IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

***JN v SSWP* (UC) [2023] UTAAC 49 (AAC)**
UA-2022-SCO-000030-UC

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

Between:

JN

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 22 February 2023

Decided after an oral hearing on 22 November 2002 and following further written submissions.

Representation: **Mike Dailly**, solicitor advocate, for the appellant

Graham Maciver, advocate, for the respondent

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 16 August 2021 under case number SC113/21/00170 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and redecide the appeal. In redeciding the appeal, I set aside the Secretary of State for Work and Pensions' decisions of 28 February 2020, 28 May 2020, 28 August 2020 and 28 November 2020 as being unlawful. It will now be for the Secretary of State to redecide on a lawful basis the appellant's entitlement to universal credit for all periods covered by the aforementioned four decisions of the respondent.

REASONS FOR DECISION

Introduction

1. This appeal is concerned with the legal effect of the order and declaration made by the Court of Appeal in *SSWP v Johnson and others* [2020] EWCA Civ 778; [2020] PTSR 1872. The Court of Appeal's judgment was given on 22 June 2020. Its order followed a few days later, on 30 June 2020. The material parts of the order read as follows:

> "1. Save that the declaration set out in the Divisional Court's order dated 24 February 2019 is replaced by the declaration in paragraph 2 below, the appeal is dismissed.
>
> 2. It is declared that the earned income calculation method in Chapter 2 of Part 6 of the Universal Credit Regulations 2013 is irrational and unlawful as employees paid monthly salary, whose universal credit claim began on or around their normal pay day, are treated as having variable earned income in different assessment periods when pay dates for two (consecutive) months fall in the same assessment period in the way described in the judgment."

2. This appeal to the Upper Tribunal is from a decision of the First-tier Tribunal dated 16 August 2021 ("the tribunal"). The tribunal refused the appeal and upheld four decisions of the Secretary of State for Work and Pensions ("SSWP") dated 28 February 2020, 28 May 2020, 28 August 2020 and 28 November 2020. The effect of those decisions was that the appellant was said to entitled to universal credit ("UC") of £0.00 for the UC assessment periods covered by the four decisions[1]. For example, it was said she was entitled to nil UC for the assessment period 28 January 2020 to 27 February 2020 under the 28 February 2020 decision.

Relevant factual background

3. Given the lack of any dispute about the facts, I can address the key factual background very briefly.

4. The appellant worked at the material time as a records assistant in a hospital and was paid on a monthly basis on the last Wednesday of each month. She made a claim for UC on 28 January 2020 and the one month assessment period under UC ran from that date (per section 7(2) of the Welfare Reform Act 2012 and regulation 21 of the Universal Credit Regulations 2013).

5. It was not, and is not, disputed that on the basis of the real time information received from HMRC in respect of each of the assessment periods under the above four decisions, the appellant had an entitlement to UC of nil (or, perhaps more accurately, was not entitled to UC for those assessment periods). It is also not disputed that these consequences resulted from the application of the earned income calculation in Chapter 2 of Part 6 of the Universal Credit Regulations 2013 ("the UC Regs"), and in particular regulations 54 and 61 of the UC Regs. It is accepted by the SSWP that the appellant's case is, on all material aspects, on all fours with the case of Ms Johnson in *Johnson*.

The First-tier Tribunal's decision

6. The tribunal decided the appellant's appeal(s) after *Johnson* had been decided by the Court of Appeal. It found, however, that the Court of Appeal's declaration that the earned income calculation method in Chapter 2 of Part 6 of the UC Regs was irrational and unlawful for someone in the appellant's position could not assist the appellant. It explained its reasoning as follows:

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[1] Nothing turns on the form in which the Secretary of State's decisions were expressed on this appeal. However, sections 3(1)(b) and 5(1)(b) of the Welfare Reform Act 2012 when read with regulation 17 of the Universal Credit Regulations 2013 may preclude the possibility of there being an entitlement to universal credit of £0.00.

> "10. The facts of this case rest on the decision of the Court of Appeal Judgement (sic) in Johnson v SSWP which confirmed that the Regulations as to the earned income calculation method outlined in chapter 2 of part 6 of he [UC Regs] is irrational and unlawful when applied to employees paid on monthly basis whose [UC claim] began on or around their normal pay day which result as in the facts and circumstances of this case in the claimant being treated as having variable earned income in different assessment periods when pay dates were two consecutive months following the same assessment period.
>
> 11. That [ir]rationality has been remedied by way of [the] Universal Credit Earned Income Amendment Regulations 2020 which came into force on 16/11/2020 but which amendments are not retrospective and do not apply to an award of Universal Credit [if] it has an assessment period that begins on 15/11/2020 or earlier.
>
> 12. The tribunal do not accept that the appellant's human rights have been violated but do sympathise with the position in which she has been placed prior to the amending legislation taking into account the rationality of the imposition of the regulations to the particular circumstances of his case.
>
> 13. The appeal fails and the original decision of 28/02/20 [as] reconsidered but not revised on 19/06/2021 is confirmed and…referred to for its terms."

7. This reasoning is compressed, and certainly on the human rights argument is non-existent (though it is not necessary for me to address the detail of the human rights argument given my view about the effect of *Johnson*). However, the inadequacy in the tribunal's reasoning cannot assist the appellant if, in substance and as a matter of law, the tribunal is correct about *Johnson* not assisting her.

8. The SSWP supports the view of the tribunal. His view, in short, is as follows. First, the law that applied to the four decisions under appeal to the tribunal was the law as set out in Chapter 2 of Part 6 of the UC Regs *before* its amendment with effect from 16 November 2020. Second, the Court of Appeal's declaration in *Johnson* did not have any effect on that law at the time of those four decisions. It seems to me that this is a fair view of what the tribunal decided.

The relevant law

9. I set out the law in a little detail even though this appeal is not concerned with arguments about the application of the law but the effect of the Court of Appeal's declaration about the irrationality and unlawfulness of certain aspects of that law.

10. Section 1(1) in Part 1 of the Welfare Reform Act 2012 ("the WRA") provides that

> "A benefit known as universal credit is payable in accordance with this Part"

11. Section 3 of the WRA deals with entitlement to UC and provides, insofar as is relevant, as follows:

> "3.-(1) A single claimant is entitled to universal credit if the claimant meets-
>
> (a) the basic conditions; and
>
> (b) the financial conditions for a single claimant…".

12. The 'basic conditions' are addressed in section 4 of the WRA and include, inter alia, that the claimant is aged at least 18 years of age, is in Great Britain and is not receiving education. None of the basic conditions are in issue on this appeal.

13. Section 5 then sets out the 'financial conditions' thus (so far as is relevant):

> "5.-(1) For the purposes of section 3, the financial conditions for a single claimant are that-
>
> (a) the claimant's capital, or a prescribed part of it, is not greater than a prescribed amount; and
>
> (b) the claimant's income is such that, if the claimant were entitled to universal credit, the amount payable would not be less than any prescribed minimum."

14. Sections 7 and 8 of the WRA deal with 'awards' and provide as follows:

> "**Basis of awards**
>
> 7.-(1) Universal credit is payable in respect of each complete assessment period within a period of entitlement.
>
> (2) In this Part an "assessment period" is a period of a prescribed duration.
>
> (3) Regulations may make provision—
>
> (a) about when an assessment period is to start;
>
> (b) for universal credit to be payable in respect of a period shorter than an assessment period;
>
> (c) about the amount payable in respect of a period shorter than an assessment period.
>
> (4) In subsection (1) "period of entitlement" means a period during which entitlement to universal credit subsists.
>
> **Calculation of awards**
>
> 8.-(1)The amount of an award of universal credit is to be the balance of—
>
> (a) the maximum amount (see subsection (2)), less
>
> (b) the amounts to be deducted (see subsection (3)).
>
> (2) The maximum amount is the total of—
>
> (a) any amount included under section 9 (standard allowance),
>
> (b) any amount included under section 10 (responsibility for children and young persons),
>
> (c) any amount included under section 11 (housing costs), and
>
> (d) any amount included under section 12 (other particular needs or circumstances).
>
> (3) The amounts to be deducted are—
>
> **(a) an amount in respect of earned income calculated in the prescribed manner** (which may include multiplying some or all earned income by a prescribed percentage), and

(b) an amount in respect of unearned income calculated in the prescribed manner (which may include multiplying some or all unearned income by a prescribed percentage).

(4) In subsection (3)(a) and (b) the references to income are—

(a) in the case of a single claimant, to income of the claimant, and

(b) in the case of joint claimants, to combined income of the claimants."

(I have highlighted in bold the key part of the WRA as far as this appeal is concerned.)

15. Schedule 1 to the WRA sets out supplementary regulation-making powers for universal credit and by paragraph 4 provides, so far as is material, as follows:

"*Calculation of capital and income*

4(1) Regulations may for any purpose of this Part provide for the calculation or estimation of—

(a) a person's capital,

(b) a person's earned and unearned income, and

(c) a person's earned and unearned income in respect of an assessment period.

(2) Regulations under sub-paragraph (1)(c) may include provision for the calculation to be made by reference to an average over a period, which need not include the assessment period concerned.

(3) Regulations under sub-paragraph (1) may—

(a) specify circumstances in which a person is to be treated as having or not having capital or earned or unearned income;

(b) specify circumstances in which income is to be treated as capital or capital as earned income or unearned income;

(c) specify circumstances in which unearned income is to be treated as earned, or earned income as unearned;…."

16. Regulation 21(1) and (2) of the UC Regs provide that:

"21.-(1) An assessment period is a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists.

(2) Each assessment period begins on the same day of each month…"

17. Regulation 22(1) of the UC Regs details the amount to be deducted under section 8(3) of the WRA. At the material time it provided as follows:

"22.—(1) The amounts to be deducted from the maximum amount in accordance with section 8(3) of the Act to determine the amount of an award of universal credit are—

(a) all of the claimant's unearned income….in respect of the assessment period; and

(b) 65% of the amount by which the claimant's earned income in respect of the assessment period exceeds the work allowance."

18. Regulations 54(1) and 61(2)(a) of the UC Regs lay at the heart of the Court of Appeal's irrationality declaration in *Johnson*, and at the material time provided as follows.

> "**Calculation of earned income - general principles**
>
> 54.—(1) The calculation of a person's earned income in respect of an assessment period is, unless otherwise provided in this Chapter, to be based on the actual amounts received in that period.
>
> **Information for calculating earned income**
>
> 61.—(1) Where—
>
> (a) a person has employed earnings in respect of which deductions or repayments of income tax are required to be made under the PAYE Regulations; and
>
> (b) the person required to make those deductions or repayments is a Real Time Information employer,
>
> the information on which the calculation of those earnings is to be based for the purposes of determining the person's earned income is the information about those earnings reported to HMRC in accordance with the PAYE Regulations.
>
> (2) Where paragraph (1) does not apply or where a Real Time Information employer fails to report information to HMRC, the person must provide such information for the purposes of calculating the person's earned income at such times as the Secretary of State may require.
>
> (3) Where, by virtue of paragraph (1), the calculation of employed earnings is to be based on information reported under the PAYE Regulations, those employed earnings are to be treated as if they had been received by the person in the assessment period in which the Secretary of State receives that information, unless the Secretary of State has made a determination in accordance with regulation 54(2)(b) (estimate where information not reported) in relation to a previous assessment period.
>
> (4) In this regulation "Real Time Information employer" has the meaning in regulation 2A(1) of the PAYE Regulations"

19. Regulation 61 was amended with effect from 16 November 2020 by the Universal Credit (Earned Income) Amendment Regulations 2020 (SI No. 11338 of 2020). It was common ground before me that those amendment regulations took effect prospectively only and so could not assist the appellant in this appeal in respect of any of the four decisions identified in paragraph two above. It is certainly difficult to see on what basis the amendment regulations on their face, or on any other basis, may be read as having retrospective effect.

Discussion and conclusion

20. I do not dispute, nor was it disputed before me, that the relevant statutory regulations in place at the time of each of the four decisions under appeal to the tribunal was the pre-16 November 2020 version of Chapter 2 of Part 6 to the UC Regs, and regulations 54 and 61 in those regulations in particular. Nor is it disputed, as I have already said, that the effect of those regulations in their pre-16 November 2020 form lead to the appellant not being entitled to UC for the four relevant

assessment periods (or having an entitlement of 'nil' UC, as the Secretary of State's appeal response to the tribunal put it, if that is possible under the law).

21. The real issue to be addressed on this appeal is whether those regulations were the only law to be applied by the SSWP, the tribunal and the Upper Tribunal. In particular, was it an "error of law" for the tribunal to rely on those regulations given the declaration in *Johnson* that those regulations are irrational and unlawful?

22. Section 11 of the Tribunals, Courts and Enforcement Act 2007 confers the right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the First-Tier Tribunal". Section 12 of the same Act deals with the Upper Tribunal's powers of remedy on such an appeal. These arise, per section 12(1), "if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law".

23. It has long been settled that "an error on a point of law" includes where the decision made by the First-tier Tribunal involved the application of legislation which is *ultra vires* (i.e. outwith the regulation-making powers provided for in the parent Act of Parliament). In *Chief Adjudication Officer v Foster* [1993] A.C. 754 (*R(IS) 22/93*), the House of Lords confirmed that what is now the Upper Tribunal's 'error of law' jurisdiction includes irrational regulations or regulations which are irrational in their effect. This is a species of illegality or unlawfulness in terms of the Secretary of State having acted irrationally in the exercise of his regulation making powers, as Lord Justice Underhill stated in paragraph [115] of *Johnson* itself.

24. Likewise, and see relevantly section 13 of the Tribunals, Courts and Enforcement Act 2007, it will be an error of law for Upper Tribunal to uphold or rely on an *ultra vires* regulation.

25. How then does this jurisprudential base fit with the declaration given by the Court of Appeal in *Johnson*?

26. I should say to start with, though neither party sought to make any argument about his, that even if strictly speaking a decision of the Court of Appeal in England and Wales is not binding on the First-tier Tribunal sitting in Scotland, its decision ought to be treated as a matter of comity as effectively binding unless it is considered clearly to be wrong: see *SSWP v Deane* [2010] EWCA Civ 699; [2010] AACR 42 at paragraphs [26]-[27] and *RJ v SSWP* (JSA) [2011] UKUT 477 (AAC); [2012] AACR. The Secretary of State did not dispute this point and did not argue that *Johnson* was wrongly decided. His argument in its essence is that the declaration in *Johnson* had and has no legal effect anywhere in Great Britain and Northern Ireland. Put slightly differently (but coming to the same result), the Secretary of State's argument is that the declaration had no legal effect for any point before the Court of Appeal's order on 30 June 2020 and up to 16 November 2020 when the UC Regs were amended.

27. I do not accept the Secretary of State's argument about the legal effect of the *Johnson* declaration. There are two relevant issues that need to be addressed in order to explain why I consider the Secretary of State is wrong. First, what legal effect (if any) may a declaration given by a superior court in judicial review proceedings have? Second, if a declaration can have legal effect, from when did the declaration in *Johnson* bite? This second point is of importance on this appeal because of the dates of the Secretary of States' decisions under appeal to the tribunal. Two of those decisions, those of 28 August 2020 and 28 November 2020, fall after the 30 June 2020 date of the Court of Appeal's declaration, but two of the decisions (28 February

and 28 May 2020) fall before that date. If the declaration only has effect from 30 June 2020, it could mean it does not assist the appellant in respect of the first two decisions she appealed.

The legal effect of a declaration

28. It is general principle of the common law that the effect of a binding higher court's decision on the law is to state the law as it has always been: per *In re Spectrum Plus Ltd* [2005] UKHL 41; [2005] 2 AC 680 at paragraphs 4-7 and 34. As paragraphs [27] to [42] of *R(Majera) v SSHD* [2021] UKSC 46; [2022] AC 461 indicate, however, this principle may not always hold true for all purposes when regulations or administrative acts have been held to be *ultra vires* and thus unlawful, and this may be particularly so when determining whether the invalid regulations never had any legal effect for any past period when they were in place.

29. However, the observations of Lord Reed in paragraphs [27]-[42] of *Majera* may need to be treated with caution within the arena of the detailed adjudication machinery for deciding claims for benefit and then challenging such decisions found in the Social Security Act 1998 and Part 1 of Tribunals, Courts and Enforcement Act 2007. The appellant in this case had her claim(s) for UC decided by the Secretary of State on 28 February 2020, 28 May 2020, 28 August 2020 and 28 November 2020 under section 8 of the Social Security Act 1998. On appeal against those decisions, under section 12 of the Social Security Act 1998, the tribunal stood in the shoes of the Secretary of State as the date of each of those decisions and had to decide the appeals on the basis of the applicable law as in effect at those (four) dates. The issue to be decided on this appeal is whether the declaration substituted by the Court of Appeal in *Johnson* was part of the applicable law in effect on each or any of those four decision dates. (I may add here that it was common ground before me that the so called 'anti-test case rule' found in section 27[2] of the Social Security Act 1998 does not apply to any of the four decisions under appeal to the tribunal.)

30. In terms of the general effect of declarations made by courts empowered to do so, it seems plain to me from recent case law that a declaration is to be treated in effect as binding on the Secretary of State as a Minister in His Majesty's Government. Thus in *R(NCCL) v SSHD and FCO* [2018] EWHC 975 (Admin); [2019] QB 481, the Divisional Court said the following about declarations made in judicial review proceedings.

> "The power to grant a declaration
>
> 48. The history and development of the Court's power to grant a declaration is discussed in Zamir and Woolf, The Declaratory Judgment (4th ed., 2011), Ch. 2. For present purposes it will suffice to note that the power to grant a declaration, even if no other remedy is sought, was conferred by the Rules of the Supreme Court 1883 in Order 25, Rule 5. That was replaced by the Rules of the Supreme Court 1965, Order 15, Rule 16, which stated:
>
> > "No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the

[2] Section 27 of the Social Security Act 1998 may arguably be said to be the statutory means by which the social security adjudicatory machinery acts, per the above paragraphs in *Majera*, to prevent a binding Upper Tribunal or court decision from having retrospective effect other than in the individual case decided by the Upper Tribunal or court.

> court may make binding declarations of right whether or not any consequential relief is or could be claimed."

49. The current power of the Court is governed by the Civil Procedure Rules 1998, as amended, and in particular Rule 40.20, which states:

> "The Court may make binding declarations whether or not any other remedy is claimed."

50. It is to be noted that the phrase now is "binding declarations" and there is no longer any reference to a declaration "of right".

51. Nevertheless, what is significant is that a declaration is binding. This is unsurprising given its function in our legal system. As Zamir and Woolf put it, at para. 1-02:

> "A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words coercive, judgment which can be enforced by the courts. … A declaratory judgment … pronounces upon a legal relationship but does not contain any order which can be enforced …"

52. There is a constitutional convention that the executive will comply with a declaration made by the court even though it does not have coercive effect. For example, in *R v Secretary of State for Transport, ex p. Factortame Ltd* [1990] 2 AC 85 at p.150, Lord Bridge of Harwich said:

> "The form of final relief available against the Crown has never presented any problem. A declaration of right made in proceedings against the Crown is invariably respected and no injunction is required."

53. However, it is important to note what is said by Zamir and Woolf, at para. 1-07:

> "… Whilst the defendant is assumed to have respect for the law, justice does not rely on this alone. A declaration by the court is not a mere opinion devoid of legal effect: the controversy between the parties is determined and is *res judicata* as a result of the declaration being granted."

31. This view as to the binding effect of a declaration on the executive (i.e. here the Secretary of State) has been given added, indeed decisive force, by the Supreme Court in *Craig v HM Advocate* [2022] UKSC 6; [2022] 1 WLR 1270. The appeal in *Craig* concerned the powers of Scottish Ministers in relation to extradition proceedings but where, in so doing, they are required not to act incompatibly with rights guaranteed by the European Convention on Human Rights. The appeal also concerned the obligations of Ministers and the Government "in relation to a declaration by a court that their conduct is unlawful" (para. [3]). The relevant declaration and the Government's failure to follow it is recounted in paragraphs [22] and [23] of *Craig* as follows:

22. ….Lord Malcolm made an order in which he "found and declared that in its continuing failure to bring into force in Scotland the extradition forum bar provisions in section 50 of, and Schedule 20 to, the Crime and Courts Act 2013, the UK Government is acting unlawfully and contrary to its duties under section 61 of the Act". Counsel for the appellant did not seek an order requiring the Government to bring the forum bar provisions into force in Scotland, as it was assumed that they would do so in compliance with the declaratory order.

23. No appeal was taken against that decision, which became final. Nevertheless, the Government's failure to make a commencement order continued.

32. The Supreme Court addressed what it called "*Issues relating to the effect of the declaratory order*" as follows. Given the importance of the points made, I set them out in full.

39. Counsel stated, on behalf of the Home Secretary, that she accepted that successive Secretaries of State had acted unlawfully. It had been believed that the commencement provisions permitted the commencement of the forum bar provisions in only part of the UK. The court had told the Secretary of State that that belief was wrong. However, by making a declaratory order and refraining from granting an order for specific performance (a remedy available in Scotland for the enforcement of statutory duties, by virtue of section 45 of the Court of Session Act 1988) - which, counsel said, it could have done - the court had told the Secretary of State that the failure to commence the provisions was unlawful, but not that the provisions had to be commenced. Notwithstanding the court's order, the Lord Advocate's concerns about the forum bar provisions remained. The Secretary of State therefore had to decide whether to impose the forum bar provisions despite the constitutional problem arising from those concerns, or to repeal the provisions for the whole of the UK (by which counsel presumably meant that the Secretary of State had to decide whether to propose to Parliament a legislative measure which, if enacted, would have that effect). The time taken to consider that question was said to explain the delay between December 2018, when the Secretary of State was declared to be acting unlawfully, and September 2021, when the commencement order was made.

40. In written submissions, counsel also contended that, following the declaratory order, it was for any party who sought to rely on the provisions not commenced to apply for an order for specific performance requiring the Home Secretary to bring them into effect. The effect of the declaratory order was not that the forum bar provisions were unlawfully excluded from the extradition scheme, but that they were "lawfully recognised as not part of the scheme, but on a basis that could be relied upon to bring them within the scheme if desired". It seems, therefore, that the order was not regarded as having any practical implications for the Home Secretary unless and until a further, coercive, order was sought and obtained.

41. The submissions which I have summarised reveal a number of misunderstandings. First, Lord Malcolm did not merely reject the contention

that section 61 of the 2013 Act permitted the commencement of the forum bar provisions in only part of the UK. As was explained at para 21 above, he also made it clear that the Scottish Ministers' opposition to the provisions was not a lawful justification for the failure to bring them into force in Scotland: Parliament had decided, in enacting section 61, that they were to be brought into force throughout the UK. In those circumstances, the explanation put forward for the delay in commencement following Lord Malcolm's judgment simply reflects a perpetuation of the same error of law as underlay the delay in commencement before that judgment.

42. Secondly, the order made by Lord Malcolm did not merely imply that the Home Secretary had acted unlawfully in the past. It was expressed in the present tense: it declared that "in its *continuing* failure to bring into force in Scotland the extradition forum bar provisions … the UK government *is acting* unlawfully and contrary to its duties under section 61" (emphasis added). That order was not challenged, and became final. In the absence, at least, of any material change of circumstances - in which event I am inclined to think that the Secretary of State might have applied to the court for a further order declaring that the failure to commence the provisions was no longer unlawful - it was the duty of the Secretary of State to act in conformity with the court's order (and, as I have explained in para 41, the Secretary of State's decision not to exercise the power to make a commencement order, after the court's order, was in any event unlawful, as it was vitiated by an error of law).

43. Thirdly, the argument that, where a statutory duty exists which is capable of being enforced by a coercive order, a party should apply for such an order against a Government minister, instead of relying upon compliance with a declaratory order, has implications for the constitutional relationship between the Government and the courts.

44. In that regard, some general observations about the use of declaratory orders in public law may be helpful. It has been firmly established since the case of *M v Home Office* [1994] 1 AC 377 that there is a clear expectation that the executive will comply with a declaratory order, and that it is in reliance on that expectation that the courts usually refrain from making coercive orders against the executive and grant declaratory orders instead. In that case, the House of Lords held that a mandatory interim injunction had been properly granted against the Home Secretary, and that, following his department's breach of the injunction, he could properly be found in contempt of court (although no punishment was considered necessary beyond the payment of costs). Lord Woolf, with whom the other members of their Lordships' House agreed, observed at p 397 that the fact that these issues had only arisen for the first time in that case was confirmation that in ordinary circumstances ministers of the Crown and government departments scrupulously observed decisions of the courts. He continued:

> "*Because of this*, it is normally unnecessary for the courts to make an executory order against a minister or a government department since they will comply with any declaratory judgment made by the courts

> and pending the decision of the courts will not take any precipitous action." (Emphasis added)

He added at pp 422-423:

> "The fact that, in my view, the court should be regarded as having jurisdiction to grant interim and final injunctions against officers of the Crown does not mean that that jurisdiction should be exercised except in the most limited circumstances. In the majority of situations so far as final relief is concerned, a declaration will continue to be the appropriate remedy on an application for judicial review involving officers of the Crown. As has been the position in the past, the Crown can be relied upon to co-operate fully with such declarations."

45. The Government, for their part, have always accepted that they can be relied upon to comply with declarations: see, for example, the recent case of *Vince v Advocate General for Scotland* [2019] CSIH 51, where the court accepted the Government's submission that it was unnecessary to make a coercive order against the Prime Minister, since members of the Government could be expected to respect a declaratory order. It is to be hoped that the submissions made on behalf of the Government in the present case do not represent a fully considered departure from that longstanding approach.

46. The Government's compliance with court orders, including declaratory orders, is one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts. The courts' willingness to forbear from making coercive orders against the Government, and to make declaratory orders instead, reflects that trust. But trust depends on the Government's compliance with declaratory orders in the absence of coercion. In other words, it is because ours is a society governed by the rule of law, where the Government can be trusted to comply with court orders without having to be coerced, that declaratory orders can provide an effective remedy. Although cases have occurred from time to time in which ministers have failed to comply with court orders (such as *M v Home Office* and the recent case of [*Majera*}, they are exceptional, and can generally be attributed to mistakes and misunderstandings rather than deliberate disregard. However, where a legally enforceable duty to act, or to refrain from acting, can be established, the court is capable of making a coercive order, as *M v Home Office* and *Davidson v Scottish Ministers* [2005] UKHL 74 demonstrate. Furthermore, a declaratory order itself has important legal consequences. First, the legal issue which forms the subject matter of the declaration is determined and is res judicata as a result of the order being granted: *St George's Healthcare NHS Trust v S* [1999] Fam 26, 59-60. In addition, a minister who acts in disregard of the law as declared by the courts

> will normally be acting outside his authority as a minister, and may consequently expose himself to a personal liability for wrongdoing: *Dicey, Introduction to the Study of the Law of the Constitution*, 10th ed (1959), pp 193-194.*"*

33. The following points may be emphasised from the decisions in *NCCL* and *Craig*, and may be applied as such to the declaration in *Johnson*. First, the declaration is a binding statement by the court pronouncing upon the existence of a legal state of affairs, which in *Johnson* was a binding statement that the earned income calculation method in the UC Regs is irrational and unlawful. Second, the Secretary of State was required to act in conformity with that declaration. Third, such compliance is one of the core principles of the rule of law: see further para. [45] of *Majera*. Fourth, in these circumstances the lack of any coercive effect in the declaration is immaterial.

From when does the Johnson declaration bite?

34. Turning therefore to the legal effect of the Court of Appeal's substituted declaration in *Johnson*, as paragraph [28] of *Majera* helpfully reminds us it is the terms of the order of the court which have legal effect (see further, if needed, *SSWP v Robertson* [2015] CSIH 82 at paragraph [42]), although the reasoning of the court may inform what was ordered or declared.

35. On the face of the terms of the declaration made in *Johnson* it states that the earned income calculation method in the UC Regs **is** irrational and unlawful for those such as Ms Johnson. No temporal qualification is included in the terms of the declaration, which it is to be assumed was agreed to by the Secretary of State. Nor is the language couched in terms, per Lord Malcolm's declaration as set out in paragraph [22] of *Craig*, of a 'continuing failure' by the Secretary of State. The absence of such language might be said to stand against the declaration being intended to have retrospective effect. On the other hand, as I come to below, in terms of the Secretary of State acting within his legislative regulation making powers, the statement that the earned income calculation method calculation in the UC Regs "is irrational and unlawful" is most obviously a statement about the lawfulness of that bit of the delegated legislation from the point when it was made. If it had been intended to declare in *Johnson* that the Secretary of State was acting unlawfully from a given point in time by failing to amend the UC Regs, the declaration could have been so worded.

36. An example where a temporal qualification was included in a declaration is in the *NCCL* case cited above. In that case it was conceded in early July 2017, after the judicial review proceedings had been commenced, that Part 4 of the Investigatory Powers Act 2016 ("the IPA") was incompatible with EU law and would need to be amended. The reasons why that was so are not relevant. Part 4 of the IPA had not, however, been amended by the date of the High Court's judgment in *NCCL*, which was given on 27 April 2018. The NCCL sought an order disapplying the EU law incompatible aspects of Part 4 of the IPA. It initially argued, however, that any such order should be suspended until 31 July 2018 in order to give the "Government and Parliament a reasonable opportunity to introduce legislation which is compatible with EU law" ([para. [10]). It is noteworthy that the High Court in *NCCL* proceeded on the basis that a declaration given by it could have immediate effect (see paragraph [36] and [46]). However, it declined to take such a step because immediately disapplying Part 4 of the IPA would result in chaos and damage to the public interest (paras. [46]

and [92]). It therefore made a declaration stating the two respects in which Part 4 of the IPA were incompatible with EU law and stating that the legislation had to be amended within a reasonable time, which the court said was by 1 November 2018 (paras [100] and [186]-[187]). It is plain from the terms of the judgment in *NCCL* that the High Court considered the declaration it made imposed an obligation on the Government to amend the legislation by 1 November 2018.

37. The Secretary of State in written submissions made after the oral hearing before me argues that the decision in *NCCL* supports his argument that the *Johnson* declaration had no legal effect, immediate or otherwise. He argues that the earned income calculation method in the UC Regs also concerned complicated changes to the law which he was best placed to address at the (undefined) point in time when he sought to introduce amendments to the UC Regs. I consider *NCCL* in fact points in the opposite direction and does not lend the Secretary of State's argument any support. I say this because what *NCCL* emphasises, even accepting the similarities between it and *Johnson* about the difficulties in changing the respective statutory regimes, is the lack of any temporal qualification in the *Johnson* declaration. The arguments the Secretary of State makes in this appeal about his having needed time following the *Johnson* declaration to introduce amendments to the UC Regs to remove the irrational effect of those regulations for a certain category of claimant, are, as *NCCL* fully shows, arguments he could (and perhaps even did) make in *Johnson*. However, no such arguments are reflected in the terms of the declaration made in *Johnson*.

38. Nor do I find persuasive in this regard the Secretary of State's reliance in his later submission on what he terms the 'forward looking nature' of his decision making functions under, inter alia, sections 10, 25 and 27 of the Social Security Act 1998. To start with, it is not clear that this argument formed any part of the Secretary of State's case in *Johnson*. Secondly, not all such decision-making functions are necessarily forward looking. For example, the Secretary of State may revise (that is, change) a past decision under section 9 of the Social Security Act 1998 at any time if that past decision was based on 'official error'. Thirdly, the Secretary of State positively submits, and this is accepted on this appeal, that the 'anti-test case' rule in section 27 of the Social Security Act 1998 does not apply to *Johnson* (because *Johnson* was a judicial review and not an appeal). Accordingly, had the High Court or the Court of Appeal in fact quashed as *ultra vires* parts of the UC Regs in *Johnson*, the appellant in this appeal would have been able to rely on such a holding, to her benefit, in respect of the four decisions under appeal. Her remedy would not therefore be forward looking. There are good practical reasons why no such quashing order was made in *Johnson*, not least that removing regulation 54 or 61 of the UC Regs, or 'blue pencilling' parts of them, would not have assisted Ms Johnson and may have rendered the UC statutory scheme unworkable. However, none of this in my judgment provides any necessary implication as to how the declaration in *Johnson* is to be read.

39. I may add here that I am also not persuaded by the Secretary of State's argument that the case law which emphasises caution in courts or tribunals holding delegated legislation to be *ultra vires* on the basis of irrationality, see by way of example paragraphs [57]-[58] (and the case law cited therein) of *Pantellerisco v SSWP* [2021] EWCA Civ 1454; [2021] PTSR 1922, also usefully informs whether and from when the *Johnson* declaration had effect. He argues that the weighty factors against making a finding of irrationality are "itself of significance in determining

whether the Court of Appeal can have intended that there be some special measure for Ms Johnson in the resolution of her judicial review, notwithstanding that it restricted itself to a declaration – as Parliament has approved a contrary approach, it is submitted that the Court cannot have had that in mind"

40. There are a number of difficulties with this argument. First, it seems to assume the point in issue by proceeding on the basis that the remedy of a declaration was a restricted legal result. Moreover, it argues back from what Parliament in fact later did (the prospective only amendment regulations) as showing what the Court of Appeal meant by wording the declaration in the way it did. This is not only constitutionally suspect in terms of the separation of powers between the judiciary and the executive in Parliament, but also relies on matters of which the court could not have been aware as informing what the court 'had in mind'. Second, the declaration given in *Johnson* arose from the court having found the earned income calculation was irrational, notwithstanding the caution it had to exercise before so doing, and I struggle to see once that stage had been reached why the caution exercised in making an irrationality finding remains relevant as a matter of law. This submission of the Secretary of State seems, with respect, to fall close to rearguing the irrationality argument he lost in *Johnson*, but at a later stage. It also renders the irrationality finding, notwithstanding it was only made in the very clearest and most compelling of cases, of little or no benefit to those in respect of whom it was made. Moreover, I do not see any necessary equivalence between the factors to be taken into account before holding delegated legislation to be irrational (e.g. that the regulations were subject to Parliamentary approval) and the factors that might inform whether the Court of Appeal intended its declaration to have effect. The relevance of such factors would most likely sound in whether a declaration was made at all, or at least in the detail one might expect to find in the terms of the declaration, as in the *NCCL* case. In short, this argument appears to be no more than a different way of the Secretary of State making the argument I have addressed in paragraph 37 above.

41. The starting point to understanding what the Court of Appeal intended by the terms the declaration in *Johnson* are, in my judgment, two general considerations. The first of these is that the Secretary of State has to act *intra vires* (that is, within his or her powers under the WRA) when making the UC Regs. The most definable role for the Secretary of State as actor in his legislative role, absent any other pointer, is the date the regulations were (first) made. It is when those regulations were made that the Secretary of State most obviously exercised his regulation making powers under the WRA. The second consideration is the lack, as I have already rehearsed, of anything in the terms of the declaration indicating that it had become irrational for the Secretary of State to keep in place the earned income calculation method from some date later than the date the UC Regs were made. These considerations suggest that the language used by the Court of Appeal in the declaration in *Johnson* was intended to mean that the earned income calculation method found in regulations 54 and 61 of the UC Regs was irrational and unlawful when the UC Regs were made in February 2013.

42. This view as to the effect of the declaration may be said to be supported by different aspects of the Court of Appeal's judgment in *Johnson*.

43. First, there are passages in the reasoning which support that what the Court of Appeal was declaring in its order was that the Secretary of State had irrationally exercised his regulation making power when the regulations were first made. (There are also important passages that point the other way, which I will return to below.)

For example, Lord Justice Underhill in paragraph 112 characterised the *ultra vires* in terms of "the failure of the Secretary of State to ensure that the Regulations cater for the phenomenon of "non-banking day salary shift"", which he said "was unlawful". The language of 'catering for' would most obviously arise from when the UC Regs were first made. Furthermore, in paragraph 115 the same judge, in addressing the relevance of a *Padfield* ground of challenge to the UC Regs, said "these various characterisations are simply aspects of the fundamental question of whether Parliament can have intended the rule-making power to be exercised in a way which produces so arbitrary and harmful an impact on the [claimants] and the very many other claimants who are in the same position". Again, the rule-making power was most obviously exercised when the UC Regs were made in 2013. Lady Justice Rose (as she then was) makes similar statements. For example, she says in paragraph 47 that what "is alleged to be irrational is the initial and ongoing failure of the SSWP to include in the [UC Regs] a further express adjustment to avoid the consequences of the non-banking day salary shift and the application of regulation 54 for claimants in the position of the Respondents" (my underling added for emphasis). In paragraph 105 she characterised the judicial review challenge as being to "the combined effect of the [UC Regs] as currently enacted and their failure to include an exception to the general principle in regulation 54". The 'current enactment' and 'failure' there spoken of must, at least arguably, include the UC Regs when they were made.

44. Second, the discussion by the Court of Appeal of the ground of challenge raised by one of claimants in *Johnson* based on *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997 (see paras. [105]-[106] and [115],) and, at least in Lord Justice Underhill's view, its near equivalence to the irrationality challenge, is itself illuminating because a *Padfield* ground would most obviously apply from the outset of the UC Regs being made.

45. Against this, however, are other passages in the judgment of Lady Justice Rose in *Johnson* which point against the declaration being intended to have the effect of treating the earned income calculation method of the UC Regs as irrational and unlawful for people such as Ms Johnson from the date the UC Regs were made in 2013. In paragraph 47, as has already been noted, the court speaks of the "ongoing failure" of the Secretary of State to include an adjustment in the UC Regs to avoid such a consequence. Paragraph 50 of the judgment talks of "allowing [the problem] to persist unresolved" and deciding not to "fine-tune" the UC Regs; though this leaves undefined from when the Secretary of State so 'allowed' and 'decided'. Paragraph 50 is followed by a sub-heading "the allegedly perverse consequences of the present regime" and paragraph 68 considers the disadvantages of not *taking steps to resolve* the problem. Further, paragraph 76 states that it "cannot be impossible to draft an exception to cover the particular problem highlighted in this case", it being irrational "to refuse to sort out this problem" and it not being justified to refuse "to put right the problem that has arisen for the [judicial review claimants in *Johnson*]".

46. All of these passages would seem to support the view, notwithstanding the wording of the declaration, that the court was not concerned with the *vires* of the UC Regs when first made but rather the irrationality of the Secretary of State not later taking legislative steps to amend the UC Regs when the problem became apparent. This is supported by what Lord Justice Underhill says in paragraphs [42], [83(2)] and [90] in *Pantellerisco* about what was decided in *Johnson*. What this leaves unanswered, however, is exactly when the Secretary of State ought to have taken such steps.

47. The sub-heading following paragraph 83 in the Court of Appeal's judgment in *Johnson* is: "Is it irrational for the SSWP not to enact a solution to this problem". The use of the present tense "Is" here might suggest the court was concerned only with the rationality of the Secretary of State not enacting a solution at the time of the Court of Appeal's decision, and this could be said to correspond with the use of the "is irrational" in the declaration. Even were that the case, however, it would mean the Secretary of State's last two UC entitlement decisions in this case would have been based on irrational and unlawful legislation.

48. It may be said against even this view of the temporal effect of the declaration, and this is essentially the Secretary of State's argument as I understand it, that the discussion Lady Justice Rose then begins in paragraph 84 of *Johnson* may indicate the court was concerned with the steps the Secretary of State should take *after* the declaration to resolve the problem. This may find support in the forward-looking language at the beginning of paragraph 84, which refers to consideration of further factors that the Secretary of State "should take into account when deciding whether to solve the problem". (Insofar as it can properly be taken into account in determining the scope of the *Johnson* declaration, Lord Justice Underhill's "(at least in due course)" in paragraph 83(2) of *Pantellerisco* may be said to support such an argument.)

49. However, I am not persuaded by this reading of *Johnson*. Firstly, the terms of the declaration are clear, if perhaps not its effect: the earned income calculation method in the UC Regs is irrational and unlawful as it affected Ms Johnson (and the appellant in this appeal). Given this, in terms of the rule of law it makes no sense to say the Court of Appeal was leaving it for the Secretary of State to decide *whether* to solve the problem. He was acting unlawfully in not doing so. Second, the discussion in paragraphs 84 to 91 in *Johnson* is in fact about when Ministers may first have been aware of the problem, particularly when the universal credit benefit was being designed. It is instructive that Lady Justice Rose ends that discussion by concluding that "the Minister was not told that there was nothing that could be done about such issues without compromising the automated nature of the calculation process". Nothing in that discussion is suggestive of the Court of Appeal leaving it to the Secretary of State, and giving him more time from the date of its order, to sort out the problem. Third, when Lady Justice Rose returns in paragraph 92 to consider (per para. [84]) "any further factors the SSWP should take into account when deciding whether to resolve the problem", she considers those factors to be relevant to the "rationality of the ongoing decision not to create [a solution to the problem" (my underlining). That is language of the past (as well as the present and potentially the future) about the approach of the Secretary of State to the problem. Fourth , Lady Justice Rose's concluding language in paragraph 107 of the "the SSWP's refusal to put in place a solution to this very specific problem is so irrational that I have concluded that the threshold is met because no reasonable SSWP would have struck the balance in that way" is not consistent with the declaration only having effect from (some undefined) future date.

50. There is also a more general point about not eliding or confusing the irrationality holding of the court with the steps to be taken by the Secretary of State to resolve the problem. The holding declares that the earned income calculation method in the UC Regs is irrational and unlawful. It is that 'problem' the Secretary of State was required to resolve. However, in the absence of the declaration being worded such that the

Secretary of State's would only be acting irrationally if he did not amend the UC Regs from a given point in the future so as to resolve the problem (as per *NCCL*), what the Secretary of State had to do was to remove the irrational and unlawful effect of the UC Regs for all periods under the declaration when they had that effect. If, as I decide, the declaration had effect from at least April 2018, the Secretary of State will have acted, and will have continued to act, irrationally and unlawfully in UC decisions for *Johnson* lookalike claimants for all periods not covered by any remedy he then put (or is still to put) in place. To this extent the time the Secretary of State took to resolve the problem is irrelevant.

51. There are in my judgment other aspects of the judgment in *Johnson* which show the Court of Appeal intended the declaration to have effect at least from the dates of the UC entitlement decisions challenged on the judicial reviews by Ms Johnson and the other claimants.

52. Paragraph 50 in *Johnson* ends "is it possible to say that no reasonable Secretary of State would have struck the balance in the way [he] has done in this case?". The reference to 'this case' must be about the judicial review claims brought by the four claimants in *Johnson* in 2018 against decisions made by the Secretary of State in 2018 (or perhaps even 2017), and so reads most obviously, given the terms of declaration, as the Secretary of State having acted irrationally in applying the UC Regs in those 2018 decisions. This viewpoint is underscored by Lady Justice Rose later, in paragraph 59, agreeing with the judicial review claimants that the oscillations in their UC awards was perverse, which must seemingly be about their awards under the challenged 2018 decisions. It is further supported by the penultimate sentence in paragraph 62:

> "The SSWP has put forward no reason why the date on which [the judicial review claimants] submitted their claim for universal credit should result in them losing a considerable amount of money each year for however long their entitlement lasts."

53. Moreover, in paragraph 46 of *Johnson* Lady Justice Rose, with whom Lord Justices Irwin and Underhill agreed, characterised as "correct" the judicial review claimants, including Ms Johnson, focusing "the challenge in their original claim forms [for judicial review of the Secretary of State's decisions made in 2017 and 2018 about their entitlement to UC] on the irrationality of the outcome, whereby the happenstance of the date on which they applied for universal credit results in them losing, several months each year, the entitlement to the work allowance which the [UC Regs] clearly intended to confer on them". It is difficult to read this passage other than as indicating that the Court of Appeal considered the relevant part of the UC Regs had had an irrational and unlawful effect ('the outcome') at least from the dates of those entitlement decisions in 2018.

54. In addition, as the learned commentators to the UC Regs in Volume II of Sweet and Maxwell's *Social Security Legislation* series point out, the Court of Appeal's approach to the Human Rights Act 1998 discrimination argument suggests that the court intended the declaration to have effect at least from when the judicial review claims were made by Ms Johnson and the other claimants in those proceedings. In paragraph 108 of *Johnson* Lady Justice Rose said, on behalf of the court, that as the irrationality ground succeeded the human rights challenge did not arise for consideration. That seemingly must have been on the basis that the discrimination argument could provide the claimants with no greater remedy than that which the

'irrationality declaration' provided them with. The claimants' judicial reviews, however, were direct challenges to decisions concerning UC assessment periods in 2017 or 2018. They argued that the application of the law by the Secretary of State in his decisions in 2017 and/or 2018 in respect of those assessment periods was, inter alia, unlawful because it discriminated against them contrary to their rights under the European Convention on Human Rights as scheduled to the Human Rights Act 1998. The human rights discrimination argument if successful could have led to the entitlement decisions from 2017/2018 being quashed and them having to be remade on a lawful and non-discriminatory basis. If that is what could have resulted under the discrimination ground of challenge, on the face of it the court intended no lesser result to apply under the irrationality ground of the judicial review claims.

55. A further supporting consideration is that, as has already been addressed in paragraphs 45 and 46 above, the Court of Appeal was concerned with the irrational failure of the Secretary of State to take legislative steps to remove the problem when that problem became apparent. It is clear to me from all that is said in *Johnson* that the problem at least became apparent when the claimant's brought their judicial review claims in April 2018: see further Lady Justice Rose at paragraph 110 and "the problem identified by [the judicial review claimants]".

56. All of these considerations lead me to conclude that the Court of Appeal intended the declaration to have effect (that is, bite) at least from the date of the Secretary of State's UC entitlement decisions under challenge before it. Such a conclusion means that the declaration also has effect in terms of all four of the UC entitlement decision made by the Secretary of State concerning the appellant on this appeal. Those decisions, by way of reminder, were dated 28 February 2020, 28 May 2020, 28 August 2020 and 28 November 2020.

57. The same result may obtain in respect of this appeal by way of a different analysis. The above conclusion is based on the terms of the declaration made by the Court of Appeal, as informed by that court's reasoning. However, the Court of Appeal was not itself exercising an original judicial review jurisdiction on the claims for judicial review. It was exercising an appellate function on the Secretary of State's appeal from the order of the High Court of 24 February 2019 in which the judicial review claims had succeeded. The Secretary of State's appeal was dismissed, save for the declaration made by the High Court being replaced by the declaration set out by the Court of Appeal in its order. The appeal being dismissed meant that the High Court's order that the judicial reviews succeeded remained as the operative order with effect from 24 February 2019 but with a different declaration applying from that date within that order. In other words, the composite order of the High Court of 24 February 2019 is to be taken to read:

> "The Claimants' applications for judicial review are allowed to the extent that it is DECLARED that the earned income calculation method in Chapter 2 of Part 6 of the Universal Credit Regulations 2013 is irrational and unlawful as employees paid monthly salary, whose universal credit claim began on or around their normal pay day, are treated as having variable earned income in different assessment periods when pay dates for two (consecutive) months fall in the same assessment period in the way described in this judgment."

58. If this is correct then even if the declaration only has effect from the date of the order, it has that effect from a date, 24 February 2019, before any of the four UC entitlement decisions that are in issue on this appeal were made.

Remedy

59. For the reasons I have given above, I am satisfied that at the time the Secretary of State made the four entitlement decisions of 28 February 2020, 28 May 2020, 28 August 2020 and 28 November 2020, it was wrong in law for him to apply the earned income calculation method in the UC Regs to the appellant's UC claims. This is because at that time, as a matter of law, the relevant regulations in the UC Regs were irrational and unlawful as they applied to the appellant.

60. Following, *Foster* the tribunal whose decision is under challenge in this appeal made an error on a point of law in upholding the four decisions of the Secretary of State. This is because, in so doing, it too was applying delegated legislation that was irrational and unlawful. For me not to set aside its decision on this basis would be to perpetuate that error of law. Moreover, for the same reasons I would be acting in error of law if I remade the decision on the same basis and to the same effect. Nor is there any obvious basis on which I can lawfully remake the First-tier Tribunal decisions on appeal from the four decisions of the Secretary of State. The amending regulations, which I will assume do solve the problem, do not apply. Furthermore, it was not suggested to me by either party, nor can I separately identify, how disapplying or blue pencilling any part of either regulation 54 or regulation 61 of the UC Regs in force at the relevant times would work to assist the appellant.

61. It is in these circumstances that I make the decision in the terms set out above. It is only the Secretary of State who can 'sort out the problem' identified in *Johnson* for periods before 16 November 2020. What he cannot do following *Johnson* is to apply the earned income calculation method in the UC Regs as they stood before 16 November 2020 as to do so would be for him to act unlawfully.

62. In relation to how the Secretary of State now acts lawfully to decide the relevant claims for UC made by the appellant, I observe that on the information put before me by the Secretary of State on this appeal it is apparent that he was able to effect a remedy for Ms Johnson in respect of at least some of the periods in issue on her judicial review claim. This was seemingly by way of a manual readjustment that overrode the UC computer system. It appears that such steps were taken after the High Court's decision in *Johnson*. That would not seem to me to be a point of material distinction as the Secretary of State's case has always been that regulation 54 of the UC Regs cannot be read flexibly because the system could not manage such adjustments.

63. Given this appeal has resolved itself on the irrationality ground, there is no need for the discrimination argument to be considered.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 22 February 2023