**Law and Policy**

1. Section 105 of the Welfare Reform Act 2012 inserted section 71ZB into the Social Security Administration Act 1992 (“**SSAA 1992**”) made overpayments of UC, including by official error, recoverable but gave the Secretary of State discretion over whether to recover any overpayment:

*“s.71ZB(1) The Secretary of State may recover any amount of the following paid in excess of entitlement – (a) Universal Credit,”*

1. Paragraph 8.6 Benefit Overpayment Recovery Guide (“**BORG**”)[[1]](#footnote-1) lists factors which may be relevant to a decision not to recover or ‘waive’ an overpayment.

* “*The debtor’s financial circumstances and those of their household*
* *Whether the recovery of the debt is impacting the debtor’s health or that of their family*
* *DWP conduct, including statements made by DWP, and the circumstances surrounding how the overpayment arose*
* *The debtors conduct and whether the debtor took steps to mitigate any overpayment, contact or notify DWP, whether the debtor misrepresented or failed to disclose any matter, or if there was any fraudulent conduct etc*
* *Whether the debtor has relied on the overpayment to their detriment*
* *Whether the Department intended the claimant to have the money – for example where the claimant was paid the wrong benefit but could have claimed a different benefit and received the same amount of money*
* *Where the debtor can demonstrate that they did not benefit from the money that was paid*
* *Any other factor which appears relevant to the decision maker, or which indicates recovery would not be in the public interest.”*

1. The BORG states at paragraph 8.9 that waiver is not dependent on all the factors listed in paragraph 8.6 being applicable and will depend on the individual circumstances of the case.
2. Legitimate expectation can present an absolute defence to recovery of an overpaid benefit (*R (K) v SSWP* [2023] EWHC 233 (Admin)).

**GROUNDS OF CHALLENGE**

**Ground 1: Breach of legitimate expectation**

1. If established, legitimate expectation provides an absolute defence to overpayment recovery (*R (K) v SSWP* *[2023] EWHC 233 (Admin)).*

“*Where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context*”: Re Finucane [2019] UKSC 7, [2019] 3 All ER 191, §62.

1. The test is made out in C’s case, in circumstances where:
   1. C disclosed all relevant facts about to the DWP [at the time of [her/his] claim/ at the time of the change of circumstances]. C was informed that [s/he] was entitled to the money/ it would not impact on [her/his] benefit].
   2. C then was paid [Universal Credit/ element of UC], despite having informed the DWP official of the [relevant information/ change of circumstances]. On this basis C assumed [s/he] was entitled to it. [S/he] quite reasonably thought DWP officials – having been provided with the required information - would factor it into [her/his] benefit claim.
   3. C relied on the DWP’s assurance and conduct to [her/his] detriment. Namely, C spent the money on day to day living expenses such as food and bills on the understanding that it was [her/his] income to keep. [S/he] has not held it back. Repaying it will therefore result in serious difficulties for C who will be forced to make deny [her/him]self basic amenities for a considerable period of time.
   4. It would not be fair for DWP to recover the overpayment, considering that:

* it was caused by DWP’s mistake,
* C acted in good faith and did not contribute to the overpayment,
* [C has health issues which could be made worse by the ongoing overpayment recovery, ]
* C has difficult personal circumstances [refer to anything relevant e.g. caring responsibilities],
* recovering the debt from C would result in financial difficulties for C.

1. As such, DWP’s recovery of the debt is in ongoing breach of C’s legitimate expectation to keep the overpaid money.
2. **Ground 2: Breach of A1P1**
3. In *Čakarević v Croatia – Application No.48921/13* (ECtHR, 26 April 2018) the government’s recovery of overpaid benefit caused by entirely their own mistake was a breach of A1 P1. The claimant’s legitimate expectation was capable of constituting a ‘possession’.
4. Relevant factors appliable in that case are relevant to C, including the fact that:

* the claimant has acted in good faith;
* [s/he] did not contribute to the incorrect decision;
* a long period elapsed between the payments and the discovery of the error by the DWP;
* the money was relied on by C to satisfy [her/his] daily living expenses;
* the impact that having the repay the debt will have and is having on C, considering [her/his] health and financial circumstances (detailed above).

1. Applying *Čakarević*, the ongoing recovery of the overpayment from C represents an unlawful interference with [her/his] A1P1 rights.

**Action requested:**

1. The SSWP is requested to take the following action:
2. Urgently suspend the recovery of the overpayment debt as soon as possible and in any event within 7 days i.e XXX;
3. With your substantive response on XX, confirm the SSWP’s agreement to waive the full outstanding sum of the UC overpayment and to refund monies already deducted from C.

1. [Benefit overpayment recovery guide - GOV.UK (www.gov.uk)](https://www.gov.uk/government/publications/benefit-overpayment-recovery-staff-guide/benefit-overpayment-recovery-guide) [↑](#footnote-ref-1)