IN THE UPPER TRIBUNAL **Appeal No. CUC/1019/2020**
(ADMINISTRATIVE APPEALS CHAMBER)

BEFORE UPPER TRIBUNAL JUDGE WEST

On Appeal from the First-tier Tribunal (Social Entitlement Chamber) SC242/19/05749

BETWEEN

Appellant LR

and

Respondent THE SECRETARY OF STATE FOR WORK AND PENSIONS

BEFORE UPPER TRIBUNAL JUDGE WEST

Decided after a hearing on 8 February 2022

DECISION

The decision of the First-tier Tribunal sitting at Fox Court dated 26 February 2020 under file reference SC242/19/05749 does not involve an error on a point of law. The appeal against that decision is dismissed.

REASONS

Introduction

1. This is an appeal, with my permission, against the decision of the First-tier Tribunal sitting at Fox Court on 26 February 2020.

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 26 February 2020 as "the Tribunal".

3. The claimant appealed against the decision of 8 October 2018 that she was in receipt of unearned income in the form of an Irish widow's contributory pension ("IWCP") which fell to be deducted from her universal credit. The Secretary of State decided that her IWCP was to be classified as "unearned income" under the relevant legislative provisions because it was analogous to UK widow's pension. The decision was reconsidered, but not revised, on 14 May 2019.

4. The matter came before the Tribunal on 26 February 2020 when the claimant appeared with a friend and a Russian interpreter and gave oral evidence. The Secretary of State was represented by a presenting officer. The appeal was refused and the original decision confirmed.

History Of The Claim

5. The claimant made a claim for universal credit on 28 April 2018. She declared that she was not working and had a health condition restricting her ability to take up or look for work. On 30 May 2018 she applied for and was granted bereavement support payment ("BSP"). On 6 June 2018 she provided a copy of her late husband's death certificate confirming that he had died on 27 April 2018. She also provided a copy of her BSP notice.

6. Following submission of her application, her universal credit was calculated for the assessment period 28 April 2018 to 27 May 2018 as the standard allowance of £317.82 and the housing element of £514.28 (with no deductions), giving her a total of £832.10.

7. On 13 September 2018 she reported that she had started to receive an Irish pension payment. On 24 September 2018 she provided a copy of a letter

dated 8 June 2018 from the Social Welfare Service Office in Sligo, Ireland, which confirmed that she had been provisionally awarded an IWCP at the maximum rate of €203.50 per week from 15 June 2018.

8. On 8 October 2018 a decision was made to take into account the sum of £786.33 per month (i.e. the monthly amount of her IWCP) for the period from 28 August 2018 to 27 September 2018. The adjustment meant that £786.33 was deducted from her universal credit of £832.10 as it was counted as unearned income, which left a balance of £45.77 universal credit to be paid to her.

9. On 21 November 2018 she requested an explanation as to why the sum had been deducted and that was provided to her. She then requested a mandatory reconsideration on the basis that she had been provisionally awarded IWCP and it would stop when she reached 66.

10. On 14 May 2019 the decision was upheld on the mandatory reconsideration. She filed an appeal on 9 June 2019 and an oral hearing was held on 26 February 2020, as a result of which the Tribunal upheld the decision of the Secretary of State. The Tribunal refused permission to appeal.

The Statement Of Reasons

11. So far as material, the Tribunal found that

> "11. The Tribunal accepted [the claimant] as a credible, reliable and honest witness who presented her case in a straightforward manner. She has kept the respondent updated at all times as to her financial position and provided all relevant documents as and when required. However this was not a credibility issue. The sole issue before me was whether the Irish Widow's (Contributory) Pension should be counted an unearned income for the purpose of calculating her Universal Credit.
>
> 12. Regulation 66 of the Universal Credit Regulations 2013 at paragraph 1(c) is the relevant provision in this appeal and it defines unearned income as any benefit, allowance or other payment which is paid under the law

of a country outside the UK and is analogous to a benefit mentioned in sub-paragraph (b).

13. The term analogous should be given its normal meaning and does not mean identical to, or the same as, but rather similar to, or corresponding to.

14. Bereavement Support Payment ("BSP") is a benefit that does not fall to be deducted as unearned income and [the claimant] submitted that her WCP should be counted as the same as this as it is not an indefinite payment and she had only been awarded it provisionally.

15. BSP replaced bereavement benefits for those people in the UK whose spouse or civil partner died on or after 06/04/2017. These payments are not deducted from UC. They are time limited to a maximum of 18 months. I find that the WCP has not been time limited. Although it I described as a provisional award those payments have been put in place and are ongoing. It is clear from the correspondence that they will continue until 66 years when they will be reassessed only if there is a different pension in payment at that point. Although [the claimant] will need to reapply when she is aged 66 years for the continuation of the payments it is clear that they will continue to be paid. The letters written by the Irish authorities state that at 66 years [she] may qualify for State Pension Contributory and if this is the case then her payments will be transferred to this pension, if appropriate. Otherwise, she will continue to receive her WCP. In her oral evidence [she] accepted that her WCP will continue unless she remarries or has a partner in which case the payment may be removed. She also accepted that it is her intention to reapply about 6 months before her 66th birthday and that the payments will continue.

16. I therefore find as a fact that it is not the case that the WCP is a time limited pension. I further find that it is not analogous to BSP and cannot therefore be said to be analogous to BSP and therefore exempt from deduction from UC. Instead I find that the WCP is analogous to a UK Widow's Pension, which does count as unearned income that should be deducted from UC.

17. [The claimant] made a further point at the hearing in her final submissions. She referred to the WCP having two names, a long name and a short name. She then

> referred to the fact that war widow's pensions (which do not count as unearned income for the purposes of calculating UC) also have two names, a long name and a short name. On that basis she submitted that her pension should be treated in the same way and not be deducted. She submitted that this meant that her pension is analogous to a war widow's pension. With the greatest respect to [her], this argument is fundamentally flawed. It is the characteristics of the pension, the terms of payment and the basis of payment which I must look at. Her WCP cannot be compared to the pensions of those whose spouse or partner have died in service of the British army and I therefore reject this argument.
>
> 18. I find the WCP is analogous to a UK widow's pension and on that basis I confirm the decision made by the respondent and I find that it should be counted an unearned income which is properly to be deducted from any calculation of UC. The appeal is therefore refused."

The Appeal

12. On 21 August 2020 I acceded to the claimant's application and granted her permission to appeal. It seemed to me that the matter merited consideration and authoritative treatment by the Upper Tribunal.

13. I therefore granted the claimant's application for permission to the appeal against the decision of the Tribunal sitting at Fox Court dated 26 February 2020. I made further directions for the conduct of the appeal on 22 February 2021. The Secretary of State requested an oral hearing of the appeal.

14. The claimant declined the opportunity to be represented by the Free Representation Unit and did not want to attend the hearing. She also declined a telephone or video hearing. That is no criticism of her. The point in issue was a relatively esoteric one of statutory construction, which would have been made all the more difficult for her as a Russian speaker who would have needed the assistance of an interpreter.

15. I heard the appeal, albeit in the claimant's absence, on the morning of 8 February 2022 when the Secretary of State was ably represented by Emily Mackenzie of counsel, who was able to provide a much more detailed

exposition of the legislative history and purpose of the relevant legislation than had been possible at an earlier stage of the litigation.

The Legislation

16. In its original form, regulation 66 of the Universal Credit Regulations 2013 ("the 2013 Regulations") provided that

> "**What is included in unearned income?**
>
> 66(1) A person's unearned income is any of their income, including income the person is treated as having by virtue of regulation 74 (notional unearned income), falling within the following descriptions—
>
> (a) retirement pension income (see regulation 67);
>
> (b) any of the following benefits to which the person is entitled, subject to any adjustment to the amount payable in accordance with regulations under section 73 of the Social Security Administration Act 1992 (overlapping benefits)—
>
> (i) jobseeker's allowance,
>
> (ii) employment and support allowance,
>
> (iii) carer's allowance,
>
> (iv) bereavement allowance,
>
> (v) widowed mother's allowance,
>
> (vi) widowed parent's allowance,
>
> (vii) widow's pension,
>
> (viii) maternity allowance, or
>
> (ix) industrial injuries benefit, excluding any increase in that benefit under section 104 or 105 of the Contributions and Benefits Act (increases where constant attendance needed and for exceptionally severe disablement);
>
> (c) any benefit, allowance, or other payment which is paid under the law of a country outside the United

> Kingdom and is analogous to a benefit mentioned in sub-paragraph (b)".

17. As amended by the regulation 3(9)(a) of the Universal Credit (Miscellaneous Amendments, Saving and Transitional Provision) Regulations 2018 ("the 2018 Amendment Regulations"), with effect from 11 April 2018 the text of regulation 66(1) now reads as follows (with emphasis added to highlight the amendments);

> **66 What is included in unearned income?**
>
> (1) A person's unearned income is any of their income, including income the person is treated as having by virtue of regulation 74 (notional unearned income), falling within the following descriptions—
>
> (a) retirement pension income (see regulation 67) *to which the person is entitled, subject to any adjustment to the amount payable in accordance with regulations under section 73 of the Social Security Administration Act 1992 (overlapping benefits);*
>
> (b) any of the following benefits to which the person is entitled, subject to any adjustment to the amount payable in accordance with regulations under section 73 of the Social Security Administration Act 1992 (overlapping benefits)—
>
> (i) jobseeker's allowance,
>
> (ii) employment and support allowance,
>
> (iii) carer's allowance,
>
> *[(iv) …]*
>
> (v) widowed mother's allowance,
>
> (vi) widowed parent's allowance,
>
> (vii) widow's pension,
>
> (viii) maternity allowance, or
>
> (ix) industrial injuries benefit, excluding any increase in that benefit under section 104 or 105 of the Contributions and Benefits Act (increases where

> constant attendance needed and for exceptionally severe disablement);
>
> (c) any benefit, allowance, or other payment which is paid under the law of a country outside the United Kingdom and is analogous to a benefit mentioned in sub-paragraph (b)".

18. Thus the text of paragraph (1)(a) has been harmonised with the existing text of paragraph 1(b), although Miss Mackenzie was unable to explain the reason behind that amendment (the institutional memory in the Department provided no key to the solution) and she was not aware of any case which had consider the effect of the unamended paragraph 1(a). It may be that the amendment was designed simply to harmonise the texts of paragraphs 1(a) and (1)(b).

19. Widow's allowance was payable to women widowed on or after 11 April 1988 and up to and including 8 April 2001; there were three main types of widow's allowance. Widow's pension was a weekly benefit payable to a widow without dependent children, providing that she was widowed before 8 April 2001. Widow's pension falls within the ambit of paragraph (1)(b)(vii). Widowed mother's allowance was a weekly benefit payable to a widowed mother (again providing that she was widowed before 8 April 2001) if (in summary) her husband had paid enough national insurance contributions and she was receiving child benefit for one of her children. Widowed mother's allowance falls within the ambit of paragraph (1)(b)(v). Widow's payment was a single tax-free lump sum of £1,000 payable if her husband had paid enough national insurance contributions and she was under 60 when he died, or her husband was not getting state pension when he died. As a tax-free lump sum, widow's payment does not fall within paragraph (1)(b).

20. For those whose spouse or civil partner died thereafter, i.e. on or after 9 April 2001, but on or before 5 April 2017, widow's allowance was replaced by bereavement benefit. There were three types of bereavement benefit. Bereavement allowance was a weekly benefit payable for a maximum of 1 year from the date of death. Bereavement allowance fell within the ambit of

the original paragraph (1)(b)(iv), but by the time of the amendment by the 2018 Amendment Regulations it had been superseded by BSP and could be omitted from the text. Widowed parent's allowance was a weekly benefit payable to a widowed parent. Widowed parent's allowance falls within the ambit of paragraph (1)(b)(vi). Bereavement payment was again a tax-free lump sum. As a tax-free lump sum, bereavement payment does not fall within paragraph (1)(b).

21. For those whose spouse or civil partner died on or after 6 April 2017, bereavement benefits have been replaced by BSP. BSP consists of a first lump sum payment at one of two rates and up to 18 further payments. The higher rate consists of a lump sum of £3,500 and monthly payments of £350; the lower rate consists of a lump sum of £2,500 and monthly payments of £100. A claimant who receives, or is entitled to, child benefit will get the higher rate. A claimant who does not get child benefit will get the lower rate unless she was pregnant when her spouse or civil partner died. Although BSP contains both a one-off element and a recurring element, it appears to be treated for the purposes of regulation 66 as if it were more akin to widow's payment or bereavement payment and does not fall within paragraph (1)(b), although again the institutional memory in the Department could not explain the policy reason behind that decision. It is not therefore controversial that the claimant's award of BSP does not need to be deducted from her award of universal credit.

The Key Issue

22. The Secretary of State's argument essential argument was that the claimant was in receipt of an IWCP (which was not time-limited) and that such a pension was (a) paid under the law of a country outside the United Kingdom and (b) analogous to a widow's pension as mentioned in regulation 66(1)(b)(vii). Thus she argued that the IWCP should be counted as unearned income which was properly to be deducted from any calculation of universal credit.

23. The question which originally concerned me was this. What regulation 66(1) provides is that

> "A person's unearned income is any of their income … falling within the following descriptions—
>
> …
>
> (c) any benefit, allowance, or other payment which is paid under the law of a country outside the United Kingdom and is analogous to a benefit mentioned in sub-paragraph (b)".

24. However, a benefit mentioned in sub-paragraph (b) was not merely one which was listed or "mentioned", but one which was

> "*any of the following benefits* ***to which the person is entitled***
>
> …
>
> (vii) widow's pension"

25. It appeared at first blush therefore that, for the purposes of sub-paragraph (c), an analogous benefit in sub-paragraph (b) arguably had two conditions. It must be one to which the person was *entitled and* it must be one of the benefits listed or mentioned in sub-sub-paragraphs (i) to (ix) of sub-paragraph (b). That point was not addressed in the Secretary of State's original submission of 15 December 2020.

26. The Secretary of State's original argument was that

> "Guidance states that a person's unearned income is any benefit allowance or other payment which is paid under the law of a country outside the United Kingdom *and is analogous to a benefit payable in the UK*".

That was not an accurate rendition of the terms of regulation 66(1)(b) and required further exposition.

27. As I have explained above, BSP replaced bereavement benefit for those people in the United Kingdom whose spouse or civil partner died on or after 6 April 2017. The claimant's husband died on 27 April 2018. She was not therefore entitled to bereavement benefit, but only to BSP instead. The Secretary of State accepted that BSP (which is limited to a ceiling of 18 months) was not a prescribed source of unearned income and was not taken into account in the universal credit assessment.

28. Although the claimant was entitled to it, BSP was not one of the benefits listed in regulation 66(1)(b).

29. By contrast, she was not entitled to widow's pension, although it was one of the benefits listed in regulation 66(1)(b).

30. If that analysis were correct, the claimant's IWCP did not fall to be counted as unearned income under regulation 66(1)(c) because BSP was not one of the benefits listed in regulation 66(1)(b) and, whilst widow's pension was listed or mentioned in regulation 66(1)(b), she was not entitled to it.

31. The Secretary of State maintained that her decision was correct. IWCP fell to be deducted from the claimant's universal credit entitlement as unearned income under the provisions of the legislative scheme properly construed. There were two sub-issues which arose for decision:

(a) did the claimant's IWCP fall to be classified as unearned income on the grounds that it was analogous to UK widow's pension only if the claimant were *"entitled"* to UK widow's pension? Miss Mackenzie submitted that the answer was 'no': correctly interpreted, the legislation did not require that the claimant be entitled to UK widow's pension.

(b) was IWCP analogous to UK widow's pension? The Secretary of State submitted that the answer was 'yes', as the Tribunal correctly found. I was satisfied that IWCP was analogous to UK widow's pension and did not require

Miss Mackenzie to address me on that point, although I will set out her written submissions on the point, which I adopt as a correct exposition of the law.

32. I am satisfied, with the benefit of Miss Mackenzie's much fuller exposition of the law, that the answer to the first question is indeed "no" and that, correctly interpreted, the legislation does not require that the claimant be entitled to UK widow's pension.

The First Issue: The Meaning Of Regulation 66(1)(c)

33. Miss Mackenzie submitted that only foreign benefits which were analogous to "a benefit mentioned in sub-paragraph (b)" were caught by regulation 66(1)(c). For the purposes of the claimant's case widow's pension was a benefit mentioned in sub-paragraph (b).

34. It was common ground that the claimant was not entitled to UK widow's pension (the UK benefit to which it was submitted that IWCP was analogous) because that only applied to those who were widowed before 8 April 2001. As someone whose spouse died on or after 6 April 2017, the claimant was entitled to and received BSP (which was not a benefit listed in sub-sub paragraphs (b)(i)-(ix), as I have explained above). Therefore, if the correct construction of regulation 66(1)(c) were that a foreign benefit might be classified as unearned income only if it were analogous to a UK benefit to which the person was entitled, the Secretary of State would have erred in reducing her universal credit by the amount of her IWCP.

35. However, the Secretary of State submitted that such an interpretation was not correct. The proper construction of regulation 66(1)(c) was that a foreign benefit was to be classified as unearned income provided it was analogous to one of the UK benefits listed in regulation 66(1)(b), regardless of whether the person was entitled to that benefit. There were three cumulative reasons which supported that contention:

(a) that interpretation reflected the ordinary and natural meaning of the words used in regulations 66(1)(b) and 66(1)(c), construed in context;

(b) a purposive construction of regulation 66 supported that interpretation; and

(c) the contrary interpretation led to absurd results, which the legislator could not be taken to have intended.

36. The ordinary and natural meaning of the words "mentioned in sub-paragraph (b)", construed in the context of regulation 66 as a whole, was that a foreign benefit was to be classified as unearned income provided that it was analogous to one of the UK benefits appearing in the list in the sub-sub paragraphs to regulation 66(1)(b).

37. The analogous UK benefit must merely be "mentioned" in sub-paragraph (b). Widow's pension (and the other benefits listed in sub-sub-paragraphs (i)-(ix)) were "mentioned" in the sub-sub paragraphs of sub-paragraph (b). In that context Miss Mackenzie relied on the Oxford English Dictionary definition of "mention", namely "1. to make mention of; to refer to or remark upon incidentally; to specify by name or otherwise … 2. to state incidentally … 3. to speak or make mention of", and of "mentioned", namely "of which mention has been made".

38. Had the draftsman intended that a further requirement be imposed by reference to the words preceding the sub-sub paragraphs ("to which the person is entitled, subject to any adjustment to the amount payable in accordance with regulations under section 73 of the Social Security Administration Act 1992 (overlapping benefits)"), he would have used different and clearer language in regulation 66(1)(c). For example, he would have specified that the sums paid pursuant to the foreign benefit must be analogous to "income which forms part of the person's unearned income pursuant to sub-paragraph (b)" or perhaps to "income falling within the description given in sub-paragraph (b)".

39. The words "to which the person is entitled," in regulation 66(1)(b) should not be construed in isolation. Rather, they must be read together with the

words which follow them: “subject to any adjustment to the amount payable in accordance with regulations under section 73 of the Social Security Administration Act 1992 (overlapping benefits)”. When that phrase was read as a whole, the clear intention was to explain that what was to be deducted as unearned income was the net amount of the listed benefit, once it had been reduced pursuant to provisions of the Social Security Administration Act 1992 (“the 1992 Act”).

40. Miss Mackenzie submitted that that interpretation was further supported by the legislative history of regulation 66(1)(a). As enacted in 2013, that provision simply referred to “retirement pension income”. The further words which now appeared, as a result of the 2018 Amendment Regulations (the same ones as appeared in regulation 66(1)(b) and which gave rise to the issue under discussion: i.e. from “to which the person is entitled” to “(overlapping benefits)”) were inserted later. The fact that the words “to which the person is entitled” were only introduced concurrently with the reference to adjustments under overlapping benefits provisions served to demonstrate that they were not intended to have any independent meaning, still less to impose any new requirement. Rather, the intention was to ensure that deductions were only made of the net benefits payable. It was axiomatic that the phrase must have the same meaning every time it appeared in the 2013 Regulations. Those points were supported by the explanatory notes to the 2018 Amendment Regulations, which stated:

> “Provision is also made for state retirement pension income to be taken into account in universal credit net of any deductions applied under overlapping benefit rules, in the same way as other unearned state benefits.”

41. Further, it would not make sense for the draftsman to have imposed a test of entitlement in regulation 66(1)(b) because mere entitlement to the benefits listed in that sub-paragraph did not suffice for them to be classified as unearned income. The provisions specifying that “notional unearned income” should be included as unearned income to be deducted (regulations 66(1)

and 74(1)) expressly did *not* apply to the benefits listed in regulation 66(1)(b). That is because regulation 74 of the 2013 Regulations provides that

> "**Notional unearned income**
>
> 74(1) If unearned income would be available to a person upon the making of an application for it, the person is to be treated as having that unearned income.
>
> (2) Paragraph (1) does not apply to the benefits listed in regulation 66(1)(b)".

So a person's regulation 66(1)(b) benefits would only be included in his unearned income if they had been applied for and awarded, not merely because the person was entitled to them.

42. A purposive construction of regulation 66 revealed that the correct interpretation must be that advanced by the Secretary of State.

43. As the Ministerial Submission of 16 May 2011 suggested, the purpose of the legislative scheme under consideration was to ensure that universal payments were reduced where claimants had other sources of income, to reflect the fact that the purpose of universal credit was to meet basic needs and that it needed to be affordable to the taxpayer. That was explained by Swift J in ***R (Moore) v SSWP*** [2020] EWHC 2827 at [26-27] (in which the same Ministerial Submission was considered by the Court) (with emphasis added):

> "Two general principles applied for the purposes of formulating the approach taken in the Universal Credit system to the treatment of earned and unearned income. *Universal Credit payments should be reduced to take account of unearned income, pound for pound. Since the purpose of Universal Credit is to meet basic needs, it was considered inappropriate not to take account of unearned income in this way."*

44. Certain income types were excepted from that general principle. The reason for that was to ensure that claimants with specific additional needs

were protected, to treat income equivalent to earnings (e.g. statutory maternity pay) consistently with earnings, and to disregard income sources where it was administratively more simple to do so.

45. The legislation thus focussed on what income the person received which met his needs and thus reduced his need for universal credit. The purpose of regulation 66 within that scheme was to set out those sources of unearned income which fell to be deducted from a person's universal credit entitlement because, if they were not, that person would receive a greater universal credit entitlement than the legislator had determined was necessary to meet his needs and was a fair burden to place on the taxpayer.

46. Thus the intention behind regulation 66(1)(c) must be to deduct from a person's universal credit payments any foreign benefit which provided an income which met that person's needs in a materially similar way to the way in which a UK benefit would do. If such foreign benefits were not deducted, then the person would receive a higher payment of universal credit than the legislator had deemed necessary to meet his needs and was fair on the taxpayer. Equally, such a person would be placed at an advantage to his equivalent who received the UK benefit rather than the foreign one.

47. It was irrelevant whether the person in question was also entitled to (or actually received) the analogous UK benefit. If he did receive it, then of course it would be deducted from his universal credit as normal, but that was a separate question from the question of whether the foreign benefit fell to be deducted.

48. Miss Mackenzie submitted that, taking into account the intention behind the legislation, it was clear that, where a person was paid a foreign benefit which was analogous to one of the benefits listed in regulation 66(1)(b)(i)-(ix), those payments were to be classified as unearned income and deducted from the person's universal credit entitlement. If the legislation were interpreted as not requiring that unless the person was also entitled to the analogous UK benefit, that would frustrate the legislator's intention. As she put it in oral

argument, the relevant question is whether the foreign benefit meets the claimant's needs in a materially similar way to the UK benefit.

49. Thirdly, she submitted that construing regulation 66(1)(c) such that the only foreign benefits to be deducted from universal credit payments were those analogous to UK benefits to which the universal credit claimant was entitled led to 'absurd' results (i.e. results which were anomalous and illogical).

50. Such an interpretation would mean that, where a person was paid a foreign benefit analogous to a UK benefit, but happened not to be entitled to the equivalent UK benefit, he received more universal credit than someone who only received the UK benefit. There was no logical reason to distinguish between those two persons: in both cases the foreign benefit was assisting to meet his needs.

51. That would result in claimants effectively being penalised for meeting the criteria for UK benefits. For example, a person who had made sufficient national insurance contributions to qualify for UK maternity allowance would have any foreign maternity allowance which she was paid deducted from her universal credit, whereas a person who had not made those domestic national insurance contributions would not.

52. Similarly, the fact that the claimant did not meet the criteria to receive UK widow's pension, but did meet the criteria for the equivalent Irish benefit meant that she was in a better position, for no good reason, than a person who met the criteria for the UK benefit.

53. Whether or not a particular universal credit recipient was entitled to one of the regulation 66(1)(b) benefits might not be an easy question to answer. Depending on the benefit in question and whether the person had ever applied for it with supporting documentation, it could require extensive investigation by the Secretary of State into the person's circumstances. There was nothing in the 2013 Regulations to suggest that such inquiries were to be

undertaken to determine whether a person's foreign benefit ought to be classified as unearned income. It would be preferable to avoid an interpretation which placed that burden on the Secretary of State and on universal credit claimants. Furthermore, the Secretary of State's interpretation meant that a consistent approach could be taken to a given foreign benefit across multiple cases.

54. I accept Miss Mackenzie's submissions as a correct exposition of the law, in particular, in relation to the correct construction of the words used in regulations 66(1)(b) and 66(1)(c), for the reasons set out in her submissions which I have encapsulated in paragraphs 37, 39 and 41 above. When the phrase "to which the person is entitled" is read as a whole, in conjunction with the phrase which follows it, the clear intention is to explain that what is to be deducted as unearned income is the net amount of the listed benefit, once it has been reduced pursuant to provisions of the 1992 Act. Moreover, given the terms of regulation 74(2) of the 2013 Regulations, a claimant's regulation 66(1)(b) benefits will only be included in his unearned income if they have been applied for and awarded, not merely because he is entitled to them.

55. I also accept that a purposive construction of regulation 66, as set out in paragraphs 43 to 48 above, demonstrates that the Secretary of State's contention as to the interpretation of regulation 66(1)(b) and 66(1)(c) is correct.

56. I also accept her submission as set out in paragraphs 49 to 53 above, that construing regulation 66(1)(c) such that the only foreign benefits to be deducted from universal credit payments are those analogous to UK benefits to which the universal credit claimant is entitled, would lead to anomalous and illogical results for the reasons which she gives.

57. For these reasons I am satisfied that the claimant's IWCP does not fall to be classified as unearned income on the grounds that it is analogous to UK widow's pension only if the claimant is "entitled" to UK widow's pension.

Correctly interpreted, the legislation does not require that the claimant be entitled to UK widow's pension

The Second issue: The Analogy Between IWCP And UK Widow's Pension

58. With regard to the second issue, Miss Mackenzie submitted that the Tribunal was correct to find that the IWCP which the claimant received was "analogous" to UK widow's pension.

59. To be "analogous", she argued, the foreign benefit must be similar or comparable in relevant respects. It did not have to be identical. That would impose too high a standard, since welfare systems were bound to differ to some degree to reflect the society in which they had developed. The essential question was whether the two were similar in terms of their nature and purpose.

60. First, and most importantly, the Tribunal was correct to rely upon the fact that the nature and duration of the payments was similar. Both benefits resulted in a weekly income at an amount determined by a range of factors. UK widow's pension continued until the widow became entitled to state pension, at which point that latter benefit was granted instead. The position in Ireland was similar: the pension was paid for the lifetime of the pensioner, although at age 66 it was necessary to reapply as at that point those who qualified would be transferred to a state pension instead. The claimant accepted in her oral evidence before the Tribunal that her IWCP would continue unless she remarried or had a new partner and that she intended to reapply approximately 6 months before her 66th birthday so that the payments would continue.

61. Second, the conditions for entitlement were similar. Both required that: (i) the claimant's spouse had died; (ii) the claimant not be cohabiting with anyone else; (iii) the late spouse made qualifying national insurance contributions; and (iv) the claimant be under the age of state pension. The most notable differences were that UK widow's pension was only payable if the claimant

were aged 45 or over when her spouse/civil partner died. It was also only available to women whose husbands had died, whereas the Irish benefit was extended to widowers in 1994 and to civil partners in 2011. However, neither of these differences was material: both benefits were designed to serve a similar purpose.

62. In her grounds of appeal, the claimant argued that she was only awarded IWCP "provisionally". However, it was clear from the correspondence that the award was only provisional in the sense that it had been automatically made pending her signing and returning a form.

63. Although not strictly relevant (since the only question was whether IWCP was analogous to widow's pension), it was clear that IWCP was not analogous to BSP because that was payable only for a limited period: a maximum of 18 months.

64. I accept Miss Mackenzie's submission as a correct exposition of the law. To be "analogous", the foreign benefit must be similar or comparable in relevant respects, but does not have to be identical. The essential question is whether the two benefits are similar in terms of their nature and purpose. In this case both benefits result in a weekly income at an amount determined by a range of factors and both have similar conditions for entitlement. Such differences as there are between UK widow's pension and IWCP are not material for the purposes of the statutory analogy.

65. The fact that the claimant was awarded IWCP "provisionally" does not detract from that conclusion. It is clear from the surrounding correspondence that the award was only provisional in the sense that it had been automatically made pending her signing and returning a form. The IWCP is paid for the lifetime of the pensioner, although at age 66 it is necessary to reapply since at that point those who qualify would be transferred instead to a state pension. In the case of the claimant her IWCP would continue unless she remarries or had a new partner and her intention is to reapply approximately 6 months before her 66th birthday so that the payments would continue.

66. Although not strictly relevant (since the question is whether IWCP is analogous to widow's pension), I am also satisfied that IWCP is not analogous to BSP because that benefit is payable only for a limited period with a ceiling of 18 months.

67. I am therefore satisfied that that IWCP is analogous to UK widow's pension and that as such it falls to be deducted from the claimant's award of universal credit as unearned income.

Conclusion

68. For these reasons I am satisfied that the decision of the Tribunal below was correct in law. The Tribunal was correct to find that the Secretary of State was entitled to deduct the claimant's IWCP from her universal credit entitlement as unearned income under regulation 66(1)(c) of the 2013 Regulations.

69. The appeal is therefore dismissed.

Mark West
Judge of the Upper Tribunal

Signed on the original 16 February 2022