



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**UT ref: *UA-2023-000333-USTA*
[2024] UKUT 207 (AAC)**

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

RA

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 15 July 2024
Decided after an oral hearing on 31 January 2024.

Representation:

Appellant: The appellant represented himself.
Respondent: Mr Thomas Francis of counsel instructed by the Government Legal Department.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The two decisions of the First-tier Tribunal made on 3 January 2023 under case number SC068/22/01128 were made in error of law and are set aside.

The Upper Tribunal gives the decision(s) the First-tier Tribunal ought to have given.

The Upper Tribunal's decision is to allow the appellant's appeal from the Secretary of State's decisions of 17 June 2021 and replace those Secretary of State decisions with a decision that the appellant remains entitled to universal credit from 27 March 2020 (and so was not overpaid universal credit from 27 March 2020 to 26 April 2021).

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. In *FO v SSWP (UC) [2022] UKUT 56 (AAC)* Upper Tribunal Judge Wikeley had cause to comment that First-tier Tribunals:

“may sometimes need to be wary about taking at face value the Department for Work and Pensions (DWP)’s written submission in response to a claimant’s appeal.”

This is another such case, and another in the context of universal credit.

2. In *FO* what was missing from the Secretary of State’s appeal response to the First-tier Tribunal was the evidence that substantiated the decision under appeal to remove the appellant’s entitlement to universal credit. In this case, what is missing from the appeal response is the correct relevant law said to underpin the first decision under appeal.

3. There were two decisions under appeal to the First-tier Tribunal (“FTT”), both of which are dated 17 June 2021. These decisions were described in the Secretary of State’s appeal response to the FTT as follows:

“On 17 June 2021, it was decided that [the appellant] had been paid in excess of entitlement to Universal Credit as he failed to provide sufficient evidence to validate his claim.

Subsequently, this caused an overpayment of £5328.57 from assessment period 27 March 2020 to 26 April 2021 and this amount is recoverable from [the appellant].”

4. It may be thought obvious from the terms of these decisions, but I make the point in any event, that given the appellant made his claim for universal credit on 27 March 2020, the effect of the 17 June 2021 decisions was that the appellant had been found in June 2021 not to be entitled to universal credit from the outset of his claim for that benefit.
5. The appeal response explained, under “**Section 4 - The facts of the case**”, that the appellant had made a claim as a single person for universal credit on 27 March 2020. For context, the first Covid-19 national lockdown had come into force in the United Kingdom the day before, on 26 March 2020. The appeal response then stated that on 5 April 2020 the appellant’s identification had been verified “using the Trust & Protect policy that had been put in place during the Covid-19 pandemic”. As will be seen, that policy was not put before the FTT nor was it put before the Upper Tribunal. This section of the appeal response to the FTT continued:

“4.3 On the 01 May 2020 a ‘New Customer Call’ was carried out by a Universal Credit agent where they informed [the appellant] that his identification would be correctly verified again later in his claim once the Covid restrictions had been eased.

4.4 On the 12 May 2021 a journal message was posted stating that an appointment had been arranged for [the appellant] on the 14 May 2021 between 9:00am and 12:00pm, to validate his identification.

6. The appellant was unable to attend the 14 May 2021 meeting, but he did attend another meeting on 17 May 2021. At that meeting, according to the appeal response, he was asked to do two things. First, to upload documents to verify his identify. Second, to upload evidence of flights in and out of the country and any travel documents for when he was out of the UK in December 2020.

7. The narrative that led to the decisions under appeal to the FTT appears in Section 4 of the appeal response as follows:

“4.6.....The claim was suspended until the evidence was received.

4.7 On the 08 June 2021 a reminder was posted to [the appellant’s] journal requesting he upload his travel documents so that it could be established for how long he was out of the country in December 2020.

4.8 On the 10 June 2021 a journal message was posted stating that Universal Credit had still not received the travel evidence that [the appellant] agreed to provide. He was given until the 17 June 2021 to provide the evidence, or his claim would close from the start of the claim. On the same day [the appellant] replied stating that he was experiencing difficulty in locating the 3rd party that had booked and arranged the trip but would continue searching.

4.9 No evidence was received and on the 17 June 2021 the claim was closed and an overpayment of £5328.57 from assessment period 27 March 2020 to 26 April 2021, was issued.”

8. As will become apparent, but is worth emphasising at this stage, as a matter of law ‘suspending the claim’ in the context of the facts of this case and then ‘*closing*’ the claim are both legal nonsense. And, if I may say so, this ought to be apparent to anyone charged with making social security decisions.

9. The Secretary of State’s appeal response to the FTT proceeded to set out, in **Section 5**, what it titled “**The Decision Maker’s response**”. This recited the terms of regulation 45 of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (“the UC (D&A) Regs”), regulations 37 and 38 of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (“the UC (C&P) Regs) and regulation 11 of the Universal Credit Regulations 2013. In addition, reference was made to the test in section

71ZB(2) of the Social Security Administration Act 1992. This last provision enables the Secretary of State to make recoverable an overpayment of universal credit. However, it is the logically prior basis of lawfully deciding there has been an overpayment of universal credit which was (and remains) the critical issue on the appeal from the Secretary of State's decisions of 17 June 2021.

10. However, having set out the above regulations 45, 37, 38 and 11, respectively, they were just left hanging in mid-air in the Secretary of State's appeal response. By this I mean there was no attempt to explain in the appeal response the relevance of any of those regulations to the decisions under appeal. This can be seen from the rest of what was (relevantly) said in '**The Decision Maker's response**'.

"Overpayment

[The appellant] made a single claim to Universal Credit on the 27 March 2020.

On the 17 May 2021 he attended a telephone appointment and agreed to upload evidence to verify his identity. He was also requested to upload evidence of flights and travel that had taken place in December 2020.

It is Universal Credit policy that the information declared by the claimant is verified and checked. This process happens throughout the claim. Due to COVID pandemic, emergency legislation was put in place in order for claimants to receive benefit, under the Trust and Protect policy.

On the 14 March 2022 [the appellant] lodged an appeal to HMCTS disputing the Secretary of State's decision dated 17 June 2021. His grounds for appeal are '**What you disagree with** The Amount to be repaid

Why you disagree with it I agree that one month if that should be repaid. But certainly not the whole amount as i was duped into a false position by going abroad to seek new work by a person who presented himself as a good and honest human being. He took advantage of my mental state, financial state, my business collapsing and the raped me abroad. I tried many ways to find him, but he has become illusive and uses other names. He paid for everything and all i did was turn up and trust someone i should not have.

Anything else you want to tell the tribunal I'm shocked and disgusted that after my business collapsing through COVID, losing my partner and family as well as having mental health problems that I am to blame for this.

No further evidence has been submitted with this appeal for consideration.

It is important that Universal Credit verify all aspects of the claim.

On the 17 May 2021 you confirmed that in December 2020 you had left the country to go to Spain. Looking at your journal I can no evidence of you ever notifying Universal Credit that you were leaving the country and for how long you were planning to be out of the country. When asked for the dates you left and returned to the UK you were unable to remember. You were advised on numerous occasions that if you did not provide evidence of your travel your claim to Universal Credit would close and an overpayment from the start of the claim issued.

Although you believe that you should only repay 1 assessment period, until such time we receive the relevant evidence to prove that you were in the country the full overpayment from the start of the claim will remain in place.

You agreed to your claimant commitments on the 21 November 2020. You agreed that you would notify Universal Credit of any changes to your circumstances and comply with all requests.

Entitlement

As you have not been able to provide evidence of your travel, and confirm that you were in the UK, I submit that [the appellant] has been paid in excess of entitlement to Universal Credit and the decision maker has committed no error in law by closing the account and issuing an overpayment.

The breakdown of the overpayment is detailed below.”

11. Reading the above explanation for the decisions under appeal to the FTT leaves one no clearer, I would respectfully suggest, as to the relevance of any of the regulations relied on in the appeal response.
12. Judge Wikeley suggested in *FO* that the DWP may have been economical with the photocopier in leaving critical evidence out of the evidence provided by the Secretary of State to the First-tier Tribunal. Judge Wikeley further commented that the appeal response in *FO* was “[p]utting it mildly... on the thin side”. The Secretary of State’s appeal response to the FTT in this appeal may not have missed out any critical documents, save for the “Trust and Protect policy”, but its explanation for why the law mandated the decision that the appellant had been overpaid universal credit from the outset of his claim for that benefit was at best of no assistance and at worst positively misleading.
13. However, the FTT was seemingly not troubled by any of these issues. In confirming the Secretary of State’s decisions of 17 June 2010, the FTT in its decision notice of 3 January 2023³ decided that the “Appellant was not entitled to UC from 27/03/20 [because] [t]he Appellant failed to provide information to validate his claim when he was asked to do so.”

14. The FTT's reasons for its decision(s) were as follows:

“2. The Appellant made a claim for UC on 27 March 2020. Under the “Trust and Protect” scheme introduced during the Covid 19 pandemic; the Respondent relaxed some of the requirements relating to proof of identity to avoid the need for claimants to visit a Jobcentre. On 1 May 2020, the Appellant was awarded UC from the date of his claim and told that at a later date he would be asked to verify his identity.

3. Having failed to attend an appointment on 14 May 2021, the Appellant attended a telephone appointment on 17 May 2021 when he agreed to upload evidence to verify his identity. He disclosed that he had been abroad in December 2020, and also agreed to provide evidence about this trip. The Respondent wanted to see documents detailing the Appellant's flight in and out of the country. The Appellant's claim was suspended pending receipt of the evidence. The Appellant did not comply with the Respondent's request and on 10 June 2021, he was told that if he did not provide the documents by 17 June 2021 his claim would be closed.

4. On 10 June 2021, the Appellant replied on his journal stating that he was having difficulties in obtaining the documents required, but he would continue trying. However, in the absence of any evidence, on 17 June 2021, the Respondent closed the Appellant's claim from 27 March 2020 and this gave rise to the overpayment.

5. The Appellant asked for the decisions to be looked at again and on 8 March 2022, the Respondent reconsidered matters, but the decisions were not changed.

6. The Appellant made his appeal on 14 March 2022 explaining the circumstances he found himself in when he went abroad in December 2020 with a man who promised to help him, but who instead assaulted him. The Appellant wrote to the Tribunal on 26 July 2022 to “*add some substance as to how this has happened*”. The Appellant was self-employed and lost his business when the leisure industry closed down because of Covid 19. His health suffered and in December 2020, the Appellant met a man who promised to help him, making travel arrangements for them to go abroad on a three-day trip. The Appellant was assaulted by this man and he has had no contact with him since then.

7. The Appellant stated in the notice of appeal that he did not wish to attend a hearing. The appeal was listed on 12 October 2022 to be determined on the papers, but it was adjourned to allow the Appellant to attend a hearing to provide further information. The Appellant responded on 17 November 2022 and said that after much consideration he could not put himself through matters and asked for the appeal to be heard on the papers. I looked at all the evidence in the appeal bundle and took

account of the overriding objective before deciding that I was able to determine the appeal without a hearing.

8. The Regulations require a claimant to provide evidence in order to determine whether a decision awarding a benefit should be revised. A claimant must supply such evidence within 14 days or satisfy the Secretary of State that it does not exist or it is not possible to obtain it (reg 45 of the UC,PIP,JSA and ESA (Decisions and Appeals) Regulations 2013.

9. The Respondent states in an undated written submission in response to the Appellant's evidence (Addition C to the appeal bundle) that his UC was not stopped because he travelled abroad but because at an appointment on 17 May 2021, he agreed to upload evidence to verify his identity and he failed to do so. The Appellant does not address this issue in his appeal and he has confined his comments to the trip abroad in December 2020. The Appellant's claim was closed because he did not verify his identity and not because he went abroad for a few days and could not provide any documents to establish the dates."

15. It can be seen that the sole regulation on which the FTT based its decision(s) was regulation 45 of the UC (D&A) Regs UC. Further, the FTT repeated the legal fallacy of the appellant's 'claim' having been 'closed'. In addition, although it is not relevant given the basis for allowing this appeal and in fairness is not a matter raised previously on this appeal to the Upper Tribunal, an issue may have arisen about whether it was fair to decide the appeal in the way the FTT. I make this last point because the information the appellant had been asked to provide on by the previous First-tier Tribunal on 12 October 2022 was particularly about the date he was out of the country in December 2020. However, the basis on which the appeal was decided was not about the appellant being abroad in December 2020 but his alleged failure to provide evidence said to be relevant to his entitlement to universal credit from 27 March 2020. Given the focus in the appeal response on December 2020 and the First-tier Tribunal's directions of 12 October 2022 concern with December 2020 also, it may arguably have been unfair for the FTT to decide the appeal without making it plain to the appellant that the key issue he needed to address on the appeal was his entitlement to universal credit from 27 March 2020.
16. Setting this fairness consideration to one side, however, I am satisfied on the arguments before me that the FTT erred in law in its decision of 3 January 2023 by failing to engage sufficiently, in truth at all, with the underpinning statutory bases for the two decisions under appeal to it. In particular, the FTT failed to identify the correct legal basis for removing the appellant's entitlement to universal credit from 27 March 2020.
17. The lack of engagement with the relevant law was, regrettably, also something that ran through the Secretary of State's appeal responses to the FTT. The First-tier Tribunal may be the superior decision-making body (per paragraph [14] of *R(IB)2/04*), but it is entitled to be assisted on what the relevant law is by the Secretary of State in his response to the appeal and be provided with any

relevant documents in the Secretary of State's possession: see *IS v Craven DC* (HB) [2013] UKUT 9 (AAC) and rule 24(2)(e) and (4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685).

18. That said, First-tier Tribunals should not simply follow slavishly the Secretary of State's appeal response. A combination of their superior adjudication position and inquisitorial inquiry means the First-tier Tribunal should ensure that the correct law is applied in deciding the appeal before it. Manifestly, that did not happen on this appeal, as I explain below.
19. The important relevant background to the two decisions made by the Secretary of State on 17 June 2021 was that the appellant had been awarded universal credit on 1 May 2020 on his claim for that benefit which he had made on 27 March 2020. In other words, as one of the appeal responses put it, the appellant had made a successful claim for universal credit.
20. In the language of the governing statute found in section 8 of the Social Security Act 1998 (which applies to universal credit – see section 8(3)(aa) of the Social Security Act 1998) this meant that the 27 March 2020 claim for universal credit had been decided by the Secretary of State (on 1 May 2020). That claim then ceased to subsist when the entitlement decision was made. This is because under section 8(2)(a) of the Social Security Act 1998 provides that:

“8.-(2) Where at any time a claim for a relevant benefit is decided by the Secretary of State-

 - (a) the claim shall not be regarded as subsisting after that time; and
 - (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.”
21. Section 8(2) has been a fundamental tenet of the social security decision-making structure since 1999, when the Social Security Act 1998 came into effect. As a consequence of section 8(2), there was and is no statutory authority for the appellant's claim being 'closed' in June 2021, whether from 27 March 2020 or any other date. That claim had ceased to subsist from the point when it was decided and universal credit awarded to the appellant on 1 May 2020m. That is why I have described the Secretary of State's and FTT's language of 'closed' as legal nonsense.
22. This is not just a point about language. It is another fundamental aspect of social security decision-making that the decision made on 1 May 2020 awarding the appellant universal credit was, as a matter of law, a **final** decision: per section 17(1) of the Social Security Act 1998. The consequence of this is that the appellant's award of universal credit could not be removed by either the Secretary of State or the FTT simply because he had failed to verify his identity (or not evidenced the date he was abroad in December 2020.) The 1 May 2020 awarding decision had not been appealed by the appellant. This means that the only legal way in which the decision could be changed was (and is) either by revising the decision (under section 9 of the Social Security Act 1998) or

superseding the decision (under section 10 of the Social Security Act 1998. And in doing either, a proper ground for revision or supersession had to be identified and then applied correctly on the evidence.

23. Putting this point another way, the appellant's alleged failure on or after 17 May 2021 to provide information to verify his identity could not in and of itself provide a lawful basis for bringing his entitlement to universal credit to an end. The awarding decision of 1 May 2020 needed either to be revised or superseded on a basis provided for in the law.
24. Unfortunately, neither of the Secretary of State's appeal responses to the FTT, nor the FTT itself, identified this issue or sought to grapple effectively with it.
25. Regulation 45 of the UC (D&A) Regs, which is the only legislative provision on which the FTT relied, does not provide any valid revision or supersession ground. This is because the only outcome regulation 45 allows for, if information is not provided under it, is suspension by the Secretary of State of payment of benefit. The ending of *entitlement* in cases where information has been sought or a suspension has been imposed under regulation 45 may only arise under regulation 47 of the UC (D&A) Regs, and then only if the requirements in regulation 45 and regulation 47 have properly been met by the Secretary of State. However, there is nothing to show that either the Secretary of State or the FTT relied on regulation 47 of the UC (D&A) Regs as the basis of their decisions to bring the appellant's entitlement to an end. More importantly, regulation 47 of the UC (D&A) Regs could not provide a statutory basis for 'terminating' the appellant's entitlement from the date it was awarded from on 27 March 2020. This is because regulation 47(2) only authorises entitlement to cease from the date on which the benefit had been suspended under regulation 45 of the UC (D&A) Regs.
26. The only other relevant statutory authority (relevant in terms of the appellant verifying his identity as opposed to his having been abroad) referred to in the Secretary of State's appeal responses and mandatory reconsideration decisions is regulations 37 and 38 of the UC (C&P) Regs). However, the FTT did not base its decisions on either piece of legislation. Regulation 37 of the UC (C&P) Regs, moreover, cannot be applicable as it is concerned with information in connection with a *claim*. Regulation 38(2) of the UC (C&P) Regs may be the most applicable regulation as it concerns providing information under regulation 45(4)(a) of the UC (D&A) Regs in respect of whether an **award** (i.e. a decision awarding benefit) ought to be revised or superseded. However, regulation 38(2) of the UC (C&P) Regs) only empowers the seeking of information. Moreover, the basis for superseding the awarding decision and ending entitlement when such information is not supplied under regulation 47 of the UC (D&A) Regs again only applies from the date of suspension.
27. It was therefore left entirely unclear, in both the Secretary of State's first decision of 17 June 2021 and the FTT's decision, what the statutory basis was for ending the appellant's entitlement to universal credit from the date it was awarded in March 2020 on the basis of his alleged failure to provide information on or after 17 May 2021.

28. In giving permission to appeal, I said that regulation 47(2) of the UC (D&A) Regs recognises that entitlement may cease from an earlier date than that provided for in regulation 47(2), but the deficit in the FTT's (and the Secretary of State's) decision was in identifying the legal authority (and the evidence which justified the exercise of that authority) that enabled the appellant's award of universal credit to be removed from the 27 March 2020 date from which it had been awarded. I further said that the Upper Tribunal would want to understand the precise statutory basis for the appellant's entitlement to universal credit being removed from 27 March 2020 based on his (alleged) failure to verify his identity on or after 17 May 2021. If instead the Secretary of State's (ill-explained) intention was only to 'terminate' the award of universal credit from the date of the regulation 45 suspension under regulation 47(2) of the UC (D&A) Regs, I directed that that should be made clear.
29. In his submission supporting the appeal the Secretary of State revealed (for the first time) what he said was the correct statutory basis for the first 17 June 2021 decision. This is a statutory basis that did not feature at all in either the Secretary of State's appeal response or in the FTT's consideration of the appeal(s). The material parts of the Secretary of State's submission read as follows:

“4.3 It is clear that The Secretary of State has used incorrect terms throughout this appeal. I apologise for this error and for the confusion it has caused. However, I respectfully submit that although the incorrect terms were used, the decision made was indeed a revision – as was required in law to terminate the award effective from the date of claim.....

4.6 It is clear that the intention was to accept a claim, make any subsequent award for UC under the Covid easements and then revisit the conditions of entitlement at a later date. All this happened. The consequence for the claimant was that his award ended. The UT Judge is correct however in that it is not clear as to how we have come to end this award. If this has been done under suspension and termination regulations then on the face of it the Judge is right in that an incorrect date was used and the resulting overpayment would have been for a month, in line with the date from which payment was suspended.

4.7 However, upon examination of the dates and guidance it appears that the award has been revised under Regulation 9(b), of the UC (D&A) Regs, to the start of the award. The claimant made a claim for UC and part of this process is verification of identity. By not providing this evidence, UC was awarded on a mistake as to a material fact of the claimant not being who he says he is. Regulation 9(b) is provided for within regulation 47(2) – the suspension termination provision. There is no mention of this in our response to the FTT. For its part the tribunal did not recognise this omission at the hearing and confirmed it did not inform its decision in its statement of reasons for its decision. This we accept is a clear error of law. There are inadequate reasons to explain to the

claimant the reasons for the dates used and how this falls within the legislative framework.....

4.10 Given the inadequate response of the Secretary of State compounded by the Tribunal's failure to identify the correct law in its statement of reasons, the Secretary of State accepts that the Tribunal's decision contains an error of law. In the circumstances, I would respectfully request that a Direction is made to refer the decision back to the Secretary of State to make the decision properly. This would clarify the law used and provide a full explanation to the claimant. (For information. As at the date of drafting this submission, the claimant had still not verified his ID. If he was to do that, then it is likely that the decision would be revised in his favour.)"

30. I was concerned with aspects of this submission and so directed an oral hearing of the appeal. I described my reasons for doing so as follows:

"3. The Secretary of State supports the appeal to the extent of agreeing that both the First-tier Tribunal's decisions of 3 January 2023 **and** the Secretary of State's decisions of 17 June 2021 had no properly explained lawful basis to remove Mr A's award of universal credit from the date it was first made on 27 March 2020.

4. Although the Secretary of State argues in paragraph 4.10 of [the] submission of 6 July 2023 that I should refer the decision back to the Secretary of State to make the decision properly, it seems to me, at least arguably, that cannot be the correct remedy as the Secretary of State cannot remake a decision if his original decision remains in place: see section 17(1) of the Social Security Act 1998. Arguably, the correct remedy, pursuant to section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 would be for me to set aside the First-tier Tribunal's decision for error of law and give the decision the First-tier Tribunal ought to have given.

5. One way of my redeciding the first instance appeals would be by my simply setting aside the Secretary of State's two decisions of 17 June 2021 on the basis that the Secretary of State had failed in those decisions to establish that he had a lawful and evidential basis for either decision. That would mean that [the appellant] would remain entitled to universal credit from 27 March 2020 until the Secretary of State makes any fresh decision on that entitlement.

6. The alternative way of my redeciding the first instance appeals, following *R(IB)2/04*, would be for me to make the decision(s) the Secretary of State *could* have made on 17 June 2021. However, that would arguably give rise to a potentially difficult issue of whether the revision ground in regulation 9(b) of the Universal Credit etc (Decision and Appeals) Regulations 2013 could be made out. I say this because the said regulation 9(b) is founded on the original decision being based on a mistake of material fact, but what fact was the awarding decision of

1 May 2020 mistaken about? I struggle at present to see that it is, as Ms Spinks argues for the Secretary of State, that the original decision was mistaken about [the appellant] being who he said he is. The decision of 1 May 2020 awarded universal credit to [the named appellant] of [address]. (See section 4.2 of Secretary of State's appeal response to the First-tier Tribunal – "On the 05 April 2020 his identification was verified using the Trust & Protect policy that had been put in place during the Covid-19 pandemic (the underlining is mine and has been added for emphasis).) What of those facts was there a mistake about?

7. I am also concerned as to how and why the Secretary of State's decision of 17 June 2021 removing [the appellant's] entitlement to universal credit from the date he was awarded it in March 2020 came to be made on such a legally wrong, confused and ill-explained basis, as appears to be the case. How was it that an appeal response was drafted, and considered by the Secretary of State to be an appropriate and accurate response to the appeal, when it made no reference to revision or regulation 9 of the Universal Credit etc (Decisions and Appeals) Regulations 2013 and referred (legally entirely inaccurately) to the "claim" being "closed"?

8. I am further concerned at the reference in the appeal response to a "Trust & Protect policy", which was apparently put in place during the Covid-19 pandemic, when there was then nothing in the appeal response to explain to [the appellant] or the First-tier Tribunal what that policy was, what relevance it had to verifying [the appellant's] identify in March-May 2020, and what relevance it may have had in May 2021 when [the appellant] seemingly was asked again to confirm his identity.

31. In a later set of directions I required the Secretary of State to file a further written submission/skeleton argument "which addresses all the points and concerns I raised in paragraph four to eight" of the directions set out immediately above. I said that this was to enable the appellant in particular to have as clear a picture as possible before the oral hearing of the Secretary of State's stance on his appeal to the Upper Tribunal and his entitlement to universal credit at the relevant time.
32. The Secretary of State partially met this requirement through filing a skeleton argument crafted by Mr Francis of counsel. That argument clarified that the Upper Tribunal could either remit the appeal(s) to be decided by a new First-tier Tribunal or remake the decisions on those appeals itself. As for the substance of the application of regulation 9(b) of the UC (D&A) Regs, and the "Trust and Protect policy", the argument contended that:

"10...It is the R's case that it intended to accept the A's claim for universal credit less the usual identity verification requirements due to the exigencies of the COVID-19 pandemic.... Despite the A committing to do so, he failed to provide post hoc identity verification by 17 June 2021 or at all. As a consequence, the R concluded that the A's claim for UC had

been granted in error *from inception* and stood to be revised under reg.9(b).....

11.....the failure to refer to reg 9....was a clear error of law....

12. Finally, and as above, reference to the “Trust and Protect Policy” not just in the R’s appeal response but, importantly, also before the FtT is material to the facts (which are not disputed), namely that the standard identity verification requirements necessary to found an award of universal credit were for obvious reasons relaxed at the time in question (in relation to steps designed to suppress the transmissibility of COVID-19 during the early days of the pandemic), which is why the A’s award was granted before he had provided identity verification and purportedly revised when he failed post hoc to provide those documents.

13. If the full rationale for that policy was not explained fulsomely, the UT is invited (potentially) to identify that a possible error of law, but it is submitted that it was plain that that policy relaxed identity verification requirements which would fall to be re-imposed at a later time (indeed it is not clear what other possible relevance could be derived – either by the FtT, [the appellant] or [now] the UT – from mention of/reference to that policy).”

33. It is as striking as it is surprising that what is missing from this argument is (i) the “Trust and Protect policy” itself and (ii) the evidence of the exact terms by which the appellant ‘committed’ to that policy in March/April 2020. Those deficits were not made good at the hearing before me. In fact, no-one from the DWP attended that hearing. Mr Francis was the sole person to appear for the Secretary of State at the hearing. What is also missing is any explanation for why the Secretary of State’s appeal response to the FTT was so deficient and inaccurate. Nor did Mr Francis have any instructions on any of these points.
34. I cannot identify any good reason why the ‘Trust and Protect policy’ or the evidence of the appellant committing himself to it (and what that meant) was not put before the FTT or the Upper Tribunal. On the face of it both were relevant documents in the Secretary of States’s possession that he was obliged to disclose under rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. On the Secretary of State’s case as it is now argued, both documents were relevant to the relaxation of identity requirements in place on 27 March 2020 and what the appellant may have been required to show in June 2021. Policies that affect claimants ought, at least as a starting point, be made known to them: see, for example, *NM v Secretary of State for Work and Pensions* (JSA) [2016] UKUT 0351 (AAC).
35. As it is, and in any event, I am not persuaded that there was any basis for revising the awarding decision of 1 May 2020 on the basis, per regulation 9(b) of the UC (D&A) Regs that it “was made in ignorance of, or was based on a mistake as to, some material fact” and as a result was more advantageous to the appellant than it otherwise would have been.

36. Given the lack of engagement by the Secretary of State on this appeal, I do not purport to trespass more generally in this decision on the important issue of easements introduced in or after March 2020 as a result of the Covid-19 pandemic and how benefit decisions could be looked at again and if necessary corrected once the need for those easements had passed.
37. However, on the facts of this case, I cannot identify any fact which the 1 May 2020 decision was mistaken about. The critical issue on which the Secretary of State seeks to found is a failure by the appellant to *verify* his identity he had been accepted as having on 1 May 2020. There is no mistake about the appellant being who he says is and was accepted as being on 1 May 2020, or at least no argument has ever been advanced to this effect. The need to verify something (i.e., demonstrate or confirm that something is true) and the absence of such verification does not necessarily show the something is not true. In this appeal the decision which the Secretary of State was and is seeking to revise was a decision that the appellant (of his name and of his address) was entitled to universal credit. The absence of verification (or confirmation) of the name and address does not, without more, show that the decision was in fact mistaken about who the appellant was or where he lived.
38. For the reasons given above, the appeal succeeds and I give the decision as set out above.

**Approved for issue by Stewart Wright
Judge of the Upper Tribunal**

On 15 July 2024