IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001437-TC**
(ADMINISTRATIVE APPEALS CHAMBER) **UA-2021-001302-TC**
(previously CTC/576/2021
CTC/581/2021)

On Appeal from the First-tier Tribunal (Social Entitlement Chamber) SC946/20/01217

BETWEEN

Appellant HIS MAJESTY'S REVENUE AND CUSTOMS

and

Respondent (1) THE SECRETARY OF STATE
FOR WORK AND PENSIONS
(2) GS

BEFORE UPPER TRIBUNAL JUDGE WEST

Decided on consideration of the papers: 4 January 2023

DECISION

The decision of the First-tier Tribunal sitting at Bolton dated 2 December 2020 under file reference SC946/20/01217 involves an error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal set aside.

The decision is remade. The remade decision is to dismiss the claimant's appeal from HMRC's decision of 12 August 2020. The claimant and his

partner were not entitled to tax credits from 7 July 2020 because they made a claim for universal credit on that day and the Secretary of State was satisfied that they met the basic conditions for eligibility specified in s.4(1)(a) to (d) of the Welfare Reform Act 2012.

This decision is made under section 12(1), (2)(a) and (2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. The question which has to be decided on this appeal is whether the First-tier Tribunal ("the Tribunal") erred in law in its decision of 2 December 2020 when it allowed the claimant's appeal from the decision of HMRC dated 12 August 2020 that the claimant and his partner were not entitled to tax credits from 7 July 2020 because they had claimed universal credit on that date and the Secretary of State was satisfied that they met the basic conditions for eligibility specified in s.4(1)(a) to (d) of the Welfare Reform Act 2012.

2. The Tribunal allowed the claimant's appeal and found that, given that the stop notice from the Secretary of State was only received by HMRC on 10 July 2020 and that the claimant's application for universal credit had been made and withdrawn on 7 July 2020, the Tribunal did not consider as sound the assertion made by HMRC that there could be no doubt that the claimant and his partner satisfied the basic conditions of entitlement. There was a doubt as to whether the basic conditions were satisfied until such time as his partner had submitted information and the appeal therefore succeeded. Consequently their entitlement to working tax credits did not come to an end from 7 July 2020 by the making of such a claim.

3. Whether the Tribunal erred in law in so concluding turns on the meaning and legal effect of certain provisions within the Universal Credit (Transitional Provisions Regulations 2014 ("the UC TP Regs"), as they were in force at the date of HMRC's decision on 12 August 2020. A related and logically prior question also arises, however, about the extent of a Tribunal's jurisdiction to consider issues concerning entitlement to tax credits under the UC TP Regs when considering an appeal from a decision which has brought a claimant's entitlement to tax credits to an end when the claimant claims universal credit. There is also a further question about the effect of a withdrawal of a claim for universal credit after it has been submitted.

4. This appeal was initially stayed behind a block of cases which dealt with a number of issues relating to eligibility for what are termed "legacy benefits" (which include tax credits) after the making of a claim for universal credit. After those appeals had been determined, the stay was lifted on 19 January 2022 and further case management directions were made. However, on 28 June 2022 the Chamber President, Mrs Justice Farbey, convened a three-judge panel in the case of ***HMRC v (1) Secretary of State for Work and Pensions (2) SA (TC)*** [2022] UKUT 350 (AAC) (***"SA"***) to decide that appeal in order to give a definitive answer to the first two questions summarised above in the context of a tax credits appeal. The decision in this appeal was therefore held back until the decision in ***SA*** had been determined. That three-judge panel (of which I was a member) promulgated its decision on 20 December 2022. I am satisfied that there is no material difference between the appeal in that case and the appeal in this case and I am also satisfied that I can now proceed to determine this appeal in the light of the decision in ***SA*** without requiring further submissions by the parties or holding an oral hearing. In his original response to HMRC's appeal the claimant sought an oral hearing of the appeal, although in his most recent response of 19 July 2022 he asked for the matter to be decided without a hearing and did not wish to make any further observations or submissions. The Upper Tribunal is empowered to

reach any decision without a hearing, although by rule 34(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 it must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter. I am satisfied for the reasons set out below that an oral hearing of the appeal would make no difference to the outcome of the appeal and I have therefore determined the matter on the papers without an oral hearing and without requiring further submissions.

5. The appeal was brought by HMRC against the Tribunal's decision. The claimant is the second respondent to the appeal. The Secretary of State for Work and Pensions is the first respondent, having been joined to the Upper Tribunal appeal proceedings on 19 January 2022 when the stay was lifted. The Secretary of State was joined to the appeal because he is responsible for the administration of the universal credit benefits scheme and making decisions under that scheme.

The Factual Background

6. The claimant and his partner had been in receipt of tax credits since 29 June 2004. During the tax year 2020-2021 they were awarded working tax credits. On 7 July 2020 they purported to make a claim for universal credit. I shall refer in more detail below to the precise details of that claim.

7. Subsequent to that universal credit claim, on 10 July 2020 HMRC received an electronic notification from the Department for Work and Pensions ("a stop notice") stating that the basic conditions in s.4(1)(a) to (d) of the Welfare Reform Act 2012 ("the 2012 Act") were satisfied.

8. The stop notice evidenced that the Secretary of State was satisfied that the conditions in regulation 8(1)(a) and (b) of the UC TP Regs were satisfied in the case of the claimant and his partner because (i) they had made a claim (I shall return to that aspect of the matter below) and (ii) they satisfied the

basic conditions specified in s.4(1)(a) to (d) of the 2012 Act, by virtue of their ages which they gave, their presence in Great Britain (tested through the provision of their address in Great Britain) and their statement that they were not receiving full-time education.

9. On 13 July 2020 the claimant and his partner were issued with a notice pursuant to s.17(1) of the Tax Credits Act 2002 ("the TCA 2002") that they were not entitled to working tax credits from 7 July 2020. The notice advised them that a decision on entitlement for the period from 6 April 2020 to 6 July 2020 would be taken on that basis in the absence of any statement from them to a contrary effect. The proposed decision was that they were entitled to working tax credits of £1,106.80. They did not respond to that notice. The s.18 decision, which carried appeal rights, was taken thereafter on 12 August 2020.

10. On the same day the claimant sought a mandatory reconsideration of that decision. The decision was reconsidered, but not revised, on 17 August 2020.

11. On 21 August 2020 the claimant appealed against HMRC's decision. He argued that their tax credits should not have been stopped because they did not fully complete the claim for universal credit. He rightly did not seek to argue that they did not meet the basic eligibility conditions for universal credit. There could be no argument but that they met the basic eligibility conditions for universal credit in s.4(1)(a) to (d) of the 2012 Act in that they were both at least 18 years old, they had not reached the qualifying age for state pension credit, they were in Great Britain and they were not receiving education and the claimant did not seek to argue to the contrary.

12. The claimant argued that he had withdrawn his claim on 7 July 2020, on the day on which he made it, and before HMRC had received the stop notice from the Secretary of State and thus that he had withdrawn their claim for

universal credit before the stop notice was issued, a point to which I shall return below.

13. The Tribunal allowed the claimant's appeal and held that, since the claimant's application for universal credit had been made and withdrawn on 7 July 2020, it did not accept that the Secretary of State could be satisfied as to the basic conditions of entitlement. The claimant had been asked to submit a number of further documents and his partner had not submitted any application at all. Accordingly there was a doubt as to whether the basic conditions were satisfied and the claimant should be given the benefit of that doubt.

14. Moreover, given that the claim was made and withdrawn on the same day and the stop notice was not issued until 10 July 2020, the Tribunal was not satisfied that there was the simultaneous existence of claim and the Secretary of State's satisfaction as to the basic conditions of entitlement. The appeal therefore succeeded. Consequently the claimant and his partner's entitlement to working tax credits did not come to an end from 6 July 2020 by the making of such a claim.

The Legislation

15. S. 38 of the TCA 2002 deals with appeals against tax credits decisions. It provides, so far as is relevant:

> 38(1) An appeal may ... be brought against:
>
> (a) a decision under section 14(1), 15(1), 16(1), 19(3), or 20(1) or (4) or regulations made under section 21,
>
> (b) the relevant section 18 decision in relation to a person or persons and a tax credit for a tax year and any revision of that decision under that section.

16. The 2012 Act provides for entitlement to universal credit as follows:

3 Entitlement
(1) A single claimant is entitled to universal credit if the claimant meets—

(a) the basic conditions, and

(b) the financial conditions for a single claimant.

(2) Joint claimants are jointly entitled to universal credit if—

(a) each of them meets the basic conditions, and

(b) they meet the financial conditions for joint claimants.

4 Basic conditions
(1) For the purposes of section 3, a person meets the basic conditions who—

(a) is at least 18 years old,

(b) has not reached the qualifying age for state pension credit,

(c) is in Great Britain,

(d) is not receiving education, and

(e) has accepted a claimant commitment.

(2) Regulations may provide for exceptions to the requirement to meet any of the basic conditions (and, for joint claimants, may provide for an exception for one or both).

(3) For the basic condition in subsection (1)(a) regulations may specify a different minimum age for prescribed cases.

(4) For the basic condition in subsection (1)(b), the qualifying age for state pension credit is that referred to in section 1(6) of the State Pension Credit Act 2002.

(5) For the basic condition in subsection (1)(c) regulations may—

(a) specify circumstances in which a person is to be treated as being or not being in Great Britain;

(b) specify circumstances in which temporary absence from Great Britain is disregarded;

(c) modify the application of this Part in relation to a person not in Great Britain who is by virtue of paragraph (b) entitled to universal credit.

(6) For the basic condition in subsection (1)(d) regulations may—

(a) specify what "receiving education" means;

(b) specify circumstances in which a person is to be treated as receiving or not receiving education.

(7) For the basic condition in subsection (1)(e) regulations may specify circumstances in which a person is to be treated as having accepted or not accepted a claimant commitment.

5 Financial conditions

(1) For the purposes of section 3, the financial conditions for a single claimant are that—

(a) the claimant's capital, or a prescribed part of it, is not greater than a prescribed amount, and

(b) the claimant's income is such that, if the claimant were entitled to universal credit, the amount payable would not be less than any prescribed minimum.

(2) For those purposes, the financial conditions for joint claimants are that—

(a) their combined capital, or a prescribed part of it, is not greater than a prescribed amount, and

> (b) their combined income is such that, if they were entitled to universal credit, the amount payable would not be less than any prescribed minimum.

17. The UC TP Regs provide, so far as is material, as follows.

> **Termination of awards of certain existing benefits: other claimants**
> 8(1) This regulation applies where—
>
> (a) a claim for universal credit (other than a claim which is treated, in accordance with regulation 9(8) of the Claims and Payments Regulations, as having been made) is made; and
>
> (b) the Secretary of State is satisfied that the claimant meets the basic conditions specified in section 4(1)(a) to (d) of the Act (other than any of those conditions which the claimant is not required to meet by virtue of regulations under section 4(2) of the Act).
>
> (2) Where this regulation applies, all awards of … tax credits … to which the claimant (or, in the case of joint claimants, either of them) is entitled on the date on which the claim is made are to terminate, by virtue of this regulation—
>
> (a) on the day before the first date on which the claimant is entitled to universal credit in connection with the claim; or
>
> (b) if the claimant is not entitled to universal credit, on the day before the first date on which he or she would have been so entitled, if all of the basic and financial conditions applicable to the claimant had been met.
>
> **Modification of tax credits legislation: finalisation of tax credits**
> 12A(1) This regulation applies where—
>
> (a) a claim for universal credit is made, or is treated as having been made;

> (b) the claimant is, or was at any time during the tax year in which the claim is made or treated as made, entitled to a tax credit; and
>
> (c) the Secretary of State is satisfied that the claimant meets the basic conditions specified in section 4(1)(a) to (d) of the Act (other than any of those conditions which the claimant is not required to meet by virtue of regulations under section 4(2) of the Act).
>
> (2) Subject to paragraph (3), where this regulation applies, the amount of the tax credit to which the person is entitled is to be calculated in accordance with the 2002 Act and regulations made under that Act, as modified by the Schedule to these Regulations ("the modified legislation").
>
> (3) Where, in the opinion of the Commissioners for Her Majesty's Revenue and Customs, it is not reasonably practicable to apply the modified legislation in relation to any case or category of cases, the 2002 Act and regulations made under that Act are to apply without modification in that case or category of cases.

18. Regulation 5(3) of the Universal Credit (Transitional Provisions) Amendment Regulations 2022 removed sub-paragraph (1)(b) from regulation 8 of the UC TP Regs with effect from 25 July 2022. The Explanatory Memorandum to those 2022 Amendment Regulations contains the following information about this amendment:

> "7.8 These regulations include a provision that will remove regulation 8(1)(b) of the 2014 Regulations. This provision was introduced for the very early stages of the UC rollout. It requires that the Secretary of State is satisfied that the basic conditions of eligibility for UC (excluding the condition that a claimant commitment has been agreed) have been met before awards of IS, HB or Tax Credits can be terminated when UC is claimed.
>
> 7.9 This particular amendment resolves an inconsistency in the current legislation. The provision governing the termination of income-based Jobseeker's Allowance (JSA(IB)) and income-related Employment

> and Support Allowance (ESA(IR)) is contained in Commencement Orders rather than the Transitional Regulations. Here, the only requirement is that a Universal Credit (UC) claim has been made; there is no requirement for the Secretary of State to be satisfied the basic conditions have been met.
>
> 7.10 This means that under the current Regulation 8(1)(b) there could be cases where a doubt as to whether meeting the basic conditions means that a Housing Benefit (HB) and/or Tax Credits award cannot be terminated at the point of UC claim pending further investigation, but the income-based Jobseeker's Allowance (JSA(IB)) or income-related Employment and Support Allowance (ESA(IR)) award must be terminated. Where it is found that the claimant does not satisfy UC's basic conditions, the claimant would find themselves remaining on HB or Tax Credits (subject to continued entitlement), but unable to make a new claim for JSA(IB) or ESA(IR). Therefore, this amendment is to ensure such a situation cannot arise".

The Decision in *SA*

19. What the three-judge panel said in ***SA***, so far as material was that

> "21. We should emphasise two points at the outset of our discussion of the issues on this appeal.
>
> 22. First, no part of this appeal concerns the effect of withdrawal of a claim for universal credit on the effective operation of regulation 8 of the UC TP Regs. Accordingly, our decision does not decide whether *HMRC v AB* [2021] UKUT 209 (AAC) was correctly decided on this withdrawal point nor whether the decision in *JL v Calderdale MBC and SSWP* [2022] UKUT 9 (AAC) is correct in holding that once made a claim for universal credit cannot (effectively) be withdrawn so as to prevent regulation 8(1)(b) of the UC TP Regs from having effect. We do, however, set out below the explanation provided by the Secretary of State concerning how the system for claiming universal credit operates.

23. Second, as noted above, regulation 8 of the UC Regs has been amended since 25 July 2022 to remove sub-paragraph (1)(b) from it. Our decision on the reach of regulation 8(1)(b) of the UC TP Regs is therefore likely to be limited in its effect.

24. As initially argued before us, the central issue on the appeal appeared to be whether, for the purposes of regulation 8(1)(b) of the UC TP Regs, the Secretary of State was required to investigate and determine whether the claimant met the right to reside test before he could be satisfied that the basic condition specified in s.4(1)(c) of the 2012 Act was met.

25. It was the view of FtT that the statutory language of “the Secretary of State is satisfied that the claimant meets the basic conditions specified in s.4(1)(a) to (d) of the Welfare Reform Act 2012” in regulation 8(1)(b) of the UC TP Regs required the Secretary of State to be satisfied not only that the claimant was ‘in Great Britain’ (per s.4(1)(c) of the 2012 Act) but also that he met the deeming provisions (i.e. had a qualifying right to reside in Great Britain) made under s.4(5)(a) of the 2012 Act. The reasoning of the FtT plainly proceeded on the basis that, as the Secretary of State had decided, on the claimant’s (and his wife’s) claim for universal credit, that he was not entitled to universal credit because he did not have a qualifying right to reside under regulation 9 of the UC Regs, this meant that regulation 8(1)(b) of the UC TP Regs was not met. This was because the Secretary of State could not be satisfied that the claimant (or his wife) met the basic condition specified in section 4(1)(c) of the 2012 Act (when read with s.4(5)(a) and regulation 9 of the UC Regs).

26. We are not concerned in this appeal with whether the claimant (or his wife) was correctly found by the Secretary of State not to be entitled to universal credit because he (or his wife) did not have a qualifying right to reside in Great Britain under regulation 9 of the UC Regs. The appeal before us is not an appeal from a decision of a First-tier Tribunal on an appeal against the decision of the Secretary of State that the claimant was not entitled to universal credit. Indeed, for the purposes of this appeal, and the appeal before the FtT from HMRC’s decision 31 July 2018 terminating the

claimant's award of tax credits, the claimant seeks positively to rely on the Secretary of State's decision that he was not entitled to universal credit as showing that the Secretary of State could not properly be satisfied that he met the basic condition specified in section 4(1)(c) of the 2012 Act.

27. However, although much of the argument on this appeal has concerned the meaning, or correct scope, of the relevant language that was in regulation 8(1)(b) of the UC TP Regs, we raised during the course of argument the extent to which that could be in issue on an appeal concerning tax credits. We will address this issue first because it places in the correct context our (necessarily, as it turns out, *obiter*) views on the correct construction of regulation 8(1)(b) of the UC TP Regs.

28. In our judgment the fundamental error of law the FtT made was to consider on the appeal before it against HMRC's decision under s. 18 of the TCA 2002 that it was for the tribunal to determine as a matter of substance whether the Secretary of State had been properly satisfied at the time of issue of the stop notice that the claimant met the basic conditions specified in s. 4(1)(a) to (d) of the 2012 Act. Whatever the reach of regulation 8 of the UC TP Regs, the FtT did not have before it an appeal against the Secretary of State's decision that the claimant was not entitled to universal credit (on the ground that he did not have a right of residence in Great Britain that qualified for the purposes of universal credit). We add, though strictly not a matter for us on this appeal, that it is difficult to see the basis on which the Secretary of State *being satisfied* under the regulation 8(1)(b) UC TP Regs test could amount to him arriving at an appealable decision under sections 8(1) and 12(1) of the Social Security Act 1998: see further paragraphs [15]-[16] of *Carpenter v SSWP* [2003] EWCA Civ 33; *R(IB) 6/03*. By way of example, even if the Secretary of State was satisfied that the basic conditions stipulated in regulation 8(1)(b) were met, he could not by that alone have decided (per section 8(1)(a) of the Social Security Act 1998) the claim for universal credit, because satisfaction of the financial conditions in section of the 2012 Act would need to established to decide that claim.

29. What was before the FtT was an appeal under s.38(1)(b) of the TCA 2002 against the s.18 decision of HMRC (as modified by regulation 12A(2) and the Schedule to the UC TP Regs, the effect of which provided for "in year" finalisation of the tax credit award). S.38(1) of the TCA 2002 provided the claimant with no right of appeal against the Secretary of State being 'satisfied' under regulation 8 of the UC TP 2014 Regulations that the condition specified in s.4(1)(c) of the 2012 Act was met. S. 18 governed the FtT's jurisdiction: *HO v HMRC* (TC) [2018] UKUT 105 (AAC) at [73] and the FtT stood in the shoes of the HMRC decision maker and gave the decision which that decision maker was empowered to give under s.18: *HO* at [75].

30. Once this point is reached, the critical question is what HMRC and, for our purposes, the FtT needed to decide about regulation 8(1)(b) (and 12A(c)) of the UC TP Regs. The answer is much more limited than the FtT considered.

31. Regulation 8(2) of the UC TP Regs provides that where regulation 8 applies, a tax credit award is "to terminate by virtue of this regulation." In other words, the tax credit award is to cease by operation of law if regulation 8 applies. Whether regulation 8 applied at the material time in our judgment involved no more than two questions of <u>fact</u>, which had to be determined on relevant evidence. First, whether a claim for universal credit had been made. A claim for universal credit plainly had been made in this case and the same was and is not disputed. Second, whether the Secretary of State was in fact satisfied that the claimant met the basic conditions specified in s.4(1)(a) to (d) of the 2012 Act. That factual question in our judgment was answered affirmatively by the stop notice which was received by HMRC from the Secretary of State on HMRC on 25 June 2018. Again, even though the stop notice was not before the FtT or us (though we set out below the information provided to us concerning how these stop notices were generated), the claimant does not dispute that the stop notice in fact concerned him and stated that the Secretary of State was satisfied that he met the basic conditions specified in s. 4(1)(a) to (d) of the 2012 Act. Once these two questions of fact had been determined,

the only remaining question for the FtT arising under regulations 8 and 12A of the UC TP Regs was the correct date of termination of the tax credits award under regulation 8(2) of the UC TP Regs.

32. The language of regulation 8(1) of the UC TP Regs, particularly the statutory focus of it applying where a claim '*is*' made and where the Secretary of State '*is*' satisfied, is the language of fact. The language used is not concerned with any wider issue of whether the claim was properly made or the Secretary of State was properly satisfied that the specified basic conditions were met. Had that been the intention then such language could have been used. Perhaps more importantly, however, there is no sound basis for reading in language such as "properly satisfied" by necessary implication when to do so would involve HMRC trespassing on the decision making functions for universal credit for which it has no statutory authority otherwise conferred on it.

33. Put shortly, the relevant issue for the FtT was limited to whether the Secretary of State *was* (i.e. in fact) satisfied, and not whether he *was entitled to* be satisfied, that the conditions specified in s.4(1)(a) to (d) of the 2012 Act were met, and it erred in law in going further than this.

34. Our decision in effect ends at this point. Just as it was not for the FtT to decide whether the Secretary of State had been properly satisfied about the specified basic conditions being met, it is not strictly for us to decide what regulation 8 of the UC TP Regs requires of the Secretary of State to be 'satisfied'. If the evidence shows that he was in fact satisfied that the claimant bringing the s. 18 appeal met the specified basic conditions in section 4(1)(a) to (d) of the 2012 Act, why he was satisfied is not for the First-tier Tribunal on an appeal under s. 18 of the TCA 2002. It must follow that issues about whether the Secretary of State was properly satisfied cannot arise on any further appeal to the Upper Tribunal from such a s.18 appeal. The Upper Tribunal in such a circumstance is not dealing with a judicial review of whether the Secretary of State had been properly satisfied that the basic conditions specified in s. 4(1)(a) to (d) of the 2012 Act were met,

and nor are we. To that extent, we consider that Upper Tribunal case law which has sought to decide the correct meaning of regulation 8(1)(b) of the UC TP Regs in the context of appeals concerning benefits other than universal credit (for example, *SK v Revenue and Customs Commissioner and another* [2022] UKUT 10 (AAC), [2022] PTSR 818) should be treated as being *obiter* on the point.

35. However, the correct meaning of regulation 8(1)(b was fully argued before us and we consider in these circumstance it is appropriate, subject to what we have just said, to state our views on those arguments, albeit briefly.

36. We address first the process by which a claim for universal credit was made at the relevant time, which in this case was evidenced before us in the claimant's universal credit application.

37. The default position was that the claim for universal credit had to be made online: see further *GDC v SSWP (UC)* [2020] UKUT 108 (AAC) at [8]–[10] and [39]–[47]. When making the claim, the claimant was asked a number of questions, including what his address was. If an address in Great Britain was not provided, the claim could not be submitted (and no stop notice would be issued). Conversely, if an address in Great Britain was provided, the Secretary of State accepted, for the purposes of regulation 8(1)(b) of the UC TP Regs, that the claimant met the condition specified in s.4(1)(c) of the 2012 Act and the stop notice would be issued on this basis. Further questions were asked about nationality and absence from the UK. None of those answers would lead to a stop notice being generated. The answers to those questions were used later, to inform whether or not further eligibility checks needed to be conducted. The remaining conditions specified in s.4(1)(a), (b) and (d) of the 2012 Act were tested by questions relating to age and education.

38. Given the above, we have no reason to dissent from the view of Upper Tribunal Jacobs in *SK* that a stop notice was the means by which the Secretary of State communicated to HMRC: (a) that a claim for universal

credit had been made for the purposes of regulation 8(1)(a) of the UC TP Regs; and (b) his satisfaction, for the purposes of regulation 8(1)(b) of the UC TP Regs, that the claimant met the basic conditions specified in s.4(1)(a) to (d) of the 2012 Act. Moreover, the Secretary of State had established a system under which he satisfied himself of the relevant matters through reliance on a computer programme, by answers given to relevant questions.

39. On the meaning of regulation 8(1)(b) of the UC TP Regs, we consider that the view of Judge Jacobs in *SK* is correct. The Secretary of State needed only to have been satisfied that the claimant was in Great Britain (which he tested by asking for an address in Great Britain) and did not need to apply the conditions set out in secondary legislation, including provisions which deemed a person to be or not to be in Great Britain. As Judge Jacobs put it in paragraph [22] of *SK*:

> "Regulation 8(1)(b) refers to 'the basic conditions specified in section 4(1)(a) to (d)'. My conclusion is that this means 'the basic conditions *as specified in* section 4(1)(a) to (d)'. That excludes cases in which a person is *treated as* not being in Great Britain under section 4(5)(a). In other words, it excludes cases in which section 4(1)(c) is qualified by deeming provisions."

40. This accords with the language specified in s.4(1)(c). It requires simply that a person be "in Great Britain". The secondary legislation made under s. 4(5) of the 2012 Act sets out the detail for when a person is *deemed*, inter alia, not to be in Great Britain, but that is separate from s. 4(1)(c) and is not a basic condition which is specified by regulation 8(1)(b). The use of the word "specified" has to be given meaning. The only sensible meaning is that given in paragraph [22] of *SK*. The claimant was unable to provide us with any persuasive answer for why the word 'specified' was needed at all if his argument was correct. His argument really depended on ignoring or omitting the word 'specified', but we could identify no good legal reason for doing so.

41. The *SK* construction of regulation 8(1)(b) is also supported by the words in brackets which appeared at

the end of it – "(other than any of those conditions which the claimant is not required to meet by virtue of regulations under section 4(2) of the Act)" – as this shows the draughtsperson was aware of, but chose not to refer to in the opening words in regulation 8(1)(b), additional conditions imposed by secondary legislation. It is further supported by regulation 8(2)(b) of the UC TP Regs which, by contrast, use more expansive language which includes meeting the financial conditions to be entitled to universal credit. Reading regulation 8 as a whole shows, in our view, a clear and deliberate distinction between the narrow focus in regulation 8(1)(b) on meeting the basic conditions *specified* in s.4(1)(a)-(d) of the 2012 Act and meeting those (and other) conditions of entitlement to universal credit more generally.

42. Perhaps the best point that could be made in favour of the claimant's reading of regulation 8(1)(b) is one we raised with the parties at the outset of the hearing and on which we sought further submissions after the hearing. This concerns the use of the word "entitled" in regulation 8(2)(a) and (b) of the UC TP Regs. Regulation 8(2) deals with the date of termination of the tax credits award where regulation 8(1) applies. However, regulation 8(2)(a)'s language of the tax credits award terminating on the day before the first date on which the claimant is entitled to universal credit in connection with the claim (for universal credit) might suggest that regulation 8 was concerned with stopping the tax credits award only where (and when) it had been decided the claimant had become entitled to universal credit. The language of regulation 8(2)(b) gives rise to same issue, albeit in the context of the tax credits award ending on the day before the claimant would have been entitled to universal credit had he met all the basic and financial conditions of entitlement to universal credit, but again the focus may be said to be on waiting to terminate the tax credits award until it has been decided if a claimant is entitled (or not) to universal credit.

43. However, we do not consider this is a good argument. We accept the argument of HMRC and the Secretary of State that, properly construing the actual words used in regulation 8(2) within the context of the provision as a whole and the wider statutory context (*R*

(Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3, [2022] 2WLR 343, at [29] and [31]), nothing in regulation 8(2) required an award of tax credits to continue until a claim for universal credit had been decided.

44. The key focus of regulation 8(2) of the UC TP Regs is on (the day before) the first date on which the claimant is entitled to universal credit (or would have been entitled if their claim had been successful). Importantly, that is not necessarily the same date as the date on which the entitlement to universal credit is *decided*, and often entitlement will arise from an earlier date. Nor does regulation 8(2) tie the termination date for the tax credits award to the date on which the claim for universal credit is decided. Entitlement to universal credit is dependent on a claim being made for it, per section 1 of the Social Security Administration Act 1992. It is also dependent on the basic and financial conditions for universal credit being satisfied. Moreover, universal credit is payable in respect of "each complete assessment period within a period of entitlement" (s.7(1) of the 2012 Act), with regulation 21 of the UC Regs providing 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". Furthermore, a claim for universal credit may be "backdated" for up to one month if specified conditions are met. Such entitlement will not actually come about until a decision is made on the claim that the person is entitled. However, entitlement does not arise only from the date of the decision. In fact, in most cases where there is entitlement it is likely to arise for a period of weeks (if not months) before the date on which the decision is made.

45. The words "the first date on which the claimant is entitled" in regulation 8(2)(a) clearly mean, in our view, the date from which entitlement to universal credit arose in law in connection with the claim for that benefit and an award was thus payable. They do not mean, nor do they say, the later date on which a decision on entitlement was made. This is supported by the wording in regulation 8(2)(b), which (for the cohort of claimants not entitled to universal credit) is the "date on which he or

> she would have been entitled to" universal credit. That can only be the date from which entitlement would have begun (if all the conditions of entitlement had been met), rather than any later date on which an adverse entitlement decision was made.
>
> 46. Another powerful indicator against the argument suggested in paragraph 42 above is that if regulation 8(2) were construed such that the award only terminated from the date of the decision on entitlement, the requirement for the Secretary of State to be satisfied that the specified basic requirements were met would be rendered otiose. To do so would run contrary to a generally accepted principle of statutory construction that the legislature does nothing in vain: see *Bennion, Bailey and Norbury* on Statutory Interpretation (8th edition, 2020), section 13.6. Rejecting the argument ensures meaning is given to regulation 8(1)(a).
>
> 47. Finally, in addition to what we have said generally about previous Upper Tribunal decisions and the scope of regulation 12(1)(b) of the UC TP Regs now needing to be read as being *obiter* on that issue, we would express specific disagreement with what was said in paragraph [39] of *MR v HM Revenue and Customs* (TC) (*CTC/923/2018*)."

Discussion

20. This appeal is not an appeal from a decision of a Tribunal on an appeal against the decision of the Secretary of State that the claimant and his partner were not entitled to universal credit. Indeed, for the purposes of this appeal, the claimant sought positively to rely on the Secretary of State's decision that they were not entitled to universal credit as showing that the Secretary of State could not properly be satisfied that they met the basic conditions specified in s.4(1)(a) to (d) of the 2012 Act.

21. As is apparent from the decision in ***SA***, it is not for the Tribunal on the appeal before it against HMRC's decision to terminate the award of tax credits to determine as a matter of substance whether the Secretary of State had been properly satisfied at the time of issue of the stop notice that the claimant

and his partner met the basic conditions specified in s.4(1)(a) to (d) of the 2012 Act. The Tribunal did not have before it an appeal against the Secretary of State's decision that the claimant and his partner were not entitled to universal credit.

22. What was before the Tribunal was an appeal against the decision of HMRC to terminate the award of tax credits. The Tribunal stood in the shoes of the decision maker and gave the decision which that decision maker was empowered to give.

23. Once that point is reached, the critical question is what HMRC and the Tribunal needed to decide about regulation 8(1)(b) of the UC TP Regs.

24. Regulation 8(2) of the UC TP Regs provides that, where regulation 8 applies, a tax credits award is "to terminate by virtue of this regulation." In other words, the tax credits award is to cease by operation of law if regulation 8 applies. Whether regulation 8 applied at the material time involved no more than two questions of fact, which had to be determined on relevant evidence. First, whether a claim for universal credit had been made. I am satisfied that a claim for universal credit had been made in this case. (I shall deal below with the effect of its withdrawal.) Second, whether the Secretary of State was in fact satisfied that the claimant and his partner met the basic conditions specified in s.4(1)(a) to (d) of the 2012 Act. That factual question was answered affirmatively by the stop notice which was received by HMRC from the Secretary of State on 10 July 2020. The claimant does not dispute that the stop notice in fact concerned him and his partner and stated that the Secretary of State was satisfied that they met the basic conditions specified in s.4(1)(a) to (d) of the 2012 Act. Once those two questions of fact had been determined, the only remaining question for the Tribunal arising under regulations 8 of the UC TP Regs was the correct date of termination of the tax credits award under regulation 8(2) of the UC TP Regs.

25. The language of regulation 8(1) of the UC TP Regs, particularly the statutory focus of it applying where a claim '*is'* made and where the Secretary of State '*is*' satisfied, is the language of fact. The language used is not concerned with any wider issue of whether the claim was properly made or the Secretary of State was properly satisfied that the specified basic conditions were met. Had that been the intention then such language could have been used. Perhaps more importantly, however, there is no sound basis for reading in language such as "properly satisfied" by necessary implication when to do so would involve HMRC trespassing on the decision making functions for universal credit for which it has no statutory authority otherwise conferred on it.

26. Put shortly, the relevant issue for the Tribunal was limited to whether the Secretary of State *was* (i.e. in fact) satisfied, and not whether he *was entitled to* be satisfied, that the conditions specified in s.4(1)(a) to (d) of the 2012 Act were met. That issue was not correctly identified and analysed by the Tribunal and it made an error of law in reaching the conclusion which it did.

27. The claimant sought to argue that the online claim form had not been completed since there were further matters which needed to be addressed and completed. He specified in particular the provision of passports and driving licences, the confirmation of earnings, information about employment status and other information and his partner's telephone interview.

28. However, it is clear from the analysis in ***SA*** that a claim for universal credit had been submitted (indeed it was not until that point that the information on the claim form became visible to the staff of the Department for Work and Pensions, see ***GDC v Secretary of State for Work and Pensions (UC)*** [2020] UKUT 108 (AAC) ("***GDC***") at [47] and the Secretary of State was satisfied that he and his partner met the basic conditions for eligibility for universal credit.

28. The claimant therefore argued (and the Tribunal accepted) that because he had withdrawn the claim on the same day on which he had submitted it and the stop notice had not been received by HMRC until 3 days later, there was not the simultaneous existence of claim and the Secretary of State's satisfaction as to the basic conditions of entitlement.

29. I deal with that question in the following section.

30. I would add the following. Just as it would not have been for the Tribunal to decide whether the Secretary of State had been properly satisfied about the specified basic conditions being met, it is not strictly for me to decide what regulation 8 of the UC TP Regs requires of the Secretary of State to be 'satisfied'. If the evidence shows that he was in fact satisfied that the claimant bringing the appeal met the specified basic conditions in s.4(1)(a) to (d) of the 2012 Act, why he was satisfied was not for the Tribunal on an appeal. It must follow that issues about whether the Secretary of State was properly satisfied cannot arise on any further appeal to the Upper Tribunal from such an appeal. The Upper Tribunal is not dealing with a judicial review of whether the Secretary of State had been properly satisfied that the basic conditions specified in s.4(1)(a) to (d) of the 2012 Act were met. To that extent, Upper Tribunal case law which has sought to decide the correct meaning of regulation 8(1)(b) of the UC TP Regs in the context of appeals concerning benefits other than universal credit (for example, ***SK v Revenue and Customs Commissioner and another*** [2022] UKUT 10 (AAC), [2022] PTSR 818) should be treated as being *obiter* on the point.

31. However, given the process by which a claim for universal credit was made at the relevant time (as to which see paragraph 37 of the decision in ***SA***), I have no reason to dissent from the view of Upper Tribunal Jacobs in

SK that a stop notice was the means by which the Secretary of State communicated to HMRC: (a) that a claim for universal credit had been made for the purposes of regulation 8(1)(a) of the UC TP Regs; and (b) his satisfaction, for the purposes of regulation 8(1)(b) of the UC TP Regs, that the claimant met the basic conditions specified in s.4(1)(a) to (d) of the 2012 Act. Moreover, the Secretary of State has established a system under which he satisfied himself of the relevant matters through reliance on a computer programme, by answers given to relevant questions.

32. Although I am not bound by the *obiter dicta* in ***SK***, nevertheless on the meaning of regulation 8(1)(b) of the UC TP Regs, I am satisfied that the view of Judge Jacobs in ***SK*** is correct. The Secretary of State needed only to have been satisfied that the claimant and his partner were 18 years of age, had not reached the age for state pension credit, were in Great Britain (which he tested by asking for an address in Great Britain, which they provided) and were not receiving full-time education. He did not need to apply the conditions set out in secondary legislation, including provisions which deemed a person to be or not to be in Great Britain nor to determine matters such as verification of identity online nor matters such as the financial conditions for entitlement. As Judge Jacobs put it in paragraph [22] of ***SK***:

> "Regulation 8(1)(b) refers to 'the basic conditions specified in section 4(1)(a) to (d)'. My conclusion is that this means 'the basic conditions *as specified in* section 4(1)(a) to (d)'. That excludes cases in which a person is *treated as* not being in Great Britain under section 4(5)(a). In other words, it excludes cases in which section 4(1)(c) is qualified by deeming provisions."

33. The ***SK*** construction of regulation 8(1)(b) is also supported by the words in brackets which appeared at the end of it – "(other than any of those conditions which the claimant is not required to meet by virtue of regulations under section 4(2) of the Act)" – as that shows that the draftsman was aware

of, but chose not to refer to in the opening words in regulation 8(1)(b), additional conditions imposed by secondary legislation. It is further supported by regulation 8(2)(b) of the UC TP Regs which, by contrast, use more expansive language which includes meeting the financial conditions to be entitled to universal credit. Reading regulation 8 as a whole shows a clear and deliberate distinction between the narrow focus in regulation 8(1)(b) on meeting the basic conditions *specified* in s.4(1)(a) to (d) of the 2012 Act and meeting those (and other) conditions of entitlement to universal credit more generally.

34. Again, although I am not bound by the *obiter dicta* in ***SA***, I am satisfied that the views of the three-judge panel expressed in paragraphs 42 to 47 of that decision were correct

The Decision In *JL*

35. The claimant submitted that he had withdrawn the application on the same day as he made it and that that precluded the Secretary of State from being satisfied that he and his partner fulfilled the basic conditions for eligibility for universal credit.

37. In ***JL v Calderdale MBC and the Secretary of State for Work and Pensions*** [2022] UKUT 9 (AAC) ("***JL***") a claimant made an application for universal credit between 12.42 and 13.05, but repented of it and sought to withdraw the application at 15.35. Nevertheless, Upper Tribunal Judge Jacobs held that, once made, a claim for universal credit cannot (effectively) be withdrawn so as to prevent regulation 8(1)(b) of the UC TP Regs from having effect. In so doing he explained that he was not following the analysis in ***HMRC v AB*** [2021] UKUT 209 (AAC) ("***AB***"). He had read that decision and examined the file and it was clear that the judge made his decision on different arguments and a different explanation of how the online universal credit system worked.

38. Judge Jacobs explained that there were two ways of analysing the effect of the attempt to withdraw the claim, but the result was the same on either analysis:

> **“H. The attempt to withdraw the claim**
> 21. There are two ways of analysing the effect of the attempt to withdraw the claim.
>
> *The claim could not be withdrawn*
>
> 22. One analysis is that it was too late to withdraw the claim once regulation 8(1) was satisfied.
>
> 23. A claim may be withdrawn, but only before a determination has been made on it. This is governed by regulation 31(1) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI No 380):
>
> > (1) A person who has made a claim for benefit may withdraw it at any time before a determination has been made on it ...
>
> The withdrawal takes effect ‘when it is received’: regulation 31(2). Regulation 31 repeats regulation 5(2) of the Social Security (Claims and Payments) Regulations 1987 (SI No 1968).
>
> 24. In this case, the claimant attempted to withdraw his claim at 15:35, about 2½ hours after he made the claim. The evidence in *SK* was that the universal credit online claim system checks that the basic conditions in section 4(1)(a) to (d) are met and will only allow the claim to be submitted if they are. At that moment, the Secretary of State is satisfied for the purposes of regulation 8(1)(b).
>
> 25. It does not matter that this process is computerised. As I said in *SK*, the Secretary of State is entitled to rely on a computer programme to identify cases in which the transitional condition is satisfied. Section 2 of the Social Security Act 1998 is the authority for this:

> 2 Use of computers
> (1) Any decision, determination or assessment falling to be made or certificate falling to be issued by the Secretary of State under or by virtue of a relevant enactment, or in relation to a war pension, may be made or issued not only by an officer of his acting under his authority but also—
>
> (a) by a computer for whose operation such an officer is responsible; and
>
> (b) in the case of a decision, determination or assessment that may be made or a certificate that may be issued by a person providing services to the Secretary of State, by a computer for whose operation such a person is responsible.
>
> (2) In this section 'relevant enactment' means any enactment contained in—
> ...
>
> (k) Part 1 of the Welfare Reform Act 2012; ...

Universal credit is governed by Part 1 of the Welfare Reform Act 2012 and so within section 2. What the computer produces is not a decision or an assessment, but it is a determination. The Court of Appeal explained the difference between a decision and a determination under the 1998 Act in *Carpenter v Secretary of State for Work and Pensions* (reported as *R(IB) 6/03*). Laws LJ said:

> 14. ... if one looks at the whole legislative scheme there is a plain distinction between a decision (that is, a decision upon the actual question whether a claimant is entitled to a particular benefit or not) and what may conveniently be called a determination (that is, a determination of any matter along the way leading to a decision, including a determination of a procedural issue such as an application for an adjournment). ...

The conclusion that the Secretary of State must reach under regulation 8(1)(b) is aptly captured by Laws LJ's words as a 'matter along the way leading to a decision'.

26. So, on that approach to regulation 31(1), the claim could not be withdrawn because a determination had been made on it.

27. My reasoning has so far assumed that determination in regulation 31(1) is not to be equated with a final decision on the claim, which is sometimes called an outcome decision. The wording of regulation 31(1) follows the wording of regulation 5(2) of the 1987 Regulations; both use the expression 'at any time before a determination has been made on it'. As far as I can discover, the power to withdraw was first set out in legislation in the 1987 Regulations. The language used differs from the language used in regulation 5A of the Supplementary Benefit (Claims and Payments) Regulations 1981 (SI No 1525), which dealt with deemed withdrawals. Contrast 'at any time before a determination has been made on it' (1987 and 2013) with 'before the determination of any claim' (1981). The language also differs from section 12(2) of the Social Security Act 1998, which refers to a claim being 'decided'.

28. What if this interpretation is wrong?

The withdrawal was not retrospective in effect

29. If it was not too late to withdraw the claim, doing so had no effect on regulation 8.

30. If I am wrong about the meaning of regulation 31(1), the claimant was entitled to withdraw his claim later the same day, because the Secretary of State had not decided the claim and did not purport to do so until 21 May 2018. Regulation 31(2) provides that 'Any notice of withdrawal ... has effect when it is received.' That raises the question: was the effect retrospective with the result that the claim had never existed? My answer is: no. In short, the withdrawal did not rewrite history. There are a number of grounds that support that conclusion.

31. First, that is the natural reading of the language of regulation 31(2).

32. Second, regulation 31(2) merely repeats the

language of the 1987 Regulations. Both Regulations were made to deal with the procedure on claims for benefits. There was no need to make a withdrawal retrospective in that context. Once the claim ceased to exist, there would no longer be a claim to decide and no decision would be made. The result would be the same whether or not the effect under regulation 31(2) was retrospective. There is no need to read the legislation as providing for retrospective effect because that was not necessary to achieve its objective.

33. Third, there is some authority that a claim cannot be withdrawn retrospectively. It lends support to my conclusion, but I acknowledge that the context was different. At one time, a claim was considered to continue to exist throughout the period of an award made on it. That was the analysis of the Tribunals of Commissioners in *R(S) 1/83* and *R(S) 2/98*. It was in that context that Mr Commissioner (later Upper Tribunal Judge) Mesher decided in *CJSA/3979/1999* that it was not possible to withdraw a claim retrospectively, but said:

> 24. ... it does not necessarily follow ... that a claim cannot be withdrawn for a prospective period even though there is a current indefinite award. The decisions of the Tribunals of Commissioners were subsequently reversed by section 8(2)(a) of the Social Security Act 1998:
>
> (2) Where at any time 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; ...

The result is that Judge Mesher's reasoning no longer applies. As I directed the tribunal in *CDLA/1589/2005* at [1]:

> The reasoning in [*CJSA/3979/1999*] is no longer entirely apposite under the adjudication procedures introduced by the Social Security Act 1998, but it remains good law that a claimant may surrender an award of benefit. As the Secretary of State did not

> make an award of universal credit, the issue of surrender does not arise.
>
> *Even if the withdrawal was retrospective, it did not matter to the transition to universal credit*
>
> 34. A different approach is that regulation 31(2) is irrelevant. Rather, regulation 8 is freestanding and operates without regard to regulation 31. On this approach, what matters is the existence of facts, meaning that a claim has been made that meets the basic conditions (a)-(d). On my analysis in *SK*, the point of reference of regulation 8 as a transitional provision is on the moment when the claim is made and the Secretary of State is satisfied that the relevant basic conditions are met. At that moment, as a matter of fact in history, there is no doubt that the claimant had made a claim and no doubt either that he met the necessary basic conditions. As I explained in *SK*, the making of the claim and the determination under regulation 8(1)(b) take effect simultaneously through the universal credit computer system. The notification to the local authority, by the so-called stop notice, is a merely administrative act with no adjudicative effect. Accordingly, regulation 8 came into play as soon as the claim was made. Anything that happened after that is irrelevant because the transition to universal credit had been triggered."

39. Where a judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, the second of those decisions should be followed in the absence of cogent reasons to the contrary, see ***Re Lune Metal Products Ltd*** [2006] EWCA Civ 1720 per Neuberger LJ at [9]

> "Whether or not the decision is ultimately upheld in this court, I consider that Judge Hodge was entirely right to follow the decision of Rimer J. Where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary: see *Colchester Estates (Cardiff) v Carlton*

> *Industries Plc* [1986] Ch 80 at 84E-85H per Nourse J. The present case appears to me to be *a fortiori*. There were a number of inconsistent first instance decisions on the point, which Rimer J considered, and came to a clear conclusion as to which line of authority he agreed with. In those circumstances, very convincing reasons indeed would have had to have been put before Judge Hodge before he could sensibly have departed from the reasoning and conclusions of Rimer J"

(and see too Lord Neuberger in ***Willers v. Joyce (Re Gubay (deceased) No 2)*** [2016] UKSC 44 at [9], Lewison J in ***Re Cromptons Leisure Machines Ltd*** [2006] EWHC (Ch) 3583, [2007] BCC 214 and HHJ Purle QC in ***Re BXL Services*** [2012] EWHC 1877 (Ch)).

40. I therefore follow the decision of Upper Tribunal Judge Jacobs in ***JL*** in preference to that of Upper Tribunal Judge Mitchell in ***AB***. No convincing reasons have been put to me which would justify departing from the reasoning and conclusions in ***JL***, which in any event I find compelling.

41. In any event, it is clear that Judge Mitchell made his decision on different arguments and a different explanation of how the online universal credit system worked.

42. Accordingly I conclude that the withdrawal of the application on the same day as it was made did not preclude the Secretary of State from being satisfied that the claimant and his partner fulfilled the basic conditions for eligibility for universal credit and that the Tribunal was wrong to conclude otherwise.

Conclusion

43. The decision of the Tribunal involves an error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal set aside.

44. The decision is remade. The remade decision is to dismiss the claimant's appeal from HMRC's decision of 12 August 2020. The claimant and his partner were not entitled to tax credits from 7 July 2020 because they made a claim for universal credit on 7 July 2020 and the Secretary of State was satisfied that they met the basic conditions for eligibility specified in s.4(1)(a) to (d) of the 2012 Act. HMRC had lawfully terminated their award of tax credits from 7 July 2020 pursuant to regulation 8(1)(a) and (b) of the Universal Credit (Transitional Provisions) Regulations 2014 ("the UC TP Regs"), as they were in force at the date of HMRC's decision on 12 August 2020.

Mark West
Judge of the Upper Tribunal

Authorised for issue on 4 January 2023