



Neutral Citation Number: [2025] UKUT 016 (AAC)

Appeal No. UA-2023-001878-BB

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

AET

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

**Before: Upper Tribunal Judge Stout
Decided on consideration of the papers**

Representation:

Appellant: Derek Stainsby (Plumsted Community Law Centre)

Respondent: Joshua J Bicknell (DMA Leeds)

On appeal from:

Tribunal: First-Tier Tribunal (Social Entitlement Chamber)

Tribunal Case No: 1673 4566 1368 2358

Tribunal Venue: Cardiff (on the papers)

Decision Date: 23 October 2023

Anonymity: The appellant in this case is anonymised in accordance with the practice of the Upper Tribunal described in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28, i.e. on the basis that no party has objected to it and the practice does not prevent publication by a party or anyone else of the identities of the individuals involved in the case. Anyone who wishes to be informed of the identity of the parties may make an application to the Upper Tribunal, and the parties will be given notice and an opportunity to object if such an application is made.

SUMMARY OF DECISION

BEREAVEMENT PAYMENTS (3)

The Bereavement Benefits (Remedial) Order 2023 (SI 2023/134) (the 2023 Order) remedied the incompatibility with the Human Rights Act 1998 (HRA 1998) identified by the High Court (Holman J) in *R (Jackson) v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin), [2020] 1 WLR 1441 by providing for cohabiting partners with dependent children to be entitled to Bereavement Support Payment (BSP) on the same basis as couples who are married or in a civil partnership. The 2023 Order had retrospective effect, introducing that new entitlement with effect from 30 August 2018. In this case, the Upper Tribunal decides that the new law only applies to claims made after the date of the coming into force of the 2023 Order on 9 February 2023. Claims made before that date still fall to be determined by reference to the previous rules.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

REASONS FOR DECISION

Introduction

1. This appeal concerns the effect of *The Bereavement Benefits (Remedial) Order 2023* (SI 2023/134) (the 2023 Order) which came into force on 9 February 2023. The 2023 Order was made to remedy the incompatibility with the Human Rights Act 1998 (HRA 1998) identified by the High Court (Holman J) in *R (Jackson) v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin), [2020] 1 WLR 1441 and to enable claims for Bereavement Support Payment (BSP) by persons with dependent children who were cohabiting partners (not married or in a civil partnership) at the time of the death. The 2023 Order among other things amended retrospectively section 30 of the Pensions Act 2014 (PA 2014) in order to entitle cohabiting to partners with dependent children to BSP from 30 August 2018.
2. The appellant appeals against the First-tier Tribunal's decision of 23 October 2023 striking out her appeal against the decision of the Secretary of State of 24 November 2022 that she was not entitled to BSP in respect of her partner's death because she was not married to, or in a civil partnership with him, at the time of his death.
3. When considering whether or not to grant permission in this case, I was satisfied that the appeal was reasonably arguable as a matter of law, but noted that it was academic as far as the appellant is concerned. Sadly, the appellant died after commencing the appeal, and the appeal was in any event no longer of any financial consequence for her (or her estate) because she made a second (successful) claim for BSP following the coming into force of the 2023 Order as a result of which she was awarded BSP. However, having considered submissions from the parties, I decided that this was an exceptional case where it was appropriate to consider an appeal that had become academic for the particular appellant because I was persuaded that the issue raised in this appeal was potentially one of wider concern to other claimants.
4. However, I declined the Secretary of State's invitation to list the case for an oral hearing as I was satisfied (and remain satisfied) that the case could fairly be determined on the papers.

Factual background

5. The appellant's partner died on 4 November 2022. At that time, the appellant was cohabiting with her partner, but was not married to him or in a civil partnership with him. They had a dependent child.

6. On 24 November 2022 the appellant completed an online form claiming BSP. Her application was refused on 24 November 2022 on the basis that she was not married to, or in a civil partnership with, her deceased partner.
7. At that time, the effect of section 30(1) and (4)(a) of the PA 2014 was that a person was not entitled to a BSP in respect of a partner with whom they were cohabiting unless they were married to, or in a civil partnership with, the deceased at the time of death.
8. The appellant immediately on 24 November 2022 appealed to the First-tier Tribunal.
9. The First-tier Tribunal stayed the appeal and directed the respondent Secretary of State to carry out a Mandatory Reconsideration of the decision.
10. On 9 February 2023 the 2023 Order came into force extending entitlement to BSP to persons who were 'merely' cohabiting with their partners at the time of death. (The detail of the 2023 Order is dealt with further below.)
11. The Mandatory Reconsideration of the 24 November 2022 decision was carried out on 17 March 2023. The decision was not changed.
12. Also on 17 March 2023 the appellant submitted a second claim for BSP using the same online form as previously and including the same details.
13. On 14 April 2023 that second claim was granted.
14. The stay on the appellant's appeal against the original decision was then lifted and the matter came before a District Tribunal Judge on the papers on 23 October 2023. The Judge struck the appeal out under rule 8(3)(c) of The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the FT Rules) on the ground that it stood no reasonable prospect of success because:

The decisions of the higher courts do not change the law as it was applied to a claim at the time. This means that an appeal under the old law cannot succeed. If a new claim is made, the DWP will decide entitlement to bereavement payment under the new law. This Tribunal cannot decide whether a new claim will succeed.
15. The appellant then appealed to the Upper Tribunal.

The change in the legislation on 9 February 2023

16. Prior to 9 February 2023, section 30(1)(a) of the PA 2014 provided that a person was entitled to BSP if "the person's spouse or civil partner dies".
17. By regulation 19(2) of the *Social Security (Claims and Payments) Regulations 1987* (SI 1987/1968) (the 1987 Regulations), the prescribed time for claiming BSP was "three months beginning with any day on which, apart from satisfying the condition of making a claim, the claimant is entitled to the benefit concerned".

18. By regulation 19(3BA) the prescribed time for claiming the rate set out in regulation 3(2) or (5) of the *Bereavement Support Payment Regulations 2017* (SI 2017/410) (the 2017 Regulations) was “12 months beginning with that date of death” (i.e. the death of the spouse or civil partner).
19. By regulation 2 of the 2017 Regulations, the period for which BSP could be claimed was as follows:-
 - 2.—(1) The period for which bereavement support payment is payable is as follows.
 - (2) The period starts—
 - (a) on the date the person’s spouse or civil partner died, where the person claims the payment three months or less after that date; or
 - (b) at the beginning of the period of three months preceding the date the person claims the payment, where the person claims the payment—
 - (i) more than three months after the date the person’s spouse or civil partner died; and
 - (ii) no more than three months after the date the period finishes under paragraph (3).
 - (3) The period finishes at the end of the period of 18 months beginning with the day after the date the person’s spouse or civil partner died.
20. In the case of *In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 4, the Supreme Court made a declaration of incompatibility under section 4 of the HRA 1998 in relation to section 39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 on the basis that, insofar as it precluded any entitlement to widowed parent’s allowance by a surviving unmarried partner, it was incompatible with Article 14, in conjunction with Article 8, of the European Convention on Human Rights (ECHR).
21. In the case of *Jackson and others v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin), the High Court (Holman J) made a declaration of incompatibility in relation to section 30(4)(a) read with section 30(1) of the Pensions Act 2014 on the basis that, insofar as it empowered the Secretary of State to make regulations that bereavement support payment be paid at a higher rate in the case of a person with dependent children only if they are a spouse or civil partner of the deceased, it was incompatible with Article 14, in conjunction with Article 8, of the ECHR.
22. The 2023 Order was made on 8 February 2023 to remediate the incompatibilities identified in *McLaughlin* and *Jackson*. By virtue of article 1(2) the 2023 Order came into force on 9 February 2023. By virtue of article 1(3) the amendments made by articles 4 to 9 of the Order “are to be treated as having had effect from 30th August 2018” (i.e. the date of the decision of the Supreme Court in *McLaughlin*).
23. By article 4(2)(a) of the 2023 Order, section 30(1)(a) of the PA 2014 was amended to provide that a person is entitled to BSP if “the person’s spouse, civil partner or cohabiting partner dies”. By article 4(2)(b), for the purposes of that section “two persons are cohabiting partners if they are not married to, or civil partners of, each other but are living together as if they were married or civil partners”. There was also

power to make further provision by regulations as to the definition of cohabiting partner.

24. By article 3, sub-paragraph (4), sub-paragraphs (5) and (6) of that article are stated to apply “where, apart from satisfying the condition of making a claim, the claimant is entitled to bereavement support payment as a result of this Order in relation to a death which occurred before the day this Order comes into force”. Sub-paragraph (5) then provides that regulation 19(2) of the 1987 Regulations “is to be read in relation to that entitlement as follows ... the words from “three months” to the end of the paragraph are to be read as “21 months beginning with the day after the day the Bereavement Benefits (Remedial) Order 2023 comes into force”, while regulation 19(3BA) is to be “read as though the following was substituted for it ... the date on which the claimant’s cohabiting partner (within the meaning in section 30(6B) of the Pensions Act 2014) died” and “that date of death” is to be read as “the day the Bereavement Benefits (Remedial) Order 2023 comes into force”.
25. Article 6 made provision amending regulation 2 of the 2017 Regulations to include the following:
- (4) Paragraphs (5) and (6) apply where the person is entitled to bereavement support payment—
 - (a) as a result of the amendments made by the 2023 Remedial Order, and
 - (b) as a result of the death of their cohabiting partner occurring on or after 30th August 2018 and before the RO commencement day.
 - (5) The period starts—
 - (a) with the RO commencement day, where the person claims the payment 12 months or less after that date; or
 - (b) at the beginning of the period of three months preceding the date the person claims the payment, where the person claims the payment—
 - (i) more than 12 months after the RO commencement day; and
 - (ii) no more than three months after the date the period finishes under paragraph (6).
 - (6) The period finishes at the end of the period of 18 months beginning with the RO commencement day.
 - (7) Paragraphs (8) and (9) apply where the person is entitled to bereavement support payment—
 - (a) as a result of the amendments made by the 2023 Remedial Order, and
 - (b) as a result of the death of their cohabiting partner occurring on or after 6th April 2017 and before 30th August 2018.
 - (8) The period starts with the RO commencement day.
 - (9) The period finishes—
 - (a) at the end of the period of W months beginning with the RO commencement day, where the person claims the payment 12 months or less after the RO commencement day; and
 - (b) at the end of—
 - (i) the period described in sub-paragraph (a); or
 - (ii) if shorter, the period of X months beginning with the RO commencement day,

where the person claims the payment more than 12 months after but no more than 21 months after the RO commencement day.

(10) For the purposes of paragraph (9)—

“W months” means the number of months which is 18 less Y;

“X months” means the number of months which is 21 less Z.

(11) For the purposes of paragraph (10)—

“Y” is the number of monthly recurrences of the day of the month on which the person’s cohabiting partner died which occur during the period beginning with the day after the date of the cohabiting partner’s death and ending with 29th August 2018;

“Z” is the number of monthly recurrences of the day of the month on which the RO commencement day occurs during the period beginning with the day after the RO commencement day and ending with the date on which the person claims the payment.

(12) In paragraph (11)—

(a) for the purposes of the definition of “Y”—

(i) paragraph (7) of regulation 3 applies as if the words “for the purposes of paragraphs (1) and (4)” were omitted, and

(ii) paragraph (8) of regulation 3 applies as if the words “for those purposes” were omitted;

(b) for the purposes of the definition of “Z”—

(i) where the 2023 Remedial Order comes into force on the 31st day of a month, the monthly recurrence of the RO commencement day is to be treated as falling on the last day of the month;

(ii) where the 2023 Remedial Order comes into force on the 29th or 30th day of a month, the monthly recurrence of the RO commencement day in February is to be treated as falling on the last day of February.

(13) In paragraphs (4) to (12)—

“the 2023 Remedial Order” means the Bereavement Benefits (Remedial) Order 2023; and

“the RO commencement day” means the day on which the 2023 Remedial Order comes into force.”.

The arguments in this case

26. The First-tier Tribunal in this case struck out the appellant’s appeal on the basis that “the decisions of the higher courts do not change the law as it was applied to a claim at the time. This means that an appeal under the old law cannot succeed. If a new claim is made, the DWP will decide entitlement to bereavement payment under the new law. This Tribunal cannot decide whether a new claim will succeed”.
27. The appellant in this case, through her representative, argues that the First-tier Tribunal erred in law. The appellant accepts that, by virtue of section 4(6) of the HRA 1998 the declaration of incompatibility made by Holman J in *Jackson* did not affect the validity, continuing operation or enforcement of the PA 2014. However, the appellant argues that the 2023 Order is on its face retrospective in effect and changed the law from 30 August 2018. On that basis, the appellant submits that, once the 2023 Order came into force on 9 February 2023, the appellant’s claim for BSP should have been dealt with after that date as if the amendments to the law made by the 2023 Order applied to it, even though the appellant’s claim for BSP

was made (and first determined) before the 2023 Order came into force. The appellant accordingly submits that the First-tier Tribunal erred in law in striking out her appeal against that decision, because by the time the matter was considered by the First-tier Tribunal the 2023 Order was in force and the First-tier Tribunal should have applied it to her claim. In short, she submits that she did not need to put in a second claim for BSP after the 2023 Order came into force. Her first claim should have sufficed.

28. The Secretary of State disputes the appellant's interpretation of the effect of the 2023 Order. The Secretary of State submits that, properly interpreted, the 2023 Order only changed the law for claims made after the 2023 Order came into force, notwithstanding its retrospective changes to the conditions of entitlement.
29. The Secretary of State refers to section 1 of the Social Security Administration Act 1992 (SSAA 1992) and section 8 of the Social Security Act 1998 (SSA 1998) which latter states at sub-paragraph (2): "Where at any time a claim for a relevant benefit is decided by the Secretary of State – (a) the claim shall not be regarded as subsisting after that time; and (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time." The Secretary of State also refers to section 12(8) of the SSA 1998 which makes the same point in relation to appeals to the First-tier Tribunal: "In deciding an appeal under this section, the First-Tier Tribunal... (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made". The Secretary of State submits that, in the light of those provisions, the First-tier Tribunal cannot proceed on the basis of a "legal fiction that a (non-existent) 'decision' on a 'claim' has been taken under 'new law', when in fact no such claim has been made, and no such decision taken".
30. The Secretary of State accepts that in principle Parliament could amend law retrospectively so as to provide explicitly that 'new law' did apply to an earlier decision, and refers in this regard to *Reilly v SSWP* [2017] QB 657 at [137], but submits that this is not what has happened in this case. The Secretary of State submits that the effect of the Remedial Order is that cohabittees with children whose partners died up to 18 months before 30 August 2018 had a a right to claim BSP only once the Remedial Order was in force on 9 February 2023 (with the amount of BSP being diminished for each month by which their partner's death pre-dated 30 August 2018). The Secretary of State further points to the unreported, unpublished decision of Judge Ward in *SD v SSWP* (UA-2019-002258-BB) (13 March 2024) as a case in which the Secretary of State submits that his interpretation was accepted, albeit without argument.
31. The Secretary of State also suggests that claims made before 9 February 2023 by cohabiting partners would not have included evidence against which that claim could be assessed, whereas after 9 February 2023 the claim did include such evidence.
32. The appellant's representative in response submits that the Secretary of State is wrong: that the appellant's claim before 9 February 2023 was identical to her claim after 9 February 2023, that once the 2023 Order was in force both claims should have been dealt with in accordance with the same legal principles which, by dint of

that Order now represented the law from 30 August 2018 onwards. The appellant submits that *Reilly v SSWP* makes clear that sections 8 and 12 of the SSA 1998 do not prevent claims having to be decided in accordance with retrospectively effective legislation. The appellant submits that *SD v SSWP* cannot be relied on by the Secretary of State given that it has not been published and was not the subject of argument.

My decision

33. In my judgment, the Secretary of State is right as to the result in this case, but not as to legal route by which that result is reached.
34. The *Reilly* case (known as *Reilly II*) provides the most convenient starting point for the analysis. That case concerned among other things the effect of the Jobseekers (Back to Work Schemes) Act 2013 (the 2013 Act) which was enacted in order retrospectively to validate the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (the 2011 Regulations) which had been held by the Court of Appeal (and later the Supreme Court) in *Reilly I* to be ultra vires in certain respects. In *Reilly II* the Court of Appeal held the 2013 Act to have been unlawful insofar as it breached some claimants accrued rights to possessions under Article 1 of the First Protocol to the ECHR, or their fair trial rights under Article 6 of the ECHR, so that the declaration of incompatibility made by the High Court in *Reilly II* under section 4 of the HRA 1998 was upheld. However, the Court of Appeal held that the Act did otherwise have retrospective effect. The Court held that the 2013 Act applied to cases where an appeal had already been made or had already been decided before the Act came into force as it did to decisions and appeals after that date. This was because section 1(1) of the 2013 Act provided that it was to have retrospective effect "for all purposes" and could not be read down. The Court specifically considered whether section 12(8)(b) SSA 1998 (on which the Secretary of State places reliance in these proceedings) prevented Tribunals from taking account of the new law in appeals against decisions made before the 2013 Act came into force, but decided that it did not. The important paragraphs of the judgment for present purposes are as follows (emphasis added):

131 In our opinion Charles J was right that the 2013 Act cannot be read as containing the limitation found by the majority. We base that view principally on the phrase "**for all purposes**" in section 1(1), which Mr Eadie said, essentially rightly, as we believe, should be the beginning and end of the analysis. The effect of that phrase as a matter of ordinary domestic construction seems to us clear beyond argument; and even if resort is had to section 3 of the HRA, and fully acknowledging the strength of the interpretative obligation which it imposes, its words seem to us **incapable of being read down so as to have anything less than their plain literal meaning. An exclusion for the case of those who had already brought proceedings would have been straightforward and in our view would certainly have been included if that was the intention. ...**

136 Mr Jones's fourth point depended on **the effect of section 12(8)(b) of the Social Security Act 1998**. Section 12 is, it will be recalled, the

provision which gives claimants for social security benefits a right of appeal to the FTT against decisions of the Secretary of State. Subsection (8) reads (so far as material): “In deciding an appeal under this section, the First-tier Tribunal; (a) . . . (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.” Mr Jones submitted that that meant that when the FTT came to consider any of the appeals pending as at the date of the coming into force of the 2013 Act it would be obliged to disregard the effect of the Act, notwithstanding that it was expressed to be retrospective, because its enactment would constitute a “circumstance not obtaining . . . when the decision appealed against was made”. He said that that reading of subsection (8)(b) was confirmed by the decision of this court in *McKiernon v Secretary of State for Social Security* (1989) 2 Admin LR 133, to which we return below. He made it clear that, contrary to what the tribunal (which treated it as a distinct “second issue”) appears to have understood, he did not rely on this as a point in its own right: rather, he submitted, it weighed in support of his construction of the 2013 Act, since Parliament, he submitted, could not have intended to apply a provision to claimants which would create a clash with the provisions of a different statute.

137 We do not believe that this argument has any force. **The effect of section 12(8)(b) cannot be to nullify subsequent, explicitly retrospective, legislation which would otherwise govern the decision of the FTT.** *McKiernon v Secretary of State for Social Security* is not authority to the contrary. It was a decision about the effect of a different provision, section 104(1)(b) of the Social Security Act 1975, which permitted the decision of a tribunal determining benefit entitlement to be reviewed “if there has been any relevant change of circumstances since the decision was given”. The respondent’s claim to benefit was initially held to be out of time, but the provision in question was then held to be ultra vires and an award of benefit was made by the tribunal. The provision imposing the time bar was shortly afterwards retrospectively validated by primary legislation, and the issue was whether that constituted a “change of circumstances” permitting the award to be reviewed. This court held that it did. But that is a wholly different question, which sheds no light on how section 12(8)(b) would apply in the circumstances with which we are concerned. Our analysis corresponds, we believe, to that of Charles J at paras 161—168 of the tribunal’s decision.

138 Finally, Mr Jones drew attention to the fact that section 3 of the 2013 Act provided that it should come into force on the day that it was passed (i e 26 March 2013). He said that many other statutes having retrospective effect achieved that effect by providing instead that the Act should be “deemed to have come into force” on some date earlier than its actual enactment. He referred us to one example where that formulation was used in respect of the entire statute, namely the British Nationality (Falkland Islands) Act 1983 (see section 5(2)); and to two where it was used in relation to particular sections, namely the Finance Act 1980 (see section 118(6)) and the Channel Tunnel Rail Link Act 1996 (see section 46(4)). This was said to reinforce the argument that the 2013 Act was not intended to be “completely

retrospective”.

139 We see nothing whatever in this argument. **The fact that provision is made for a statute to come into force on a particular date is in no way inconsistent with a provision that some or all of its effects should be retrospective.** The fact that the draftsman has on some occasions used a different technique to achieve the same effect is neither here nor there. We suspect that there may have been particular reasons why that technique may have been thought more appropriate in the case of the examples given (particularly where only some particular provisions were retrospective), but the point does not merit exploration. Even if it is only a matter of different drafting styles, the difference is of no significance.

35. It is clear from the Court of Appeal’s decision in *Reilly 2* that the key question as to the effect of retrospective legislation on decisions taken or appeals commenced before the new legislation came into force is what the effect of that legislation is when it is properly construed in accordance with ordinary principles of legislative interpretation. If, so construed, it does have retrospective effect on those decisions and appeals then that is the law that must be applied by the Secretary of State and the Tribunal when deciding cases following the coming into force of the new legislation. Sections 8(2) and 12(8) of the SSA 1998 (or other equivalent provisions in other legislation) cannot prevent retrospective legislation being applied if that is the proper effect of that legislation.
36. So: what is the effect of the 2023 Order, properly interpreted? In my judgment, its effect is as the Secretary of State contends, although that is not how the legislation reads at first blush.
37. At first blush, the terms of article 1(3) of the 2023 Order, stating that the amendments made by articles 4 to 9 of the Order “are to be treated as having had effect from 30th August 2018”, appears to be as unequivocal as the provision of the 2013 Act that the Court of Appeal in *Reilly II* held gave that Act retrospective effect. Although the 2023 Order does not use the term “for all purposes”, there is nothing equivocal about article 1(3) which provides for retrospective effect of all the amendments without any qualification within that article.
38. However, the remainder of the Order contains provisions which, in my judgment, clearly limit the retrospective effect that would otherwise have been achieved by virtue of article 1(3).
39. First, article 3(4) of the 2023 Order states that sub-paragraphs (5) and (6) of that article are to apply (only) where, in addition to having made a claim, the claimant is (now) entitled to BSP as a result of the 2023 Order in relation to a death that occurred before the Order came into force on 9 February 2023. Sub-paragraphs (5) and (6) then refer back to “that entitlement”, i.e. to the entitlement newly given by the 2023 Order. Sub-paragraph (5) amends the time limit for bringing of a claim in respect of that entitlement (under regulation 19(2) of the 1987 Regulations) to “21 months **beginning with** the day after the day the [2023 Order] comes into force” (emphasis added). On its face, therefore, there is clear provision that a claim in

respect of the new entitlement cannot be brought before the 2023 Order comes into force, only afterwards. It is this provision which, in my judgment, is the operative provision that achieves the effect that the Secretary of State believes the Order to have.

40. Further, this is not an isolated provision. The remainder of the Order is also consistent with it. Thus, article 3(6) and article 6 (set out above) provide for the periods during which BSP is to be paid in respect of this new (retrospective) entitlement to run from or by reference to the day that the 2023 Order comes into force (“the RO commencement day” defined in article 6(13)). Thus the Order takes a consistent approach: claims must be made after the Order comes into force, and although the entitlement may relate to a period before the Order comes into force, it is only payable for the period after the Order came into force.

Conclusion

41. In short, properly construed, the effect of the 2023 Order is in my judgment retrospectively to create entitlements to BSP in respect of the period between 6 August 2018 and 9 February 2023 that did not exist at the time (even following the decision of the High Court in *Jackson*, given that the effect of a declaration of incompatibility under s 4 HRA 1998 does not affect the continuing validity of the legislation). However, claims to those entitlements could not be made prior to the coming into force of the 2023 Order on 9 February 2023, so that decisions by the Secretary of State and appeals by the Tribunal concerned with claims to BSP made prior to 9 February 2023 properly fell to be considered under the ‘old’ law even after 9 February 2023.
42. So far as the decision of the First-tier Tribunal in this case is concerned, it follows that there was no material error of law. The Tribunal was incorrect to state that “the decisions of the higher courts do not change the law as it was applied to a claim at the time”, because in general the decisions of the higher courts are ‘declaring’ the law as it has always been and thus do have the practical effect of changing the law (see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 378g–h, per Lord Goff of Chieveley). What the Tribunal said was, however, correct as regards the particular decision in the *Jackson* case because declarations of incompatibility under section 4 of the HRA 1998 leave the legislation in question continuing in force and effect. It is also the case that even if the Tribunal had properly considered the effect of the 2023 Order, the outcome would have been the same. Properly construed, the effect of the 2023 Order was to change entitlement to BSP retrospectively, but not to change the law that should be applied to claims for BSP made before the coming into force of that Order. It follows that the First-tier Tribunal was right to strike this claim out, albeit for the wrong reasons. In the circumstances, there is no need to set that decision aside and the appellant’s appeal against that decision does not succeed.

Holly Stout
Judge of the Upper Tribunal

14 January 2025