Neutral Citation Number: [2020] EWHC 1999 (Admin)

Case No: CO/2253/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING AT THE CIVIL JUSTICE CENTRE, BIRMINGHAM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2020

Before:

MR JUSTICE SWIFT

- -

BETWEEN

THE QUEEN
on the application of

MICHAEL CONNOR **Claimant**

- and -

THE SECRETARY OF STATE FOR WORK AND PENSIONS **Defendant**

- -

The Claimant appeared in person
Ms Katherine Apps and Ms Kate Wilson (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 19th March 2020
Further written submissions 17th April 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely and circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on the 24 July 2020.

MR. JUSTICE SWIFT

A. Introduction

1. When a person makes a claim for Employment and Support Allowance ("ESA"), that claim is decided by the Secretary of State for Work and Pensions. If the claim is refused, the benefits claimant has a right of appeal to the First-tier Tribunal. However, the effect of regulation 3ZA of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("regulations 3ZA" and "the Decisions and Appeals Regulations", respectively) is that the right of appeal does not arise until the Secretary of State has had the chance to decide whether or not to revise her decision to refuse the claim for ESA. The issue in these proceedings is whether regulation 3ZA is lawful insofar as it applies where the benefit claimed is ESA.

2. Following a decision by the Secretary of State on 18 October 2018 that the Claimant ("Mr Connor"), no longer met the requirements to be eligible to receive ESA, Mr Connor asked that the decision be revised. His request was received by the Department for Work and Pensions on 1 November 2018. No decision was taken on that request until March 2019. This prompted him to contend in these proceedings that the requirement set out in regulation 3ZA is an unlawful restriction on his right of access to a court, as guaranteed by the Human Rights Act 1998, and specifically by ECHR article 6.

(1) Employment and Support Allowance

3. ESA is an allowance payable in accordance with the provisions of Part 1 of the Welfare Reform Act 2007 ("the 2007 Act") and the Employment and Support Allowance Regulations 2008 ("the ESA Regulations") made under section 8 of that Act. Although not the only condition to entitlement, ESA is payable if a person has limited capability for work. The detail of that requirement is set out in Part 5 of the ESA Regulations. The primary provision on limited capability for work is that such capability is determined by assessment of the extent to which the benefits claimant is able to perform the activities listed in Schedule 2 to the ESA Regulations. (See regulation 19. Such assessments are often referred to as work capability assessments.) To that end, regulation 21 permits the Secretary of State to require information to be provided to her, and regulation 23 permits her to require a claimant to attend for medical examination. If a benefits claimant, without good cause, either fails to provide information requested or fails to attend a medical examination he is "to be treated as not having limited capability for work" (see respectively, regulation 22 and regulation 23(2)). Separately from regulation 19, a benefits claimant is treated as having limited capability for work if his circumstances fall within the scope of those described in any of regulation 20, regulation 25, regulation 26 and regulation 29. Lastly on this point, regulation 30 makes provision about when benefits claimants are to be treated as having limited capability for work pending decisions on the application of any of regulations 19, 22, 23, 25, 26 and 29.

4. Regulation 30 plays a significant part in Mr Connor's case, and is as follows

> "**30 — Conditions for treating a claimant as having limited capability for work until a determination about limited capability for work has been made**
>
> (1) A claimant is, if the conditions set out in paragraph (2) are met, to be treated as having limited capability for work until such time as it is determined—
>
> (a) whether or not the claimant has limited capability for work;
>
> (b) whether or not the claimant is to be treated as having limited capability for work otherwise than in accordance with this regulation; or
>
> (c) whether the claimant falls to be treated as not having limited capability for work in accordance with regulation 22 (failure to provide information in relation to limited capability for work) or 23 (failure to attend a medical examination to determine limited capability for work).
>
> (2) The conditions are—
>
> (a) that the claimant provides evidence of limited capability for work in accordance with the Medical Evidence Regulations; and
>
> (b) in relation to the claimant's entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, it has not been determined—
>
> (i) in the last determination preceding the date of claim for an employment and support allowance, that the claimant does not have limited capability for work; or
> (ii) within the 6 months preceding the date of claim for an employment and support allowance, that the claimant is to be treated as not having limited capability for work under regulation 22 or 23,
>
> unless paragraph (4) applies.
>
> (3) Paragraph 2(b) does not apply where a claimant has made and is pursuing an appeal against a relevant decision of the Secretary of State, and that appeal has not yet been determined by the First-tier Tribunal.

(4) This paragraph applies where—

(a) the claimant is suffering from some specific disease or bodily or mental disablement from which the claimant was not suffering at the time of that determination;

(b) a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened; or

(c) in the case of a claimant who was treated as not having limited capability for work under regulation 22 (failure to provide information), the claimant has since provided the information requested under that regulation.

(5) In this regulation a *"relevant decision"* means—

(a) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work; or

(b) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work since a previous determination by the Secretary of State or appellate authority that the claimant does have limited capability for work.

(6) In this regulation, *"appellate authority"* means the First-tier Tribunal, the Upper Tribunal, the Court of Appeal, the Court of Session, or the Supreme Court."

I make two points about regulation 30. The first is that the usual effect of regulation 30(2) is that the initial period of any claim for ESA is supported by medical evidence from the benefits claimant's GP that the claimant lacks capability for work (see regulation 2 of the Social Security (Medical Evidence) Regulations 1976), rather than a decision following assessment under regulation 19, or a decision that the claimant is to be treated as having limited capability for work under any of the other regulations referred to above. During this period, ESA is paid at what is referred to as the "assessment phase rate". The evidence before me is to the effect that this initial period is usually some 13 weeks or so. The second point concerns the effect of regulation 30(3). Where a benefits claimant appeals a decision by the Secretary of State that he does not have limited capability for work, and when that decision was either the first time that issue was considered by the Secretary of State in respect of that claimant, or when it follows an earlier decision by the Secretary of State that that benefits claimant did have limited capability for work, the benefits claimant will continue to receive ESA on the strength of the evidence of his GP until such time as the First-tier Tribunal determines the appeal. The Secretary of State refers to this as "payment pending

appeal". In this way, regulation 30(3) of the ESA Regulations operates as an exception to a general rule set out in section 17 of the Social Security Act 1998, that decisions of the Secretary of State on entitlement to benefits take immediate effect and are not suspended pending the outcome of any appeal.

(2) Decisions and appeals on applications for Employment and Support Allowance

5. So far as relevant to the issues raised in this claim, the framework for decision-making on claims to entitlement to social security benefits is set out in the Social Security Act 1998 ("the 1998 Act"), and the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("the Decisions and Appeals Regulations").

6. By section 8 of the 1998 Act, decisions on entitlement to ESA are taken by the Secretary of State for Work and Pensions. Section 10 of the 1998 Act permits the Secretary of State to take decisions that supersede decisions she has taken under section 8. Section 10 is as follows:

> "**10 — Decisions superseding earlier decisions.**
>
> (1) Subject to subsection (3) below, the following, namely—
>
> (a) any decision of the Secretary of State under section 8 above or this section, whether as originally made or as revised under section 9 above;
>
> (aa) any decision under this Chapter of an appeal tribunal or a Commissioner; and
>
> (b) any decision under this Chapter of the First-tier Tribunal or any decision of the Upper Tribunal which relates to any such decision,
>
> may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on his own initiative.
>
> (2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.
>
> (3) Regulations may prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under this section.
>
> (5) Subject to subsection (6) and section 27 below, a decision under this section shall take effect as from the date on which it is

made or, where applicable, the date on which the application was made.

(6) Regulations may provide that, in prescribed cases or circumstances, a decision under this section shall take effect as from such other date as may be prescribed.

(7) In this section—

"appeal tribunal" means an appeal tribunal constituted under Chapter 1 of this Part (the functions of which have been transferred to the First-tier Tribunal);
"Commissioner" means a person appointed as a Social Security Commissioner under Schedule 4 (the functions of whom have been transferred to the Upper Tribunal) and includes a tribunal of such persons."

By section 9 of the 1998 Act, the Secretary of State may revise any decision she has taken, whether under section 8 or under section 10 of the Act.

"**9 — Revision of decisions.**

(1) Any decision of the Secretary of State under section 8 above or section 10 below may be revised by the Secretary of State—

(a) either within the prescribed period or in prescribed cases or circumstances; and
(b) either on an application made for the purpose or on his own initiative;

and regulations may prescribe the procedure by which a decision of the Secretary of State may be so revised.

(2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.

(3) Subject to subsections (4) and (5) and section 27 below, a revision under this section shall take effect as from the date on which the original decision took (or was to take) effect.

(4) Regulations may provide that, in prescribed cases or circumstances, a revision under this section shall take effect as from such other date as may be prescribed.

(5) Where a decision is revised under this section, for the purpose of any rule as to the time allowed for bringing an appeal, the

> decision shall be regarded as made on the date on which it is so revised.
>
> (6) Except in prescribed circumstances, an appeal against a decision of the Secretary of State shall lapse if the decision is revised under this section before the appeal is determined."

7. The Regulations made pursuant to section 9(1) of the 1998 Act are in the Decision and Appeals Regulations. Regulation 3 is the primary regulation for this purpose. Regulation 3 has been amended on numerous occasions since first made in 1999. Regulation 3 lists the circumstances in which the Secretary of State may revise a decision she has taken under either section 8 or section 10 of the 1998 Act. The list is relatively lengthy. It includes a power for the Secretary of State to revise her decision either at her own initiative or at the request of the benefits claimant, within a month of the decision (regulation 3(1)); power for the Secretary of State when a decision she has taken is under appeal, to revise the decision at any time prior to the determination of the appeal (regulation 3(4A)); and a power, at any time, to revise a decision made as a result of official error or which was taken in ignorance of or based on a mistake as to some material fact (regulation 3(5)).

8. Both the 1998 Act and the Decisions and Appeals Regulations make provision for appeals. Under section 12 of the 1998 Act there is a right of appeal to the First-tier Tribunal. So far as material to the issues in this case, section 12 is as follows.

> "**12 — Appeal to First-tier Tribunal.**
>
> (1) This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which—
>
> (a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or
> (b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act;
>
> (2) In the case of a decision to which this section applies, the claimant and such other person as may be prescribed shall have a right to appeal to the First-tier Tribunal, but nothing in this subsection shall confer a right of appeal
>
> (a) in relation to a prescribed decision, or a prescribed determination embodied in or necessary to a decision, or
> (b) where regulations under subsection (3A) so provide.
>
> (3) Regulations under subsection (2) above shall not prescribe any decision or determination that relates to the conditions of entitlement to a relevant benefit for which a claim has been validly made or for which no claim is required.

(3A) Regulations may provide that, in such cases or circumstances as may be prescribed, there is a right of appeal under subsection (2) in relation to a decision only if the Secretary of State has considered whether to revise the decision under section 9.

(3B) The regulations may in particular provide that that condition is met only where—

(a) the consideration by the Secretary of State was on an application,

(b) the Secretary of State considered issues of a specified description, or

(c) the consideration by the Secretary of State satisfied any other condition specified in the regulations.

(3C) The references in subsections (3A) and (3B) to regulations and to the Secretary of State are subject to any enactment under or by virtue of which the functions under this Chapter are transferred to or otherwise made exercisable by a person other than the Secretary of State.

(3D) In the case of a decision relating to child benefit or guardian's allowance, the making of any appeal under this section against the decision as originally made must follow the Commissioners for Her Majesty's Revenue and Customs first deciding, on an application made for revision of that decision under section 9, not to revise the decision.

…

(6) A person with a right of appeal under this section shall be given such notice of a decision to which this section applies and of that right as may be prescribed.

(7) Regulations may —

(a) make provision as to the manner in which, and the time within which, appeals are to be brought;

(b) provide that, where in accordance with regulations under subsection (3A) there is no right of appeal against a decision, any purported appeal may be treated as an application for revision under section 9.

(8) In deciding an appeal under this section, the First-tier Tribunal

(a) need not consider any issue that is not raised by the appeal; and

(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.

> (9) The reference in subsection (1) above to a decision under section 10 above is a reference to a decision superseding any such decision as is mentioned in paragraph (a) or (b) of subsection (1) of that section."

Subsections (34A) and (3B) were added by section 102(3) of the Welfare Reform Act 2012.

9. The power at subsection (3A) was exercised in the form of the Social Security, Child Support, Vaccine Damage and Other Payments (Decisions and Appeals) (Amendment) Regulations 2013. Those Regulations inserted regulation 3ZA into the Decisions and Appeals Regulations.

> "**3ZA— Consideration of revision before appeal**
>
> (1) This regulation applies in a case where—
>
> > (a) the Secretary of State gives a person written notice of a decision under section 8 or 10 of the Act (whether as originally made or as revised under section 9 of that Act); and
> >
> > (b) that notice includes a statement to the effect that there is a right of appeal in relation to the decision only if the Secretary of State has considered an application for a revision of the decision.
>
> (2) In a case to which this regulation applies, a person has a right of appeal under section 12(2) of the Act in relation to the decision only if the Secretary of State has considered on an application whether to revise the decision under section 9 of the Act.
>
> (3) The notice referred to in paragraph (1) must inform the person—
>
> > (a) of the time limit specified in regulation 3(1) or (3) for making an application for a revision; and
> >
> > (b) that, where the notice does not include a statement of the reasons for the decision ("written reasons"), he may, within one month of the date of notification of the decision, request that the Secretary of State provide him with written reasons.
>
> (4) Where written reasons are requested under paragraph (3)(b), the Secretary of State must provide them within 14 days of receipt of the request or as soon as practicable afterwards.

> (5) Where, as the result of paragraph (2), there is no right of appeal against a decision, the Secretary of State may treat any purported appeal as an application for a revision under section 9 of the Act."

The effect of regulation 3ZA is that the section 12 right of appeal does not arise unless the benefits claimant first applies to the Secretary of State to revise her decision. If a benefits claimant attempts to appeal, that appeal "may" be treated by the Secretary of State as an application for revision under section 9 of the 1998 Act.

(3) The facts, and Mr Connor's case in these proceedings

10. Mr Connor first applied for ESA on 9 October 2014 and was paid the allowance from that date. In November 2016 the First-tier Tribunal found in his favour on his appeal from a decision made on 24 November 2015, following a medical examination on 6 November 2015, that he did not have limited capability for work. Thereafter, Mr Connor continued to receive ESA. In 2018 the Secretary of State reviewed Mr Connor's entitlement to receive ESA. On 3 August 2018 the Department for Work and Pensions sent Mr Connor a "Capability for Work Questionnaire" and asked him to complete it. On 22 September 2018 Mr Connor attended a face-to-face assessment of his capability for work. The upshot was a decision on 18 October 2018 (under section 10 of the 1998 Act) that Mr Connor did not have limited capability for work and for that reason was not entitled to receive ESA. Payment of ESA ceased.

11. On 30 October 2018, Mr Connor requested that the Secretary of State's decision be revised. His request was received by the Secretary of State on 1 November 2018. However, through error no action was taken in response. Jean Wilson, a Service Excellence Relationship Manager at the Department for Work and Pensions has made witness statements for these proceedings. Among other matters she has investigated what happened to Mr Connor's request. She reports that the request for revision was incorrectly entered onto the Secretary of State's electronic document management system. The consequence was that the document was not recognised or recorded as a request for reconsideration, and instead was classified as "unstructured whitemail" (i.e., unclassified correspondence which needed to be reviewed by Department of Work and Pensions staff). As at the end of 2018 and the beginning of 2019, unstructured whitemail was not regularly reviewed and a backlog built up. It was not until 6 March 2019 – 4 months after Mr Connor's request had been received – that it was identified as a request for revision. The next day it was sent to the relevant team at the Department for Work and Pensions for consideration. The decision letter was sent to Mr Connor on 20 March 2019; that letter informed him that the Secretary of State had decided not to revise her 18 October 2018 decision.

12. Although as of 20 March 2019, Mr Connor had a right of appeal against the Secretary of State's 18 October 2018 decision he chose not to exercise that right of appeal. He had ceased to receive ESA from 18 October 2018, but with effect from the same date he had made successful claims to receive Carer's Allowance and Income Support. The combined weekly value of those benefits was broadly the same as the ESA he had previously received. Instead, by letter dated 24 April 2019 Mr Connor informed the

Secretary of State of his decision to challenge the legality of regulation 3ZA of the Decisions and Appeals Regulations.

13. This claim was filed on 10 June 2019. Mr Connor's challenge is to the following effect. Overall, Mr Connor submits that regulation 3ZA is an abrogation of the established section 12 right of appeal and is contrary to the right to a hearing guaranteed by ECHR article 6. Within that overall submission he advances three more specific submissions. *First*, that regulation 3ZA results in an open-ended deferral of the right of appeal provided in section 12 of the 1998 Act. In this regard, he points to his own experience of seeking revision of the Secretary of State's decision. *Second*, Mr Connor contends that the effect of regulation 3ZA read together with regulation 30 of the ESA Regulations is that for however long it takes for the Secretary of State to decide the application to revise her decision, ESA is not payable. This is anomalous: ESA is payable prior to a decision under section 8 or section 10; while the Secretary of State decides whether to revise her decision payment stops; once that decision is taken payment of ESA will resume either if the Secretary of State has revised her decision, or if the benefits claimant initiates an appeal to the First-tier Tribunal. If the latter, ESA continues to be payable until the First-tier Tribunal has determined the appeal. Mr Connor points out not only that there is no provision for payment of ESA while the application for revision required by regulation 3ZA is in progress, but also that even after the revision process is complete if an appeal is commenced and ESA is re-instated pending the appeal, there is no provision for back payment of ESA to cover the period prior to the revision decision. *Third*, Mr Connor's case is that regulation 3ZA places a condition on the right of access to the First-tier Tribunal that is disproportionate because it places benefits claimants, such as him, who are vulnerable, in a position of "legal and financial limbo distress and destitution" for the duration of the revision process that must be pursued before an appeal can be commenced. In this regard, he points out that regulation 3ZA places no limit on the time permitted to the Secretary of State to determine an application for revision. Again, Mr Connor points to the circumstances of his own application, which remained outstanding for 4 months.

B. Decision

14. In principle, the decision to make regulation 3ZA of the Decisions and Appeals Regulations falls within the scope of the enabling power at section 12(3A) – (3B) of the 1998 Act. Regulation 3ZA as made, is to the effect that where notice of a decision made under section 8 or 10 of the 1998 Act includes a statement to the effect that there is a right of appeal against the decision only if the Secretary of State has considered an application to revise her decision, the section 12 right of appeal only arises once the Secretary of State has considered such an application. This imposes a condition precedent to the right of appeal. However, a condition of that sort is precisely what is envisaged by section 12(3A) of the 1998 Act.

15. Mr Connor's submission is that all this notwithstanding, the exercise of the section 12(3A) power to make a provision in the shape of regulation 3ZA is a disproportionate interference with the right of access to court guaranteed under ECHR article 6. The existence of the right of access to court was recognised by the European Court of Human Rights in its judgment in *Golder v United Kingdom* (1979) 1 EHRR 524. The

complaint in that case was brought by a serving prisoner. At that time, Prison Rules provided that a prisoner might only "communicate with any person in connection with any legal or other business…" with the permission of the Home Secretary. Mr Golder asked permission to communicate with his lawyer in connection with defamation proceedings he wished to commence arising out of allegations that he had assaulted a prison officer. The Home Secretary refused permission. The Court accepted that this refusal hindered Mr Golder's recourse to court saying that "hindering the effective exercise of a right may amount to a breach of that right even if the hinderance is of a temporary character" (see judgment at paragraph 26). The Court next concluded that the right of access to a court was inherent in the rights stated in ECHR article 6(1), namely the right to have disputes as to civil rights and obligations determined by an independent tribunal at a fair and public hearing that takes place within a reasonable time. On the facts, the Court concluded that the Home Secretary's refusal was an interference with the right of access, and that it was an interference that was not justified. The Court reasoned as follows at paragraph 40 of its judgment.

> "40. … In petitioning the Home Secretary for leave to consult a solicitor with a view a to suing Laird for libel, Golder was seeking to exculpate himself of the charge made against him by the that prison officer on 25 October 1969 and which had entailed for him unpleasant consequences, some of which had still subsisted by 20 March 1970. Furthermore, the contemplated legal proceedings would have concerned an incident which was connected with prison life and had occurred while the applicant was imprisoned. Finally, those proceedings would have been directed against a member of the prison staff who had the charge in the course of his duties and who was subject to the Home Secretary's authority.
>
> In these circumstances Golder could justifiably wish to consult a solicitor with a view to instituting legal proceedings. It was not for the Home Secretary himself to appraise the prospects of the action contemplated; it was for an independent and impartial court to rule on any claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of Golder, the right to go before a court as guaranteed by Article 6(1)."

This conclusion rested only on the circumstances of Mr Golder's case; the Court stated in terms that it was not its function to "elaborate a general theory of the limitations admissible", either in respect of convicted criminals, or otherwise.

16. In this case, the Secretary of State accepts that a decision on entitlement to ESA is the determination of a civil right or obligation for the purposes of article 6(1). It follows that access to the First-tier Tribunal via the section 12 right of appeal is the means by which the requirements of article 6(1) to have access to an independent and impartial tribunal, are met. Logically also, the condition precedent to the availability of the section 12 right of appeal, created by regulation 3ZA is an impediment to the right of access guaranteed by article 6(1). This is so because, as is made clear by section 17 of the 1998 Act, a decision by the Secretary of State under either section 8 or 10 of

the 1998 Act takes immediate effect. The dispute that attracts the operation of the article 6(1) rights exists from the date of the section 8 or section 10 decision. However, the effect of regulation 3ZA is that the right of access to the First-tier Tribunal does not arise until the Secretary of State has considered whether to revise her decision.

17. Mr Connor's submission goes further. He relies on the judgment of the Supreme Court in *R(UNISON) v Lord Chancellor* [2017] ICR1037 in support of his submission that the condition imposed by regulation 3ZA is an abrogation of the right of access to court. In *UNISON*, the Supreme Court considered the legality of the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013. That Order required payment of issue fees and hearing fees, with the amount payable depended on the type of claim being pursued. The Court considered detailed evidence as to the consequences of the requirement to pay the fees required by the 2013 Order. Based on that evidence it concluded that the 2013 Order "effectively prevents access to justice and is therefore unlawful" (per Lord Reed at paragraphs 97 – 98).

18. I do not consider that regulation 3ZA is a provision of the same order as the requirement to pay fees in issue in the *UNISON* case. Contrary to Mr Connor's submission, regulation 3ZA does not abrogate access to the First-tier Tribunal. The Secretary of State now has the opportunity to revise her decision before proceedings in the First-tier Tribunal can be commenced, but that does not give the Secretary of State any form of improper control over access to the Tribunal. The benefits claimant who wishes to challenge the Secretary of State's decision must first go through the revision process; the Secretary of State is required to take a decision on the application for revision; but once that has happened it is for the benefits claimant to decide whether or not to start proceedings before the First-tier Tribunal, and it is for that Tribunal itself to control the course those proceedings.

19 Even though the condition imposed by regulation 3AZ is not an abrogation of the right of access to court, for the reasons already given I accept that it is an impediment or hinderance to that right of access. Thus, the issue is whether the condition is proportionate.

20. I accept that regulation 3ZA pursues a legitimate objective. The material amendments to section 12 of the 1998 Act were made by section 102 of the Welfare Reform Act 2012. The Explanatory Notes for Section 102 of the 2012 Act stated as follows:

> ***"Section 102: Power to require consideration of revision before appeal***
>
> 497. Section 12 of the SSA 1998 makes provision for a claimant (or any other prescribed person) to appeal to the First-tier Tribunal against a decision of the Secretary of State. Although the claimant (or other person) could ask initially for the decision to be reconsidered with a view to revision (under section 9 of the Act), in practice many people do not do so and make an appeal from the outset.
>
> 498. In order to resolve more disputes with claimants through the internal reconsideration process before an appeal to the tribunal

is made, subsections (2) and (3) of section 102 amend section 12 to enable the Secretary of State to make regulations setting out the cases or circumstances in which an appeal can be made only when the Secretary of State has considered whether to revise the decision.

499. New section 12(3B), which is inserted by subsection (3), contains examples of how the new power might be used. In particular, regulations may provide that there is to be a right of appeal only where the Secretary of State has considered whether to revise the decision as a result of an application having been made for that purpose.

500. In certain cases, the regulation-making powers under section 12 of the SSA 1998 are exercisable by a person other than the Secretary of State (for example, functions relating to child benefit and guardian's allowance are exercisable by HMRC). New subsection (3C), which is also inserted by subsection (3), makes it clear that in any particular case the new powers in section 12(3A) are to be exercisable by the person responsible for making regulations under section 12 in that case.

501. Where there is no right of appeal as a result of regulations made under the new provisions, subsection (4) enables provision to be made in regulations for treating any purported appeal as an application for revision.

502. Subsection (5) provides that regulations to be made under new subsection 12(3A) will be subject to the affirmative procedure.
503. Subsection (6) introduces Schedule 11 which makes equivalent provision in the case of certain other appeals. These relate to vaccine damage payments, child support, the recovery of benefits, housing benefit and council tax benefit, and payments in respect of mesothelioma.

504. Section 136(4)(b) enables regulations made under the new provisions to be brought into force in different areas at different times, which enables a phased implementation. The new regulations under section 12(3A) may need to be accompanied by changes to other regulations relating to decisions and appeals. But such other regulations cannot normally be made so as to apply only to a limited area. Subsections (7) to (9) of section 102, therefore, enable other provisions in legislation relating to decisions and appeals, if made in connection with regulations requiring consideration of revision before appeal, to apply only in relation to a limited area."

Regulation 3ZA pursues the purposes referred to in paragraphs 497 and 498 of the Explanatory Note, namely improving the effectiveness of the administrative decision-

making by the Secretary of State, so as to make more efficient use of the resources of the First-tier Tribunal.

21. In terms of the proportionality analysis, the remaining matters are the third and fourth questions identified by Lord Sumption and Lord Reed in their judgments in *Bank Mellat v HM Treasury (No.2)* [2014] AC 700: could the objective have been pursued by a less intrusive measure without compromising its achievement; and having regard for the objective pursued and the severity of the consequences of the measure enacted, has a fair balance been struck between the interests of those affected and the general public interest? See per Lord Sumption at paragraph 20, per Lord Reed at paragraphs 74 -76.

22. In support of his submission on disproportionality Mr. Connor focuses on two matters: that access to the First-tier Tribunal may be delayed for an indefinite period because there is no prescribed period within which the Secretary of State must deal with an application to revise her decision; and that for the period it takes for the revision decision to be made, however long that is, payment of ESA ceases.

23. As to the first of these, the time taken to reach decisions on revision applications, the evidence for the Secretary of State is not entirely comforting. The evidence in Ms Wilson's witness statements includes the following. For the period August 2018 to April 2019 the median clearance time for revision applications (for all claims, not just ESA claims) was between 11 and 16 days. A report prepared in November 2017 "Mandatory Reconsideration Audit Sample Evaluation Report" recorded that the target time for a revision decision was 7 working days and that 96% of decisions were taken within 10 working days. However, the same report goes on to explain the average period between communication of the Secretary of State's decision and the communication of the revision decision was 33 working days (i.e. more than 6 weeks) and that most cases were cleared by 35 working days (7 weeks). This information suggests and I accept, that what happened to Mr Connor's application for revision was out of the ordinary. As I have said above, his application fell victim to a filing error so that on arrival it was not passed to the correct team within the Department for Work and Pensions. The consequence of that error was compounded by the backlog in reviewing the so-called "unstructured whitemail". This meant that it was not until March 2019 (some 4 months it was submitted), that Mr Connor's application was recognised for what it was, passed to the correct team, and then dealt with. Once Mr Connor's application reached the correct team in the Department for Work and Pensions, it was dealt with within a time comparable to the decision-making times referred to by Ms Wilson for the period August 2018 to April 2019, and also in the November 2017 report. In her submissions Counsel for the Secretary of State (Katherine Apps) contended that any issue of proportionality ought to be considered on the premise that the system of decision-making is capable of producing decisions within an acceptable period of time. Based on the evidence I have seen, I accept that is so. Nevertheless, even on this premise, even if the waiting time before the section 12 right of appeal can be exercised even if measured in terms of more or less than a hand full of weeks, that waiting time remains significant in the context of a claim for benefits by claimants who may lack access to other resources. This point does, therefore, carry some weight for the purposes of the disproportionality submission.

24. So far as concerns ESA claims there is a further matter relevant to the proportionality fair balance, in the form of regulation 30(3) of the ESA Regulations. As explained

above, this provides that in some instances ESA will continue to be paid following a decision by the Secretary of State under section 8 or section 10 of the 1998 Act, pending an appeal to the First-tier Tribunal (payment pending appeal). Payment is not automatic: the benefits claimant must comply with the condition at regulation 30(2)(a) to provide evidence of his limited capability for work that meets the requirements of Social Security (Medical Evidence) Regulations 1976; and the appeal must be an appeal against a "relevant decision". This latter requirement means that ESA will continue to be paid only if the decision under appeal is the first decision by the Secretary of State that the claimant does not have limited capability for work, or a decision to that effect which follows an earlier decision by the Secretary of State or the First-tier Tribunal that the claimant had limited capability for work. Nevertheless, there is no reason to doubt that many persons who have previously received ESA benefit from payment pending appeal. Had Mr Connor appealed, he would have fallen into this category.

25. It is anomalous that the payment pending appeal arrangements for ESA under regulation 30(3) of the ESA Regulations do not extend to ESA claimants who are required by regulation 3ZA to request the Secretary of State to revise a decision and await her decision on that request before initiating an appeal.

26. This is not the only anomaly created by the interposition of regulation 3ZA into the decision-making and appeals system. A different anomaly was considered by the Upper Tribunal in *R(CJ and SG) v Secretary of State for Work and Pensions* [2017] UKUT 324 (AAC). In that case (which also concerned claims for ESA), the benefits claimants were late in making the required application to the Secretary of State to revise her decision. The anomaly was explained by the Upper Tribunal in the following way:

> "5. Before the introduction of MR [mandatory review], a dissatisfied claimant could ask for a benefit decision to be revised either on any ground within one month or subsequently at any time but in that event only on one or more of certain prescribed grounds. Quite independently, a claimant also had one month in which to appeal on any ground to the F-tT against the decision. When a claimant appealed to the F-tT within or outside the one-month time limit, as a matter of departmental practice, it was commonplace for the appeal to be reconsidered internally to identify whether there were any grounds to revise the decision, so negating the need for the appeal to proceed. If the appeal was made outside the one-month time limit, it was treated as in time if the departmental decision-maker did not object, providing it was received within the absolute time limit of 13 months from the date of the original decision. If the departmental decision-maker objected, the F-tT could decide to extend time. Crucially, it was always for the F-tT (and not the Department for Work and Pensions, Her Majesty's Revenues and Customs or local authority, depending on the benefit concerned) to decide whether the appeal had been made within the time limit and whether or not time should be extended. In other words, the F-tT, not the relevant Department, acted as gatekeeper to the independent and judicial dispute resolution system.

> 6. After the introduction of MR, and under the regime now in place, a dissatisfied claimant can still ask for a benefit decision to be revised, again whether on any ground within one month or after that period but then only on a prescribed ground. The difference, however, is that now claimants have no immediate right to go straight to appeal. Instead, if they wish to challenge the decision, they are required within one month to apply for a "mandatory reconsideration" – in effect, a revision – of the original decision. It is only when they have received a MR notice from the Secretary of State's decision-maker (assuming the decision is not changed entirely in their favour) that they can lodge an appeal with the F-tT (within one month).
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> 7. So, in short, what was in effect a one-step process (appeal and in practice reconsideration by the relevant Department) has become a two-stage process (mandatory reconsideration and then appeal). The claimants' challenge in these proceedings is not to the two-stage MR process, but to its application and effect.
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> 8. A potential pinch point in the MR procedure occurs if the claimant does not apply for a MR within a month of being notified of the original decision. In this event the parties' respective positions are starkly summarised at paragraph 2 above. So, in those circumstances [counsel for the Secretary of State] submits that – absent either the Secretary of State's decision-maker unilaterally reconsidering the matter and agreeing to look again at an otherwise out-of-time MR request or the claimant making a successful application for judicial review – the right of appeal to the F-tT is effectively lost. To all intents and purposes – we return later to the possibility of judicial review – the Secretary of State has become gatekeeper to the independent tribunal system. [Counsel for the claimants], in contrast, argues that the claimant who is late with their MR request still has the right to have their case considered by the F-tT on its merits."
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> [emphasis in the original]

The Upper Tribunal resolved the problem by construing regulation 3ZA(2) to include a situation in which the Secretary of State had decided to refuse to consider a request for revision because it had been made too late. The outcome, that the Secretary of State had not assumed a role as gatekeeper for the First-tier Tribunal, was clearly the preferable outcome. However, that outcome was only achieved by a strongly purposive approach to the meaning of the words used in regulation 3ZA(2). The issue in the *CJ and SG* case highlights the possibilities for unintended consequences inherent in a provision such as regulation 3ZA which interposes conditions between decision and appeal. The issue in this case is more of the same.

27. At the hearing of this case I gave the Secretary of State the opportunity to file further evidence and submissions to explain why no provision exists to pay ESA to claimants, required by regulation 3ZA to ask the Secretary of State to revise her decision, for the duration of the revision period on the same basis that it is paid (pursuant to regulation 30(3) of ESA Regulations) once an appeal has been commenced. After the hearing, the Secretary of State provided a further witness statement and exhibits from Ms Wilson, and further detailed written submissions. However, none of this further information provides the answer.

28. My conclusion is that regulation 3ZA of the Decisions and Appeals Regulations is a disproportionate interference with the right of access to court, so far as it applies to claimants to ESA who, once an appeal is initiated, meet the conditions for payment pending appeal under regulation 30(3) of the ESA Regulations.

29. I accept that regulation 3ZA pursues legitimate purposes both in terms of improving the effectiveness of the Secretary of State's administrative decision-making, and in promoting efficient use of the resources of the First-tier Tribunal. Even though under regulation 3(4A) of the Decisions and Appeals Regulations it is open to the Secretary of State to revise a decision at any time when an appeal is pending, I accept that there is likely to be practical advantage from a requirement that every appeal be preceded by an opportunity for the Secretary of State to look again at her decision to be satisfied that it is correct. That advantage may well be significant for the Secretary of State: if errors are spotted during the revision process the resources she has at her disposal to respond to appeals will be more efficiently used.

30. I also accept that to the extent that the process interposed by regulation 3ZA between initial decision and right of appeal amounts to interference with a benefits claimant's right of access to court, the interference is small. Where the interference arises, it will comprise no more than a relatively short period of delay. I further recognise that there will also be cases where the requirement imposed by regulation 3ZA works to the advantage of a benefits claimant: when a decision is revised in his favour payment of the benefit concerned will commence or resume much sooner than it would had it been necessary to pursue the matter to a decision by the First-tier Tribunal.

31. However, when it comes to ESA claimants such as Mr Connor who, were an appeal to be in progress would meet the conditions for payment pending appeal under regulation 30(2) of the ESA Regulations, the requirement under regulation 3ZA is disproportionate having regard to the combined effect of (a) the period of time the benefits claimant will now need to wait before the right of appeal arises; and (b) the unexplained absence of any provision for payment of ESA during that period equivalent to the payment pending appeal arrangements that arise once an appeal has been started.

32. The revision application required by regulation 3ZA may not be entirely for the benefit of the Secretary of State and the general public interest that her work embodies, but it is a mechanism that is primarily for her benefit. Since that is so, it should operate in a way that reflects a fair balance between that general public interest and the interests of benefits claimants who may not now commence appeals before giving the Secretary of State the opportunity to revise her decision. When considering whether that fair balance exists, it is striking that no explanation has been provided why ESA is payable pending appeal pursuant to the provisions regulation 30(2) of the

ESA Regulations but not for the period taken by the Secretary of State to consider whether to revise her decision. Even assuming that revision decisions are taken and communicated within a relatively short period (7 – 10 working days: see above at paragraph 23), and even allowing for the fact that amounts paid as ESA are in absolute terms modest, the absence of that ESA payment for that period of time may be very significant to those who receive the benefit.

33. A large part of the evidence in Ms Wilson's second witness statement, and of the written submissions made by Secretary of State following the hearing, was devoted to explaining what alternative benefits an ESA claimant might be able to claim while waiting for the Secretary of State to take her revision decision. Now that the roll-out of Universal Credit is largely complete, the alternative claim would be for payment of Universal Credit. Prior to this Ms Wilson explains that an ESA claimant could make an alternative claim either for Job Seeker's Allowance or Income Support. She also explains the assistance that can be made available to help claimants apply for these alternative benefits. She further explains how, if an ESA claimant subsequently initiates an appeal, the payment pending appeal made under regulation 30(3) of the ESA Regulations can be offset against any alternative benefits that might by that time be in payment. However, this does not satisfactorily address the fair balance question. Even though alternative benefits may be available for the period the Secretary of State takes to complete her revision decision, requiring ESA claimants to make such alternative claims is likely to be cumbersome. It places a burden on ESA claimants.

34. Both the absence of payment available to ESA claimants while they wait for the Secretary of State's revision decision equivalent to payment pending appeal under regulation 30(3), and the absence of any explanation of why, in terms of payment of ESA, the period pending a revision decision is treated differently to the period pending an appeal decision, are telling. For ESA claimants, the regulation 3ZA requirement represents a re-balancing of interests. Prior to the introduction of regulation 3ZA, the Secretary of State could revise any decision that was subject to an appeal pending before the First-tier Tribunal: see regulation 3(4A) of the Decisions and Appeals Regulations introduced in 2002. That provision remains in force. If such a revision were undertaken it would be at a time when an ESA claimant would have the benefit of payment pending appeal. The advantage permitted to the Secretary of State by regulation 3ZA comes at a cost to ESA claimants. There is no explanation for that. There is no evidence to support a conclusion that the objective pursued by regulation 3ZA would to any extent be compromised if payments like the payments pending appeal made to ESA claimants who are pursuing appeals to the Tribunal, were made to them while they waited on the Secretary of State's revision decision. Since regulation 3ZA applies to all benefits decisions not just decisions on ESA, it is entirely possible that the practical issue highlighted by this claim, relating to the position of ESA claimants was not spotted. Be that as it may, in the absence of payment equivalent to payment pending appeal, the application of regulation 3ZA to ESA claimants does not strike the required fair balance, and for that reason is an unjustified impediment to the right of access to court guaranteed by ECHR Article 6. To this extent, this application for judicial review succeeds.

C. Disposal

35. Following circulation of the draft of this judgment, I invited the parties to make further submissions as to the form of the order that should be made to reflect the judgment above. The parties agreed (and I accept) that the appropriate remedy is a declaration to the effect that regulation 3ZA of the Decisions and Appeals Regulations is unlawful insofar as it is applied to ESA claimants who would, if pursuing an appeal to the First-tier Tribunal, subject to compliance with the condition at regulation 30(2) of the ESA Regulations, be entitled to receive payment pending appeal pursuant to regulation 30(3).