[2023] AACR 9

R (Bui) v Secretary of State for Work and Pensions; R (Onakoya) v Secretary of State for Work and Pensions [2023] EWCA Civ 566

CA (Underhill, Nugee and Edis LJJ) **UA/2021/000580-JR**
25 May 2023 **UA/2022/000464-JR**

Social Security Administration Act 1992; National insurance numbers; Advance payments; Entitlement; Irrationality; Social security benefits

The appellants were individuals who had been granted limited leave to remain in the UK with recourse to public funds. They had applied for universal credit (UC) but did not have National Insurance numbers (NINo). They satisfied the conditions for UC but to be entitled to benefit they had to make a claim. The Social Security Administration Act 1992 Part I section 1(1B)(a) required the claim to be accompanied by the person's NINo or section 1(1B)(b) required the person to make an application for a NINo to be allocated to them, accompanied by information or evidence enabling such a number to be so allocated.

There had been delays in allocating each appellant with a NINo and it had taken some months for them to receive UC, which had been backdated to the date of their claim. The Secretary of State took the view that no advance payments of UC could be made until the end of the verification process for the claimant's entitlement to a NINo.

The appellants challenged the Secretary of State's policy not to make any payment of UC or any payment on account until a NINo had been allocated. They each brought a claim for judicial review. The two cases were heard together in the Upper Tribunal (Administrative Appeals Chamber) by a three-judge panel. The Upper Tribunal dismissed their applications on the basis that the Secretary of State's position was justified by public policy to impose a verification process before awarding or paying public funds.

The claimants appealed with permission to the Court of Appeal.

Held, allowing the appeal in part that:

1. it was not irrational for the Secretary of State to have a two-stage process under which the claimant's eligibility for UC was checked first, and then the entitlement to and allocation of an NI number was separately considered if necessary (paragraphs 65-70).

2. evidence that enables a NINo to be allocated to a claimant for benefit is evidence that establishes that the claimant does in fact have a right to benefits. False documents do not do this.

3. DWP's blanket practice of refusing to pay advance payments simply on the basis that a claimant does not have a NINo is flawed. The legislation does not prevent the DWP from making advance payments to someone who does not have a NINo.

DECISION OF THE COURT OF APPEAL

Richard Drabble KC, Tom Royston and Rosalind Burgin, instructed by Child Poverty Action Group appeared for Ms Bui

Richard Drabble KC and Darryl Hutcheon instructed by Central England Law Centre appeared for Ms Onakoya

Edward Brown KC and Talia Zybutz, instructed by the Treasury Solicitor appeared for the Secretary of State for Work and Pensions

APPROVED JUDGMENT

Lord Justice Nugee:

Introduction

1. This appeal is about Universal Credit (**"UC"**). It concerns the gap between a person claiming UC and receiving it, and whether the Secretary of State can make payments on account during that period. The specific question concerns those who claim UC but who do not have a National Insurance Number (**"NINo"**) at the time of making a claim.

2. UC is only payable to those who make a claim. In simple terms the process is as follows. The claimant makes a claim for UC. It is then for the Secretary of State for Work and Pensions (**"the Secretary of State"**) to decide the claim (although in practice this and other decisions are made by officials in his department, the Department for Work and Pensions (**"the DWP"**), on his behalf). If the decision is that the claimant is entitled to UC, an award is made. Once an award is made the benefit is put into payment.

3. It necessarily however takes some time for the decision to be made. What is more, UC is payable by reference to assessment periods of a month, and is paid in arrears, only having to be paid within 7 days of the end of each assessment period. That means that when a person claims UC, they will not be paid UC, even if the claim is decided promptly in their favour, for some 5 weeks after making a claim.

4. The Secretary of State has power under regulations to make a payment on account of benefit to a person who has made a claim for benefit which has not yet been determined and is in financial need, if it appears likely to the Secretary of State that the conditions of benefit are or will be satisfied. These payments on account are known as advance payments. Very many applicants for UC apply for, and receive, advance payments to cover them in the gap between claiming UC and UC coming into payment. Decisions on advance payments are made quickly, often on the same day.

5. There is a problem however for those who do not have a NINo. It is by statute a condition of entitlement to UC, like other social security benefits, that the claimant either has a NINo at the time of claiming or, if they do not have one, applies for one to be allocated, providing information or evidence enabling that to be done. The DWP treats a claim for UC by a person who does not have a NINo as including an application for one to be allocated. The practice, as explained in detail below, is for one set of officials first to check that the claimant is otherwise eligible for UC, and then for the claimant's entitlement to a NINo to be verified by a specialist team. Only once that has been done will the claim for UC be accepted.

6. In such a case the Secretary of State takes the view that no advance payments can be made until the end of the verification process. This is on the basis (in summary) that it is not possible to assess whether a claimant is "likely" to satisfy the conditions for benefit until that point. The practical effect is that a claimant for UC who does not have a NINo cannot access either UC itself or advance payments pending the verification process and may be entirely without income for that period.

7. These two appeals concern individuals who did not have NINos and who applied for

UC. In each case there were significant delays in processing their claims due to administrative error. They have each now in fact been paid what they are entitled to. But their cases form a convenient vehicle to examine the questions of law that arise. They each brought a claim for judicial review. The two cases were heard together in the Upper Tribunal (Administrative Appeals Chamber) by Farbey J (the Chamber President) and Upper Tribunal Judges Wikeley and Church (**"the UT"**). In a decision issued by the UT on 18 July 2022 at [2022] UKUT 189 (AAC) they dismissed the applications for judicial review. The claimants now appeal with permission granted by Lewis LJ.

Statutory framework – (1) UC

8. It is convenient to set out the relevant statutory provisions at the beginning. They can be divided into three groups. The first are those specifically dealing with UC. The second are those which deal with the administration of social security benefits generally. The third are those dealing with interim payments or payments on account.

9. So far as the first group of provisions is concerned, UC was introduced in 2013 by the Welfare Reform Act 2012 (**"WRA 2012"**), initially for a small cohort of claimants, and was later expanded until national coverage was achieved in December 2018. Part 1 of the WRA 2012 (ss. 1 to 43) concerns UC, and Chapter 1 of Part 1 (ss. 1 to 12) deals with entitlement and awards. The first group of sections (headed "Introductory") consists of ss. 1 and 2. These provide that a benefit known as UC is payable in accordance with Part 1 (s. 1(1)), that it may be awarded either to a single person or to a couple jointly (s. 1(2)), and that a claim may be made for UC by a single person or members of a couple jointly (s. 2).

10. The next group of sections (headed "Entitlement") consist of ss. 3 to 6. These provide that claimants are entitled to UC if they meet the basic conditions and the financial conditions (s. 3), specify the basic conditions and financial conditions (ss. 4 and 5 respectively), and provide for certain restrictions on entitlement (s. 6). The basic conditions specified in s. 4(1) are as follows:

> "**4 Basic conditions**
>
> (1) For the purposes of section 3, a person meets the basic conditions who—
>
> (a) is at least 18 years old,
>
> (b) has not reached the qualifying age for state pension credit,
>
> (c) is in Great Britain,
>
> (d) is not receiving education, and
>
> (e) has accepted a claimant commitment."

The financial conditions specified in s. 5 are that a claimant's (or joint claimants') capital is below a prescribed amount, and that their income is such that if they were entitled to UC, the amount payable would not be less than any prescribed minimum.

11. The next group of sections in Chapter 1 (headed "Awards") consists of ss. 7 and 8: s. 7(1) provides that UC is payable in respect of each complete assessment period within a period of entitlement (the period during which entitlement to UC subsists), and s. 8 sets out how awards are

calculated. This is supplemented by the final group of sections in Chapter I, namely ss. 9 to 12 (headed "Elements of an Award").

12. The remaining Chapters of Part I contain provisions relating to claimant responsibilities (Chapter 2) and supplementary and general provisions (Chapter 3) respectively.

13. Various regulations have been made for the purpose of WRA 2012. The Universal Credit Regulations SI 2013/376 (**"the UC Regulations"**) contain further provisions about such matters as entitlement and the calculation of awards. Regulation 9 for example expands on the basic condition in s. 4(1)(c) WRA 2012 that a person "is in Great Britain". It provides that, subject to exceptions, a person is to be treated as not being in Great Britain if he is not habitually resident in the United Kingdom, Channel Islands, Isle of Man or Republic of Ireland (reg 9(1)); and is not to be regarded as habitually resident there unless he has a right to reside in one of those places (reg 9(2)). Regulation 21 concerns assessment periods. It provides that an assessment period is a period of one month beginning with the first date of entitlement, and each subsequent period of one month during which entitlement subsists (reg 21(1)).

14. Further regulations are found in the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations SI 2013/380 (**"the UC etc Claims and Payment Regulations"**). Part 4 of the regulations (regs 45 to 56) concerns payment of benefit, which is defined so as to include UC (reg 2). Regulation 45 provides that subject to the other provisions of Part 4, benefit is to be paid in accordance with an award as soon as is reasonably practicable after the award has been made. Regulation 46 provides for payment of benefit by direct credit transfer to a bank account. Regulation 47 concerns payment specifically of UC. It provides the general rule that UC is payable monthly in arrears in respect of each assessment period (reg 47(1)); and that where paid by direct credit transfer it is to be paid within 7 days of the last day of the assessment period.

Statutory framework – (2) Administration of social security benefits

15. The second group of provisions concerns the administration of social security benefits generally. For a person to receive payment of UC they not only need to satisfy the basic conditions and financial conditions set out in the WRA 2012, but also to satisfy certain administrative conditions. Mr Edward Brown KC, who appeared with Ms Talia Zybutz for the Secretary of State, referred to the question whether an individual's personal circumstances are such as to satisfy the conditions set out in the WRA 2012 as "eligibility" and the question whether they have complied with the administrative conditions as "entitlement". This distinction between eligibility and entitlement is not found in the statutory language but it is a convenient one and I will adopt it.

16. Entitlement, as opposed to eligibility, depends on compliance with the requirements of the Social Security Administration Act 1992 (**"SSAA 1992"**). The SSAA 1992 lays down the general rule that a person is not entitled to benefit unless they duly make a claim for it (s. 1(1)).

17. This section was amended by the Social Security Administration (Fraud) Act 1997 (**"the SS (Fraud) Act 1997"**). As its title suggests, this Act contained a number of provisions intended to aid in the prevention and detection of fraud in connection with social security benefits. One of these was s. 19, headed "Requirement to state national insurance number", which amended s. 1 SSAA 1992 by adding new sub-sections (1A) to (1C).

18. As so amended, s. 1(1) to (1B) provide as follows:

> "**1 Entitlement to benefit dependent on claim**
>
> (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 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."

These provisions apply to claims to benefit as defined by s. 1(4). The definition was amended in 2013 by the WRA 2012 to add UC as one of the benefits to which the provisions in s. 1 apply (s. 1(4)(za)).

19. The next stage after the making of a claim is for the claim to be decided. By virtue of s. 8 of the Social Security Act 1998 (**"SSA 1998"**) this is a matter for the Secretary of State.

This provides, so far as relevant, as follows:

> "**8 Decisions by Secretary of State.**
>
> (1) Subject to the provisions of this Chapter, it shall be for the Secretary of State—
>
> (a) to decide any claim for a relevant benefit…"

"Relevant benefit" is defined by s. 8(3). Again the definition was amended in 2013 by the WRA 2012 to include UC (s. 8(3)(aa)).

20. If the decision is to uphold the claim, this is generally referred to as an award of benefit. We were not referred to any statutory definition of award, but it is a term frequently used in the primary and secondary legislation (see for example ss. 7 and 8 WRA 2012 ("Basis of awards" and "Entitlement to awards"), and ss. 9 to 12 WRA 2012, each of which begins "The calculation of an award of universal credit is to include…") and in *Secretary of State for Work and Pensions v Adams* [2003] EWCA Civ 796 at [17] Sedley LJ said that an award of benefit (in that case invalidity benefit) signified "an extant decision that the claimant is entitled to it".

21. The effect of an award of UC is that UC becomes payable in accordance with the UC etc Claims and Payment Regulations. This means that it is paid in respect of each assessment period (reg 47 of the UC etc Claims and Payment Regulations). Since the first assessment period runs from the date of entitlement (reg 21 of the UC Regulations) and a claimant is not entitled until he or she has made a claim (s. 1(1) SSAA 1992), the practical effect is that once an award of UC is made UC is payable for each assessment period of a month, starting from the date of claim. But under reg 21 of the UC Regulations it is only payable in arrears and within 7 days of the end of each assessment period. Hence there is a built-in gap of some 5 weeks or so between a claim being made and UC actually being paid, even in the usual case where the claim is processed reasonably promptly.

Statutory framework – (3) interim payments or payments on account

22. Statutory provision enabling payments of benefits to be made to claimants pending determination of their claim is a long-standing feature of the social security legislation. The earliest iteration of the legislation that we were shown was s. 51 of the Social Security Act 1986 (**"SSA 1986"**), which enabled regulations to be made to provide, among other things, for the making of a payment on account of benefit where a claim had been made and it was impracticable for it to be immediately determined (s. 51(1)(f)(ii)).

23. This was re-enacted in similar terms by s. 5 SSAA 1992. In 2013 s. 5 was amended by the WRA 2012 to provide as follows:

> "**5 Regulations about claims for and payments of benefit**
>
> (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"

At the same time the list of benefits to which the section applied was expanded to include UC (s. 5(2)(za)). The section has since been amended but not so as to affect these aspects of it.

24. Regulations were duly made under s. 51 SSA 1986, called the Social Security (Payments on account, Overpayments and Recovery) Regulations SI 1988/664, reg 2 of which provided the Secretary of State with discretionary power to make an interim payment, that is a payment on account of benefit to which it appeared to him that a person was or might be entitled, in circumstances where, among other things, a claim had been made but it was impracticable for it to be determined immediately.

25. These regulations continued in force when s. 51 SSA 1986 was replaced by s 5 SSAA 1992, although they were amended from time to time. They were revoked and replaced in 2013 by new regulations made under s. 5 SSAA 1992, namely the Social Security (Payments on Account of Benefit) Regulations SI 2013/383 (**"the Payments on Account Regulations"**). These, as amended, are the regulations in force. Part 2 of the regulations (regs 3 to 10) concerns payments on account. Reg 3 contains a definition of benefit which includes UC (reg 3(1)(a)). Reg 4 provides that the Secretary of State may make a payment on account of benefit to a person ('A') in accordance with that Part. Reg 5 (as amended) provides:

> "**5 Payment on account of benefit where there is no award of benefit**
>
> (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."

26. Reg 6 makes provision for the Secretary of State to have a similar power where an award of benefit has been made but (among other things) the date for the first payment of benefit to A has not yet been reached. Reg 7 contains a definition of what it is for A to be in financial need for these purposes. Reg 10 contains provision for payments on account to be brought into account against payments of benefit.

National Insurance Numbers (NINos).

27. NINos are of course very familiar as numbers unique to individuals, which remain unchanged throughout one's life. The United Kingdom does not operate a national identity scheme as such, and in the absence of such a scheme, NINos operate as the principal method of identification of individuals by the state, being used by a number of agencies such as the DWP, HMRC and the Home Office.

28. NINos have been a feature of the National Insurance system since it was introduced in 1948, enabling contributions to be recorded against an individual's name. They are recognised by statute, as s. 1(1B) SSAA 1992 shows. But they do not themselves have a legislative basis. Mr Brown told us that the practice of allocating NINos to individuals was purely a matter of executive policy. They are not automatically allocated at birth. But Government policy is to allocate NINos to individuals in the UK, irrespective of nationality, who require, or are likely to require, a NINo.

29. In practice this means that almost everyone resident in the UK will be allocated one shortly before they reach 16 ("juvenile registration"). Juvenile registration is the responsibility of HMRC, and any young person who is both resident in the UK and part of a live claim to child benefit will be allocated a NINo at the age of 15 years and 9 months. This makes it unnecessary for this cohort to make individual applications when they start work or claim benefits.

30. But this does not in fact apply to all young people as it is only the case if child benefit is claimed for them, which is not always done. If an individual was not previously registered as a juvenile (either because although resident in the UK no child benefit was claimed for them, or because they have come to the UK subsequently), they can be registered as adults if either they have a right to work and wish to access the labour market, or if they make a claim for benefits. Adult registration is the responsibility of the DWP and the DWP's policy is only to allocate a NINo when there is a business need, that is to record national insurance contributions for those lawfully starting employment or for the payment of benefits to those entitled to them. The DWP prioritises the latter "benefit-inspired" applications over the former "employment-inspired" applications.

31. The fact that everyone either lawfully in work or in receipt of benefits has a unique, life-long, identification number serves a number of purposes. For those in work, NINos are used for maintaining not only national insurance contribution records but also taxation records. For those in receipt of benefits, NINos assist in the calculation and payment of benefits. For example the UC system uses a claimant's NINo to receive a claimant's earnings information from HMRC (which helps the DWP to calculate the right amount of benefit); and the DWP's Central Payment System uses NINos to ensure that payment is made to the right person. NINos are also integral to the DWP's aim of mitigating fraud in the benefits system: the use of NINos makes it easier to identify identity theft, and also mitigates the risks of both social security fraud (claiming benefits to which a person is not entitled) and labour market fraud (working when a person is not entitled).

Allocation of NINos to those making a claim for UC

32. The evidence for the Secretary of State (given in each case by Ms Alexia Johnston, a Policy Team Leader at the DWP) contains a very helpful account of the internal processes used by the DWP to ascertain or allocate a NINo when a claimant claims UC. This was supplemented by some further information supplied to us at our request after the hearing. It is not necessary to detail it all but I will summarise the essential points.

33. Under s. 1(1B) SSAA 1992 (paragraph 18 above) it is a requirement of entitlement to UC that either (i) the claim to UC is accompanied by a statement of the claimant's NINo; or (ii) the claim is accompanied by information or evidence enabling the NINo that has been allocated to them to be ascertained; or (iii) the claimant makes an application for a NINo to be allocated to them. One might have expected from this that a claimant for UC would be asked when they applied whether they already had a NINo (and if so, whether they knew what it was); and that if they did not, they would be prompted to apply for one.

34. In fact this is not what happens. Claims for UC are now made by completing an online application form. This contains no questions about NINos as such, but it does require the claimant to give personal details such as their name, date of birth and address. The next step is for the DWP to ascertain if the claimant meets the eligibility requirements under the WRA 2012. This involves a check on their identity, described in the evidence as "verifying their identity to UC standards", and also confirming that they are habitually resident. As part of this process the claimant may be asked to provide proof of identity such as a passport. These processes are carried out by the UC Team. After the claimant's identity has been verified to UC standards, an automated search is carried out for the claimant's NINo using the information provided by them.

35. If this does not identify the claimant's NINo, the UC agent carries out basic checks to see if the claimant already has a NINo. If this does not produce a result, the UC agent applies for a NINo to be allocated. This is done by completing an internal form which is then passed to a different team, the NINo allocation team. The allocation of NINos is a separate, specialised function within the DWP, and the NINo officers (unlike UC agents) are security-cleared in the light of the nature of the process. The form makes it clear that a case should not be referred to the NINo allocation team until eligibility for benefit (that is, for UC, in the terms of the WRA 2012) has already been established.

36. On receipt of the form a NINo agent carries out a more advanced check to see if the claimant already has a NINo. If none is traced they then carry out checks to confirm that the claimant has the right to reside in the UK; that they have the right of access to public funds; and that their identity is verified to what is described as "medium confidence level in line with the [DWP's] common standard of identity verification". This may include asking the claimant for proof of their identity and immigration status, and a NINo decision maker conducting checks against Home Office sources to confirm that the information presented with the NINo application matches information on the Home Office system such that the claimant's identity and immigration status are valid.

37. Once the NINo decision maker has verified the information to the appropriate standard, a NINo is allocated and noted on the form and this is returned to the UC agent who requested it. The target turnaround time for allocating NINos for benefit-inspired applications is 10 working days. Mr Brown told us that this is much quicker than for employment-inspired applications (where individuals apply online).

38. In some cases the verification process can result in the original (provisional) decision on eligibility for UC being invalidated, for example on the grounds that the claimant has no recourse to public funds, that their immigration status is invalid, or that their identity has not been established.

Advance payments

39. The UC system is designed such that a claimant cannot receive any payment from UC

without a fully verified NINo. For ordinary monthly payments this is not in most cases a problem. As already explained, UC is payable in monthly instalments in arrears, the first payment being paid within 7 days of the end of the first month of entitlement. In the majority of cases there is sufficient time for a NINo to be allocated before UC would fall due for payment in any event.

40. But there will be a gap of 5 weeks or so between a claim for UC being made and UC being received. For those with NINos this gap can be filled by advance payments. These are in practice the norm rather than the exception: the UT was told that some 60% of claimants for UC take up advance payments.

41. But because the UC system requires a fully verified NINo before payment, no advance payments are made to those without a NINo until one has been allocated. This can obviously cause hardship for those without any other income during this period.

Facts of individual cases

42. Ms Bui and Ms Onakoya, the claimants in the two specific cases before us, have now each received payment of the UC to which they are entitled, backdated to the date of their claims, and they have no ongoing loss. As it was put by Mr Richard Drabble KC, who appeared with Mr Tom Royston and Ms Rosalind Burgin for Ms Bui, and with Mr Darryl Hutcheon for Ms Onakoya, the case is not about quantum of UC payments but about timing.

43. In those circumstances the facts of the individual cases are no longer of prime significance and can be shortly stated. Ms Bui is a Vietnamese national who was granted limited leave to remain in the UK (with recourse to public funds) in November 2020. She applied for UC on 13 January 2021. The UC team verified her identity on 26 January 2021 and that she was habitually resident on 13 February 2021. (For those purposes she was asked to provide her passport and residence permit.) But she did not receive payment of UC (backdated to the date of claim of 13 January 2021) until 26 May 2021. It appears that the reason for the delay was that after the UC team had verified her identity and confirmed that she met the eligibility requirements she was incorrectly told to make her own (employment-inspired) NINo application instead of the case being then referred, as it should have been, to the NINo allocation team. Nothing was ever said to her about advance payments.

44. Ms Onakoya is a Nigerian national. She was granted limited leave to remain in the UK (with recourse to public funds) in March 2021. She applied for UC on 8 April 2021. After she had uploaded her passport and residence permit she was told on 24 May 2021 that her entitlement to UC had been approved. But payment of UC (again backdated to the date of claim) was not made until 11 June 2021. The delay appears to have been caused by the fact that she had made an employment-inspired application for a NINo. This should not have prevented her case being referred to the NINo application team, but the UC agent wrongly thought that it did. Ms Onakoya did ask about an advance payment but was told that one could not be issued before her NINo had been allocated.

45. In each case therefore the delay in allocating a NINo was primarily caused by individual human errors rather than by the design of the DWP's policies.

Decision of UT

46. Ms Bui and Ms Onakoya each brought a claim for judicial review. They each said that

the Secretary of State's policy of not making any payment of UC, or advance payment, until a NINo had been allocated, was unlawful. The claims were heard together by the UT.

47. For present purposes the relevant parts of the UT's decision can be summarised as follows. First, they rejected a submission that all that s. 1(1B)(b) SSAA 1992 required was an application for a NINo with evidence, and that there was no requirement for that evidence to be verified. Their reasoning can be seen from their decision at [55]-[56], as follows:

> "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."

48. Second, they rejected a submission that once an application had been made for a NINo advance payments could be made to a claimant. Their reasoning on this issue can be seen from their decision at [58]-[60] as follows:

> "58. The Advance Payment Regulation enables a UC advance to be made if three conditions are satisfied…
>
> 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)."

49. The UT then rejected certain other arguments which have not been revived on this appeal and dismissed the applications for judicial review.

Grounds of Appeal

50. Three grounds of appeal are advanced by Mr Drabble:

(1) Ground 1 challenges the UT's conclusion, in relation to advance payments, that the "likelihood" criterion in reg 5(1)(b) of the Payment on Account Regulations cannot be met in the case of claimants who do not have a NINo.

(2) Ground 2 challenges the UT's conclusion on s. 1(1B)(b) SSAA 1992. It is contended that on a correct interpretation this does not require that the information or evidence provided by the claimant is formally or fully verified before the claimant qualifies for benefit.

(3) Ground 3 challenges the practice whereby NINo allocation does not begin until every other aspect of a claimant's eligibility to UC has been determined.

Ground 2

51. I will start with Ground 2 which logically comes first. This question is also the main issue decided by the UT and I accept Mr Brown's submission that it is what the case is fundamentally about. It is a pure question of statutory construction. I will set out s. 1(1B)(b) SSAA 1992 again for the sake of convenience:

> "(1B) This subsection is satisfied in relation to a person if—
>
> …
>
> (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."

Mr Drabble's submission, as formulated in his skeleton argument, was that the word "enabling" has a forward-looking meaning: it does not describe a completed review or completed verification of the information supplied, but simply connotes that a NINo would in principle be possible.

52. The difficulty I have with this way of putting the point is that it is not clear what it is intended to mean in practical terms. What s.1(1B)(b) requires is that the application is accompanied by certain information or evidence. The words "enabling such a number to be so allocated" are a description of the information or evidence which is required. Plainly these words cannot be interpreted as referring to information or evidence that is *already* verified – that would be nonsensical. Nor is there anything in s. 1(1B)(b) which expressly requires that the information or evidence supplied is *subsequently* verified. In terms all it requires is that the application is accompanied by appropriate information or evidence. In principle that requirement will either be complied with it or not at the time that the application is made (the actual process may not be quite as neat as this but this is what the statutory language

contemplates). What is appropriate information or evidence is information or evidence that enables a NINo to be allocated, which is necessarily something that will happen after receipt. In that sense I agree that the word "enabling" is forward-looking: appropriate information or evidence is information or evidence that will enable the DWP to allocate a NINo.

53. But this obscures the real difference between the parties. This was clarified in the oral submissions. Mr Drabble submitted that information or evidence satisfied s. 1(1B)(b) if it appeared on its face sufficient to enable a NINo to be allocated. If it turned out subsequently that the information or evidence was false, any award of benefit could be superseded or revised: see ss. 9 and 10 SSA 1998, and regulations made thereunder.

54. As Mr Brown put it, this submission means that the real question is this: is it enough for a claimant to submit information or evidence that purports to justify the allocation of a NINo? Or must a claimant submit authentic information or evidence that does in fact justify the allocation of a NINo? To use the example referred to by the UT, if as part of the processing of their claim a claimant is asked to upload their passport, do they satisfy s. 1(1B)(b) by uploading a passport that appears genuine, or only by uploading one that is genuine?

55. Once the issue is identified in this way, I think the answer is self-evident. Evidence that enables a NINo to be allocated seems to me plainly to refer to evidence that does in fact justify the allocation of a NINo, not evidence that merely purports to but in fact does not. "Enabling" is admittedly a slightly odd word to use in this context. It is a perfectly apt word in s. 1(1B)(a)(ii) ("information or evidence enabling the [NINo] that has been allocated to be ascertained") where the sense is that once the DWP has got the relevant information (name, address, date of birth and so on), it can find the claimant's NINo, usually automatically. But "enabling" is a less apt word in s. 1(1B)(b). Of course the DWP *could* allocate a NINo to someone presenting false documents and in that sense even false documents could be said to *enable* a NINo to be allocated, but I agree with Mr Brown that it is perfectly obvious that what is meant is information and evidence that *justifies* the allocation of a NINo. Since NINos are only allocated to those who need them (something which, as Mr Brown said, the framers of the legislation can be expected to have known), and this in turn means those who either have a right to work or (in the present context) a right to benefits, I think it follows that evidence that enables a NINo to be allocated to a claimant for benefit is evidence that establishes that the claimant does in fact have a right to benefits. False documents do not do this.

56. I would have reached this conclusion even without the fact that s. 1(1A) and (1B) were introduced into s. 1 SSAA 1992 by the SS (Fraud) Act 1997. But that I think puts the matter beyond doubt. The very purpose of this Act was to reduce the incidence of fraud in the social security system. It is therefore evident that the requirement for claimants to either have a NINo (and disclose it, or disclose information enabling it to be found), or to apply for one, was itself an anti-fraud measure, designed to prevent social security benefits from being paid to those not entitled to them. In those circumstances it can scarcely be supposed that Parliament's intention was that claimants could comply with the new requirement in s. 1(1B)(b) by supplying information or evidence that appeared on its face to justify the allocation of a NINo, but was in fact false.

57. That is enough to dispose of Ground 2, but I should briefly mention three points put forward by Mr Drabble. One, found in his written submissions but not I think repeated orally, was that the Secretary of State's interpretation would render s. 1(1B)(b) otiose. As soon as the verification process is successfully completed, a NINo is allocated and at that point the claimant will qualify under s. 1(1B)(a), and so reliance on s. 1(1B)(b) is not needed.

58. The answer to this point is that given by Mr Brown. The effect of s. 1(1B)(b) is to crystallise the date of entitlement as the date of the initial UC claim. That means that a claimant without a NINo can make a claim and, once approved, benefit will be payable as from that date (as it was in the case of Ms Bui and Ms Onakoya). If s. 1(1B)(b) were not there, a claim could only be made by someone within s. 1(1B)(a), that is someone who already had a NINo, and neither Ms Bui nor Mr Onakoya could have made a claim until a NINo had been allocated to them. Their entitlements would therefore start from the dates of claims made after allocation of a NINo, and not (as in fact happened) from the dates of claims made some time before the allocation of a NINo. I agree with this analysis which seems to me unanswerable.

59. The second point relied on by Mr Drabble was that the UT's decision was inconsistent with that of Mr Commissioner Rowland in CH 4085/2007 [2008] UKUT 14 (AAC). That was not a decision in relation to UC (which did not then exist) but it did concern s. 1(1B)(b) SSAA 1992, in the context of a claim to housing benefit. It was a case where although the claimant had a NINo, her husband did not, and although information was submitted by the husband as requested (such as his name, address and date of birth), he failed to attend an interview. The actual decision of Commissioner Rowland was that the information or evidence referred to in s. 1(1B)(b) did not extend to information and evidence provided at an interview. That was because the application had to be "accompanied" by the information, and the information and evidence mentioned in the legislation is "only that information and evidence that the person concerned could reasonably be expected to send when the application was made" (at [30]). He did however also say that there is no requirement that a NINo has been allocated before benefit is awarded, it being sufficient that an application had been made; and that "the payment of benefit is not generally to be delayed while the application for the [NINo] is processed" (at [26]).

60. I do not consider it necessary to consider whether the actual decision was correct on its own facts, which are some way removed from the present question; it was dealing with a different problem, that of when and how evidence and information should be provided, and not with the quality of information provided, namely whether it was genuine or fraudulent, at all. And the Commissioner's observations at [26] were undoubtedly, as the UT said in the present case, obiter dicta and he did not explore the questions we have been asked to consider. I do not in those circumstances find the decision of any real assistance for the resolution of the present case.

61. The third point relied on by Mr Drabble was a statement made by the relevant Minister (Mr Oliver Heald, then the Parliamentary Under-Secretary of State for Social Security) during the committee stage of what became the SS (Fraud) Act 1997. He said (Standing Committee E, 28 January 1997):

> "The hon. Member for Leyton mentioned delays in the allocation of a national insurance number. It is not necessary for a number to have been allocated before a claim can be processed. Under subsection (1B)(b), it is simply necessary for a person to apply and supply the necessary supporting information."

Mr Drabble suggested that this statement was admissible under the rule in *Pepper v Hart* [1993] AC 593, and that it supported his interpretation.

62. I do not propose to consider whether the strict rules for admissibility laid down in *Pepper v Hart* are satisfied in this case, nor whether permission should be given to advance this point, which is a new point not raised below, because I do not find the Minister's comments

helpful on the present question. They are little more than a paraphrase of the statutory language. As a matter of law it was true to say that a NINo does not need to have been allocated before a claim is processed, in the sense that consideration of whether the claimant meets the eligibility requirements can, and does, proceed before the allocation of a NINo. Even if by "processed" the Minister meant "processed to the point of payment" it was strictly accurate to say that the Act does not require the allocation of a NINo as a pre-condition of payment. All that the Act requires, as the Minister says, is for the claimant to apply and supply "the necessary" supporting information. What the Minister does not address is what happens if information is supplied which on its face appears to support the application but on examination turns out not to be genuine. But that is the question that is in effect raised by Ground 2. In those circumstances I do not regard the Minister's statements as helping to resolve that question.

63. None of these points therefore is sufficient to displace what I regard as the natural meaning of the statutory language. The position can in my view be simply stated. In order for a person to be entitled to UC they must make a claim (s. 1(1) SSAA 1992), and if they do not already have a NINo must apply for one (s. 1(1A) and (1B)(b) SSAA 1992). That must be supported by information and evidence that justifies the allocation of a NINo. It is then for the Secretary of State to decide the claim (s. 8 SSA 1998). In order to decide the claim the Secretary of State must decide among other things if the information and evidence does justify the allocation of a NINo. If it does the claim is upheld and an award of UC made. But if it does not the claim is not upheld and no award is made. That seems to me what the statutory provisions provide and to amount to a coherent and understandable scheme.

64. In my judgment therefore the UT was entirely right on this point, and I would dismiss this ground of appeal.

Ground 3

65. I propose to consider Ground 3 next. Mr Drabble submitted that the practice of the Secretary of State in having a two-stage process, under which the UC agent first verified the claimant's identity to UC standards and otherwise checked the claimant's eligibility for UC, and then the NINo officer went over the same material a second time, was unlawful in needlessly delaying the process. It would, he said, be possible for the Secretary of State to begin the verification process on day 1 of a UC claim so that the NINo allocation proceeded in parallel with the other entitlement conditions.

66. Mr Brown submitted that the NINo allocation process takes place in the way it does because it would be illogical and a waste of resources to refer a case to the NINo officers unless and until it were known that the claimant required a NINo. The first stage is therefore designed to confirm whether the claimant meets (or, to be more precise, appears to the UC agent to meet) the eligibility requirements under the WRA 2012, as unless they pass this first stage the business case for an allocation of a NINo to them is not made out. Moreover as part of the first stage there will be an automated search to see if the claimant already has a NINo, followed by basic searches by the UC agent if they do not (see paragraphs 35 and 36 above). It is only if these processes do not succeed in tracing a NINo for the claimant that the case is referred to the NINo allocation officers.

67. Mr Drabble accepted that his challenge to the Secretary of State's practice was a rationality challenge and required him to establish that the system operated by the Secretary of State was irrational. We were not addressed on the principles applicable to such a challenge but they have been elucidated in numerous authorities. It was not disputed that in a case such

as this they impose a high hurdle.

68. In my judgement the claimants have not demonstrated that the Secretary of State's current arrangements are irrational. As Mr Brown said in his opening remarks it is a hallmark of a civilised welfare system to pay claimants what they are properly entitled to promptly. But that not only entails processing claims without undue delay, it also entails ensuring that payments are only made to those who are in fact entitled to them. That among other things involves taking steps to identify and reduce fraud. Fraud is corrosive to the public good, being a waste of public resources and something which can potentially be used to perpetrate organised crime. It is for the Secretary of State to devise and operate administrative systems which are designed to meet the twin objectives of prompt payment (not delaying the processing of claims) and accurate payment (paying the right amount to those entitled to benefit but not paying those who have no right to benefit), objectives which are necessarily somewhat in tension.

69. It is not suggested in those circumstances that there is anything irrational in the Secretary of State making use of a limited number of specialist, security-cleared officers to carry out the verification checks involved in the NINo allocation process, something which the ordinary UC agents are not in a position to do. And it seems to me that Mr Brown is right that once this position is accepted, it is also rational for this necessarily resource-intensive process to be reserved for those cases which have been shown to need it. The vast majority of claimants after all do have NINos already. It therefore makes sense for cases only to be referred to the NINo allocation team once the UC agent has checked that the claimant appears to meet the eligibility requirements and that no NINo has been found for them either automatically or by the basic searches carried out by the UC agent. In that way the NINo allocation officers can be deployed solely to deal with cases where the claimant appears both to have an entitlement to benefit and to be without a NINo. The suggested alternative of the NINo officers dealing with every case on day 1 would divert this limited resource to a very large number of cases where they turned out not to be needed. Far from speeding up the process, that would be likely to delay the allocation of NINos to those who do need them.

70. The UT does not appear to have been asked to consider this issue specifically in the way that we were and we do not therefore have the benefit of any separate consideration of it by them, but for the reasons I have given I would dismiss this ground of appeal.

Ground 1

71. The final ground of appeal is Ground 1. This challenges the Secretary of State's position that it is not possible to make advance payments to UC claimants without a NINo.

72. Mr Drabble's submission was very simple. Under s. 5(1)(r)(i) SSAA 1992 (as amended by the WRA 2012), regulations can be made providing among other things for "the making of a payment on account of such a benefit [which includes UC] … in cases where it is impracticable for a claim to be … determined immediately": see paragraph 23 above. Under reg 5(1) of Payments on Account Regulations, the Secretary of State may make a payment on account of benefit (which includes UC) to a claimant if three conditions are satisfied: see paragraph 25 above. The first is satisfied if the claimant has made a claim for benefit but the claim has not yet been determined (reg 5(1)(a) and (2)) and the third is satisfied if the claimant is in financial need (reg 5(1)(c)). In the case of claimants for UC who are awaiting determination of their claim the first condition will be satisfied, and the third condition will no doubt very often be satisfied. The remaining condition is the second, in reg 5(1)(b), which I repeat here for convenience:

> "(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)"

The Secretary of State's position is that where a claimant does not have a NINo this condition cannot be satisfied until the verification undertaken under the NINo allocation process has taken place. Mr Drabble submits that that is wrong, and that even before verification the Secretary of State can properly form the view that it is likely that the claimant will turn out to be entitled to UC, and hence that it is "likely that the conditions of entitlement are satisfied."

73. As a matter of the ordinary use of language there seems to me to be considerable force in Mr Drabble's submission. Reg 5 is expressly dealing with a case where a claim has been made but not yet determined (unlike reg 6 which concerns a case where an award has been made but not yet come into payment). *Ex hypothesi* therefore in a reg 5 case, it will not be known at the date of the application for an advance payment whether the claimant will fact turn out to be entitled, and the criterion for payment in reg 5(1)(b) is therefore not that the claimant *will* be entitled but the lower one of it appearing to the Secretary of State that it is *likely* that they will be entitled. It is not at first sight obvious why this should not apply to the s. 1(1B)(b) requirement as much as the other conditions of entitlement.

74. It is therefore necessary to consider with some care why the Secretary of State says that this is not right. Mr Brown in his written submissions made a number of points. First he said that the way the case was argued below was confined to whether the Payment on Account Regulations shed light on the true interpretation of s. 1(1B)(b) SSAA 1992. That may or may not be so, but the point is now clearly taken as a separate point on the applicability of reg 5 of the Payment on Account Regulations to a person with no NINo.

75. Second, Mr Brown said that the claimants sought to argue that it was not necessary for s. 1 SSAA 1992 to be satisfied before an advance payment could be made. In his written submissions he said that this was a new point that they should not be allowed to take on appeal, but in his oral submissions he confirmed that this objection was not pressed. On the substance of it, he submitted that the Secretary of State has a duty not to pay benefit monies to persons that are not entitled to them, and that the power to make advance payments to claimants was not a power to disapply the statutory restriction on entitlement in s. 1 SSAA 1992; this created a threshold condition that claimants had to actually satisfy, not just be likely to satisfy.

76. This argument was not developed orally. Insofar as I have understood the point that is being made I do not accept it. Take a person such as Ms Onakoya. It is now known that she did satisfy the conditions for entitlement to UC. That means she not only met the eligibility conditions for UC as laid down in the WRA 2012 (at least 18, habitually resident in the UK and the like), but also the conditions for entitlement in s. 1 SSAA 1992 (making a claim, making an application for a NINo, and providing the appropriate information and evidence). Mr Brown accepts that the former are "conditions of entitlement for benefit" within the meaning of reg 5(1)(b) and that the Secretary of State can take a view as to whether it is "likely that they are satisfied" even before determination of the claim. But I do not myself see why the latter are not also "conditions of entitlement for benefit" and why it is not possible in principle for the Secretary of State to consider whether it is likely that they are satisfied. I do not see that the requirements of s. 1(1B) SSAA 1992 are a threshold that needs to be shown to have been crossed before the question can even be asked. And if it does appear to the Secretary of State to be likely that the conditions are satisfied then s. 5 SSAA 1992 and reg 5 of the Payment on

Account Regulations would seem to supply the necessary statutory power to make a payment on account even to a person who in the event turns out not to have been entitled after all. The risk of paying someone who is not in fact entitled is a risk that is inherent in a scheme which permits payments to claimants before their claims have been determined.

77. The third point made by Mr Brown, and the one on which he concentrated his oral submissions, was that it is not in practice possible to form a view as to whether a claimant is likely to pass the verification test. He sought to uphold the view of the UT at [59] that verification for the purposes of s. 1(1)(b) is a "neutral exercise" in the sense that it will not be "likely" that verification will or will not be established (see paragraph 48 above). I have to say I do not quite understand what is meant by a neutral exercise in this context. Mr Brown said that a better word might be "binary" and that what was meant was that either the verification exercise would show that the claimant was duly entitled or it would not. It would return a value of either 0 or 1 and could not be in between. That I understand, but I do not see how that differs from the satisfaction of any condition. Take the first of the basic conditions of eligibility, which is that the claimant is at least 18. That too is a binary condition that will either be satisfied or not: the claimant will either be at least 18 at the date of claim or not. In most cases it will no doubt be apparent, even before the claim is determined, that the claimant will be likely to satisfy this condition, but there may be cases where there is real doubt. In such a case the Secretary of State can nevertheless, it seems to me, quite properly take the view in a particular case that it is *likely* that the claimant will satisfy the condition even if this has not yet been established and may not be certain. I do not see why it is in principle any different with the verification process undertaken for those with no NINo.

78. In oral submissions Mr Brown made the point that until the verification process has in fact been undertaken it is in practice impossible to assess what the outcome is likely to be. This seems to me a slightly different point. It is not directed to whether in principle the Secretary of State can properly ask the question whether it is likely that the s. 1(1B)(b) condition will turn out to be satisfied, but to whether in practice the Secretary of State (or realistically his officials) will in any individual case be able to answer that question Yes. Mr Brown said that the UC agents would not be able to do so as they have no training or experience in identifying fraudulent applications and so no way of assessing the likelihood of the claim being verified, and that the NINo agents would in practice not be able to form a view one way or the other until they had considered the case at which point they would be in a position to determine it anyway.

79. This I think is a more substantial argument. But it seems to me a point that turns on the facts of particular cases. I do not think we can properly say that in every case where a claimant applies for UC and does not have a NINo, it necessarily follows that the Secretary of State will be unable to determine whether it is likely that the claimant will satisfy the requirements of s. 1(1B)(b) so as to be entitled to benefit. It does not seem self-evident that this will always be impossible; nor do I think that the evidence expressly deals with this question. The scheme of the provisions contemplates that in a case where a claimant's claim has not yet been determined and the claimant is in need the Secretary of State will consider whether it appears likely that the conditions of entitlement are met; and it seems to me that this is just as much so in a case where the claimant does not have a NINo as in the case when they do. In my judgment therefore the Secretary of State's practice in never considering whether this is likely in a case where the claimant does not have a NINo is flawed.

80. Quite what this might entail in practice is not something that we can resolve on this appeal. Mr Brown pointed to a statement by Ms Johnston that the potential alternative to the

current practice would be to allocate a temporary NINo to a claimant (which would allow the payment of an advance to them prior to the allocation of a final NINo) but that this would be unlikely to save any time for claimants; and he said that changing the system to cater for this would not only be disruptive but also risk undermining a key protection against fraud. We do not have the material to assess such questions and in any event it is a matter for the Secretary of State and not for the Court to decide on the administrative arrangements to put in place. All that I mean to decide is that the Secretary of State's position that it is never possible to pay an advance payment to a claimant without a NINo (because it is not possible to assess whether it is likely that the claimant meets the conditions of entitlement until their application for a NINo has been verified) is not one that is warranted by the language of the regulation. Pending such verification it seems to me to be possible in principle for the Secretary of State to consider whether it is likely that such a claimant meets the conditions of entitlement or not. How that can be done in practice is not I think something we can rule on.

81. I would therefore allow the appeal on Ground 1 to this limited extent. We heard no submissions on the appropriate form of relief (and the respective Appellant's notices simply seek the setting aside of the order appealed against without indicating the form of any substitute order) and I would invite counsel to address this in submissions, if not agreed, after our draft judgments are circulated.

Lord Justice Edis:

82. I agree.

Lord Justice Underhill, Vice-President of the Court of Appeal (Civil Division):

83. I also agree