[2016] AACR 37

(LDG v Department for Social Development (JSA) [2015] NICom16)

Mr O Stockman **C12/14-15(JSA)**
Commissioner
16 April 2015

Jobseeker's allowance – failure to sign – claimant makes contact within prescribed time but does not show good cause – should sanction apply or does entitlement cease?

Human rights – whether application of a sanction for failure to sign an unjustifiable interference with right to the protection of property included in Article 1 of Protocol 1 of the European Convention on Human Rights

The claimant made a claim for and was awarded jobseeker's allowance (JSA) from 2 November 2013. He failed to attend to make a signed declaration on 28 November 2013. He then attended on 29 November and provided reasons for not attending on the previous day. On 3 December 2013, a decision-maker decided that the claimant had not demonstrated good cause for failing to make a signed declaration on the day in question and imposed a sanction which removed payment of the claimant's JSA for one week from 6 December 2013 to 12 December 2013 inclusive. After the decision dated 3 December 2013 was reconsidered but not changed, the claimant appealed. The appeal tribunal upheld the decision of the decision-maker. The claimant appealed to the Commissioner.

Held, allowing the appeal, that:

1. the current form of regulation 27 of the Jobseeker's Allowance Regulations (Northern Ireland) 1996 (the JSA Regulations) prescribes that, in order for entitlement to JSA not to cease, contact must be made within a relevant period of five working days in the event of a failure to provide a signed declaration, as well as imposing an additional requirement that good cause be shown for that failure (paragraph 54);

2. article 10(2)(c) of the Jobseekers (Northern Ireland) Order 1995 (the Order) permits the making of regulations providing for entitlement to JSA to cease where a claimant does not make prescribed contact with an employment officer within a relevant period after a failure to provide a signed declaration. However, there is no provision in article 10(2)(c) to enable regulations to be made requiring good cause to be established in relation to such a failure, in order to retain entitlement to JSA. Consequently, the inclusion of the words "and shows that he had good cause for the failure" at the close of regulation 27 has the effect of adding a condition of entitlement which is not permitted by the empowering provision in article 10(2)(c) of the Order. These closing words are *ultra vires* and of no legal effect. They are severable from the rest of regulation 27 and must be omitted as, only without them, did that provision retain a meaning consistent with the regulation-making power in article 10(2)(c) (paragraph 55 and paragraphs 58 to 60);

3. the application of regulation 27A of the JSA regulations to the claimant, resulting in the restriction of the payability of JSA for one week, did not represent a violation of his peaceful enjoyment of property under Article 1 of Protocol 1 of the European Convention on Human Rights. To the extent that it was an interference with that right, it was justified in the public interest for the Department's broader policy objectives (paragraph 79).

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal from the decision of a tribunal sitting at Belfast on 3 March 2014.

2. For the reasons I give below, I allow the appeal and I set aside the decision of the appeal tribunal under article 15(8)(a)(i) of the Social Security (Northern Ireland) Order 1998 (SI 1998/1506).

3. I give the decision which I consider that the appeal tribunal should have given, without making fresh or further findings of fact.

4. My decision is that the jobseeker's allowance (JSA) is not payable to the appellant for a period of one week from 6 December 2013 to 12 December 2013.

Background

5. The appellant made a claim for JSA from the Department for Social Development (the Department) from 2 November 2013. He attended a fresh claim interview on 4 November 2013. There he was given documents which included a JS40 booklet. The JS40 indicated dates on which the appellant was required to attend his local Social Security Office to make a signed declaration. On 13 November 2013 the appellant was awarded JSA. He attended the Social Security Office on Thursday 14 November 2013 in order to make a signed declaration. He was due to attend again after two weeks.

6. The appellant failed to attend on 28 November 2013. However, he attended on Friday 29 November and provided reasons for not attending on the previous day. He explained that he got the days mixed up, thinking that the previous day was a Wednesday and therefore not a signing day. On 3 December 2013 a decision-maker decided that the appellant had not demonstrated good cause for failing to make a signed declaration and that a "sanction" of removing payment of JSA for one week from 6 December 2013 to 12 December 2013 was appropriate. Notification of this decision was issued to the appellant on 3 December 2013. Following a reconsideration application, which led to the decision being upheld, the appellant appealed the decision.

7. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal disallowed the appeal. The appellant requested a statement of reasons, which was issued on 8 July 2014. On 25 July 2014 the appellant requested the LQM to grant leave to appeal to the Social Security Commissioner. By a decision issued on 5 August 2014 the LQM refused leave to appeal. On 4 September 2014 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

8. The appellant submits that the tribunal erred in law as the benefit sanction applied to him was in violation of rights under the human rights principles enshrined in a number of international conventions and the Human Rights Act 1998. He submits that his rights were violated as he was left without any means of subsistence by the decision of the tribunal.

9. The Department was invited to make observations on the appellant's grounds. Mr Joe O'Connor of decision-making Services (DMS) replied on behalf of the Department. Mr O'Connor indicated that, for reasons different to the appellant's grounds, he supported the application for leave to appeal.

10. The gist of the submissions advanced by Mr O'Connor was that the appellant's failure to sign on had the consequence that he was no longer entitled to JSA, as opposed to liable to the sanction of loss of payment of JSA for one week. However, the effect of this, submitted Mr O'Connor, was ameliorated by an interpretation derived from Great Britain Commissioner's decision CSIS/745/2002, such that when the appellant reported to the Department one day late, his claim to JSA continued from that date, resulting in the loss of only one day's entitlement.

11. The appellant responded and, while accepting the points made by Mr O'Connor which were in his favour, continued to submit that the decision was erroneous in law on the grounds initially advanced. I granted leave to appeal and I directed an oral hearing of the appeal.

12. Before the date of hearing, Mr Tony Gough for the Department made further submissions. In the course of these the Department resiled from the approach previously adopted by Mr O'Connor. The Department no longer supported the appellant's appeal, submitting that entitlement was not affected in the circumstances of the case, but that a sanction of loss of payment of JSA for one week was the appropriate outcome.

13. The appellant in his responding submissions focussed on the right to property in Article 1 of Protocol 1 to the European Convention on Human Rights. The Department accepted that this was engaged on the facts, albeit arguing that a breach of the right was justified. The appellant relied on evidence on the functioning of the sanctions regime which, he submitted, showed that it did not meet the stated policy aims. In consequence, he submitted that the burden of justification which fell on the Department was not met.

The tribunal's decision

14. The tribunal which determined the appeal at first instance heard submissions from the appellant relating to two technical matters. It also heard his substantive submission to the effect that his right to JSA was protected by international human rights law and that the jobseeker's agreement was a voluntary agreement which did not affect his entitlement. As the technical points were not determinative of the appeal, the appellant ceased to rely on them.

15. After considering the appellant's grounds of appeal, the tribunal found that the appellant was under obligations set by regulations 23 and 24 of the Jobseeker's Allowance Regulations (Northern Ireland) 1996 (SR 1996/198) (the JSA Regulations). The tribunal held that entitlement to JSA was not in dispute, but that the issue was whether JSA was payable due to the applicability of sanctions. The tribunal decided that regulation 27 of the JSA Regulations applied to the appellant. [If I follow the logic of the tribunal's decision correctly, this should be a reference to regulation 27A and I understand that this reference to regulation 27 is an accidental error in the decision]. It decided that the appellant's circumstances did not fall into the prescribed categories of "good cause" specified in regulations 28 and 30 of the JSA Regulations or did not otherwise amount to good cause. It determined that regulation 27B of the JSA Regulations provided that the appropriate sanction period was one week in his case.

16. In so deciding, the tribunal rejected the appellant's submission that the jobseeker's agreement was purely voluntary and found that no right to property was threatened in the circumstances.

Relevant legislation

17. In order to make it easier to understand the discussion which follows, it is necessary to set out the legislation enabling the establishment of the sanctions regime and the main regulations which give it effect. The primary regulation-making power is contained in article 10 of the Jobseekers (Northern Ireland) Order 1995 (SI 1995/2705) (the 1995 Order).

18. At the date that I am concerned with for the purposes of this appeal, article 10 of the 1995 Order had been amended by the Welfare Reform and Pensions (Northern Ireland) Order 1999 (SI 1999/3147) and the Welfare Reform Act (Northern Ireland) 2010. It also had to be read in the light of article 3 of the Welfare Reform (2010 Act) (Commencement No.1 and Transitory Provision) Order (Northern Ireland) 2010 (SR 2010/327). So far as relevant, it read:

"**10.–**(1) Regulations may make provision for requiring a claimant (other than a joint-claim couple claiming a joint-claim jobseeker's allowance) –

(a) to attend at such place and at such time as an employment officer may specify; and

(b) to provide information and such evidence as may be prescribed as to his circumstances, his availability for employment and the extent to which he is actively seeking employment.

(1A) … [*not relevant, as relating solely to joint claim couples*];

(2) Regulations under paragraph (1) or (1A) may, in particular –

(a) prescribe circumstances in which a jobseeker's allowance is not to be payable for a prescribed period (of at least one week but not more than two weeks) in the case of –

(i) a claimant (other than a joint-claim couple claiming a joint-claim jobseeker's allowance) who fails to comply with any regulations made under that paragraph, or

(ii) a joint-claim couple claiming a joint-claim jobseeker's allowance a member of which fails to comply with any such regulations;

(b) provide for the consequence set out in sub-paragraph (a) not to follow if, within a prescribed period of a person's ("P") failure to comply with any such regulations ("the relevant period"), P or, if P is a member of a joint-claim couple, either member of the couple –

(i) makes prescribed contact with an employment officer, and

(ii) shows that P had good cause for the failure;

(c) provide for entitlement to a jobseeker's allowance to cease at such time as may be determined in accordance with any such regulations if P or, as the case may be, a member of the couple does not make prescribed contact with an employment officer in the relevant period;

(ca) prescribe circumstances in which a jobseeker's allowance is to be payable in respect of a claimant even though provision made by any such regulations by virtue of sub-paragraph (a) prevents payment of a jobseeker's allowance in respect of the claimant; and

(d) prescribe –

(i) matters which are, or are not, to be taken into account in determining whether a person has, or does not have, good cause for failing to comply with any such regulations; and

(ii) circumstances in which a person is, or is not, to be regarded as having, or not having, good cause for failing to comply with any such regulations.

(2A) … [*not relevant*];

(3) In paragraph (1) 'employment officer' means an officer of the Department, an officer of any other Department, or such other person as may be designated for the purposes of that paragraph by an order made by the Department."

19. Specific regulations requiring attendance and the provision of information and evidence, and providing for the consequence of failure to comply with those requirements, appear at Chapter IV of the JSA Regulations. At the time under consideration in the present appeal, these had been most recently amended by the Jobseeker's Allowance (Sanctions for Failure to Attend) Regulations (Northern Ireland) 2012 (SR 2012/44). So far as is relevant, the JSA Regulations as amended provided:

"23. A claimant shall attend at such place and at such time as an employment officer may specify by a notification which is given or sent to the claimant and which may be in writing, by telephone or by electronic means.

24(6) A claimant shall, if the Department requires him to do so, provide a signed declaration to the effect that –

(a) since making a claim for a jobseeker's allowance or since he last provided a declaration in accordance with this paragraph he has either been available for employment or satisfied the circumstances to be treated as available for employment, save as he has otherwise notified the Department or an employment officer, as the case may be;

(b) since making a claim for a jobseeker's allowance or since he last provided a declaration in accordance with this paragraph he has either been actively seeking employment to the extent necessary to give him his best prospects of securing employment or he has satisfied the circumstances to be treated as actively seeking employment, save as he has otherwise notified the Department or an employment officer, as the case may be, and

(c) since making a claim for a jobseeker's allowance or since he last provided a declaration in accordance with this paragraph there has been no change to his circumstances which might affect his entitlement to a jobseeker's allowance or the amount of such an allowance, save as he has notified the Department or an employment officer, as the case may be.

24(10) Where, pursuant to paragraph (6), a claimant is required to provide a signed declaration he shall provide it on the day on which he is required to attend in accordance with a notification under regulation 23 … or such other day as the Department or an employment officer, as the case may be, may require.

25(1) Entitlement to a jobseeker's allowance shall cease in the following circumstances –

(a) if a claimant fails to attend on the day specified in a relevant notification, and fails to make contact with an employment officer in the manner set out in that notification before the end of the period of 5 working days beginning with and including the first working day after the day on which the claimant failed to attend;

(b) if –

(i) that claimant attends on the day specified in a relevant notification but fails to attend at the time specified in that notification, and an employment officer has informed that claimant in writing that a failure to attend, on the next occasion on which he is required to attend, at the time specified in such a notification may result in his entitlement to a jobseeker's allowance ceasing or the benefit not being payable for a period, and

(ii) he fails to attend at the time specified in such a notification on the next occasion; and

(iii) that claimant fails to make contact with an employment officer in the manner set out in such a notification before the end of the period of 5 working days beginning with and including the first working day after the day on which that claimant failed to attend at the time specified;

(c) subject to regulation 27,if that claimant was required to provide a signed declaration as referred to in regulation 24(6) (provision of information and evidence) and he fails to provide it on the day on which he ought to do so in accordance with regulation 24(10).

27. Entitlement to a jobseeker's allowance is not to cease by virtue of regulation 25(1)(c) (entitlement ceasing on a failure to comply) if, before the end of the period of 5 working days beginning with and including the first working day after the day on which a claimant failed to provide a signed declaration in accordance with regulation 24(10) (provision of information and evidence), he makes contact with an employment officer in the manner set out in a notification under regulation 23 or 23A (attendance) and shows that he had good cause for the failure.

27A(1) A jobseeker's allowance is not to be payable for the period prescribed in regulation 27B (prescribed period for the purposes of regulation 27A) if either the first or the second condition is satisfied.

(2) The first condition is satisfied if a claimant –

(a) fails to attend on the day specified in a relevant notification;

(b) makes contact with an employment officer in the manner set out in a relevant notification before the end of the period of 5 working days beginning with and including the first working day after the day on which he failed to attend on the day specified; and

(c) fails to show good cause for that failure to attend.

(3) The second condition is satisfied if –

(a) he attends on the day specified in a relevant notification, but fails to attend at the time specified in that notification;

(b) the employment officer has informed him in writing that a failure to attend, on the next occasion on which he is required to attend, at the time specified in a relevant notification, may result in his entitlement to a jobseeker's allowance ceasing or the benefit not being payable for a period;

(c) he fails to attend at the time specified in a relevant notification on the next occasion;

(d) he makes contact with an employment officer in the manner set out in a relevant notification before the end of the period of 5 working days beginning with and including the first working day after the day on which he failed to attend at the time specified; and

(e) he fails to show good cause for that failure to attend.

27B(1) The period prescribed for the purposes of regulation 27A (circumstances in which an allowance is not to be payable) is –

(a) one week on the first occasion on which a jobseeker's allowance is determined not to be payable to the claimant by virtue of regulation 27A; and

(b) 2 weeks on the second and each subsequent occasion during the same jobseeking period on which a jobseeker's allowance is determined not to be payable to the claimant by virtue of regulation 27A.

(2) The period begins –

(a) where, in accordance with regulation 26A(1) (jobseeker's allowance) of the Claims and Payments Regulations, a jobseeker's allowance is paid otherwise than fortnightly in arrears, on and including the day following the end of the last benefit week in respect of which that allowance was paid; and

(b) in any other case, on and including the first day of the benefit week following the date on which a jobseeker's allowance is determined not to be payable.

29. In determining, for the purposes of regulation 27 (where entitlement is not to cease), whether a claimant has good cause for failing to comply with a requirement to provide a signed declaration, as referred to in regulation 24(6) (provision of information and evidence), on the day on which he ought to do so the matters which are to be taken into account shall include the following –

(a) whether there were adverse postal conditions;

> (b) whether the claimant misunderstood the requirement on him due to any learning, language or literacy difficulties of the claimant or any misleading information given to the claimant by an employment officer."

Hearing

20. I held an oral hearing of the appeal. The appellant attended but was not represented. Mr Gough and Mr John Gorman of DMS appeared for the Department. I am grateful to the appellant and to the DMS representatives for their focussed and helpful written and oral submissions.

21. The appellant submitted that the sanctions regime which had led to payment of JSA being stopped for one week had led to an interference with his right to property under Article 1, Protocol 1 of the European Convention on Human Rights. The Department had accepted in written submissions that this provision was engaged, but had submitted that the sanctions regime was nevertheless a proportionate interference with the right for a legitimate aim in the public interest. The appellant presented evidence of the operation of the JSA sanctions regime which, he submitted, demonstrated that the operation of the sanctions did not meet a legitimate aim.

22. The Department made submissions addressed to the legislation establishing the system of sanctions and to the proper operation of that system. For the Department, Mr Gough candidly outlined that there was a difficulty for the Department arising from the form taken by the legislation following amendment by the Welfare Reform Act (Northern Ireland) 2010.

23. Mr Gough explained the intention behind the amendments and submitted an extract from the Delegated Powers Memorandum in respect of the Welfare Reform Act (Northern Ireland) 2010, which had been placed before the Social Development Committee of the Northern Ireland Assembly. The memorandum concerned clause 27 of the Northern Ireland Welfare Reform Bill. This clause substituted paragraphs (a) to (c) of article 10(2) of the 1995 Order, as well as inserting a new paragraph and subsection.

24. The intended change was that, in certain circumstances where a claimant failed to comply with the requirements of the regulations, payability of JSA would be restricted for a period of one or two weeks, rather than entitlement ceasing altogether. The reason for this, it was explained, was that most claimants who lost entitlement made fresh claims. The administrative burden of dealing with fresh claims following the removal of entitlement was felt to be excessive. The Department decided that it would be administratively less onerous to restrict payability for a temporary period instead.

25. This notwithstanding, it was intended to retain a power to remove entitlement where a claimant failed to meet an obligation and subsequently made no further contact with the Department within a set period, so that claims could be ended in such circumstances. In order to achieve this, the JSA regulations were amended to add regulations 27A and 27B, which provided for the restriction of payment of JSA for up to two weeks without a loss of entitlement, while regulations 25, 26 and 27 continued to provide for removal of entitlement in certain circumstances.

26. Mr Gough outlined that regulation 23, together with regulation 24(6) and 24(10) of the JSA Regulations, created an obligation on a claimant to attend a specified place and to make a signed declaration on a specific date. He submitted that where a claimant failed to attend and make a signed declaration, regulation 25(1)(c) of the JSA Regulations meant that entitlement

would cease, subject to regulation 27. Regulation 27 provided that entitlement would not cease where a claimant contacted an employment officer within five days of the failure to attend and showed that he had good cause for not attending.

27. Mr Gough outlined that the practice of the Social Security Agency and the interpretation of the Department for Work and Pensions in Great Britain had been that the consequence of regulation 25(1)(c) and regulation 27 was that a sanction should be applied, rather than entitlement end. This would be consistent with the approach of the tribunal. However, on a plain reading of regulation 25(1)(c) and 27, it was an entitlement issue rather than a payability issue.

28. Nevertheless, he submitted that regulation 27 should be read and interpreted in the context of article 10(2)(c) of the 1995 Order. This provided only for entitlement to cease in the context of a failure to make contact with an employment officer within a relevant period. He observed that regulation 25 of the JSA Regulations, as qualified by regulation 27, arguably went beyond the decision-making powers given by the 1995 Order. He submitted that regulation 27 should be read and interpreted in the light of article 10(2)(c).

29. The appellant did not make submissions on the issue of the *vires* of the JSA Regulations. He maintained the argument that his human rights were violated by the imposition of a sanction. He refined his argument, in the light of case law of the Supreme Court in *R v Secretary of State for Work and Pensions* [2015] UKSC 16, to accept that certain international treaties were not binding in national law unless specifically incorporated. However, he relied on specific rights which had been incorporated by the Human Rights Act 1998, namely the right to property under Article 1, Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

30. In relation to Article 1 Protocol 1 of the ECHR, the appellant submitted evidence in the form of extracts from reports from the Trussell Trust, the Child Poverty Action Group (CPAG), the Centre for Welfare Reform, Homelesslink, Oxfam, Gingerbread, Church Action on Poverty, the Citizens Advice Bureau, the Social Security Advisory Committee and the House of Commons Work and Pensions Committee.

31. The appellant submitted that the sanctions regime did not work in the public interest. He submitted that the main people being sanctioned were young people under 25 and disabled people, and that the main reasons for being sanctioned were missing interviews and not participating in work programmes. He submitted that, despite being designed to help and encourage claimants in the search for work, there was no direct correlation between sanctions and work outcomes.

32. Much of the evidence was based on the situation in Great Britain and, for example, submitted on the basis of the Trussell Trust and Oxfam that a result of the use of sanctions was an increase in reliance on foodbanks between 2012-13 and 2013-14. The appellant, relying on CPAG and Homelesslink, submitted that sanctions failed to help claimants move into work but rather had the effect of disengaging people from the workplace. He referred to evidence of Employment and Support Allowance (ESA) sanctions applying to people with mental health problems. He referred to other structural problems which created barriers to work, and submitted that there was no evidence of beneficial outcomes from the sanctions regime. He pointed to a recent House of Commons Committee report "Benefit sanctions beyond the Oakley review", which criticised the lack of availability of hardship payments for two weeks of a sanction period. He noted that 33 of 49 cases of claimant suicides since February 2012 had resulted in DWP

recommendations for change at local or national level, although the evidence did not directly connect these deaths to sanctions.

33. Mr Gorman for the Department outlined the Department's argument on Article 1 Protocol 1. He submitted that if legislation provided for payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 or Protocol 1 for persons satisfying its requirements.

34. The gist of Mr Gorman's submission was that the appellant had been deprived of a property right, but that it was justifiable, being in the public interest and subject to the conditions provided for by law.

35. He referred to the Great Britain Department for Work and Pensions (DWP) publication "No one written off: reforming welfare to reward responsibility", which had proposed changes to the JSA sanctions regime. He referred to the consultation responses to the proposals. He referred to the explanatory memorandum to the Great Britain Jobseeker's Allowance (Sanctions for Failure to Attend) Regulations 2010 (SI 2010/509) which stated that benefit sanctions were introduced to encourage jobseekers to attend mandatory interviews or appointments because they are proven to help and support them in jobsearch activity and finding sustained employment. He referred to the impact assessment carried out under section 24 of the Northern Ireland Act 1998, in which the Department had concluded that its proposals were not incompatible with Convention Rights or Community Law and were not discriminatory.

36. The material he relied on showed that in Great Britain 12,000 jobseekers had their claims closed down each month, resulting in the need to make a new claim and loss of only two days benefit typically. The new regime would increase the amount of benefit lost to a maximum of two weeks and thereby increase the incentive for jobseekers to attend their appointments and interviews. Thus, he submitted, the change to the sanctions regime was designed to change the behaviour of some jobseekers in relation to attending interviews and appointments in a way which would increase their chances of gaining employment, while reducing the administrative burden from claims being closed due to non-attendance, only for new claims to be made shortly afterwards, entailing additional costs to the public purse.

37. He relied on the recent decision of the UK Supreme Court in *R v Secretary of State for Work and Pensions* [2015] UKSC 16, where Lord Read stated that the Court could properly have regard to the extent to which policy proposals had been subject to a democratic debate. He relied on an extract from Lord Read's speech where he in turn quoted Lord Bingham of Cornhill in *R v Countryside Alliance v Attorney General* [2007] UKHL 52, at paragraph 45, saying:

> "'The democratic process is liable to be subverted if, on a question of moral and political judgement, opponents of the Act achieve through the courts what they could not achieve in Parliament.'
>
> The same is true of questions of economic and political judgement".

38. Mr Gorman submitted that any interference with the appellant's rights was pursuing a legitimate aim in the public interest and was proportionate.

Assessment

The JSA Regulations governing sanctions and entitlement

39. This appeal involves consideration of a fairly complicated legislative background. I acknowledge the efforts of the tribunal to arrive at the correct decision by having recourse to first principles in applying the legislation. However, I observe that the tribunal was undoubtedly hampered in its efforts by the fact that the version of article 10 of the Jobseekers Order in the submission placed before it by the Department, and which is quoted in its statement of reasons, was the version that predated amendment by the Welfare Reform Act (Northern Ireland) 2010 from 13 August 2010, rather than the version which the tribunal had to apply.

40. It appears to me that the consequence of amendments introduced by the Welfare Reform Act was the creation of two distinct mechanisms for dealing with failure by claimants to comply with certain obligations placed upon them by the JSA Regulations. These obligations included the requirement to attend at a specified place and time when notified by an employment officer by regulation 23 and the requirement to provide a signed declaration by regulation 24(6). Contrary to the appellant's submission, these are statutory conditions of entitlement, rather than voluntary undertakings by a claimant.

41. By regulation 27A(1) and (2), JSA ceases to be payable for a prescribed period of one or two weeks if a claimant fails to attend and, having made contact with an employment officer within five days, fails to show good cause for failing to attend. By regulation 27A(1) and (3), JSA ceases to be payable if a claimant who has attended but not at a specified time, and having been warned of the consequence of a further failure to attend at a specified time, fails again to attend at a specified time, contacts an employment officer within five days, but fails to show good cause for failing to attend at the specified time. By these provisions, entitlement does not cease and payment is only temporarily restricted. Matters to be included in deciding whether or not good cause has been shown are prescribed at regulations 28 and 30.

42. By contrast, entitlement is to cease altogether under regulation 25(1)(a) if a claimant fails to attend and fails to make contact with an employment officer within five days. Similarly by regulation 25(1)(b), entitlement is to cease if a claimant has attended but not at a specified time, having been warned of the consequence of a further failure to attend at a specified time, fails again to attend at the specified time, and fails to contact an employment officer within five days.

43. Therefore, failure to attend, or to attend at the right time, if contact is made with an employment officer within five days, and good cause for non-attendance is accepted by the employment officer, has no consequence for either payability or entitlement. Failure to attend, or to attend at the right time, if contact is made with an employment officer within five days and good cause for non-attendance is not accepted, can result in a restriction of payability for one or two weeks. A failure to attend, or to attend at the right time, if no contact is made with an employment officer within five days, will result in an end to entitlement.

44. Further provision is made at regulation 25(1)(c), which provides that entitlement shall cease if the claimant was required to make a signed declaration under regulation 24(6) and fails to provide it on the day on which he ought to do so in accordance with regulation 24(10). This is subject to regulation 27, which provides that entitlement is not to cease if the claimant makes contact with an employment officer within five days and shows that he had good cause for the failure. Matters to be included in deciding whether or not good cause has been shown for the purpose of regulation 27 are prescribed at regulation 29.

45. In the present case the appellant's attendance was required for the purpose of making a signed declaration under regulation 24(10). The appellant failed to attend and to make a declaration. He then made contact on the following day. Under regulations 25(1)(c) and 27, the consequence for the appellant, who has made contact with an employment officer within five days of failing to make a signed declaration, but where the employment officer has not accepted that he had good cause for failing to make a signed declaration, is that entitlement must cease.

46. If entitlement must cease upon the application of regulation 25(1)(c) and regulation 27, the consequence is that regulation 27A can have no application to the case. A sanction of restricting payability for one or two weeks cannot be applied when the claimant has no entitlement to JSA. Therefore the tribunal's decision to that effect must be in error of law.

47. Nevertheless, Mr Gough submits that this was not the policy intention. He also submits that the practice adopted by the Social Security Agency is that payability, but not entitlement, is affected where a claimant makes contact within five days, even if good cause is not accepted. He submits that this is consistent with the former interpretation of equivalent provisions by the DWP in Great Britain, whose legislation now differs significantly from that in Northern Ireland. The DWP took the view that regulation 25(1)(c) only applies to a particular category of claimants required to make a signed declaration, namely "postal signers". These are claimants who, due to factors such as remote geographical location and poor transport links, do not have to attend fortnightly to provide a signed declaration, but as the term suggests, send it by post. There is some support for that interpretation in the fact that among the matters to be taken to account in regulation 29 in determining whether good cause has been shown is whether there were adverse postal conditions.

48. However, it does not seem possible to square that interpretation with the wording of the legislation. In particular, while there is a stand-alone duty to attend at regulation 23, and a stand-alone duty to provide a signed declaration at regulation 24(6), by regulation 24(10) the claimant's duty to provide a signed declaration pursuant to paragraph (6) is a duty to provide it on the day on which he is required to attend in accordance with a notification under regulation 23. Both regulation 25(1)(c) and regulation 27 make express reference to providing a declaration in accordance with regulation 24(10). Thus, it appears to apply in the case of claimants who are required to attend at an office to sign their declaration and not to "postal signers".

49. The notification under regulation 23 appears at page 32 of the JS40 claim booklet issued to claimants, including the appellant, and includes the instructions:

> "Please attend, to sign your declarations (if you are a postal jobseeker, complete, sign and return your declarations) on [date]
> And again on (date and time)
> Then every second week on (date and time).
> Please bring this booklet every time you come to see us.
> If you do not bring this booklet with you, you may have to wait to be seen.
> If you cannot attend at the same time and on the days shown
>
> - you may lose your entitlement to Jobseeker's Allowance
> - any payment due may be delayed

> Contact us immediately if you cannot attend, otherwise, after 5 days your claim will be closed."

50. This notification appears to envisage an end of entitlement rather than a temporary restriction on payability, although it makes no reference to 'good cause'.

51. Mr Gough maintains that it was not a policy intention that entitlement would cease as a consequence of failing to attend to sign a declaration, where the claimant contacted an employment officer within five days. He submits that regulation 27 of the JSA Regulations should be read in the light of article 10(2) of the 1995 Order as amended.

52. It can be seen that article 10(1) of the 1995 Order provides the power to make regulations requiring attendance and the provision of certain information and evidence. Article 10(2)(a)(i) provides the power to make regulations restricting the payability of JSA for up to two weeks for failure to attend or provide information. Article 10(2)(b) provides for payability not to be restricted where a claimant contacts an employment officer within a relevant period and shows good cause for that failure. Article 10(2)(c) provides power to make regulations prescribing that entitlement to JSA shall cease altogether where a claimant does not contact an employment officer within the relevant period.

53. Specifically, Mr Gough makes the submission that, in the light of the regulation-making power in article 10(2)(c), which makes no reference to the requirement to show good cause, regulation 25(1)(c) and regulation 27 of the JSA Regulations should be read as not requiring good cause to be shown. This would mean that loss of entitlement would not be a consequence of failing to attend to make a signed declaration on an appointed date where contact is made with an employment officer within the relevant period.

54. I consider that the meaning of regulation 25(1)(c) and regulation 27 when read together is absolutely plain. These regulations require entitlement to cease where contact is made within the five day period, yet good cause for failure to attend and sign a declaration is not established. I cannot read a different meaning into these provisions simply because they do not reflect a particular policy intention. There is no ambiguity in the provisions. I cannot interpret the regulation in such a way as to ignore the plain meaning which appears on its face.

55. Nevertheless, it appears to me that the regulation-making power in article 10(2)(c) of the 1995 Order, as amended, does reflect the policy intention stated by Mr Gough, even if regulation 25(1)(c) and regulation 27 do not. Article 10(2)(c) permits the making of regulations providing for entitlement to JSA to cease where a claimant does not make prescribed contact with an employment officer within the relevant period. The relevant period is the same period which may be prescribed by article 10(2)(b) for the purpose of payability and which has been prescribed as five days by regulations. There is no provision in article 10(2)(c) to enable regulations to be made requiring good cause to be established in order to retain entitlement to JSA.

56. It seems to me that the real question arising in this appeal is whether the requirement to show good cause prescribed by regulation 27 is authorised by the regulation-making power in article 10(2)(c). Article 10(2)(c) only permits regulations which provide for JSA entitlement ceasing if prescribed contact is not made within the relevant period. The nature of the contact is prescribed by regulation 27 – namely that "he makes contact with an employment officer in the manner set out in a notification under regulation 23 …". The notification in question in this case is the JS40 booklet. In this case the appellant made contact within the relevant period in

accordance with his JS40. The appellant has not met the additional condition for retaining entitlement, namely the requirement to show "good cause". However, regulations prescribing a further condition of this nature are not expressly authorised by article 10(2)(c).

57. It has been established at least since *Foster v Chief Adjudication Officer* [1992] QB 31 that a Social Security Commissioner has the jurisdiction to determine any challenge to the *vires* of a regulation as being beyond the scope of the enabling power whenever it is necessary to do so in determining whether a decision under appeal was erroneous in point of law.

58. It appears to me that the inclusion at the end of regulation 27 of the words "and shows that he had good cause for the failure" has the effect of adding a condition of entitlement which is not permitted by the empowering provision in article 10(2)(c) of the 1995 Order.

59. Article 10(2)(b)(ii) clearly permits such a condition in terms of a restriction of payability under regulations made under article 10(2)(a). By contrast, it appears to me that there is no equivalent power in terms of the regulations removing entitlement. I conclude that the closing words of regulation 27, namely "and shows that he had good cause for the failure" add a condition which is not permitted by the regulation-making power. It further appears to me that these words are severable from the rest of regulation 27. Without them, regulation 27 retains a meaning consistent with the regulation-making power in article 10(2)(c) and indeed with the policy intention articulated by Mr Gough.

60. I cannot give a construction to the words in question which is consistent with the power given by article 10(2)(c). Therefore, I must conclude that the closing words of regulation 27, namely "and shows that he had good cause for the failure" are *ultra vires* and of no legal effect. In order for regulation 25(1)(c) and regulation 27 to be given a legal effect which is consistent with the decision-making power, regulation 27 must be read as if the ten words at the end of the regulation were omitted, resulting in it reading as follows:

> "27. Entitlement to a jobseeker's allowance is not to cease by virtue of regulation 25(1)(c) (entitlement ceasing on a failure to comply) if, before the end of the period of 5 working days beginning with and including the first working day after the day on which a claimant failed to provide a signed declaration in accordance with regulation 24(10) (provision of information and evidence), he makes contact with an employment officer in the manner set out in a notification under regulation 23 or 23A (attendance)."

61. The consequence is that the appellant must retain entitlement to JSA. Therefore, but by a different route to that followed by the Department and the tribunal, I consider that the next issue in the case becomes the application of sanctions. In this respect, the appellant submits that this was a violation of his property rights under Article 1 of Protocol 1 to the ECHR.

Right to property

62. The appellant relied in his initial submissions on general provisions in international human rights conventions, including the Universal Declaration of Human Rights. At hearing, the issue became much more focussed on specific aspects of international law which were incorporated into UK national law. The appellant relied principally on Article 1 of Protocol 1 of the ECHR, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

63. The first question arising is whether the appellant has been denied peaceful enjoyment of his possessions.

64. In the decision of the Grand Chamber of the European Court of Human Rights in *Stec v United Kingdom* (Applications 65731/01 and 65900/01), it was said at paragraph 50:

> "In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable."

65. *Stec* was subsequently applied by the House of Lords in the case of *RJM v Secretary of State for Work and Pensions* [2008] UKHL 63. This was because section 2(1) of the Human Rights Act 1998 obliges a court or tribunal determining a question which has arisen in connection with a Convention right to take into account any judgement, decision, declaration or advisory opinion on the European Court of Human Rights, so far as (in its opinion) it is relevant to the proceedings.

66. The appellant submits on the basis of *Stec* that Article 1 of Protocol 1 is clearly engaged because he was in receipt of a monetary benefit (a "possession") of which he was deprived by the State when the sanctions were imposed.

67. I am aware that the contrary is also arguable, considering, for example, the decision of Lang J in *Reilly & Hewstone v SSWP* [2014] EWHC 2182 (Admin). That case was concerned with the Great Britain equivalent of regulation 19A of the JSA Regulations and the requirement to undertake work or work-related activity or face sanctions. Lang J was considering a different type of sanctions regime to the one I have to consider and, in particular, the effect of court decisions on the right to property in the light of retrospective legislation. Her decision, to the effect that the restriction of payability was not an interference with property rights, could arguably fall to be distinguished from the present case. However, since the Department accepts that Article 1 Protocol 1 is engaged on the basis of *Stec* in the present appeal, I do not need to resolve the question.

68. It being accepted that the restriction of JSA to which the appellant would have been entitled represented an interference with his rights under Article 1 Protocol 1, the next issue is whether such interference was nevertheless a justified and proportionate one.

69. The test of proportionality was articulated in the Inner House of the Court of Session in *AXA General Insurance Ltd & Ors v The Scottish Ministers & Ors* [2011] ScotCS CSIH 31, where it was said at paragraph 130:

> "[130] In light of the Strasbourg jurisprudence it was accepted by the reclaimers that a measure adopted by a State which constituted an interference with the property of a citizen would nevertheless not constitute a breach of A1P1 if the State could justify its adoption by showing that the measure served a legitimate aim in the public interest and that the measure was proportionate, in the sense of striking a fair balance between the rights of the citizen concerned and the public interest. Although in the argument for the respondents, particularly the Lord Advocate, the elements of legitimate aim and proportionality of the measure were sometimes merged, we did not understand it to be disputed that on a proper analysis the justifying of the measure involved the two-stage exercise of (a) identifying the aim of the legislative measure and the legitimacy of that aim as one serving the public interest and (b) assessing its proportionality in the light of that aim."

70. Mr Gorman for the Department has pointed to the policy aims of the JSA sanctions regime as applied in this case. He submitted that the provisions which have affected the appellant were introduced for the legitimate aim of encouraging attendance at mandatory appointments or interview, because they are proven to help with job search activity. He submitted that assurances were given to the Social Security Advisory Committee when consultation was underway about aspects of the functioning of the scheme, that an equality impact assessment under section 75 of the Northern Ireland Act 1998 had been carried out and that the regulations had been assessed as compatible with the Department's obligations under the European Convention and under Community law. He submitted that the measures were in the public interest and not disproportionate.

71. The appellant has sought to present evidence on the functioning of the sanctions scheme. His basic submission was that the effect of the JSA sanctions had to be taken into account when addressing the proportionality of the measures. He submitted evidence which contained criticism of the functioning of the JSA sanctions regime which had been prepared by non-governmental organisations. The material advanced by the appellant is primarily from Great Britain. The sanctions regime there has been different to Northern Ireland since the Welfare Reform Act 2012 and I suspect that some of the evidence submitted addresses a situation which is not current here. Further, some of the evidence advanced by the appellant is addressed to persons with mental health problems in the context of ESA sanctions, and not of direct relevance.

72. In *Broniowski v Poland* (Application 31443/96) the European Court of Human Rights said at paragraphs 148–9:

> "148. Any interference with the enjoyment of a right or freedom recognised by the Convention must pursue a legitimate aim. By the same token, in cases involving a positive duty, there must be a legitimate justification for the State's inaction. The principle of a 'fair balance' inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community. Moreover, it should be reiterated that the various rules incorporated in Article 1 are not distinct, in the sense of being unconnected, and that the second and third rules are concerned only with particular instances of interference with the right to the peaceful enjoyment of property. One of the effects of this is that the existence of a 'public interest' required under the second sentence, or the 'general interest' referred

> to in the second paragraph, are in fact corollaries of the principle set forth in the first sentence, so that an interference with the exercise of the right to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 must also pursue an aim in the public interest (see *Beyeler*, cited above, § 111).
>
> 149. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures to be applied in the sphere of the exercise of the right of property, including deprivation and restitution of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation. Furthermore, the notion of 'public interest' is necessarily extensive. In particular, the decision to enact laws expropriating property or affording publicly funded compensation for expropriated property will commonly involve consideration of political, economic and social issues. The Court has declared that, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, it will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation (see *James and Others*, cited above, p. 32, § 46, and *The former King of Greece and Others*, cited above, § 87) …"

73. It can be seen from the above that a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, national authorities are in principle better placed than judges to appreciate what is in the public interest on social or economic grounds. A court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation". This approach has been followed by UK courts, including the UK Supreme Court in *Humphreys v HM Revenue and Customs* [2012] UKSC 16; [2012] AACR 46.

74. The consequence of his JSA sanction has been to restrict payment of JSA for one week in the case of the appellant. He is not someone who would fall into a vulnerable group – although protection might exist for other claimants who are members of vulnerable groups. Therefore the appellant is left without income for the duration of the sanction. He points to the potential effect of the sanctions regime on other social groups. However, while the material advanced by the appellant may well indicate legitimate policy concerns arising from the real world effect of the JSA sanctions, I am not concerned with a review of the policy on its merits. I am much more narrowly restricted in my consideration of the issue.

75. The Department has shown that the policy intention behind the JSA sanctions was to encourage attendance at mandatory appointments or interviews, because they are proven to help with job search activity. I consider that this is a legitimate aim.

76. The Department policy represented a change in the form of sanctions. Instead of a loss of one or two day's entitlement, followed by a fresh claim with resulting administrative burden, the Department introduced a potentially longer restriction of payability of one or two weeks which involved a smaller administrative burden. It appears that the interference with payment of benefit was for a relatively short period – one week in the first instance – and that this was the equivalent of less than two per cent of annual JSA entitlement. Evidence had suggested that the previous consequence of loss of entitlement for one or two days was an ineffective sanction. It

therefore appears that the policy was seeking to achieve its effects by the least possible interference with the appellant's rights.

77. The appellant has asserted that there are broad effects of the sanctions regime going beyond his individual case. If he had alleged that he was a member of a specific group which experienced different treatment, and that the treatment amounted to unlawful discrimination for that reason, the evidence of general effects on that group could have relevance. However, that is not the situation here. I am concerned solely with the question of the interference with the individual appellant's rights. I have not therefore had regard to the general material – some of which does not appear to be directly relevant to JSA in any event – which he has placed before me.

78. In order for the JSA sanctions regime to be unlawful, it would have to be shown that the policy choice of the Department is manifestly without reasonable foundation. I do not accept that this can be said of the policy.

79. I do not consider that the application of regulation 27A of the JSA Regulations to the appellant, resulting in the restriction of payability of JSA for one week, represented a violation of his right to peaceful enjoyment of property. To the extent that it was an interference with that right, it was justified in the public interest for the Department's broader policy objectives.

Has the tribunal erred in law?

80. The tribunal has referred to regulation 27 of the JSA Regulations and has applied the sanctions regime to the applicant. I suspect that it meant to refer to regulation 27A. However, this is nothing more than an accidental error which the tribunal could have corrected itself.

81. The tribunal has overlooked the effect of regulations 25(1)(c) and 27 on the present case which, on their face, have the effect of disentitling the appellant to JSA altogether. This would have been a fundamental error, as a restriction on payability could not have been implemented if the appellant had no existing entitlement to JSA. However, as I have found a relevant aspect of regulation 27 to be *ultra vires*, with the effect that entitlement did not cease in the circumstances, that oversight would have had no material effect on the correctness of the decision actually reached by the tribunal.

82. It appears to me that the tribunal has reached the correct conclusion in the appeal, subject to correcting the reference to regulation 27. Nevertheless, as the reasoning by which I have found the tribunal's conclusion to be correct is different from the tribunal, I consider that I should formally set aside the decision of the tribunal and allow the appeal.

83. The tribunal decision is in error of law and I set it aside. However, I re-make the decision to the same effect as the tribunal.

84. My decision is that the jobseeker's allowance is not payable to the appellant for a period of one week from 6 December 2013 to 12 December 2013.