reasons we have given, the legislation imposed no such requirement.

71. The period for which the UC claim was made was an objective matter to be determined on the evidence by the Secretary of State's decision maker when deciding the claim under section 8(1) of the 1998 Act. In this case, although the decision-making was not laid out with any great clarity in the appeal papers, the decision of 16 April 2020 that the Appellant was entitled to UC from 16 March 2020 included a decision that the Appellant was not entitled to UC from 16 February 2020 because he did not satisfy the two parts of regulation 26(2) of the 2013 Regulations. That may have been the appropriate decision to be made at the time on the basis of the evidence the Secretary of State's decision maker had before them on 16 April 2020. As we have already noted, it is not for us in our appellate jurisdiction to pass judgment on what evidence *ought* to have been before the decision maker on or with the UC claim. That is matter for the Secretary of State. However, given what we have said earlier in this paragraph about the scope of the decision on the claim, it will open to claimants, as the appellant did in this case, to appeal the UC entitlement decision and raise as an issue on the appeal whether they satisfied the terms of regulation 26(2) of the 2013 Regulations.

72. The First-tier Tribunal in this case failed to decide whether the conditions in regulation 26(2) and any of the circumstances in regulation 26(3) of the 2013 Regulations were satisfied. That issue is remitted to a new First-tier Tribunal to be decided.

73. The Appellant's success on this appeal to the Upper Tribunal on error of law says nothing one way or the other about whether his appeal will succeed on the facts before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law as set out above and once it has properly considered all the relevant evidence.

The reasons of Judge Jacobs for allowing the appeal

74. I agree with my colleagues' conclusion and with what that means for the scope of an appeal to the First-tier Tribunal. I have been concerned – perhaps too concerned – to understand how regulation 26 operates, in order to ensure that the conclusion we have reached is consistent with the context of related provisions and properly authorised by enabling powers, either individually or in combination: *Payabi v Armstel Shipping Corporation* [1992] QB 907 at 924 and *Banks v Chief Adjudication Officer* [2001] 1 WLR 1411 at [43]. The regulation must be interpreted if possible to bring them within the available enabling powers: *Raymond v Honey* [1983] AC 1 at 12-13.

75. I begin with the way that regulation 26 has to be applied by the decision-maker and then come to how it has to be applied by the First-tier Tribunal on appeal. For convenience I use 'the relevant period' to refer to the period in respect of which the claim is made.

A. Regulation 26 before the decision-maker

76. The decision-maker has to identify the period in respect of which the claim is made for the purposes of regulation 26 in order: (a) to decide whether the claim was made on the first day of the relevant period; and (b) if it was not, to decide whether to extend the time for claiming. As I see it, this is a partly a matter of law and partly the result of the decision-maker's analysis, with a contribution from the claimant. How does the decision-maker identify the relevant period?

When entitlement begins on the date of claim

77. The process begins with a claim. Regulation 8 provides for how it must be made and regulation 10 governs the date of claim. The date of claim provides the default start date for the claimant's entitlement, because regulation 26(1) provides that the claim must be made on the first day of the relevant period.

78. Regulation 36 (authorised by section 5(1)(c) of the Administration Act) provides that the claim is for an indefinite period.

79. Put the date of claim and regulation 36 together and you have a period. And the claim is made on the first day of that period. I see regulations 26(1) and 36 as operating in conjunction and as authorised by a combination of section 5(1)(a) and (c). Regulation 36 (authorised by 5(1)(c)) operates at the moment the claim is made and provides a period, and regulation 26(1) operates in relation to that period by fixing the time to claim as the first day of that period. This may appear circular, but it is not. The regulations do not operate sequentially, rather they operate simultaneously by virtue of the combined effect of different enabling powers. That

is why I have emphasised that regulations do not have to be authorised by a single enabling power.

80. That is how the legislation works for cases in which no question of entitlement before the date of claim arises. The relevant period is fixed in part by the claimant and in part by operation of law. The period is indefinite, because that is what regulation 36 provides. The start date is the date of claim, which is largely under the claimant's control. I say 'largely' because regulation 10 does not leave the matter entirely to the claimant.

When entitlement begins after the date of claim

81. It is possible for the decision-maker to decide that entitlement begins only after the date of claim but before the date of decision. This does not affect the analysis. The relevant period does not change, but the decision-maker is able to award from a later date in the period. This is a result of the claim subsisting until it is decided. That was decided in *R(S) 1/83* at [10] and is assumed by section 8(2)(a) of the 1998 Act.

When entitlement begins before the date of claim

82. Suppose now that, somehow or other, the claimant makes known to the decision-maker that they would like to claim from an earlier date.

83. It is tempting to say that, by specifying the date, the claimant has fixed the start of the relevant period. That was, at least at one stage, Mr Royston's argument. And it works, but only so long as the decision-maker accepts that regulation 26(2) is satisfied from the date requested. The decision-maker decides that entitlement can begin on the date requested. That becomes the first date of entitlement and therefore the first date of the relevant period.

84. It is the decision-maker's decision that has this effect, not the claimant's request, application, claim or any other word you choose to use. The result of the decision-maker deciding that entitlement begins earlier than the date of claim is that the claim was not made on the first day of the relevant period. And by virtue of regulation 26(2) that triggers the duty to extend the period for claiming. And the effect of that is that section 1(1)(a) of the Administration Act is satisfied.

85. The period for claiming is extended by virtue of the decision-maker's decision. It is not the direct effect of a request for entitlement to begin earlier. Nor is it a direct effect of the decision that regulation 26(2) is satisfied. There must be a decision to extend the period.

86. So far so good for Mr Royston's argument. But suppose now that the decision-maker decides that regulation 26(2) is not satisfied. If Mr Royston's analysis is correct, it makes matters worse for the claimant, much worse. The claimant identified the start of the relevant period, but the decision-maker has decided that entitlement can only begin on the date of claim. That means that the claimant did not make their claim on the first day of the relevant period. The result is that regulation 26(1) is not satisfied and that there has been no valid claim as required

by section 1(1)(a). There is no way of escaping that conclusion, which is surely not a sensible result for the regulations to produce. It is not possible to use the *R(S) 1/83* analysis. That depends on there being a claim, whereas in this scenario there is no claim.

87. However, that problem does not arise on my approach under which the relevant period is fixed by the decision-maker largely as a matter of operation of law. As the decision-maker has decided that entitlement begins from the date of claim, the case is no different from one in which no issue of earlier entitlement arises. Regulation 26(2) is satisfied, as is section 1(1)(a).

Advance claims and awards

88. The provision for advance claims and awards supports this analysis.

89. Regulation 32 provides for the possibility that a claimant is not entitled at the date when the decision was made, but will qualify after that date if circumstances do not change. A claim ceases to subsist when it is decided under section 8(2)(a) of the Social Security Act 1998. So the decision-maker cannot make an award on that claim that begins at a later date. Regulation 32 overcomes this by providing for the decision-maker to treat the claim as made on the first day of the period from which the claimant becomes entitled. This is authorised by section 5(1)(b) of the Administration Act. It also has the effect of satisfying regulation 26(1).

90. There are two lessons to learn from regulation 32.

- First, the period is fixed by operation of law. Regulation 32 specifies the time from which the claim is made, thereby fixing the start of the relevant period, and regulation 36 provides that it is for an indefinite period.

- Second, the date of claim is changed to make it the first day of the period. That is authorised by section 5(1)(b), which also authorises regulations that treat the claim as made on an earlier date. Now that could have been used to deal with claims for entitlement before the date of claim and that would be backdating. But that is not the technique that is used in regulation 26(2). The contrast with regulation 32 highlights the points.

The monthly pattern of awards

91. Mr Holborn argued that allowing a tribunal to change the first date of entitlement because that would disrupt the monthly pattern of assessment periods. Mr Royston pointed out that that problem is overcome by regulation 21A of the 2013 Regulations.

B. Regulation 26 before the First-tier Tribunal

92. If the decision-maker makes an award of UC, the decision will consist of three elements: the benefit, the rate and the period. If the decision-maker refused the claim, the decision will consist of the two elements: the benefit and the start of the period from which the refusal operates.

93. The claimant will be able to challenge any of those elements. As with any other issue, the claimant is entitled to introduce evidence that was not before the decision-maker, raise new issues, and present new arguments. This allows the First-tier Tribunal to substitute its decision for that of the decision-maker, which may involve changing any of the elements in the decision under appeal.

UPPER TRIBUNAL JUDGE JACOBS

UPPER TRIBUNAL JUDGE WIKELEY

UPPER TRIBUNAL JUDGE WRIGHT

(Approved for issue on 1st September 2022)