[2025] UKUT 259 (AAC)

IN THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER) **Appeal No. UA-2024-000647-USTA**

Appellant KK

and

Respondent THE SECRETARY OF STATE FOR WORK AND PENSIONS

BEFORE UPPER TRIBUNAL JUDGE WEST

Hearing Date: 1 August 2025

Decision Date: 1 August 2025

Representation: Mr Alex Kane, welfare benefits caseworker, for the Appellant (Hackney Community Law Centre)

Ms Cecilia Ivimy KC, counsel, for the Respondent (instructed by the Government Legal Department)

ON APPEAL FROM

Tribunal:	First-tier Tribunal (Social Entitlement Chamber)
Tribunal Venue:	Fox Court
Tribunal Case No:	SC242/23/05918
Tribunal Hearing Date:	1/11/2023

Summary of Decision Universal Credit - proper interpretation of regulation 11(3)(a)(i) Universal Credit Regulations 2013 ("the 2013 Regulations") - whether rules governing temporary absence abroad from Great Britain for medical treatment comply with Article 14, read in conjunction with Article 1 to the First Protocol ("A1P1"), of the European Convention on Human Rights - whether a period of absence abroad can be split into multiple phases, such that a universal credit ("UC") claimant who suffers a medical emergency after departure can have his continued absence from Great Britain disregarded under the medical treatment provisions, either under regulation 11 of the 2013 Regulations or, if necessary, in order to achieve a Convention-compliant reading of that regulation

Keyword Name 45 Universal Credit

45.9 Universal Credit other

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

DECISION

The decision of the First-tier Tribunal (Social Entitlement Chamber) dated 1 November 2023 under file reference SC242/23/05918 contains an error on a point of law. The appeal is allowed and the decision of the Tribunal is remade. The Appellant's award of universal credit is superseded from 24 March 2023. The Appellant is refused permission to amend his grounds of appeal to include Ground 2A. The appeal is otherwise dismissed.

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

REASONS

Introduction

1. The issues in this appeal are (1) the proper interpretation of regulation 11(3)(a)(i) of the Universal Credit Regulations 2013 ("the 2013 Regulations") and (2) whether the rules governing temporary absence abroad from Great Britain for medical treatment comply with Article 14, read in conjunction with Article 1 to the First Protocol ("A1P1"), of the European Convention on Human Rights. More particularly, can a period of

absence abroad be split into multiple phases, such that a universal credit ("UC") claimant who suffers a medical emergency *after* departure can have his continued absence from Great Britain disregarded under the medical treatment provisions, either under regulation 11 of the 2013 Regulations or, if necessary, in order to achieve a Convention-compliant reading of that regulation?

The Statutory Framework

2. The Welfare Reform Act 2012 ("the 2012 Act") sets out the basic conditions for entitlement to UC and provides that

> **"Basic conditions**
> (1) For the purposes of section 3, a person meets the basic conditions who—
>
> (a) is at least 18 years old,
>
> (b) has not reached the qualifying age for state pension credit,
>
> (c) is in Great Britain,
>
> (d) is not receiving education, and
>
> (e) has accepted a claimant commitment.
>
> ...
>
> (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;
>
> (b) specify circumstances in which temporary absence from Great Britain is disregarded;
>
> (c) modify the application of this Part in relation to a person not in Great Britain who is by virtue of paragraph (b) entitled to universal credit".

3. Regulation 11 of the 2013 Regulations (in the form in which it existed at the date of decision in this case) then provides (with emphasis added) that

"Temporary absence from Great Britain
11(1) A person's temporary absence from Great Britain is disregarded in determining whether they meet the basic condition to be in Great Britain if—

(a) the person is entitled to universal credit immediately before the beginning of the period of temporary absence; and

(b) *either*—

(i) the absence is not expected to exceed, and does not exceed, one month, *or*

(ii) paragraph (3) or (4) applies.

(2) The period of one month in paragraph (1)(b) may be extended by up to a further month if the temporary absence is in connection with the death of—

(a) the person's partner or a child or qualifying young person for whom the person was responsible; or

(b) a close relative of the person, or of their partner or of a child or qualifying young person for whom the person or their partner was responsible,

and the Secretary of State considers that it would be unreasonable to expect the person to return to Great Britain within the first month.

(3) This paragraph applies where the absence is not expected to exceed, and does not exceed, 6 months and is *solely* in connection with—

(a) the person undergoing—

(i) treatment for an illness or physical or mental impairment by, or under the supervision of, a qualified practitioner, or

(ii) medically approved convalescence or care as a result of treatment for an illness or physical or mental impairment, where the person had that illness or impairment before leaving Great Britain; or

(b) the person accompanying their partner or a child or qualifying young person for whom they are responsible for treatment or convalescence or care as mentioned in sub-paragraph (a).

> (4) This paragraph applies where the absence is not expected to exceed, and does not exceed, 6 months and the person is
>
> (a) a mariner; or
>
> (b)a continental shelf worker who is in a designated area or a prescribed area.
>
> (5) In the regulation
> ...
>
> "medically approved" means certified by a registered medical practitioner;
>
> ...
>
> "qualified practitioner" means a person qualified to provide medical treatment, physiotherapy or a form of treatment which is similar to, or related to, either of those forms of treatment".

The Background Facts

4. The background facts are not in dispute and can be shortly stated. In summary, the Appellant claimed UC in a joint claim with his wife from 2019. On 5 March 2023 he travelled with his wife to India, expecting to return on 1 April 2023. He had previously notified the Department of Work and Pensions of his travel plans. He did not travel in order to undergo medical treatment or convalescence. On 30 March 2023, whilst in India, he was admitted to a medical facility for 2 days for treatment for various medical conditions. On the same date he was medically advised that he should, following discharge, take approximately 3 months' bed rest. This delayed his return. On 26 April 2023 his wife notified the Department of the change and that they had not returned. The Appellant returned to the UK in June 2023.

5. On 10 May 2023 the Secretary of State superseded and disallowed the Appellant's award of UC for the assessment period commencing 24 March 2023 to 23 April 2023 on the basis that there was a relevant change of circumstance on 30 March 2023, when the Appellant ceased to expect to return to Great Britain within one month.

The Decision of the Tribunal

6. The matter came before the Tribunal on 4 October 2023. The Appellant did not appear, having asked for the matter to be determined on the papers and the Tribunal

considered that it was fair to proceed in his absence. The appeal was dismissed. As I have explained, the facts before the Tribunal were not contentious.

7. The Tribunal found that the Appellant's absence exceeded one month, that neither regulation 11(3)(a)(i) nor 11(3)(a)(ii) applied to his absence and that the absence could not accordingly be disregarded. The Tribunal found that the Appellant's award should be superseded for both the assessment period 24 February 2023 to 23 March 2023 and also for the assessment period 24 March 2023 to 23 April 2023.

8. In its statement of reasons of 19 November 2023 the Tribunal found that

> "Decision
> 1. [The claimant] is not entitled to Universal Credit ("UC") for the assessment periods beginning on 24 February 2023 onwards. This is because he did not meet the basic requirement to be in Great Britain and could not be treated as being in Great Britain. He has been overpaid a total of £3,760.00 and that sum is recoverable from him.
>
> Background
> 2. [The claimant] successfully claimed UC on 24 June 2019 in a joint claim with his wife. This means that the assessment periods for his claim ran from the 24th. of each month to the 23rd of the following month.
>
> 3. There is no dispute that on 3 March 2023 [he] advised the Respondent that he was going to be travelling abroad on 5 March 2023 and that he intended to return on 1 April 2023 (see page 8).
>
> 4. On 26 April 2023 [he] informed the Respondent that he was in fact still abroad. This was, he said, because he had fallen ill whilst away and he had been taken to hospital. He said that he had been advised not to travel (see page 8).
>
> 5. On 10 May 2023 one of the Respondent's decision makers decided that [the claimant] had been absent for longer than was permitted. They superseded the decision to award him UC for the assessment period beginning on 24 March 2023. On the same day a further decision was made that [he] had been overpaid £1,880 in UC in respect of that assessment period and that that sum was recoverable from him.
>
> 6. [The claimant] requested mandatory reconsiderations of those decisions and on 12 July 2023 that reconsideration was carried

out. The decision was not changed. [He] then appealed against the decisions to this Tribunal. In their appeal submissions the Respondent now argued that as [the claimant] in fact left the country on 5 March 2023 he also had no entitlement to benefit for the assessment period beginning on 24 February 2023 as he was absent for some of that period, and so the overpayment was now £3,760.

...

10. The points to note from these provisions are as follows. Firstly, the starting point is that, unless the provisions in regulation 11 apply, any absence from Great Britain removes a person's entitlement to UC. It follows that if a claimant does in fact leave Great Britain, they must show that they fall within the exemptions in order to continue to be entitled to benefit.

11. Secondly, there are three conditions to be met in order to fall within the scope of paragraph (1). Firstly, there must be a pre-existing entitlement, which is not a problem in this case. Then the absence must not be expected to exceed one month, and finally, the absence must not in fact exceed one month. It follows that if a person leaves Great Britain only intending to be away for, say, a single day, but in fact they do not return for over a month, their absence must be taken into account from the outset, and they will lose entitlement to benefit unless they can bring themselves within the ambit of the other provisions in regulation 11.

12. With regard to paragraph (3) of regulation 11 it must be noted that a person's absence must be **solely** in connection with their undergoing treatment or convalescence and any treatment must be by or under the supervision of a qualified person and any convalescence must be certified by a registered medical practitioner. Also, in the case of convalescence, the illness or impairment must have been present before the person left Great Britain.

13. With regard to the recovery of overpayments, the law provides that where there has been a revision or supersession of the entitlement decision, all overpayments are recoverable no matter how caused.

14. In addition to those provisions it is also important to bear in mind that UC is payable by reference to assessment periods, and that by virtue of regulation 35(1) and paragraph 20 of Schedule 1 of the Universal Credit etc (Decisions and Appeals) Regulations 2013 any change of circumstances takes effect from the first day of the assessment period in which it occurred.

...

Findings of Fact

17. There was no dispute that [the claimant] and his wife left Great Britain on 5 March 2023, as this is what he has stated in his UC journal (page 8). Although he does not state where he was going to, the medical evidence suggests that he had travelled to Jalandhar in India. I accepted that it was his intention to return on 1 April 2023. In his journal entry on 26 April he clearly stated that the reason for his journey was to take a holiday (page 8) and I accepted that. There was no suggestion that he had travelled abroad in order to undergo any treatment or convalescence.

18. It is not clear when [he] returned to Great Britain but his journal entry for 1 May 2023 clearly shows that he was still away then (page 8). In a journal entry made on 17 July 2023 it states that he was away for 3 months (page 6). There is no doubt, therefore, that he was absent for the period from 5 March 2023 until at least 23 April 2023, a period in excess of 4 weeks. He was, therefore, absent for part of the assessment period beginning on 24 February 2023 and for the whole of the assessment period beginning on 24 March 2023.

...

19. I was also satisfied that [the claimant] was paid £1,880 in UC for those two assessment periods (see pages 20 and 44). This makes a total payment of £3,760.00.

20. [His] case, which I entirely accept, was that while he was away he became ill and had to be admitted to hospital. The medical evidence shows that he was advised to take complete bed rest from 30 March 2023 to 5 June 2023 (see page 40). I accept that he received medical advice to the effect that he should not travel and that as a result he was unable to return home on the date that he had planned. The treatment he received was as a result of his being taken ill whilst away, it was not treatment for which he had made his journey in the first place.

Conclusions

21. I concluded that [the claimant] did not fall within the scope of regulation 11 and that his absence could not be disregarded. Although he had a pre-existing entitlement to UC and although he did not intend to be away for more than a month, his absence did in fact exceed the period of 1 month.

22. I was satisfied that [he] could not bring himself within the scope of regulation 11(3). He had not travelled to India to undergo treatment and there was no certificate to show that he

> was undergoing medically approved convalescence. In any event, I was also satisfied that the reasoning behind his visit was to have a holiday and, therefore, it cannot be said that he was absent solely for medical purposes.
>
> 23. In this case regulation 11 does not apply because the absence in fact exceeded 1 month and regulation 11(3) does not apply. That being the case the whole of the absence must be taken into account. This began on 5 March 2023.
>
> 24. In my judgment [the claimant's] departure from Great Britain on 5 March 2023 for a period which in fact exceeded 1 month amounted to a change of circumstances for the purposes of regulation 23 of the Universal Credit etc (Decisions and Appeals) Regulations 2013 and thereby justified the making of a supersession decision in relation to entitlement. That change of circumstances took effect from the first day of the assessment period in which it took place, which, in this case, was 24 February 2023. It follows that [the claimant] was not entitled to UC for that assessment period. [He] did not return to Great Britain until after the end of the next assessment period, 23 April 2023, and so he was also not entitled to UC for the assessment period beginning on 24 March 2023.
>
> 25. I was satisfied that the original decision to award UC had been superseded by the entitlement decision made on 10 May 2023. [The claimant] was not entitled to UC for the two assessment periods in question. It follows that he has been overpaid a total of £3,760. As all overpayments are recoverable whatever their cause, it follows that that sum is recoverable from [him]."

9. The claimant applied for permission to appeal on 19 December 2023, which application was refused on 1 March 2024 by the District Tribunal Judge. That decision was issued to the parties on 5 April 2024. He then sought permission to appeal from the Upper Tribunal on 7 May 2024 raising new grounds not raised before the Tribunal. That renewed application was made in time because 7 May 2024 was the first working day after 5 May 2024.

10. On 14 June 2024 I acceded to the claimant's application and granted him permission to appeal, although I remarked that I remained to be convinced that ground 1 disclosed an error of law, but did not exclude it from the grant of permission to appeal. I made directions for the provision of further submissions by the parties.

11. I heard the appeal on the morning of 1 August 2025 when the parties were represented by Mr Alex Kane of Hackney Law Centre for the Appellant and Ms Cecilia Ivimy KC for the Secretary of State. I reserved my decision.

The Grounds of Appeal

12. The grounds of appeal for which permission was given were:

Ground 1: The Tribunal erred in its treatment of regulation 11(3)(a)(i) of the 2013 Regulations in requiring the need for medical treatment to predate a claimant's departure from Great Britain

Ground 2: In the alternative, the Tribunal was required to give regulation 11 a Convention-compliant interpretation on the basis that it otherwise unlawfully interfered with the Appellant's Article 14 ECHR rights, taken with Article 1 of the First Protocol to, the European Convention on Human Rights (he no longer relies on Article 8).

13. Further to his Reply, the Appellant sought permission to add a ground 2A, which is an alternative Article 14 discrimination argument based on an alleged difference in treatment with housing benefit claimants in respect of the housing cost element:

> The Tribunal was required to give regulation 11 a Convention-compliant interpretation on the basis that the rules treat him less favourably, for no good reason, than either: (1) a person in exempt, rather than settled, accommodation, or (2) a person who has attained the qualifying age for State Pension Credit (or as a member of a couple, of whom both members have reached that age)

14. Ground 3: the Secretary of State fairly identified an alternative basis for part-allowing the appeal: it is clear under ***AM v Secretary of State for Work and Pensions (UC)*** [2024] UKUT 137 (AAC) has the effect that, should the other grounds fail, the Appellant's award was to be superseded and disallowed from 24 March 2023, not 24 February 2023, reducing the amount of (recoverable) overpayment to £1,880.

Ground 1: Interpretation of the 2013 Regulations

15. The real issue between the parties on this ground is whether the "solely in connection" imposes both (as says the Secretary of State) a temporal and purposive requirement, or merely a purposive requirement.

16. The Appellant submits that the 2013 Regulations permit phasing of an absence such that a claimant whose absence is disregarded under one basis may have his continued absence disregarded on another. That is not limited to regulation 11(2) ("the bereavement disregard").

17. Regulation 11 neither textually nor structurally excludes such a disregard.

18. The basic conditions for entitlement to UC include being in Great Britain and regulations may "specify circumstances in which *temporary absence* is to be disregarded" (emphasis added)]: ss.4(1)(c), 4(5)(b) of the 2012 Act

19. A claimant must be entitled to UC immediately before the beginning of the period of temporary absence. Regulation 11(1)(b) sets out several different bases for disregard.

20. The argument that the phrase "solely in connection with" means both covering the entire period of absence and being for no other purpose than medical treatment is the "entire trip" approach, whereas the argument that "solely" simply means there are no other reasons than medical treatment for the fact that the claimant is outside Great Britain at any time is the "given time" approach.

21. First, the "entire trip" approach requires regulation 11(3)(a)(i) to be read as containing a requirement that the treatment be pre-arranged that its text does not.

22. In ***Secretary of State for Work and Pensions v NJ (ESA)*** [2024] UKUT 194 (AAC) at [35], a case in relation to the Employment and Support Regulations 2008 ("the ESA Regulations"), Upper Tribunal Judge Stout considered that the Tribunal judge was right to focus on the claimant's reasons for extended absences going beyond the initial four week period permissible in ESA absences as "it is only the extended period that needs to fall within the scope of regulation 153. Any shorter

period will be caught by regulation 152." Regulation 152 and 153 of the ESA Regulations are structurally similar. Those appear to be different "pathways", as might regulation 11(1)(b)(i) and regulation 11(1)(b)(ii).

23. The predecessor regulations both required an absence to be for the specific purpose of being treated for incapacity for work which commenced before leaving Great Britain.

24. Second, the structure of regulation 11 should not be a barrier to this analysis. If there is an issue, it must arise from the "solely in connection" condition:

(a) The rarely used mariner/continental shelf disregard provisions (under regulation 11(4)) occupy the same position within the structure of regulation 11. Regulations 11(3) and 11(4) are direct alternatives: regulation 11(1)(b)(ii).

(b) If a claimant who is a continental shelf worker is initially abroad on a one month absence, then moves to a "prescribed area" as to engage regulation 11(4), there should be no barrier to his taking advantage of the 6 month disregard period without first returning to Great Britain.

(c) Nor should there be any barrier arising from the relationship of the related disregard provisions by moving from a regulation 11(1)(b)(i) to a regulation 11(3) absence.

25. Regulation 11(1)(b) sets out various possible bases of disregard.

26. The default is an absence not expected to exceed one month, which does not actually exceed one month. That may be extended by up to a further month where:

(a) The absence is *in connection* with the death of a close family member and

(b) The Secretary of State considers it unreasonable to expect the claimant to return within one month

27. In a regulation 11(2) case (bereavement), a claimant is still relying on regulation 11(1)(b)(i), but the time period is simply extended.

28. It is possible to go from regulation 11(1)(b)(i), whether or not extended by regulation 11(2), to regulation 11(1)(b)(iii) (where reg 11(4A) is engaged).

29. It must be possible to go from regulation 11(1)(b)(i) (again, whether or not extended by regulation 11(2)) to reg 11(1)(b)*(ii)* (where regulation 11(4) is engaged). Otherwise, it would lead to an absurd result insofar as the latter concerns regulation 11(4) (mariners; continental shelf workers in a designated/prescribed area).

30. Regulation 11(3) occupies the same position within the structure of regulation 11 as does regulation 11(4). There cannot be a structural problem with going from regulation 11(1)(b)(i) to (ii) unless the "solely in connection with" requirement makes it so.

31. Similarly, it would be possible to go from regulation 11(3) to regulation 11(4) or vice versa.

32. Third, adopting ***AM'***s reconciliation of regulation 11 with the assessment period concept, the question is: was there a change of circumstances justifying supersession by the end of a given assessment period.

33. The Appellant submits that ***AM*** lends some support to the possibility of an absence being disregarded initially on the basis of regulation 11(1)(b)(i) and then under regulation 11(3): "the absence" for the purpose of regulation 11 is not immutable. In Assessment period 2, the assessment period ceased to be one which was disregarded. It is not the period of absence which is disregarded, but the fact of the claimant's absence.

34. In circumstances where entitlement continues until the supervening circumstance (here, a need for medical treatment), there are no grounds for supersession. If the relevant regulation 11 time period is exceeded, then there would be grounds to supersede and disallow the award.

(a) A claimant who exceeds one month of absence and does not fall within regulation 11(2), 11(3) or 11(4) will have his award superseded and disallowed effective from the beginning of assessment period 2.

(b) A claimant who does fall within those paragraphs will have retain entitlement in assessment period 2.

35. The Appellant does not accept that a seven month period of permissible absence would be created on this interpretation. The submission is that the decision maker is no longer concerned with the initial period. Either the initial absence has been disregarded under regulation 11(1)(a) (possibly extended by regulation 11(2)) and the award has continued, or it has not, and must be disallowed. There still remains a 6-month total limit.

36. The correct reading at all material times has been that a period of factual absence from Great Britain cannot exceed 6 months if entitlement is to continue. A continental shelf worker who travels to a prescribed area from an unrelated one month absence would otherwise have been capable (prior to the 2025 amendment) of attracting a 7-month absence if there were no such limit implied within the structure of the original regulation 11.

37. The phrasing “in connection with” does not directly implicate the claimant’s purpose, as would a test involving reasonable belief. Even on the Secretary of State’s approach, the purpose of the treatment cannot be decisive. The objectivity in the ‘solely in connection with’ condition cuts both ways. If, for example, a claimant is rendered comatose by an accident on arrival at the destination airport, the entire time abroad is coextensive with medical treatment. That would nonetheless be solely in connection with such treatment. The intention of a claimant may clearly be relevant to the categorisation of the absence. Mixed intentions at the operative time will be fatal to an argument that absence should be disregarded under regulation 11(4).

38. At a time when the Appellant's absence fell squarely within the one month rule, his absence ceased to be for any other reason than medical treatment. That is what allows the continuing absence to be disregarded.

39. Fourth, the "before leaving Great Britain" proviso. The failure to exclude illness/impairment which postdates departure from Great Britain from the ambit of regulation 11(3)(a)(i), where the same is specifically excluded by regulation 11(3)(a)(ii) in connection with convalescence/care, suggests that it ought to be possible to disregard under the former continued absence which is solely in connection with medical treatment that was not preplanned.

40. Regulation 11(3)(a)(i) is not subject to the qualification, as is 11(3)(a)(ii) (convalescence or care), that "the person had that illness or impairment before leaving Great Britain".

41. It would have been open to the drafters of the Regulations to include that same qualification in regulation 11(3)(a)(i), or as an umbrella in 11(3) or 11(3)(a). They did not.

42. That contrasts with the previous regulations dealing with absence from abroad. The equivalent in regulation 153(c) of the ESA Regulations did not make separate provision for convalescence, but included a similar proviso (albeit that the absence abroad needed to be for the purpose of treatment for limited capability for work):

> "the claimant is absent from Great Britain solely—
>
> (i) in connection with arrangements made for the treatment of the claimant for a disease or bodily or mental disablement directly related to the claimant's limited capability for work *which commenced before leaving Great Britain*" (emphasis added).

43. The "entire trip" approach appear to make that distinction redundant. It is difficult to see how an absence abroad for a condition which a claimant did not have before leaving Great Britain could ever be disregarded.

44. Adopting a cautionary belt and braces approach, the Appellant submits that the more natural approach for the draftsman would be to adopt that across both the medical treatment and convalescence limbs.

45. The certification point does not add significantly to the analysis. It does not go to whether or not an illness must predate the travel abroad.

46. The Appellant submits that the mischief at which the "solely in connection" condition is directed is the possibility of claimants obtaining minor medical treatment to justify time abroad. That would be the effect if merely "in connection with" was the test. "Solely in connection" having only a qualitative, and not a temporal, dimension, is consistent with the drafting of the regulation.

47. Fifth, while only the bereavement disregard involves "extension", that is consistent with its being the only disregard (prior to recent amendment) to involve a two stage test:

(a) Is the absence abroad in connection with a relevant death

(b) Is it unreasonable to expect the person to return within one month

(c) The Secretary of State (or the Tribunal) may extend time by up to a further month

48. Sixth, that interpretation avoids inconsistency with the housing benefit scheme (if the reading below holds); a scheme which is structurally similar.

49. The housing benefit rules are set out here rather than under Ground 2A. The Secretary of State has at this point sought to rebut the Article 14 argument rather than disagreeing on construction of the Housing Benefit Regulations, but it is acknowledged this may well be a point of dispute.

50. If the effect of the 2013 Regulations is to require a preplanned absence, the Appellant submits there would be significantly different protection of a claimant's

housing costs depending on whether he receives UC housing costs element or housing benefit.

51. While the permissible periods of absence were tightened by the Housing Benefit and State Pension Credit (Temporary Absence) (Amendment) Regulations 2016 to align more closely with the relevant periods for UC absences, the structure of housing benefit was left unchanged.

52. In the Housing Benefit Regulations, absence abroad is managed as an aspect of the condition that a claimant is normally occupying the home, rather than part of a basic condition of presence in Great Britain.

53. Regulations 7(13C) and (13D) make provision for a person abroad to be treated as occupying a dwelling as his or her home for up to 4 weeks. Regulation 7(13E) makes provision for extension to up to 8 weeks in the case of a relevant death, analogous to regulation 11(2) of the Regulations.

54. Regulation 7(17C), taken with regulation 7(16), provides for a longer 26 week permissible absence abroad in the case of temporary absentees who are, among other conditions

> "(ii) resident in a hospital or similar institution as a patient; or
>
> (iii)undergoing, or as the case may be, his partner or his dependent child is undergoing, medical treatment, or medically approved convalescence, in accommodation other than residential accommodation; or
>
> ...
>
> (vii) a person who is receiving medically approved care provided in accommodation other than residential accommodation …".

55. This structure provides the possibility to transfer between different exceptions in relation to absence abroad during an award. ***CH/996/2004*** demonstrates in the housing benefit context the possibility of changing the basis of disregard.

56. That involved a claimant who left the UK on 28 February 2001 at [4] and booked a return flight on 30 April 2001 for 11 June 2001 at [19]. This meant that it stopped being "unlikely" that he would return home within 13 weeks (the permitted length of absence from the home at the time). Sometime after 30 April 2001, he became ill with viral hepatitis: at [6, 20]. His underlying entitlement to housing benefit resumed, ending when his absence was no longer unlikely to exceed 52 weeks (the permitted length of absence from the home in cases of medical treatment at the time): at [20.3].

57. Finally, this interpretation avoids the difficult consequence that a claimant is not required to "reset" his or her absence to obtain medical treatment. The Secretary of State's interpretation permits a claimant (if he can achieve the medically inadvisable by returning to Great Britain) to reset the clock and begin a new period of absence. This is a point which is submitted also to go to justification.

Ground 2: Interference with Convention rights

58. This ground only arises if ground 1 is wrong and regulation 11(3)(a)(i) does require medical treatment which is the sole cause of a claimant's absence from Great Britain to be prearranged on ordinary principles of interpretation.

59. It is common ground that A1P1 is engaged on ambit.

60. In the application for permission, this was put as ***Thlimmenos*** discrimination in failure to make different provision. It may more aptly be characterised as indirect discrimination on the basis that the one month standard rule is more likely to affect disabled people. The issue is therefore the measure itself, rather than the difference in treatment. Identifying the measure is therefore critical.

61. The Appellant would frame the measure as the regulation 11 scheme of disregards of absence abroad, in which a one month rule is applicable to all claimants, which cannot in any health-related circumstances be extended.

Status

62. The Appellant relies on status as a disabled person in establishing indirect discrimination. It is recognised however, that with status reduced to "vanishing point"

(***Stevenson v Secretary of State for Work and Pensions*** [2017] EWCA Civ 2123 at [41]) other, narrower statuses are plausible. Those narrower statuses, such as comparing with those who require treatment whilst in Great Britain (wherever that treatment actually occurs) with those who require treatment once physically outside Great Britain (even if treated as in Great Britain) are likely to be justified as not manifestly without reasonable foundation.

63. Person A, a person in full health, and Person B, a disabled person, are both subject to the same default one-month absence abroad rule in the absence of a relevant bereavement on an absence not intended to be for the purpose of medical treatment, assuming he is not an offshore worker or mariner. Though A and B are both subject to the default one month absence rule, B is at greater risk of losing entitlement of benefit for reasons connected with his status.

64. Issue is taken with the connection of the Appellant's extended absence with his disabilities. His hospital admission included treatment for bronchial asthma. He was treated with oxygen and nebulisers.

Difference in treatment

65. As the Secretary of State acknowledged in her Statement under s.174(2) of the Social Security Act 1992, following the report of the Social Security Advisory Committee in relation to the 2016 amendments to housing benefit and state pension credit absence abroad provisions, "both older people and disabled people are more likely to need to go outside GB for medical treatment, or to need hospital treatment when they are abroad".

66. The Secretary of State does note that only very limited data was available in respect of legacy benefits and that does not appear to have changed since the roll-out of UC. The Upper Tribunal is invited to adopt the observation in that statement in a prima facie case for indirect discrimination (accepted by the Secretary of State in an impact assessment relating to tightening the housing benefit absence abroad requirements).

Justification

67. The standard of justification is in issue. Although clearly a measure in social and economic policy, it is submitted there can be expected to be a disparate impact on disabled persons. Lord Reed PSC observed in ***SC*** at [188], that the ECtHR has "held that very weighty reasons have to be put forward before a difference in treatment on the ground of gender be regarded as compatible with the Convention, whether the alleged discrimination is direct or indirect".

68. The Appellant accepts there is some force in the point that certain insurable risks are assumed by claimants travelling abroad. Persons who require medical treatment unconnected to status of disability (for instances, natural disasters and accident cases) can fairly be said to have taken a risk of travelling. The Appellant submits that (assuming this ground arises) it applies in disability-related medical treatment cases, but not in accident cases because it is within the scope of a relevant status outside a claimant's control. There is a greater risk to disabled persons of being "stranded" due to medical needs, particularly in persons with comorbidities.

69. The Secretary of State considers the justification for the regulation 11(3) rule allowing treatment that cannot be obtained in the country, or treatment abroad on the NHS. But that is not what the provision achieves. Necessity may of course be relevant to assessment of whether a given absence is as a matter of fact solely in connection with medical treatment.

70. The Secretary of State contends there are evidential and operational difficulties associated with verifying medical treatment. It is said to be more challenging accurately to verify the detailed reasons for being abroad and there is an increased risk of fraud. Those concerns are misplaced.

(a) This is likely to be a relatively small cohort.

(b) These are not concerns unique to a need for treatment postdating a claimant's departure from Great Britain. Decision makers already need to make evaluative judgements on issues of intention to return, extension for a relevant bereavement, and indeed whether a given absence is solely in connection with medical treatment: cf. ***NJ (ESA).***

(c) Compelling evidence is likely to be required in any case to which the provision applies. A claimant's contention that it was medical treatment that delayed his or her return are apt to be carefully scrutinised. This is precisely the sort of case where supporting documentary evidence can be readily expected of a claimant.

(d) The Secretary of State is of course entitled to adopt a precautionary approach and has powers to suspend benefit under Part 5 of the Decisions and Appeals Regulations in order to conduct enquiries. On the claimant's side, the safeguards of revision and appeal are available in the event of refusal. The Secretary of State is entitled to test robustly a claimant's evidence at any hearing and make representations if the refusal is challenged.

(e) The critical distinction between medical absence connected to a disabled person's health and other absences Contrary to the Secretary of State's concern about policy implications for the other permitted absence periods, there is no reason for there to be any broader impact.

Remedy

71. It is agreed that disapplication would not assist the Appellant as he would not have met the basic condition and he acknowledges that the Upper Tribunal lacks jurisdiction to make a declaration of incompatibility. There only lies an effective remedy before the Upper Tribunal in the event of breach, if the incompatible provisions can be reinterpreted under s.3 of the HRA.

72. The interpretation of regulation 11 is, if not correct, at least tenable and can provide a basis for a Convention-compatible reading which remedies the discrimination.

73. The Secretary of State's justification on disability discrimination likely meets the manifestly without reasonable foundation standard, but it falls short of "very weighty reasons".

Ground 2A: Discrimination with respect to housing benefit claimants

74. The first issue is whether the Housing Benefit Regulations would have permitted the Appellant's housing costs entitlement to continue, which analysis is set out above.

75. If so, does the difference in treatment result in unlawful discrimination to UC claimants (those who are left with no choice but to claim UC by reason of age, relationship status or their type of accommodation)?

76. Here, the Appellant relies (under ***Stevenson*** in particular) on a much narrower status as (then) a working-age person in settled accommodation. As a result, he could only claim UC for housing costs support.

77. He would plead differential treatment in respect of either claimants who have attained qualifying age for state pension credit, or alternatively homeless persons or persons in supported accommodation. This alleged differential treatment does not involve a suspect ground, and therefore the standard of justification is "manifestly without reasonable foundation".

78. The Appellant acknowledges the decision of this tribunal in ***RJ v HMRC; HMRC v RJ*** [2021] UKUT 40 (AAC) at [106] on the differential treatment under replacement benefit systems.

79. He submits that ***RJ*** should be distinguished because UC (particularly the housing costs element) is not a replacement for housing benefit. They continue to exist side by side and will continue to do so. The structure of the absence abroad provisions results in differential (and it is submitted unjustified) treatment.

80. Regulation 6A of the Universal Credit (Transitional Provisions) Regulations 2014 "("the UC (TP) Regulations 2014") carves out specific circumstances for which there is no end to housing benefit entitlement, notwithstanding the roll-out of UC.

81. Tax credits, while extant and the time of ***RJ*** and until recently, were to be abolished, not qualified. The groups who remain able to claim are considerable: all pension age people without a partner under such age (that is, any pensioner other than a member of a mixed age couple), who would otherwise meet the conditions for

housing benefit, plus those in exempt accommodation. Only housing benefit could survive managed migration under Part 4 of the UC (TP) Regulations 2014.

Justification

82. There appears to be no issue with a housing benefit claimant moving from a 4-week disregard to a 26-week disregard for unplanned medical treatment. It is not apparent that the fusion of multiple benefits into one composite benefit justifies a difference in treatment between housing benefit and UC claimants insofar as (the Secretary of State's case) the former may have their homes protected by continuing benefit during medical treatment abroad whereas the latter may not.

83. The fact that the mechanism through which housing benefit deals with claimants leaving the country is different is an issue of form rather than substance. Housing benefit achieves through the lens of "occupation of the claimant's property as the home" what UC does via treating a claimant as in Great Britain.

84. The Secretary of State notes that housing benefit serves a more limited purpose than other legacy benefits. But that is the same purpose served by the housing costs element of UC. The practical reality is that, unless a claimant is in settled housing provided by a local authority or housing association, the housing costs element is likely constitute the bulk of a claimant's award (as was the case here).

85. The Secretary of State largely sought to maintain the status quo. The rules on UC, (if ground 1 fails) do not represent the status quo in relation to housing costs provision. In circumstances where a housing benefit claimant would have his housing costs protected, there is no justification to fail to do so for UC claimants.

86. The Appellant submits, in accordance with Ground 1, that the 2013 Regulations can and should be read to permit genuine medical treatment which is the sole reason a claimant remains outside Great Britain, provided that there has been no ground for supersession and disallowance. That interpretation does not run against the grain of the legislation.

87. There is bespoke provision in which entitlement to the housing costs element may continue to run while the claimant is disqualified as a prisoner. It is accepted that to read in an exception would clearly amount to impermissible redrafting.

Why the Upper Tribunal is invited to grant permission: factors other than merits

88. It is acknowledged that this point is raised for the first time at a late stage and risks adding further delay to proceedings which have already involved significant delay, particularly given that the Secretary of State would need fair opportunity to respond.

89. The power to allow amendment is a broad discretionary power, to be exercised in accordance with the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the 2008 Rules"), and on balance, permitting the new ground (if deemed arguable) would further that objective for these reasons:

(1) The Secretary of State has filed detailed witness evidence from a senior civil servant on the justification of the absence abroad rules and provided supporting contemporaneous policy documents on those regulations. That evidence does touch on the housing benefit rules. Any further evidence required would build on that, and is limited in scope.

(2) The Secretary of State is now recovering via deductions from ongoing benefit the overpayment which currently exists and that will not change (the deduction as things stand would be due to take place for a number of years). So further delay causes [??}, aside from the resources involved with these proceedings.

(3) Any further delay should not be substantial. While the Appellant's representative has certainly contributed to the delay, there has been delay on both sides in what is a complex case.

(4) The inquisitorial nature of social security tribunal procedure extends to appeals on points of law to the Upper Tribunal. If it had become apparent that this was an arguable issue, the Upper Tribunal could in any event become obliged to deal with it.

(5) The 2008 Rules give avoiding unnecessary formality and seeking flexibility in the proceedings. dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties. The Appellant continues to qualify for means-tested benefit and is reliant on charity assistance. Representation is outside the scope of legal aid even before the Upper Tribunal and in this case Exceptional Case Funding for counsel's opinion was refused.

(6) The impact of a refusal, if the underlying ground is deemed to have a realistic prospect of success, would be a risk of a s.6 HRA breach on the part of the Upper Tribunal.

(7) It may be thought desirable for a conclusive answer on this issue which is yet (as far as we aware) to be decided by any court of record.

(8) If the further ground might realistically succeed, it may be thought preferable to case manage to limit further delay rather than to refuse permission. The Upper Tribunal may consider that limiting any further exchange to written submissions may be sufficient to mitigate the risk of any further delay.

Ground 3: the Secretary of State's concession as to the amount of overpayment

90. The Secretary of State candidly and fairly identified ***AM*** as a basis for part-allowing the appeal. The Appellant agrees that the decision that he was overpaid for two assessment periods, rather than one, cannot survive Upper Tribunal Judge Church's analysis in ***AM***. He concedes that there was a recoverable overpayment for one assessment period.

The Secretary of State's Submissions

91. In summary, the response of the Secretary of State is as follows.

(1) Ground 3: *assessment period beginning 24 February 2023*. The Secretary of State invited the Upper Tribunal to the appeal in part on an additional ground not raised by the Appellant. The Appellant's absence during the whole of the first assessment period, commencing 24 February 2023 and ending on 23 March 2023, met the

conditions for disregard under regulation 11(1)(b)(i). The relevant change of circumstance occurred in the *second* assessment period, which commenced on 24 March 2023. The Tribunal accordingly erred in finding that supersession should take effect from 24 February 2023. The Appellant agreed.

(2) Ground 1: even if the Appellant's absence from 30 March 2023 to 23 April 2023 was solely in connection with qualifying treatment, that absence cannot be disregarded under regulation 11(3)(a)(i). The natural and proper meaning of regulation 11(3)(a)(i) is that, as at the date of the relevant decision, the entire period of absence abroad, from leaving Great Britain to return, must be *solely* in connection with qualifying treatment to be disregarded. It does not operate as an extension to the usual one month period for persons who are absent abroad for some other reason and then find that their return is delayed by unplanned medical treatment. In such cases, the usual one month disregard period alone applies.

Ground 2: the Appellant alleges that the one month rule in regulation 11(1)(b) discriminates indirectly against him Appellant as a disabled person in breach of Article 14 read with A1P1. There is insufficient evidence before the Upper Tribunal to establish any prima facie indirect discrimination on grounds of disability. Alternatively, the rule as drafted pursues the legitimate aims of ensuring that the general condition that claimants be in Great Britain (necessary for the fair and effective targeting of public funds) is not undermined by widely drawn exceptions, and the need for exceptions to be fair, clear and administratively workable. The rule is rationally connected to those aims. It constitutes a deliberate legislative choice and cannot be impugned as manifestly without reasonable foundation.

(4) Ground 2A: the Appellant seeks to amend to add a new Article 14 ground that temporary absence rules directly discriminate against UC claimants as compared to certain housing benefit claimants. That amendment should not be permitted: it is raised at a late stage, after the Secretary of State has served her evidence, and the Secretary of State is prejudiced as a result. In any event the ground is not arguable on the merits.

92. The Secretary of State invites the Upper Tribunal: (1) to remake the decision of the Tribunal and to decide that the Appellant's award is superseded from 24 March 2023, (2) to refuse permission to amend to add Ground (2A) and otherwise to dismiss the appeal.

Temporary absence

93. The relevant legislative framework governing temporary absence is not in dispute. S. 4(1)(c) of the 2012 Act provides that it is a basic condition that a claimant for UC "is in Great Britain". S.4(5)(b) provides that regulations may "specify circumstances in which temporary absence from Great Britain is disregarded".

94. The relevant circumstances are specified in regulation 11 of the 2013 Regulations, which were approved under the affirmative procedure by a resolution of each House of Parliament.

95. The effect of regulation 11(1)(b)(i) is accordingly that, subject to prior entitlement, any absence which is not expected to exceed and does not exceed one month is disregarded; this includes periods of absence for medical reasons.

96. The effect of regulation 11(3), read with regulation 11(1), is that absences for medical reasons are to be disregarded for a longer six month period if a series of conditions are met:

(1) Prior entitlement: the person must be entitled to UC "immediately before the beginning of the period of temporary absence": regulation 11(1)(a).

(2) Period: the absence must not be expected to exceed and must not exceed 6 months: regulation 11(3)).

(3) Purpose: the absence must be "solely in connection with" qualifying treatment or qualifying convalescence: regulation 11(3)(a)(i) and (ii).

Decisions, change of circumstance and supersession

97. S.7(1) of the 2012 Act provides that UC is payable in respect of each complete assessment period within a period of entitlement.

98. Regulation 23 of the Universal Credit etc (Decisions and Appeals) Regulations 2013 ("the Decisions Regulations") provides that the Secretary of State may supersede a decision in respect of which there has been a relevant change of circumstance since the decision to be superseded had effect.

99. Regulation 35(1) of the Decisions Regulations provides, so far as relevant:

> "Schedule 1 … makes provision for the date from which a superseding decision takes effect where there has been … a relevant change of circumstances since the earlier decision took effect".

100. Paragraph 20 of Schedule 1 provides so far as relevant:

> "in the case of universal credit, a superseding decision made on the ground of a change of circumstances takes effect from the first day of the assessment period in which that change occurred or is expected to occur."

Submissions

(a) Regulation 11(1)(b): assessment period beginning 24 February 2023

101. During the whole of the assessment period 24 February 2023 to 23 March 2023, the Appellant met the conditions for his absence to be disregarded under regulation 11(1)(b)(i): he was entitled to UC immediately before his temporary absence commenced when he left Great Britain on 5 March 2023 and throughout the assessment period his absence was not expected to exceed, and did not exceed, one month. There was no change of circumstance which required notification during that assessment period.

102. The fact that, in the following assessment period 24 March 2023 to 23 April 2023 there was a change of circumstance, in that, as of 30 March 2023, his absence was no longer expected not to exceed one month, and from 5 April his absence in fact exceeded one month, does not change that analysis: the Appellant's absence during

the first assessment period fell within regulation 11(1)(b)(i) and was required to be disregarded: see the analysis of the Upper Tribunal in ***AM v Secretary of State for Work and Pensions*** [2024] UKUT 137 (AAC) at [25].

103. Accordingly, it is not in dispute between the parties that the decision to supersede and disallow the Appellant's UC claim for the period 24 February 2023 to 23 March 2023 was incorrect. This was a material error of law and financially disadvantageous to the Appellant. The Secretary of State invites the Upper Tribunal to exercise its discretion to remake this part of the decision pursuant to s. 12(2)(b) of the 2007 Act rather than remit to the Tribunal for rehearing.

(b) Ground 1: interpretation of regulation 11(3)(a)(i)

104. The Appellant argues that, when interpreting regulation 11(3)(a)(i), temporary absence may be taken as "the fact of being absent", which he calls the "given time approach", rather than by reference to the entire period of absence, which he calls "the entire trip approach". He argues that a period of absence which is not solely for qualifying treatment at the outset of the absence may nevertheless be disregarded if, after the trip has commenced, the continued absence is solely for qualifying treatment and the other conditions for disregard are met (i.e. the prior entitlement and six month period conditions).

105. This is contrary to the wording of regulation 11(3), the structure of regulation 11 as a whole and its purpose:

(1) Regulation 11(1) determines when "a person's temporary absence from Great Britain is disregarded". Each of the disregard exceptions includes a time limit for temporary absence expressed as a period of months. These periods must be calculated for each assessment period by reference to the expected or actual length of the temporary absence. As to when temporary absence commences and ends for this purpose, the natural meaning of the words "temporary absence from Great Britain" is a period which commences when the claimant leaves Great Britain and ceases when he or she returns. Temporary absences from Great Britain which meet certain criteria – as to length, purpose and/or circumstance – are then disregarded.

(2) For medical treatment, in addition to a maximum 6 month period, regulation 11(3)(a)(i) provides that "the absence" must be "solely in connection with" qualifying treatment. The reference to "the absence" refers back to 11(1): "a person's temporary absence from Great Britain". "Solely" in this context, on its natural meaning, refers to singularity of purpose. In other words, absence which is for the mixed purpose of holiday and medical treatment, or absence which commences for the purpose of holiday but then becomes absence for the purpose of medical treatment, will not be "solely in connection with" medical treatment.

(3) The Appellant accepts the former proposition, but not the latter. In addition to running contrary to the natural meaning of the words "the absence" and "solely" in regulation 11(3) (see above), this construction does not work when regulation 11 is read as a whole. Since the Appellant accepts that the prior entitlement condition applies, on his case the absence period which is to be disregarded must commence during the initial one month disregard period allowed by regulation 11(1)(b)(i) (otherwise there could be no prior entitlement). Presumably, he accepts that the period of absence for the purposes of regulation 11(1)(b)(i) must be calculated by reference to when the claimant left Great Britain. But his case is that regulation 11(3) then permits that one month period to be extended, with the subsequent period of absence calculated by reference not to when the claimant left Great Britain but by reference to its purpose. There is no good reason why the same concept - "the absence" - should be construed in different ways within the same section.

(4) Moreover, regulation 11(1) provides that the exceptions in regulations 11(1)(b)(i) and 11(3) are in the alternative ("either … or"). If it had been intended that a period of absence for medical reasons could extend the standard one month disregard by up to a further six months, the drafters would have included an extension provision similar to regulation 11(2). The wording of regulation 11(3) is different: it does not extend the one month period, but provides for an entirely separate six month period of disregard. Further, the effect of the Appellant's interpretation is that, if a claimant happens to require treatment during the first month of a trip abroad, he is entitled (arbitrarily) to claim for up to a seven month total period of absence from Great Britain, when the intention is clearly that the maximum absence allowed should be six months.

(5) Nor does the Appellant's construction accord with the purpose of regulation 11(3). Regulation 11(3) is (as the above analysis shows) not intended to extend the period for which UC is available to persons temporarily absent from Great Britain if they experience medical emergencies within one month of travelling abroad. Rather, the mischief at which regulation 11(3) is aimed is ensuring that people who need to leave Great Britain to obtain treatment or for convalescence are not penalised by having their benefit withdrawn. Their position contrasts with those who unexpectedly experience a medical emergency while abroad: anyone who chooses to travel can be expected to assume that risk and, in principle, to insure against it, see the witness statement of Jackie Germain at [30]. This underlying purpose is reflected in the fact that regulation 11(3)(a)(i) is drafted by reference to treatment by a qualified practitioner. If it were intended to extend time for persons who experience a medical emergency abroad, one would expect it to be drafted by reference to whether a medical condition (and not specific treatment for a medical condition) prevents a claimant from returning to Great Britain.

(6) Regulation 11(4) does not assist the Appellant. The same arguments apply to regulation 11(4) as to regulation 11(3). Regulation 11(4) is an alternative and not an extension to regulation 11(1)(b)(i).

(7) The proviso in regulation 11(3)(a)(ii) that the claimant must have had the relevant medical condition "before leaving Great Britain" does not assist the Appellant either. He argues that the absence of such a proviso in reg. 11(3)(a)(i) means that it must have been intended that temporary absence for treatment for a medical condition which arises for the first time within the one month period after the claimant has left Great Britain can be disregarded. That does not follow. As explained above, such an interpretation is at odds with the wording, structure and purpose of regulation 11 as a whole. Nor is there a coherent reason why the relevant medical condition should have to pre-date the leaving of Great Britain in the case of convalescence under regulation 11(3)(a)(ii), but not in the case of regulation 11(3)(a)(i). The more natural meaning is that the two provisions both require that the purpose of the absence – to treat a medical condition, or to convalesce from a condition – is required from the outset of the absence in each case. The proviso in regulation 11(3)(a)(ii) simply reflects the specific rules governing convalescence which require prior certification of the underlying

condition by an approved medical practitioner: see regulation 11(3)(a)(ii) and regulation 11(5).

(8) The Appellant argues that his "given time" approach must be correct because it cannot have been intended that UC must be disallowed for an entire period of absence which has been solely in connection with qualifying medical treatment simply because the period is extended for other reasons, e.g. a delayed flight. But regulation 11 must be read in the context that awards of UC are made by reference to monthly assessment periods and by reference to the rules governing changes of circumstance. Entitlement can only ever be determined at a given point in time. If a claimant's temporary absence meets all the conditions for disregard under regulation 11(3) in a given assessment period, but there is then a change of circumstance which means that the conditions are no longer satisfied (such as a delayed flight extending absence beyond six months, or the reason for absence changing from medical treatment to holiday) that change would have to be notified. Any supersession would take effect in relation to the period in which the conditions for disregard ceased to be satisfied, but would not take effect for prior periods: see the analysis under Ground 3 above. At any given decision point, however, relevant conditions must be met for the whole period of absence for it to be disregarded.

(9) Finally, the Appellant argues that housing benefit rules allow for transfer between different exceptions in relation to absence abroad during an award. But as the Appellant points out, the (complex) housing benefit rules turn on application of conditions governing occupation of the home. They pre-date UC which was intended to be a simplification and departure from existing rules governing benefits for housing. There is no reason why there should be any read across from housing benefit rules on temporary absence to the entirely different legislative scheme in regulation 11.

106. For all of these reasons, Ms Ivimy KC submitted that the Tribunal correctly found that, even assuming that from 30 March 2023 to 23 April 2023 the Appellant's absence was solely in connection with undergoing qualifying treatment, his absence from Great Britain from 5 March to 23 April 2023 was not solely in connection with that treatment and did not therefore fall within regulation 11(3)(a)(i).

Ground 2: regulation 11(1)(b) and Article 14 ECHR

107. The Appellant argued in his application for permission to appeal that he has suffered ***Thlimmenos*** discrimination because he has received "the same treatment as claimants without health conditions in the absence abroad rules". In his Reply, he re-framed this ground as a challenge to regulation 11(1)(b), relying on Article 14 read with A1P1, and arguing that the discrimination is "indirect discrimination on the basis that the one month standard rule is more likely to affect disabled people". He asserts that disabled people are "at greater risk of losing entitlement of benefit for reasons connected with their status". He relies a statement made by the Secretary of State that "both older people and disabled people are more likely to need to go outside GB for medical treatment, or to need hospital treatment when they are abroad."

No evidential basis for finding of indirect discrimination

108. The Secretary of State accepts that the application of regulation 11(1)(b), as a rule governing entitlement to UC, in principle falls within the ambit of A1P1. There was no evidence before the Tribunal, however, to establish prima facie indirect discrimination on grounds of disability. There was no evidence concerning any disability of the Appellant. Nor was there any evidence that the medical condition for which he was treated whilst abroad was linked to any disability. The evidence on this latter issue appears to be to the contrary: the Appellant states in his reasons for seeking mandatory reconsideration that "the reason for my extended absence was due to unforeseen health issues. While I was abroad, I fell seriously ill and was admitted to a hospital for medical treatment". Nor was there any evidence establishing that disabled persons generally, as compared to other persons in receipt of UC, are more likely to be unable, if they experience a health emergency abroad, to travel home within the 1 month standard disregard period.

109. These factual matters were simply not explored before the Tribunal because this Ground was not advanced. This evidential deficiency not been made good before the Upper Tribunal. Ms Ivimy KC submitted that these evidential deficiencies mean that there is no proper basis on which the Upper Tribunal can proceed to make a finding that the legislation on its ordinary meaning indirectly discriminates against disabled people generally or the Appellant in particular, nor any basis on which it can seek to interpret regulation 11(1)(b)(i) under s. 3 of the Human Rights Act 1998 ("the HRA")

HRA in a Convention compliant way (as the Appellant appears to invite it to do): see ***Imperium v Jersey Competent Authority*** [2025] UKPC 28 at [77-83] and ***R (Z) v Hackney LBC*** [2020] 1 WLR 4327 at [114] where the Privy Council and Supreme Court expressly warned against the Court applying s. 3 of the HRA or making findings that legislation is not compatible with Convention rights on an abstract or hypothetical basis, without close regard to the specific facts of the claimant's case.

Justification

110. In any event, even if the Upper Tribunal were to consider that it could make a determination on this Ground, the rule in regulation 11(1)(b) is justified. The rule which the Appellant seeks to impugn involves a judgment of social and economic policy in the field of welfare benefits. The relevant test to determine justification is accordingly whether the rule is "manifestly without reasonable foundation": ***R (SC) v Secretary of State for Work and Pensions*** [2022] AC 223 at [158].

111. As explained above, Parliament has chosen to introduce, through regulation 11(1)(b)(i), a general one month exception to the requirement that claimants be in Great Britain. That one month period applies to all claimants, including those whose absence abroad is unexpectedly extended by a medical condition or the need for medical treatment. Outside that one month period, exceptions are very narrowly drawn. This reflects the general importance attached to claimants meeting the basic conditions for entitlement to UC, including presence in Great Britain, which is a fundamental feature of the UC system.

112. Parliament has deliberately chosen to provide a one month and not any other longer period of disregard for all claimants who require unplanned medical treatment abroad. That is a discretionary judgment which was open to it. The rules as drafted pursue the legitimate aims that exceptions are: limited in scope so that they do not undermine the rule requiring presence in Great Britain (which is a fundamental condition of UC and protects public funds); fair and consistent between claimants; avoid complexity and are administratively workable - including by minimising the need for decision makers to consider evidence and/or exercise discretionary judgment, see generally the witness statement of Jackie Germain at [28-33]. The one month rule is rationally connected to all of these aims. The Courts have repeatedly recognised the

need for bright line rules of this kind in the context of UC and warned the Court against making findings that a particular rule is irrational, even if it produces hard results in an individual case: see e.g. ***Pantellerisco v Secretary of State for Work and Pensions*** [2021] EWCA Civ 1454 at [43].

113. The Appellant's case appears to be that disabled persons should be afforded a longer disregard period if their disability gives rise to a health issue which requires them to stay abroad for a period longer than one month. In effect, the Appellant argues for an entirely new exception to be inserted into regulation 11 for disabled persons temporarily absent abroad. As to this:

(1) A rule of this kind would necessarily expand the cohort of claimants who may retain entitlement whilst abroad and introduce potentially significant additional cost. It would do so in circumstances where the Government has taken the view that individuals who choose to travel abroad (including disabled persons) can be expected to have assumed the risk of experiencing a medical emergency whilst travelling and can in principle insure against that risk, including by taking out insurance which provides for medical evacuation.

(2) Such a rule would introduce significant complexity. "Disability" for these purposes would have to be defined and rules or guidance introduced to distinguish between persons who are and are not disabled. Moreover, the rule would have to distinguish between medical conditions suffered abroad which are and are not related to disability. (The Appellant accepts that disabled persons should not be permitted a longer period of disregard if they suffer a medical emergency abroad – e.g. a car accident – unrelated to their disability.)

(3) Any new rule of this kind would insert into the temporary absence scheme a need for decision-makers to consider medical evidence from practitioners treating patients abroad on an emergency basis in order to establish: the existence of a medical condition that prevents travel and the link between the condition and the underlying disability. Not only does this introduce complexity, evidence from overseas practitioners concerning medical conditions experienced overseas is inherently more difficult to verify than UK medical evidence concerning pre-existing conditions. At the

same time, ready verification is essential to ensure that the system operates efficiently and fairly, is not abused and that fraudulent claims are denied.

114. The Appellant has no good answer to why these reasons are not sufficient to establish a rational foundation for the one month rule. He asserts, without evidence, that the cohort of persons affected if the rule were to be expanded is likely to be small. He points out that decision-makers may need to make judgments in other circumstances, including in relation to extension of time for bereavement and when assessing whether an absence for planned treatment abroad is solely in connection with medical treatment (requiring evaluation of UK medical evidence). But the fact that judgments may have to be made or evidence considered in relation to different exceptions does not establish that the general rule in regulation 11(1)(b)(i) is manifestly without reasonable foundation.

Remedy

115. As explained above, the Appellant's case is that the one month rule in regulation 11(1)(b) is unlawful on grounds of indirect discrimination. If (contrary to the submissions above) that Ground is made out, he has made no submissions on how this could be remedied by the Upper Tribunal.

116. The Appellant has not made any submissions on how the regulation could be interpreted pursuant to s.3 of the HRA in a way which is compatible with Article 14. Any interpretation of regulation 11(1)(b) to extend the one month rule in the case of disabled persons would go well beyond interpretation and would stray into the legislative function which is not permitted by s. 3 of the HRA. It would require in substance, the Tribunal to determine for itself a new set of circumstances under which absence for medical reasons must be disregarded, including the appropriate period of absence as well as other qualifying conditions.

117. Nor, as the Appellant accepts, is this a case where the Tribunal, by disapplying a provision in the 2013 Regulations or otherwise, can treat the Appellant as entitled to UC. That is because, in the absence of any applicable exception, s. 4 of the 2012 Act applies and the Upper Tribunal is bound to give effect to it.

Ground 2A: differences in Housing Benefit and UC rules and Article 14 ECHR

118. The Appellant seeks to raise a new ground of appeal, namely that regulation 11(1)(b) constitutes unlawful direct discrimination contrary to Article14 read with A1P1 as between certain housing benefit claimants and UC claimants.

119. There is no good reason why this Ground could not have been brought at an earlier stage. It arises by comparison of the relevant legislative provisions in the UC regulations and those governing housing benefit. The Ground is advanced after the Secretary of State has served her evidence. If it is to be advanced, she should be afforded the chance to put in evidence in reply, explaining the differences of approach and the reason for them. To do so at this late stage would require an adjournment. That would not be in accordance with the overriding objective (in particular, having regard to the delay in hearing this appeal which has already occurred). For these reasons, the Secretary of State invites the Upper Tribunal to refuse permission to amend to include this Ground.

120. For the avoidance of doubt, she submits that amendment to include this Ground should in any event be refused because it has no reasonable prospect of success. Differences of treatment between (a) UC claimants and (b) housing benefit claimants who are pensioners or in supported housing/temporary accommodation do not give rise to a legitimate claim for discrimination. It is not appropriate to seek to draw a comparison between legacy and UC benefit regimes and argue that differences give rise to discrimination under Article14: see ***RJ v HMRC*** [2021] UKUT 40 (AAC) at [106]. That case cannot be distinguished: although housing and UC continue to exist side-by-side, UC is ultimately a replacement scheme for housing benefit. The same was true for the benefits in issue in ***RJ***. In any event, any difference of treatment is a function of the different bases on which the rules governing the two benefits operate and cannot be impugned as manifestly without reasonable foundation: compare ***R (TP) v Secretary of State for Work and Pensions*** [2018] EWHC 1474 at [68]. The submissions on remedy are repeated.

Conclusion

121. For those reasons, the Upper Tribunal is invited to grant permission on ground 2A and to allow the appeal on ground 1, 2 or 2A. If the appeal is refused on those grounds, the decision can properly be remade thus:

(a) The Appellant and his wife were not entitled to UC from 24 March 2023 to 23 April 2023.

(b) They were overpaid £1,880 and that overpayment is recoverable from them under s.71ZB of the Social Security Administration Act 1992.

Analysis

Ground 3

122. The parties are in agreement that the decision to supersede and disallow the Appellant's UC claim for the first assessment period from 24 February 2023 to 23 March 2023 was incorrect. That was a material error of law and it was financially disadvantageous to the Appellant. I agree that the appropriate course is to remake that part of the decision pursuant to s.12(2)(b) of the 2007 Act rather than to remit to the Tribunal for rehearing.

123. The Appellant and his wife were not entitled to UC from 24 March 2023 to 23 April 2023. They were overpaid £1,880 and that overpayment is recoverable from them under s.71ZB of the Social Security Administration Act 1992.

Ground 2A

124. The correct approach is to apply under rule 5(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to amend a document. The document is the notice to appeal under rule 22(2)(b), which consists of the grounds on which permission was given. This coincides with the approach under CPR rule 52.17: "An appeal notice may not be amended without the permission of the appeal court." As Hickinbottom LJ explained in ***Hickey v Secretary of State for Work and Pensions*** [2018] 4 WLR 71:

> "74. … an appellant who has obtained permission to appeal and wishes to add to or otherwise amend his grounds must make a formal application to do so under CPR r 52.17, as soon as he reasonably can. Grounds of appeal cannot be covertly amended,

> for example by including changes to them in the skeleton argument …
>
> 75. Compliance with the rules will ensure that appeal hearings are properly focused, as they must be. Although of course the merits of an application to amend grounds of appeal will necessarily be fact-specific, where an appellant proposes substantial changes to the grounds of appeal from those upon which he has obtained permission to appeal but has made no application — or no reasonably prompt application — to amend, he should not expect an appeal court to be sympathetic. Appeal courts have a variety of sanctions at their command should a party fail to comply with important mandatory procedural rules that apply to appeals."

125. Those remarks related to CPR, but they apply equally to the position under the Tribunal Procedure Rules. Lateness will be a consideration in the Upper Tribunal's assessment of whether to grant such permission.

126. There is no good reason why the Ground 2A could not have been brought at an earlier stage. The Appellant has already had considerable indulgence, both in being granted permission on two grounds not advanced at first instance and again in extensions of time. My further directions of 25 February 2025 gave the Appellant the opportunity to reply to the Secretary of State's late witness statement, but that was not an invitation to advance a yet further ground of appeal almost a year after the appeal process had commenced. If it were to be advanced, the Secretary of State should in fairness be given the opportunity to put in further evidence in reply, explaining the differences of approach between housing benefit and UC and the reasons for them. To do so at this stage would require an adjournment and yet further submissions, as the Appellant candidly accepted. That is not in accordance with the overriding objective, particularly having regard to the delay in hearing the appeal which has already occurred. I therefore to refuse the Appellant permission to amend to include Ground 2A.

127. In any event, I am satisfied that Ground 2A has no reasonable prospect of success. As Ms Ivimy KC rightly submitted, the complex housing benefit rules turn on the application of conditions governing occupation of the home. They pre-date UC, which was intended to be a simplification and departure from existing rules governing

benefits for housing. There is no reason why there should be any read across from housing benefit rules on temporary absence to the entirely different legislative scheme in regulation 11 of the 2013 Regulations.

128. Moreover, differences of treatment between UC claimants and housing benefit claimants who are pensioners or in supported housing/temporary accommodation do not give rise to a legitimate claim for discrimination. I again agree with Ms Ivimy KC that is not appropriate to seek to draw a comparison between legacy benefits and the UC regime in this respect on the basis that the differences give rise to discrimination under Article14. Although housing benefit and UC continue for the present to exist side-by-side, UC is ultimately a replacement scheme for housing benefit. The same was true for the benefits in issue in ***RJ***. In any event, any difference of treatment is a function of the different bases on which the rules governing the two benefits operate and cannot be impugned as manifestly without reasonable foundation: see in this context ***R (TP)*** at [68].

Ground 1

129. I accept the arguments of the Secretary of State. The problem with the Appellant's submissions is that they all ultimately founder on the preamble to regulation 11(3) which states that the paragraph applies where the absence is not expected to exceed, and does not exceed, 6 months and is *solely* in connection with treatment or convalescence or care. The Appellant's arguments are all an attempt to get round that express wording. In this case it is common ground that the Appellant went abroad for a holiday and it was only whilst he was on holiday that he became ill and required medical treatment. The exception in regulation 11(3) cannot therefore have applied to him.

130. The Appellant's submissions on the construction of regulation 11(3)(a) run contrary to the express wording of regulation 11(3), the structure of regulation 11 as a whole and its purpose.

131. In the first place they do not give full force and effect to the requirement that the absence must be "solely in connection with" the medical treatment or the convalescence. "Solely" in this context, on its natural meaning, must refer to singularity

of purpose. In other words, absence which is for the mixed purpose of holiday and medical treatment, or absence which commences for the purpose of holiday, but then becomes absence for the purpose of medical treatment, will not be "solely in connection with" medical treatment.

132. As a matter of the construction of the regulation, regulation 11(1) provides that the exceptions in regulations 11(1)(b)(i) and 11(3) or (4) are in the alternative ("either … or"). Regulation 11(b)(i) can be extended by up to a further month if the bereavement provision in regulation 11(2) applies, but the one month period in regulation (b)(i) is an alternative to, and is not to be construed cumulatively with, regulation 11(3) or (4)

133. I agree with Ms Ivimy KC that, if it had been intended that a period of absence for medical reasons could extend the standard one month disregard by up to a further six months, the draftsman could and should have included an extension provision similar to regulation 11(2).

134. By contrast, the wording of regulation 11(3) is noticeably different: it does not extend the one month period (as does regulation 11(2)), but provides for an entirely *separate* six month period of disregard, provided that it is "solely in connection with" qualifying treatment. It is not open to a claimant to mix and match regulations 11(b)(i) and 11(b)(ii), or to indulge in "phasing" of them, as the Appellant seeks to do. It is therefore incorrect to assert that, at a time when his absence fell squarely within the one month rule, his absence ceased to be for any other reason than medical treatment and that that allowed his continued absence to be disregarded.

135. Regulation 11(3) is not intended to extend the period for which UC is available to persons temporarily absent from Great Britain if they experience medical emergencies within one month of travelling abroad. Rather, the mischief at which regulation 11(3) is aimed is ensuring that people who need to leave Great Britain to obtain treatment or for convalescence are not penalised by having their benefit withdrawn.

136. There is considerable force in Ms Ivimy KC's submission that the position of someone who leaves Great Britain for the purpose of qualifying treatment is to be

contrasted with that of a person who unexpectedly experiences a medical emergency whilst abroad. Anyone who chooses to travel abroad can be expected to assume that risk and, in principle, to insure against it. That underlying purpose is reflected in the fact that regulation 11(3)(a)(i) is drafted by reference to treatment by a qualified practitioner. If it were intended to extend time for persons who experience a medical emergency abroad, one would expect it to be drafted by reference to whether a medical condition (and not specific treatment for a medical condition) prevents a claimant from returning to Great Britain.

137. Regulation 11(4) does not assist the Appellant. The same arguments apply to regulation 11(4) as to regulation 11(3). Moreover, regulation 11(4) does not contain the "solely in connection with" stipulation present in regulation 11(3). Regulation 11(4) is, again, an alternative to, and not an extension of, regulation 11(1)(b)(i).

138. I do not accept the argument which Mr Kane put at the forefront of his submissions that the 2013 Regulations permit the "phasing" of an absence such that a claimant whose absence is disregarded under one basis may have his continued absence disregarded under another and that such an approach is not limited to regulation 11(2). That is a wholesale rewriting of regulation 11. Regulation 11(1)(b)(i) and 11(1)(b)(ii) are alternatives. Regulation 11(2) can extend the one month provision in regulation 11(1)(b)(i) by up to a further month, but it does not apply to regulation 11(b)(ii) and thus not to regulation 11(3) or 11(4).

139. The "entire trip" approach does not require regulation 11(3)(a)(i) to be read as containing a requirement that the treatment be pre-arranged which its text does not. On the contrary, that is precisely what the text *does* require because the opening words of the provision expressly require that the absence is "solely in connection" with the qualifying treatment.

140. Mr Kane sought to argue that "the structure off regulation 11 should not be a barrier to [his] analysis", but that is a tacit recognition that the Appellant's construction of regulation 11(3) is simply untenable.

141. Mr Kane also asserted that in circumstances where entitlement continues until the supervening circumstance (here a need for medical treatment), there were no grounds for supersession. But here there were grounds for supersession because the continued absence was not "solely" for the qualifying medical treatment because regulation 11(3) did not apply. Thus, as Mr Kane then rightly said, a claimant, like the Appellant, who exceeds one month of absence and does not fall within regulation 11(2), 11(3) or 11(4) will have his award superseded and disallowed with effect from the beginning of assessment period 2 (as, which is common ground, the Tribunal should have found in this case)

142. Although Mr Kane relied on the proviso in regulation 11(3)(a)(ii), that the claimant must have had the relevant medical condition "before leaving Great Britain", I am satisfied that that does not assist him either. His case is the absence of such a proviso in regulation 11(3)(a)(i) means that it must have been intended that temporary absence for treatment for a medical condition which arises for the first time within the one month period after the claimant has left Great Britain can be disregarded. I agree with Ms Ivimy KC that that does not follow. As explained above, such an interpretation is at odds with the wording, structure and purpose of regulation 11 as a whole. It also again ignores the opening stipulation of regulation 11(3) that the absence is solely in connection with the treatment or the convalescence.

143. Moreover, there is there no coherent reason why the relevant medical condition should have to pre-date the leaving of Great Britain in the case of convalescence under regulation 11(3)(a)(ii), but not in the case of treatment under regulation 11(3)(a)(i) and in fact that is not the case, as the opening words of regulation 11(3) expressly provide (see above). In the light of the opening words, the more natural meaning is indeed that the two provisions *both* require that the purpose of the absence (whether to treat a medical condition or to convalesce from a condition) is required from the outset of the absence in each case. I agree with Ms Ivimy KC that the proviso in regulation 11(3)(a)(ii) simply reflects the specific rules governing convalescence which require prior certification of the underlying condition by an approved medical practitioner: see regulation 11(3)(a)(ii) and regulation 11(5).

144. Mr Kane also argued that the mischief at which the "solely in connection" condition was directed was the possibility of claimants obtaining minor medical treatment to justify time abroad. "Solely in connection" had only a qualitative and not a temporal dimension and was consistent with the drafting of the regulation. That I regard as an ingenious flight of fancy, but it has no warrant in the actual wording of the regulation, which does not refer to major or minor treatment, but to "treatment".

145. Mr Kane undoubtedly raises hard cases. Can it be that UC must be disallowed for an entire period of absence which has been solely in connection with qualifying medical treatment simply because the period is extended for other reasons, e.g. a last minute delayed flight? The answer is that regulation 11 is explicit in its terms and that it must be read in the context that awards of UC are made by reference to monthly assessment periods and by reference to the rules governing changes of circumstance.

146. Entitlement can only ever be determined at a given point in time. If a claimant's temporary absence meets all the conditions for disregard under regulation 11(3) in a given assessment period, but there is then a change of circumstance which means that the conditions are no longer satisfied (such as a delayed flight extending absence beyond six months, or the reason for absence changing from medical treatment to holiday), that change would have to be notified.

147. Any supersession would take effect in relation to the period in which the conditions for disregard ceased to be satisfied, but would not take effect for prior periods. At any given decision point, however, the relevant conditions must be met for the whole period of absence for it to be disregarded. That there may be hard cases does not

148. As Underhill LJ said in ***R (Johnson) v Secretary of State for Work and Pensions*** [2020] EWCA Civ 778; [2020] PTSR 1872 at [113]:

> "113. I start by saying that I recognise, as does Rose LJ, the extraordinary complexity of designing a system such as universal credit, and that it necessarily involves a range of practical and political assessments of a kind which the court is not equipped to judge. I also accept that in order to be workable

> any such system may have to incorporate bright-line rules and criteria which do not discriminate fully between the circumstances of different individuals … For those reasons I fully accept that a court should avoid the temptation to find that some particular feature of such a system is 'irrational' merely because it produces hard, even very hard, results in some individual cases.

149. Finally, the Appellant argues that housing benefit rules allow for transfer between different exceptions in relation to absence abroad during an award. Insofar as this raises Ground 2A of the proposed grounds of appeal, I do not give permission for it to be relied upon (see below), but insofar as it bears on the construction of regulation 11 I reject the argument in any event. The complex housing benefit rules turn on application of conditions governing occupation of the home. They pre-date UC, which was intended to be a simplification and departure from existing rules governing benefits for housing. There is no reason why there should be any read across from housing benefit rules on temporary absence to the entirely different legislative scheme in regulation 11. Just how different the provisions are is exemplified by the details which Mr Kane set out in the course of his skeleton argument, which I have set out above. They bear no relationship to the provisions in regulation 11 of the 2013 Regulations and cannot be read across into them.

150. Mr Kane sought to rely on the terms of the newly-inserted regulations 11(1)(b)(iii), (4A) and (4B) in support of his argument, but those provisions only came into force on 18 July 2025 and do not assist in the interpretation of the regulations at the date of decision in May 2023. To the extent that they are relevant at all, they simply serve to explode the argument yet further. The newly-inserted regulation 111(1)(b)(iii) is again an alternative ("either .. or ... or") to regulations 11(1)(b)(i) and 11(1)(b)(ii), not an addition to, or cumulation with, them. One can no more move from (i) to (iii) than one can from (i) to (ii).

151. Although Mr Kane also sought to derive comfort from the decision in ***NJ***, properly understood it does not assist him. There Upper Tribunal Judge Stout was considering the exception in regulation 153 of the ESA Regulations 2008 and whether the fact that the claimant's temporary absences from Great Britain in order to be treated by exposure to sunlight at her family home in Spain fell within the exception so as to

enable her to continue to be entitled to benefits when abroad. As in the case of regulation 11(3) of the 2103 Regulations, one of the conditions for the exception required absence solely in connection with arrangements made for relevant treatment. In that context Judge Stout held that

> "23. So far as relevant to the present appeal, the exception in regulation 153 does not apply unless "the claimant is absent from Great Britain **solely** … in connection with arrangements made for the treatment of the claimant for a disease or bodily or mental disablement directly related to the claimant's limited capability for work which commenced before leaving Great Britain" (emphasis added).
>
> ...
>
> 26. There was no real difference between the parties as to what "solely" means in this case. Both were agreed that it means that the treatment needs to be the only reason for the absence ... The change in language does, though, suggest to me that the legislator wished to make clear that the reason or purpose was to be judged objectively and not simply by reference to the stated reason or purpose of the claimant. I return to this point below.
>
> 27. Although Mr Edwards had sought to refer back to case law on predecessor versions of the legislation in support of his argument that a similarly strict approach should be taken to the current regulations, it is in fact apparent from *CIB/1956/2001* (to which Mr Hallström referred) that "solely" is actually a 'tightening up' on the wording in the predecessor legislation. The predecessor legislation, as I have noted, required absence to be for the "specific purpose" of being treated. The predecessor legislation was interpreted by Judge Rowland in *CIB/1956/2001* at [5] as requiring only that treatment be an "operative purpose" of the absence, even if it was not the main (let alone "sole") purpose of the absence. It is plain that "solely" is a stricter test.
>
> 28. Both parties were agreed that the fact that someone does things other than being treated while away from Great Britain does not mean that they are not absent "solely in connection with" the treatment. For example, the fact that someone abroad for the purpose of treatment also has breaks between treatment in which they go swimming, eat, or engage in sight-seeing does not necessarily change the purpose of the absence, although both parties accept that it might if the Tribunal concludes that the activities engaged in between treatments are actually part of the purpose for going (or staying on after arrival). I agree, and would add that "solely" does not allow for any "dominant purpose" type

> test: as soon as there is more than one purpose to the absence, regulation 153 ceases to be satisfied.
>
> ...
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> 30. As a matter of principle, both parties are also agreed that, in deciding whether treatment is the "sole" reason for the absence, the Tribunal must not confine itself to considering whether, subjectively, it is the claimant's sole reason for absence, but must consider the matter objectively. As already noted, I agree that the test must be objective, and that the use of the language "in connection with" rather than "purpose" makes clear that the Tribunal has to consider the matter objectively."

None of that assists in the Appellant in this case. Quite the reverse.

152. Mr Kane sought to derive assistance from paragraph [35] of the judgment to the effect that

> "It is important in this respect not to overlook that the Tribunal was, quite properly, considering the claimant's reasons for "going to Almeria **for extended periods of time**" (emphasis added). It was right to do so because, as both parties accepted in the course of argument, the regulation 153 exception only becomes relevant after the regulation 152 exception has been exhausted. Any claimant can be absent from Great Britain for a "short absence" of up to four weeks without losing their entitlement to benefit. The issue for the Tribunal in this case was therefore what NJ's reasons were for extended periods of absence going beyond four weeks. In so saying, I am mindful that a Tribunal of Commissioners in *R(S) 1/90*, addressing the predecessor provisions in the 1975 Regulations, held that in order to qualify for that exception the claimant needed to have had treatment as a "specific purpose" for the absence before going abroad. I am not sure whether it would necessarily be right to read that decision across to the differently-worded provision in the ESA Regulations, but I do not need to decide that point in this case. Even assuming that the necessary purpose needs to be established before departure from Great Britain in accordance with *R(S) 1/90*, the Tribunal in this case was still right to focus on the claimant's reasons for extended absences going beyond the initial four-week period as it is only that extended period that needs to fall within the scope of regulation 153. Any shorter period will be caught by regulation 152. Once that point is understood, it can readily be seen that it was open to the Tribunal to accept that NJ's reasons for extended absences (going beyond 'normal holiday' length, and in a place that NJ would not choose to go on holiday) were rational."

153. However, that must be read in the light of the preceding paragraphs, and all that Judge Stout was saying was that she did not need to decide the point which arose in ***R(S) 1/90***, but that in any event, on the assumption that the necessary purpose needed to be established before departure from Great Britain, the Tribunal in the case before her was still right to focus on the claimant's reasons for extended absences going beyond the initial four-week period. Once that point was understood, it could readily be seen that it was open to the Tribunal to accept that NJ's reasons for extended absences (going beyond "normal holiday" length, and in a place to which she would not choose to go on holiday) were rational.

154. That is explained by what she said in the next two paragraphs:

> "36. The Secretary of State also submits that, if the Tribunal had taken the correct approach, it would have been bound to infer that part of the reason for the absence was the fact that the Almeria property is NJ and Dr J's second home and thus one of NJ's reasons for absence must be to live in and maintain a family home (or, at a minimum, to accompany her husband while he does so). However, again, the Tribunal was rightly focusing on NJ's reasons for extended periods of absence. The Tribunal was clearly alive to the Secretary of State's argument the fact that the property is their second home meant that the claimant must have more than one purpose in staying there for extended periods. Those facts are in the judgment, but the Tribunal rejects the Secretary of State's case in that respect for essentially the same reasons as it rejects the Secretary of State's case about holidays. As the judge puts it at [31], "I am wholly satisfied that this is not a case of a couple simply spending time holidaying in their second home … the climate at their home in Almeria provides respite from her condition as exposure to sunlight increases her serotonin levels, thus alleviating some of her symptoms, and for that specific reason they seek to spend extended periods of time there".
>
> 37. While many Tribunals would not have reached the same conclusion, I am not persuaded that this Tribunal's decision was perverse, particularly given its findings as to the severity of the claimant's OCD condition, and the credibility of NJ's and Dr J's evidence as to the positive impact on her of spending time in Almeria. These factors together explain the Tribunal's conclusion that in this particular case the sole reason for NJ spending extended periods of time in Almeria was to alleviate her condition and that holidaying or maintaining of their second

> home was not part of her reasons for spending an extended period of time there. The fact that by staying for extended periods they may also enjoy the opportunity of holidaying or maintaining their second home does not prevent the Tribunal from concluding that the sole purpose of their extended stays was the treatment. Provided a Tribunal is satisfied for adequate reasons (as this Tribunal was at [21]) that these were merely incidental benefits ("effects", to use Lord Brightman's term in *Mallalieu*) rather than the purpose of the extended stay, there is nothing wrong in law with the Tribunal reaching the conclusion that this Tribunal did in this case."

Ground 2

155. The original ground of appeal has shifted from the claim to ***Thlimennos*** discrimination to a challenge to regulation 11(1)(b), relying on Article 14 read with A1P1, arguing that the discrimination is "indirect discrimination on the basis that the one month standard rule is more likely to affect disabled people" on the basis that disabled people are "at greater risk of losing entitlement of benefit for reasons connected with their status".

156. The Secretary of State accepts that the application of regulation 11(1)(b), as a rule governing entitlement to UC, in principle falls within the ambit of A1P1.

157. It seems to me, however, that ground 2 fails at the outset in that there was no evidence before the Tribunal, however, to establish prima facie indirect discrimination on grounds of disability. There is passing reference to health problems on the part of the Appellant, but little if any to any disability of the Appellant. There was no evidence that the medical condition for which he was treated whilst abroad was linked to any disability. Insofar as there is any, it appears to be to the contrary: the Appellant stated in his reasons for seeking mandatory reconsideration that "the reason for my extended absence was due to unforeseen health issues. While I was abroad, I fell seriously ill and was admitted to a hospital for medical treatment". There was no evidence establishing that disabled persons generally, as compared to other persons in receipt of UC, are more likely to be unable, if they experience a health emergency abroad, to travel home within the 1 month standard disregard period. Those factual matters were simply not explored before the Tribunal because the ground of appeal was not advanced. Nor has the deficiency been made good before me. The furthest that could

be said was that the Appellant's hospital admission included treatment for bronchial asthma and that he was treated with oxygen and nebulisers, but there was also reference to depression, stool incontinence and typhoid.

158. I agree with Ms Ivimy KC that these evidential deficiencies mean that there is no proper basis on which I can proceed to make a finding that the legislation on its ordinary meaning indirectly discriminates against disabled people generally or the Appellant in particular, nor any basis on which I can seek to interpret regulation 11(1)(b)(i) under s. 3 of the HRA) in a Convention compliant way.

159. In this respect it is sufficient to cite the Privy Council in ***Imperium v Jersey Competent Authority*** [2025] UKPC 28 at [77-79]:

> "77. This lack of relevant evidence is likely to have contributed to the failure on the part of the Court of Appeal to focus on the essential issue which was whether the operation of the costs rule in its application to Imperium's participation in these legal proceedings infringed any right of Imperium under article 6(1). Instead, it focussed on the more abstract question of whether the legislation was compatible with article 6(1), as if it were an ab ante challenge to the legislation.
>
> 78. While it is possible in certain circumstances to bring a general challenge to legislation on ECHR grounds, this is exceptional and a violation of the ECHR is usually required to be established by reference to the manner in which the law has been applied to the claimant in the specific circumstances of the case. In *Verein KlimaSeniorinnen Schweiz v Switzerland*, a Grand Chamber of the European Court of Human Rights observed:
>
> > "460. The Convention does not provide for the institution of an *actio popularis*. The Court's task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, for instance, *Roman Zakharov v Russia [GC], (Application No 47143/06),* para 164, ECtHR 2015, with further references). Accordingly, a person, non-governmental organisation or group of individuals must be able to claim to be a victim of a violation of the rights set forth in the Convention. The Convention does not permit individuals or groups of individuals to complain about a

> provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (see *Aksu v. Turkey [GC], (Application Nos 4149/04 and 41029/04*), paras 50-51, ECtHR 2012)."

79. It was Imperium's case that the 2018 Law should be read down so as to be given effect in a way which is compatible with Convention rights (under article 4 HRL) or alternatively that it should be declared incompatible with Imperium's Convention rights (under article 5 HRL). In either case, it is necessary to focus on the effect of the 2018 Law as applied to Imperium's case. In *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327 Lord Sales explained (at para 114) with regard to section 3 of the United Kingdom Human Rights Act 1998 (the equivalent provision to article 4 HRL):

> "The proper approach to construction is that legislation should be read and given effect in a particular case according to its ordinary meaning, unless the person who is affected by it can show that this would be incompatible with their Convention rights under the [Human Rights Act 1998] … as applied to their case. Only then do the special interpretive obligations under section 3(1) of the [Human Rights Act] … come into play to authorise the court to search for a conforming interpretation at variance with the ordinary meaning of the legislation."

The position with regard to section 4 of the United Kingdom Human Rights Act 1998 (the equivalent provision to article 5 HRL) is very similar. In *R (Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] AC 271, although Baroness Hale accepted that there may be occasions when it might be appropriate to make a declaration of incompatibility in the abstract, irrespective of whether the provision in question is incompatible with the rights of the individual litigant, she continued (at para 102):

> "But in my view the court should be extremely slow to make a declaration of incompatibility at the instance of an individual litigant with whose own rights the provision in question is not incompatible. Any other approach is to invite a multitude of unmeritorious claims."

160. In my judgment, and on the present state of the evidence, it would be wholly impermissible to seek to apply s. 3 of the HRA or making findings that legislation is not compatible with Convention rights on an abstract or hypothetical basis, without close

regard to the specific facts of the claimant's case (which were never determined because the point was not in issue). I do not therefore need to have further regard to Ground 2, which fails at the outset.

Justification

161. In those circumstances the issue of justification does not arise, but it should be noted that the rule which the Appellant challenges involves a judgment on social and economic policy in the field of welfare benefits and that the relevant test, as Lord Reed explained in ***SC*** is whether the rule is "manifestly without reasonable foundation".

162. Although in the circumstances I do not have to decide the point, it seems to me that the submissions by Ms Ivimy KC on behalf of the Secretary of State, which I have set out in paragraphs 111 to 115 above, are compelling.

163. As to the Appellant's attempts to challenge those assertions by the Secretary of State, which I have set out at paragraph 70 above:

(a) there is no evidence one way or the other that the relevant cohort is likely to be small, but it cannot be regarded as more likely than not that it will in fact be small

(b) the fact that judgments may have to be made in other fields, such as intention to return, or bereavement cases, does not establish that the general rule in regulation 11(1)(b)(i) is manifestly without reasonable foundation

(c) the expression of optimism that absence abroad owing to medical treatment which delayed return will be the sort of case where supporting documentation can readily be expected of a claimant is not borne out by judicial experience

(d) reference to the position of the Secretary of State in testing a claimant's evidence at a hearing and to make representations if the refusal is challenged suggests if anything that the concerns expressed by her about evidential and operational difficulties are indeed made out and a matter of live concern

(e) it is said that the critical distinction is between medical absence connected to a disability and other absence and that, contrary to the Secretary of State's concern about policy implications for the other permitted absence periods, there is no reason for there to be any broader impact, why should the line be drawn there? What about hard cases arising out of natural disasters or accidents involving other family members?

Remedy

164. As to remedy, in the event that I had found that the one month rule in regulation 11(1)(b) was unlawful on grounds of indirect discrimination, I agree with Ms Ivimy KC that any interpretation of regulation 11(1)(b) to extend the one month rule in the case of disabled persons would go well beyond statutory interpretation and would be an all to obvious exercise in purported judicial legislation which is impermissible under s. 3 of the HRA. It would require the Upper Tribunal to determine a new set of circumstances under which absence for medical reasons must be disregarded, including the appropriate period of absence, as well as other qualifying conditions.

165. All that was suggested was that "the interpretation of regulation 11 is, if not correct, at least tenable, and can provide a basis for a Convention-compatible reading which remedies the discrimination". That is not a basis for an exercise under s.3 of the HRA.

166. Moreover, as the Appellant accepts, this is not a case where the Upper Tribunal, by disapplying a provision in the 2013 Regulations or otherwise, can treat him as being entitled to UC. That is because, in the absence of any applicable exception, s.4 of the 2012 Act applies and the Upper Tribunal is bound to give effect to it.

167. When I pressed Mr Kane in argument as to how regulation 11(3) should be read to achieve a Convention-compliant result he proffered two suggestions, either

> "(3) This paragraph applies where the absence is not expected to exceed, and does not exceed, 6 months and is solely in connection *(in qualitative terms rather than temporal terms)* with—

> (a) the person undergoing—
>
> (i) treatment for an illness or physical or mental impairment by, or under the supervision of, a qualified practitioner, or
>
> (ii) medically approved convalescence or care as a result of treatment for an illness or physical or mental impairment, where the person had that illness or impairment before leaving Great Britain ..."

or a recasting along the lines of *"medical treatment is the only reason for the claimant's absence from Great Britain once other disregards have been exhausted".*

168. Both of these solutions are attempts at judicial legislation rather than interpretation of the regulation in a Convention-compliant fashion and I reject them.

Conclusion

169. The decision of the First-tier Tribunal (Social Entitlement Chamber) dated 1 November 2023 under file reference SC242/23/05918 contains an error on a point of law. The appeal is allowed and the decision of the Tribunal is remade.

170. The Appellant's award of universal credit is superseded from 24 March 2023.

171. The Appellant is refused permission to amend his grounds of appeal to include Ground 2A.

172. The appeal is otherwise dismissed.

Mark West
Judge of the Upper Tribunal

Authorised for issue 1 August 2025