IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CIS/191/2021

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

Between:

Mr J.E.

Appellant

- v –

Secretary of State for Work and Pensions (SSWP)

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 12 January 2022
Decided on consideration of the papers

Representation:

Appellant: In person
Respondent: Mr W. Spencer, DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction and background

1. This appeal is about the rules governing access to social fund winter fuel payments and in particular the effect of the time limit for making a claim. The winter fuel payment is a one-off lump sum payment for pensioners (and not to be confused with social fund cold weather payments).

2. This is the Appellant's appeal against the decision by the First-tier Tribunal ("the Tribunal") dated 21 October 2020. The Tribunal decided that the Appellant was not entitled to winter fuel payments for several past years as the prescribed time limit for claiming for each year's payment had passed by the time he applied.

3. In summary, the Appellant argues that he has been discriminated against when compared with the position of a woman of the same age who would (most likely) have received an automatic award of a winter fuel payment.

4. The Appellant's appeal to the Upper Tribunal is not supported by the Secretary of State's representative. Having reviewed the competing arguments, I have decided to dismiss the Appellant's appeal. My reasons for so doing follow.

The factual background

5. The bare facts are not in dispute. The Appellant was born on 3 April 1951. He made an advance claim for the state retirement pension in January 2016. He was duly awarded state retirement pension with effect from 5 April 2016 (had he been a woman, he would have qualified for a state pension some four years or so earlier, as from 6 March 2012: see Pensions Act 1995, Schedule 4, Part I, Table 1). In November 2016 the Department for Work and Pensions (DWP) notified the Appellant that he qualified for the winter fuel payment for the winter of 2016/17. In April 2017 the Appellant wrote to the DWP querying his entitlement to winter fuel payments for previous winters. The Appellant's letter is worth quoting in full (or almost in full) as it compendiously sets out the core of his argument:

> Dear Sirs
>
> WINTER FUEL ALLOWANCE
>
> COMPLAINT ON GROUNDS OF GENDER DISCRIMINATION
>
> I was notified in November 2016 that I was entitled to the above allowance. This was shortly after my 65th birthday, when I started to receive my state pension.
>
> I since discovered that I could have claimed this payment for years going back to 2012/13 but was advised over the phone by DWP that any such claim is now time-barred.
>
> I understand that men who reach pension age are automatically awarded the allowance. Before that age, men need to be aware of entitlement and make a claim within a short time frame.
>
> I also understand that the law was changed after a successful 1999 ECJ case which ruled that (at that time, i.e. before changes to pension ages for men and women) it was unlawfully discriminatory to award women the allowance at age 60 and men at age 65. I consider that the claims process

> retains a significant element of discrimination. The allowance is generally considered to be available to pensioners, which explains why, by your own statistics, a significant number of men aged 60-64 fail to claim it. Women were automatically awarded the payment at age 60; men aged 60-64 needed to be aware of the amended legislation and make a claim, within short time-limits. This is clear discrimination.
>
> In the circumstances I wish to claim the allowance for previous years.

6. I interpose here that the qualifying age for winter fuel payments had originally been pensionable age (i.e. then 60 for a woman and 65 for a man). The CJEU decision to which the Appellant referred in the penultimate paragraph of his letter was *R v Secretary of State for Social Security, ex parte Taylor* (C-382/98) [2000] 1 CMLR 873. The Luxembourg Court held that the different qualifying ages for men and women amounted to unlawful discrimination on the ground of sex contrary to EC Directive 79/7. In response, Parliament therefore equalised the qualifying age for winter fuel payments at 60 for both men and women with effect from the winter of 2000/01. It remained at that level until 6 April 2010, when the gradual process of increasing the pensionable age for women began.

7. Reverting to the circumstances of this case, the DWP issued the Appellant with a WFP1 claim form, which he returned on 29 November 2017, making a claim for the four earlier winters of 2012/13, 2013/14, 2014/15 and 2015/16. On 11 April 2018 a DWP decision-maker concluded that the Appellant was not entitled to a winter fuel payment for any of the four winters in question. The reason given was that his claim of 29 November 2017 was received outside the prescribed time limits, the last such date being the 31st of March at the end of each winter in question. This disallowance decision was maintained on mandatory reconsideration. The Appellant then appealed to the Tribunal.

The First-tier Tribunal's decision

8. The Tribunal allowed the Appellant's appeal, albeit only in small measure. Its decision essentially fell into two parts.

9. First, the Tribunal decided that the Appellant was <u>not</u> entitled to winter fuel payments in respect of the three winters of 2012/13, 2013/14 and 2014/15. The reason for this was that the prescribed time limit for applying for the payment had passed in each case. The Tribunal dealt with the Appellant's discrimination argument in the following terms in its decision notice:

> 2. The [Appellant] argues that he has been discriminated against because women are automatically awarded the fuel allowance at the age of 60 compared to his position as a man who has to apply for the allowance within a specific timescale.
>
> 3. The legislation which was passed in 2000 amended the UK law in response to the case law referred to by [the Appellant] in his appeal. The Social Fund Winter Fuel Payment Regulations came into force on 3/4/00 and removed the distinction in treatment between men and women on the basis of age. Further the regulations set out the time limit at regulation 3(1)(b) for claiming the winter fuel payment that now applies to both men and women.

10. Secondly, however, the Tribunal decided that the Appellant was entitled to the winter fuel payment for the winter of 2015/16. In its decision notice the Tribunal gave the following summary reasons for the latter decision:

> 6. The DWP had accepted [the Appellant's] claim for his state pension as a claim for his Winter Fuel Payments. His application was received on 25/1/16. Clearly that application would be too late to claim any winter fuel payment for any year before 31/3/16.
>
> 7. However, given that his application of 25/1/16 was accepted as a claim for his winter fuel payment for that year, [the Appellant] should have been entitled to the winter fuel payment for the winter of 2015/16. By 31/3/16 he had already attained the qualifying age for state pension [credit] by the qualifying week for that year (in September 2015) and he had submitted his application for the payment before 31/3/16.

11. The Tribunal accordingly set aside the DWP's decision of 11 April 2018. It found instead that the Appellant was entitled to a winter fuel payment for 2015/16 but not for the preceding winters 2012/13, 2013/14 and 2014/15.

The rules governing entitlement to a social fund winter fuel payment

12. The rules governing entitlement to winter fuel payments are set out in the Social Fund Winter Fuel Payment Regulations 2000 (SI 2000/729), which run to just four provisions. Regulation 1 deals with citation, commencement and interpretation. Regulation 2 sets out the entitlement rules for winter fuel payments. Regulation 3 specifies certain individuals who are not entitled to such a payment. Finally, regulation 4, the primary focus of this appeal, makes provision for "Making a winter fuel payment without a claim".

13. The age rule is contained in regulation 2(1)(b). A person qualifies for a winter fuel payment where "in or before the qualifying week [s/he] has attained the qualifying age for state pension credit". The "qualifying week" is defined as meaning "in resect of any year the week beginning on the third Monday in the September of that year" (regulation 1(2)). "The qualifying age for state pension credit" in turn means "(a) in the case of a woman, pensionable age; or (b) in the case of a man, the age which is pensionable age in the case of a woman born on the same day as a man" (regulation 1(2)). While the drafting is somewhat convoluted, it achieves the policy objective of ensuring men and women are treated equally (at least in terms of the age at which they become entitled to a winter fuel payment).

14. The rules on claiming winter fuel payments are rather unhelpfully spread across regulations 3 and 4. Regulation 3(1)(b) excludes from entitlement any person "who has not made a claim for a winter fuel payment on or before the 31st March following the qualifying week in respect of the winter following that week." The 31st March cut-off point for the previous winter is in effect an absolute rule – there is no discretionary provision for backdating as applies in many mainstream social security benefits (see regulation 19 of, and Schedule 4 to, the Social Security (Claims and Payments Regulations 1987 (SI 1987/1968), and see Social Security Commissioner's *CIS/2337/2004* at paragraph 19). This time limit has been held not to infringe claimants' rights under Article 1 of the First Protocol to the European Convention on Human Rights, even where a

winter fuel payment has been made to the same person in respect of a previous winter (see again *CIS/2337/2004*).

15. There is one important exception to the rule excluding from entitlement those persons who have not made a timely claim for a winter fuel payment by 31st March. This relates to those who have automatically received a payment without making a claim at all (see regulation 3(2)(a) and regulation 4(1)). This exception needs to be understood in its wider context. The general rule in social security law is that entitlement to benefit is dependent on a claim being made (section 1(1) of the Social Security Administration Act 1992). However, this general rule does not apply to winter fuel payments (as this benefit is not listed in section 1(4)of the 1992 Act; see *CIS/2337/2004* at paragraph 9). So, making a claim for such a payment is not a statutory precondition of entitlement. Moreover, regulation 4 makes further specific and somewhat unusual provision as follows:

> **Making a winter fuel payment without a claim**
>
> **4.** (1) Subject to paragraph (2), the Secretary of State may on or before the 31st March of the year following the year in which the qualifying week falls make a winter fuel payment under regulation 2 in respect of the preceding winter to a person who (disregarding regulation 3(b)) appears from official records held by the Secretary of State to be entitled to a payment under that regulation.
>
> (2) Where a person becomes entitled to income support, state pension credit or an income-related employment and support allowance in respect of the qualifying week by virtue of a decision made after that week that section 115 of the Immigration and Asylum Act 1999 (exclusions) ceases to apply to him the Secretary of State shall make a winter fuel payment to that person under regulation 2 in respect of the winter following the qualifying week.
>
> (3) Subject to paragraph (4), for the purposes of paragraphs (1) and (2) official records held by the Secretary of State as to a person's circumstances shall be sufficient evidence thereof for the purpose of deciding his entitlement to a winter fuel payment and its amount.
>
> (4) Paragraph (3) shall not apply so as to exclude the revision of a decision under section 9 of the Social Security Act 1998 (revision of decisions) or the supersession of a decision under section 103 of that Act (decisions superseding earlier decisions) or the consideration of fresh evidence in connection with the revision or supersession of a decision.

16. Regulation 4(2) can be safely ignored as the Appellant is not a refugee and in any event this sub-section is effectively otiose since regulation 21ZB of the Income Support (General) Regulations 1987 (SI 1987/1967) was revoked by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 with effect from 14 June 2007.

17. In sum, therefore, regulation 4(1) vests the Secretary of State with a discretionary power (but not a duty – see *CIS/4088/2004* and *CIS/751/2005*) to make winter fuel payments on the basis of DWP records and without an express claim for such a benefit having been made by the individual in question. The information in such official records is deemed to be sufficient evidence of

entitlement (or not, as the case may be) to a winter fuel payment (see regulation 4(3)). The initial decision is then subject to revision or supersession in the usual way (regulation 4(4)). As the mandatory reconsideration notice issued to the Appellant in the present appeal put it, regulation 4(1) "is not an exemption from the obligation upon individuals to make a claim. It is an easement for the administrator, whereby payments can be issued automatically in the vast majority of social security benefit customers' cases before December of that year".

18. Furthermore, as Mr Commissioner Jacobs (as he then was) explained in *CIS/2337/2004*, the recipient of a winter fuel payment does not have an ongoing right to a payment (at paragraph 27):

> Each year is considered separately. What happens is that, for administrative convenience, the Secretary of State is authorised to make payment each year without a claim. If the Secretary of State acts, there is no need for a claim. If the Secretary of State does not act, a payment can only be made if a claim is made. The basic requirement is that there must be a claim. This is subject to a concessionary power for the Secretary of State to pay without a claim.

19. To sum up the legislative scheme, Mr Commissioner Rowland put it this way in *CIS/840/2005* and *CIS/841/2005* (at paragraph 16): "the idea behind the legislation is clearly that a winter fuel payment should be payable only if a claim is made before 31 March of the relevant year or the Secretary of State makes a decision before that date on his own initiative."

The Appellant's case in a nutshell

20. The essence of the Appellant's case is helpfully summarised in his original letter of enquiry (see paragraph 5 above). In his letter of appeal to the Tribunal below, he further explained as follows:

> "I am appealing this decision on the basis that the claims process involved amounts to sex discrimination (against men). I am not claiming that the decision is contrary to the winter fuel payments legislation. I accept that the refusal is in accordance with the legislation. My point is that the legislation, and specifically the short 12 month time limit for making a claim, discriminates against men and therefore infringes equalities legislation".

21. By the "12 month time limit" the Appellant was presumably referring to the fact that a claim for a winter fuel payment has to be made by the 31st of March of each year. In addition, the Appellant argued that the claims process is discriminatory in that, as he put it:

    a. A woman reaching age 60 would have written to DWP to claim the state pension and would have been automatically awarded the winter fuel payments; whereas

    b. A man reaching age 60 would have had to be aware of his entitlement and submit claims within 12 months.

22. In his notice of appeal to the Upper Tribunal, the Appellant expanded on the argument that he was the victim of indirect sex discrimination, contrary to section 19 (and 29) of the Equality Act 2010:

> In the context of my case, the time limit had no practical effect on women. On reaching age 60, a woman would have applied to DWP for a state pension and she would have either automatically been awarded the winter fuel payment or she would have been invited to apply for one.
>
> By contrast, a man would not have needed to apply for a state pension until reaching age 65. At age 60 he would have had to have been aware of his entitlement to winter fuel allowance and made an application within 12 months of his 60th birthday. DWP only notified men of this entitlement if they had their current address, i.e. were clients of the social security system. In my case, I was informed by DWP of my right to apply on my 65th birthday (when I applied for my state pension), by which time it was too late to apply for back years.

The Secretary of State's response to the appeal to the Upper Tribunal

23. Mr Wayne Spencer, who now acts for the Secretary of State in these proceedings, does not support the Appellant's appeal against the Tribunal's decision. Mr Spencer contends that the Equality Act 2010 does not assist the Appellant. He also argues that there is no indirect discrimination contrary to Article 1 of Protocol 1 and Article 14 of the European Convention on Human Rights. In particular, his submission is that the Appellant and his female comparator are not in analogous situations and that there is objective justification for the different treatment.

The Upper Tribunal's analysis

Introduction

24. The gravamen of the Appellant's case is a claim of indirect sex discrimination. There are three principal ways in which such indirect sex discrimination might be susceptible to challenge: under EC Directive 79/7, under the Equality Act 2010 and under the European Convention on Human Rights (ECHR) as incorporated by the Human Rights Act 1998. I consider each regime in turn.

Indirect discrimination and EC Directive 79/7

25. The claimant in *CIS/2497/2002* also had a late claim for a winter fuel payment refused. Rather as with the Appellant in the present appeal, the claimant there argued that the time limit was inconsistent with the decision of the CJEU in *R v Secretary of State for Social Security, ex parte Taylor*. Mr Commissioner Mesher rejected that argument (at paragraph 3):

> The effect of the ECJ's ruling was simply that the existing regulations on winter fuel payments were not exempt from the effect of EC Council Directive 79/7 that there should be no discrimination on the ground of sex in matters of social security ... The imposition of time limits is not in itself contrary to EC law.

26. However, the Commissioner gave the claimant permission to appeal in that case for the following reasons (also in paragraph 3):

> Is the exemption in regulation 4(1) from the requirement that a claim for a winter fuel payment has been made indirectly discriminatory on grounds of sex? Those whose entitlements are identified from official records appear to be people who were receiving state retirement pension or some other

> social security benefits in the qualifying week. If there are likely to be more women than men aged over 60 but below 65 in that category (because of the differential pensionable age and other factors), is the exemption indirectly discriminatory? If so, could it be objectively justified? Also, could it be argued that that indirect discrimination falls within the derogation in Article 7(1)(a) of Directive 79/7 for differential pensionable ages for state retirement pensions and for possible consequences on other benefits? Finally, if there was a discrimination that was contrary to Directive 79/7, was the claimant disadvantaged by it when his claim was made outside the period in which the Secretary of State could make a winter fuel payment without there having been a claim?

27. This passage also reflects the Appellant's grounds in the present case. In particular, he contends that regulation 4(1) is indirectly discriminatory in its impact and is not objectively justified.

28. However, in the appeal proper in *CIS/2497/2002* the Commissioner rejected those arguments for the following reasons, holding that there was nothing in EU law to take away the ordinary operation of the 2000 Regulations:

> 7. I can explain that conclusion fairly briefly. I have already explained when granting leave to appeal (see paragraph 3 above) why the only element of European Community law which could possibly help the claimant is the argument based on indirect discrimination and the exemption from the requirement to claim WFP [winter fuel payment[for those identified by the Secretary of State as entitled from official records which he held. It may be that that argument falls down at several of the points which identified in paragraph 3. For instance, it might be the case that, where there is a requirement to claim applied equally to both sexes, but a benevolent exception allowing payment to be made without a claim to a class that is likely to contain more women than men, there is not discrimination against men contrary to Directive 79/7. But it is not necessary to explore that or most other points in any detail. That is because I have concluded that the claimant's case fails on the last point identified in paragraph 3 above.
>
> 8. The requirement in regulation 3 is to make a claim before the 31 March after the winter in question. The effect of the exception in regulation 4 also expires on the same 31 March. The Secretary of State only has the power under regulation 4 to make a WFP in the absence of a claim if he acts before 31 March. Here the claimant did not claim until 19 July 2001. I conclude that, even on the assumption that there was discrimination on the ground of sex contrary to Article 4(1) of Directive 79/7 in relation to the exception from the requirement to claim, the claimant was not disadvantaged by such assumed discrimination. He was disadvantaged by the overall and identical time-limit set for claims and for the making of payments without a claim. I have explained in the direction above why the setting of such a time-limit in the 2000 Regulations is not contrary to European Community law. The provisions of regulations 2, 3 and 4 of the 2000 Regulations therefore have to be applied. The only decision which could then have been given on the claim of 19 July 2001 was that the claimant was not entitled to a WFP. The appeal tribunal did not go wrong in law in confirming that decision.

29. Thus, Mr Commissioner Mesher dismissed the appeal in *CIS/2497/2002*, even on the premise that the operation of regulation 4, allowing the Secretary of State to make payments without a claim, was indeed discriminatory in its effect. This was because the claimant had not been disadvantaged by regulation 4 but rather by "the overall and identical time-limit [i.e. 31st March following the relevant winter] set for claims and for the making of payments without a claim" alike.

30. I am unaware of the decision in *CIS/2497/2002* having been questioned in subsequent case law. On the contrary, it has stood the test of time. It is high authority for the proposition that the 2000 Regulations are consistent with EU law and in particular Directive 79/7. However, Commissioner Mesher made no finding as to whether the operation of regulation 4(1) was in fact indirectly discriminatory on the ground of sex. Rather, he was prepared to assume it was so for the purpose of argument. Nor did *CIS/1497/2002* explore any human rights arguments.

Indirect discrimination and the Equality Act 2010

31. I agree with Mr Spencer that there are two reasons why the Equality Act 2010 cannot assist the Appellant.

32. The first is that the Upper Tribunal does not have jurisdiction to hear challenges made under the 2010 Act (see sections 113 and 114 and *TS (by TS) v SSWP (DLA) (DLA) EK (by MK) v SSWP (DLA)* [2020] UKUT 284 (AAC); [2021] AACR 4, especially at paragraphs 63-77).

33. The second is that in any event no claim can be brought under section 29 claiming discrimination in relation to a decision that a person was required to make by statute (see paragraph 1 of Schedule 22 to the Equality Act 2010). The provision requiring any claim to be made by 31 March is just such a rule.

34. In fairness to the Appellant, I should say that he has not pressed the Equality Act point. Rather, on being signposted by the DWP to the Tribunal, he had not unreasonably assumed it had jurisdiction to consider such matters.

Indirect discrimination and the European Convention on Human Rights

Introduction

35. The Appellant did not frame his case in these terms, but the nub of his argument, when translated into legalese, is that he is the victim of indirect sex discrimination contrary to Article 1 of Protocol 1 and Article 14 of the European Convention on Human Rights.

The legal framework

36. Mr Spencer submitted as follows (at paragraph 9 of his response to the appeal):

> The four elements that must be present in any claim for a breach of Article 14 were articulated in *R (Stott) v Secretary of State for Justice* [2020] AC 51 at paragraph 8 as follows:
>
> (1) The circumstances must fall within the ambit of a Convention Right;
>
> (2) The difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status";

(3) The claimant and the person who has been treated differently must be in analogous situations;

(4) Objective justification for the different treatment must be lacking.

Where, as here, indirect discrimination is alleged, an additional level of complexity arises. The concept of indirect discrimination is recognised by the ECtHR, as follows: "The court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group." (*DH v Czech Republic* (2007) 47 EHRR 59, para 175).

37. The Appellant, of course, in order to succeed, must 'tick' all four of the numbered criteria (1) to (4) in Mr Spencer's summary. The Secretary of State's position is that the Appellant at best satisfies only the first two conditions – (1) access to a social security benefit, such as the winter fuel payment, falls within the ambit of a Convention right; and (2) the difference in treatment is said to be on the basis of sex, one of the characteristics listed in Article 14. However, Mr Spencer submits that: (3) the Appellant is not in an analogous situation to women sharing the same birthday but who are entitled to state pension at an earlier age; and (4), and in any event, there is an objective justification for any different treatment.

38. So far as the relevant law is concerned, the Supreme Court has recently summarised the general approach to Article 14 claims, as the Court of Appeal has even more recently reminded us in *MOC (by his litigation friend MG) v Secretary of State for Work and Pensions* [2022] EWCA Civ 1 at paragraph 50:

Principles on Article 14

50. In *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428, at para. 37, Lord Reed PSC set out the general approach to be adopted in Article 14 cases as follows:

> "The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* (2010) 51 EHRR 13, para 61 ('*Carson*'). For the sake of clarity, it is worth breaking down that paragraph into four propositions:
>
> (1) 'The court has established in its case law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of article 14.'
>
> (2) 'Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.'
>
> (3) 'Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is

> not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'
>
> (4) 'The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.'"

39. The Court of Appeal in *MOC (by his litigation friend MG) v Secretary of State for Work and Pensions* also drew (at paragraph 55) on the Supreme Court's analysis of indirect discrimination:

> 55. In *SC* Lord Reed explained that the concept of indirect discrimination in Article 14 has only gradually come to be recognised by the European Court of Human Rights. After referring to the relevant caselaw, including *DH v Czech Republic* (2007) 47 EHRR 3, which concerned indirect discrimination on the ground of ethnic origin, he said the following, at para. 53:
>
> > "Following the approach laid down in these and other cases, it has to be shown by the claimant that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination, so as to give rise to a presumption of indirect discrimination. Once a *prima facie* case of indirect discrimination has been established, the burden shifts to the state to show that the indirect difference in treatment is not discriminatory. The state can discharge that burden by establishing that the difference in the impact of the measure in question is the result of objective factors unrelated to any discrimination on the ground alleged. This requires the state to demonstrate that the measure in question has an objective and reasonable justification: in other words, that it pursues a legitimate aim by proportionate means (see, in addition to the authorities already cited, the judgment of the Grand Chamber in *Biao v Denmark* (2015) 64 EHRR 1, paras. 91 and 114)."

40. The identification of a comparator, or a person in an "analogous situation" for the purposes of showing indirect discrimination can prove problematic, as Baroness Hale explained in *Re McLaughlin's application for judicial review* [2018] UKSC 48 at paragraph 24:

> 24. Unlike domestic anti-discrimination law, article 14 does not require the identification of an exact comparator, real or hypothetical, with whom the complainant has been treated less favourably. Instead it requires a difference in treatment between two persons in an analogous situation. However, as Lord Nicholls explained in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] AC 173,
>
> > "… the essential question for the court is whether the alleged discrimination, that is, the difference in treatment

> of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact." (para 3)

As was pointed out in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 WLR 1434, there are few Strasbourg cases which have been decided on the basis that the situations are not analogous, rather than on the basis that the difference was justifiable. Often the two cannot be disentangled.

40. Finally, the question as to objective justification must be assessed, given the margin of appreciation, by reference to whether or not the legislature's policy choice is "manifestly without reasonable foundation". The leading authority is again the Supreme Court's decision in *R (SC) v Secretary of State for Work and Pensions* (at paragraphs 97-130). As Andrews LJ explained in *R (Salvato) v Secretary of State for Work and Pensions* [2021] EWCA Civ 1482, at paragraph 34:

> "Lord Reed concluded that the 'manifestly without reasonable foundation' formulation still had a part to play, but that the approach which the Court had followed since *Humphreys* should be modified in order to reflect the nuanced nature of the judgment which is required. He stressed the importance of avoiding a mechanical approach based on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant. The courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security, but as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification."

41. So, in order to succeed, the Appellant must be in an analogous situation to his female comparator and the Respondent must fail in showing objective justification for the measure in dispute.

Is the Appellant in an analogous situation?

42. In order to make good his claim of indirect discrimination, the Appellant has to show that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination. The Appellant's case, in effect, is that he is in an analogous situation to women of the same age who have been able to claim the state retirement pension at an earlier age than he has. Furthermore, he contends that regulation 4(1) has a disproportionately prejudicial effect on men of his age when compared with women of the same age.

43. This argument is unpersuasive for at least two reasons.

44. The first is that the purported comparison based on the age at which an individual becomes entitled to the state retirement pension is an unduly narrow approach to determining what amounts to an analogous situation. The starting point in the scheme is that men and women alike must make a claim for a winter fuel payment by 31st March for any given winter. As Mr Spencer explains (at paragraph 13 of his written submission):

> However, regulation 4 of the WFP Regulations grants the Secretary of State discretion to make a WFP payment without a claim for WFP where official records held by the Secretary show entitlement to WFP. Thus, where an individual has already submitted a claim to the Secretary for a benefit other than WFP, the Secretary has the discretion to make a payment of WFP to the individual, even though the individual failed to claim WFP, if records held by the Secretary demonstrate the individual's entitlement to WFP. In practice such records relate to the following benefits: Attendance Allowance, Carer's Allowance, Disability Living Allowance, Employment & Support Allowance, Incapacity Benefit, Income Support, Industrial Death Benefit, Industrial Injuries Disablement Benefit, Jobseeker's Allowance, Pension Credit, Personal Independence Payment, Severe Disablement Allowance, State Pension, and Widow's Benefit.

45. Individuals who make claims for one or more of these other social security benefits, with the appropriate supporting documentation, in effect allow the Secretary of State to determine, with confidence, whether the individual is entitled to a winter fuel payment and so to exercise her discretion under regulation 4(1) to award such payments. If there are no such records, by definition it is not possible for the Secretary of State to do so. There is no evidence that men are collectively disadvantaged, or women as a whole unfairly advantaged, when considering all recipients of all relevant social security benefits who may be awarded a winter fuel payment without making a claim for such a payment. The legislation does not in terms give a 'free pass' to female recipients of the state retirement pension as compared to male pensioners of the same age. Rather, regulation 4(1) empowers the Secretary of State to make a winter fuel payment to any existing claimant of either gender of any relevant social security benefit who "appears from official records held by the Secretary of State to be entitled to a payment" under regulation 2. It follows that the Appellant cannot establish that he is in an analogous position to individuals who have already claimed another social security benefit (other than a winter fuel payment).

46. Even if it is legitimate to make the narrow comparison with women of the same age who claim state retirement pension at an earlier date, the second reason is that some women will in any event still not benefit from the operation of regulation 4(1). For example, a woman may decide to defer her state retirement pension despite having reached pensionable age (with a view to becoming entitled to a higher rate of pension at a later date). Any such woman will not be able to benefit from the Secretary of State's discretion under regulation 4(1) – assuming no other social security benefit is in payment – and will have to make a claim in the normal way, just as the Appellant must (see regulation 3(1)(b)).

47. It follows that the Appellant is not in an analogous situation to a woman with the same date of birth but with a different pensionable age and a different state retirement pension entitlement.

48. Moreover, as Mr Commissioner Mesher found in *CIS/2497/2002*, "the claimant was not disadvantaged by such assumed discrimination. He was disadvantaged by the overall and identical time-limit set for claims and for the making of payments without a claim" (see paragraph 28 above).

Has the Respondent shown objective justification?

49. Leaving aside the issue of whether the Appellant is in an analogous situation, and assuming for present purposes that there is a difference of treatment as between men and women, it is only discriminatory if there is no objective and reasonable justification for the measure in question. It is axiomatic that contracting States to the ECHR are permitted a wide margin of appreciation in relation to general measures of economic or social strategy (such as social security provision).

50. As Mr Spencer points out, the relevant domestic legislative provisions, by way of response to the CJEU's decision in *R v Secretary of State for Social Security, ex parte Taylor*, "were amended so that men and women were entitled to receive WFP at the same ages. This allowed men in the position of Appellant to claim WFP at the same time as women during the period when the State Pension age for women was transitioning to equalisation with the State Pension age for men" (written submission at paragraph 17). Certainly, Parliament could have provided that – as is the case with the great majority of other social security benefits – entitlement to a winter fuel payment was contingent in all cases on making a claim for the benefit. However, the legislature decided to maintain the existing provision for automatic awards, doubtless for sound reasons of both social policy (not least in terms of increasing take-up) and administrative efficiency. But automatic awards must be made on some rational footing. As Mr Spencer submits, "DWP has cogent policy reasons why it considers only recipients of other social security benefits for the automatic award of WFP: DWP can rely on its own records for information upon which to base a WFP payment. DWP cannot be expected to make a payment where no such records exist" (written submission at paragraph 17).

51. Those reasons in themselves are sufficient to amount to objective justification for any differential treatment there may be in terms of the process of accessing winter fuel payments. There are, however, a number of further factors that support Mr Spencer's position. First, there is no suggestion of direct discrimination in this case. Second, the Appellant's challenge arises in a context that involves a substantial amount of public expenditure (winter fuel payments are not means-tested and are also non-contributory benefits). Changes to the process of allocating such payments would inevitably have consequences both for public administration and for the resources that would have to be allocated to the operation of the scheme. Third, rule 4(1) (or a drafting variant on it) has been a constant part of the legislative framework of the scheme since the outset over two decades ago (see Social Fund Winter Fuel Payments Regulations 1998 (SI 1998/19), regulation 4). All in all, the legislation under challenge has an objective and reasonable basis such that it satisfies the principle of proportionality.

A final observation

52. Finally, and as Mr Spencer correctly identifies, the Appellant's real complaint is that he was unaware of the law (and in particular the statutory time limit for making a claim) on entitlement to a winter fuel payment. Had he known about the entitlement rules, none of these problems would have arisen. Such lack of knowledge of the right to a winter fuel payment is wholly understandable, as Mr Commissioner Rowland recognised in *CIS/840/2005* and *CIS/841/2005* (at paragraph 16). Unfortunately, as Mr Spencer adds, there is no recourse for lack of knowledge of the relevant law, however obscure that law may be (the paradigm case on the obscurity of the relevant law arguably being *Secretary of State for Work and Pensions v Walker-Fox* [2005] EWCA Civ 1441, reported as *R(IS) 3/06*).

The other aspect of the First-tier Tribunal's decision

53. Given this is the Appellant's appeal, the discussion above has necessarily focussed on the main part of the Tribunal's decision, namely the confirmation of the disallowance of entitlement to winter fuel payments for the three years 2012/13, 2013/14 and 2014/15.

54. However, the Tribunal also allowed the Appellant's appeal in one respect, finding that he was entitled to a winter fuel payment for 2015/16 (see paragraph 10 above). There has been no cross-appeal by the Secretary of State on this aspect of the Tribunal's decision.

55. Nevertheless, I have to say I have some reservations as to the Tribunal's approach in this latter matter. The Tribunal allowed this part of the appeal on the premise that the "DWP had accepted [the Appellant's] claim for his state pension as a claim for his Winter Fuel Payments. His application was received on 25/1/16." It seems to me very arguable that this involved a misreading of the Department's written response to the appeal before the Tribunal, in which it was stated (admittedly somewhat ambiguously) that "as [the Appellant] was ordinarily resident in the UK his claim for State Retirement Pension was accepted as a claim for Winter Fuel Payment". Plainly, the Tribunal has read this passage to mean that the Appellant's state retirement pension claim form received on 25 January 2016 had been treated by the Department as a claim for a winter fuel payment.

56. However, I think that in the passage in question the DWP submission writer was in fact referring rather elliptically to the process of making automatic awards under regulation 4(1). In other words, once the state retirement pension was in payment (namely from 5 April 2016), then from that point the Appellant's extant and ongoing status as a benefit claimant was sufficient to trigger (in November 2016) a regulation 4(1) winter fuel payment notification for the following winter (i.e. for 2016/17). This is reinforced by the next sentence in the response, which states: "He was subsequently entitled to a Winter Fuel Payment for the winter of 2016/17 and each following winter."

57. Indeed, I should add that I can see no evidence on file that the DWP had at any time treated the state retirement pension claim form as itself a claim for a winter fuel payment. Indeed, the whole thrust of the DWP's case before the Tribunal was that a claim for winter fuel payments was not submitted by the Appellant until 29 November 2017 and, in particular, no claim for such benefit had been

made on or before 31 March 2016. In this context I also note that there is no provision in the legislation for a claim for a retirement pension of any category to be treated in the alternative as a claim for a winter fuel payment (see regulation 9 of, and Schedule 1 to, the Social Security (Claims and Payments) Regulations 1987). However, the appeal was decided by the Tribunal on the papers and so the issue was not explored at any hearing.

58. That said, I did not specifically invite submissions on this issue. It would be unfair to decide the matter definitively in the absence of representations. Furthermore, Mr Spencer has not sought to pursue the point in his written submission on behalf of the Secretary of State. I therefore propose to say no more about the question.

Conclusion

59. The First-tier Tribunal's summary decision notice in this case provided a succinct but sufficient explanation as to why it had reached the decision it had. Its decision involves no material error of law. Accordingly, I dismiss the Appellant's appeal (section 11 of the Tribunals, Courts and Enforcement Act 2007).

Nicholas Wikeley
Judge of the Upper Tribunal

Signed on the original on 12 January 2022