Neutral Citation Number: [2024] EWCA Civ 186

Case No: CA-2023-000313

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
UTTJJ Jacobs, Wikeley, Wright
2022 UKUT 242 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE NICOLA DAVIES
and
LADY JUSTICE WHIPPLE

- -

Between :

THE SECRETARY OF STATE FOR WORK AND PENSIONS	**Appellant**
- and -	
ABDUL MIAH (a protected party, by his litigation friend MASHUQ MIAH)	**Respondent**

- -
- -

Edward Brown KC (instructed by **the Treasury Solicitor**) for the **Appellant**
Tom de la Mare KC and **Tom Royston** (instructed by **Child Poverty Action Group**) for the **Respondent**

Hearing date: 7 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill:

INTRODUCTION

1. This appeal concerns an aspect of the rules governing claims for Universal Credit ("UC") generally referred to as "backdating". I will need in due course to set out the relevant statutory provisions, but before doing so I will outline the facts leading to the decision which is challenged in this appeal:

   (1) The Respondent to this appeal, Mr Miah, ("the Claimant") was born on 16 February 2000. He has a severe learning disability and appears by his father as his litigation friend.

   (2) When the Claimant reached the age of twenty, on 16 February 2020, his parents' entitlement to child tax credit ("CTC") for him ceased. In order, in effect, to replace that lost support, his father on 16 March 2020 submitted a claim for UC to the Department of Work and Pensions ("the DWP") on his behalf: the claim was made by telephone.

   (3) The general rule is that a claim for UC cannot be made for a period starting earlier than the date that it is submitted ("the date of claim"): in other words, it cannot be retrospective. But where, as the result of one of a number of specified circumstances, which include disability, a claimant could not reasonably have been expected to make the claim earlier than they did, the Secretary of State is required to allow them to claim for a period of up to a month before the date of claim: this is the "backdating" referred to above. (The provisions which have this effect are set out at paras. 12 and 13 below.)

   (4) The Claimant's father did not when he submitted the claim refer to any circumstances that might have entitled him to have the claim backdated; as will appear, the procedure for claiming did not afford any obvious opportunity to do so.

   (5) On 16 April 2020 the Claimant was informed of the DWP's decision to award him UC from the date of claim.

   (6) The fact that the decision covered only the period from the date of claim meant that there was a gap of a month between the date when the Claimant's parents ceased to receive CTC (16 February) and the date as from which he became entitled to receive UC (16 March). On 23 July 2020 the Claimant's mother asked the DWP to backdate his claim to 16 February.

   (7) That request was refused on 3 August 2020, and a request to reconsider that refusal was itself refused by a decision dated 27 October 2020[1] (though only notified to the Claimant on 11 November).

   (8) I should add that on 9 July 2020 the DWP made a further decision adding an element to the Claimant's award on account of his limited capability for work-related activity ("LCWRA"). That award ran from 16 June2020. On 10

[1] The decision itself bears the date 27/01/2020, but that is evidently a slip for 27/10/2020.

November 2020 the Claimant asked for it to be backdated to 16 February 2020. By a reconsideration decision apparently of the same date that request too was rejected. This decision has not featured separately in the submissions before us but I mention it since it forms part of the procedural history.

2. The basis for the refusals was not that the Claimant was unable to satisfy the substantive requirements of the backdating provisions but that in the DWP's view the Secretary of State was not empowered to backdate once a decision had been made on the original claim. The decision of 27 October 2020 explains its position succinctly as follows:

> "… [O]nce a decision is made in respect of a claim, it no longer exists as such in law and is replaced by an award or a disallowance. A claimant can seek a revision of the award within the time scales allowed (1 month in most cases) but that revision can only affect the claim for the period decided. The revision cannot add dates to the claim that were not part of the original decision. In other words, you can change the award from the date the claim begins but you cannot backdate a claim to an earlier period by means of a revision."

(The provisions relating to "revision" are set out at paras. 23-27 below.)

3. The Claimant appealed to the First-tier Tribunal against the Secretary of State's decision of 3 August 2020. The appeal was heard on 25 March 2021. By a decision promulgated on 5 November 2021 FTTJ Joshi accepted the DWP's contentions and the appeal was dismissed.

4. The Claimant then appealed to the Upper Tribunal. The appeal was heard by a panel of three Judges – UTJJ Jacobs, Wikeley and Wright. By a decision dated 14 September 2022 they unanimously allowed the appeal and held that the Claimant was entitled to seek to backdate his claim. They remitted the case for a determination of whether on the particular facts of his case the requirements of the backdating provisions were satisfied. It is against that decision that the Secretary of State appeals to this Court, with permission granted by Lewis LJ.

5. The question whether the DWP was entitled to refuse to entertain the Claimant's request to backdate depends on the construction of the applicable statutory provisions. The same issue has arisen in a number of other cases before the First-tier Tribunal (and indeed similar issues arose before the predecessors to the Administrative Appeals Chamber of the Upper Tribunal, the Social Security Commissioners) and has resulted in divergent decisions. The appeal in the Upper Tribunal was directed to be heard by a panel of three Judges because it involved "a question of law of special difficulty and/or an important point of principle or practice".

6. The Secretary of State was represented before us by Mr Edward Brown KC and the Claimant by Mr Tom de la Mare KC, leading Mr Tom Royston. Before the Upper Tribunal the Secretary of State was represented by Mr Jack Holborn and the Claimant by Mr Royston.

THE STATUTORY PROVISIONS

7. Although entitlement to UC is governed by the Welfare Reform Act 2012 we are in this appeal concerned only with the legislation about the procedures applying to claims to such entitlement, and more particularly about:

   (a) the procedure for making benefit claims – being the Social Security Administration Act 1992 ("the SSAA 1992") and the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 ("the C&P Regulations"); and

   (b) the making of decisions about such claims (including the power of revision and the right to appeal) – being the Social Security Act 1998 ("the SSA 1998") and the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 ("the D&A Regulations").

Making the claim

8. The starting-point is that entitlement to benefit is dependent on the making of a claim in accordance with the applicable regulations. Section 1 (1) of the SSAA 1992 reads:

> "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."

In *Secretary of State for Work and Pensions v Nelligan* [2003] EWCA Civ 555, [2004] 1 WLR 894, this Court confirmed that the effect of section 1 (1) was that a claim (or, exceptionally, the deemed making of a claim) was a precondition to entitlement. Mr Brown emphasised that this principle, which he described as enshrining "claimant autonomy", was a foundational feature of the benefit system.

9. The power to make regulations of the kind referred to in section 1 (1) is conferred on the Secretary of State by section 5 (1) of the Act, which reads (so far as material for our purposes):

> "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 … ."

Paragraph (b) is important for our purposes because it empowers the making of regulations providing that a claim made on one date may be treated as having been made on a different date.

10. The C&P Regulations are made under those powers.[2] They contain provisions covering a wide range of procedural matters, but under this head I need only refer to three:

    (1) Regulation 8 provides for how claims for UC are to be made. The default rule is that they must be made online, but in certain circumstances they may be made by telephone.

    (2) Regulation 10 provides, in effect, that subject to certain exceptions, the date of a claim is the date of the online communication or the telephone conversation by which it is made.

    (3) Regulation 36 provides that an award of UC is to be made "for an indefinite period".

The time within which a claim for UC must be made: regulation 26

11. Regulation 26 is headed "Time within which a claim for universal credit is to be made": that language evidently reflects the reference in section 1 (1) (a) to a claim being made "within the time" prescribed by regulations. It contains both the rules referred to at para. 1 (3) above – that is, the general rule against retrospectivity and the backdating provisions. Regulation 26 is central to the issue in this appeal.

12. The general rule is stated in paragraph (1), which reads:

> "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."

Although that is put in rather a convoluted way, its effect necessarily is that a claim can only (subject to the backdating provisions) be forward-looking.

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[2] Apparently before the Upper Tribunal the parties proceeded on the basis that the relevant *vires* were conferred by section 1, but the Tribunal pointed out that section 5 appeared "equally important" (see para. 18 of its Reasons). The formal position appears to be that section 1 contemplates the making of regulations but that the actual power to make the regulations with which we are concerned is conferred by section 5. I note that Schedule 1 to the C&P Regulations, which identifies the powers under which the regulations are made, refers to both sections.

13. The backdating provisions appear in paragraphs (2) and (3), which read (as at the material date):

> "(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.

(4)-(5) …"

14. There are thus two conditions to the operation of the backdating provisions – (a) that one of the circumstances identified in paragraph (3) applies and (b) that as a result of that circumstance the claimant could not reasonably have been expected to make the claim earlier. I will call these "the specified conditions".

15. It is clear, and not in dispute, that the intended effect of the backdating provisions is that if the specified conditions are met a claimant will be entitled to be awarded benefit in respect of a period of (up to) a month prior to the date of claim, which I will refer to as "the past period". It is less clear how the language used produces that effect. What the words of the regulation literally require the Secretary of State to do is to is to "extend the time for claiming [UC]" to the actual claim date. As Mr de la Mare observed, that formula is appropriate to a conventionally expressed limitation period in respect of a past liability, but it is not a good fit with the case of a forward-looking claim. However, inept though the drafting is, the words can and should be read purposively so as to have the intended effect. That could be done by reading them either (a) as deeming the claim to have been made at the start of the past period or (b) as deeming the past period to have started at the actual date of claim. In my view the former alternative is correct because it corresponds to the language of section 5 (1) (b) of the SSAA 1992: the claim is "treat[ed] … as having been made at [a] date earlier … than that at which it is made". It may be debatable whether, as the Upper Tribunal observed, "backdating" is an entirely accurate label for a provision that works in that way, but it is an acceptable shorthand. There are two points about how the backdating provisions work which it is convenient to make at this stage.

16. First, they are not self-executing: that is, they require a decision by the Secretary of State to extend time in the particular case. That is apparent not only from the way paragraph (2) is worded – "the Secretary of State is to extend …" – but from the fact that in each case a decision has to be made about whether as a matter of fact the specified conditions are satisfied.

17. Secondly, they do not impose any express obligation on a claimant wishing to invoke the backdating provisions to make any application or request to that effect, or therefore to supply evidence or information necessary for a decision to be made about whether to extend time. Mr Brown made the obvious point that the Secretary of State would only be in a position to extend time under paragraph (2) if the claimant provides the

evidence which would enable him[3] to decide whether the specified conditions were satisfied. He made it clear that it was not the position of the Secretary of State that he would only consider a request to backdate if the claimant explicitly invoked the backdating provisions and provided the supporting evidence were provided. He said that, provided the information supplied by a claimant gave sufficient reason to believe that the backdating provisions might apply, the decision-maker would adopt the inquisitorial approach endorsed by the House of Lords in *Kerr v Department for Social Development (Northern Ireland)* [2004] UKHL 23, [2004] 1 WLR 1372 ("the *Kerr* duty"), and make any necessary further enquiries and extend time if the specified conditions were found to be satisfied.[4] But he submitted that the claimant had to say enough to trigger such enquiries in the first place. That seems to accord with common sense.

Amendment

18. Regulation 30 provides that a claim can be amended at any time before it has been determined. It reads:

> "(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."

19. The essential point for our purposes is that an amendment can only be made before the claim has been determined. In the generality of cases the Secretary of State determines a claim for UC within a month of the date of claim, and he may do so sooner than that. In practice, therefore, a claimant would be well-advised to make any amendment application as soon as possible after the date of claim.

The decision

20. Section 8 of the SSA 1998 reads, so far as material:

> "(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;
>
> (b) … and

[3] For convenience I will refer to the Secretary of State in this judgment by the gender of the current incumbent.

[4] When I refer elsewhere in this judgment to a claimant requesting, or applying for, backdating I do so in that sense, i.e. to include cases where they say enough to trigger an investigation.

> (c) subject to subsection (5) below, to make any decision that falls to be made under or by virtue of a relevant enactment;
>
> (d) …
>
> (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; 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.
>
> (3)-(5) …"

Because we are on this appeal concerned with more than one kind of decision, I will refer to a decision under section 8 (1) (a) as a "determination" (borrowing that term from regulation 30 of the C&P Regulations – see para. 18 above).

21. Section 8 (2) thus makes clear that once the Secretary of State has made a determination the claim is closed, with the consequence spelt out at (b). But that is subject to the provisions for "revision" which I set out next.

22. Section 10 of the SSA 1998 also empowers the Secretary of State to make "decisions superseding earlier decisions". We are not concerned with such decisions in this case but I mention it because section 10 is referred to in some of the provisions which I quote below.

Revision

23. Section 9 of the Act empowers the Secretary of State to "revise" a decision under section 8. It reads, so far as material:

> "(1) Any decision of the Secretary of State under section 8 above or section 10 below may be revised by the Secretary of State—
>
> (a) either within the prescribed period or in prescribed cases or circumstances; and
>
> (b) either on an application made for the purpose or on his own initiative;
>
> and regulations may prescribe the procedure by which a decision of the Secretary of State may be so revised.
>
> (2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.

> (3) Subject to subsections (4) and (5) and section 27 below, a revision under this section shall take effect as from the date on which the original decision took (or was to take) effect.
>
> (4) Regulations may provide that, in prescribed cases or circumstances, a revision under this section shall take effect as from such other date as may be prescribed.
>
> (5) Where a decision is revised under this section, for the purpose of any rule as to the time allowed for bringing an appeal, the decision shall be regarded as made on the date on which it is so revised.
>
> (6) …."

(In the usual way "prescribed" means prescribed by regulations: see section 84. A general power to make regulations under the Act is conferred by section 79.)

24. Part 2 of the D&A Regulations sets out the procedure applicable to the revision of determinations pursuant to section 9. The submissions before us did not turn on the details of these provisions, and we were not taken through them in any detail. We were referred primarily to Chapter 1 of Part 2, comprising regulations 5-7, which is headed "Revision on Any Grounds". Chapter 2 is headed "Revision on Specific Grounds", but it was not contended that any of the specific grounds there provided for are relevant to the present case (though we were told that the Claimant would have sought to rely on regulation 9 (a) ("official error") if he had not been able to rely on Chapter 1). Chapter 3 is headed "Procedure and Effective Date".

25. The provision of Part 2 which is most relevant for our purposes is regulation 5, which reads:

> "(1) Any decision of the Secretary of State under section 8 or 10 of the 1998 Act ('the original decision') may be revised by the Secretary of State if —
>
> (a) …; or
>
> (b) an application for a revision is received by the Secretary of State at an appropriate office within —
>
> (i) one month of the date of notification of the original decision …;
>
> (ii) …;
>
> (iii) …; or
>
> (iv) such longer period as may be allowed under regulation 6 (late application for a revision).
>
> (2) Paragraph (1) does not apply —

> (a) in respect of a relevant change of circumstances which occurred since the decision had effect …;
>
> (b) where the Secretary of State has evidence or information which indicates that a relevant change of circumstances will occur;
>
> (c) in respect of a decision which relates to an employment and support allowance or personal independence payment where the claimant is terminally ill, unless the application for a revision contains an express statement that the claimant is terminally ill."

26. As appears from paragraph (1) (b) (iv), regulation 6 allows the Secretary of State to extend the time limit for applying for revision subject to certain conditions. The only condition to which I need refer is that time may not be extended by more than twelve months: see sub-paragraph (3) (c).

27. Regulation 21, which is part of Chapter 3, reads (so far as material):

> "Where, on a revision under section 9 of the 1998 Act, the Secretary of State decides that the date from which the decision under section 8 … of that Act ('the original decision') took effect was wrong, the revision takes effect from the date from which the original decision would have taken effect had the error not been made."

28. The purpose of the power to revise conferred by those provisions is evidently that the Secretary of State should be able, to the extent permitted, to alter his original determination in any case where it does not correspond to the claimant's correct entitlement (whether the error is in his favour or the claimant's). As it was put by a tribunal of Social Security Commissioners chaired by HH Judge Hickinbottom (as he then was) in *R(IB) 2/04*, at para. 10 (2) "the decision can be revised simply on the basis that it is considered to have been wrong as at the date when it was made".[5] An example canvassed in argument before us is where an award of UC was too low because the claimant had failed to mention a dependent child; but in truth there could be any number of mistakes by a claimant (or the DWP) which could lead to an incorrect determination.

29. It is important to note that the power to revise cannot be exercised in respect of any circumstances which have occurred since the date of the determination: an award based on such circumstances can only be obtained by making a fresh claim. That is in line with the similar restriction in section 8 (2) (b) of the SSA 1998 (see para. 20 above).

Appeals

30. Section 12 of the SSA 1998 reads (so far as material) as follows:

> "(1) This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which—

[5] In fact the decision was concerned with predecessor regulations in substantially the same terms.

> (a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or
>
> (b)-(c) ...
>
> (2) In the case of a decision to which this section applies, the claimant and such other person as may be prescribed shall have a right to appeal to the First-tier Tribunal …
>
> (3)-(9) …

UC is a "relevant benefit": see section 8 (3) (aa).

31. The D&A Regulations recognise that issues that may be raised by way of revision and by way of appeal are liable to overlap. Regulations 7 and 52 address different situations resulting from that potential overlap, but I need not for our purposes give the details.

THE PRACTICALITIES OF MAKING A BACKDATING CLAIM

32. It is an important part of the background to this appeal that the processes for making a claim provided for by regulation 8 of the C&P Regulations do not offer any obvious opportunity to a claimant to make a backdating request in accordance with regulation 26 (2) and (3) and to identify the circumstances on which they rely. I will take separately the position where the claim is made online and where it is made by telephone.

33. As for claims made online, the process is set out at paras. 38-47 of the Upper Tribunal's exemplarily clear and comprehensive Reasons in *GDC v Secretary of State for Work and Pensions* [2020] UKUT 108 (AAC) (a decision of UTJ Wikeley). I need not set out here the various stages which a claimant is required to follow. It is sufficient to say that at no point are they asked whether they wish to claim in respect of a period beginning prior to the date of claim or (therefore) given the opportunity to identify the matters that would be relevant under regulation 26 (2) and (3). Nor is any "free text" box offered prior to the point of submission of the claim in which they could, albeit unprompted, advance such a claim. Mr Brown told us that a claimant wishing to make a backdating request could do so by using the "Journal" facility by which UC claimants or beneficiaries can supply information to, or raise queries with, the DWP. If the claimant knew at the time of making their claim that they wanted to make a backdating request, they could access the Journal immediately after they had submitted the claim (though not before) and make an entry explaining the matters on which they relied. But if it was only later that they appreciated that backdating was or might be available they could also make an entry at that point – provided always that they did so prior to the determination (see para. 19 above). In either case the entry would be considered by the decision-maker, and if he or she was satisfied (if necessary, after further enquiries) that the requirements of regulation 26 (2) were satisfied the award would be backdated accordingly. Mr Brown did not specify how a Journal entry of this kind would take effect under the scheme of the C&P Regulations; but presumably it would count as an amendment of the claim in accordance with regulation 30.

34. As for claims made by telephone, although, as we have seen, the original claim in the present case was made by that route, such claims are only a small proportion of all UC

claims (apparently 2% in 2018: see *GDC*, n. 8). But the position as regards the opportunity to make backdated claims is in any event not essentially different. The DWP official at the other end of the phone simply acts as the claimant's intermediary in conducting the online process, asking the claimant the questions on the screen and inputting their answers. They will not therefore ask if the claimant wants to backdate or any other question that might elicit such an answer. If the claimant nevertheless volunteers that they want the claim to start from an earlier date than the date of claim, it seems that the official would have no tools to record such a claim except via the Journal. Thus, at best, they could make a Journal entry on the claimant's behalf immediately following submission of the claim (though I am not entirely clear that they would be able to do even that, since it may be that their role in recording the claim ends at the point of submission).

35. It is very unsatisfactory that the system for claiming UC does not offer claimants any opportunity to ask to have their claim backdated. I dare say, although we were given no figures, that the proportion of claimants entitled to backdating is quite small. But the absolute numbers will still be significant, and they are by definition people who could not reasonably have been expected to make their claim earlier and some of whom are specially vulnerable as a result of ill-health or disability; many will not have ready access to advice. Not all will have focused on the question of the date from which their entitlement will start; but even where they have, they may be unaware of, or uncertain about, the entitlement to backdate, and if the point is not raised as part of the online process they may well not pursue it. Even if they try to do so, the "Journal route" can hardly be described as obvious: inventive or well-advised claimants might take it, but it will certainly not occur to everyone.

36. The present case illustrates the problem. Although the tribunals below had no evidence on the point, it is not unlikely that the Claimant's parents expected that, provided they claimed UC soon after the expiry of the entitlement to CTC, there would be a seamless transition from payment of the one to payment of the other.[6] But even if they did not, or had not considered the question either way, it is hard to think that, if in the course of his telephone claim the Claimant's father had been asked a question which had alerted him to the possibility of backdating, he would not have made a backdating request and supplied any necessary supporting information or evidence.

37. The omission of any opportunity to ask for backdating is the more regrettable because the problem is not an artifact of the introduction of UC. Many or most of the legacy benefits had equivalent, though not identical, rules about backdating. In these cases also the paper application forms which claimants were required to complete contained no questions designed to elicit whether they wished to backdate their claim, and the problems to which this gave rise produced a substantial body of case-law.[7] The

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6 The Upper Tribunal noted that it was only by chance that the claim for UC was made exactly a month after the Claimant ceased to be entitled to CTC: that is, his parents were not aware of the significance of a month for the purpose of regulation 26.

7 Several of the authorities were in the bundle before us, and we were taken to some of them, although not in detail because counsel were agreed that they did not bear directly on the issue we had to decide. For the record they were Social Security Commissioner's decisions *R(SB) 56/83*, *CIS/371/1993*, *CIS 14082/96*, *CIS 17514/1996*, *CIS 1460/1997*, and *CIS/7621/1999*, together with decision *R(SB) 9/84* of a tribunal of Social Security Commissioners.

introduction of new processes for the submission of UC claims would have afforded an opportunity for reconsideration, but it was not taken.

38. These concerns were canvassed by the Court with Mr Brown. He fairly pointed out that we were in this appeal concerned with a question of statutory construction, and he submitted that it could not be relevant to that question whether the detailed procedures for making a claim were badly designed or otherwise deficient: we were not concerned with a claim for judicial review, still less a complaint of maladministration. As the majority of the Upper Tribunal put it at para. 60 of the Reasons:

> "We agree ... 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."

That being the Secretary of State's stance, Mr Brown did not seek to explain or justify why claimants were not given an opportunity to make a backdating request as part of the online claim process (or, therefore, the telephone process), although he did tell us that the issue was under review within the DWP.

39. I agree that in construing the statutory provisions we ought not to take into account the deficiencies in the claim process discussed above; and indeed by the end of his oral submissions I understood Mr de la Mare to accept that that must be the case. But I hope that the Court's concern on this aspect will be drawn to the attention of the Secretary of State.

THE PARTIES' CASES

40. I set out here the parties' cases as they had crystallised by the end of the oral submissions before us. As will appear, there may have been some differences in how the issues were framed at earlier stages of the proceedings, and that was to some extent reflected in the skeleton arguments; but the fundamental issue eventually emerged: see para. 48 below.

41. *The Claimant's case*. Mr de la Mare acknowledged that the claim as submitted on 16 March 2020 gave the Secretary of State no reason to believe that the backdating provisions might apply. His primary case before us relied on the backdating request made by the Claimant's mother on 23 July 2020, which, he said, had been accepted as a timeous application for revision under section 9 of the 1998 Act and regulation 5 of the D&A Regulations.[8] He contended that that request obliged the Secretary of State to consider whether to revise his original decision by extending time and that he was wrong to say that he was not empowered to do so. Mr de la Mare also advanced an alternative case, though he made it clear that it was very much secondary, to the effect that, where a claimant had not specified for what period they wished to claim the

[8] The exact procedural route that brought the appeal before us was not in issue, and the details are not entirely clear. The request of 23 July 2020 was not in the papers, but at para. 12 of its Reasons the Upper Tribunal recorded that Mr Holborn told it that the Secretary of State accepted that it "was both a request that the decision of 16 April 2020 be reconsidered and a fresh late claim for UC for the earlier period". We are not concerned with the reference to a "fresh late claim": for present purposes what matters is that the reconsideration of 27 October 2020 treated the Claimant as having applied for a revision under regulation 5 of the D&A Regulations.

Secretary of State was obliged – pursuant to the "*Kerr* duty" – to investigate in every case whether there were circumstances entitling them to backdating: that was described before us as "the maximum possible claim approach".

42. *The Secretary of State's case*. I have quoted at para. 2 above the DWP's succinct and clear statement of its reasons for declining to consider whether to revise the original decision; but Mr Brown helpfully spelt out the underlying reasoning. His submissions were based on the central proposition that the period covered by a claim is one of its definitive "parameters", in the sense that any determination can only relate to that period. The period covered by a claim for UC is fixed by regulation 26 as either the period starting with the date of claim as prescribed by regulation (1) or, but only if the Secretary of State so decides under paragraph (2), a period starting up to a month before the date of claim – in both cases continuing indefinitely thereafter: regulation 36. The Secretary of State had made no backdating decision in the present case, so the start-date of the period was fixed as the date of claim: it followed that the power to revise his determination could not be used to make an award for any past period. (This was sometimes referred to before us as a point about jurisdiction, though it may be debatable how apt a label that is.) It should be noted that Mr Brown's submission related only to the scope of the power to revise: it was not part of his case that the request for revision dated 23 July 2020 otherwise fell outside the scope of Part 2.

THE DECISION OF THE FIRST-TIER TRIBUNAL

43. Without intending any disrespect to the decision of the First-tier Tribunal Judge, I need only give an outline of his reasons for dismissing the appeal. At para. 17 he upheld the Secretary of State's submission that the request to backdate "had been made after the claim had been determined and ... the period in dispute was outside the one-month absolute time period". The Claimant's then representative had sought to rely on the Secretary of State's power to revise his decision; but the Judge held at para. 18 that the power had to be exercised in accordance with regulations and that "the Respondent's decisions are in accordance with those regulations".

THE DECISION OF THE UPPER TRIBUNAL

44. The reasoning of UTJJ Wikeley and Wright on the one hand and of UTJ Jacobs on the other is set out separately in the Upper Tribunal's Reasons, and I will summarise them in turn. I will for convenience refer to UTJJ Wikeley and Wright as "the majority", though, as will appear, I do not think their reasoning and that of UTJ Jacobs are fundamentally different.

45. I should note by way of preliminary that the appeal appears to have proceeded on the basis that the dispositive issue was "whether there needs to be a claim (either explicit or implicit) made to extend the time for claiming UC": that is not quite how it was put before us, though in the end the difference may be presentational rather than substantive.

46. Addressing that issue, the majority accepted Mr Royston's submissions for the Claimant that neither the SSAA 1992 nor the C&P Regulations (and specifically regulation 26) imposed any obligation on a claimant to specify the start-date of the period for which they wished to claim; and they rejected Mr Holborn's submission for

the Secretary of State that such an obligation was implicit. They held that it followed 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"

(para. 57). They proceeded to consider whether the decision of a tribunal of Social Security Commissioners in *R (SB) 9/84* pointed to a different conclusion but decided that it did not. The effect of their conclusion is stated at para. 71 as follows:

> "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 [emphasis in original]. That is a 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 [be] 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."

The essence of that reasoning is that the Secretary of State's determination dated 16 April 2020 necessarily, albeit implicitly, involved a decision that the Claimant was not entitled to backdating and that that aspect of the determination could accordingly be the subject of an appeal in the usual way.

47. Although UTJ Jacobs' reasoning is set out separately, I do not understand that he differed from the reasoning of the majority on the essential points. He considered separately the position of the original decision-maker and of the First-tier Tribunal in the event of an appeal. So far as the original decision-maker is concerned, he analysed at paras. 76-80 and 82-87 the way in which regulation 26 operates to define the period covered by a claim in the default situation under paragraph (1) and where time is extended under paragraph (2). He did not differ from the view of the majority that in the present case the original decision-maker was not obliged to consider a backdating claim because they were given no reason to suppose that the relevant circumstances obtained. However, he agreed with them that that did not preclude the point being raised on appeal. As to that, paras. 92-93 of the Reasons read:

> "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."

Those two paragraphs reflect the well-understood position about the scope of appeals to the First-tier Tribunal and its predecessors: see the full exposition by the tribunal in *R(IB) 2/04* (referred to at para. 28 above), at paras. 19-26.

48. Neither set of reasons refers at all to the Claimant's mother's request dated 23 July 2020 or to the provisions relating to the revision of the Secretary of State's decisions, notwithstanding that this had evidently been part of the case before the First-tier Tribunal and is central to the way that it was put by Mr de la Mare before us. On the contrary, the Tribunal's reasons are based squarely on the scope of an appeal. This is rather puzzling, though presumably it represents a difference in the focus of the argument before the Tribunal and in this Court. However after some sparring Mr Brown and Mr de la Mare were agreed that the two approaches lead to the same ultimate issue – namely whether, as Mr Brown submits, the period covered by a claim is a defining parameter such that it cannot be revisited once the claim has been determined: if he is right about that, both revision and appeal with regard to the period would be precluded. That seems to me right. Both revision and appeal are ways of correcting erroneous determinations, and their role is recognised by the legislation as being complementary (see para. 31 above): either both should be available or neither.

THE APPEAL

49. It follows from the foregoing that the issue which we have to decide is whether, on the true construction of the relevant provisions, the period covered by a claim for UC is a defining parameter, or (as the majority in the Upper Tribunal put it) a "constitutive part", of the claim such that it cannot be altered, whether by way of revision or appeal, once a determination has been made. I do not believe that that is the case. My reasons are as follows.

50. The foundation of Mr Brown's case is section 1 (1) of the SSAA 1992. That provides, as he submits, that entitlement to a benefit is conditional on the making of a claim for that benefit: there is no problem about that in the present case since the Claimant made a claim for UC. It also provides that entitlement depends on the claim being made in the manner and – which is what matters in this case – "within the time" prescribed by the relevant regulations. The natural reading of that provision is to my mind simply that if a person makes a claim outside the time prescribed by the regulations they will not be entitled to benefit. It does not in my view follow that a question about whether a claim has in fact been made in time (or, for that matter, in the prescribed manner) cannot be determined like any other issue going to entitlement – that is, in accordance with the ordinary procedures governing the determination of claims, including procedures relating to revision and appeal. If such a question were treated as outside the scope of the claim, and thus of any determination, the result would be surprising: to

take the example of appeal, it would to my mind be contrary to ordinary procedural expectations if there were no right of appeal against a patently erroneous determination by the Secretary of State that a claim was out of time.

51. In the case of a claim for UC the question whether it is in time will only arise in the context of a claim in respect of a past period, and it will depend, in accordance with regulation 26 (2) of the C&P Regulations, on a decision by the Secretary of State about whether the specified conditions are satisfied. But I do not think that can affect the correct construction of section 1 (1), which is not concerned only with UC. If the Secretary of State decides that the specified conditions are not satisfied, the claimant will not be entitled to the benefit for the past period; but there is no reason why that decision should not be treated simply as part of the determination of the claim, and subject, like the determination itself, to the procedures for revision and appeal. That was the explicit approach of the majority in the Upper Tribunal at para. 57 of their Reasons (see para. 46 above), and also implicitly of UTJ Jacobs; and I agree with them.

52. I appreciate that it may at first sight seem surprising that a determination can be revised, or appealed against, on the basis of circumstances of which the decision-maker was unaware at the time of their decision and which cannot in that sense be said to be "wrong". But Mr Brown did not (apart from his particular point considered above) argue that the power to revise an erroneous determination in a claimant's favour is limited to the correction of errors by the decision-maker. And there was no challenge before us to UTJ Jacobs' statement at para. 93 of the Upper Tribunal's Reasons (see para. 47 above) of the general scope of the First-tier Tribunal's powers on an appeal.

53. Mr Brown submitted that to allow claimants to backdate after their original claims had been determined would introduce an unacceptable level of uncertainty into the system. But any system of appeals (or revision) that allows claimants to rely on fresh evidence and arguments following determination necessarily produces some uncertainty in the sense that the level of awards may change. That is presumably, and understandably, regarded as acceptable in the interests of seeking to ensure that claimants receive the correct level of award; and the uncertainty is of course mitigated by the fairly strict time limits that apply to both processes. I do not see why the uncertainty generated by possibility of an award being belatedly backdated for a month should be regarded as any more unacceptable than that caused by the correction of other errors.

54. The reason originally given by the DWP for refusing to entertain the request for revision was that it was made following the determination of the claim: see para. 2 above. That way of putting it might suggest that the Secretary of State was relying on section 8 (2) (b) of the SSA 1998 and/or regulation 5 (2) (a) of the D&A Regulations, which preclude reliance on changes of circumstances since the date of the determination; but, as explained at para. 42 above, Mr Brown's case was ultimately based on the scope of the original claim, which could not be departed from post-determination. I should nevertheless make clear that neither section 8 (2) (b) nor regulation 5 (2) (a) poses any separate barrier to a right of revision, since a claim for backdating depends by definition on circumstances which pre-date the determination – that is to say, the circumstances which result in the claimant having been unable to make the claim earlier.

55. As noted above, a similar problem to that which gives rise to the present appeal arose under the provisions governing various of the "legacy benefits" now replaced by UC and generated a certain amount of (not wholly consistent) case-law from the Social

Security Commissioners; and the Upper Tribunal found it necessary to consider with some care the decision in *R(SB) 9/84*. However, Mr Brown and Mr de la Mare were agreed that those cases were of limited assistance, essentially because, although the applicable legislation at the relevant times was similar to that applying now, it was not identically worded. I agree, and I do not therefore propose to lengthen this judgment by an analysis of the authorities in question.

56. I would accordingly accept Mr de la Mare's primary submission and would uphold the decision of the Upper Tribunal and dismiss the appeal. It is in those circumstances unnecessary to consider his alternative submission, but it will be apparent from what I say at para. 17 above that I have difficulties with the proposition that the Secretary of State is in every case required to take the "maximum possible claim approach".

Nicola Davies LJ:

57. I agree.

Whipple LJ:

58. I agree with Lord Justice Underhill and I too would dismiss this appeal. The issue is whether a request for backdating of UC can be treated as a request for revision under s 9 of the SSA 1998 in circumstances where the original claim has already been determined under s 8 of the SSA 1998. Determination brings the claim to an end, in which case amendment of the claim is no longer possible (that is the effect of s 8(2) SSA 1998). The Secretary of State submits that is the end of the matter: the claim, including any issue as its period, is closed and cannot be the subject of revision under s 9. The claimant disagrees and submits that a closed claim can be revised, in relation to period just as much as in relation to other aspects, and if revision is refused a claimant can appeal.

59. I agree with the claimant. Paragraph 26 (2) of the C&P Regulations, which permits backdating by up to a month, is not limited by its words, context or purpose to cases where the claim remains undetermined (and amenable to amendment); it applies equally to cases where a claim has been determined but revision of that claim is now sought.

60. In this case, the claimant's mother asked for her son's claim to be backdated to 16 February 2020, the date of his 20th birthday when his parents' eligibility for CTC ceased. That request was made on 23 July 2020, by which date the claim (which had been made on 16 March 2020) had already been determined. The Secretary of State was wrong to refuse to consider that request, for lack of power to do so. He could and should have understood that it was, in effect, a request for revision of the determined claim, specifically, a request to revise that claim by backdating it to 16 February 2020, which he did have power to consider under s 9 and associated regulations. The claimant's mother's request now needs to be considered substantively.