Upper Tribunal for Scotland

[2021] UT 16
UTS/AS/20/0015

DECISION OF LADY CARMICHAEL

ON AN APPEAL

in the case of

DR, per West Lothian Council Advice Shop,
Bathgate Partnership Centre, South Bridge Street, Bathgate, EH48 1TS

Appellant

and

(FIRST) SOCIAL SECURITY SCOTLAND (SECOND) LORD ADVOCATE
per Scottish Government Legal Directorate, Victoria Quay, Edinburgh, EH6 6QQ

Respondent

FTT Case Reference AE/19/0060

23 MARCH 2021

Decision

I refuse the appeal and uphold the decision of the First-tier Tribunal.

Introduction

[1] The appellant is appealing against a decision of the First-tier Tribunal for Scotland ("FtT"). The appellant applied on 21 August 2019 for the school-age grant in respect of her son. Her application was unsuccessful. She requested a redetermination, and the decision was upheld. She appealed to the FtT. The FtT dismissed her appeal.

[2] The school-age grant is a one-off payment of £250.

[3] The appellant's son ("the child") was born on 9 February 2014, and started school in August 2019.

[4] The appellant's argument involves a contention that provisions of the Scottish statutory instrument which sets the eligibility criteria for the school-age grant are not compatible with the European Convention on Human Rights. I considered on granting permission that the appeal raised a devolution issue as defined in paragraph 1 of Schedule 6 to the Scotland Act 1998, and ordered that the appeal be intimated to the Lord Advocate and the Advocate General for Scotland. Neither had been represented before the FtT. Mr Jajdelski, advocate, was instructed both by the Lord Advocate and by Social Security Scotland.

The relevant legislation

[5] The regulations which apply are the Early Years Assistance (Best Start Grants) (Scotland) Amendment (No 2) Regulations 2019 ("the 2018 regulations"). They were made under section 32 of the Social Security (Scotland) Act 2018 ("the 2018 Act"). Section 32 provides:

> "32 - Early years assistance
> (1) Early years assistance is assistance (which may or may not take the form of money) given by the Scottish Ministers under section 24 to help towards meeting some of the costs associated with having, or expecting to have, a child in the family.
> (2) The Scottish Ministers are to make regulations prescribing -
> (a) the eligibility rules that are to be applied to determine whether an individual is entitled to early years assistance, and
> (b) what early years assistance an individual who is entitled to it is to be given.
> (3) Schedule 6 makes provision about the exercise of the power conferred by subsection (2)."

Schedule 6 provides:

"Schedule 6
Early years assistance regulations

Part 1 – Eligibility 1.
(1) The regulations must be framed so that an individual's eligibility depends on the individual satisfying one of the primary eligibility criteria.
(2) The primary eligibility criteria are that the individual—
…
(d) is responsible for a child when a specified event in the child's life occurs or has become responsible for the child within a specified period of the event.

6. Application within specified period
The regulations may provide that an individual ceases to be eligible on account of satisfying a primary eligibility criteria unless, by a deadline specified in the regulations—
(a) the individual has applied for early years assistance,
…"

[6] The 2018 regulations, so far as relevant, provide in regulation 3 and Schedule 4:

"3 - Overview
(1) Part 2 makes provision about the interpretation of these Regulations.
(2) Schedule 1 makes provision about matters of procedure for determining entitlement to early years assistance.
…
(5) Schedule 4 makes provision about the early years assistance that is to be given in connection with a child reaching the age at which children in Scotland usually start primary school (referred to in these Regulations as "school-age grant").

Schedule 4 School-age grant

Part 1 Eligibility
1 - Eligibility
An individual is eligible for a school-age grant in respect of a child if -
(a) the individual's application for the grant is made on or after 3 June 2019 (see regulation 4 in relation to when an application is to be treated as made),
(b) the individual's application for the grant is made within the period described in paragraph 2,
…
2 - Period within which application must be made
(1) The period referred to in paragraph 1(b) -
(a) begins on 1 June in the relevant year, and

(b) ends at the end of the last day of February in the following year.

(2) In sub-paragraph (1), "the relevant year" means—
(a) if the child's birthday is in January or February, the calendar year in which the child's 4th birthday falls,
(b) otherwise, the calendar year in which the child's 5th birthday falls."

[7] Those provisions in their current form are the result of amendment to the regulations, by the Early Years Assistance (Best Start Grants) (Scotland) Amendment (No 2) Regulations 2019 ("the 2019 regulations"). One of the effects of the amendment was to create the school-age grant: regulations 7 to 9 of the 2019 regulations. The amendment creating the school-age grant came into force on 3 June 2019: regulation 2(1) of the 2019 regulations.

[8] There is no real dispute between the parties as to how these provisions fall to be construed.

[9] Paragraph 1 of Schedule 4 creates two criteria as to eligibility for the school-age grant.

[10] The first criterion is that the application must be made on or after 3 June 2019: paragraph 1(a) of Schedule 4. This is the date on which the provisions of the 2018 regulations relating to the school-age grant came into force. The first criterion means that a school-age grant could only be applied for after the provisions creating it came into force and not in advance (subject to the exercise of the power under reg. 4(3) to treat an application as made on a chosen day within 10 days of it being received).

[11] The second criterion is that the application must be made within the period described in paragraph 2, which is defined in paragraph 1(b) of Schedule 4. In order to determine what the period described in paragraph 2 is, it is necessary, in the first instance, to identify "the relevant year" in accordance with paragraph 2(2) of Schedule 4. "The relevant

year" depends on the month in which the child was born. If the child was born in January or February, the relevant year is the calendar year in which the child's fourth birthday falls. Otherwise it is the calendar year in which the child's fifth birthday falls. An application must be made in the period which beginning on 1 June of the relevant year and ending at the end of the last day of February of the following year.

The appellant's case

[12] The appellant's application failed because it was not made within the period specified in schedule 4 to the regulations. It was not made within the period specified in schedule 4, paragraph 2. For the child, that period would have been between 1 June 2018 and 28 February 2019. It was impossible to make an application for him that complied with both that requirement, and the requirement that the application be made on or after 3 June 2019.

[13] The appellant argued that the regulations were not compatible with Article 1 Protocol 1 of the European Convention on Human Rights read together with Article 14.

[14] The appellant submitted that the aim of the legislation – section 32 and Schedule 6 of the 2018 Act – was to provide financial support for children at key points of transition in their early years. The policy aim underlying the regulations was to improve children's wellbeing and life chances, by providing support to low income families at key transition points in early years: *Social Security (Scotland) Bill Policy Paper; Early Years Assistance (Best Start Grant) Illustrative Regulations and Policy Narrative*, a policy document published by the Scottish Government in October 2017. The transition in question was starting school. The effect of the regulations was that the child was not eligible for the school-age grant, whereas other children who started school in the same year that he did would be. Children who

were born on or after 1 March 2014 started school at the same time he did. They would be eligible. Their fifth birthday would fall in 2019. An application for such a child might be made between 3 June 2019 and 29 February 2020. Children born in January or February 2015 might also start school in August 2019, and, again, would be eligible if an application were made between those dates.

[15] The appellant did not submit that she had a free-standing claim under Article 1 Protocol 1 ("A1P1"). Rather, she submitted that the benefit fell within the ambit of A1P1, and that the claim was treated differently from those related to children who started school at the same time, on account of the date of birth of the child. That difference of treatment was not in pursuit of a legitimate aim and was not justified.

The respondents' case

[16] The respondents referred to the Education (Scotland) Act 1980 ("the 1980 Act"), which makes provision in relation to when a person is of school age. The 1980 Act required an education authority to fix two dates: (i) a "school commencement date", which was the date for the commencement of attendance at primary schools in their area: section 32(1). In respect of the school commencement date it must fix, (ii) an "appropriate latest date", which was the date on or before which a child must attain the age of 5 years in order to come within the category of children whom the authority considered of sufficient age to commence attendance at a public primary school at the school commencement date: section 32(4).

[17] The school commencement date was usually a date in August, and the appropriate latest date was usually a date in February the following year. The period between the appropriate latest date and the next following school commencement date could not, except

with the approval of the Scottish Ministers, exceed 6 months by more than seven days: section 32(7). A child who did not attain the age of 5 years on a school commencement date was, for the purposes of section 31 of the 1980 Act, deemed not to have attained that age until the school commencement date next following the child's fifth birthday: section 32(3).

[18] That meant that a child could start primary school if the child was not yet 5 years old at the beginning of the school year in August, but would have turned 5 by the appropriate latest date in February the following year.

[19] The education authority had to make provision for a child in that category to attend school: section 32(6). There was, however, no duty on a parent whose child had not attained the age of 5 years by the start of the school year. That meant that a parent could "defer" the start of the child's attendance at school until the following school year.

[20] The first eligibility criterion, that the application must be made on or after 3 June 2019, was concerned with the timing of the application relative to a particular date, and did not, directly or indirectly, concern any characteristics of the appellant or the child. The application was made after 3 June 2019 and so no issue arose about paragraph 1(a) of Schedule 4.

[21] In relation to the second criterion, although it was expressed as concerned with the timing of the application, it related in part to how old the child was in respect of whom the application was made. Counsel offered by way of example the case of a child born in January 2013. His fourth birthday would fall in January 2017. The relevant period (so far as the second criterion was concerned) would be 1 June 2017 to 28 February 2018. The child could not satisfy the first criterion, because the application could not be made after 3 June 2019. There was no entitlement to school-age grant because it was not available in respect of children who attained the age at which children usually start school before the school-age

grant was introduced. It was not a defect in the statutory scheme that it did not apply retrospectively to all children in respect of whom all the other eligibility criteria would have been satisfied if the grant had been created earlier.

[22] The first cohort of children in respect of whom applications could satisfy both criteria were those born between 1 March 2014 and 28 February 2015. There must inevitably be a cut-off point for eligibility. The power in regulation 4(3) could never have been exercised so as to render the application relating to the child eligible.

[23] The respondents summarised their position in the following way.

[24] First, eligibility for the school-age grant was tied, by the second criterion, to the child reaching the age at which children in Scotland usually started school. Reaching that age was an event in the child's life for the purposes of paragraph 1 of Schedule 6 of the 2018 Act, even if the child did not actually start school at that point.

[25] Second, the question of whether a child had attained an age at which children in Scotland usually started school was distinct from the question of when that child actually started school. The second criterion was not concerned with when a child actually started school.

[26] Third, the choice between tying eligibility to (i) the child's reaching the relevant age or (ii) the child's starting school was a choice for the Scottish Ministers. The enabling provisions of the 2018 Act permitted them to choose either option, and the choice of the first option was open to them. It was not discriminatory or otherwise unlawful. It was intelligible why, for the purposes of assessing eligibility, a criterion such as that adopted by the Scottish Ministers was conducive to good administration, especially where it was the parent's decision whether or not to defer a child's commencement of primary school. Tracking a child's precise age, having regard to the framework under the 1980 Act, was

more straightforward than tracking when a child actually started school. It made it easier for the Scottish Ministers to forecast the need for funding in relation to the school-age grant in any particular application window. I observe that this justification was advanced by way of submission, rather than by reference to any documents reflecting the formation of policy on this basis, or a statement or affidavit by an official in the relevant department of government.

[27] In addressing compatibility with A1P1 read with Article 14 ECHR, I required to consider the following questions: (1) Do the circumstances fall within the ambit of one or more of the Convention rights?; (2) Has there been a difference of treatment between two persons who are in an analogous situation?; (3) Is that difference of treatment on the ground of one of the characteristics listed or "other status"?; (4) Is there an objective justification for that difference in treatment? (*McLaughlin's Application for Judicial Review, Re* [2018] 1 WLR 4250, Baroness Hale, paragraph 15).

[28] So far as the first of these was concerned, the respondents accepted that the circumstances of the appeal fell within the ambit of A1P1 for the purposes of Article 14. The relevant test was that set out in *Stec* v *United Kingdom* (2006) 43 EHRR 47, at paragraph 54. But for the condition of entitlement about which the appellant complained, she would have had a right to receive the benefit in question.

[29] As to the second, the respond accepted that there was a difference of treatment between children born on or after 1 March 2014 and children born before that date. Children in both of those groups started school in August 2019. Age could constitute other status for Article 14 purposes: *Schwizgebel* v *Switzerland*, 25762/07, paragraph 85; *Carvalho Pinto de Sousa Morais* v *Portugal*, no. 17484/15, 25 July 2017, paragraph 45.

[30] There was no discrimination as a result of a particular date being chosen for the commencement of a new legislative regime, and differential treatment arising from legislative change was not discriminatory where it had a reasonable and objective justification: *Zammit* v *Malta* (2017) 65 EHRR 17, paragraph 70; *Minter* v *United Kingdom* (2017) 65 EHRR SE6, paragraph 69; *R(TP)* v *Secretary of State for Work and Pensions* [2020] EWCA Civ 37, paragraph 101.

[31] So far as "status" was concerned, there was no relevant difference of status created by the Scottish Ministers' choice of a particular date (3 June 2019) for the commencement of the school-age grant, coupled with the restriction of the grant to children of an age at which children in Scotland usually start school (but not older children), although that meant that all children born before 1 March 2014, irrespective of the month of their birth, were ineligible because they fell on the wrong side of the eligibility line.

[32] Alternatively, if there were a relevant difference of status (cf *R(Delve)* v *Secretary of State for Work and Pensions* [2020] EWCA Civ 1199, paragraphs 29-36) and the matter were to be analysed as differential treatment on the grounds of age, there was a reasonable and objective justification for it in the interests of clarity and good administration, for the reasons already outlined.

[33] Section 1 of the 2018 Act set out the Scottish Social Security principles. Courts or tribunals might take those into account when determining any question in proceedings to which the principles were relevant.

[34] In terms of section 1(g)(ii) of the 2018 Act, opportunities were to be sought to continuously improve the Scottish social security system in ways which advance equality and non-discrimination. The principle in section 1(g)(ii) was concerned with opportunities to improve the social security system. The tribunal was concerned only with the proper

application of the existing system, and not with improving it. The principle was not, therefore, directly relevant to the task before tribunal. Taking the principle into account would not have led to a different result.

[35] In terms of section 1(h) of the 2018 Act, the Scottish social security system was to be efficient and deliver value for money. The Scottish Ministers' choice to frame the eligibility criteria in such a way that the school-age grant was not available in respect of children born before 1 March 2014, having regard to (i) the date of creation of the grant on 3 June 2019 and (ii) the framework under the 1980 Act, allowed for efficiency in the system. Counsel referred to the same matters to which he had already referred as supporting the choice of the Ministers to make the provision they had. Taking this principle into account would, therefore, only have supported the FtT's decision.

Decision

[36] Article 14 ECHR provides:

> "The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[37] As became clear in the course of the hearing, the dispute between the parties is focused in two questions. The first is whether there is a difference of treatment on the grounds of age, and the second is whether there is an objective justification for that difference in treatment. The European Court of Human Rights has articulated the criteria which enable determination of whether a difference in treatment contravenes Article 14 in a number of cases, including that of *Stec*, at paragraphs 51 and 52:

> "51. … A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.
>
> 52. The scope of this margin will vary according to the circumstances, the subject-matter and the background (see *Petrovic* v. *Austria*, judgment of 27 March 1998, Reports 1998-II, § 38). As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention (see *Van Raalte*, cited above, § 39, and *Schuler-Zgraggen* v. *Switzerland*, judgment of 24 June 1993, Series A no. 263, § 67). On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy […] Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" […]"

As Baroness Hale noted in *AL (Serbia)* v *Secretary of State for the Home Department* [2008] 1 WLR 1434, at paragraphs 24 and 25, there has been a tendency in the reasoning of the Strasbourg court to focus on justification, rather than on embarking on a close analysis of whether the person with whom a claimant wishes to compare himself is in a similar or analogous position. The question has been whether differences in otherwise similar situations justify a different treatment.

[38] In *R(TP)* the Court of Appeal made the following observations, at paragraph 101:

> "It is readily understandable and inevitable that legislation has to be brought into force at some point in time. Some people will therefore not necessarily benefit or be caught by it, depending on the date when events occur in relation to them. Without more, it is not possible to complain of such a distinction in treatment under Article 14. Whether one analyses that as following from the fact that there is no relevant "status" or simply that there is a reasonable and objective justification for the difference in treatment created by the legislation is in the end immaterial."

[39] In that passage the court was considering the case of *Zammit*, which had related to a restriction on increasing rent imposed by an ordinance. The landlords complained they had been treated differently from property owners who had begun leasing their property after 1995, and who were not subject to the same restriction. It expressing an understanding of the reasoning in *Zammit*, but rejecting its application to the case before it, which related to Universal Credit, and what it held were differences of treatment between different classes of claimant which were on the grounds of "other status".

[40] The case of *Zammit* is not analogous to this appeal. In my view, there is a difference of treatment between applications relating to children born respectively before and after 1 March 2014, and who are otherwise in a sufficiently similar or analogous situation, namely that they all started primary school in August 2019. It is based on their date of birth. That is a characteristic that is capable of being a status for the purposes of Article 14. I proceed, therefore, to consider whether the respondents have demonstrated that that difference is justified.

[41] The 2018 Act makes provision for assistance meeting some of the costs associated with having, or expecting to have, a child in the family: section 32(1). The eligibility rules are to framed on the basis of criteria that the individual making the claim is responsible for a child when a specified event in the child's life occurs. Although the criterion in paragraph 1(b) and 2 of the 2018 regulations is framed by reference to the period within which an application must be made, its effect is to tie eligibility to the child's reaching the age at which a child in Scotland would usually start school.

[42] A criterion which made the grant available to all children who started school in the August after the introduction of the grant is one which might well have been open to the Scottish Ministers. It would have avoided the consequence of which the appellant

complains. The choice of measure is one in relation to which there is a margin of appreciation available to the Scottish Ministers. The decisions as to the provision of financial assistance to families in the form of the school-age grant falls within the realm of social and economic policy.

[43] A solution linking eligibility to the date on which a child actually started school was not the only solution open to the Scottish Ministers. There is nothing of itself arbitrary or unreasonable about choosing to link eligibility to the event which is the child's reaching the age at which children usually attend school in Scotland. The respondents say that that solution was preferable in the interests of good administration and budgetary planning. The date on which a child actually attends school, if he does at all, is in the hands of the child's parent. A child's date of birth, however, is a known fact, which will not change. It is easy to track, and it is therefore easier for the Ministers to estimate what funds will be needed to meet it in coming years. To have selected the criterion that the Scottish Ministers did, and for those reasons, is not manifestly without foundation. I therefore refuse the appeal.

[44] I have disposed of this matter without reference to any of the principles in section 1 of the 2018 Act. Section 2 permits, rather than requires, a court or tribunal to take them into account when determining any question arising in proceedings to which the principles are relevant. What the appellant asks me to do in this appeal is to find that provisions of the 2018 regulations are incompatible with a Convention right, which would mean that the Scottish Ministers did not have the power to make them. I do not regard the principles in section 1 as illuminating the question of law that I require to determine in this case.

[45] Had I found that any provision of the 2018 regulations was incompatible with a Convention right, I would have sought further submissions as to the practical consequences

of that finding for this appeal, and as to whether I should make any order in terms of section 102(2) of the Scotland Act 1998.

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within ***30 days*** *of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*