

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 3 April 2017 at Havant under reference SC323/16/02073) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: on her claim effective from 10 August 2014, the claimant was entitled to housing costs from the beginning of the benefit week in which the housing costs qualification period ended.

REASONS FOR DECISION

A. The issue

1. The issue in this case is the date from which the claimant became entitled to receive support with her mortgage interest payment as part of her award of an employment and support allowance.

B. How the issue arises

2. The claimant was receiving incapacity benefit until it was converted to employment and support allowance in October 2011. Her award was terminated in October 2013. She made a new claim in 2014. It seems that her claim was taken as made on 10 August 2014. She was not at that date entitled to mortgage interest. On 27 January 2015, she asked for a form on which to claim the mortgage interest. One was sent to her, but no reply was received, despite a reminder, until 29 March 2016. Even then the form was not complete and it was not until 5 May 2016 that a properly completed form was returned. The decision-maker superseded the decision awarding an employment and support allowance with effect from 29 March 2016. On appeal to the First-tier Tribunal, the judge decided that the claimant was entitled to her mortgage interest from and including the benefit week that included 27 January 2015. On appeal to the Upper Tribunal, the Secretary of State's representative has conceded that the claimant was entitled from the end of the qualifying period for housing costs to be included in an award.

C. The decision before me

3. I only have jurisdiction over the decision of the First-tier Tribunal and that decision related to the August 2014 claim. The claimant asked for her housing costs to be awarded from October 2013. That is not possible, as the First-tier Tribunal explained, because the decision relating to the termination of the

claimant's previous award was not part of the appeal. The claimant has asked me to defer making a decision while her previous entitlement is reviewed. I have not done so, because I would still only have jurisdiction over the decision that was before the First-tier Tribunal. That is also why I have refused an oral hearing. The Secretary of State has conceded the case to the extent that the claimant could possibly succeed.

D. The law on housing costs

4. Housing costs are governed by Schedule 6 to the Employment and Support Allowance Regulations 2008. They are not payable immediately, but only after a qualifying period, often called a waiting period. That is the reason why the claimant had to wait before her mortgage interest could be included in her award.

E. The law on supersession

5. Supersession is a way of changing a decision. It is governed by section 10 of the Social Security Act 1998. Section 10(5) and (6) provide:

- (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.

The relevant Regulations are the Social Security and Child Support (Decisions and Appeals) Regulations 1999:

7 Date from which a decision superseded under section 10 takes effect

- (1) This regulation—
 - (a) is, except for paragraphs (2)(b), (bb) or (be), (29) and (30), subject to Schedules 3A, 3B and 3C; and
 - (b) contains exceptions to the provisions of section 10(5) as to the date from which a decision under section 10 which supersedes an earlier decision is to take effect.
- (2) Where a decision under section 10 is made on the ground that there has been, or it is anticipated that there will be, a relevant change of circumstances since the decision had effect or, in the case of an advance award, since the decision was made, the decision under section 10 shall take effect—
 - (b) where the decision is advantageous to the claimant and the change was notified to an appropriate office more than one month after the change

occurred or after the expiry of any such longer period as may have been allowed under regulation 8—

- (i) in the case of a claimant who is in receipt of income support, jobseeker's allowance, state pension credit or an employment and support allowance and benefit is paid in arrears, from the beginning of the benefit week in which the notification was made;
 - (ii) in the case of a claimant who is in receipt of income support, jobseeker's allowance or state pension credit and benefit is paid in advance and the date of notification is the first day of a benefit week from that date and otherwise, from the beginning of the benefit week following the week in which the notification was made; or
 - (iii) in any other case, the date of notification of the relevant change of circumstances; or
- (bb) where the decision is advantageous to the claimant and is made on the Secretary of State's own initiative—
- (i) except where paragraph (ii) applies, from the beginning of the benefit week in which the Secretary of State commenced action with a view to supersession; or
 - (ii) in the case of a claimant who is in receipt of income support, jobseeker's allowance or state pension credit where benefit is paid in advance and the Secretary of State commenced action with a view to supersession on a day which was not the first day of the benefit week, from the beginning of the benefit week following the week in which the Secretary of State commenced such action;

...

(12) Where this paragraph applies, a decision under section 10 may be made so as to take effect as from such date not more than eight weeks before—

- (a) the application for supersession; or
- (b) where no application is made, the date on which the decision under section 10 is made,

as is reasonable in the particular circumstances of the case.

(13) Paragraph (12) applies where—

- (a) the effect of a decision under section 10 is that there is to be included in a claimant's applicable amount an amount in respect of a loan which qualifies under—

...

- (iv) paragraph 16 or 17 of Schedule 6 to the Employment and Support Allowance Regulations; and

- (b) that decision could not have been made earlier because information necessary to make that decision, requested otherwise than in accordance with paragraph 10(3)(b) of Schedule 9A to the Claims and Payments Regulations (annual requests for information), had not been supplied to the Secretary of State by the lender.

SCHEDULE 3C

DATE FROM WHICH CHANGE OF CIRCUMSTANCES TAKES EFFECT WHERE CLAIMANT ENTITLED TO EMPLOYMENT AND SUPPORT ALLOWANCE

1. Subject to paragraphs 2 to 7, where the amount of an employment and support allowance payable under an award is changed by a superseding decision made on the ground of a change of circumstances, that superseding decision shall take effect from the first day of the benefit week in which the relevant change of circumstances occurs or is expected to occur.

F. SK v Secretary of State for Work and Pensions [2013] UKUT 138 (AAC)

6. In this case, Judge Paines was concerned with the equivalent provisions that apply to jobseeker's allowance. The facts were very similar to this case in that the claimant had been sent a form for completion with details of mortgage interest (Form MI 12) in November 2009, but it was not returned until April 2010. The judge's analysis is worth quoting in full:

21. The scheme of the legislation is that section 10(1) introduces the concept of supersession either on the Secretary of State's own initiative or on an 'application made for the purpose'. Section 10(5) then provides for the effective date of such a decision, subject to regulations such as regulation 7 of the Decisions and Appeals Regulations. In regulation 7, regulation 7(1) provides that regulation 7 is, for the most part, subject to schedules 3A to 3C. It is therefore sensible to go next to those schedules in order to see whether any of their provisions applies to the facts of a particular case and, if so, to turn back to regulation 7 in order to see whether any of its provisions that are *not* subject to the schedules also apply to the facts of a case; if so, the legislative intention appears to be that they should prevail.

22. The legislation uses, in different places, the concept of an application for supersession and the concept of a notification of a change of circumstances. They are not precisely the same thing: notifying a change of circumstances means telling the Secretary of State that circumstances have changed or will change, whereas applying for a supersession decision means asking the Secretary of State to take such a decision; that may well be on the grounds of a change of circumstances that the claimant is notifying to the Secretary of State at the same time, but it could equally be on the ground of a change of circumstances that the Secretary of State knows about but has not reacted to. Conversely, where a claimant notifies the Secretary

of State of a change in circumstances leading to a lower benefit entitlement, he is simply performing his duty to notify the Secretary of State of such a change; if the Secretary of State responds by superseding the earlier decision, that is the Secretary of State acting of his own initiative. It would be perverse to regard the claimant as having applied for a reduction of his award.

23. In the present case, regulation 7(1) leads one to paragraph 7 of schedule 3A, which I have set out at paragraph 20 above. The terms of paragraph 7 fit this case exactly: the Secretary of State's decision of 18 May 2010 did supersede a decision in respect of a claim for jobseeker's allowance on the ground that there had been a relevant change of circumstances. Therefore, it seems to me, the paragraph applies and sets an effective date of the first day of the benefit week in which the relevant change of circumstances occurred – subject only to the possibility of the paragraph being over-ridden by one of the provisions of regulation 7 referred to in regulation 7(1).

24. Of those provisions, the potentially relevant ones are regulation 7(2)(b) and 7(2)(bb). However, regulation 7(2)(b) cannot, it seems to me, be in point. It applies to changes in circumstances that are favourable to a claimant, but does not refer to a late application for a supersession but rather to a late notification of the change of circumstances. In this respect I agree with the claimant's representative that the returning of form MI 12 could not amount to notifying the Secretary of State that the 13 week waiting period had expired because (a) the form did not contain this information and (b) the Secretary of State knew it anyway. Regulation 7(2)(b) therefore cannot override paragraph 7 of schedule 3A in this case. (I add for completeness that regulation 7(2)(a) cannot do so either, both because it only applies where a change is notified and because it is not one of the provisions expressed to over-ride the schedules.)

25. That leaves regulation 7(2)(bb) and, possibly, regulation 7(12) and (13). Regulation 7(2)(bb) only applies where a superseding decision is made on the Secretary of State's own initiative. The claimant maintains that the Secretary of State's decision in his case was made on the Secretary of State's own initiative, whereas the Secretary of State maintains (and the tribunal agreed) that it was made on an application constituted by the claimant's returning of form MI 12. If the Secretary of State and the tribunal are right, then regulation 7(2)(bb) is not in point either, and the effective date remains governed by paragraph 7 of the schedule.

26. The process which led eventually to the decision of 18 May 2010 was one launched by the Secretary of State on his own initiative. The Secretary of State had responded to the information in the JSA claim form that the claimant had a mortgage by asking for further details of it to be supplied on form MI 12; that can only have been with a view to a future supersession decision that the Secretary of State was contemplating making without the claimant having asked for it.

27. If (which the papers do not disclose) no time limit is set for the return of form MI 12 – or if a claimant returns it within the time set – I see no escape from the conclusion that the whole process has run its course at the Secretary of State's initiative and regulation 7(2)(bb) applies.

28. If there was a time limit, which the present claimant did not comply with, his later returning of the form could be seen as the claimant applying for a supersession decision after failing to comply with the conditions on which the Secretary of State was prepared to supersede of his own initiative. In that case, neither regulation 7(2)(b) nor regulation 7(2)(bb) would apply: regulation 7(2)(b) would not apply because, even if returning the form were a late application for supersession, it would not be a late notification of a change in circumstances; regulation 7(2)(bb) would not apply because the decision was not made on the Secretary of State's own initiative. The result would be that the effective date remained that derived from paragraph 7 of the schedule.

29. If no time limit was expressly set in this case, then on the face of it regulation 7(2)(bb) applies. If so, it would advance the effective date of the decision to the beginning of the benefit week in which the Secretary of State commenced action with a view to supersession under regulation 7(2)(bb)(i) (the claimant's benefit being paid in arrear). In my judgment that would be the week in which the Secretary of State sent out form MI 12. CDLA/3688/2001 does not lead to any other conclusion: the issue that Judge Jacobs was dealing with in that case was whether a purported supersession decision had been taken less one month after the decision it purported to supersede; Judge Jacobs held that the decision was taken on the date it was decided to take it. He was not dealing with the concept of commencing action with a view to supersession.

30. If, by virtue of regulation 7(2)(bb), the effective date is in November, then it is earlier than the date of the change of circumstances (and quite possibly earlier than the decision it supersedes); that is an absurd result that cannot have been intended. The explanation of why regulation 7(2)(bb) is worded as it is presumably that the draftsman only envisaged a situation in which the Secretary of State began, on his own initiative, preparations for supersession in response to a change of circumstances that had by then already occurred.

31. Applying the required objective approach to construction, it would in my view be apparent to a reader knowing the background that regulation 7(2)(bb) could not intend a decision to 'take effect' – in the sense of the new rate of benefit being paid – in advance of the change of circumstances. It could only be taken to mean that the decision was to have effect as if made as at the date the Secretary of State commenced action, but that it would take effect prospectively on the basis of what was, as at that date, a future change of circumstances.

32. If form MI 12 was sent out at a time when the claimant did not have an award of JSA (which was the position between 2 and 27 November) it

seems to me impossible to make sense of regulation 7(2)(bb) at all; it would produce a decision prospectively to add housing costs to a then non-existent award. In that event, regulation 7(2)(bb) could not operate so as to over-ride paragraph 7 of the schedule.

33. There remains the question of whether regulation 7(12) and (13) could apply. I agree that regulation 7(13) is not predicated on delay by a lender, but simply on the late supply of the information for any reason. However, the relationship between regulation 7(12) and (13) and regulation 7(2) is obscure. As the claimant's representative points out, regulation 7(2) is expressed in mandatory terms whereas regulation 7(12) appears to confer a discretion. That gives some support to the view that it is intended to empower the Secretary of State as a matter of discretion to substitute a date in the range prescribed by regulation 7(12) for the date prescribed by regulation 7(2). However, (a) the Secretary of State did not purport to apply regulation 7(12) in his decision in this case; and (b) regulation 7(12) is not a provision that prevails over paragraph 7 of schedule 3A.

34. I therefore decide that the effective date of supersession in this case is governed by paragraph 7 of schedule 3A or, depending on the facts, regulation 7(2)(bb). I do not need to decide whether regulation 7(2)(bb) applies in this case. Construed so as to avoid absurdity, it produces the same result as paragraph 7 of schedule 3A: the claimant is entitled to the payment of his mortgage interest with effect from the first day of the benefit week in which his housing costs became payable.

G. The argument for the Secretary of State

7. The Secretary of State's representative before me summarised the effect of *SK* as: 'In short, a supersession to award an amount for housing costs is *always* effective from the end of the qualifying period for such costs.' The judge's reasoning applies to employment and support allowance just as to jobseeker's allowance. The representative says that the Secretary of State accepts that Judge Paines' decision was correct and that guidance tells decision-makers to apply it, although they did not do so in this case. I accept that argument and gratefully adopt and apply Judge Paines' analysis.

H. And finally – the mystery of regulation 7(12) and (13)

8. Judge Paines was puzzled by these paragraphs. According to the Secretary of State's representative before me, the mystery continues:

Admittedly, despite the years that have passed since Judge Paines gave his decision, it remains the case that the circumstances in which regulations 7(12) and (13) might properly be applied remain unknown. The mystery is rendered still deeper in the case of ESA (and income support and state pension credit) by the fact that a provision exists that would allow the Secretary of State to award no housing costs, from the start of the qualifying period, in any case where necessary information is not available (see regulation 13(1) of the [Social Security and Child Support (Decisions and

Appeals) Regulations 1999]). There is no right of appeal against such a decision (paragraph 13 of Schedule 2 to [those] Regulations), as a result of which the initial negative decision can be revised at any time so as to award any qualifying housing costs that are shown to exist (regulation 3(8) of [those] Regulations). In this way, the Secretary of State has a mechanism available to him whereby he can refuse to award housing costs from the end of the qualifying period whenever and however evidence of eligible housing costs comes into his possession. Why, then, are regulations 7(12) and (13) necessary? The Secretary of State is content to presume that although there are circumstances in which these regulations may be applied (even if they have not yet been uncovered), those circumstances can safely be said not to include the scenarios in *SK v Secretary of State for Work and Pensions*.

9. As Charles de Lint said: 'Without mysteries, life would be very dull indeed. What would be left to strive for if everything were known?'

**Signed on original
on 23 January 2018**

**Edward Jacobs
Upper Tribunal Judge**