Case Nos: UA-2021-000580-JR and UA-2022-000464-JR

IN THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

ON TRANSFER FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Before :

MRS JUSTICE FARBEY, CHAMBER PRESIDENT
UPPER TRIBUNAL JUDGE WIKELEY
UPPER TRIBUNAL JUDGE CHURCH

THE QUEEN

ON THE APPLICATION OF

Ms NGOC HONG THI BUI

Claimant

and

SECRETARY OF STATE FOR WORK AND PENSIONS

Defendant

THE QUEEN

ON THE APPLICATION OF

Ms IDOWU ONAKOYA

Claimant

and

SECRETARY OF STATE FOR WORK AND PENSIONS

Defendant

Tom Royston and Rosalind Burgin (instructed by **Child Poverty Action Group**) for Ms Bui
Darryl Hutcheon (instructed by **Central England Law Centre**) for Ms Onakoyo
Edward Brown QC and Talia Zybutz (instructed by **Government Legal Department**) for the Defendant

Hearing date: 20 May 2022

DECISION

The claimants' applications for judicial review are dismissed.

REASONS

Introduction

1. These claims raise the important question of whether the Secretary of State for Work and Pensions is entitled to withhold payment of Universal Credit ("UC") from an individual who does not yet have a National Insurance Number ("NINo") until such time as a number has been allocated. The Secretary of State submits that she is bound by statute to await the allocation of a NINo before making any payment of UC, including a payment on account. The claimants submit that the Secretary of State has misdirected herself in law: the effect of the relevant statutory provisions is that the Secretary of State ought to have awarded (and paid) UC at the point in the UC application process when they provided documentary evidence that was sufficient for the Secretary of State to allocate a NINo. In addition, Ms Bui raises questions of human rights and race discrimination.

The key statutory provision

2. The provision of primary legislation which falls to be interpreted is section 1 of the Social Security Administration Act 1992 ("the Administration Act"), which provides (so far as relevant) as follows:

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

(i) a statement of the person's national insurance number and information or evidence establishing that that number has been allocated to the person; or

(ii) information or evidence enabling the national insurance number that has been allocated to the person to be ascertained; or

(b) the person makes an application for a national insurance number to be allocated to him which is accompanied by information or evidence enabling such a number to be so allocated.

3. As neither claimant in these proceedings held a NINo when she applied for UC, the key provision for present purposes is section 1(1B)(b). That provision applies to "any benefit" (section 1(1)), including UC (section 1(4)(za)), but has received relatively little judicial consideration to date.

Allocation of NINos

4. The national insurance scheme, and NINos, were introduced in 1948. NINos provide a unique personal identification number and serve a range of purposes (including for welfare payments, recording national insurance contributions and maintaining taxation records). There are no statutory criteria governing their allocation. The policy is to allocate a NINo to anyone with a legitimate reason to have one (irrespective of nationality or citizenship). In practice, they are allocated to those individuals who are entitled to social security benefits (whether contributory benefits or otherwise) and those persons who are entitled to access the labour market. In the absence of a national identification system, they are used in the benefits system as unique reference numbers, enabling data-matching to take place so that potentially fraudulent claims for benefits may be discovered.

5. The procedure adopted by the Secretary of State for the allocation of NINos to UC claimants is set out in the written evidence of Ms Alexia Johnston, a Policy Team Leader employed by the Department for Work and Pensions ("the Department"). It is helpfully summarised in the skeleton argument of Mr Edward Brown QC on behalf of the Secretary of State. A UC decision-maker determines whether a claimant meets the substantive conditions for UC that are stipulated in Part 1 of the Welfare Reform Act 2012 (the "WRA 2012"). If they are met, but the claimant does not have a NINo, then a NINo Application Request form (an "eDCI1") will be sent to the NINo allocation team. This team operates as a second-level check in order to mitigate the risk of fraud. In every case, the issue of a NINo is subject to reasonable verification of entitlement by the NINo allocation team. The extent of verification will depend on the individual circumstances and the assessed level of risk.

6. As part of the verification process, the NINo allocation team will conduct an advanced trace on the Department's Customer Information System ("CIS") to check the claimant does not already have a NINo. That team will conduct a telephone interview to fill in the NINo application form and check sources from other Government agencies. Each application is independently assessed. The decision-maker must be satisfied that the claimant has the right to reside and is permitted to have recourse to public funds. Identity is verified to a "medium"

confidence level in line with departmental standards. If a NINo is allocated, it will be recorded in the eDCI1 form and sent to the UC decision-maker.

7. In all cases, irrespective of whether a claimant has a NINo at the time of applying for UC, the first instalment of UC should be paid within 7 days of the end of the relevant assessment period. An "assessment period" is "a period of one month beginning with the date of entitlement and each subsequent period of one month during which entitlement subsists" (Universal Credit Regulations 2013 (SI 2013/376) regulation 21(1)). As an assessment period is one month, this means that claimants do not receive their first payment of UC until about 5 weeks after their initial claim. The normal timescale for allocating a NINo via the eDCI1 procedure is 10 working days but this can be expedited where necessary. In the majority of cases, therefore, there is sufficient time for a NINo to be allocated before the point at which a claimant is paid benefit.

The claims

Bui

8. Ms Bui is a Vietnamese national. In July 2017, she was granted leave to enter the United Kingdom as a student, with no recourse to public funds. She spent 6 months studying in Bristol before moving to London in early 2018. Ms Bui's witness statement does not set out whether she continued her studies in London or abandoned them. Her son was born in August 2019. She is his sole carer. On 4 November 2020, she was granted limited leave to remain with no restrictions on recourse to public funds. She was at that time being provided with accommodation and financial support by social services.

9. On 4 December 2020, Ms Bui commenced an online application for UC. On 13 January 2021, she completed the application. On 26 January 2021, she was informed that the Department had verified her identity. On 20 February 2021, she was advised to apply for a NINo herself which she did. Regrettably, she had been given the wrong advice as a request for a NINo should have been initiated from within the Department by way of the internal process that we have described in paras 5 and 6 above. That administrative error caused delay in processing her UC claim.

10. On 25 May 2021, Ms Bui's solicitors sent a letter before claim to the Government Legal Department. The letter requested that the Secretary of State award and pay UC to Ms Bui from 13 January 2021 without further delay, and that the Department amend its system so that UC payments could be made without a NINo. The solicitors contended that the allocation of a NINo as a condition of the receipt of UC had breached Ms Bui's rights under Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"), which provides for the protection of property.

11. In response to the letter before claim, on 26 May 2021, Ms Bui was awarded a back payment of UC to cover the period between 13 January 2021 and 12 May 2021. On 27 May 2021, she received an additional payment in respect of the child element of UC to cover the same period.

12. On 2 June 2021, the Department responded to the letter before claim. The Department accepted that internal guidance had not been followed and that a NINo application ought to have been made by departmental staff on Ms Bui's behalf. Having rectified the error and commenced payments to Ms Bui, the Secretary of State was not willing to take any other steps.

13. By a claim form lodged in the Administrative Court on 19 July 2021, Ms Bui seeks declaratory relief and damages in relation to "a failure to decide to pay benefit, ongoing from 13 January 2021 until 26 May 2021." She contends that the Secretary of State's requirement that an individual must be allocated a NINo prior to payment of UC amounts to (i) a misdirection of law; (ii) a breach of A1P1; and (iii) unlawful discrimination against her as a foreign national; more specifically, indirect discrimination within the meaning of section 19(1) of the Equality Act 2010 (the "EA 2010") on grounds of race. That claim is founded on the proposition that foreign nationals are less likely than British nationals to have a NINo prior to making a claim for UC.

14. On 17 September 2021, Ms Bui was granted permission to apply for judicial review by Ms Margaret Obi sitting as a Deputy High Court Judge. On 13 December 2021, HHJ Lickley QC, sitting as a Judge of the High Court, transferred the claim to the Upper Tribunal under section 31A(3) of the Senior Courts Act 1981, citing among other matters the Upper Tribunal's specialist knowledge in this area of the law. On 14 February 2022, Farbey J directed that the claim be heard by a three-judge panel on the basis that it raised a question of law of special difficulty or an important point of principle or practice (Senior President's Practice Statement on the composition of tribunals in matters before the Upper Tribunal (Administrative Appeals Chamber), para 3(a)).

Onakoya

15. Ms Onakoya is a Nigerian national who arrived in the United Kingdom in 2008. We have not been informed of the circumstances of her entry nor of her full immigration history. She is the sole carer for her three children, who were born in the United Kingdom. Her eldest child having been registered as a British citizen at some stage, Ms Onakoya was granted limited leave to remain in March 2021 as the parent of a British child. Her leave carried no restrictions on recourse to public funds.

16. Prior to the grant of leave, Ms Onakoya and her children had been accommodated and supported by her local authority under section 17 of the Children Act 1989. On 8 April 2021, she applied for UC. On 21 May 2021, following enhanced checks, the Department verified her identity. On 24 May 2021, she was informed that her entitlement to UC had been approved. On 3 June 2021, her local authority accommodation was terminated; she and her children were moved to temporary accommodation in a hostel room which we accept was unsuitable for the children's needs. On the same day, she received a message from the Department confirming that it was awaiting allocation of a NINo in order to progress the UC claim.

17. On 5 June 2021, Ms Onakoya asked the Department about how to "get help with an advance payment." By letter dated 7 June 2021, her solicitors requested that

UC payments be urgently commenced. On 8 June 2021, she received a message from the Department saying:

> "We are still awaiting your National Insurance number. We are unable to issue advance or payment before National Insurance number has been allocated."

18. On 11 June 2021, Ms Onakoya received her first UC payment. As in Ms Bui's case, the delay in allocating the NINo was caused by the Department's failure to initiate the correct internal NINo procedure, which was in turn caused by administrative error. We are told that the delay meant that Ms Onakoya and her children were housed in the hostel room for longer than otherwise would have been the case: she had to await the allocation of a NINo before she could make progress with her application for local authority housing as a homeless person.

19. On 29 July 2021, Ms Onakoya's solicitors sent a letter before claim to the Department requesting that it amend current guidance on the provision of NINos so as to allow the payment of benefits prior to the allocation of a NINo. By letter dated 10 August 2021, the Department responded by saying that the Secretary of State had taken action to allocate a NINo to Ms Onakoya and to commence the payment of UC. The response confirmed that the Secretary of State would issue updating guidance to operational staff whenever necessary but the Secretary of State did not agree to review her position on whether the allocation of a NINo should or should not be a pre-condition of any payment of UC.

20. By a claim form lodged in the Administrative Court on about 20 August 2021, Ms Onakoya seeks declaratory relief in relation to the Secretary of State's "practice of withholding [UC] payments until a NINo is allocated", which is said to be in breach of the Secretary of State's statutory duties. Permission to apply for judicial review was granted by HHJ Simon, sitting as a Judge of the High Court, on 23 March 2022. At the same time, he transferred the claim to the Upper Tribunal. On 14 April 2022, a Registrar of the Upper Tribunal directed that both claims be heard together. We are grateful to the parties for their co-operation with the Tribunal and with each other which ensured that a three-judge panel could hear the claims on an expedited basis.

The legal framework

Welfare Reform Act 2012

21. The WRA 2012 introduced UC to replace six types of means-tested benefits (such as income support) and tax credits (such as working tax credit) for people of working age, known collectively as the "legacy benefits." As Holgate J observed in *R (TP and AR) v Secretary of State for Work and Pensions* [2022] EWHC 123 (Admin), para 2:

> "The reform had a number of aims including the simplification of the benefits system and its administrative processes, encouraging people into work where possible, improved targeting of financial support to meet needs, the removal of overlapping benefits, reduced

scope for error and fraud, and the achievement of a fairer overall financial burden on taxpayers."

22. UC provides a claimant with a single monthly payment in arrears, comprised of a number of elements designed to reflect individual circumstances. Thus, section 1 of the WRA 2012 provides as follows:

> **Universal credit**
>
> **1.—** (1) A benefit known as universal credit is payable in accordance with this Part.
>
> (2) Universal credit may, subject as follows, be awarded to—
>
> (a) an individual who is not a member of a couple (a "single person"), or
>
> (b) members of a couple jointly.
>
> (3) An award of universal credit is, subject as follows, calculated by reference to—
>
> (a) a standard allowance,
>
> (b) an amount for responsibility for children or young persons,
>
> (c) an amount for housing, and
>
> (d) amounts for other particular needs or circumstances.

23. Section 2 of the WRA 2012 provides for claims to be made either by a single person or by a couple jointly, while sections 3-6 govern matters of substantive entitlement, including the "basic conditions" (section 4) and "financial conditions" (section 5). However, the WRA 2012 and the associated secondary legislation do not contain a complete code governing entitlement to UC. In particular, a claimant must also comply with section 1 of the Administration Act, which makes entitlement to benefit dependent on making a claim.

24. As we have set out in para 2 above, the basic rule, as enshrined in section 1(1) of the Administration Act, is that no person is entitled to any benefit (as listed in section 1(4)) unless, among other things, they make a claim for it in the prescribed time and manner (or are treated as such). By virtue of section 1(1A), claimants have in addition to provide either a NINo, together with evidence or information to show it is theirs (subsection (1B)(a)(i)); or evidence or information to enable their NINo to be traced (subsection (1B)(a)(ii)).

25. Those who have no NINo must apply for one. By virtue of section 1(1B)(b) of the Administration Act, they must provide sufficient evidence or information "enabling such a number to be so allocated." Those are the key words that fall to be interpreted in these claims.

26. Three previous decisions at this level have considered the meaning of subsection (1B)(b): *CH/4085/2007* (Mr Commissioner Rowland), *CH/2366/2008* (Upper

Tribunal Judge Mesher) and *CH/2452/2009* (Upper Tribunal Judge Burns QC). The first two of those decisions recognise the problematic nature of the drafting of subsection (1B). Mr Commissioner Rowland referred to this as being "a most unsatisfactory provision in a number of respects" (para 17). Judge Mesher, referring to subsections (1A) to (1C), commented that "the inept and loose wording of those subsections creates large problems of interpretation" (para 27). These drafting infelicities may help to explain both the differences of judicial views expressed in those three decisions and our own doubts about some of the observations in *CH/4085/2007* which we discuss further below (see paras 47 and 50).

Advance payment of benefit

27. There is provision for the advance payment of benefit. The relevant enabling power is to be found in section 5(1)(r) of the Administration Act (as amended by the WRA 2012):

> **Regulations about claims for and payments of benefit**
>
> **5.—**(1) Regulations may provide
> …
> (r) for the making of a payment on account of such a benefit—
>
> (i) in cases where it is impracticable for a claim to be made or determined immediately, or for an award to be determined or paid in full immediately,
>
> (ii) in cases of need, or
>
> (iii) in cases where the Secretary of State considers in accordance with prescribed criteria that the payment can reasonably be expected to be recovered;
> …

28. Regulation 5 of the Social Security (Payments on Account of Benefit) Regulations 2013 (SI 2013/383) — for convenience in this judgment we call this provision the "Advance Payment Regulation" — provides as follows:

> **Payment on account of benefit where there is no award of benefit**
>
> **5.**—(1) The Secretary of State may make a payment on account of benefit to A if—
>
> (a) either of paragraphs (2) or (3) applies;
>
> (b) it appears to the Secretary of State likely that the conditions of entitlement for benefit are satisfied (or will be satisfied during the period in respect of which the payment is to be made); and
>
> (c) the Secretary of State is satisfied that A is in financial need.

(2) This paragraph applies where A has made a claim for benefit but the claim has not yet been determined.

(3) This paragraph applies where A is not required to make a claim for benefit by virtue of—

(a) regulation 6 or 7 of the UC etc. Claims and Payments Regulations (claims not required for entitlement to universal credit or an employment and support allowance in certain cases); or, as the case may be,

(b) regulation 3 of the Claims and Payments Regulations (claims not required for entitlement to benefit in certain cases),

but an award of benefit has not yet been made.

29. It is plain on the face of the Regulation (para 1(b)) that the threshold for an advance payment is whether it appears to the Secretary of State "likely" that the conditions of entitlement for benefit are satisfied. We shall return to this "likelihood" threshold below.

European Convention on Human Rights: Article 1 Protocol 1

30. A1P1 provides for the protection of property in the following terms:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

31. In *Moskal v Poland* (2010) 50 EHRR 22, the European Court of Human Rights considered the application of A1P1 to social and welfare benefits. It confirmed (at para 38) that A1P1 does not create a right to acquire property and that it:

> "places no restriction on the state's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme."

32. If, however, domestic legislation provides for "the payment as of right of a welfare benefit", that legislation must be regarded as generating "a proprietary interest falling within the ambit of [A1P1] for persons satisfying its requirements" (para 38). Where an individual has an "assertable right" under domestic law to a welfare benefit, the importance of that interest should be reflected by "holding A1P1 to be applicable" (para 39).

33. That A1P1 is not engaged where there is no assertable right to a social security benefit was reinforced by the Court in *Richardson v United Kingdom* 26252/08 (ECtHR 4th section, 10 April 2012). The applicant in that case complained about the raising of the pension age for women, contending that she had suffered discrimination on grounds of her age and sex. The Court considered the provisions of A1P1 read with Article 14 of the Convention. In determining that the application was inadmissible, the Court reiterated that A1P1 does not create a right to acquire property and held (at para 17):

> "Where…the person concerned does not satisfy…the legal conditions laid down in domestic law for the grant of any particular form of benefits or pension, there is no interference with the rights under [A1P1]."

34. The mere fact that a property right may be subject to revocation does not prevent it from being a "possession" within the meaning of A1P1; but a conditional claim which lapses as the result of the non-fulfilment of the condition cannot be considered to amount to a possession (*Moskal*, para 40).

Equality Act 2010

35. Section 19(1)-(2) of the EA 2010 provides:

> **19 Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

36. The protected characteristics include race (section 19(3)) which in turn includes nationality (section 9).

37. Section 29 prohibits a public authority from discriminating against a person in the exercise of a public function. It was not in dispute that the administration of social security benefits is such a function.

38. Section 136 provides:

> **136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

The meaning of section 1(1B)(b)

The NINo rule

39. On behalf of Ms Bui, Mr Tom Royston submitted that the Secretary of State had applied what he called "the NINo rule" in a way that created unlawful delay in UC decision-making, even putting to one side the case-specific errors that had occurred in the present cases. On behalf of Ms Onakoya, Mr Darryl Hutcheon made a similar submission but referred to the "NINo Before Payment" policy as opposed to a rule. We do not accept that these shorthand descriptions advance the claims on any ground of public law. The Secretary of State is entitled to exercise her statutory duties through the conventional tools of policy and consistent practice in relation to the relevant statutory provisions. That is what she has done. We are not persuaded that there is any freestanding "rule" or that we should consider anything more than the four corners of the statutory scheme. We shall concentrate on what we regard as the points of public law properly raised by the claims.

The parties' submissions

40. Mr Royston and Mr Hutcheon submitted that the Secretary of State had misdirected herself in law as to the effect of section 1(1B)(b). By referring to the provision of information "enabling" a NINo to be allocated, Parliament had connoted the future possibility of allocation and not the end result of the allocation process. The word "enabling" had a forward-looking meaning and did not describe a completed review or completed verification of the information supplied. Furthermore, they argued, the purpose of subsection (1B)(b) would be

nugatory if it required actual entitlement to a NINo, as subparagraph (a) deals with the situation where a claimant has a NINo.

41. Parliament could not have intended that UC payment must be delayed and await the allocation of a NINo. The Act requires the Secretary of State to have in place a system that does not leave UC claimants resourceless – which was the practical effect of awaiting the allocation of a NINo before paying any UC to the claimants.

42. Mr Royston and Mr Hutcheon submitted that section 1(1B)(b) requires only that an application for a NINo is made before a person is eligible for an advance payment under the Advance Payment Regulation. The NINo application must be accompanied by the kind of information and evidence which would in principle enable a NINo to be allocated. If the documents submitted by a claimant could in principle lead to a NINo, a claimant's entitlement to UC would appear "likely" right from the start of a UC claim. The likelihood threshold for an advance payment – in para 1(b) of the Advance Payment Regulation - would be met right from the start of a UC claim.

43. Mr Royston's submission, supported by Mr Hutcheon, was that the Department's requirement for a NINo to have been allocated before making an advance payment thwarted the purpose of the Advance Payment Regulation. This was because by the time a NINo had been allocated it was by definition possible to decide whether there was entitlement to UC and make a payment of benefit in the normal way. If Parliament had intended that no advance payment be made before the allocation of a NINo, the legislation would have said so. Parliament did not intend that some of the most resourceless people in society should actually have received a NINo before an advance UC payment could be awarded and paid.

44. In response, Mr Brown submitted that what he called the "gateway" to payment of UC in section 1(1B)(b) of the Administration Act was only satisfied when the accompanying information or evidence had actually been verified. Until that point, it cannot be known whether the information or evidence in question would "enable" the allocation of a NINo. The claimants' case, in effect, was that if they made an application with information or evidence that appeared or purported to be sufficient to enable a NINo to be allocated (for example, the provision of a passport as proof of identity), then they were entitled to payment of UC as of right on the same day. On the claimants' analysis, production of a fraudulent passport would trigger the payment of UC, which would be contrary to the public interest and to the objective of the legislation.

45. The requirement under the Advance Payment Regulation that it be "likely" that the conditions for entitlement for benefit are satisfied cannot apply to the entitlement conditions in section 1(1B)(b) of the Administration Act. Verification is a neutral exercise, in the sense that it will not in advance of any verification process be "likely" either that entitlement will be established or that it will be rejected: it is a matter of reaching the correct conclusion following the process established for that purpose by the Secretary of State. It follows that an advance payment could not be made in the claimants' cases until after entitlement to a

NINo was established, at which point the claimants had received UC payment in accordance with their statutory entitlement.

Analysis and discussion

46. In *CH/4085/2007*, para 26, Mr Commissioner Rowland held:

> "It is to be observed that there is no requirement that a national insurance number have been allocated before benefit is awarded. It is sufficient that an application has been made. That is consistent with the idea that having the national insurance number is not really necessary for entitlement to a non-contributory benefit but is merely a tool in the fight against fraud. The payment of benefit is not generally to be delayed while the application for the national insurance number is processed."

47. The claimants rely on this passage in support of their contention that, on the proper interpretation of section 1 of the Administration Act, it is sufficient for the award of UC that the mere provision of information that is sufficient for the allocation of a NINo will be sufficient for the award of UC. We observe, however, that the key issue before Mr Commissioner Rowland was whether a failure by the claimant's partner to attend an interview in connection with an application for a NINo justified the refusal of a claim for benefit. The Commissioner's observations in para 26 were obiter dicta. Nor did he set out any principles of law or cite any authority which would shed light on how he approached the exercise of statutory interpretation underlying his observations in para 26.

48. In *CH/2366/2008*, Judge Mesher agreed with certain aspects of the decision in *CH/4085/2007* but he doubted or disagreed with other parts of Mr Commissioner Rowland's reasoning, going so far as to describe the Commissioner as having used "some rather fancy footwork" (para 25) to achieve a particular solution. Moreover, Judge Mesher did not directly address the point made by Mr Commissioner Rowland in para 26 of the earlier decision. We do not regard Judge Mesher's decision as advancing the question of statutory interpretation one way or the other.

49. The third decision at this level (*CH/2452/2009*) concerned a number of errors in a local authority's decision-making process in a housing benefit claim. We take the view that Judge Burns' decision turns on its own facts and does not lay down any broader propositions of law. In particular, Judge Burns does not deal with para 26 of *CH/4085/2007*.

50. In sum, Mr Commissioner Rowland did not set out the principles of statutory interpretation which he employed in making the observation at para 26 of his decision. Neither of the two later decisions addressed the specific point made in that passage and which is raised by the claims before us. We therefore consider the proper construction of section 1(1B) of the Administration Act afresh for ourselves.

51. In construing the words of section 1(1B) of the Administration Act, we must "ascertain the intention of Parliament as expressed in the words it has chosen"

(*R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 A.C. 687, para 38, per Lord Millett). Our task is to "give effect to the true meaning of what Parliament has said" (para 8, per Lord Bingham of Cornhill). What Parliament has said will be derived from the meaning of individual words read in the context of the enactment as a whole. The Tribunal will "favour an interpretation of legislation which gives effect to its purpose rather than defeating it" (*Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs)* [2020] UKSC 47, [2022] A.C. 1, para 155, per Lord Reed PSC and Lord Hodge DPSC). It is well-established that, if the enactment is ambiguous, the meaning which relates to the mischief it is intended to cure should be adopted rather than a different or wider meaning which the situation before Parliament did not call for (*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 59, 614C–D).

52. The legislative history of section 1 is instructive in terms of casting light on Parliament's intention. The requirement that entitlement to benefit is conditional upon a claim for such a benefit having been made (now enshrined in subsection (1)) was originally imposed by section 165A(1) of the Social Security Act 1975 (as inserted by the Social Security Act 1985, section 17). This amendment was designed to reverse the effect of the decision in *Insurance Officer v McCaffrey* [1984] 1 WLR 1353, in which the House of Lords had held that the legislation did not require a claim as a condition precedent to entitlement to benefit. This was contrary to the Department's long-held assumption as to the administration of the benefits system, prompting Parliament to enact the 1985 amendment.

53. Subsections (1A)-(1C), however, were inserted by section 19 of the Social Security Administration (Fraud) Act 1997 with effect from 1 December 1997. Section 19 was headed "Requirement to state national insurance number." Parliament's intention was plain. Consonant with the title of the amending legislation, the new additional condition of entitlement was an anti-fraud measure. The effect of subsection (1A) (subject to any exceptions by virtue of subsection (1C)) was that making a claim in accordance with section 1(1) was no longer sufficient. The words of subsection 1(A) are unambiguous: no person whose entitlement to any benefit depends on his making a claim shall be entitled to the benefit unless subsection (1B) is satisfied.

54. Subsection (1B) provides three gateways to entitlement. Claimants necessarily fall into one of three categories in terms of their NINo status: (1) those who have a NINo and can prove it; (2) those who have a NINo and cannot remember it or themselves prove it; and (3) those who do not have a NINo. Accordingly, claimants must either (1) provide a NINo, together with evidence or information to show it is theirs (subsection (1B)(a)(i)); or (2) provide evidence or information to enable their NINo to be traced (subsection (1B)(a)(ii)); or (3) apply for a NINo and provide sufficient evidence or information "enabling such a number to be so allocated" (subsection (1B)(b)).

55. The third statutory gateway – for claimants without a NINo – does not simply require an application for a NINo. Nor does it require, as such, the allocation of a NINo. As a matter of the plain meaning of the legislative text, it requires an application for a NINo alongside "information or evidence enabling such a

number to be so allocated." Given that this was part of a package of anti-fraud measures, these words cannot refer to information or evidence which *purports* to enable a NINo to be allocated. Rather, Parliament must mean verified information or evidence which actually then enables a NINo to be allocated.

56. Against this background, neither Mr Royston nor Mr Hutcheon had a satisfactory response to the scenario in which a person supported a NINo application with a false passport. It is no answer to say that wrongly paid UC can be recovered by the Secretary of State. While that is correct as a statement of principle, the practical reality is very different, not least as short of court action (which may well not be cost-effective or feasible) the Department can only recover overpaid benefit by way of deductions from existing benefit entitlement or wages. There are therefore sound reasons of public policy for Parliament to impose, by virtue of subsection (1B)(b), a process of verification before awarding or paying public funds to a person who may not be entitled to them. While the effect of that process is that payment of UC is not possible until a NINo has been allocated, subsection (1B) does not in terms require the allocation of a NINo as a precondition of entitlement to benefit.

57. As we have set out above, the claimants also submitted that the Department's operation of the statutory provisions is incompatible with the Advance Payment Regulation. Made under the authority of section 5(1)(r) of the Administration Act, the purpose of the Advance Payment Regulation is to allow money to be paid urgently to people in need when it has not been possible to determine their entitlement to benefit. This provision is not unique to UC. However, the structure of the UC scheme, with its delayed initial payment, means that UC advances for new claimants are in practice the norm rather than the exception: we understand that some 60 per cent of all claimants take up such advance payments. Mr Brown acknowledged in his oral submissions that advance payments had become "more prominent" with the advent of UC (not least as the system of social fund crisis loans has not been replicated).

58. The Advance Payment Regulation enables a UC advance to be made if three conditions are satisfied. The first is that the claimant has made a claim for UC which has yet to be determined (regulation 5(1)(a) and (2)). The second is that the Secretary of State is satisfied that the claimant is in financial need (regulation 5(1)(c)). Neither of those criteria is problematic in the present context.

59. The third is that "it appears to the Secretary of State likely that the conditions of entitlement for benefit are satisfied (or will be satisfied during the period in respect of which the payment is to be made)" (regulation 5(1)(b)). We agree with Mr Brown that verification is a neutral exercise under section 1(1B)(b) in the sense that it will not be "likely" that entitlement will be established under that process or, conversely, not established. The Department cannot know until the verification process has been completed. Even if there were to be some case, in theory, where the likelihood threshold could be met before the allocation of a NINo, the exercise in the cases before us was, on the facts, a neutral one.

60. It follows that an advance payment could not be made in either of the claims before us until after entitlement to a NINo had been ascertained - at which point

UC could be paid in the normal way. We acknowledge that this effectively makes the Advance Payment Regulation otiose in the context of a claimant subject to section 1(1B)(b). We recognise that this may mean that claimants without NINos may be forced to rely on other less secure means of statutory or charitable welfare support. However, the provisions of the Advance Payment Regulation are secondary legislation and, on conventional principles of statutory interpretation, they cannot be deployed to interpret a provision of primary legislation such as section 1(1B) of the Administration Act. The practical effects on claimants of the interpretation that we have reached is a matter of policy for the Government. On ordinary public law principles, the Tribunal cannot and must not become involved in matters of executive responsibility.

The additional arguments of Ms Bui

A1P1

61. Mr Royston submitted that Ms Bui's making a claim to UC gave her an "assertable right under domestic law" in respect of her UC claim which satisfied the test for the engagement of A1P1 set out in *Moskal v Poland*. We disagree. Given the effect of section 1(1B)(b) of the Administration Act, there was no assertable right to UC when Ms Bui made her claim and supplied documentary evidence which ostensibly met the requirements, and neither was there an assertable right when the UC decision-maker determined that Ms Bui had met the substantive conditions for UC stipulated in Part 1 of the WRA 2012. It was not until the identification documentation had been verified that the "assertable right" to the benefit arose.

62. On a proper reading of section 1(1B)(b) of the 1992 Act, Ms Bui did not satisfy the legal conditions for the grant of UC as at 13 January 2021, but only when the NINo gateway was met, and it was only at this point that she acquired an assertable right to payment of benefit. In our judgment, Ms Bui's making of a claim and provision of documentation which *may have* fulfilled the conditions for the grant of UC did not create a property right that was subject to revocation if the documentation turned out not to be satisfactory (the situation contemplated in *Moskal v Poland*). Rather, the right did not arise until the verification process was complete.

63. Even if A1P1 is engaged, we are satisfied that some delay in making payment to claimants with no NINo pending the outcome of the verification process is justified by the important public interest in preventing the payment of benefit in respect of fraudulent claims, which was Parliament's intention in introducing section 1(1B)(b). We are satisfied that, to the extent that the process of verification involved any interference with a property right, it was justified in this case.

The EA 2010

64. Mr Royston contended that the Secretary of State's decision to await the allocation of a NINo before paying any form of UC amounted to unlawful indirect discrimination contrary to section 19 of the EA 2010 on the basis that:

(1) Administering benefit is a public function falling within section 29 of the EA 2010;

(2) National origin falls within the protected characteristic of "race" in section 19(3) of the EA 2010;

(3) The Secretary of State's practice of awaiting a NINo is particularly likely to affect foreign nationals, who are much less likely to have a NINo already than are UK nationals, given that young people who are resident in the UK at the age of 15 years and 9 months and in respect of whom child benefit is paid are allocated a NINo by HMRC; and

(4) The delay that non-UK nationals experience in receiving benefit from the Defendant following a UC claim puts them at a "particular disadvantage" when compared to UK nationals.

65. The first two of these propositions are not in dispute. With regard to (3), we note that the system of "juvenile allocation" of NINos at the age of 15 years and 9 months to all who are resident in the UK and in respect of whom child benefit is paid (which is operated by HM Revenue & Customs) is applied without reference to nationality. A foreign national who meets these conditions will receive a NINo when they reach the relevant age in the same way that a British national does. However, we accept that it is more likely that an adult British national making a benefit claim will already have a NINo than a foreign national making such a claim.

66. With respect to Mr Royston's fourth proposition, Mr Royston submitted that Ms Bui had at least shown a prima facie case of disadvantage (as required by section 136 of the EA 2010), and that the Defendant had not rebutted that prima facie case. We accept, based on the evidence (including the Secretary of State's own evidence on delay), that Ms Bui has established a prima facie case for "particular disadvantage" to foreign nationals, especially in the case of advance payments, from which those applying without a NINo are shut out.

67. However, a provision, criterion or practice is only "discriminatory" under section 19(1) of the EA 2010 if the person applying the provision, criterion or practice cannot show it to be "a proportionate means of achieving a legitimate aim" (see section 19(1)(d) of the EA 2010). The Supreme Court has held that in areas concerning general measures of economic and social strategy and moral judgments a wide margin of appreciation is given to the state (see *R(SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] A.C. 223).

68. Mr Royston urged us to engage in particularly exacting scrutiny of the issue of justification on the basis that there was no compelling evidence that the Secretary of State had weighed the potentially discriminatory impact of her policy of requiring the NINo gateway to have been reached before any claimant may receive payment, and because the putative discrimination relates to the highly sensitive ground of national origin. We have done so.

69. The government issues NINos only to those who are resident in the United Kingdom. To issue NINos to the entire world, on the off-chance that they might at some point in the future come to the UK and claim benefits or enter employment here, would plainly be impossible. Equally, abandoning the system of routinely issuing NINos to United Kingdom residents approaching adulthood would generate major inefficiency in relation to market and social security access.

70. Parliament has, by enacting the Social Security Administration (Fraud) Act 1997 which inserted section 1(1B) into the Administration Act, made it clear how the competing interests of making advance payment of benefits on account of need on the one hand, and fraud prevention on the other, are to be balanced. Giving the state the "wide margin of appreciation" that is its due in matters of economic and social strategy, we are satisfied that the operation of the NINo system in its current form is a proportionate means of achieving the legitimate aim of efficient administration of welfare benefits while preventing the misuse and abuse of public funds through fraudulent claims.

Conclusion

71. For these reasons, each of the grounds of challenge fails and these claims for judicial review are dismissed. It follows that no question of damages or other relief arises.

72. We record that, in Ms Onakoya's case, the claim originally included a ground for judicial review that challenged the lawfulness of some part of the Secretary of State's guidance for decision-makers. Following an amendment of the guidance which removed the passage under challenge, Ms Onakoya does not seek relief on this ground but seeks the costs of this part of the claim on the grounds that her challenge was successful. The Secretary of State opposes the award of costs on the grounds that the guidance was amended as a matter of expediency (to cure any possible ambiguity) and not as a legal necessity. We did not hear argument on the substantive issue and reserved our decision on costs for the parties to file written submissions.

73. We direct that the claimants should each file and serve written submissions on any consequential matters – including submissions on costs – within 14 days of the receipt of this decision. The Secretary of State should respond to those submissions within 14 days of receiving them and any Reply from either of the claimants must be received by the Upper Tribunal within 7 days thereafter.

MRS JUSTICE FARBEY, CHAMBER PRESIDENT

UPPER TRIBUNAL JUDGE WIKELEY

UPPER TRIBUNAL JUDGE CHURCH

(Approved for issue on 18 July 2022)