



**Secretary of State for Work and Pensions v AH (UC)
[2023] UKUT 274 (AAC)**

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2023-000283-UHC

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

Between:

Secretary of State for Work and Pensions

Appellant

- v -

A.H.

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 9 November 2023

Decided on consideration of the papers

Representation:

Appellant: Ms Amy Mannion of Counsel, instructed by the Government Legal Department

Respondent: In person and with no representation

DECISION

The decision of the Upper Tribunal is to allow the Secretary of State's appeal.

The decision of the First-tier Tribunal made on 3 August 2022 under number SC285/22/00888 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 re-make the decision as follows:

The claimant's appeal is refused.

The decision made by the Secretary of State on 20 September 2021 is confirmed.

The claimant is not entitled to the housing costs element of Universal Credit from the start of his claim on 17 August 2021 and throughout the time he was remanded in custody.

REASONS FOR DECISION

The issue that arises on this appeal to the Upper Tribunal

1. The issue that arises on this appeal by the Secretary of State may be framed in the following terms:

Where an individual applies for Universal Credit (UC), but before the end of their first assessment period (AP) becomes a prisoner (in circumstances where they have not been sentenced to a term in custody that is expected to extend beyond six months), are they entitled to UC?

2. The Secretary of State's position is that an individual in such circumstances is not entitled to UC (and in particular the housing costs element).
3. In short, I agree. It follows I must allow the Secretary of State's appeal against the decision of the First-tier Tribunal, which had (wrongly) decided that a claimant in such a case was entitled to UC.

Some preliminaries

4. In this decision, and so as to avoid the potential for confusion, I refer to the Appellant as "the Secretary of State" and the Respondent as "the claimant".
5. It is unfortunate that the claimant has taken no part in these proceedings, despite the efforts of the Upper Tribunal. Earlier case management directions suggested that he could contact his local law centre (whose contact details were provided). The appeal bundle was also re-sent to his new address when that became known. However, the claimant has not taken up the opportunity to make any representations in these proceedings. I recognise that he may have seen little point in engaging with the further appeals process as he has already lost the tenancy of the property concerned due to the non-payment of UC.

The chronology of this case

6. On 17 August 2021 the claimant applied for Universal Credit.
7. On 11 September 2021 the claimant was remanded in custody.
8. On 20 September 2021 one of the Secretary of State's decision-makers decided that the claimant was not entitled to the housing costs element of UC as from 17 August 2021 because he was in prison.
9. On 26 January 2022 the claimant was released from prison.
10. On 2 February 2022 the claimant, who by now was facing repossession proceedings brought by his social housing landlord, applied for the decision of 20 September 2021 to be reconsidered.
11. On 5 May 2022 a decision-maker confirmed the decision of 20 September 2021 on mandatory reconsideration.
12. On 13 May 2022 the claimant lodged an appeal against the decision of 20 September 2021.

Regulation 19 of the Universal Credit Regulations 2013

13. Central to the outcome of this case is regulation 19 of the Universal Credit Regulations 2013 (SI 2013/376; “the UC Regulations 2013”). As amended, this provides as follows:

Restrictions on entitlement – prisoners etc.

19.—(1) Entitlement to universal credit does not arise where a person is—

- (a) a member of a religious order who is fully maintained by their order;
- (b) a prisoner; or
- (c) serving a sentence of imprisonment detained in hospital.

(2) Paragraph (1)(b) does not apply during the first 6 months when the person is a prisoner where—

- (a) the person was entitled to universal credit as a single person immediately before becoming a prisoner, and the calculation of their award included an amount for the housing costs element; and
- (b) the person has not been sentenced to a term in custody that is expected to extend beyond that 6 months.

(3) In the case of a prisoner to whom paragraph (2) applies, an award of universal credit is not to include any element other than the housing costs element.

(4) In paragraph (1)(c) a person serving a sentence of imprisonment detained in hospital is a person who is—

(a) being detained—

(i) under section 45A or 47 of the Mental Health Act 1983 (power of higher courts to direct hospital admission; removal to hospital of persons serving sentence of imprisonment etc), and

(ii) before the day which the Secretary of State certifies to be that person's release date within the meaning of section 50(3) of that Act (in any case where there is such a release date); or

(b) being detained under—

(i) section 59A of the Criminal Procedure (Scotland) Act 1995 (hospital direction), or

(ii) section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (transfer of prisoners for treatment of mental disorder).

14. At this stage, two points about the construction of regulation 19 are worthy of note. First, the term “prisoner” includes a person “who is detained in custody pending trial” (i.e. on remand): see regulation 2 of the UC Regulations 2013. Secondly, regulation 19 stipulates rather curiously that “entitlement to universal credit does not arise” for prescribed categories of claimants, rather than simply

stating that such a person “is not entitled to Universal Credit”. The significance of this distinction (if any) is less than clear.

The decisions by the Secretary of State’s decision-maker

15. On 20 September 2021 the Secretary of State’s decision-maker issued an outcome decision, baldly asserting that “Entitlement to UC does not arise where a person is a prisoner” and citing regulation 19(1) of the UC Regulations 2013 (but making no mention of regulation 19(2), which disapplies regulation 19(1) in certain cases). The claimant’s imprisonment was treated as a change of circumstances and deemed to have taken place on the first day of his (first) assessment period.
16. On reconsideration on 5 May 2022 another decision-maker confusingly issued two contradictory decisions. The first recorded that the claimant was entitled to the housing costs element of UC as from 17 August 2021 because he was in prison for less than six months (relying on regulation 19(2)(b)). The second decision, effectively countermanning the first, ruled that the claimant was not so entitled. The following explanation was given in the second mandatory reconsideration notice for this about-turn (emphasis as in the original):

Whilst you have provided evidence showing that you were in custody for less than 6 months guidance states if a claimant with housing costs is a prisoner **within first Assessment Period and is a prisoner on last day of same Assessment Period** the claim closes regardless of length of sentence because there has to be an existing award in payment to continue to pay housing costs in these circumstances.

17. It appears the reference to “guidance” was a reference to internal guidance only available on the DWP Intranet. What matters, of course, is what the law actually says.

The decision of the First-tier Tribunal

18. The First-tier Tribunal (“the Tribunal”) allowed the claimant’s appeal, holding that he was entitled to the housing costs element of UC from the start of his claim on 17 August 2021 and throughout the period he was remanded in custody. In summary, the Tribunal found that the Secretary of State had erred in law by relying on regulation 19(1)(b) because regulation 19(2) operated to prevent regulation 19(1)(b) from applying in this case.
19. The essence of the Tribunal’s reasoning is captured in the following passage:

The Appellant applied for Universal Credit on 17/08/21. The evidence does not suggest there was any difficulty in terms of his entitlement before he was remanded in custody on 11/09/2021. Therefore, the Tribunal finds the Appellant had entitlement to Universal Credit from the date of his claim on 17/08/2021 onwards, even if he had not actually been paid any benefit money at that stage. His entitlement continued and was in place immediately before he became a prisoner when he was remanded in custody on 11/09/2021. His entitlement included a housing costs element, and he did not receive a term of imprisonment which either exceeded or

was expected to exceed 6 months. Therefore, the Tribunal finds that all the elements of Regulation 19(2) are satisfied and so Regulation 19(1)(b) does not apply in this case.

20. The Tribunal specifically rejected an argument advanced by the Secretary of State that the fact of the claimant's being remanded in custody amounted to a supersession by way of a change of circumstances which took effect from the start of the assessment period. This submission was made on the basis of paragraph 20 of Schedule 1 to the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381). I simply observe that the Secretary of State has since expressly abandoned that submission in the context of this further appeal.

21. The Tribunal therefore concluded as follows:

The Tribunal finds the Appellant had entitlement from the start of his claim and as all the criteria in Regulation 19(2) are satisfied, the effect of Regulation 19(2) is that the bar to entitlement as a result of being a prisoner in Regulation 19(1)(b) had no effect, so the situation regarding the Appellant's entitlement to Universal Credit was unaffected save that, under Regulation 19(3), the Appellant's entitlement to Universal Credit was limited to the housing costs element throughout the time he was remanded in custody.

22. I subsequently gave the Secretary of State permission to appeal.

Analysis

23. The fundamental difficulty with the Tribunal's approach in this case was that it sought to interpret regulation 19 of the UC Regulations 2013, and in particular the concept of entitlement to benefit, in isolation from the overall architecture of the Universal Credit scheme. This is best understood by going back to first principles.

24. The starting point is section 3(1) of the Welfare Reform Act 2012 ("the 212 Act"). This provides that a single claimant "is entitled to universal credit" if they meet the basic conditions (as set out in section 4) and the financial conditions for a single claimant (as set out in section 5). The claimant in the present case met those conditions and so on the face of it was entitled to UC. However, nothing is that straightforward.

25. This is because what section 3 of the 2012 Act appears to give with one hand section 6 of the same Act threatens to take away with the other hand. In particular, section 6(1)(a) expressly provides that "Entitlement to universal credit does not arise – (a) in prescribed circumstances (even though the requirements in section 3 are met)". "Prescribed" means, as is usually the case in social security law, specified or provided for in regulations (section 40 of the 2012 Act). Part 2 of the UC Regulations 2013 is relevant here as it carries the heading "Entitlement". The introductory regulation 7(c) at the start of Part 2 explains that amongst other matters Part 2 contains provisions about "cases where no entitlement to universal credit arises even if the basic conditions and the financial conditions are met"

(echoing the language of section 6(1)(a) of the 2012 Act). Regulation 19 is one of the provisions that falls within Part 2 of the UC Regulations 2013.

26. Returning to the primary legislation, section 7 of the 2012 Act provides that Universal Credit is payable in respect of a “complete assessment period” (subs.(1)) and also explains the concept of a “period of entitlement” (subs.(4)):

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;

(b) for universal credit to be payable in respect of a period shorter than an assessment period;

(c) about the amount payable in respect of a period shorter than an assessment period.

(4) In subsection (1) “period of entitlement” means a period during which entitlement to universal credit subsists.

27. Thus, the “period of entitlement” is the total period during which entitlement to Universal Credit subsists. Regulation 21(1) of the UC Regulations 2013, made pursuant to section 7(2) of the 2012 Act, then further provides that an “assessment period” is “a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists.” It follows that in order to be paid UC in respect of an assessment period, a claimant needs to be entitled to the benefit throughout that assessment period. Entitlement must subsist throughout, or the period in question is not an assessment period as so defined.
28. In the present claimant’s case, the date of claim was 17 August 2021. The first assessment period was accordingly the period of one month from 17 August 2021 to 16 September 2021. However, the claimant was not entitled throughout this assessment period – in other words, his entitlement did not subsist – because on 11 September 2021 he became a prisoner. As such, then by virtue of regulation 19(1)(b) entitlement to Universal Credit “does not arise” unless regulation 19(1)(b) were to be disapplied by regulation 19(2).
29. There are two limbs to the ‘escape clause’ in regulation 19(2), which applies in the first six months of imprisonment. The claimant satisfied one of these conditions but not the other. First, he had “not been sentenced to a term in custody that is expected to extend beyond that 6 months” (regulation 19(2)(b)). Secondly, however, he did not satisfy regulation 19(2)(a), namely:

(a) the person was entitled to universal credit as a single person immediately before becoming a prisoner, and the calculation of their award included an amount for the housing costs element.

30. The requirement in regulation 19(2)(a) that the claimant “was entitled to universal credit as a single person immediately before becoming a prisoner” must mean in the immediately preceding assessment period. This interpretation is supported by the further condition that “the calculation of their award included an amount for the housing costs element”. The use of the past tense demonstrates that the claimant must have already had one prior complete assessment period. It is axiomatic within the Universal Credit scheme that entitlement can be determined only at the point of assessment, which is at the conclusion of any assessment period (section 7(1) of the 2012 Act and regulation 21(1) of the UC Regulations 2013). There is no scope for a notional assessment of entitlement midway through the first assessment period as contemplated by the Tribunal.
31. It follows that on the facts the claimant’s situation did not satisfy the requirements of regulation 19(2)(a). The determination of his entitlement took place on 20 September 2021 at the conclusion of the first assessment period. By then he was not entitled – or to use the statutory formulation, entitlement did not arise – because entitlement did not subsist by virtue of regulation 19(1)(b) and that provision had not been disapplied by regulation 19(2).
32. There is one final matter I should mention. In reviewing the case I was troubled by the apparent differential treatment of those claimants who become short-term prisoners who are incarcerated in their first assessment period and those imprisoned in their second or later assessment period. In case management directions I accordingly posed the following questions seeking clarification from the Secretary of State’s representative:
- Is it the Secretary of State’s case that [the claimant] would have been able to claim the benefit of regulation 19(2) if he had become a prisoner in the second assessment period rather than the first assessment period? If that is indeed the Secretary of State’s case, what is the justification for the difference in treatment between the two cases?*
33. Ms Mannion’s submission on behalf of the Secretary of State deals with those questions in the following way (with a footnote omitted; AP = assessment period and HCE = housing costs element):

32. Had this matter concerned an existing UC beneficiary who became a prisoner in AP2, the situation would have been different. Such an individual would have been entitled to UC immediately before, demonstrated by their having reached the end of an AP, had their entitlement assessed and become the beneficiary of a calculated award which had included HCE (i.e. for AP1). They would have been able to benefit from the reg.19(2) disapplication. However, this is not the case where there is no pre-existing period during which entitlement has subsisted (as confirmed by an end of period assessment).

33. More generally, support for this approach is found in the overall structure of UC which is a payment made in arrears, depending on calculations made by reference to the circumstances at the conclusion of any complete AP.

Ascertaining whether or not eligibility arises by reference to a complete unit of time (an AP) has an inherent logic and is administratively efficient. It allows the decision maker to properly assess circumstances such as total financial eligibility, and means the events of a single day do not garner disproportionate weight. The particular length of the unit (an AP being a month) was a proper legislative choice.

34. Regulation 19(2) operates to prevent beneficiaries of UC (i.e. those whose situation has been assessed and their eligibility confirmed, demonstrated by their already having been awarded UC including a HSE) from becoming homeless during and/or by reason of a short term of imprisonment. However, where an individual is not receiving such support prior to their imprisonment, it is quite a different circumstance for that individual to begin receiving HSE payments from the state once they have become a prisoner. In a stark example (were eligibility not established by reference to the whole AP) a person awaiting sentence might claim UC with the intention of securing the HCE of a UC award solely to secure a property during a period of imprisonment. Such a person should be expected to support their housing position through other means (such as earnings or savings). To treat a new or impending prisoner in the same way as an existing UC beneficiary flies in the face of the general prohibition for prisoners at reg.19(1)(b).

35. It is accepted that this operates as a bright line which might produce harsh outcomes in some cases, such as this one. The risk of harsh outcomes when operating a complex welfare system is a factor well recognised by the Court of Appeal, which has made clear that the court should avoid finding some feature of the system irrational merely because it produced harsh results for in some individuals cases: see *Pantellerisco v SSWP* [2021] EWCA Civ 1454, [2021] PTSR 1922 at §§56-59; *Johnson v SSWP* at [2020] EWCA Civ 778, [2020] PTSR 1872 at §113. Welfare support is finite, and the current rules operate to provide ongoing protection to existing UC claimants rather than to extend housing support to those about to be or recently imprisoned.

34. I note that if the architects of the Universal Credit scheme had set the length of an assessment period as being one week rather than one month (and all other statutory conditions of entitlement had remained the same), then the claimant would not have been in this position. In that scenario he would have been able to keep his accommodation as he would have become a prisoner in what would have been the fourth weekly assessment period. However, that was not the legislative choice adopted by Parliament. I simply add that it will be no consolation to the claimant that the court recognises the risk of harsh outcomes when operating a complex welfare system.

Disposal

35. The decision that the First-tier Tribunal should have made is re-made as follows:

The claimant's appeal is refused.

The decision made by the Secretary of State on 20 September 2021 is confirmed.

The claimant is not entitled to the housing costs element of Universal Credit from the start of his claim on 17 August 2021 and throughout the time he was remanded in custody.

Conclusion

36. I therefore allow the Secretary of State's appeal to the Upper Tribunal and re-make the decision of the First-tier Tribunal.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 9 November 2023