

## Written evidence from Child Poverty Action Group (DBB0003)

### Introduction

1. Child Poverty Action Group ('CPAG') works on behalf of the more than one in four children in the UK growing up in poverty. We use our understanding of what causes poverty and the impact it has on children's lives to campaign for policies that will prevent and solve poverty – for good. We provide training, advice and information to make sure hard-up families get the financial support they need. We also carry out high profile legal work to establish and protect families' rights.
2. CPAG intervened in its own name before the Supreme Court *in the matter of an application for judicial review by McLaughlin*<sup>1</sup> and represented the claimants in *R (Jackson and others) v Secretary of State for Work and Pensions*<sup>2</sup> in order to ensure that widowed parent's allowance ('WPA') and higher rate bereavement support payment ('BSP') were payable to families where the parents were cohabiting but not married.
3. CPAG is separately making joint submissions to the JCHR along with the Childhood Bereavement Network, Widowed and Young and others. Those submissions call for the proposed draft Remedial Order to have greater retrospectivity to ensure that more families where the cohabiting parent died before 30 August 2018 are entitled to receive WPA or the full amount of higher rate BSP.
4. Reference is made in those joint submissions to a recent interim decision of the Upper Tribunal (*JG -v- Secretary of State for Work and Pensions (BB) [2021] UKUT 194 (AAC)*)<sup>3</sup> in support of the submission that the Remedial Order should, at the very least, be retrospective to the date of the High Court decision in *McLaughlin* rather than the Supreme Court decision.
5. In the present submission, we do not wish to detract from those calls for greater retrospectivity. However, we do wish to raise a number of additional issues, some of which are referred to in *JG*, concerning deficiencies in the proposed draft Remedial Order where an unmarried claimant has previously made a claim for WPA/higher rate BSP which has been refused and also where there may have been a subsequent appeal against that refusal. Due to the technical nature of these issues they were not raised in the joint submissions which are broader in nature.
6. These submissions address three different situations: 1) where there has been an earlier claim resulting in a decision by the SSWP refusing benefit but no subsequent appeal; 2) where an earlier decision of the SSWP refusing benefit has been upheld following an unsuccessful appeal; and 3) where there is an outstanding appeal against

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<sup>1</sup> [2018] UKSC 48.

<sup>2</sup> [2020] EWHC 183 (Admin).

<sup>3</sup> Available at

[https://assets.publishing.service.gov.uk/media/6123b664e90e07053d90ded4/CG\\_1616\\_2019\\_interim.pdf](https://assets.publishing.service.gov.uk/media/6123b664e90e07053d90ded4/CG_1616_2019_interim.pdf)

a refusal of benefit. First though, they provide a brief overview of the decision making and appeal structure.

#### Decision and appeals structure: finality of decisions

7. The social security decision and appeals regime is structured so as to prevent there being two decisions in respect of the same benefit for the same period. This is achieved by the concept of the “finality of decision”, provided for under s17 Social Security Act 1998 (‘SSA 1998’), with any decision of the SSWP being final, subject to appeals and revisions or supersessions.
8. As such, if a claimant makes a claim for benefit in respect of a given period, a decision of the SSWP under s8 SSA 1998 refusing that claim for that period is final unless the SSWP revises (under s9 SSA) or supersedes (under s10 SSA) that decision or it is the subject of a successful appeal (under ss12-14 SSA), at which point that original decision is essentially remade and it is that remade decision which becomes the final decision.
9. It follows that, while the SSWP can revise or supersede her own decision, if that decision has been appealed, the SSWP cannot, except in limited circumstances, supersede, and can never revise, the decision of the tribunal, nor can she consider a new claim for the same period covered by the tribunal decision. This was explained succinctly in *RR v Secretary of State for Work and Pensions (JSA)* [2017] UKUT 50 (AAC) at §31:

*It is not possible for there to be more than one outcome decision for any given period at any given time. If the effect of the decision under appeal had been to leave an earlier claim in respect of the same period undecided, the Secretary of State would have remained under a duty to decide that earlier claim and therefore to give a second outcome decision in respect of that period which might, or might not, have been the same as the decision under appeal. The 1998 Act does not contemplate that such a state of affairs could exist. Under section 17 of that Act, the decision dated 28 March 2014 was final. The FTT had power to change it on appeal and the Secretary of State had power (if grounds existed) to revise or supersede it. What the Secretary of State could not do is give another decision under section 8 for the same period on a different claim. The decision under appeal was only final—as section 17 required—if it determined all the claims relating to the period it covered.*

10. In addition, the power to revise only arises, for present purposes, if there was an official error or ignorance of or mistake of some material fact (reg 3 Social Security and Child Support (Decisions and Appeals) Regulations 1999 (‘D&A Regs’)). By contrast, the power to supersede arises where there has been a relevant change of circumstances but this only applies where there is an existing award, not a decision

refusing benefit and, even then, the supersession generally only takes effect from the date of the new decision (s10(5) SSA).

11. Also of relevance for present purposes is the fact that in deciding an appeal against a decision of the SSWP, a tribunal cannot take into account any circumstances not obtaining at the time when the decision being appealed was made (s12(8)(b) SSA).
12. The decision making and appeal structure provided for in ss8-14 SSA and the D&A Regs are left unamended by the proposed draft Remedial Order. As such, irrespective of the date which the Order is retrospective to, unmarried claimants who have already claimed WPA/higher rate BSP and had that claim refused, as well as those who have gone on to appeal that decision, will not be able to benefit in full from the Order as explained below.

*(i) Claims refused by SSWP where there has been no onward appeal*

13. Where an unmarried claimant has already made a claim for WPA/higher rate BSP and had that claim refused before the Remedial Order comes into effect, but has not gone on to appeal that refusal, there will exist a final decision for the period from the date of claim to the date of the decision refusing the claim. Once the Remedial Order is made, that claimant can put in a new claim. However, in the absence of any power to revise or supersede the original decision on the basis of a subsequent change in legislation, any award on the new claim will only cover the period *from* the date of the earlier decision. Depending on the individual facts, this date may be after the date that the Remedial Order is retrospective to.
14. For example, A's partner died on 7 September 2018. He put in a claim for BSP which was refused on 7 December 2018. Under DWP's stated intention regarding the retrospective effect of the proposed draft Remedial Order, he should be able to put in a new claim for BSP and obtain both the lump sum payment and the full 18 months of monthly payments. However, because there is a final decision that he is not entitled to BSP for the period from 7 September 2018 up to and including 7 December 2018, any decision on a new claim will only be able to cover the period from and including 8 December 2018.
15. To ensure that those unmarried claimants, who previously made a claim for WPA/higher rate BSP which was refused, benefit in full from the Remedial Order, consequential amendments will need to be made to the D&A Regs to allow for any earlier decision of the SSWP refusing benefit to be revised or superseded on the basis of the change in the law brought about by the Remedial Order.

*(ii) Claims refused by SSWP and appeal dismissed*

16. A similar issue to the above arises for those unmarried claimants who have already been refused WPA/higher rate BSP by the SSWP and had that decision upheld by an appeal tribunal. Such a decision of the tribunal is final and no new decision can be

made on a subsequent claim in relation to the period covered by the tribunal decision. Nor can the original decision of the SSWP be subsequently revised by the SSWP because, having been upheld by a tribunal, it is the tribunal's decision that is now the final decision, with the SSWP having no power to revise tribunal decisions as distinct from her own decisions. The result of this is that if a person has already had an appeal dismissed regarding a period for which they could, as a result of the Remedial Order, put in a fresh claim, they will not be able to benefit fully from the Remedial Order.

17. An example of such a situation is given at paragraph 10 of *JG* on the facts of that case but in the hypothetical situation that the retrospective date of the Remedial Order was brought forward to the date of the High Court judgment in *McLaughlin* and the appeal was no longer live: the claimant in that situation would not be able to benefit from the Remedial Order being retrospective from 9 February 2016 for the period from the partner's death (14 October 2016) to the SSWP's decision refusing the original claim (24 November 2016). Any new claim as a result of the Remedial Order would only be able to be made in relation to the period after the date of the SSWP's original decision.
18. Equally the same situation would arise if the date of retrospectivity were kept as it currently is. For example, a claimant's partner died on 30 August 2018. The claim for BSP was refused by the SSWP on 15 November 2018. This decision was appealed and the appeal dismissed in February 2019 and no onward appeal made. Despite the Remedial Order being retrospective to 30 August 2018, on its current drafting, any new claim put in by the claimant after the Order comes into force would only entitle her to BSP from 16 November 2018.
19. To enable unmarried claimants who have already unsuccessfully appealed a decision refusing them WPA/higher rate BSP to benefit in full from the Remedial Order, provision needs to be made to ensure that such earlier appeal decisions do not prevent claimants from being awarded WPA or higher rate BSP for the full period to which they would otherwise have been entitled if there was no such earlier appeal decision. At paragraph 11 of *JG* one example of how this could be done is given and there is a precedent for the SSWP having express power to supersede a decision made by an appeal tribunal in specific circumstances in reg6(2)(c) and 7(5) D&A Regs.

*(iii) Claims refused by SSWP where a claimant has an ongoing appeal*

20. If somebody has an ongoing appeal then, as the proposed draft Remedial Order currently stands, no account can be taken of it within the tribunal system as no amendments are made to s12(8)(b) SSA which prevents the First tier Tribunal ('FTT') taking account of circumstances not obtaining at the date of the original decision.<sup>4</sup> (If the FTT has not yet made a final decision on the appeal, it would be open to the SSWP to revise her original decision (possibly under reg3(4A) though see the previous limitations regarding this above)).

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<sup>4</sup> A point specifically noted in *JG* at §9.

21. Even if the Remedial Order could be taken into account by a tribunal (e.g. by amending s12(8)(b) SSA), any relief would be limited to the period covered by the Remedial Order.
22. This situation is in direct contrast to what would happen if, rather than the legislation being amended by a Remedial Order, it had been a decision of another tribunal which had established what the law was ('the relevant determination'). In line with the legal norm that the decision of a court establishes what the law has always been (such that when a precedent setting court makes a decision it shows all previous decisions not made following the law as it declares the law to be to have been wrongly decided), if a claimant has already started but not concluded appeal proceedings before the relevant determination is made, then the appeal tribunal in the claimant's case will apply the law in line with the relevant determination.
23. In the social security field, this legal norm is however expressly disapplied in relation to decisions not of tribunals but of the SSWP under what is known as the anti-test case rule, provided for in s27 SSA. Under s27, a finding of a tribunal or court as to the effect of social security legislation will only take effect in other cases being decided by the SSWP from the date of the tribunal or court decision. As a result, even where a decision relates to a person's entitlement to a benefit in respect of a period before the date of the relevant determination and the decision falls to be made after the relevant determination, the law is to be applied as originally understood in respect of periods prior to the relevant determination, not as how the court/tribunal has established it to be. This appears to be what the SSWP intends the proposed draft Remedial Order to achieve in respect of BSP claims where the death was before the current date of retrospective effect: the Department has confirmed in correspondence that for deaths before 30 August 2018, a person claiming BSP will receive a pro-rated amount e.g. if a death occurred on 31 October 2017, 10 months would have lapsed before the date of entitlement becomes effective, the claimant would therefore be entitled to only 8 monthly BSP payments.
24. Notably, the anti-test case rule does not apply where an individual has already, before the date of the relevant determination, brought their own appeal against a social security decision concerning the same legislative provision. In that situation, the tribunal or court considering the subsequent appeal will apply the legislation in line with the relevant determination<sup>5</sup>.
25. A Remedial Order (amending legislation) is necessarily distinct from a relevant determination of a court/tribunal (establishing what the legislation says). Nevertheless, we consider that if the Remedial Order is not to have full retrospective

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<sup>5</sup> This is because s27(1)(b) provides s27 only applies where after the date of the relevant determination the *Secretary of State* needs to make a particular decision where what was decided in the relevant determination affects the outcome. However, where cases are already in the tribunal system at the date of the relevant determination then it is the *Tribunal* that needs to decide a case affected by the relevant determination and not the Secretary of State.

effect, then, in relation to whatever date it is made retrospective from, those claimants who have acted promptly to challenge their lack of entitlement by bringing appeals, should be entitled to WPA/BSP from the date of their partner's death to ensure that they benefit from an effective remedy in those proceedings.

26. This is something specifically referred to in *JG* at §12:

*It is arguably one thing to make decisions of the Secretary of State effective from the date of the Supreme Court's decision in cases where the claimant did not have tribunal proceedings on foot at that date; it may be another thing to do so when the claimant did have such proceedings on foot at that date and is denied an effective remedy in respect of part of the period relevant to those proceedings.*

### Conclusion

27. To ensure that all unmarried claimants who would otherwise benefit from the amendments being made by the Remedial Order do so to the full extent it is necessary for consequential amendments to be made to the legislation governing decisions and appeals so that claimants are not prevented from benefitting for the full period due to an earlier final decision in relation to part of that period.

28. In the absence of the Remedial Order being made fully retrospective, those claimants who have acted promptly to challenge their lack of entitlement to WPA/higher rate BSP through the appeals system, should be provided with an effective remedy in respect of all of the period covered by those proceedings.

15/09/2021