IN THE UPPER TRIBUNAL **UT ref: UA-2024-000557-USTA**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 380 (AAC)**

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

Between:

GA

Appellant

- v –

The Secretary of State for Work and Pensions

First Respondent

and

The Independent Monitoring Authority for the Citizens' Rights Agreements

Intervener

Before: Upper Tribunal Judge Wright

Decision date: 25 November 2024
Decided on the papers.

Representation:

Appellant: Simon Howells of Southwark Law Centre.
Respondent: Julia Smyth of counsel.
Intervener: Party.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 22 January 2024 under case number SC242/23/01643 was made in error of law and is set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given.

The Upper Tribunal's decision is to allow the appellant's appeal from the Secretary of State's decision of 23 of August 2022 and replace that Secretary of State decision

with a decision that the appellant is entitled to universal credit on the claim she made for that benefit on 16 August 2022.

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

REASONS FOR DECISION

1. This is an appeal from the decision of the First-tier Tribunal ("FTT") dated 22 January 2024. By that decision, the FTT upheld the Secretary of State for Work and Pension's decision of 23 August 2022 that the appellant did not have a right to reside in the United Kingdom for the purposes of universal credit at the time she made a claim for that benefit on 16 August 2022.

2. The appeal is conceded by the Secretary of State, and being allowed, on one ground only.

3. The appellant sought to appeal the FTT's decision to the Upper Tribunal on the following four grounds:

> "(a) the FTT failed to make adequate findings (or give adequate reasons) in support of its conclusion that *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307 'does not apply' (i.e. that the refusal of UC did not generate a risk of breach of article 1 of the Charter of Fundamental Rights); and it failed to apply s.12(8)(b) of the Social Security Act 1998;
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> (b) the FTT wrongly rejected A's Human Rights Act discrimination argument (or alternatively, failed to provide adequate reasons or factual findings for doing so);
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> (c) the FTT it misdirected itself in law by failing to hold that the appellant, as a person with pre-settled status, was entitled to equal treatment by virtue of her rights under the Withdrawal Agreement and therefore that reg.9(3)(c)(i) UC Regulations 2013
> cannot lawfully be given effect; and
>
> (d) the FTT misdirected itself in law by failing to hold that regulation 9(3)(c)(i) of the Universal Credit Regulations 2013 is *ultra vires* section 4(5)(a) of the Welfare Reform Act 2012."

4. On 1 July 2024 Upper Tribunal Judge Ward gave the appellant permission to appeal on grounds (a), (b) and (c), but he refused permission to appeal on ground (d).

5. I set out here, for completeness and because the reasons are themselves important (and in my view plainly correct), Judge Ward's reasons for refusing permission to appeal on the *ultra vires* ground in ground (d).

"A1. *R v Secretary of State for Social Security ex p Sarwar and Getachew* [1997] CMLR 648 concerned the introduction of the habitual residence test. Mr Sarwar and Mr Getachew were, physically, "in Great Britain". The argument on their behalf that it was not possible to say that someone who was "in Great Britain" was not "in Great Britain" was rejected. The reason why it was permissible to say that was because of Social Security Contributions and Benefits Act 1992 ("SSCBA") s.137(2)(a).

A2. The Court of Appeal was concerned with the vires of a particular statutory instrument (hence its concern (at [15]) with the mischief aimed at by the Secretary of State being the need to avoid "benefit tourism") but its reasoning, based on the underlying powers in primary legislation, is not so limited. The attempt to confine the implications of the decision to the factual circumstances of benefit tourism is in my view misplaced.

A3. Henry LJ, with whom Rose LJ agreed, noted (at [23]) that the underlying powers are "widely drawn". Rejecting an argument that mere presence was sufficient, he adopted (at [29]) the reasoning of the Divisional Court that

> "What Parliament intended was that physical presence in Great Britain should be a necessary, but not a sufficient, condition for eligibility."

A4. At [30] he noted that

> "The power in the deeming provision to treat a person in Great Britain as though he were not, and so to disqualify him from benefit even though he meets the other criteria for benefit, is not easily reconcilable with the contention that presence is a sufficient criterion for entitlement. If presence alone were sufficient, what need would there be for such a deeming provision?"

He went on to reject leading counsel's answer to that question.

A5. Further, although [counsel for the appellant in this case]'s note submits, correctly, that Millett LJ dissented, he did not do so in relation to the vires of the regulation in relation to income support, but only in relation to housing benefit. As regards income support, his formulation of the same point is concisely put at [73] as follows:

> "Section 137(2)(a) authorises the Secretary of State "to prescribe circumstances in which a person is to be treated as being or not being in Great Britain". This clearly authorises him (*inter alia*) to treat a person who is in fact in Great Britain as if he were not. He is in my judgment plainly entitled to exercise this power by prescribing that a person shall not be treated as being in Great Britain unless he is habitually resident there. By doing so he has not substituted a different residence qualification for that contained in the primary legislation, but excluded from those regarded as present in Great Britain persons the quality of whose presence here is considered insufficient to qualify them for benefit."

A6. I cannot discern any material difference between the relevant legislative provision in relation to universal credit and those relating to income support considered by the Court of Appeal.

A7. Section 4(1)(c) of the Welfare Reform Act 2012 ("the 2012 Act") requires a claimant to be "in Great Britain" (compare in *Sarwar* SSCBA s.124(1)).

A8. Section 4(5)(a) provides that:

> "(5) For the basic condition in subsection (1)(c) regulations may—
> (a) specify circumstances in which a person is to be treated as being or not being in Great Britain;"

That is equivalent to SSCBA s.137(2)(a).

A9. Section 42(2) provides:

> "(2) A power to make regulations under this Part may be exercised—
> (a) so as to make different provision for different cases or purposes;
> (b) in relation to all or only some of the cases or purposes for which it may be exercised."

That is equivalent to SSCBA s.175(3).

A10. Reg.9 of the Universal Credit Regulations, mirroring the language of s.4(5)(a) of the 2012 Act, concerns "Persons treated as not being in Great Britain" and within it falls reg 9(3)((c)(i) which applies the deeming to those who have been granted limited leave under Appendix EU (i.e. Pre-Settled Status).

A11. Nor can I accept para 19 of the submission. Insofar as it relies on the claimed incompatibility of the power with factual scenarios where there has been a substantial period of residence, that is nothing new. Similar issues of compatibility can and do arise in the context of the habitual residence test, where a person may have earlier had a very lengthy period of residence in the UK before moving abroad and on returning to Great Britain is held, for a while, to fail the habitual residence test. Mr Sarwar himself had resided in the UK for 13 years prior to moving abroad and held British nationality, yet was refused income support on his claim, one month after returning, the ground that he was not habitually resident. Such scenarios did not deter the Court of Appeal from reaching its decision.

A12. Nor do I see that it avails the applicant that this particular exclusion applies only to those with a particular legal status. That is an example of s.42(2) of the 2012 Act being relied upon. Others with 5 years limited leave to remain might for instance be subject to a [no recourse to public funds] condition.

A13. In my view therefore there is no realistic prospect of success in arguing that the ratio of *Sarwar and Getachew*, by which the Upper Tribunal is bound, is not equally applicable to reg 9(3)(c)(i). Nor is there any other sufficient reason justifying giving permission to appeal, when it is covered by a ruling of long standing by the Court of Appeal."

6. The Secretary of State in her submission on this appeal to the Upper Tribunal, while taking issue with aspects of the appellant's submission, accepts that the appellant is "right in substance" on her ground (b) (the Human Rights Act 1998 discrimination ground).

7. In the circumstances the Secretary of State argues that the appeal should be allowed on the terms as set out in my decision above and that grounds (a) and (c) do not now need to be determined (on this appeal).

8. The Secretary of State's concession in respect of the appellant's ground (b), and the (sole) basis on which this appeal is being decided and allowed, is as follows:

"

II - RESPONSE TO GROUND (b)

Legal and policy background

4. The Destitution Domestic Violence Concession ("DDVC") was a policy operated by the Secretary of State for the Home Department ("SSHD"), under which certain victims of domestic abuse were eligible for temporary leave to remain outside the Immigration Rules, and access to public funds, to enable them to escape an abusive partner.

5. The DDVC applied only to those who had joined their partner under Appendix FM to the Immigration Rules, and not to those whose leave had been granted under Appendix EU. That aspect of the policy was challenged in judicial reviewing proceedings, *GN v SSHD*. In *GN*, in a consent order sealed on 13 December 2023, SSHD admitted "that he breached the Claimant's rights under Article 14 ECHR, read with Article 8 by treating her (as a victim of domestic violence with pre-settled status under Appendix EU) less favourably than a victim of domestic violence with limited leave to remain under Appendix FM." SSHD accepted "that the Claimant's treatment fell within the ambit of Article 8, that she had a relevant status as a person with Appendix EU leave who had suffered domestic violence, that she was in an analogous situation to persons with Appendix FM leave who had suffered domestic violence and that there was no justification for treating the Claimant differently."

6. From 16 February 2024, the DDVC was replaced by the Migrant Victims of Domestic Abuse Concession ("MVDAC"). The new name reflected changes to the concession. The assessment of destitution by the Home Office was removed from the application process and the reference to domestic abuse rather than domestic violence reflected the updated definition of domestic abuse in the Domestic Abuse Act 2021.

7. By Statement of Changes HC 590 to the Immigration Rules, which took effect on 4 April 2024, the settlement provisions in "Appendix Victim of Domestic Abuse" were expanded to include a spouse, civil partner or durable partner with pre-settled status under the EUSS and their dependent children (i.e. the GN cohort). At the same time, the MVDAC was updated so that it also included the GN cohort.

8. The explanatory memorandum to HC590 explained as follows:

> "*5.23 The EU Settlement Scheme (EUSS) in Appendix EU enables EU, other European Economic Area (EEA) and Swiss citizens living in the UK by the end of the transition period on 31 December 2020, and relevant family members, to obtain immigration status. Appendix Victim of Domestic Abuse provides access to immediate settlement for victims of domestic abuse who meet its relationship requirements. They currently include, together with their dependent children, any*

> *partner sponsored under Appendix FM by an EEA or Swiss citizen with settled status or (based on their residence in the UK before the end of the transition period) pre-settled status under the EUSS.*
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> *5.24 The changes expand the scope of those immediate settlement provisions to include a spouse, civil partner or durable partner with pre-settled status under the EUSS (meaning that the relationship was formed before the end of the transition period), and their dependent children. We will also include them within the scope of the Migrant Victims of Domestic Abuse Concession (outside the Immigration Rules) so that they can obtain leave outside the rules with access to public funds pending the outcome of an application in the UK under Appendix Victim of Domestic Abuse. This will ensure that partners of EEA and Swiss citizens with EUSS status are treated equally under these domestic abuse provisions, regardless of whether the relationship was formed before or after the end of the transition period.*
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> *5.25 A person granted immediate settlement under Appendix Victim of Domestic Abuse will still be able to apply for settled status under the EUSS at the point at which they would otherwise have been eligible for it, based on their continuous residence in the UK. However, in line with Article 18(1)(h) of the Withdrawal Agreement, the changes also require a person resident in the UK before the end of the transition period – where they seek to obtain settled status under the EUSS in place of indefinite leave to enter or remain granted to them under another route – to have held their existing indefinite leave at the end of the transition period.*"

9. ….[the appellant] applied for, and was in due course granted (on 17 April 2024), leave outside the Immigration Rules under the new MVDAC.

SSWP's position on ground (b)

10. In the First-tier Tribunal ("FTT"), [the appellant's] case was that "the differential treatment – which falls to be justified by the Respondent – is that Person B is entitled to a "better" form of status than Person A immediately …" ….. Her ground of appeal was as follows:

> "*There is a difference in treatment between the appellant and a person who has been granted limited leave under Appendix FM of the Immigration Rules as the spouse of a settled person or an EU citizen with pre-settled status whose relationship has broken down permanently due to domestic abuse. Their circumstances are analogous in all respects save for the fact those granted limited leave as a spouse under Appendix FM can apply to the Destitution Domestic Violence Concession and/or for indefinite leave as a victim of domestic violence thereby obtaining access to welfare benefits and other public funds, whereas the appellant is ineligible to do so.*"

11. Insofar as that was a challenge to the terms on which EUSS status is granted, or alternatively an argument that [the appellant] should have been, but was not, eligible for the DDVC, the FTT was right to say (see para. 37) that the appropriate remedy was to challenge SSHD by judicial review.

> 12. However, SSWP considers that the FTT ought to have appreciated that the essential claim against SSWP was, as [the appellant] submits in para. 14 of her grounds, that the social security legislation unlawfully discriminated against [the appellant], and that reg. 9(3)(c)(i) of the Universal Credit Regulations 2013 should be disapplied accordingly.
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> 13. SSWP considers that [the appellant] is right to submit that reg. 9(3)(c)(i) should have been disapplied, for the following reasons:
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> > 13.1. [The appellant], who was a third country national, made an application for leave outside the rules on 8 October 2021, which was refused.
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> > 13.2. At the time [the appellant] made her claim for Universal Credit on 18 August 2022, she would have been ineligible for leave under the DDVC, and so could not have become eligible for Universal Credit by obtaining such leave.
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> > 13.3. SSWP submits that where a particular form of leave confers entitlement to benefits, and another form does not, SSWP is perfectly entitled to insist that a person obtains the form of leave which confers entitlement, if they wish to claim benefits.
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> > 13.4. But in this case, [the appellant] was not eligible for leave under the DDVC, and SSHD has accepted that this breached her human rights. On that basis, on the specific facts of this case, SSWP accepts that reg. 9(3)(c)(i) falls to be disapplied in [the appellant]'s case, with the effect that she is entitled to [universal credit per *RR v SSWP* [2019] UKSC 52; [2019] 1 WLR 6430 at [27]-[30]] .
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> 14. For these reasons, SSWP invites the UT to allow the appeal on the basis that the refusal of UC was unlawfully discriminatory, contrary to Article 14 ECHR, on the grounds that the matter fell within the ambit of Article 1 Protocol 1; [the appellant] had a relevant status as a person with Appendix EU leave who had suffered domestic abuse; that she was in an analogous situation to persons with Appendix FM leave who had suffered domestic violence (who would have benefited from the DDVC and been eligible for UC accordingly); and that there was no justification for treating [the appellant] differently.
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> 15. SSWP makes no broader concession.
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> 16. So far as other individuals are concerned, SSWP will be considering the matter more generally, and will take such steps as are necessary to comply with her legal obligations. But that is, of course, outside the scope of this appeal."

9. I do not read the appellant as disagreeing in substance with the Secretary of State's concession of the appeal on the appellant's ground (b) as set out above. (The appellant would dispute what the Secretary of State may be contending is a requirement in the latter part of paragraph 13.3 of her response to the appeal, but it is accepted that what is said in that paragraph 13.3 is not material to the disposal of this appeal.)

10. The appellant states in her reply to the Secretary of State's response to her appeal to the Upper Tribunal that she "does not see any material difference between the parties' positions on ground (b)". The appellant's argument (in summary) is:

    (i) the appellant has a relevant Art.14 status or statuses, in particular as a victim of domestic violence with pre-settled status under Appendix EU of the Immigration Rules;

    (ii) she is in a comparable position to a person or persons who is or would be treated differently, in particular a foreign national who could have made use of the DDVC due to having leave under Appendix FM of the Immigration Rules, and would in those circumstances have been able to gain access to UC;

    (iii) that treatment falls within the ambit of a substantive Convention right (Art.8 ECHR); and

    (iv) the difference in treatment has not been shown to be justified.

11. The Secretary of State's concession on ground (b) in my judgement is properly and well made. It is, moreover, consistent with the High Court's (consent) order in *R(GN) v SSHD* of 13 December 2023 (AC-2023-BHM-000080). In these circumstances, I do not need any further submissions from the parties or a submission from the intervener. Nor do I consider anything of material relevance turns on whether the 'ambit' for the purposes of the Article 14 discrimination argument is that of Article 8 of the European Convention on Human Rights ("ECHR") or Article 1 of the First Protocol to the ECHR.

12. I do not need to determine grounds (a) or (c) in order to dispose properly of this appeal. The argument under ground (c) (to the extent it has not been answered in *Fertré v Vale of White Horse District Council* [2024] EWHC 1754 (KB) (which is itself now under appeal to the Court of Appeal)) and the argument about whether *AT* and *CG v Department of Communities* [2021] 1 WLR 5919 applies to third country (i.e., non-EU/EEA) nationals, will fall to be decided by the Upper Tribunal in cases where either of those points is determinative.

13. For the reasons given above, the appeal succeeds and I give the decision as set out above.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 26 November 2024