IN THE UPPER TRIBUNAL **Appeal No. CTC/2649/2019**
(ADMINISTRATIVE APPEALS CHAMBER)

On Appeal from the First-tier Tribunal (Social Entitlement Chamber) SC192/18/00195

Between

RJ

Appellant

and

HER MAJESTY'S REVENUE AND CUSTOMS

Respondent

Appeal No. CTC/392/2020

HER MAJESTY'S REVENUE AND CUSTOMS

Appellant

and

RJ

Respondent

BEFORE UPPER TRIBUNAL JUDGE WEST

Hearing date: 22 January 2021

Date of Decision: 15 February 2021

Representation

RJ: Russell James (counsel)

HMRC: Yaaser Vanderman (counsel)

DECISION

The claimant's 2019 appeal is dismissed.

HMRC's 2020 appeal is allowed. The decision of the Tribunal sitting at Weymouth dated 20 June 2019 (after a hearing on 31 May 2019) under file reference SC192/18/00195 contains an error of law.

The decision of the Tribunal is remade. The claimant's award of tax credits did not extend to the end of the tax year on 5 April 2018; the entitlement to tax credits terminated on the death of the claimant's wife on 30 January 2018. He could not thereafter make a new claim for tax credits because he lived in a universal credit full service area.

This decision is made under sections 11 and 12(1), (2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. The issues with which this decision is concerned are

(1) the construction of s.3 of the Tax Credits Act 2002 ("the 2002 Act") and whether a widower remains part of a couple, notwithstanding the death of his wife, such that he can still make a joint claim

(2) whether the claimant was subject to unlawful discrimination under the Human Rights Act 1998 on the basis of his status as a widower

(3) the effect of regulation 15(3) of the Tax Credits (Claims and Notifications) Regulations 2002 ("the 2002 Regulations") and whether its effect was that the

tax credits awarded to the claimant should be extended to the end of the tax year 5 April 2018

(4) whether the appeal had lapsed and the effect of lapse on the appeal to the Upper Tribunal

(5) whether HMRC is entitled to withdraw a concession made before the First-tier Tribunal that the tax credits awarded to the claimant should be extended to the end of the tax year 5 April 2018.

2. These are two appeals, the first with the permission of District Tribunal Judge Ponting and the second with my permission, against the decision of the First-tier Tribunal sitting at Weymouth on 31 May 2019.

3. I shall refer to the appellant in the first appeal (and respondent in the second appeal) hereafter as "the claimant". The respondent in the first appeal (and appellant in the second appeal) is Her Majesty's Revenue and Customs. I shall refer to it hereafter as "HMRC". I shall refer to the tribunal which sat on 31 May 2019 as "the Tribunal". The first appeal is that of the claimant. The second appeal is that of HMRC, but both arise out of the same decision. The number of the claimant's appeal is ***CTC/2649/2019;*** that of HMRC is ***CTC/392/2020,*** but for ease of reference hereafter I will refer to them either as "the 2019 appeal" and "the 2020 appeal" or "the claimant's appeal" and "HMRC's appeal" respectively.

The History of the Claim

4. The claimant and his wife had a joint award of tax credits from 6 April 2017 (and originally from 23 July 2007). On 30 January 2018, the claimant's wife sadly died. On 8 February 2018 HMRC terminated the joint award of tax credits with effect from 30 January 2018, pursuant to s.16 of the 2002 Act.

5. On 28 February 2018 the claimant attempted to make a single tax credits claim, but the claim was refused by HMRC on the basis that he was living in a

universal credit full service area. (His postcode had become a universal credit full service area on 6 December 2017.) He requested a mandatory reconsideration of that decision. On 16 April 2018 the decision was reconsidered, but not revised. The claimant appealed on 14 May 2018.

6. The matter came before the Tribunal on 31 May 2019 when the claimant appeared with his counsel and gave oral evidence. A presenting officer from HMRC was also present. The decision was reserved. On 20 June 2019 the Tribunal allowed the claimant's appeal and set aside HMRC's decision of 28 February 2018. In its decision notice it held that the joint claim made by the claimant and his late wife for tax credits should run until 5 April 2018 by reason of regulation 15(3) of the 2002 Regulations; thereafter only universal credit was available. No new claim for tax credits could be made once a claimant lived in a universal credit full service area. The award of tax credits ended on the change of circumstances arising on the death of a party as provided by regulation 15(3). The requirement to claim universal credit arose because of the cessation of tax credits consequent on that change of circumstances. There was no discrimination under the Human Rights Act 1998.

7. The Tribunal produced its statement of reasons on 27 August 2019, although that was not issued to the parties until 5 September 2019. On 4 October 2019 HMRC sought permission to appeal against that decision. On the following day the claimant similarly sought permission to appeal.

8. The claimant's application for permission to appeal against the decision of the Tribunal was granted by District Tribunal Judge Ponting on 29 October 2019, although for some reason there was no decision on HMRC's application. The claimant informed the Upper Tribunal of the grant of permission to appeal on 29 November 2019. On 6 January 2020 I made further directions in relation to that 2019 appeal.

9. It was subsequently brought to my attention that HMRC had also sought permission to appeal within time from the Tribunal below, but it appeared that no decision had been made by the Tribunal on that application, possibly because some confusion had been engendered by both parties seeking permission to appeal in respect of the one decision at almost the same time. I was satisfied that it was in the interests of justice to waive the requirement under rule 21(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 for the Tribunal to have considered and adjudicated upon HMRC's application for permission to appeal by virtue of rule 7(2) of those Rules, to grant permission to appeal to HMRC and to make further directions for the conduct of the two appeals.

10. On 3 March 2020 I therefore acceded to HMRC's application in the 2020 appeal and granted it permission to appeal. I directed that the file in the 2019 appeal was henceforth to be linked with and travel together with the file in the 2020 appeal and varied the directions made on 6 January 2020. HMRC was to have one month in which to make any further response to both of the appeals, beginning with the date when the directions were sent to the parties by the Upper Tribunal. The claimant was to have one month after the date on which the response was sent to him in which to reply in respect of both appeals.

11. HMRC produced its submissions on 8 June 2020, to which the claimant replied on 22 July 2020. HMRC did not seek an oral hearing, although the claimant did. In the interests of justice I was satisfied that an oral hearing of the two appeals should take place and so ordered. Before the hearing could take place, however, I required further submissions from the parties, as more particularly set out below.

12. On 4 August 2020 I therefore directed that HMRC had one month in which to make a further submission in relation to the appeals in ***CTC/2649/2019*** and/or ***CTC/392/2020***, dealing with the following issues:

(i) proof of the s.18 decision said to have been taken on 14 November 2018

(ii) whether that s.18 decision (if made) was issued to the claimant and the date on which it was issued

(iii) why the s.18 decision (if made) was not produced before the Tribunal hearing on 31 May 2019

(iv) whether the status of widow or widower was capable of coming within the scope of "other status" for the purpose of article 14 of Schedule 1 of the Human Rights Act 1998

(v) if so, whether there was discrimination against the claimant on the grounds of such other status

(vi) whether it was just to allow HMRC to resile from the concession that the tax credits awarded to the claimant should be extended to the end of the tax year 5 April 2018.

13. The claimant was to have one month after the date on which the response is sent to him in which to reply in respect of the appeals in ***CTC/2649/2019*** and/or ***CTC/392/2020,*** but limited to the issues raised by HMRC in its latest submission.

14. The hearing finally took place by Skype on the morning of 22 January 2021. The claimant was represented by Mr Russell James of counsel (who had also appeared below) and HMRC was represented by Mr Yaseer Vanderman of counsel. I am indebted to both of them for their able and economical submissions.

The Statement of Reasons

15. So far as is material, in its statement of reasons the appeal tribunal found that

"8. [The claimant] and his wife had been in receipt of tax credits since 23 July 2007.

9. On 6 December 2017 the [claimant's] postcode became an area of digital full service for Universal Credit (UC).

10. On 30 January 2018 [his wife] died.

11. On 2 February 2018 HMRC were notified of [her] death.

12. HMRC terminated the joint award.

13. No new tax credit form was sent out.

14. On 28/02/2018 a member of the CAB telephoned HMRC on behalf of [the claimant]. Although they were correctly advised that [he] was in a UC area and due to his circumstances could not claim UC, HMRC wrongly "captured" a single claim.

15. The claim could not be completed because [the claimant] lived in a UC Full-Service area and no claim for tax credits is permitted. (The Welfare Reform Act (Commencement No 17, 19, 22, 23 and 24) and Transitional and Transitory Provisions (Modification) Order 2017.)

16. The termination of the existing joint tax credit award was correct in that the death of [the claimant's wife] was a relevant change of circumstances.

17. The death of a partner where there is joint claim for Tax Credits ends a joint claim. The joint claim ceases and a new single claim could be made but only where the claimant does not live in a full UC area.

18. On the death of a partner the award does not continue but ceases.

19. Once the existing joint credit award terminated no further tax credit applications could be made in a full service area.

Arguments

20. Ms Outten on behalf of the Respondent referred to the appeal notice (A-D) and the Mandatory Reconsideration at page 3-5.

21. She referred to Section 3(3) of the Tax Credits Act 2002 ("the Act") which provided for a joint claim and that there was no midway: either a claimant was a member of a couple or not. Further that entitlement to a tax credit pursuant to a claim ceases "in the case of a joint claim, if the person by whom it was made could no longer jointly make a claim": Section 3(4) of the Act

22. As of 30/01/2018 the Appellant was no longer part of a couple and it was right to end the entitlement. A change of circumstances does not need a positive act. The Tax Credits Manual provides that where one customer dies the remaining customer should be invited to make a fresh claim if this were suitable.

23. Ms Outten conceded that the Appellant's entitlement should have continued to the end of the Tax Year by virtue of Regulation 15(3) of the Tax Credit Regulations; whilst this relates to claims the Respondent's position is that a claim is not technically finalised until the end of the Tax Year and accordingly HMRC were content to let the joint claim run until the end of the Tax Year 2018 i.e. to 05/04/2018.

24. Ms Outten reiterated that after his wife's death the Appellant was no longer part of a couple and this was a change of circumstances and an event which led under Section 3(4) to a new claim. Since the introduction of Universal Credit (UC) in full-service areas no new tax credit application could be accepted. She referred to Regulation 5 of the Transitional Provision Regulations 2014 and that there was no entitlement to tax credits. [T]he Appellant's home post code … became an UC full-service area on 06/12/2017 precluding any application for tax credits thereafter.

25. In respect of the Human Rights arguments put forward there was no evidence of discrimination nor of a widow/widower being a protected category.

26. Ms Outten left with the Tribunal and the Appellant's Representative a copy of her speaking notes with supporting documentation (Pages 71–116).

27. Mr Russell James on behalf of the Appellant put forward two arguments, the first on the proper construction of Section 3(3)(a) and (4)(a) and the second that the decision of HMRC was discriminatory under the Human Rights Act in that [the claimant] had been discriminated against as a widower and that his Article 8 and Article 1 of the First Protocol Rights are both engaged.

28. Mr Russell James argued that Section 3(4)(a) of the Act envisages that claims for couples end when they are no longer a couple by choice. Mr Russell James linked this section with [Regulation] 15 of the Tax Credits (Claims and Notifications) Regulations 2002 which provides for a claim made to be continued by the survivor after the death of one party to a joint claim. He contended that [the claimant] had made the joint claim provided for by Regulation 15.

29. Mr Russell James in looking at discrimination made clear that he was not seeking to make the point that the Regulations for UC must be the same as those for Tax Credits. He referred to ***TP & AR v. SS*** at page 58 of the bundle and which sets out at paragraph 56 what is required to involve a breach namely that (1) there has been differential treatment (2) on the grounds of other status and (3) in relation to a matter falling within the scope or ambit of Article 14 and (4) which the defendant cannot show is objectively justified.

30. Mr Russell James said that the “other status” relied on was that of widow/widower.

Reasons

31. The Tribunal first considered the construction points raised by Mr Russell James.

32. Mr Russell James was clear that his argument turned on the cessation of tax credits not on the failure to make a claim or the fact that no new claim can be made in a full-service UC area. He argued that for [the claimant] nothing had changed, he had taken no action, his wife had sadly died but he remained in the same house with the same family. There was nothing that [he] had done which altered his tax credit status and the entitlement should not have ceased.

33. The Tribunal did not accept this argument. Mr Russell James referred to Section [3](4)(a). This sets out "Entitlement to a tax credit pursuant to a claim ceases in the case of a joint claim, if the person by whom it was made could no longer jointly make a joint claim". He lay emphasis on the word "could" and that Section 3(3)[(a)] and (4)(a) envisage a couple no longer being a couple by choice. The Tribunal decided that this was to read far too much into the wording of the section. There was nothing to indicate that the sections only refer to the ending of coupledom by choice.

34. Mr Russell James linked the provisions of the Act with Regulation 15 of the Tax Credits (Claims and Notifications) Regulations 2002. These Regulations set out the process to be followed where any person who has made a claim dies and in 15(1)(c) where the tax credit has been awarded for the whole or the part of the year but a decision has yet to be made by HMRC.

35. Regulation 15(3) allows a claim to continue where one party in a joint claim has died. However under Regulation 16 the extent of that claim by the survivor is limited to the date of death of the member of the couple who has died; or, if earlier, the 5th April in the tax year to which the claim relates.

36. [The claimant] had made a claim but as the survivor of a couple where one has died that claim is limited to the end dates provided for in Regulation 16 and does not continue beyond.

37. [The claimant] has an obligation to inform the Respondent of a Change of Circumstances (Regulation 21(2)(a) The Tax Credits (Claims and Notifications) Regulations 2002). This he properly did. He had ceased to be part of a couple; this then put in train the changes provided for in Section 3(4) of the Act and the cessation of his joint claim. No other construction can be put on the Act and Regulations as drafted.

38. Turning now to the argument that [he] has a valid claim under the Human Rights Act and he has been discriminated against. Mr Russell James refers specifically to the last category "other status" listed in Article 14 of Schedule 1 of the Human Rights Act 1998 and set out on page 43 of the bundle. He defined

"widows and widowers" as those within "other status" for purposes of tax credit claims on death.

39. There have been a number of cases which have looked at groups falling within "other status" and endeavouring to define what the relevant characteristics are. In *R (RJM) v. The Secretary of State* [2009] AC 311 Lord Walker defined concentric circles with those in the more peripheral circle less likely to come within the most sensitive area where discrimination would be difficult to justify. The personal characteristics which define a group are innate, largely immutable and closely connected with an individual personality. The first circle included gender/sexual orientation and congenital disability, the second nationality, language, religion and politics where characteristics may be almost innate or may be acquired and the third and outer groups "other acquired characteristics" which are more concerned with what people do or what happens to them.

40. Even if one were to accept that widows/widowers fell into the last category that is not sufficient. In order for any issue of discrimination to arise there must be a difference in treatment of persons of an analogous or relevantly similar status. Mr Russell James provided no comparators. [The claimant's] position has changed because of the death of his wife but the position for Tax Credits is not about his status as widower but as a single claimant against his previous position as part of a couple. If he had been in a couple where an unconsensual separation had taken place, he would have been in the same position.

41. Discrimination has been held to mean the treating differently, without objective and reasonable justification, of persons in relevantly similar situations. [The claimant] and his wife had a joint claim, a claim that depended on their being a couple. The couple no longer existed. A joint claim rests on a claim by a couple (as defined in Section 5(A) of the Act). When a couple no longer exists the claim and entitlement change. This is not a matter of marriage, death and the status of the widow/widower. Tax Credits are based on joint and single claims; there is no discrimination between all those who are able to make a joint claim and all those who are single and can only make a single claim. [The claimant] was not discriminated against as a widower.

> 42. The decision set out above was set aside to take account of the concession made from HMRC at paragraph 24 above. The joint claim made by the Appellant and his late wife for Tax Credits should run to 05/04/2018. Thereafter only Universal Credits are available and on the single claim made by [the claimant] on 28/02/2018 the entitlement conditions are not satisfied because the law does not permit tax credit claims from people living in a Universal Credit (UC) Full-Service Area."

The Legislation

16. So far as material, s.3 of the 2002 Act provides that

> "(3) A claim for a tax credit may be made—
>
> (a) jointly by the members of a couple both of whom are aged at least sixteen and are in the United Kingdom …, or
>
> …
>
> (b) by a person who is aged at least sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) (jointly with another).
>
> (4) Entitlement to a tax credit pursuant to a claim ceases—
>
> (a) in the case of a joint claim, if the persons by whom it was made could no longer jointly make a joint claim, and
>
> …
>
> (b) in the case of a single claim, if the person by whom it was made could no longer make a single claim.
>
> …
>
> (5A) In this Part "couple" means—
>
> (a) a man and woman who are married to each other and are neither—
>
> (i) separated under a court order, nor

(ii) separated in circumstances in which the separation is likely to be permanent

…

(8) In this Part—

"joint claim" means a claim under paragraph (a) of subsection (3), and

"single claim" means a claim under paragraph (b) of that subsection".

17. S.23 of the 2002 Act provides that

"(1) When a decision is made under section 14(1), 15(1), 16(1), 18(1), (5), (6) or (9), 19(3) or 20(1) or (4) or regulations under section 21, the Board must give notice of the decision to the person, or each of the persons, to whom it relates.

(2) Notice of a decision must state the date on which it is given and include details of any right to a review under section 21A and of any subsequent right to appeal against the decision under section 38".

18. Regulations 15 and 16 of the 2002 Regulations provide that

"**Persons who die after making a claim**
15(1) This regulation applies where any person who has made a claim for a tax credit dies—

(a) before the Board have made a decision in relation to that claim under section 14(1) of the Act;

(b) having given a notification of a change of circumstances increasing the maximum rate at which a person or persons may be entitled to the tax credit, before the Board have made a decision whether (and, if so, how) to amend the award of tax credit made to him or them; or

(c) where the tax credit has been awarded for the whole or part of a tax year, after the end of that tax year but before the Board have made a decision in relation to the award under section 18(1), (5), (6) or (9) of the Act.

(2) In the case of a single claim, the personal representatives of the person who has died may proceed with the claim in the name of that person.

(3) In the case of a joint claim where only one of the persons by whom the claim was made has died, the other person with whom the claim was made may proceed with the claim in the name of the person who has died as well as in his own name.

(4) In the case of a joint claim where both the persons by whom the claim was made have died, the personal representatives of the last of them to die may proceed with the claim in the name of both persons who have died.

(5) For the purposes of paragraph (4), where persons have died in circumstances rendering it uncertain which of them survived the other—

(a) their deaths shall be presumed to have occurred in order of seniority; and

(b) the younger shall be treated as having survived the elder.

Persons who die before making joint claims
16(1) This regulation applies where one member of a … couple dies and the other member of the … couple wishes to make a joint claim for a tax credit.

(2) The member who wishes to make the claim may make and proceed with the claim in the name of the member who has died as well as in his own name.

(3) Any claim made in accordance with this regulation shall be for a tax credit for a period ending with—

(a) the date of the death of the member of the couple who has died; or

(b) if earlier, 5th April in the tax year to which the claim relates."

19. Article 14 of Schedule 1 of the Human Rights Act 1998 ("the 1998 Act") provides that

> "**Prohibition of discrimination**
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

The Claimant's Submission: The 2019 Appeal

20. On behalf of the claimant Mr James submitted that there were two issues on the 2019 appeal:

(1) the correct construction of s.3 of the 2002 Act

(2) whether or not the cessation of tax credits and/or the preclusion on making a new claim, with only universal credit being available, amounted to discrimination contrary to article 14 of Schedule 1 of the 1998 Act on the grounds of "other status", namely that of widower.

21. The first ground of appeal was concerned with two contentions, both of which were rejected by the Tribunal. The first was that, applying the express wording of s.3 of the 2002 Act, the claimant's entitlement to tax credits had not ceased as at 28 February 2018 because he could jointly make a claim. The wording of s.3(4) of the 2002 provided that entitlement ceased if he could no longer make a joint claim, but the effect of regulation 15(3) of the 2002 Regulations and/or the concession of HMRC was such that he could continue with his joint claim and was not someone who could no longer make a joint claim.

22. The second concerned the definition of a "couple". Where a man and woman were married, they were only taken outside the definition by separation under s.3(5A). The Oxford English Dictionary definition of "separate/separating/separated" was "1. Move or come apart. 2. Stop living together as a couple. 3. Divide into distinct parts. 4. Form a distinction or

boundary between". "Separation" was defined as "1. The act of separating. 2. The state in which a husband and wife remain married but live apart". These definitions made plain that separation involved a decision by one or both parties to cease living together. It was only in those circumstances that married persons were taken outside the definition of a "couple". In the claimant's case there was no such decision by either him or his wife and in those circumstances the exclusion did not apply. On the proper construction of the section the claimant therefore remained in a couple. No one would seek to contend that a widow or widower had ceased to be part of a couple with the deceased and the focus of the relevant part of the section was on the word "couple" rather than on the requirement of marriage. Hence the Tribunal was wrong to reject the claimant's construction of s.3 of the 2002 Act.

23. As to the second ground of appeal, Mr James contended that it was unlikely to be in contention that, where the state created a system of welfare benefits, it must do so in a manner compatible with article 14 of the European Convention on Human Rights (***R (TP and AR) v. Secretary of State for Work and Pensions*** [2018] EWHC 1474). There were three principal questions which arose in relation to that ground:

(1) was the status of widow or widower capable of coming within the scope of "other status" for the purpose of article 14?

(2) was there discrimination on the grounds of other status?

(3) in the event that the answers to those questions was in the affirmative, what was the correct approach or remedy to avoid that discrimination?

24. As to the first of those three issues, it was the claimant's case that the status of widow or widower did come within the scope of "other status" for the purposes of article 14, see Murray J in ***Haringey LBC v. Simawi*** [2018] EWHC 2733 where he said at [38]

> "It seems to me that whether a person is widowed or divorced is capable of being a personal characteristic or status for the purposes of article 14."

On appeal ([2019] EWCA Civ 1770 at [45]) the Court of Appeal held that that was a tenable conclusion on which they were prepared to proceed.

25. As to whether there was a breach of article 14, the considerations for the Tribunal were succinctly summarised in ***R (TP and AR)*** where Lewis J (as he then was) explained at [56] that

> " … it is necessary to consider whether (1) there is differential treatment (2) on the grounds of other status (3) in relation to a matter falling within the scope or ambit of Article 14 ECHR and (4) which the defendant cannot show is objectively justified."

26. In the circumstances of the present case, there was differential treatment between the claimant on the one hand and on the other a couple who were married where both parties were alive. In the case of the claimant, the effect was that he was no longer entitled to child tax credit and because of his modest capital arising out of a life insurance payment he was not eligible for universal credit. By contrast, a married couple where both parties were living would not be subject to the same cessation of their tax credits. In that respect it was important to remember that the purpose of child tax credits was to help with the costs of raising a child; it was not concerned with the status of their parents.

27. It was not the claimant's contention that tax credits could not be replaced by universal credit - that was a matter for Parliament. It was his case that to cause his tax credits to cease because of the death of his wife was differential and discriminatory treatment, with nothing to do with the purpose of child tax credits, compared with the position which other couples faced. The claimant was at a significant disadvantage and prejudice by the operation of those rules when compared with a couple where both parties were living.

28. He contended that that difference in treatment could not be justified by HMRC. There was no proper basis for ending his child tax credits earlier than other couples where the parties had not chosen to separate and change their circumstances and where the cost involved in bringing up the children remained the same.

29. What then should be done about the discrimination? There were two alternative routes open to the Upper Tribunal. The first was to read the relevant legislation compatibly with the European Convention as required by s.3 of the 1998 Act. In reading legislation compatibly, the tribunal could imply words and could do so notwithstanding that on first consideration such an interpretation was not obviously apparent (see ***Manchester CC v. Pinnock*** [2010] UKSC 45 and ***Hounslow LBC v. Powell*** [2011] UKSC 8). In this case s.3 of the 2002 Act could be read compatibly by adopting the interpretation contended for in the first ground of appeal or by reading the cessation provision as not applying where one member of the couple had died or by implying the words "by choice of at least one party" after "separated".

30. The second alternative approach was to disregard those provisions of the subordinate legislation relied on by HMRC which precluded the claimant from making a tax credit claim and made available only a universal credit claim, namely

(i) the Universal Credit (Transitional Provisions) Regulations 2014 ("the 2014 TP Regulations") and/or

(ii) the Welfare Reform Act 2012 (Commencement No 17, 19, 22, 23 and 24) and Transitory Provisions (Modification) Order 2017 ("the 2017 Order").

That such an approach was permissible had recently been made clear in ***RR v. Secretary of State for Work and Pensions*** [2019] UKSC 52 at [30].

31. The effect of disregarding the subordinate legislation referred to would be to permit a claim for child tax credits by the claimant and those in similar circumstances only. That would avoid the discrimination which had arisen in the present case.

32. In reply to HMRC's submission on the 2019 appeal (as to which see below), Mr James repeated his contention that the point was one of statutory interpretation. The structure of the legislation was that a claim could be made, firstly, jointly by a couple (s.3(3)(a) of the 2002 Act) and secondly by a single person if not entitled to make a claim as being in a couple (s.3(3)(b)). Primacy was therefore given to the question of whether or not the individual was part of a couple. If so, then s.3(3)(b) of the Act did not apply. The claim then ceased if the individual could no longer make a joint claim, but if he could continue to make a joint claim then it did not.

33. In the present case the claimant was part of a couple with his wife and the second part of the question under ground 1 of his appeal was whether he was separated under a court order or in circumstances in which the separation was likely to be permanent. It was submitted that common parlance and the reasonable person would not describe a widow or widower as separated. There was no reason why the commitment or devotion should be any the less simply by reason of death.

34. As to the second ground, HMRC did not address or challenge the points made in the grounds of appeal in respect of the first two issues identified in paragraph 19 above, viz. (1) was the status of widow or widower capable of coming within the scope of "other status" for the purpose of article 14? (2) was there discrimination on the grounds of other status? Instead it focussed solely on what was the correct approach in the event that there was discrimination. The claimant did not therefore repeat the submission made as to why the Tribunal was wrong to find that there was no discrimination and instead focussed on the issue of whether it was entitled nonetheless to proceed as it did.

35. Mr James contended that HMRC overlooked that it was not simply s. 3 of the 2002 Act which gave rise to the discrimination, but the combination of that section and the secondary legislation contained within the 2014 TP Regulations and/or the 2017 Order.

36. HMRC relied on s.6(2) of the 1998 Act and the decision in ***R v. Secretary of State for Work and Pensions, ex p. Hooper*** [2005] UKHL 29 ("***Hooper***"). However, neither produced the result for which HMRC contended. That was because they were not concerned either with reading the legislation compatibly or with secondary legislation. As to the first of those, s.3 of the 1998 Act provided that legislation should, so far as possible, be read and given effect in a way which was compatible with Convention rights. In relation to the second, the Supreme Court in ***RR v. Secretary of State for Work and Pensions*** explained that "the courts have subsequently held that, where it is possible to do so, a provision of subordinate legislation which results in a breach of Convention rights must be disregarded" (paragraph 30).

37. It was set out in the claimant's grounds of appeal how the 2002 Act could be read and given effect in a way compatible with his Convention rights and ensuring that he was not the subject of discrimination. Alternatively, by disregarding the secondary legislation which resulted in the claimant being in a universal credit area, the discriminatory effect was not produced because he could make a claim for child tax credits.

HMRC's Submission: The 2019 Appeal

38. HMRC's submission on the issue of statutory interpretation was a short one. Whilst the claimant argued that, following the death of one member of a couple, regulation 15(3) of the 2002 Regulations made special provisions for a joint claim to continue in those circumstances, the correct position was that the regulation simply allowed the surviving member of a couple to act on behalf of the deceased for administrative purposes. The Regulations did not override the rule found in s.3(4)(a).

39. On the human rights issue, HMRC relied on s.6 of the 1998 Act which states that:

> "**6 Acts of public authorities**
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes—
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature…".

40. Therefore, submitted HMRC, the Tribunal had no alternative but to apply the primary legislation enshrined in the 2002 Act.

41. The only decision available to HMRC was to terminate the claimant's joint tax credit claim following the death of his wife by virtue of the primary legislation in s.3(4)(a) of the 2002 Act. That issue was considered in ***Hooper***. That decision concerned whether the Secretary of State's refusal to pay widow's benefits to widowers found within ss.36 and 37 of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act") amounted to unlawful discrimination. The widowers argued that non-payment of those benefits violated their Convention rights and was unlawful under s.6(1) of the 1998 Act. Lord Nicholls of Birkenhead, however, confirmed that no other decision was open for the Secretary of State to make:

> "4. Let me explain. Whether the limb of section 6(2) applicable in the present case is paragraph (a) or

> paragraph (b) depends upon the view taken of the Secretary of State's common law powers. That is the starting point. Under the Social Security Contributions and Benefits Act 1992 Parliament made provision for payment of benefits to widows, but not widowers. The parliamentary intention in this regard was abundantly clear. If the effect of this statutory provision was that thereafter the Secretary of State acting on behalf of the Crown could not lawfully have made corresponding payments to widowers in exercise of the Crown's common law powers, then the present case would fall squarely within section 6(2)(a). If the Secretary of State could not lawfully have made corresponding payments to widowers he could not have acted otherwise than he did."

42. Although ***Hooper*** dealt with the 1992 Act, the same rationale applied to the 2002 Act. The Tribunal was therefore correct in not making a declaration of incompatibility. However, it erred in law by misapplying the primary legislation and allowing the continuation of the joint claim beyond the death of the claimant's wife, which was the subject of the 2020 appeal by HMRC.

HMRC's Submission: The 2020 Appeal

43. HMRC appealed on the basis that the Tribunal's decision to allow the tax credits claim to run to the end of the tax year on 5 April 2018 was wrong. HMRC's case was that regulation 15(3) enables the continued administration of a tax credit claim once a member of a couple dies, but that it does not alter the rule in s.3(4)(a) of the Act that a joint claim could not continue following the death of one member of a couple. Therefore it submitted that it had no alternative but to terminate the joint claim with effect from 30 January 2018.

44. Notwithstanding this, the Tribunal decided that, following the death of a claimant in a joint claim, entitlement to tax credits continued until the end of the tax year. That, however, was on the basis of a concession by HMRC in argument before the Tribunal, which was set out in paragraph 23 of the statement of reasons:

> "[HMRC's representative] conceded that the Appellant's entitlement should have continued to the end of the Tax

> Year by virtue of Regulation 15(3) of the Tax Credit Regulations, whilst this relates to claims the Respondent's position is that a claim is not technically finalised until the end of the Tax Year and accordingly HMRC were content to let the joint claim run until the end of the Tax Year 2018 i.e. to 05/04/18".

45. The Tribunal accepted that concession by HMRC in making its decision. Paragraph 42 of its statement of reasons stated

> "The decision set out above was set aside to take account of the concession from HMRC, as paragraph [23] above. The joint claim made by the Appellant and his late wife for Tax Credits should run to 05/04/18…"

46. HMRC submitted that it reacted to the death of the claimant's wife by terminating the joint award on 28 February 2018 with effect from 30 January 2018 pursuant to s.16 of the 2002 Act. That was a direct consequence of the specific rule in s.3(4)(a). A s.18 decision on entitlement still needed to be taken at the end of the tax year. There was only one decision for HMRC to take and that was to confirm that entitlement ceased on 30 January 2018. The final s.18 decision was taken on 14 November 2018, which correctly reflected that the claimant's joint entitlement ended on 30 January 2018. Allowing the joint claim to run until 5 April 2018 was not a decision available for the Tribunal to make: the claimant could no longer make a joint claim for tax credits since he no longer satisfied the criteria set out in s.3(3)(a) of the Act.

47. That analysis was supported by the decision of Deputy Commissioner Green (as she then was) in ***CTC/3864/2004*** at paragraph 16:

> "16. If the claimant is found to have been part of an unmarried couple, then according to s.3(3)(a) of the 2002 Act, such a claim should have been made jointly. It appears from s.3(1) that entitlement to a tax credit is dependent on the making of a claim for it. The wording of s.3(3)(b) makes it clear that a claim can only be brought under (b) if that person is not entitled to make a claim under s.3(3)(a). The two claims are mutually exclusive. Thus, if the claimant's claim fails under s.3(3)(b) or is terminated for failing to meet the criteria of

> a single claim, it appears that there has to be a claim under s.3(3)(a) for the claimant to receive an award. Section 3(2)(b) of the Act provides that where the Board have decided under s.16 of the Act (as here) to terminate an award of a tax credit made on a claim, (subject to any appeal) any entitlement, or subsequent entitlement, to the tax credit for any part of the same tax year is dependent on the making of a new claim. In the absence of a new claim, there would then appear to be no entitlement".

48. The mutually exclusive nature of single and joint claims was later confirmed by Mr Commissioner May QC (as he then was) at paragraph 16 of his decision in ***CSTC/724/2006*** (reported as ***R(TC) 1/07***):

> "16. I find myself in agreement with the position adopted by Deputy Commissioner Green that claims made under section 3(3)(a) and 3(3)(b) are mutually exclusive. I follow her decision. I am persuaded by [HMRC's representative's] argument as to why this is the case. In my view a cohabitee who has not been an applicant in a claim cannot acquire the right to a potential tax credit when he was not a party to the claim in the first place and acquire potential liabilities arising therefrom. I also do not consider that the provisions contained in section 3, in either the form it was in at the time of the claim or in its amended form from 5 December 2005, allow for the course adopted by the tribunal. In these circumstances, I am satisfied that the tribunal erred in law in deciding the appeal before it on the basis which it did".

49. Although those two decisions discussed whether single claimants ought to have claimed jointly, the mutually exclusive nature of joint and single claims was relevant to the present appeal when considering the point in time when the claimant could no longer claim in a joint capacity.

50. In the case of the death of a claimant, regulation 15 of the 2002 Regulations enabled the remaining member of the couple to administer the claim on behalf of the survivor and the deceased claimant. It did not enable entitlement to continue when a person could no longer make a joint claim, in circumstances such as when one member of the couple was deceased. In

short, regulation 15 did not affect the rules of entitlement and the Tribunal erred in law by holding otherwise.

51. Arguably, submitted HMRC, it did not complete a mandatory reconsideration in respect of the s.16 decision terminating the claimant's joint award. However, the Tribunal proceeded on the basis that both the termination and the refusal to award the single claim were under appeal. HMRC took the s.18 decision in respect of the joint claim on 14 November 2018. As a result, by the time that the appeal was heard by the Tribunal on 31 May 2019 and made its decision on 20 June 2019, the s.16 decision had been lapsed by the s.18 decision. Therefore, the Tribunal did not have the jurisdiction to hear the appeal in respect of the s.16 decision and was under a duty to strike out that part of the appeal. In support of that contention HMRC relied on the decision of the three-judge panel in ***LS and RS v Commissioners for Her Majesty's Revenue and Customs*** [2017] UKUT 257 (AAC), [2018] AACR 2 at [55]:

> "In this case, the decision that was the subject matter of the appeal to the First-tier Tribunal was made on 2 October 2013. By the time the tribunal made its decision, HMRC had made a decision under section 18. There is an issue whether the section 18 decision had been issued to the claimant prior to the tribunal's decision. It is not necessary for us to resolve this issue. If the decision had been issued, the First-tier Tribunal had no jurisdiction and it was under a duty to strike out the appeal. The proper disposal before the Upper Tribunal would be to re-make the First-tier Tribunal's decision to that effect. Even if the decision had not been issued, the claimant is now aware of it and, in view of our reasoning, there would be nothing to gain from further proceedings in respect of the section 16 decision. Either way, the outcome is the same for the claimant. We have compromised by giving a decision that even if the First-tier Tribunal made an error of law, it is not appropriate to set its decision aside".

52. As confirmed at paragraph 33 of ***LS and RS***, the Upper Tribunal nevertheless maintains jurisdiction to hear and decide an appeal in these circumstances, even if the issue is academic:

> "33. … The Upper Tribunal is not under a duty to strike out an appeal just because the First-tier Tribunal had no jurisdiction to entertain the proceedings; its decision has not ceased to exist. And, as the Upper Tribunal has jurisdiction, it has power to deal with an issue that might be considered academic in view of the First-tier Tribunal's lack of jurisdiction. It is at this stage that there is scope within its jurisdiction for discretion in the exercise of the Upper Tribunal's power to hear and decide an academic issue".

53. The reason for that distinction was explained in paragraph 23 of ***LS and RS***

> "In the case of the Upper Tribunal, an appeal is governed by section 11(1) of the Tribunals, Courts and Enforcement Act 2007, which provides for the right of appeal on any point of law arising from a decision made by the First-tier Tribunal. That decision is valid for the purposes of an appeal regardless of whether or not it was made within the tribunal's jurisdiction, whether or not it was validly made, and whether or not it involved the making of an error of law. If it were otherwise, the right of appeal would be ineffective, as the Privy Council recognised in *Calvin v Carr* [1980] AC 574 at 590:
>
> > "... where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent. So to hold would be wholly unreal."
>
> The underlying principle was stated by the Court of Appeal in *Secretary of State for the Home Department v VM (Jamaica)* [2017] EWCA Civ 255 at [20]:
>
> > "Formal decisions of a tribunal are valid and of binding effect unless and until set aside by some order of the tribunal itself (e.g. if it comes to appreciate that it mistakenly acted without jurisdiction) or of a superior tribunal or court or on judicial review.""

54. Mr Vanderman also drew my attention to a number of other passages in ***LS and RS*** which it is appropriate to set out in full since they put paragraphs 23, 33 and 55 in context:

> **"A. What we have decided**
> 1. As soon as the Commissioners for Her Majesty's Revenue and Customs have made a decision under section 18 of the Tax Credits Act 2002 for a tax year, any decision made under section 16 for that tax year ceases retrospectively to have any operative effect, any appeal that has been brought against that section 16 decision therefore lapses, the First-tier Tribunal ceases to have jurisdiction in relation to that appeal and that tribunal must strike out the proceedings.
>
> **…**
>
> *LS - CTC/3228/2015*
>
> 7. In this case, the section 18 decision was made before the First-tier Tribunal made its decision on the claimant's section 16 appeal, although she says that she was not aware of it. It only came to light when submissions were made on the appeal to the Upper Tribunal.
>
> 8. We take the history of this case from HMRC's submission to the Upper Tribunal written by John Best. On 2 October 2013, the claimant's award of tax credits for the tax year 2013-2014 was terminated under section 16. The claimant exercised her right of appeal to the First-tier Tribunal, which dismissed the appeal on 28 August 2015. By that time, there had been a decision under section 18, which was made on 2 March 2015. The claimant says that she was not notified of that decision; the First-tier Tribunal was unaware of it.
>
> …
>
> **H. Jurisdiction, lapsing and appeals in principle**
> 16. Both Mr Royston and Ms Ward sought to avoid issues of jurisdiction in order to classify the issue as one of case management under which it was possible for tribunals to produce a pragmatic outcome. We do not accept that argument. As we are differing from the joint approach of counsel, we need to explain in detail why their approach is not permissible.

…

21. In the case of the First-tier Tribunal, a tax credit appeal is governed by section 38, which provides for an appeal to be brought against a decision under section 16(1). That decision is the subject matter of the appeal. If there is no section 16 decision, there is no subject matter for an appeal and, therefore, the tribunal can have no jurisdiction in relation to it.

…

25. The reason why the appeal lapses is that there is no longer any decision against which an appeal can be brought and, as a result, the tribunal has no jurisdiction in relation to any appeal that has been lodged. It makes no difference in principle to the reasoning whether the earlier decision ceased to have operative effect before or after the claimant lodged the appeal.

…

29. When the First-tier Tribunal and Upper Tribunal came into operation on 3 November 2008, the position changed. The rules of procedure under the Tribunals, Courts and Enforcement Act 2007 introduced a specific provision dealing with lack of jurisdiction. Rule 8(2)(a) introduced a duty to strike out all or part of proceedings if the tribunal did not have jurisdiction in relation to them. It is impossible to interpret rule 8 as admitting any discretionary element. The terms of rule 8(2) could not be clearer: the tribunal must strike out the proceedings. That is the unmistakeable language of a duty. It is in contrast to rule 8(3), which merely authorises the tribunal to strike out proceedings by providing that it may do so.

30. The duty imposed by rule 8(2) reflects the tribunal's duty not to act outside its jurisdiction and the requirement that it decide whether it has jurisdiction. Its introduction may have been prompted by the arrangements for lodging an appeal. In some cases, the appeal is lodged with the decision-maker. Once such an appeal has been lodged, it is impossible for the tribunal simply to refuse to admit it and important to ensure that it is the tribunal, rather than the decision-maker, that exercises the gatekeeper control over which appeals are and are not within its jurisdiction.

31. The introduction of rule 8(2)(a) makes it important to understand the principles upon which lapsing operates. If (as we have decided) it operates by depriving a tribunal of jurisdiction, it imposes a duty on tribunals to dispose of cases by way of strike out rather than by one of the other methods that were previously used. And the strike out procedure contains an important and obligatory step by which the tribunal must allow the claimant a chance to make representations. This allows the claimant to argue that no later decision has been made or, if one was made, it has not been issued. This chance is all the more important because, unlike other strike out provisions, there is no power to reinstate proceedings once they have been struck out under rule 8(2).

32. When a section 16 appeal lapsed by virtue of a section 18 decision, it used to be possible for a tribunal to avoid any issue of jurisdiction and, therefore, the need for a claimant to lodge a new appeal against the section 18 decision. All the tribunal had to do was to treat the appeal as continuing against the section 18 decision. That is no longer possible; since the introduction of mandatory reconsideration in April 2014, before an appeal can be brought against a decision, the claimant must first apply for a review of the decision under section 21A. Only when that has been carried out and HMRC have issued a formal notice is it possible to appeal (section 38(1A)). This procedure is designed to avoid the need for an appeal if HMRC identify an error in a decision. Its effect, though, is to make it impossible for tribunals to short-circuit the appeal process in the way that was possible previously. It may be that this was a factor that prompted the judge in *RF* to try to find a way to avoid the need for a claimant to go through the mandatory reconsideration procedure and then lodge another appeal.

…

40. But these differences in the schemes and their operations are not ones of substance. In both schemes, decisions are made by reference to the conditions of entitlement on the basis of the evidence available to the decision-maker at the time and are subject to change as further evidence requires. As Ms Ward said at the hearing in relation to section 14: “HMRC would not make an award if the conditions of entitlement were not satisfied.” The difference in the design and operation of

decision-making regimes for social security and tax credits does not affect the essential similarity. It seems to us that the differences are required by the nature of tax credit as an annual entitlement calculated in a way that is more akin to a tax than a benefit, but paid in a way that is more akin to a benefit. If anything, the tax credit scheme makes it clearer that the effect of a section 18 decision is to deprive the decisions under sections 14, 15 and 16 of any operative effect, even within the tax year to which they related, since their inherently provisional nature makes it more likely than in the social security scheme that they will only be of temporary effect. That is put beyond doubt by the mandatory nature of the procedure under sections 17 and 18, and underlined by the provision in section 18(11) that the decision under that section is conclusive on entitlement for the tax year in question. That is the position whether or not the First-tier Tribunal knows of the section 18 decision when it considers the section 16 appeal.

J. Applying the principles to tax credit cases before the Upper Tribunal

41. We have explained why the subject matter of an appeal differs in proceedings before the First-tier Tribunal and the Upper Tribunal. Both tribunals are under a duty to strike out proceedings in relation to which they have no jurisdiction. What makes the proceedings different in the Upper Tribunal from the First-tier Tribunal is that the decision under appeal is different. The decision under appeal to the Upper Tribunal is not a decision under the Tax Credits Act, but the decision of the First-tier Tribunal. That decision has sufficient existence to form the subject matter of appeal, so the duty to strike out is not triggered.

42. It follows that, in proceedings before the Upper Tribunal, it does not matter for the purposes of the Upper Tribunal's jurisdiction whether the section 18 decision was given:

• before the claimant made an appeal to the First-tier Tribunal;

• during the course of the proceedings before that tribunal;

• after the First-tier Tribunal made its decision; or

• during the course of the proceedings before the Upper Tribunal. In all these case, the Upper Tribunal had and retains jurisdiction to hear the case.

43. As the Upper Tribunal has jurisdiction, it also has power to decide an issue that is, as a result of the section 18 decision, academic between the parties. It is the existence of a decision that allows scope for the Upper Tribunal to exercise its power to hear such issues in accordance with the principles established by *R v Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450. It is this that distinguishes the *Salem* line of authorities from the principle set out in *In re X*, part of which we have already cited. This is the full passage from Black LJ's judgment:

> "47. I do not think that the jurisprudence goes so far as to establish that this court should entertain an appeal in a case in which the lower court was itself only ever engaged upon a determination of hypothetical or academic issues. In each of the cases to which I refer in the preceding paragraph, the matter began as a real dispute between parties to conventional litigation of one sort or another, before a court which undoubtedly had jurisdiction to rule upon the dispute, but the issue had been settled or otherwise resolved before the case reached the appeal court. I note the authorities, therefore, as a useful reminder that a pragmatic approach to litigation may sometimes be appropriate, particularly in the light of the overriding objective set out in today's procedural rules, but they do not, to my mind, constitute a licence to ignore jurisdictional and procedural rules completely nor do they permit the courts to be used to determine issues just because it would be useful to have an authoritative answer."

As soon as the appeal lapses before the First-tier Tribunal, that tribunal ceases to have jurisdiction and from then on, in Black LJ's words, "was itself only ever engaged upon a determination of hypothetical or academic issues". There is no longer any issue in dispute between the parties in relation to the section 16 decision and it is not permissible to resurrect under the guise of an academic issue any dispute that did at one time exist against a decision that no longer exists.

> 44. If the Upper Tribunal does not decide an issue as an academic one, its powers are set out in section 12(2) of the Tribunals, Courts and Enforcement Act 2007. Depending on the circumstances of the case, the Upper Tribunal might consider it appropriate (i) not to set aside a decision of the First-tier Tribunal despite an error of law or (ii) re-make the decision, perhaps by substituting a decision striking out the proceedings on the appeal to the First-tier Tribunal for lack of jurisdiction."

The Claimant's Submission: The 2020 Appeal

55. In reply to HMRC's submission on the 2020 appeal, Mr James submitted that the first alleged error of law relied upon was said to be that the s.16 decision of 28 February 2018 had lapsed by reason of an alleged s.18 decision in respect of the joint claim on 14 November 2018. HMRC's submission of 8 June 2020 was the first time that this had been raised.

56. In respect of that point the claimant contended that

(i) there was no evidence of the alleged decision upon which reliance was now being placed, only an assertion to that effect on the part of HMRC and nothing had been produced evidencing what had allegedly been decided and when

(ii) the alleged decision had not been mentioned in the proceedings before: either HMRC was not aware of it or it was in breach of rule 24(4) of the Tribunal Procedure (First-tier) Tribunal (Social Entitlement Chamber) Rules 2008 in the proceedings below

(iii) no decision to that effect had been received by the claimant

(iv) HMRC had not included it within its application for permission to appeal and permission had not been granted for it to be pursued as part of its appeal.

57. The claimant submitted that it would not accord with the overriding objective to allow HMRC to seek to introduce new evidence and argue a new point which it had concealed from him and the Tribunal.

58. He submitted that that provided the answer to HMRC's first point, but in the event that the Upper Tribunal were to entertain the argument, it was acknowledged that the decision in ***LS and RS*** was relevant. However

(i) that case did not appear to deal with a case such as the present where there was no evidence of a decision pursuant to s.18 of the 2002 Act and no decision which complied with the mandatory requirements of s.23 of the 2002 Act; and/or

(ii) in any event, the decision in ***LS and RS*** itself expressly recognised that the Upper Tribunal could determine a point of principle which remained relevant (paragraph 33) and it was argued that the just approach in this case would be to do so. It was in excess of 2 years since the case began on an issue of real importance to the claimant and it would be wrong and prejudicial to him for HMRC to deprive him, through its own actions or omissions, of a significant decision.

59. As to the second alleged error upon which reliance was now placed, that again concerned the conduct of HMRC. It was clear from the statement of reasons that it was HMRC's case (by way of concession) that the claimant's entitlement should have continued up to 5 April 2018 (see paragraph 23). That was not the case advanced by the claimant and the position was questioned by the judge (as appeared from the question in the record of the proceedings at page 120), but the concession was maintained by HMRC and that was the basis of the decision at paragraph 42 of the statement of reasons.

60. It was the claimant's case that, the concession having been made, it was not just to permit HMRC to resile from it on the appeal and that the appeal should be dismissed. Moreover, HMRC's position in the Tribunal below was a permissible interpretation of the statutory language in s.3 of the 2002 Act because

(i) s.3(4) of the 2002 Act stated that

> "Entitlement to a tax credit pursuant to a claim ceases … (a) in the case of a joint claim, if the person by whom it was made could no longer jointly make a claim …"

(ii) s. 4(1) of the 2002 Act provides that

> "regulations may … (e) provide for a claim for a tax credit to be made or proceeded with in the name of a person who has died"

(iii) regulation 15 of the 2002 Regulations provides that

> "(3) In the case of a joint claim where only one of the persons by whom the claim was made has died, the other person with whom the claim was made may proceed with the claim in the name of the person who has died as well as in his own name"

(iv) to answer the question posed by s.3(4) of the 2002 Act, viz. could the claimant make a claim, the answer was in the affirmative. The language was permissive, not mandatory and that was the question to be answered in deciding whether or not the claim ceased

(v) the point did not arise in the decisions referred to in HMRC's submissions and it was a matter for statutory interpretation.

Further Submissions

HMRC's Submission

61. In its submission of 6 October 2020, pursuant to my further directions of 4 August 2020, HMRC dealt with the issues as follows:

Issue (a): proof of the s.18 decision said to have been taken on 14 November 2018

Issue (b): whether that s.18 decision (if made) was issued to the claimant and the date on which it was issued.

62. The relevant print-outs from the HMRC computer system were attached to the submission as Appendix A. In particular

(a) the first print-out showed that the s.18 decision was taken on 12 November 2018;

(b) the second print-out showed the reason why the s.18 decision was not taken until 12 November 2018. That was because there was a discrepancy between HMRC systems and the information provided by the claimant and it took time for that to be resolved;

(c) the third print-out showed that the s.18 decision was issued to the claimant on 14 November 2018.

63. Issue (c): why the s.18 decision (if made) was not produced before the Tribunal hearing on 31 May 2019.

64. Unfortunately, HMRC was not able to explain why the s.18 decision was not before the Tribunal at the hearing.

65. Issue (d): whether the status of widow or widower was capable of coming within the scope of "other status" for the purpose of article 14 of Schedule 1 of the Human Rights Act 1998.

66. HMRC was willing to proceed on the basis that being a widower could, in principle, amount to “other status” for the purposes of Article 14.

67. Issue (e): if so, whether there was discrimination against the claimant on the grounds of such other status

68. There were four questions which had to be answered in such a case: ***Gilham v Ministry of Justice*** [2019] 1 WLR 5905 (SC) at [28] (Baroness Hale). They were: (i) whether the facts fell within the ambit of one of the Convention rights; (ii) whether the claimant had been treated less favourably

than others in an analogous situation; (iii) whether the reason for that less favourable treatment was one of the listed grounds or some "other status" and (iv) whether that difference was without reasonable justification or a proportionate means of achieving a legitimate aim.

69. The claimant's appeal was hopeless because of its failure to satisfy (ii) and (iv). In relation to (ii), the claimant argued that he was being treated less favourably than "any married person where neither has chosen to end that marriage or separate". The group of married persons he identified were not in an analogous situation; they were still part of a two-person unit and, therefore, in a completely different position. The legislation recognised that distinction by treating single claims and joint claims separately. In essence, the claimant's real complaint was that he could no longer obtain a single award of tax credit due to the introduction of universal credit. As he would undoubtedly be unsuccessful in directly challenging the scheme of universal credit, he had sought to do so indirectly.

70. As to (iv), to the extent that he had been treated less favourably than others in an analogous situation, the proper question was whether the measure itself – i.e. restricting joint awards to situations where the two partners were still alive and together – was manifestly without reasonable foundation: ***R (DA) v Secretary of State for Work and Pensions*** [2019] 1 WLR 3289 at [66] (Lord Wilson). It was clearly not. Indeed, it was difficult to see what the opposing argument was. The claimant pointed to the use to which the award would be put: raising his sons. That was not relevant to the legal test.

71. Issue (f): whether it was just to allow HMRC to resile from the concession that the tax credits awarded to the claimant should be extended to the end of the tax year 5 April 2018.

72. The short answer was that it would be *ultra vires* the 2002 Act to allow the joint claim to be extended to 5 April 2018. That was because entitlement to a

tax credit ceased in the case of a joint claim "if the persons by whom it was made could no longer jointly make a joint claim": s.3(4) of the 2002 Act.

73. The claimant's entitlement to tax credit therefore ceased on 30 January 2018 when he could no longer make a joint claim.

74. In the circumstances, it was not a question of what was just. If the Upper Tribunal acted otherwise than to allow HMRC's appeal and restore the termination decision, it would be acting *ultra vires* the 2002 Act, regardless of any concessions made by HMRC.

The Claimant's Submission

75. In his submission, the claimant addressed three of the issues arising out of HMRC's further submission:

(i) the alleged s.18 decision of 14 November 2018;

(ii) HMRC's attempt to withdraw from the concession made in the First-Tier Tribunal; and

(iii) the discrimination arguments.

76. The claimant's position was that he had not received a decision dated 14 November 2018 and neither the existence of such a decision or a notice of it was disclosed in the Tribunal.

77. HMRC had provided no explanation for its failure to disclose the fact of this decision before the Tribunal nor had it produced any notice that it alleged was given to the claimant of that decision.

78. There had been no notice pursuant to s.23 of the 2002 Act and there had been, to the claimant's knowledge, no notice of a decision. The effect was that, just shy of 3 years since the death of his wife, HMRC had not complied

with its statutory obligations and appeared to be contending that the decision of which he was not notified, provided an answer to his appeal. In those circumstances the appeal should be determined on its merits.

79. No explanation was given for the concession made in the Tribunal and HMRC did not engage with the issue of prejudice to the claimant in allowing it to withdraw its concession or to address the question of whether it would be just to allow it to do so.

80. It was accepted that the Upper Tribunal had the power to allow HMRC to withdraw its concession, but it was wrong of HMRC to contend that it did not need to consider whether it was just to do so, or the prejudice to the claimant, or whether there was a good reason for allowing HMRC to withdraw its concession. The role of the Upper Tribunal was to allow or dismiss an appeal and if the concession was not withdrawn HMRC's appeal must fail.

81. As to discrimination, there did not appear to be any dispute as to the legal position as between the parties; the dispute was as to the application of those principles to the facts of the case.

82. The first point made by HMRC concerned comparators, with HMRC contending that the comparator could not be a married couple by restating the difference that there were two people instead of one. That was an erroneous approach because:

(i) in the words of Lady Hale in ***Gilham v Ministry of Justice*** at [31] it "is to confuse the difference in treatment with the ground or reason for it" and

(ii) if, as HMRC was prepared to proceed on the basis (as recently was the Court of Appeal) of a widow or widower being an "other status", there must be a comparator. A proper comparator was a married couple.

83. As explained in ***R (DA) v Secretary of State for Work and Pensions***, two approaches were permissible. Discrimination could be treating someone differently without an objective and reasonable justification, or treating similarly without an objective or reasonable justification persons in relatively different situations (paragraph 48). On either analysis the claimant was prima facie being discriminated against. It was because of his status as a widower that he was being treated unfavourably in being required to make a fresh application, now for universal credit, rather than being entitled to continue to receive child tax credits.

84. The approach of HMRC was to require the claimant to be in the same, as opposed to an analogous or comparable, situation. That was incorrect.

85. The other argument advanced by HMRC was that any less favourable treatment was justified as being not manifestly without reasonable foundation. It was helpful to restate the position to address that point. The objectively unarguable position was this: the claimant's entitlement to child tax credits (a benefit intended to assist with the cost of bringing up a child or children) ceased and he was required by the 2014 TP Regulations and/or the 2017 Order to apply for universal credit if he was eligible. That situation arose solely due to the death of his wife; but for that death he would still be in receipt of child tax credits for their sons. The effect of that was that the claimant now received no benefits in respect of their two sons.

86. The issue which therefore arose was whether that unfavourable treatment was manifestly without reasonable foundation. It is the claimant's case that there was no justification at all for the difference in treatment as between 29 January 2018 when his wife was alive and he received child tax credits and 30 January 2018 when his wife was deceased. No reasons for that difference in treatment were advanced for the simple reason that there were none.

87. Once it was accepted that there was discrimination, the issue of how to remedy it arose. That could be achieved by interpretation of the legislation or

by not applying the secondary legislation, as set out in the claimant's previous submissions.

Analysis: The 2019 Appeal

The Construction Issue

88. The ability to make a joint *claim* is governed by s.3(3)(a) of the 2002 Act which provides that

> "(3) A claim for a tax credit may be made—
>
> (a) jointly by the members of a couple both of whom are aged at least sixteen and are in the United Kingdom …"

89. In the case of such a joint claim, *entitlement* to a tax credit ceases in the circumstances set out in s.3(4)(a) of the 2002 Act which provides that

> "(4) Entitlement to a tax credit pursuant to a claim ceases—
>
> (a) in the case of a joint claim, if the persons by whom it was made could no longer jointly make a joint claim".

90. The short answer to the claimant's argument on statutory construction is that, in the case of the death of one of the persons by whom the joint claim was made, the persons by whom such a joint claim was made could no longer jointly make a joint claim because one of them is dead. Under s.3(4)(a) the entitlement to a tax credit accordingly ceases on the death of one of the joint claimants.

91. Regulation 15(3) of the 2002 Regulations does not have the effect contended for by Mr James on behalf of the claimant, namely that he could continue with his joint claim and was not someone who could no longer make

a joint claim. (I shall deal below in the context of the 2020 appeal with the effect of HMRC's concession at first instance that the tax credits award should nevertheless run to 5 April 2018, the end of the relevant tax year.)

92. It is important to read regulation 15(3) in the context of the regulation as a whole, not in isolation. That is why I have set it out in full above. It deals with persons who die after making a claim, not with entitlement to tax credits:

> "15(1) This regulation applies where any person who has made a claim for a tax credit dies—
>
> (a) before the Board have made a decision in relation to that claim under section 14(1) of the Act".

93. In that case (and the two other situations set out in sub-paragraphs (b) and (c)), the following provisions of the regulation apply. They are clearly administrative provisions which allow the claim to be carried on; they do not govern entitlement to tax credits. In the case of a single claim, under regulation 15(2) the personal representatives of the person who has died may proceed with the claim in the name of that person. In the case of a joint claim where only one of the persons by whom the claim was made has died, under regulation 15(3) the other person with whom the claim was made may proceed with the claim in the name of the person who has died as well as in his own name. In the case of a joint claim where both the persons by whom the claim was made have died, under regulation 15(4) the personal representatives of the last of them to die may proceed with the claim in the name of both persons who have died. Regulation 15(3) does not have, and could not have, the effect of amending the provisions of s.3(4) of the 2002 Act as contended for by the claimant.

94. Moreover, the claimant's argument concerning the definition of a "couple" under s. 3 of the Act is misconceived. The persons making a joint claim must be a couple as defined by s.3(5A) to make a joint claim in the first place. However, their entitlement ceases in the case of a joint claim if the person by whom it was made could no longer make a joint claim. They may cease to be able to make a joint claim if they are separated under a court order, or if they

are separated in circumstances which are likely to be permanent, or if one of them has died (in all of which cases they will have ceased to be a "couple").

95. It is not therefore correct to say that, when a man and woman are married, they are *only* taken outside the ability to make a joint claim by separation under s.3(5A). They also cease to be a couple when one of them dies. As a matter of common parlance no one would describe a widow or widower as being part of a "couple" after suffering bereavement consequent on the death of his or her spouse.

96. I therefore reject the first ground of appeal in the 2019 appeal.

The Human Rights Issue

97. So far as the four questions set out in ***Gilham*** are concerned, there is no dispute about the first question, whether the facts fall within the ambit of one of the Convention rights and HMRC is content to proceed on the basis that being a widower can in principle amount to "other status" for the purposes of Article 14. The two questions for determination are therefore (ii) whether the claimant has been treated less favourably than others in an analogous situation and (iv), if so, whether that difference was without reasonable justification or a proportionate means of achieving a legitimate aim.

98. I do not accept that the approach of HMRC is to require the claimant to be in the same, as opposed to an analogous or comparable, situation. But what is an analogous situation in the present context? In my judgment, it is difficult to comprehend a more stark difference than that between a married or cohabiting couple and a union, marital or otherwise, sundered by death. The situation of a married or cohabiting couple on the one hand and a widow or widower on the other is rendered fundamentally different by virtue of the death of their spouse or partner. To quote Lord Nicholls in ***R (Carson) v Secretary of State for Work and Pensions*** [2006] 1 AC 173 at [3]:

> "There may be such an obvious, relevant difference between the claimant and those with whom he seeks to

> compare himself that their situations cannot be regarded as analogous."

99. Mr Russell James sought to argue that the decision in ***Simawi*** demonstrated that it was possible to compare a widower with someone who was separated. However, what Murray J was prepared to accept as arguably analogous in ***Simawi***, in the context of that particular statutory framework, was that

> "32. My view is that the position of a qualifying family member following the death of a widowed tenant under a secure tenancy is arguably analogous to the position of a qualifying family member following the death of a divorced tenant. There is, of course, a difference in the position of the deceased, which arises by operation of sections 87 to 88, but that is why the positions of the qualifying family members are merely analogous and not, in essence, the same. That difference results in the difference of treatment that is at the heart of Mr Simawi's case. It is safer, therefore, to proceed, albeit tentatively, on the basis that the positions are analogous, and to consider questions 3 and 4 of Baroness Hale's four-stage test in *McLaughlin*."

100. In other words the comparator of a child of a widowed parent was the child of a divorced parent. The position of one child was analogous to that of the other child. That is intrinsically different from the situation of a married or cohabiting couple and a widow or widower in the context of an altogether different statutory framework where the distinction drawn in the primary legislation is between joint claims and single claims. The case is not about the difference in treatment caused by the claimant's status as a widower, but about his status as single claimant as opposed to a joint claimant as part of a couple. The obvious, stark and relevant difference between the claimant and those with whom he seeks to compare himself is therefore such that their situations cannot be regarded as analogous or comparable. I am therefore satisfied that the claimant has not been treated less favourably than others in an analogous situation.

101. I therefore turn to the fourth question, namely whether any such difference in treatment, if made out, was without reasonable justification or a proportionate means of achieving a legitimate aim. It is for the complainant, not the Secretary of State, to show that the adverse treatment complained of was manifestly without reasonable foundation, as Lord Wilson explained in ***R (DA) v. Secretary of State for Work and Pensions*** [2019] UKSC 21, [2019] 1 WLR 3289:

> "66. How does the criterion of whether the adverse treatment was manifestly without reasonable foundation fit together with the burden on the state to establish justification, explained in para 50 above? For the phraseology of the criterion demonstrates that it is something for the complainant, rather than for the state, to establish. The rationalisation has to be that, when the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."

102. Moreover, the correct approach to determining whether a difference of treatment constitutes impermissible discrimination allows for a wide margin of appreciation, as Murry J explained in ***Simawi***:

> "46. In relation to objective justification, the ECtHR set out the correct approach to determining whether a difference of treatment constitutes impermissible discrimination in *Carson v United Kingdom* (2010) 51 EHRR 13 at [61]:
>
> > "[I]n order for an issue to arise under art. 14 there must be a difference in the treatment of person in analogous, or relevantly similar, situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other

> words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background. A wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the general interest on social and economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'." (Footnotes omitted.)”

103. It seems to me that, whether the issue is analysed as eligibility for tax credits (whether as a joint claimant or a single claimant) or as the migration from legacy benefits to universal credit, that is a general measure of economic or social strategy such that it should be accorded a wide margin of appreciation.

104. The distinction drawn in the primary legislation between joint claims and single claims is also a bright line rule. The adoption of a bright line rule is a legitimate way of achieving a workable rule and legal certainty. The fact that there may be hard cases which fall the “wrong side” of a bright line rule does not invalidate the rule if on the whole it is beneficial (see ***Mathieson v Secretary of State for Work and Pensions*** [2015] UKSC 47; [2015] 1 WLR 3250 per Lord Wilson at paragraph 27 and per Lord Mance at paragraph 51).

105. It is inherent in the notion of a bright line rule that the provision in question is clear and simple to apply in any given factual situation. Thus, in ***Mathieson***, the bright line rule – that the Secretary of State was in the event unsuccessful in seeking to justify – was the regulation which suspended

payments of disability living allowance ("DLA") to disabled children who had been inpatients in a National Health Service hospital for more than 84 days. Such a statutory provision involved a sequence of stark bright lines: the claimant was either a child or he was not; he was either in receipt of DLA or not; he was either an NHS inpatient or not; and he had been in hospital for more than 84 days or not. Each of those was a readily discernible straightforward question of fact. In this case the difference between joint claims and simple claims is clear and simple to apply in any given factual situation.

106. The real gravamen of the claimant's case is that the effect of the legislation is that he was no longer entitled to child tax credit and because of his capital arising out of a life insurance payment he is not eligible for universal credit (see the letter dated 26 March 2018 on page 20 of the bundle). That does not, however, mean that such difference in treatment was without reasonable justification or a proportionate means of achieving a legitimate aim. It is not appropriate to say that any replacement benefit system must replicate features and definitions used in the former system and, if it does not do so, then to seek to argue that the new system includes differential treatment within the meaning of Article 14 as the new system treats people in a certain (and illegitimate) way when, under the previous and replaced system, they would have been treated in a different way.

107. As Lewis J said in ***R (TP and AR)*** at [70]-[72]

> "70. The second way in which the claimants put their challenge to the 2013 Regulations is as follows. They contend that under the former benefit rules those in the support group were entitled to a basic allowance to meet their needs. Those who satisfied additional criteria received the basic allowance and SDP and EDP. Now, they say, those in the support group continue to have their needs met by payment of a standard allowance (at a higher rate than the previous basic allowance) but those who have additional needs receive the standard allowance but do not have any additional amounts paid to them by way of additional disability premiums. This, they say, is to treat people in different positions (i.e.

people with different levels of need) in the same way. That, they say, amounts to differential treatment which the defendant must objectively justify or it will amount to discrimination contrary to Article 14 read with Article 1 of the First Protocol. They rely upon the principle summarised by the European Court of Human Rights in paragraph 44 of its judgment in *Thlimmenos v Greece* (2001) 31 EHRR 15:

> "44. The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".

71. First, this is not, in truth, a case where people in different positions are treated differently under the relevant legislation. The fact is that universal credit, provided for by the 2012 Act and the 2013 Regulations, provide for certain levels of cash benefits to certain persons who meet certain criteria. The claimants, however, seek to rely upon previous decisions of the legislature and the executive as to the amounts of, and the circumstances in which, cash payments were to be payable under the former legislative regime providing for welfare benefits. The criteria identified under the previous regime do not define an objectively ascertainable factual state of affairs which must similarly be accommodated by any replacement system. Rather, the criteria previously adopted reflected the judgement then made as to how best to direct assistance to those perceived to be in need of such assistance. Universal credit is a self-contained system which will operate according to the criteria provided by the legislation creating that system. It is not appropriate to say that any replacement benefit system must replicate features and definitions used in the former system and, if it does not do so, then to seek to argue that the new system includes differential treatment within the meaning of Article 14 ECHR as the new system treats people in the

> same way when, under a different and replaced system, they would have been treated in a different way.
>
> 72. Secondly, in any event, the decision to pay a higher allowance to all persons with a particular level of disability, and not to pay additional disability premiums (such as the SDP and EDP payable under the former welfare system) is objectively justifiable. It is a conscious and considered decision by the legislature and the executive in the context of the allocation of resources in the context of social and welfare policy. The decision-makers consider that this approach best directs assistance to those who need it (and those with other needs should have those needs assessed under the social care legislation rather than as part of universal credit). The previous disability premiums were seen as complex to administer and were not seen to have been appropriately targeted. For those reasons, discussed more fully above in relation to the first aspect of this challenge, any differential treatment arising out of the fact that claimants now received the same level of benefits for disability, whereas formerly different groups received different benefits, is objectively justifiable. Such a policy is not manifestly without reasonable foundation. Applying the claimants' preferred approach, the measure pursues a rational aim, is connected to that aim and that aim could not be achieved by a less intrusive measure. Indeed, to adopt a different measure and give different payments to these groups would be to seek to achieve a different aim, not the aim pursued by universal credit. For the reasons set out in paragraph 68 above, the measure strikes a fair balance."

108. Mr Russell James argued that the claimant's entitlement to child tax credits (a benefit intended to assist with the cost of bringing up a child or children) ceased and he was required by the 2014 TP Regulations and/or the 2017 Order to apply for universal credit if he was eligible. That situation arose solely due to the death of his wife; but for that death he would still be in receipt of child tax credits for their sons. The effect of that was that he now received no benefits in respect of their two sons. He argued that there was no justification for the difference in the treatment of the claimant as between 29 January 2018 when his wife was alive and he received child tax credits and 30 January 2018 when his wife was deceased.

109. In my judgment, however, the death of the claimant's wife made all the difference. As I explained in paragraph 100, in the context of the tax credits legislation there is an intrinsic difference between the situation of a married or cohabiting couple and a widow or widower where the distinction drawn in the primary legislation is between joint claims and single claims. The case is not so much about the difference in treatment caused by the claimant's status as a widower, but about his status as single claimant as opposed to a joint claimant as part of a couple. Although Mr James argued that there was no proper basis for ending the claimant's child tax credits earlier than other couples where the parties had not chosen to separate and change their circumstances and where the cost involved in bringing up the children remained the same, the crucial distinction is that on the death of one spouse the survivor is no longer part of a couple and is no longer entitled to tax credits pursuant to a joint claim because the persons by whom it was made could no longer make a joint claim.

110. For these reasons I am satisfied that there was no differential treatment in the case of the claimant and that if, contrary to that view there were, such treatment would be objectively justified, even on the assumption that a widow or widower has "other status" for the purposes of Article 14.

111. That suffices to deal with the human rights issue, but for the sake of completeness I shall go on to consider Mr James's third contention on the footing that a widow or widower has "other status" for the purposes of Article 14 and that the discrimination claim is otherwise made out.

S.3 of the 1998 Act

112. In ***Gilham*** at [39] Baroness Hale stated that

> "In *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, the House of Lords held that the interpretive duty in section 3 of the Human Rights Act 1998 was the primary remedy. Section 3(1) reads: "So far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible

> with the Convention rights". In *Ghaidan v Godin-Mendoza* it was also established that what is "possible" goes well beyond the normal canons of literal and purposive statutory construction. Philip Sales QC, for the Government, argued (at p 563) that section 3(1) required a similar approach to the duty to interpret domestic legislation compliantly with EU law, so far as possible, citing *Litster v Forth Dry Dock Engineering Co Ltd* [1990] 1 AC 546. Both Lord Steyn (paras 45 and 48) and Lord Rodger (paras 118 and 121) agreed that what was possible by way of interpretation under EU law was a pointer to what was possible under section 3(1), citing *Litster* as well as *Pickstone v Freemans Plc* [1989] AC 66. Lord Nicholls referred to the "unusual and far-reaching character" of the obligation (para 30). He also emphasised that it did not depend critically on the particular form of words used, as opposed to the concept (para 31). Lord Rodger, too, said that to attach decisive importance to the precise adjustments required to the language of the particular provision would reduce the exercise to a game (para 123). The limits were that it was not possible to "go against the grain" of the legislation in question (para 121) or to interpret it inconsistently with some fundamental feature of the legislation (Lord Nicholls, at para 33, echoing *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 AC 291)."

113. Mr James submitted that in this case s.3 of the 2002 Act could be read compatibly by adopting the interpretation contended for in the first ground of appeal or by reading the cessation provision as not applying where one member of the couple had died or by implying the words "by choice of at least one party" after "separated". Whilst the point does not arise for decision given the conclusion which I have reached about the human rights argument in the second ground of appeal, it seems to me that the claimant's submission cannot be adopted in the present context. The first and second alternatives seem to me to amount to the same thing, whether one describes a widow or widower as still being part of a couple notwithstanding the death of the deceased or whether one describes it as reading the cessation provision as not applying where one member of the couple had died. In either event the couple is being treated as surviving notwithstanding that it has been sundered by death. That, it seems to me, is an impossible interpretation which goes

against the grain of the crucial distinction between joint and single claims. The third alternative - implying the words "by choice of at least one party" after "separated" – would only assist in the case where both parties to a marriage or relationship are still alive and could sensibly be described as part of a "couple" (which is not the case here).

RR (AP) v Secretary of State for Work and Pensions

114. The facts of the ***RR*** case were that RR lived with his severely disabled partner in social sector rented accommodation with two bedrooms. On 5 March 2013 Sefton Borough Council decided that RR and his partner were under-occupying the accommodation and reduced his entitlement to housing benefit by 14% pursuant to Regulation 13B of the Housing Benefit Regulations 2006. RR appealed. The First-tier Tribunal held that RR required a second bedroom because of his partner's disabilities and her need to accommodate medical equipment and supplies. The Upper Tribunal allowed the respondent's appeal: [2018] UKUT 355 (AAC). The question arose as to what powers Tribunals had to interpret or disapply secondary legislation following the decision of the Court of Appeal in ***Secretary of State for Work and Pensions v Carmichael*** [2018] 1 WLR 3429 ("***Carmichael (CA)***"). The Upper Tribunal granted RR a leapfrog certificate under s.14A of the Tribunals, Courts and Enforcement Act 2007, enabling him to appeal directly from the Upper Tribunal to the Supreme Court (leapfrogging the Court of Appeal) if given permission to do so (which was duly granted by the Supreme Court).

115. That case raised the following issues (of which the first is the relevant one for present purposes):

(1) whether statutory authorities, including the First-tier Tribunal and Upper Tribunal, had the power or duty to calculate entitlement to housing benefit without making deductions for under-occupancy, so as not to violate a claimant's rights under the European Convention on Human Rights

(2) if so, the extent to which the payment of discretionary housing payments were relevant to the task of the statutory authorities in calculating entitlement.

116. On 13 November 2019 the Supreme Court allowed the appeal in ***RR***, deciding that a public authority was required to disregard a provision of subordinate legislation which resulted in a breach of a Convention right unless it was impossible to do so. It accepted that the approach of the Court of Appeal in ***JT v First-tier Tribunal (SEC) (EHRC intervening)*** [2019] 1 WLR 1313 was correct (and that the Court of Appeal in ***Carmichael (CA)*** was wrong).

117. For present purposes the key passage in ***RR*** is this:

> "27. Although the majority of the Court of Appeal in *Carmichael (CA)* [2018] 1 WLR 3429 accepted the arguments of the Secretary of State, in my view Leggatt LJ was entirely right to accept the arguments of the claimant. There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear.
>
> 28. The HRA draws a clear and careful distinction between primary and subordinate legislation. This is shown, not only by the provisions of section 6(1) and 6(2) which have already been referred to, but also by the provisions of section 3(2). This provides that the interpretative obligation in section 3(1):
>
> > "(a) applies to primary and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents the removal of the incompatibility."

Once again, a clear distinction is drawn between primary and subordinate legislation.

29. The obligation in section 6(1), not to act in a way which is incompatible with a Convention right, is subject to the exception in section 6(2). But this only applies to acts which are required by primary legislation. If it had been intended to disapply the obligation in section 6(1) to acts which are required by subordinate legislation, the HRA would have said so. Again, under section 3(2), primary legislation which cannot be read or given effect compatibly with the Convention rights must still be given effect, as must subordinate legislation if primary legislation prevents removal of the incompatibility. If it had been intended that the section would not affect the validity, continuing operation or enforcement of incurably incompatible subordinate legislation, where there was no primary legislation preventing removal of the incompatibility, the HRA would have said so.

30. Contrary to the Secretary of State's argument, *Mathieson* [2015] 1 WLR 3250 was not a "one off". As shown by the authorities listed in paras 21–23 above, the courts have consistently held that, where it is possible to do so, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded. There may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision. But that was not the case in *Francis* [2006] 1 WLR 3202, where the maternity grant could be paid to the holder of a residence order who qualified for it in all other respects; nor was it the case in *In re G* [2009] AC 173, where the unmarried couple could be allowed to apply to adopt (in reaching my opinion, I satisfied myself that this would not cause problems elsewhere in the statutory scheme); nor was it the case in *Burnip* and *Gorry* [2013] PTSR 117, where housing benefit could simply be calculated without the deduction for under-occupation; nor was it the case in *Mathieson*, where DLA could simply continue to be paid during the whole period of hospitalisation; nor was it the case in *JT* [2019] 1 WLR 1313, where criminal injuries compensation could be paid without regard to the "same roof" rule; and nor is it the case here, where the situation is on all fours with *Burnip* and *Gorry*. There is no legislative choice to be exercised. As Dan Squires QC, for the Equality and Human Rights Commission, put it, where discrimination has been found, a legislator may choose between

> levelling up and levelling down, but a decision-maker can only level up: if claimant A is entitled to housing benefit of £X and claimant B is only entitled to housing benefit of £X–Y, and the difference in treatment is unjustifiably discriminatory, the decision-maker must find that claimant B is also entitled to benefit of £X."

118. Mr James sought to contend that it was not simply s. 3 of the 2002 Act which gave rise to the discrimination alleged, but the combination of that section and the secondary legislation contained within the TP Regulations 2014 and/or the 2017 Order.

119. However, the provision which ends the entitlement to tax credit pursuant to a joint claim is s.3(4) of the 2002 Act, which is contained in primary legislation. It is not therefore possible to achieve the necessary equality of treatment by disapplying secondary legislation. The provision which ultimately led to the loss of entitlement to a tax credit was s.3(4) of the 2002 Act. Neither the TP Regulations 2014 nor the 2017 Order provide for an exception in the case of the death of a joint claimant in a tax credits case. If the Upper Tribunal were to create a new exception to the prohibition in s.3(4) of the 2002 Act, it would be impermissibly making a legislative choice, rather than simply disregarding an incompatible provision of secondary legislation. According to ***RR***, only the latter is permissible.

120. Moreover, the effect of the TP Regulations 2014 and the 2017 Order is to preclude the making of a new clam for tax credits (by way of a new single claim) in a universal credit full service area. They do not preclude the making of an application for universal credit. What precludes entitlement to universal credit is the amount of the claimant's capital arising out of the life insurance payment which means that he is not eligible for universal credit.

121. For these reasons I reject the second ground of appeal. It follows that the claimant's 2019 appeal against the decision of the Tribunal must be dismissed.

Analysis: The 2020 Appeal

122. It seems to me that there are three matters which fall for decision in the 2020 appeal:

(i) whether the decision under appeal has lapsed and, if so, whether there is jurisdiction to hear the appeal

(ii) whether regulation 15(3) has the effect that the award of tax credits extended to the end of the tax year on 5 April 2018 or whether the entitlement terminated on the death of the claimant's wife on 30 January 2018

(iii) whether, on the assumption that regulation 15(3) did not have that effect, but the Tribunal nevertheless accepted the concession by HMRC, it is now just to allow HMRC to resile from that concession.

Lapse And s.23 of the 2002 Act

123. With regard to the first issue, I am satisfied from the print-outs produced by Mr Vanderman that (a) the s.18 decision was taken on 12 November 2018 (the first print-out), (b) the reason why the s.18 decision was not taken until 12 November 2018 was because there was a discrepancy between HMRC systems and the information provided by the claimant and it took time for that to be resolved (the second print-out) and (c) the s.18 decision was issued to the claimant on 14 November 2018 (the third print-out). To the point that HMRC had not included the issue within its application for permission to appeal and that permission has not been granted for it to be pursued as part of its appeal, the short answer is that I will determine this appeal on the substance of the matters in issue and, to the extent necessary, I grant permission for the point to be argued.

124. Why the s.18 decision was not before the Tribunal on 31 May 2019 is not clear (probably through oversight), but in the light of what was said in paragraphs 40 and 55 of ***LS and RS*** I do not need to decide that issue. Nor, again in the light of those paragraphs in that decision, but subject to the s.23

point, do I need to decide whether the notice was actually received by the claimant.

125. The s.23 point was not raised, argued or decided in ***LS and RS***, so I am not impressed by Mr Vanderman's submission that there was nothing in the point since otherwise it would have been the subject of a decision by the three-judge panel.

126. Nor was the point raised at first instance in the present case, so there are no findings of fact one way or the other as to whether the claimant had in fact received the s.18 decision. Mr James's submission was that the claimant had not received a decision dated 14 November 2018 and neither the existence of such a decision or a notice of it was disclosed in the Tribunal at first instance, but that is submission, not evidence. For the purposes of determining the point I shall, however, assume in the claimant's favour that he did not receive notice of the s.18 decision, at least until it appeared with HMRC's most recent submission

127. As a matter of principle I can see no difference in the notification provision being contained in a statute (here s.23 of the 2002 Act) rather than in a statutory instrument enacting procedural rules (in social entitlement cases, regulation 28 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991). In both cases the notification provision is cast in mandatory terms, but that leaves the question of what the effect of non-compliance is.

128. Non-compliance is surely not fatal to existence of a decision in all circumstances. Suppose that an award is made and put into payment; no-one would say that that was not a valid award.

129. The question, it seems to me, is why a notice is required. One reason is so that the claimant knows his financial position and can plan accordingly. Another is so that he knows that it exists and can challenge it. A failure in

relation to the first reason is less significant than a failure in relation to the second reason.

130. Thus, in ***R(P) 1/04*** it was held by Mr Commissioner Williams (as he then was) that a failure to issue notice of a decision did not invalidate the decision, but simply had the effect that the time for appealing against the decision did not start to run.

131. Similarly where a decision is issued, but incorrectly tells the claimant that benefit has been awarded for life when it has in fact been awarded only for a limited period: the decision is valid, but time for appealing runs from when the claimant is informed of the true nature of the decision: ***CDLA/3440/2003***.

132. In the light of those authorities, in my judgment a failure to comply with s.23 of the 2002 Act does not affect the existence of the decision, but cannot be relied on against a claimant where time limits are concerned. In this case, therefore, the s.18 decision was valid even if the claimant had not been notified of it in accordance with s.23.

133. It follows from the decision of the three-judge panel in ***LS and RS*** that, as soon as HMRC had made a decision under s.18 of the 2002 Act for the tax year, any decision made under s.16 for that tax year ceased retrospectively to have any operative effect. Consequently any appeal which the claimant had been brought against that s.16 decision therefore lapsed. The First-tier Tribunal ceased to have jurisdiction in relation to that appeal and that Tribunal should have struck out the proceedings. The position is, however, different in the Upper Tribunal. The Upper Tribunal is not under a duty to strike out an appeal just because the First-tier Tribunal had no jurisdiction to entertain the proceedings; its decision has not ceased to exist. As the Upper Tribunal has jurisdiction, it has power to deal with an issue which might be considered academic in view of the First-tier Tribunal's lack of jurisdiction. There is therefore scope within its jurisdiction for discretion in the exercise of the Upper Tribunal's power to hear and decide an academic issue. In view of the general

importance of the construction and human rights points raised in the claimant's 2019 appeal, I have heard and determined them and not simply dismissed the appeal *in limine* or struck it out.

134. Having heard and determined the issues in the claimant's appeal, for the reasons set out above I have dismissed them rather than simply struck out the appeal. In that sense the outcome is the same for the claimant (as it was in ***LS and RS*** where the resolution of the appeal was a compromise in the sense that the three-judge panel gave a decision that, even if the First-tier Tribunal had made an error of law, it was not appropriate to set its decision aside), although that is subject to what I say about the other issues in the 2020 appeal by HMRC.

Regulation 15 of the 2002 Regulations

135. With regard to the second issue, it follows from what I have said in paragraphs 91 to 93 above that regulation 15(3) does not have the effect of extending the entitlement to tax credits to the end of the tax year on 5 April 2018 and, absent the concession by HMRC, the Tribunal ought to have decided that the entitlement ended on 30 January 2018 on the death of the claimant's wife.

HMRC's Concession

136. Ought HMRC now be allowed to resile from that erroneous concession?

137. Although neither counsel cited it to me, there is authority on that question in the form of the decision of Upper Tribunal Judge Gamble in ***LC v Secretary of State for Work and Pensions*** [2009] UKUT 153 (AAC) in which he said

> "10. In regard to the concessions made below, Miss Haldane submitted that in Scottish civil practice an appellate court can permit the withdrawal by a party to proceedings of a concession which he had made in a lower court if that concession was a concession of law and if to do so would not materially prejudice the other party. She relied on the decision of an Extra Division of the Inner House of the Court of Session in *Connolly v*

Simpson 1993 S.C.391. In particular, she referred me to a passage from Lord McCluskey's judgement in that case, at p.408, F. She went on to submit that the concessions made in this case by the presenting officer were concessions of law and that for me to set aside the tribunal's decision and direct a complete rehearing (as distinct from remaking the decision myself) would not materially prejudice the claimant. Not surprisingly, Mrs Brown strongly dissented from that aspect of Miss Haldane's submissions. In her contention, to set the decision of the tribunal aside, even by way of remitting the case to another tribunal, would result in serious prejudice to the interest of the claimant. Finally, Miss Haldane suggested that for the Upper Tribunal to permit the withdrawal of the concessions made in the First-tier Tribunal was, if anything, more appropriate in this jurisdiction, which was inquisitorial in nature, than in the adversarial one of the civil courts.

11. In my view, Miss Haldane's final submission on the issue of the presenting officer's concessions, summarised immediately above, holds the key to this aspect of the case. The Secretary of State has an adjudicative function in these proceedings under Section 8(1)(c) of the Social Security Act 1998, read along with sub-section (4) of that Section and Section 9 of that Act. He possesses the functions which were formerly those of the adjudication officer and before that, in the case of non-means tested benefits of the insurance officer. Those functions were semi-judicial, *R(SB) 8/83*, paragraph 5. The Secretary of State's duty is to ensure that the correct decision under the appropriate legislation is made. In the exercise of that duty, he regularly supports appeals to the Upper Tribunal in cases where he had opposed the allowing of an appeal below and had been successful in that opposition. His approach in this case is the converse of his support of claimants' appeals in other cases. It is one which his adjudicative function entitles him to take. Further, as a Judge of the Upper Tribunal, I have an inquisitorial jurisdiction. With these points in mind, I hold that neither the Secretary of State nor myself are bound by the concessions made in the tribunal below by the presenting officer. I draw strong support for that conclusion from the statements made by a very experienced and respected Commissioner, Mr Commissioner Rice, in paragraph 7 of *R(IS)14/93*. There he puts matters thus:

> "In the written submissions of the adjudication officer a concession was made that the claimant was at the relevant time without capital resources. However, in his oral submissions to me Mr Butt resiled from that concession, and contended that this was very much an open question which fell for consideration. Mr Shrimpton complained in no uncertain terms that he was taken by surprise. Although he did not seek an adjournment to deal with the point, he complained that there should have been some indication that the Department's attitude had changed. He went further, and argued that the Department were, in view of their concession in the written submissions, precluded from resiling therefrom. The position was analogous to pleadings. Whilst I appreciated Mr Shrimpton's irritation at the change of attitude on the part of the adjudication officer, I pointed out to him that, as this was an inquisitorial jurisdiction, I had to consider every point relevant to the issue, whether put forward by the parties or not, and for that matter I was not bound by any concession made by either party. Mr Shrimpton contended that this was not an inquisitorial, but an adversarial jurisdiction. I rejected that contention. It has always been accepted that this jurisdiction is inquisitorial in nature, a point emphasised at paragraph 14 of *CIS/360/1991* where specific reference is made, in support of the proposition, to *Reg v. Medical Appeal Tribunal (North Midland Region) ex parte Hubble* [1958] 2 QB 228 at page 240; *R v. Deputy Industrial Injuries Commissioner ex parte Moore* [1965] 1 QB 456 at pages 486-7 and to the following reported cases *R(U) 5/77; R(I) 6/81; R(S) 4/82 (T); R(F) 1/83; R(SB) 2/83 (T); R(S) 1/87*."

I accept that there is a procedural difference between the case just cited and the present one in that in *R(IS) 14/93*, the concessions in question were both made and withdrawn at appellate level. However, I do not consider that affects the application of the statement of principle cited above to the present proceedings. Like Mr Commissioner Rice, I hold that I am "not bound by any concession made by either party" adding whether made before the Upper Tribunal or, as here, before the Appeal Tribunal (the statutory predecessor of the First-tier Tribunal). The concessions made by the presenting officer at the appeal tribunal hearing do not therefore preclude the Secretary of State from submitting before

> me that the tribunal decision should be set aside as affected by a mistake of law.
>
> 12. In regard to the issue of legitimate expectation, Miss Haldane helpfully referred me to the detailed analysis of this developing area of public law by Lord Reed in *Shetland Islands Council v Lerwick Port Authority* [2007] CSOHO5. I hold that, in this case, no question of legitimate expectation arises which prevents the Secretary of State from resiling before me from the concessions made before the tribunal below. I accept Miss Haldane's submission to that effect. I do not consider that the making of the concessions by the presenting officer amounted to an undertaking that the Secretary of State would not exercise his statutory right to seek permission to appeal against the tribunal's decision, or in the event that such permission was granted that he would not seek to argue before the Upper Tribunal that the tribunal's decision was incorrect in law. At the very least, the concessions were not clear and unambiguous representations to that effect."

138. In line with that decision, I hold that neither the Secretary of State nor myself are bound by the concessions made in the Tribunal below by the presenting officer. The concessions made by the presenting officer at the Tribunal hearing do not therefore preclude the Secretary of State from submitting before me that the Tribunal decision in that respect should be set aside as affected by a mistake of law. Moreover, on the facts of this case, I do not consider that the making of the concession by the presenting officer amounted to an undertaking that the Secretary of State would not exercise her statutory right to seek permission to appeal against the Tribunal's decision, or in the event that such permission was granted that she would not seek to argue before the Upper Tribunal that the Tribunal's decision was incorrect in law.

139. It is not therefore necessary for HMRC to demonstrate that it was just to withdraw the concession, or that its withdrawal would not cause the prejudice to the claimant, or that there was a good reason for HMRC to be allowed to withdraw its concession. The concession in relation to regulation 15(3) was clearly wrong and HMRC is entitled to withdraw it.

140. It follows therefore that regulation 15(3) does not have the effect of extending the entitlement to tax credits to the end of the tax year on 5 April 2018 and that, notwithstanding the concession by HMRC (by which neither the Secretary of State or the Upper Tribunal is bound), the Tribunal ought to have decided that the entitlement ended on 30 January 2018 on the death of the claimant's wife. It also follows that the decision to extend the entitlement to tax credits to the end of the tax year on 5 April 2018 was wrong in law.

Conclusion

The 2019 Appeal

141. For these reasons I consider that, in the case of the death of one of the persons by whom a joint claim for tax credits was made, the persons by whom such a joint claim was made can no longer jointly make a joint claim because one of them is dead. Under s.3(4)(a) of the 2002 Act the entitlement to a tax credit accordingly ceases on the death of one of the joint claimants. A widower does not remain part of a couple notwithstanding the death of his wife, such that he can still make a joint claim.

142. Regulation 15(3) of the 2002 Regulations does not have the effect that the award of tax credits extended to the end of the tax year on 5 April 2018; the entitlement to tax credits terminated on the death of the claimant's wife on 30 January 2018.

143. The claimant was not subject to unlawful discrimination under the Human Rights Act 1998 on the basis of his status as a widower.

144. Accordingly the claimant's 2019 appeal is dismissed.

The 2020 Appeal

145. In respect of HMRC's appeal, I consider that the decision under appeal has lapsed, but that the Upper Tribunal nevertheless has jurisdiction to hear the appeal.

146. Non-compliance with s.23 of the 2002 Act (assuming that it occurred) does not invalidate the s.18 decision.

147. As stated above, regulation 15(3) of the 2002 Regulations does not have the effect that the award of tax credits extended to the end of the tax year on 5 April 2018; the entitlement to tax credits terminated on the death of the claimant's wife on 30 January 2018

148. HMRC is entitled to withdraw the erroneous concession made before the Tribunal that the effect of regulation 15(3) was that the award of tax credits extended to the end of the tax year on 5 April 2018 and did not terminate on the death of the claimant's wife on 30 January 2018.

149. Accordingly HMRC's 2020 appeal is allowed.

150. The decision of the Tribunal is remade. The claimant's award of tax credits did not extend to the end of the tax year on 5 April 2018; the entitlement to tax credits terminated on the death of the claimant's wife on 30 January 2018. He could not thereafter make a new claim for tax credits because he lived in a universal credit full service area.

Mark West
Judge of the Upper Tribunal

Signed on the original 15 February 2021