IN THE UPPER TRIBUNAL **Appeal No. CPIP/1962/2018**
(ADMINISTRATIVE APPEALS CHAMBER) **NCN: [2020] UKUT 107 (AAC)**

BEFORE JUDGE WEST

DECISION

The decision of the First-tier Tribunal sitting at Northampton dated 28 February 2018 under file reference SC316/17/01084 involves an error on a point of law. The claimant's appeal against that decision is dismissed and the decision of the Tribunal is set aside.

The decision is remade.

The claimant is not entitled to either component of personal independence payment from and including 2 November 2016.

However, the Secretary of State has taken note of the Tribunal's exploration of the evidence and its conclusions in relation to the daily living component of personal independence payment (under which the claimant had been entitled to 16 points for the daily living component). The decision of the Upper Tribunal has confirmed an unintended lacuna in the relevant legislation, as a result of which the Secretary of State has taken such steps as are necessary to enable her to make an extra statutory payment to the claimant in an amount equal to the daily living component of personal independence payment at the enhanced rate (*i.e.* equal to the award of personal independence payment which he would have received but for the lacuna). The Tribunal decided that it was not appropriate to fix a time limit to the award.

[Note: this paragraph immediately above is not part of the decision, but should be read in conjunction with it]

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

REASONS

Introduction

1. This is an appeal, with the permission of District Tribunal Judge Campbell, against the decision of the Tribunal sitting at Northampton on 28 February 2018.

2. I shall refer to the appellant hereafter as "the claimant". The respondent is the Secretary of State for Work and Pensions. I shall refer to her hereafter as "the Secretary of State". I shall refer to the tribunal which sat on 28 February 2018 as "the Tribunal".

3. This case concerns a claimant over the age of 65 who had hitherto been in receipt of both components of disability living allowance. When he was nearly 66, he applied for personal independence payment. His was a disability living allowance transfer case within the meaning of the applicable legislation because (a) he had not reached the age of 65 on 8 April 2013, (b) he was a person who was entitled to disability living allowance and (c) he claimed personal independence payment in response to a notification sent to him by the Secretary of State for Work and Pensions.

4. The appeal brought to light that there was a lacuna in the personal independence payment legislation which worked to the disadvantage of claimants; in particular, the secondary legislation failed to provide any exemption from s.83(1) of the Welfare Reform Act 2012 in a disability living allowance transfer case where a revision or supersession decision was made. The result was that the Secretary of State and the Tribunal were required to make a nil award. It was never the intention that the legislation should apply in this way and the legislation had never in fact been applied in that way in the past.

5. Given that the problem occurred in primary legislation the Tribunal could not read down the relevant wording so as to enable the legislation to be applied in a way compliant with the European Convention on Human Rights.

6. To obviate the problem thrown up by this case, the Secretary of State took such steps as were necessary to enable her to make an extra statutory payment to the

claimant in an amount equal to the daily living component of personal independence payment at the enhanced rate (i.e. equal to the award of personal independence payment which he would have received but for the lacuna). The problem has been solved for the future by the introduction of amending secondary legislation, which came into force on 4 July 2019, to fill the unintended lacuna which had hitherto existed.

The Facts

7. The claimant, who was born on 17 September 1950 and who has a number of medical conditions, was originally entitled to the higher rate of the mobility allowance and the highest rate of the care component of disability living allowance. He had not reached the age of 65 on 8 April 2013.

8. Following an invitation to make a claim on 11 July 2016 (pages 399 to 400), the claimant made a claim for personal independence payment on 15 July 2016, by which time he was aged 65, having attained that age on 17 September 2015.

9. By a decision dated 4 October 2016 (pages 102 to 111) he was awarded the daily living component of personal independence payment at the standard rate with effect from and including 2 November 2016 to and including 5 September 2019. He scored 10 points for the daily living component. No award of the mobility component was made because he scored only 4 points. The decision was reconsidered and revised on 22 November 2016, so that the claimant scored 11 points on the daily living component and 4 points on the mobility component (pages 117 to 126), although that did not affect his level of provision because he would have needed 12 points for the award of the enhanced rate. He appealed against that decision and the First-tier Tribunal dismissed the appeal and confirmed the decision on 27 July 2017 (the decision notice is at pages 194 to 195 and the statement of reasons at pages 199 to 206; the claimant did not appear, but the Tribunal considered that it was fair to proceed in his absence)**.** He did not appeal to the Upper Tribunal.

10. The claimant then made an application for supersession which was received on 3 February 2017 (pages 207 to 260)**.** By decision dated 13 July 2017 (pages 320 to 330), the Secretary of State decided that he was still entitled to the daily living component

of personal independence payment at the standard rate, scoring 11 points for that component, but was not entitled to the mobility component. The decision letter stated:

> "The law says we cannot award or increase the mobility part of PIP for claimants aged 65 or over. Whilst I accept your ability to walk has worsened I cannot look at your award as this happened after you reached 65. Therefore I cannot award you any PIP for help with mobility needs."

11. That decision was maintained on mandatory reconsideration on 23 August 2017 (pages 338 to 348).

The Appeal to the Tribunal

12. The claimant appealed against that decision. The matter came before the Tribunal on 28 February 2018 and the appeal was allowed. On this occasion the claimant attended with his wife and gave oral evidence. The Tribunal awarded the claimant the enhanced rate of the daily living component, awarding him 16 points for that component, but confirmed the decision in respect of the mobility component (the decision notice is at pages 380 to 381 and the statement of reasons at pages 387 to 390**).** The Tribunal decided that it was not appropriate to fix a time limit to the award. The Tribunal stated at paragraph 5 of its decision (and see also paragraph 21 of the statement of reasons) that:

> "The Tribunal cannot consider an award of the mobility component as [the claimant] is over the age of 65 years and has not previously been entitled to the mobility component of Personal Independence Payment."

13. On receipt of the statement of reasons the claimant sought permission to appeal from the Tribunal Judge (pages 392 to 393), which was granted by District Tribunal Judge Campbell on 1 July 2018 (page 403).

14. In granting permission to appeal the Tribunal Judge raised the following issues:

(1) whether regulation 25(b) of the Social Security (Personal Independence Payment) Regulations 2013 ("the 2013 Regulations") operates in circumstances where an initial

claim for personal independence payment was made prior to the age of 65, but not determined until after that age was reached, but the potential entitlement to the mobility component only arose as a result of a supersession application made after the relevant age had passed. Did the references to the "claim" in regulation 25 refer to the original claim or the application date for supersession? What did the language used in the statutory instrument justify in terms of the conclusion reached?

(2) although permission was not granted on that basis, the claimant sought clarity as to whether regulation 15, which was potentially relevant by virtue of regulation 26, might be construed to refer to awards of disability living allowance when previous awards were specified.

15. The claimant informed the Upper Tribunal of the grant of permission to appeal on 1 August 2018 (pages 404 to 408).

The Claimant's Ground of Appeal

16. The claimant's ground of appeal, as drafted for him by the Daventry Citizens' Advice Bureau, was that it was possible to qualify for the enhanced rate of the mobility component of personal independence payment if the claimant met the entitlement conditions for that rate and he had received the enhanced rate in an award which ended less than one year before the claim. He had received the enhanced rate of the mobility component in his previous award of personal independence payment which ended on 15 July 2016 and put in a new claim on 3 February 2017, which was less than one year later. That was in fact mistaken on two grounds: (i) the claimant had received an award of the mobility component in his previous award of disability living allowance, but had never had an award of the mobility component of personal independence payment; (ii) the award of disability living allowance had ended on 1 November 2016 (page 103), not on 15 July 2016, which was the date on which the new personal independence payment claim had been made.

17. I made initial directions for further submissions on 28 August 2018 and on 26 March 2019 I made further directions for the conduct of the appeal.

The Legislation

18. S.83(1) of the Welfare Reform Act 2012 ("the 2012 Act") provides for a general bar on entitlement to personal independence payment after the "relevant age":

> "A person is not entitled to the daily living component or the mobility component for any period after the person reaches the relevant age".

19. The relevant age means pensionable age, or if higher, 65 (s.83(2)). The relevant age in the case of the claimant is 65. For the sake of simplicity, references in the text below are to the age of 65.

20. Section 83(3) of the Act permits exceptions to be set out in regulations. Exceptions are made by the following provisions:

> (1) regulation 25(a) of the 2013 Regulations applies where a claimant was entitled to an award "of either or both components" before the age of 65. "Component" means "the daily living component or, as the case may be, the mobility component of personal independence payment": regulation 2. That means that regulation 25(a) does not apply in a disability living allowance transfer case ("a DLA Transfer Case"), where (as defined) there would have been no award of personal independence payment before the age of 65
>
> (2) regulation 25(b) applies where a claim for personal independence payment has been made before the age of 65, but had not been determined before the claimant reached the relevant age
>
> (3) regulation 15 of the 2013 Regulations, as applied by regulation 26: see further below.
>
> (4) regulation 27 of the 2013 Regulations, which makes special provision in relation to the revision or supersession of

> awards of personal independence payment where a person is over the age of 65: see further below.
>
> (5) regulation 27 of the Personal Independence Payment (Transitional Provisions) Regulations 2013 ("the TP Regulations"). Regulation 27(2) of the TP Regulations provides for a one-off exception to s.83 of the 2012 Act when a person (under 65 on 8 April 2013) with a current award of disability living allowance[1] claimed personal independence payment for the first time. Regulation 27(3) applies in similar circumstances, where there was no entitlement to disability living allowance on the day on which the claim for disability living allowance was made, but where there was entitlement in the past year.

(Somewhat confusingly, two of the exceptions arise out of two different regulations, coincidentally both numbered 27, one under the 2013 Regulations and the other under the TP Regulations as I have defined them, although even more confusingly both were passed in the same year.)

21. Regulation 27 of the 2013 Regulations (revision and supersession of an award after a person has reached the relevant age), which is the fourth exception listed above, provides as follows:

> "27(1) Subject to paragraph (2), section 83(1) of the Act (persons of pensionable age) does not apply where —
>
> (a) C has reached the relevant age and is entitled to an award ("the original award") of either or both components pursuant to an exception in regulation 25 or 26; and
>
> (b) that award falls to be revised or superseded.
>
> (2) Where the original award includes an award of the mobility component and is superseded for a relevant change of

[1] Regulation 2 of the TP Regulations defines "DLA entitled person" as a person aged 16 or over who is entitled to either component or both components of disability living allowance.

> circumstance which occurred after C reached the relevant age, the restrictions in paragraph (3) apply in relation to the supersession.
>
> (3) The restrictions referred to in paragraph (2) are —
>
> (a) where the original mobility component award is for the standard rate then, regardless of whether the award would otherwise have been for the enhanced rate, the Secretary of State –
>
> (i) may only make an award for the standard rate of that component; and
>
> (ii) may only make such an award where entitlement results from substantially the same condition or conditions for which the mobility component in the original award was made.
>
> (b) where the original mobility component award is for the enhanced rate, the Secretary of State may only award that rate of that component where entitlement results from substantially the same condition or conditions for which the mobility award was made.
>
> (4) Where the original award does not include an award of the mobility component but C had a previous award of that component, for the purpose of this regulation entitlement under that previous award is to be treated as if it were under the original award provided that the entitlement under the previous award ceased no more than 1 year prior to the date on which the supersession takes or would take effect".

The Secretary of State's First Submission: Summary

22. After two extensions of time, the Secretary of State made a response to the appeal on 14 December 2018 (pages 435 to 443). In summary she submitted that

(1) the appeal had brought to notice that there was a lacuna in the personal independence payment legislation which worked to the disadvantage of claimants; in particular, the secondary legislation failed to provide any exemption from s.83(1) of the 2012 Act in a DLA Transfer Case where a revision or supersession decision was made. The result was that the Secretary of State and the Tribunal were required to make a nil award

(2) she accepted that application of the legislation was discriminatory in its effect, but in the light of the decision of the Court of Appeal in ***Secretary of State for Work and Pensions v. Carmichael*** [2018] 1 WLR 3429, she did not consider that she could properly invite the Tribunal to read down the relevant wording so as to enable the legislation to be applied in a way compliant with the European Convention on Human Rights

(3) it was only the instant appeal which had brought the problem to light and, since it was never the intention that the legislation should apply in this way, the legislation had never in fact been applied in that way in the past. Rather, as with cases where a claimant was in receipt of personal independence payment before the age of 65, claimants in DLA Transfer Cases had been able to achieve an uplift in their award of personal independence payment on an application for supersession of their personal independence payment award for the daily living component, where circumstances warranted it, but not for a new or increased award of the personal independence payment mobility component

(4) in the light of the above the Upper Tribunal should set aside the First-tier Tribunal's decision and replace it with a nil award of both components of personal independence payment

(5) if the Upper Tribunal confirmed the lacuna in the legislation, she intended to take such steps as were necessary to enable her to make an extra statutory payment to the claimant in an amount equal to the daily living component of personal independence payment at the enhanced rate (i.e. equal to the award of personal independence payment which he would have received but for the lacuna). (I reiterate at this point that the Tribunal decided that it was not appropriate to fix a time limit to the award.)

The Secretary of State's First Submission: Detailed Response

23. The claimant's was a DLA Transfer Case. When he applied for personal independence payment, regulation 27(2) of the TP Regulations applied to him because: (a) he had not reached the age of 65 on 8 April 2013; (b) he was a DLA entitled person; and (c) he claimed personal independence payment in response to a notification sent to him by the Secretary of State.

24. As set out above, it had come to Secretary of State's attention that there was a lacuna in regulation 27(1) of the 2013 Regulations, as it applied to a DLA Transfer Case in that

(a) regulation 27(1) of the 2013 Regulations applied only where a person was entitled to an award of either or both components *"pursuant to an exception in regulation 25 or 26*" of those Regulations (referred to in regulation 27(1) as an "original award"). As noted above, "component" meant either component of personal independence payment

(b) that meant that it did *not* cover a DLA Transfer Case (i.e. where the exception in regulation 27 of the TP Regulations applied on transfer to personal independence payment and thus where the exceptions in regulations 25 and 26 of the 2013 Regulations did not apply).

25. The (unintended) effect was that on any decision on revision or supersession in a DLA Transfer Case, s.83(1) barred the making of an award. In this case, it should have resulted in a decision on the claimant's application for supersession that he was not entitled to either component of personal independence payment at all from and including 2 November 2016.

26. That, however, was not consistent with how the legislation had actually been applied in practice. The Secretary of State's practice had always been to treat awards in DLA Transfer Cases as "original awards," such that DLA Transfer Cases were treated in the same way as cases where there was an award of personal independence payment before the age of 65. (The intended policy was set out in the Department's consultation on "DLA Reform and Personal Independence Payment: completing the detailed design", published in March 2012.)

27. Applying the legislation in its then current form resulted in an obvious disparity of treatment between DLA Transfer Cases and cases where there was an award of personal independence payment before the age of 65. For obvious reasons, it was never the intention that there should be any difference of treatment. The intention was

always that regulation 27 of the 2013 Regulations should apply to DLA Transfer Cases.

28. In the circumstances, the Secretary of State conceded that application of the legislation in its current form would be incompatible with Article 14, read with Article 1 Protocol 1, of the European Convention on Human Rights.

29. In the light of the Court of Appeal's decision in ***Secretary of State for Work and Pensions v Carmichael*** [2018] 1 WLR 3429, the Secretary of State did not consider that she could properly invite the Upper Tribunal to ignore the plain wording of regulation 27(1) of the 2013 Regulations. The result, she submitted, was that the claimant was not entitled to either component of personal independence payment.

30. However, subject to the Parliamentary calendar, the Secretary of State intended to lay amending regulations at the earliest opportunity, to bring DLA Transfer Cases expressly within the exception in regulation 27(1) of the 2013 Regulations.

31. In the claimant's case, the consequence was that under the then current version of the legislation the outcome of his application for supersession was that he was not entitled to either component of personal independence payment from and including 2 November 2016. The decision of the Tribunal fell to be set aside by the Upper Tribunal accordingly and be replaced with a nil award.

32. However, the Secretary of State had taken note of the Tribunal's exploration of the evidence and its conclusions in relation to the daily living component of personal independence payment (under which the claimant had been entitled to 16 points for the daily living component). If the decision of the Upper Tribunal confirmed the lacuna in the legislation, the Department intended to take such steps as were necessary to enable it to make an extra statutory payment to the claimant in an amount equal to the daily living component of personal independence payment at the enhanced rate (*i.e.* equal to the award of personal independence payment which he would have received, but for the lacuna). (Again I reiterate at this point that the Tribunal decided that it was not appropriate to fix a time limit to the award.)

The Secretary of State's First Submission: The Mobility Component

33. For the reasons already set out, there was no proper basis upon which the Tribunal could award the mobility component of personal independence payment. Under the legislation, the proper outcome was a nil award.

34. The position would be the same in relation to the mobility component even if regulation 27(1) of the 2013 Regulations applied, as the Tribunal found. That was because of the restrictions in regulation 27(2) to (3), which applied where the original award of personal independence payment included an award of the mobility component at the standard rate. The award could not be increased to the enhanced rate and an award of the standard rate might only be made where entitlement resulted from substantially the same condition(s) for which the previous personal independence payment mobility award was made.

35. Regulation 27(4) applied where the original award of personal independence payment did not include an award of the mobility component, but where the claimant had "a previous award of that component" in the year prior to the date on which the supersession would take effect. In such circumstances, entitlement under the previous award was treated as if it were under the original award. "Component" here again meant the mobility component of personal independence payment: regulation 2. Regulation 27(4) did not therefore apply by virtue of a previous award of the mobility component of disability living allowance. Regulation 27(4) did not apply in the present case because the claimant had never had an award of the mobility component of personal independence payment.

The Secretary of State's First Submission: Response to The Grounds of Appeal Raised in the Grant of Permission

36. With regard to the grounds of appeal raised in the grant of permission by Tribunal Judge Campbell the Secretary of State submitted that

(1) regulation 25(b) of the 2013 Regulations did not apply in this case because the claimant did not make a claim for personal independence payment before reaching the age of 65

(2) regulation 15 of the 2013 Regulations, as modified by regulation 26, did not apply either. Regulation 15 applied to a "previous award" which had ended: regulation 15(1)(b). "Previous award" meant "an award of either or both components to which C has ceased to be entitled" and "component" again meant the daily living component or the mobility component of personal independence payment: regulation 2. Regulation 15 did not, therefore, apply where an award of disability living allowance had ended. The claimant had not had a previous award of the mobility component of personal independence payment and his award of the daily living component had not ended at the material time, so regulation 15 (as modified by regulation 26) did not apply.

37. In the circumstances, the Upper Tribunal was invited to set aside the decision of the Tribunal and replace it with a decision that the claimant was entitled to a nil award from and including 2 November 2016.

Further Directions

38. The Supreme Court had (as of 11 February 2019) given permission to appeal against the decision in ***RR (AP) v Secretary of State for Work and Pensions*** [2018] UKUT 355 (AAC), which was in effect an appeal against the decision in ***Secretary of State for Work and Pensions v. Carmichael***, following a leapfrog certificate granted by the Upper Tribunal. It was not, however, clear when that appeal would be heard (or decided).

39. Despite two reminders dated 19 January and 28 February 2019, the claimant had not replied to the Secretary of State's submission. (That is not a criticism of the claimant: the issue at stake was an esoteric one, even by the standards of social security legislation, and he may perfectly legitimately have taken the view that he could not sensibly contribute to the detailed textual exegesis of the various sets of regulations.) On 26 March 2019 I therefore made further directions for the conduct of the appeal.

40. I observed that, in the event that the Upper Tribunal were to accede to the submission of the Secretary of State set out above, the claimant should be entitled to know when such an extra statutory payment would be made to him.

41. I therefore directed that the Secretary of State should have one month in which to make a further submission, dealing with the following issues:

> (1) in paragraph 17 of the submission it was envisaged that attachments would be appended from the Department's consultation on "DLA Reform and Personal Independence Payment: completing the detailed design", but they had not been appended. Copies of the relevant pages should now be provided
>
> (2) in paragraphs 3.2 and 20, the Secretary of State submitted that, in the light of the decision of the Court of Appeal in ***Secretary of State for Work and Pensions v. Carmichael***, she could not properly invite the Upper Tribunal to ignore the plain wording of regulation 27(1) of the 2013 Regulations, with the result that the claimant was not entitled to either component of personal independence payment. Did the Secretary of State maintain that position in the light of the later decision of the Court of Appeal in ***JT v. First-tier Tribunal (SEC) (EHRC intervening)*** [2019] 1 WLR 1313?
>
> (3) in the event that the Upper Tribunal were to accede to the Secretary of State's submission that it should set aside the decision of the Tribunal and replace it with a decision that the claimant was entitled to a nil award, the Secretary of State proposed "to take such steps as are necessary to enable [her] to make an extra statutory payment to the Appellant in an amount equal to PIP (DL) at the enhanced rate (i.e. equal to the award of PIP that [the Appellant] should have received, but for the lacuna". How quickly did the Secretary of State envisage being in a position to make that extra statutory payment to the claimant in the event that the decision of the First-tier Tribunal were set aside?

42. The claimant was to have one month to reply; if he did not do so, no further reminders would be sent to him. The matter was then to be referred back to me for decision.

Further Submissions

43. In her second submission dated 7 May 2019 (pages 449 to 451), the Secretary of State dealt with the stipulated issues as follows:

(1) in response to the first issue, the two policy documents were now attached with relevant passages side-lined (pages 452 to 533). There was nothing specifically relevant in the documents; the point was rather that there was nothing to indicate any intention to treat differently persons like the claimant, as would be expected if that had been the intention

(2) as to the second issue, the Secretary of State maintained her position that this was a ***Carmichael*** type case rather than a ***JT*** type case. It is not necessary for present purposes to set out that part of the submission, which has in any event now been overtaken by the decision of the Supreme Court in ***RR*** and which requires a different analysis of the issue (although in the Secretary of State's later submission the situation resulted in the same conclusion, albeit for different reasons)

(3) the answer to the third question was that the Secretary of State had already commenced making extra statutory payments of the daily living component of personal independence payment at the enhanced rate to the claimant.

RR (AP) v Secretary of State for Work and Pensions

44. The facts of the ***RR*** case were that RR lived with his severely disabled partner in social sector rented accommodation with two bedrooms. On 5 March 2013 Sefton Borough Council decided that RR and his partner were under-occupying the accommodation and reduced his entitlement to housing benefit by 14% pursuant to Regulation 13B of the Housing Benefit Regulations 2006. RR appealed. The First-tier Tribunal held that RR required a second bedroom because of his partner's disabilities and her need to accommodate medical equipment and supplies. The Upper Tribunal allowed the respondent's appeal: [2018] UKUT 355 (AAC). The question arose as to

what powers Tribunals had to interpret or disapply secondary legislation following the decision of the Court of Appeal in ***Carmichael***. The Upper Tribunal granted RR a leapfrog certificate under s.14 A of the Tribunals, Courts and Enforcement Act 2007, enabling him to appeal directly from the Upper Tribunal to the Supreme Court (leapfrogging the Court of Appeal) if given permission to do so. As stated above, the Supreme Court granted permission on 11 February 2019.

45. That case raised the following issues:

(1) whether statutory authorities, including the First-tier Tribunal and Upper Tribunal, had the power or duty to calculate entitlement to housing benefit without making deductions for under-occupancy, so as not to violate a claimant's rights under the European Convention on Human Rights

(2) if so, the extent to which the payment of discretionary housing payments were relevant to the task of the statutory authorities in calculating entitlement.

46. The hearing in ***RR*** was in fact expedited and was heard by the Supreme Court on 3 July 2019. Judgment on the appeal was awaited when the instant case was referred back to me on 17 July 2019.

47. I considered that, although the facts of the instant case and the statutory context in which it arose were not the same as that in ***RR***, the determination of the first question in ***RR*** might potentially impact on the outcome of this case. It was therefore appropriate to stay all further proceedings in the instant case until the determination of the appeal by the Supreme Court and I duly stayed the action on that date (pages 537 to 540).

48. On 13 November 2019 the Supreme Court allowed the appeal in ***RR***. It was therefore appropriate to lift the stay in these proceedings to allow for a further submission by the Secretary of State and I lifted the stay on 22 November 2019 (pages 541 to 544). I directed the Secretary of State to make a further submission in the light of the outcome of the appeal in ***RR*** in the Supreme Court, after which the matter was to be referred back to me for final decision.

The Secretary of State's Further Submissions

49. The Secretary of State made further submissions in response to that direction on 11 February 2020 (by email and not yet paginated or added to the appeal bundle). In summary, her position remained that the Tribunal could not award benefit by way of remedy in the instant case. However, that would have no impact on the claimant personally, since the Department of Work and Pensions had already been making to him extra statutory payments of the daily living component of personal independence payment at the enhanced rate. In addition, legislative amendments had now been made by the Personal Independence Payment (Transitional Provisions) (Amendment) Regulations 2019 ("the 2019 Regulations") to remedy the issue which the instant case had brought to light.

50. She submitted that in ***RR*** the Supreme Court decided that a public authority was required to disregard a provision of subordinate legislation which resulted in a breach of a Convention right unless it was impossible to do so. It accepted that the approach of the Court of Appeal in ***JT v First-tier Tribunal (SEC) (EHRC intervening)*** [2019] 1 WLR 1313 was correct (and that the Court of Appeal in ***Carmichael*** was wrong).

51. The key passage in ***RR*** was this:

> "27. Although the majority of the Court of Appeal in *Carmichael (CA)* [2018] 1 WLR 3429 accepted the arguments of the Secretary of State, in my view Leggatt LJ was entirely right to accept the arguments of the claimant. There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear.
>
> 28. The HRA draws a clear and careful distinction between primary and subordinate legislation. This is shown, not only by the provisions of section 6(1) and 6(2) which have already been referred to, but also by the provisions of section 3(2). This provides that the interpretative obligation in section 3(1):
>
> > "(a) applies to primary and subordinate legislation whenever enacted; (b) does not affect the validity,

> continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents the removal of the incompatibility."

Once again, a clear distinction is drawn between primary and subordinate legislation.

29. The obligation in section 6(1), not to act in a way which is incompatible with a Convention right, is subject to the exception in section 6(2). But this only applies to acts which are required by primary legislation. If it had been intended to disapply the obligation in section 6(1) to acts which are required by subordinate legislation, the HRA would have said so. Again, under section 3(2), primary legislation which cannot be read or given effect compatibly with the Convention rights must still be given effect, as must subordinate legislation if primary legislation prevents removal of the incompatibility. If it had been intended that the section would not affect the validity, continuing operation or enforcement of incurably incompatible subordinate legislation, where there was no primary legislation preventing removal of the incompatibility, the HRA would have said so.

30. Contrary to the Secretary of State's argument, *Mathieson* [2015] 1 WLR 3250 was not a "one off". As shown by the authorities listed in paras 21–23 above, the courts have consistently held that, where it is possible to do so, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded. There may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision. But that was not the case in *Francis* [2006] 1 WLR 3202, where the maternity grant could be paid to the holder of a residence order who qualified for it in all other respects; nor was it the case in *In re G* [2009] AC 173, where the unmarried couple could be allowed to apply to adopt (in reaching my opinion, I satisfied myself that this would not cause problems elsewhere in the statutory scheme); nor was it the case in *Burnip* and *Gorry* [2013] PTSR 117, where housing benefit could simply be calculated without the deduction for under-occupation; nor was it the case in *Mathieson*, where DLA could simply continue to be paid during the whole period of hospitalisation; nor was it the case in *JT* [2019] 1 WLR 1313, where criminal injuries compensation could be paid without regard to the "same roof" rule; and nor is it the case here, where the situation is on all fours with *Burnip* and *Gorry*. There is no legislative choice to be exercised. As Dan Squires

> QC, for the Equality and Human Rights Commission, put it, where discrimination has been found, a legislator may choose between levelling up and levelling down, but a decision-maker can only level up: if claimant A is entitled to housing benefit of £X and claimant B is only entitled to housing benefit of £X–Y, and the difference in treatment is unjustifiably discriminatory, the decision-maker must find that claimant B is also entitled to benefit of £X."

52. Importantly for the purposes of the present case, it was common ground in ***RR*** that the First-tier Tribunal, in reading a new exception into the secondary legislation, had gone beyond what was permissible: see [5], [15] and [24].

53. In the present case, the Secretary of State submitted that it was not possible to achieve the necessary equality of treatment by disapplying secondary legislation. The provision which ultimately led to a nil award in a DLA Transfer Case was s.83 of the 2012 Act. Neither regulation 27(1) of the 2013 Regulations nor regulation 27 of the TP Regulations provided for an exception in DLA Transfer Cases. If the Tribunal were to create a new exception to the prohibition in s.83 of the 2012 Act for DLA Transfer Cases, it would be impermissibly making a legislative choice, rather than simply disregarding an incompatible provision of secondary legislation. According to ***RR***, only the latter was permissible.

54. For those reasons and the reasons set out in previous submissions, the Secretary of State therefore invited the Upper Tribunal to set aside the decision of the Tribunal and replace it with a nil award.

55. Neither party requested an oral hearing in the instant case and I am satisfied that it is not necessary to hold one in order to determine this appeal.

The 2019 Regulations

56. The 2019 Regulations as now enacted provide that

> **"Citation and commencement**
>
> 1. These Regulations may be cited as the Personal Independence Payment (Transitional Provisions)

(Amendment) Regulations 2019 and come into force on 4th July 2019.

Amendment to the Personal Independence Payment (Transitional Provisions) Regulations 2013

2. After regulation 27 (persons aged 65 and over to be entitled to personal independence payment in certain circumstances) of the Personal Independence Payment (Transitional Provisions) Regulations 2013 insert—

"**Revision and supersession of an award of personal independence payment in certain circumstances**

27A(1) Subject to paragraph (2), section 83(1) of the Act (persons of pensionable age) does not apply to a person who —

(a) met the conditions at paragraph (2) or (3) of regulation 27, and

(b) is entitled to an award of personal independence payment ("the original award"), and that award is revised or superseded within the meaning of section 9 or 10 of the 1998 Act respectively.

(2) Where the original award includes the mobility component of personal independence payment and is superseded, paragraphs (2) and (3) of regulation 27 of the PIP Regulations apply in relation to the supersession.

(3) In this regulation, the references to an original award are to be read as including a concessionary payment made in lieu of personal independence payment under arrangements by the Secretary of State with the consent of the Treasury".

57. The explanatory note (which is not part of the Regulations) explains that

"These Regulations amend the Personal Independence Payment (Transitional Provisions) Regulations 2013 which transfer disability living allowance entitled persons to personal independence payment ("DLA transfer claimants") by providing an exemption to personal independence payment ("PIP") age restriction in section 83(1) of the Welfare Reform Act 2012 in cases where transfer claimants' PIP awards are revised or superseded for a change of circumstances.

Regulation 2 inserts a new provision, regulation 27A, into the Transitional Regulations to correct an unintended gap in the

> legislation. Regulation 27A provides former DLA transfer claimants, who are now in receipt of PIP and who transferred to PIP when aged 65 or older, an exemption from the restriction in section 83(1) of the Welfare Reform Act 2012 where their PIP award is revised or superseded. It also provides that when that PIP award is superseded it will be subject to the limitations on the mobility component for those aged 65 or over provided at regulation 27(2) and (3) of the Social Security (Personal Independence Payment) Regulations 2013.
>
> Regulation 2 also applies these provisions to those in receipt of concessionary payments made in lieu of an award of the daily living component, mobility component or both components of PIP".

The Decision on the Appeal

58. I accept the submissions of the Secretary of State. In the circumstances, particularly since the claimant will be in no worse a position as a result of the extra statutory payments already implemented by the Secretary of State and given further that the unintended lacuna revealed by the case has now been filled by the 2019 Regulations, I do not consider that anything would be gained by repeating those submissions in detail as part of my decision. I have already set them out extensively as part of the narrative of the case in the preceding paragraphs.

59. It is, however, appropriate to summarise my conclusions in the following paragraphs.

60. The claimant's case is a DLA Transfer Case. When he applied for personal independence payment, regulation 27(2) of the TP Regulations applied to him because: (a) he had not reached the age of 65 on 8 April 2013, (b) he was a DLA entitled person and (c) he claimed personal independence payment in response to a notification sent to him by the Secretary of State.

61. There was an unintended lacuna in regulation 27(1) of the 2013 Regulations as originally drafted, as it applied to a DLA Transfer Case in that

(a) regulation 27(1) of the 2013 Regulations applies only where a person is entitled to an award of either or both components *"pursuant to an exception in regulation 25 or*

26" of those Regulations (referred to in regulation 27(1) as an "original award"). In this context, "component" means either component of personal independence payment

(b) that means that it does *not* cover a DLA Transfer Case (i.e. where the exception in regulation 27 of the TP Regulations applies on transfer to personal independence payment and thus where the exceptions in regulations 25 and 26 of the 2013 Regulations does not apply).

62. The (unintended) effect of the lacuna is that on any decision on revision or supersession in the claimant's DLA Transfer Case, s.83(1) of the 2012 Act bars the making of an award.

63. In this case, that should have resulted in a decision on his application for supersession that he was not entitled to either component of personal independence payment from and including 2 November 2016.

64. The application of the legislation in its then current form results in an obvious disparity of treatment between DLA Transfer Cases and cases where there was an award of personal independence payment before the age of 65. It was never the intention that there should be any difference of treatment. The intention was always that regulation 27 of the 2013 Regulations should apply to DLA Transfer Cases.

65. The application of the legislation in its then current form would be incompatible with Article 14, read with Article 1 Protocol 1, of the European Convention on Human Rights.

66. Although by virtue of the decision of the Supreme Court in ***RR*** a public authority is required to disregard a provision of subordinate legislation which results in a breach of a Convention right unless it is impossible to do so, according to the same decision under section 3(2) of the Human Rights Act 1998 primary legislation which cannot be read or given effect compatibly with the Convention rights must still be given effect, as must subordinate legislation if primary legislation prevents removal of the incompatibility.

67. In the claimant's case it is not possible to achieve the necessary equality of treatment by disapplying secondary legislation. The provision which ultimately leads to a nil award in a DLA Transfer Case is primary legislation in the form of s.83 of the 2012 Act. Neither regulation 27(1) of the 2013 Regulations nor regulation 27 of the TP Regulations 2013 provides for an exception in DLA Transfer Cases. If the Tribunal were to create a new exception to the prohibition in s.83 of the 2012 Act for DLA Transfer Cases, it would be impermissibly making a legislative choice, rather than simply disregarding an incompatible provision of secondary legislation.

68. The lacuna has been filled with effect from 4 July 2019 by the 2019 Regulations and has been cured in this case by the Secretary of State's extra statutory payment of the rate of personal independence payment which the claimant would have enjoyed but for the lacuna.

69. As to the first of the grounds raised in the grant of permission to appeal, the short answer is that regulation 25(b) of the 2013 Regulations does not apply in this case because the claimant did not make a claim for personal independence payment before reaching the age of 65.

70. As to the second of those grounds, regulation 15 of the 2013 Regulations, as modified by regulation 26, does not apply either. Regulation 15 applies to a "previous award" which has ended: regulation 15(1)(b). "Previous award" means "an award of either or both components to which C has ceased to be entitled" and "component" again means the daily living component or the mobility component of personal independence payment: regulation 2. Regulation 15 does not, therefore, apply where an award of disability living allowance has ended. The claimant has not had a previous award of the mobility component of personal independence payment and his award of the daily living component of personal independence payment had not ended at the material time, so regulation 15 (as modified by regulation 26) does not apply.

71. As to the ground adduced by the claimant himself in his notification of the grant of permission to appeal, that was in fact mistaken on two grounds: (i) the claimant had received an award of the mobility component in his previous award of disability living

allowance, but had never had an award of the mobility component of personal independence payment; (ii) the award of disability living allowance had ended on 1 November 2016 (page 103), not on 15 July 2016, which was the date on which the new personal independence payment claim had been made. Regulation 27(4) of the 2013 Regulations applies where the original award of personal independence payment does not include an award of the mobility component, but where the claimant had "a previous award of that component" in the year prior to the date on which the supersession would take effect. In such circumstances, entitlement under the previous award would be treated as if it were under the original award. "Component" here means the mobility component of personal independence payment: regulation 2. Regulation 27(4) does not therefore apply by virtue of a previous award of the mobility component of disability living allowance. Regulation 27(4) does not apply in the present case because the claimant had never had an award of the mobility component of personal independence payment.

Conclusion

72. The decision of the First-tier Tribunal sitting at Northampton dated 28 February 2018 under file reference SC316/17/01084 involves an error on a point of law. The claimant's appeal against that decision is dismissed and the decision of the Tribunal is set aside.

73. The decision is remade.

74. The claimant is not entitled to either component of personal independence payment from and including 2 November 2016.

75. However, the Secretary of State has taken note of the Tribunal's exploration of the evidence and its conclusions in relation to the daily living component of personal independence payment (under which the claimant had been entitled to 16 points for the daily living component). The decision of the Upper Tribunal has confirmed an unintended lacuna in the relevant legislation as a result of which the Secretary of State has taken such steps as are necessary to enable her to make an extra statutory payment to the claimant in an amount equal to the daily living component of personal independence payment at the enhanced rate (*i.e.* equal to the award of personal

independence payment which he would have received but for the lacuna). The Tribunal decided that it was not appropriate to fix a time limit to the award.

76. So that the claimant is clear when he reads this decision, his appeal does not succeed and is dismissed. The decision of the Tribunal was wrong in law and is set aside. The claimant is not entitled to either component of personal independence payment from and including 2 November 2016. However, he will not be worse off than if the decision of the Tribunal had been upheld. Under the decision of the Tribunal the claimant had been entitled to 16 points for the daily living component and would have been entitled to the enhanced rate of that component. Moreover, the Tribunal decided that it was not appropriate to fix a time limit to the award. The Secretary of State has taken such steps as are necessary to enable her to make an extra statutory payment to him in an amount equal to the daily living component of personal independence payment at the enhanced rate (*i.e.* equal to the award of personal independence payment which he would have received but for the lacuna).

77. Although the decision is dated as of 1 April 2020, there will in the present circumstances inevitably be some delay in issuing it. As of today's date it is not clear how long that delay will be, but the Upper Tribunal Office will do its level best to issue it as soon as circumstances permit.

Signed **Mark West**
Judge of the Upper Tribunal

Dated **1 April 2020**