**IN THE UPPER TRIBUNAL** **Appeal No. UA-2023-000802-USTA**
**ADMINISTRATIVE APPEALS CHAMBER** **[2024] UKUT 340 (AAC)**

On appeal from First-tier Tribunal (Social Entitlement Chamber)

**Between:**

**P.H.C.**

Appellant

- v -

**Secretary of State for Work and Pensions**

Respondent

**Before: Upper Tribunal Judge Wikeley**

Decision date: 28 October 2024
Decided on consideration of the papers

**Representation:**
Appellant: In person
Respondent: Ms Emma Fernandes and Ms Jessica Cowan, Decision Making and Appeals, DWP

## DECISION

**The decision of the Upper Tribunal is to allow the appeal.** The decision of the First-tier Tribunal made on 14 September 2022 under number SC154/22/01415 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

**DIRECTIONS**

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **The new First-tier Tribunal should not involve the tribunal judge who considered this appeal on 14 September 2022.**

3. **If the Appellant has any further written evidence to put before the new First-tier Tribunal, this should be sent to the HMCTS regional tribunal office within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the original decision of the Secretary of State under appeal (i.e. 25 February 2022).**

4. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.**

5. **The Upper Tribunal office should ensure that a copy of the Appellant's e-mail to the Upper Tribunal adminappeals e-mail address and dated 26 January 2024 (timed at 11:51:53) (with attachments) should be sent to the Secretary of State's representative and to the First-tier Tribunal.**

6. **Within one month of the date of issue of this decision, the Secretary of State's representative should provide the First-tier Tribunal with a further supplementary submission dealing with the significance of the further evidence referred to in Direction 5 above.**

**These Directions may be supplemented by later directions by a Tribunal Legal Officer, Tribunal Registrar or Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.**

## REASONS FOR DECISION

### Introduction

1. This is a case about establishing a claimant's identity (and that of her children) for the purposes of making a claim for Universal Credit (UC).

2. This appeal is a further example of the occasional gap (some might say the occasional chasm) between what the law says on the one hand about the adjudication of claims for benefit and how the Department for Work and Pensions (DWP) actually operates its decision-making arrangements on the other.

3. The claimant in this appeal was (or so it appears) previously known by a name which gave her the initials HCU. The claimant is now known by a different name which gives her the initials PHC. The initial 'H' stands for the same forename in both instances, while the initial 'C' stands for different names. I use her initials (whether previously HCU or more latterly PHC) to preserve the claimant's privacy.

4. In this decision (unless quoting directly from documents in the appeal bundle) I refer to the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380) by way of shorthand as the 'UC etc (Claims and Payments) Regulations 2013'. Likewise the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381) are referred to as the 'UC etc (Decisions and Appeals) Regulations 2013'.

### The Appellant's request for an oral hearing of her Upper Tribunal appeal

5. PHC requests an oral hearing of her Upper Tribunal appeal as a means of proving her existence and her identity. The Secretary of State's representative (who supports the appeal to the Upper Tribunal) does not request an oral hearing.

6. I have concluded that it is fair and just to determine this appeal 'on the papers'. However, and as a result of my decision, PHC will have the opportunity to attend an oral hearing of her substantive appeal before a new First-tier Tribunal. That is the appropriate forum for the further fact-finding that is necessary in this case.

### The background

7. On 8 November 2021 PHC made a claim for UC for herself and her four children. It appears (at least from the UC journal entries) that she completed all the relevant parts of the online UC claim form. Somewhat confusingly, PHC also made the following entry in her UC journal: "There have been changes to my identity from [PHCC] to [PHCU]". Having said that, the extra 'C' in 'PHCC' was the same as the 'C' in 'HCU' and the 'P' in 'PHCU' was the same as the 'P' in 'PHC'.

8. The following month PHC attended an identity appointment but, according to the DWP at least, failed to provide the required identification at that interview. On 5 January 2022 the following further exchange took place in her UC journal about the identity of her children. The DWP sent PHC a message in these terms:

> Hello [PHC] If you wish to claim to Universal Credit for your children you need to upload one the following into your Universal Credit account by 05/02/2022 for each child along with proof that your children are in full time education: One of the following: • Full Birth Certificate • Medical Card •

> Adoption certificate • Passport • Child benefit award letter. I have sent you a to-do which you can see in your account called 'upload documents'. Please follow the instructions to upload the following evidence. We will not be able to pay you for any of your children until this information is received. You need to do this by 5 February 2022.

9. PHC replied as follows:

> I already explained to DWP at [the job centre] that I cannot present you with any proof of an image, payment of any income or document to prove my and my children's change of names. I am currently home schooling my oldest daughter because she was unlawfully denied admission into school and my 3 other children are unlawfully placed in a Catholic school which is against my will and my race. As a result of your request made today, I have made a complaint today to HMCTS concerning evidence of deed poll registered with the court. I have uploaded this evidence as proof.

10. The DWP assert that no such deed poll evidence was uploaded. In any event it is not immediately obvious why difficulties over the children's schooling should have prevented proof of their identity by some other means (e.g. birth certificates or HMRC child benefit decision letters).

11. On 25 February 2022 the DWP 'closed' her claim. According to the official entry in her UC journal, the reason for the closure was "The claimant failed to provide evidence". PHC applied unsuccessfully for mandatory reconsideration and then lodged an appeal with the First-tier Tribunal (FTT) against the decision dated 25 February 2022.

12. The DWP's written response to the appeal before the FTT characterised the decision under appeal in the following terms:

> On 25/02/2022, the Decision Maker made a decision that [PHC's] claim to Universal Credit was to be closed as she failed to provide evidence of identity for herself or her children.

13. The DWP's response to the appeal also sought to justify the decision in question in the following way:

> No evidence of identity has been provided for PHC or her children, as required to make a claim to UC as per regulation 45 of The Universal Credit, PIP, JSA and ESA (Decisions and Appeals) Regulations 2013.

14. On 14 September 2022 the FTT confirmed the DWP's decision dated 25 February 2022 and so refused PHC's appeal. The FTT's statement of reasons gave the following explanation (the text within square brackets is as it appears in the original):

> The respondent is entitled to request evidence and the appellant is requested to provide it in connection with an application for Universal Credit [Regulations 38 and 45 of the Universal Credit … (Claims and Payments) Regulations 2013.] The appellant failed to provide it so the respondent was entitled to terminate the claim. [Regulation 47 of the Universal Credit … (Claims and Payments) Regulations 2013.]

15. Presumably in the first sentence we are meant to read "the appellant is *required* to provide" in place of "the appellant is requested to provide" such evidence. More

seriously, and putting to one side for a moment the question as to whether they are indeed applicable, the statutory references in the square brackets appear to be somewhat garbled. Those in the first set of square brackets should be to regulation 38 of the UC etc (Claims and Payments) Regulations 2013 and regulation 45 of the UC etc (Decisions and Appeals) Regulations 2013. The second citation should be to regulation 47 of the UC etc (Decisions and Appeals) Regulations 2013.

**A summary of the proceedings in the Upper Tribunal**

16. On 16 October 2023 Upper Tribunal Judge Citron gave PHC permission to appeal to the Upper Tribunal, pointing out that, although the Department had the power to require provision of proof of identity, it was not itself a condition of entitlement to UC. Judge Citron further considered it was arguable that the FTT had accordingly lost sight of its task, namely to determine whether the Respondent's decision to refuse the Appellant's claim for UC was correct in law.

17. On 15 November 2023 Ms Emma Fernandes filed a written submission on behalf of the Secretary of State, supporting the Appellant's appeal to the Upper Tribunal. On 26 January 2024 Deputy Upper Tribunal Judge Buley KC issued further and more detailed observations and directions on the appeal. In pursuance of those directions, Ms Jessica Cowan provided a very helpful supplementary submission on the appeal on behalf of the Secretary of State (dated 18 March 2024).

**Making sense of 'case closure' in cases where identity is in issue**

18. As Ms Cowan frankly acknowledged in her supplementary submission, "UC DMs [decision-makers] act in accordance with national operational procedures, or more local practices, that tend not to concern themselves with their statutory basis, which tends to lead to decisions that do not refer to statutory provisions or concepts." And, one might add, such an approach also tends to lead to decisions that, if they do refer to statutory provisions or concepts at all, they often refer to the wrong ones. As a result, as another of the Secretary of State's submission writers has observed in an earlier case, "any attempt to understand the legal nature of any given instance of 'claim closure' is obliged to have recourse to informed inference (or desperate guesswork)" (*PP v Secretary of State for Work and Pensions* [2020] UKUT 109 (AAC); [2020] AACR 25 at paragraph 8). The present appeal is a classic case in point.

19. Ms Cowan suggests that in the instant case there are (at least) five different ways in which the DWP decision-maker's disallowance for the claimant's failure to prove her identity might potentially be understood in terms of the applicable legal framework. Using her labels, they are as follows:

    (1) Interpretation One: suspension and termination

    (2) Interpretation Two: disallowance as penalty for failing to comply with a request for evidence

    (3) Interpretation Three: claim not in the required manner (version 1)

    (4) Interpretation Four: claim not in the required manner (version 2)

    (5) Interpretation Five: disallowance under sections 1(1A) and 1(1B)

20. For those readers who are impatient for answers, I agree with Ms Cowan that Interpretation Five of this typology reflects the correct approach to questions of identity. Furthermore, my reasoning for the most part adopts Ms Cowan's analysis

Interpretation One: suspension and termination

21. This appears to have been the approach taken by the DWP appeals submission writer at first instance. They sought to make sense of what had happened by stating in the response to the appeal that the Appellant's claim had been closed "as per regulation 45" of the UC etc (Decisions and Appeals) Regulations 2013. However, for the following reasons this reading cannot be right.

22. So far as is material, regulation 45 of the UC etc (Decisions and Appeals) Regulations 2013 provides as follows:

> *Provision of information or evidence*
>
> 45.—(1) This regulation applies where the Secretary of State requires information or evidence from a person mentioned in paragraph (2) ("P") in order to determine whether a decision awarding a benefit should be revised under section 9 of the 1998 Act or superseded under section 10 of that Act.
>
> (2) The persons are—
>
> (a) a person in respect of whom payment of any benefit has been suspended in the circumstances set out in regulation 44(2)(a) (suspension in prescribed cases);
>
> (b) a person who has made an application for a decision of the Secretary of State to be revised or superseded;
>
> (c) a person from whom the Secretary of State requires information or evidence under regulation 38(2) (evidence and information in connection with an award) of the Claims and Payments Regulations 2013;
>
> (d) a person from whom the Secretary of State requires documents, certificates or other evidence under regulation 31(3) (evidence and information) of the Jobseeker's Allowance Regulations 2013;
>
> (e) a person whose entitlement to an employment and support allowance or universal credit is conditional on their having, or being treated as having, limited capability for work.

23. There are two clear reasons why regulation 45 cannot apply in the present case.

24. The first reason is that, according to paragraph (1), regulation 49 applies only "where the Secretary of State requires information or evidence … in order to determine whether a decision awarding a benefit should be revised under section 9 of the 1998 Act or superseded under section 10 of that Act". Yet there was no pre-existing decision in this case awarding benefit that was capable of revision or supersession.

25. The second reason is that the information or evidence has to be required from one of the categories of claimant listed in paragraph (2). However, PHC did not fall into any of the categories (a) to (e). The most promising might appear to be category (c) – "a person from whom the Secretary of State requires information

or evidence under regulation 38(2) (evidence and information in connection with an award) of the Claims and Payments Regulations 2013" – but this provision is again predicated on there being an existing award of benefit that is susceptible to revision or supersession (see further below).

26. Regulation 47 of the UC etc (Decisions and Appeals) Regulations 2013 certainly provides for (as the heading puts it) "Termination for failure to furnish information or evidence" but this only comes into play where payment of benefit has been suspended under (amongst other provisions) regulation 45. If regulation 45 does not bite for the purposes of a suspension, then neither can regulation 47 bite by way of termination (see *RA v Secretary of State for Work and Pensions (UC)* [2024] UKUT 207 (AAC) at paragraph 25). Furthermore, and in any event, a decision to terminate under regulation 47 falls to be made by way of a supersession (see *R(H) 4/08* at paragraphs 28-34), which again presupposes an existing decision.

27. It follows that regulations 45 and 47 of the UC etc (Decisions and Appeals) Regulations 2013 on suspension and termination cannot logically be invoked as a means of disallowing a new claim for benefit.

Interpretation Two: disallowance as penalty for failing to comply with a request for evidence

28. The DWP's response to PHC's appeal, as well as including regulations 45 and 47 of the UC etc (Decisions and Appeals) Regulations 2013, also set out the text of regulation 38 of the UC etc (Claims and Payments) Regulations 2013. However, as noted in relation to the previous interpretation, this provision is again predicated on there being an existing award of benefit that is susceptible to revision or supersession. Indeed, the heading to the regulation puts this beyond any doubt (emphasis added): "Evidence and information in connection with an award".

29. The preceding regulation is on the face of it more in point. The heading to regulation 37 of the UC etc (Claims and Payments) Regulations 2013 is undoubtedly more promising (again, with emphasis added): "Evidence and information in connection with a claim". So far as is material, regulation 37 provides as follows:

> *Evidence and information in connection with a claim*
>
> 37.—(1) Subject to regulation 8 of the Personal Independence Payment Regulations, paragraphs (2) and (3) apply to a person who makes a claim for benefit, other than a jobseeker's allowance, or on whose behalf a claim is made.
>
> (2) The Secretary of State may require the person to supply information or evidence in connection with the claim, or any question arising out of it, as the Secretary of State considers appropriate.
>
> (3) The person must supply the Secretary of State with the information or evidence in such manner as the Secretary of State determines within one month of first being required to do so or such longer period as the Secretary of State considers reasonable.

30. The DWP's request that PHC provide evidence as to her identity (and that of her children) can readily be construed as having been made under regulation 37(2).

Did her apparent or alleged failure to do so mean that her claim for UC fell to be disallowed by way of a penalty for such failure? There is nothing in regulation 37 (or elsewhere in either set of the relevant 2013 regulations) to suggest that a failure to comply with such a request leads automatically to a disallowance. However, the answer can be found in the case law.

31. Commissioner Mesher (as he then was) put it this way in *R(IS) 4/93* (at paragraph 14):

> … It is not in itself a ground of disentitlement to income support that a claimant has failed to provide sufficient evidence to support his claim. But the result of such a failure will be that he fails to prove some essential element of entitlement. That, in a sense, is the sanction behind regulation 7(1) of the Claims and Payments Regulations. The adjudication officer and appeal tribunals must consider the essential elements of entitlement directly. That, in my view, is what the Commissioner meant in paragraph 13 of *R(SB) 29/83* when he said that the benefit officer **must** give a decision on a claim. He goes on to refer to this being "the only fair way to bring in issue a question as to whether or not a benefit officer has sufficient information and whether, having regard to the information which he has, the decision he has given is correct". But that passage does not suggest that a claim can be disallowed on the independent ground of insufficiency of information. The essential elements of entitlement must be considered directly in the light of the evidence available and the burden of proof on the claimant.

32. Likewise, and as the Tribunal of Commissioners explained in *R(H) 3/05* (at paragraph 79), "An administering authority is therefore required to inform a claimant of the information and evidence he should provide and it is for the claimant to supply such information or evidence as best he can. Where a claimant fails to provide information or evidence he can reasonably be expected to provide, there is no express sanction – but an inference may be taken against him and the case or the relevant issue may as a result be determined against him."

33. It follows that a failure to provide evidence in response to a request under regulation 37 of the UC etc (Claims and Payments) Regulations 2013 is not, in and of itself, a sufficient reason for disallowing a claim for benefit.

<u>Interpretation Three: claim not in the required manner (version 1)</u>

34. Can a new claim for UC be automatically disallowed because it has not been made in the required manner? Version 1 of this approach is sketched out by Ms Cowan in her supplementary submission in the following terms (at paragraph 14):

> Section 1(1) of the Social Security Administration Act 1992 makes it a condition of entitlement that a claim to be made in the manner stipulated in regulations. One of the ways in which the regulations allow a claim for UC to be made is electronically. However, a person may only use an electronic communication to claim UC if the conditions of paragraph 2 of Schedule 2 to the Claims and Payments Regulations are satisfied. One of those conditions is that "the person uses an approved method of [...] authenticating the identity of the sender of the communication where required to do so" (paragraph 2(3)(a)). It might be argued that the ID interview precisely was the approved method of authenticating her identity

> for this purpose. It would follow that if the claimant did not authenticate her identity in this way, she was not allowed to claim electronically and therefore had not claimed in the manner the regulations stipulate.

35. However, I agree with Ms Cowan that on closer analysis this line of argument is unsustainable. The fact of the matter is that PHC went through all the steps in the official online UC claims process and was permitted to lodge her electronic claim. As Ms Cowan rightly observes, "In these circumstances, the argument that the ID interview is the paragraph 2(3)(a) approach method of authenticating identity in effect posits that the Secretary of State in practice permits the claimant to use the official electronic mechanism for making a claim and then afterwards decides whether or not the claimant is to be allowed to do what she has already been allowed to do. I submit that this is absurdly topsy-turvy" (at paragraph 15).

36. Indeed, it appears that the online UC claims process does not currently impose any requirement that a prospective claimant prove their identity. Furthermore, there is no evidence that PHC was asked to prove her identity before making her online claim. That being so, she was not required to use an approved method of authenticating her identity for the purposes of the condition of making an electronic claim (in paragraph 2(3)(a) of Schedule 2 to the UC etc (Claims and Payments) Regulations 2013). It necessarily follows that her subsequent failure to prove her identity to the Secretary of State's satisfaction did not mean that she was not permitted to make such a claim. She had already successfully crossed that particular bridge.

37. This construction is consistent with the description by the Court of Appeal of the UC claims process and departmental post-claim procedures in *R (Bui) v Secretary of State for Work and Pensions* [2023] EWCA Civ 566 at paragraph 34 (emphasis added):

> … 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…

38. It follows that the ID check is not strictly part of the process of making a claim at all. Rather, it is part of the post-claim procedure for assessing whether the UC conditions of entitlement are met. There can be no question of a claimant being retrospectively denied the use of the online claim regime which they have already been allowed to use to lodge a claim. It follows that this version of an approach based on the claim not being made in the required manner cannot provide the answer as to the basis for a disallowance where the claimant's identity has not been established.

<u>Interpretation Four: claim not in the required manner (version 2)</u>

39. There is an alternative possible variant of the approach which purports to disallow a new claim as not being made in the required manner. As noted in relation to Interpretation Three above, section 1(1)(a) of the Social Security Administration

Act (SSAA) 1992 provides that a person shall not be entitled to benefit unless "he makes a claim for it in the manner … prescribed in relation to that benefit by regulations". This requirement was considered by Upper Tribunal Judge Perez in *ED v Secretary of State for Work and Pensions* [2020] UKUT 352 (AAC) ('*ED v SSWP*'), a case in which the claimant made a series of claims for benefit using a false (and indeed wholly fictitious) identity, which only came to light sometime later.

40. In discussing section 1(1)(a) of the SSAA 1992, Judge Perez suggested that as a general principle:

> 38. It seems to me that, whether a person is asked on a paper form, by telephone or online ("electronically") to supply the name and date of birth of the person making the claim and in respect of whom the claim is made, that must be a requirement to supply the real name and real date of birth…

41. It might therefore be argued on this basis that a claimant's failure to provide their real name on a benefit claim might constitute a failure to make "a claim for it in the manner … prescribed" and as such result in a disallowance. There are, however, at least three potential difficulties with such an analysis.

42. The first is that there are important differences on the facts as between the instant appeal and *ED v SSWP*. In the latter case it was (albeit belatedly) known that the claimant was not the (fictitious) person who she claimed to be. In contrast, in PHC's case there was no evidence at all suggesting the claimant was someone else – at most it was a case of an alleged failure to provide supporting evidence to confirm her identity. There was no suggestion she was concealing her true identity and as such no basis for drawing an adverse inference to the effect that she was someone other than who she said she was. Furthermore, PHC's case was about a new claim for benefit whereas *ED v SSWP* was about a revision of an award made on an existing claim.

43. The second difficulty is that Judge Perez's observations in *ED v SSWP* on section 1(1)(a) as a ground for disallowance were somewhat tentative and were not strictly necessary for her decision. Primarily the judge relied upon section 1(1) of the SSAA 1992 (irrespective of section 1(1)(a)) or in the alternative section 1(1A) and 1(1B) (on which see further below) as the basis for finding that the claimant was not entitled to benefit. Notably counsel for the Secretary of State in that case did not seek to mount an argument for disallowance based exclusively on section 1(1)(a) (see paragraph 36) and Judge Perez was careful not to express a definitive view in the absence of full argument on the point (see paragraph 40).

44. That leads neatly to the third difficulty with this potential approach based on the claim not being in a required manner. The absence of full argument on the point in *ED v SSWP* meant that Judge Perez's attention was not drawn to the decision of Commissioner Howell QC in *CIS/51/2007*, a case in which a claim had been rejected because the claimant had failed to provide proof of identity. That authority does not support the proposition that a claim form is only properly completed if the answers are accurate and truthful. As Commissioner Howell explained:

> 8. As a matter of language it seems to me indifferent whether one expresses that by saying he had not shown he had a "valid claim" to each benefit being sought, or that his claims failed to show he qualified for entitlement and so

> they were disallowed. For all practical purposes it comes to the same thing. This is however an area where it is well to be careful of the language one uses, because it is easy enough to muddle up (a) the requirements for making a *claim* under the regulations (which are purely a matter of form and procedure), and (b) the obvious and universal necessity for any person making such a claim to substantiate it by showing he meets the qualifying conditions for entitlement (which is a matter of fact and evidence). To complete the prescribed form giving a name, address and national insurance number complies with (a); to show that the name, address and number given are genuinely those of the person submitting the claim form is within (b)…

45. Accordingly, I agree with Ms Cowan's submission that:

> 26 … the requirements that make up a prescribed manner of claiming merely require the claimant to set out in a particular way *the case for benefit* he wishes to make. Once that has been done, a claim in the prescribed manner is made, and the truthfulness and merits of the case that has been presented are separately and subsequently considered as part of an outcome decision as to the claimant's entitlement to benefit under the claim. In my submission, this approach is more consistent not just with well-established conceptions of decision making but also with the existence of a condition of entitlement (in sections 1(1A)-(1B) of the Administration Act) that quite obviously has to do with the claimant's identity.

46. Those 'well-established conceptions of decision making' in the arena of benefits adjudication include the principles laid down in *Kerr v Department for Social Development* [2004] UKHL 23, not least Baroness Hale's statement, following her review of the authorities, that:

> 62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.

47. I therefore agree with Ms Cowan's submission that the idea that the factual accuracy of a claimant's statement of their identity is relevant to whether a claim has been made in the prescribed manner for the purposes of section 1(1)(a) of the SSAA 1992 is fatally problematic. But that still leaves section 1(1A) and 1(1B) to be considered.

<u>Interpretation Five: disallowance under SSAA 1992 sections 1(1A) and 1(1B)</u>

48. This interpretation is much more promising. Section 1(1), (1A) and (1B) of the SSAA 1992 (as amended by section 19 of the Social Security Administration (Fraud) Act 1997) provide 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.

49. Section 1(1B) provides for three alternative conditions ((1B)(a)(i), (1B)(a)(ii) and (1B)(b)), each of which must be considered in turn. It is only where the claimant fails to meet all three tests that the entitlement condition in section 1(1A) is not satisfied.

50. This was the case in *ED v SSWP*, where Judge Perez accepted the submission made on behalf of the Secretary of State that the claimant was disentitled from the outset of her claim(s) by virtue of section 1(1A) and (1B) (see paragraphs 54-64). I agree with Ms Cowan's analysis at paragraph 32 of her supplementary submission:

> A claimant's identity is relevant to the condition of entitlement in section 1(1A) and falls to be ascertained by way of the steps in section 1(1B). A decision as to whether the claimant has shown whether he is who he says he is falls to be made under that section and as part of the investigation of the claimant's entitlement under a claim as made. It is not made during the preceding stage of determining whether the claim has been made in the required manner.

51. Ms Cowan helpfully further submits as follows:

> 33. In the case of a person who does not provide a NiNo when claiming, section 1(1B) envisages a two-step process:
>
> 34. It is first considered whether the information and evidence the claimant has provided allows a NiNo that was allocated to her to be tracked down (see section 1(1B)(a)(ii)). As was noted in paragraph 34 of *Bui*, in practice

> "the UC agent carries out basic checks to see if the claimant already has a NINo."
>
> 35. If no such NiNo is found, an application for a NiNo is made (in practice by DWP on the claimant's behalf), and then consideration is given as to whether the information and evidence the claimant submits in connection with that application are sufficient to allow a NiNo to be allocated (see section 1(1B)(b)), a matter that will centrally turn on whether the applicant is who she says she is. As paragraphs 35 and 36 of *Bui* note, in practice this stage of the process is conducted by specialist NiNo allocation officers, and as part of the process they will first return to the question raised by section 1(B)(a)(ii): "On receipt of the form a NINo agent carries out a more advanced check to see if the claimant already has a NINo." As paragraph 36 of *Bui* also notes, the NINo allocation officer will also consider whether the claimant has a right to reside in the UK. If it is concluded that the claimant has no right to reside, the NiNo allocation process will stop. The claim will then be disallowed on the right-to-reside grounds instead (e.g. under section 4(1)(c) of the Welfare Reform Act 2012).
>
> 36. In the case at hand, the Secretary of State's decision can, I submit, plausibly be construed as a finding that the claimant has failed to satisfy sections 1(1A) and 1(1B) for the following reasons:
>
> a) The claimant has not stated a NiNo that is hers.
>
> b) The claimant cannot show that a NiNo has been allocated to her because she has not shown who she really is.
>
> c) A NiNo could not properly be allocated to her because she because she has not shown who she really is.

52. It follows that section 1(1A) and 1(1B) of the SSAA 1992 set out the correct approach to questions of a claimant's identity in relation to new claims for UC (and most probably other benefits, although none are at issue in this appeal).

53. The position with regard to PHC's children is not quite the same. In the first place regulation 5 of the UC etc (Claims and Payments) Regulations 2013 provides that section 1(1A) (and so by necessary extension section 1(1B)) "is not to apply to a child or qualifying young person in respect of whom universal credit is claimed". The UC child element is then payable "for each child or qualifying young person for whom a claimant is responsible" (regulation 24(1) of the Universal Credit Regulations 2013 (SI 2013/376)). Assuming that PHC herself can satisfy section 1(1A), then entitlement to the child element under regulation 24 will depend on the Secretary of State being satisfied as to the existence and identity of any children. It is then for the claimant to prove the child's existence and identity on the balance of probabilities, applying the principles set out in *Kerr v Department for Social Development*.

**The First-tier Tribunal's decision in the present appeal**

54. The FTT approached the appeal applying Interpretation Two from the five-fold typology above. In effect, it treated the claimant's failure to comply with the requirement under regulation 37 of the UC etc (Claims and Payments) Regulations 2013 to provide identity evidence as sufficient reason in and of itself to disallow the claim. For the reasons above, that approach involved an error of

law. The FTT should have tackled the appeal through the lens of section 1(1A) and (1B) of the SSAA 1992. I therefore allow PHC's appeal, set aside the FTT's decision dated 14 September 2022 and remit the appeal to be reheard by a fresh tribunal.

**The approach that the new First-tier Tribunal should take**

55. In her supplementary submission, Ms Cowan sets out an invaluable summary of the approach that the new FTT should adopt:

> 39. On appeal against a decision that a claimant is not entitled to benefit because he or she does not satisfy section 1(1A) of the Administration Act, a FTT is not confined to considering whether the Secretary of State's decision – and thus his approach to section 1(1B) – was reasonable on the evidence before him and consistent with the relevant law. Rather, the FTT is engaged in a rehearing of the question of whether the claimant satisfies the requirements of section 1(1B) (*R(IB) 2/04* at paragraphs 13-15 and 19-33). In effect, it must apply *for itself* the tests in section 1(1B) in the light of the evidence that is *now* available to it, which could in principle include any evidence of identity that was brought to light by the claimant or the Secretary of State after the date of the decision under appeal (cf. *R(DLA) 3/01* at paragraph 58).
>
> 40. On appeal, a FTT should establish precisely what steps the Secretary of State has taken in relation to section 1(1B). In particular, it should ensure that it is provided with (a) copies of all information and evidence that the claimant provided when claiming and during the Secretary of State's subsequent investigations (including proper accounts of any interviews that have been conducted), and (b) an informative summary of what has been fed into what tools with what results. However, the tribunal is not, in my submission, bound to follow in the Secretary of State's footsteps. It will be up to it to decide for itself how to approach and apply the tests in section 1(1B). For example, where, as here, the Secretary of State has found that section 1(1B) is not satisfied without determining whether the specialist tools available to a NiNo allocation officer can trace a NiNo for a person with the claimant's alleged details, but the tribunal is of the view that it would be best to establish whether a NiNo exists for such a person and then consider whether the claimant and that person are one and the same with the benefit of the information relating to the NiNo-holder that DWP's records contain, then it is entitled to direct the Secretary of State to carry out this investigation and provide it with an account of its methods and findings. In the end, it will be for the tribunal to decide whether a NiNo allocated to the claimant has been identified and (if not) whether the claimant has established his identity to such a degree of confidence that a NiNo can properly to be allocated to him. In short, in my submission, one way or another, it will fall to the tribunal to make a fresh, evidence-based appraisal of whether the claimant is who [she] says [she] is.

56. Ms Fernandes, in the original written submission on behalf of the Secretary of State, helpfully provided a checklist to assist the new FTT in its decision-making, namely to:

(a) establish what evidence the Secretary of State has requested from the claimant, and what her responses were; and

(b) establish what computer searches the Secretary of State had conducted with a view to tracing an existing NINO for the claimant, and what the results were;

(c) determine whether the tests in sections 1(1B)(a)(i) and (ii) had been properly investigated and applied;

(d) if sections 1(1B)(a)(i) and (ii) were not met, determine, for the purposes of section 1(1B)(b), whether:

(i) the claimant has been given proper notice of the information or evidence she was required to provide about her identity, and a proper opportunity to provide this; and

(ii) if she has, whether the available evidence shows, on the balance of probability, that she is who she says she is; and

(e) finally decide, in the light of the foregoing, whether:

(i) the Secretary of State's disallowance of the claim was premature and hence must be set aside; or

(ii) none of the conditions in section 1(1B) were met and hence the claimant was not entitled to UC.

57. I would add that before addressing the issue identified in paragraph 56(a), the FTT should consider what information the Appellant did herself provide, and whether that information was itself sufficient to enable the Secretary of State to ascertain her NiNo. On the face of it at least she appears to have provided her NiNo with her mandatory reconsideration request (see paragraph 59 below).

58. The District Tribunal Judge will doubtless wish to consider whether to make more specific case management directions. It will doubtless also be in her own best interests that PHC herself should comply with any such directions as and when they are issued. I make the following further observations in the hope they may be of assistance.

**The evidence relating to the National Insurance number (NiNo)**

59. The DWP response to PHC's original appeal to the FTT included on the cover page a NiNo starting with the letters 'SG' (which I refer to here as the 'SG NiNo'). According to Ms Cowan, the SG NiNo was allocated to a person known as HCU on 2 March 2006. As such, she contends, that SG NiNo would not have been traceable using the surname which the Appellant gave when (now) describing herself as PHC. Ms Cowan adds that at the time of the UC claim the decision-maker did not know about the SG NiNo. However, in the absence of the full UC claim form from the FTT appeal bundle it is not clear whether PHC did in fact refer to the SG NiNo at the time of her original claim. What appears to be beyond any doubt is that in her request for mandatory reconsideration (her letter dated 4 March 2022) PHC certainly and expressly cited the SG NiNo by way of a case reference.

60. PHC subsequently provided the Upper Tribunal with further evidence, notably by way of various attachments to an e-mail dated 26 January 2024 (timed at 11:51:53). It is not clear from the electronic file whether this evidence was copied

by the Upper Tribunal office to the Secretary of State's representative. Be that as it may, I direct that a copy of this e-mail (with its multiple attachments) should be forwarded by the Upper Tribunal office to both the Secretary of State's representative and the relevant FTT office. This evidence includes copies of the following:

- DWP documentation relating to a PIP appeal by HCU in 2015 (FTT ref SC154/15/01491) citing the SG NiNo and PHC's current (2024) home address;
- A FTT statement of reasons for HCU's appeal against the disallowance of her claim to maternity allowance (FTT hearing on 18 May 2017 under ref SC154/17/01350) together with the original DWP decision letter dated 16 February 2017, the latter also citing the SG NiNo and PHC's current (2024) home address
- A National Insurance Numbercard for the SG NiNo in the name of HCE (where the 'HC' are the same as in HCU).

61. It may well be that the new FTT takes the view that on the basis of this evidence it can be satisfied on the balance of probabilities that PHC meets the requirements of section 1(1A) and (1B) of the SSAA 1992. However, that is ultimately a question of fact for the new tribunal to determine. In the meantime, I direct the Secretary of State's representative to provide a further supplementary submission for the FTT dealing with the significance of this further evidence.

62. Meanwhile PHC would be well advised to gather together any further relevant evidence to assist in confirming both her own identity and that of each of her four children. This will obviously include any formal legal documentation (e.g. passports, birth certificates, driving licences and deed polls). It could also include other official documentation (e.g. correspondence from HMRC (about tax credits and/or child benefit), GPs, hospitals, schools and financial institutions such as banks) and any further documentation which goes to show that she was HCU, and she is now PHC, and that they are one and the same person, and that she has four children as she states.

## Conclusion

63. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

**Nicholas Wikeley**
**Judge of the Upper Tribunal**

Authorised for issue on 28 October 2024