IN THE UPPER TRIBUNAL **UT Ref: UA-2022-SCO-000053-PIP**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

GH (deceased) (by his wife as his appointee/attorney)

Appellant

- v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 26 April 2023

Decided on consideration of the papers.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal made on 2 February 2022 was not made in error of law.

REASONS FOR DECISION

1. This appeal must be dismissed because no effective remedy can be, or could have been, afforded to the appellant, even if he could have succeeded on all his discrimination arguments leading up to the issue of remedy.

2. The appellant sadly died in 2022, in the course of these Upper Tribunal appeal proceedings. However, no issue has arisen about the Secretary of State exercising the power under regulation 56(1) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments Regulations) 2013 to appoint the deceased's wife to continue with this appeal (if the power of attorney no longer enables the wife to do so).

3. The First-tier Tribunal in its decision of 2 February 2022 dismissed the appellant's appeal and upheld the Secretary of State's decision of 8 July 2021. That decision of the Secretary of State was to the effect that the appellant was

entitled to the enhanced rate of the daily living component and the standard rate of the mobility component of the Personal Independence Payment ("PIP") with effect from 17 May 2021.

4. The appellant was born in May 1950. He had an award of Disability Living Allowance (DLA) from in or about 2010. He had been diagnosed with a brain tumour around that time. In 2015 the award of DLA moved to be an award of PIP. The appellant's award of PIP was made under a decision dated 28 August 2015 and awarded him the standard rate of both components of PIP for an unlimited period from 23 September 2015. At that point the appellant was aged 65.

5. In June 2021 the appellant applied for supersession of the PIP award on the basis that the brain tumour had progressed and he had been diagnosed as terminally ill. By this point the appellant was aged 71. On 8 July 2021 the Secretary of State, through one of his decision makers, accepted the appellant was terminally ill and superseded the PIP award with effect from 4 June 2021 so as to award the appellant the enhanced rate of the daily living component and the standard rate of the mobility component of PIP. On mandatory reconsideration the award of the enhanced rate of the care component of PIP and the standard rate of the mobility component was held to arise from an earlier date of 7 May 2021.

6. The reason the award of PIP in respect of the mobility component was not increased to the enhanced rate under the supersession decision of 8 July 2021 was because of the terms of section 83 of the Welfare Reform Act 2012 ("WRA") and the regulations made under it. Those regulations are found in regulations 25-27 of the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regs"). In this case the only relevant regulation is regulation 27 of the PIP Regs, which deals with supersession of a PIP award after the claimant has reached pensionable age.

7. Section 83 of the WRA provides as follows:

> "**Persons of pensionable age**
> 83.-(1) A person is not entitled to the daily living component or the mobility component for any period after the person reaches the relevant age.
> (2) In subsection (1) "the relevant age" means—
> (a) pensionable age (within the meaning given by the rules in paragraph 1 of Schedule 4 to the Pensions Act 1995); or
> (b) if higher, 65.
> (3) Subsection (1) is subject to such exceptions as may be provided by regulations."

8. Regulations 25-27 of the PIP Regs set out the following exceptions to the general rule in section 83 that entitlement to PIP cannot arise after the age of 65.

PART 6
Provisions relating to age

Exceptions to section 83 where entitlement exists or claim made before relevant age

25. Section 83(1) of the Act (persons of pensionable age) does not apply where C has reached the relevant age if C —

(a) was entitled to an award of either or both components on the day preceding the day on which C reached the relevant age; or

(b) made a claim for personal independence payment before reaching the relevant age and that claim was not determined before C reached that age but an award of either or both components would be made in respect of C but for section 83(1) of the Act.

Claim for personal independence payment after an interval and after reaching the relevant age

26.—(1) Where C has reached the relevant age and makes a new claim in the circumstances set out in regulation 15 the following exceptions apply.

(2) The exceptions referred to in paragraph (1) are —

(a) section 83(1) of the Act (persons of pensionable age) does not apply;

(b) the reference to '2 years' in regulation 15(1)(b) is to be read as '1 year';

(c) where C is assessed as having severely limited ability to carry out mobility activities for the purposes of the new claim –

(i) C is entitled to the enhanced rate of the mobility component only if C was entitled to that rate of that component under the previous award; and

(ii) where C is not entitled to the enhanced rate of that component because of paragraph (i), C is entitled to the standard rate of that component provided that C was entitled to that rate of that component under the previous award; and

(d) where C is assessed as having limited ability to carry out mobility activities for the purposes of the new claim, C is entitled to the standard rate of the mobility component only if C was entitled to that component, at either rate, under the previous award.

Revision and supersession of an award after the person has reached the relevant age

27.—(1) Subject to paragraph (2), section 83(1) of the Act (persons of pensionable age) does not apply where —

(a) C has reached the relevant age and is entitled to an award ("the original award") of either or both components pursuant to an exception in regulation 25 or 26; and

(b) that award falls to be revised or superseded.

(2) Where the original award includes an award of the mobility component and is superseded for a relevant change of circumstance which occurred after C reached the relevant age, the restrictions in paragraph (3) apply in relation to the supersession.

(3) The restrictions referred to in paragraph (2) are —
(a) where the original mobility component award is for the standard rate then, regardless of whether the award would otherwise have been for the enhanced rate, the Secretary of State -
(i) may only make an award for the standard rate of that component; and
(ii) may only make such an award where entitlement results from substantially the same condition or conditions for which the mobility component in the original award was made.
(b) where the original mobility component award is for the enhanced rate, the Secretary of State may only award that rate of that component where entitlement results from substantially the same condition or conditions for which the mobility award was made.
(4) Where the original award does not include an award of the mobility component but C had a previous award of that component, for the purpose of this regulation entitlement under that previous award is to be treated as if it were under the original award provided that the entitlement under the previous award ceased no more than 1 year prior to the date on which the supersession takes or would take effect."

9. The appellant has never disputed that section 83 of the WRA and regulation 27 of the PIP Regs have the effect that his award of the mobility component of PIP could not have been increased to the enhanced rate under the supersession decision of July 2021. By then he was 71 years old and so beyond his pensionable age. The effect of regulation 27(3) of the PIP Regs is that an award of the standard rate of the mobility component of PIP made to a claimant before pensionable age cannot be increased, on supersession, to the enhanced rate after the claimant has reached his or her pensionable age.

10. The appellant's case before the First-tier Tribunal and on this further appeal to the Upper Tribunal is that this effect of the statutory regime cited above amounted to unjustified discrimination against him as a terminally ill person under Article 14 of the European Convention on Human Rights ("ECHR").

11. There are a number of steps in the appellant's discrimination argument that are not free from difficulty and are contested by the Secretary of State. Least of all, Article 14 of the ECHR has no independent existence and only applies if the subject matter of the dispute falls within the ambit of another ECHR right. This step may not present the appellant with any great difficulty as his entitlement to PIP may well fall within the ambit Article 1 of the Protocol 1 to the ECHR. However, issues arising under Article 14 of the ECHR, such as what his 'status' is, the relevant comparator for making out the discriminatory effect of the above statutory provisions and whether any discrimination is justified, have been subject of detailed argument in these proceedings and are not straightforward. Nor will they necessarily sound in the appellant's favour.

12. However, it is not necessary in my judgment for me to seek to resolve any of these arguments. Nor would it be a proportionate exercise for me to do so in clear circumstances where the appellant cannot, even assuming he can succeed on all those arguments, obtain any effective remedy on this appeal

nor could he have done so before the First-tier Tribunal. Indeed, the position in my judgment is even starker than that as, as far as I can see, the appellant, or now his wife, cannot obtain an effective remedy from any court or tribunal in Great Britain.

13. The validity of the statutory scheme concerning entitlement to PIP after pensionable age has been traversed and affirmed, in terms of domestic law absent any human rights challenge, most recently in *SC v SSWP* (PIP) [2022] UKUT 97 (AAC).

14. The remedy issue is similar to that which arose in *J-AK v SSWP* (DLA) [2017] UKUT 420 (AAC). That decision concerned a challenge under the Equality Act 2010 as well as a discrimination argument under the Human Rights Act 1998. However, the point made on remedy in paragraphs [79]-[83] of *J-AK* was a general one and was not tied to the Equality Act.

15. The terms of section 83(1) of the WRA are the critical starting point for considering the appellant's appeal because they preclude any person over pensionable age from being entitled to PIP after pensionable age. Section 83(3) of the WRA enables regulations to be made to provide exceptions to this general rule. However, those regulations provide what may be termed a 'get out' from the general rule that no one can be entitled to PIP after pensionable age. There is no dispute that at the material time the appellant was aged more than (his) pensionable age. Accordingly, the legislative starting point is Parliament's view, as expressed in section 83(1) of the WRA, that no one can be entitled to PIP after pensionable age.

16. Acts of Parliament cannot be disapplied by courts of tribunals. Even if an Act of Parliament (or a section within it) breaches a person's human rights, the most the High Court of Justiciary or Court of Session (but not a tribunal) can do is grant a declaration of incompatibility in respect of the offending section of the Act under section 4 of the Human Rights Act 1998 "HRA"). Even in that circumstance, however, the declaration of incompatibility does not affect the validity or continuing legal effect of the provision in question: section 4(6) HRA and *Re K (a child) (secure accommodation order: right to liberty)* [2001] 2 All ER 719.

17. The basis on which the appellant was entitled to *any* PIP after he reached pensionable age was, and could only be, the regulations made pursuant to section 83(3) WRA. Those regulations are found in regulations 25-27 of the PIP Regs, and are set out above. As Judge Wikeley described in paragraph 33 of *SC*, these regulations provide a beneficial exception to the general rule in section 83(1) that a person cannot be entitled to PIP after pensionable age. In other words, it is only because of these regulations that entitlement to the mobility component of PIP, at the standard rate, can continue after pensionable age. Without the regulations entitlement to any rate of the mobility component (or the daily living component) would have to end on a person reaching pensionable age. That is because of the general rule against entitlement to PIP after pensionable age clearly enacted by Parliament in section 83(1) of the WRA.

18. As I understand the argument advanced on behalf of the appellant relying on *RR v SSWP* [2019] UKSC 52, his remedy is to disapply those (beneficial) regulations. But such a remedy would mean that no-one can take the benefit of the regulations, or at least in disapplying them would mean there is no beneficial regulation on which the appellant can reply: see similarly the discussion of the *Robertson* case at paragraph 3 of *J-AK*. Disapplying the regulation(s), because it only allows the standard rate of the mobility component of PIP to be awarded after pensionable age, on the face of it, would leave the rule in section 83(1) in place, which cannot benefit the appellant.

19. It is noteworthy that disapplying the (found to be unjustified discriminatory) effects of the housing benefit regulation in *RR* was sufficient. However, in this appeal it would not be sufficient because to disapply or ignore regulation 27 of the PIP Regs could not of itself provide any legal basis for the appellant being entitled to the enhanced rate of the mobility component of PIP; indeed absent regulation 27 the appellant ought not to have been entitled to any PIP after he reached the age of 65 given the terms of section 83(1) of the WRA. It was the regulation in issue in *RR*, regulation B13, that itself mandated the (discriminatory) deduction to the claimant's housing benefit. The effective remedy in *RR* was therefore to ignore or disapply regulation B13, because to apply it would be unlawful under the Human Rights Act 1998. In this appeal, however, regulation 27 is a beneficial provision, the disapplication or ignoring of which cannot assist the appellant.

20. Further, reading in words to the regulations (an argument only latterly made by the appellant) would in my judgment go against the clear intention of Parliament in crafting the beneficial exceptions to the general rule in section 83(1) such that those exceptions have been expressly limited to the standard rate of the mobility component as shown, by way of example, by the wording of regulation 27(3)(a)(i) of the PIP Regs: see sections 3 and 6(2)(b) of the Human Rights Act 1998, *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 at paragraph [33] and *RR* at paragraph [30].

21. The 'read-in' remedy latterly suggested by the appellant involves reading in words to regulation 21 of the PIP Regs so as to omit paragraph (3)(a)(i) from regulation 27 of the PIP Regs for those with a terminal illness. I am not satisfied that this is doing anything less than legislating, which ought to be for Parliament.

22. Firstly, regulation 21's concern, albeit it is about claimants with a terminal illness, is limited to removing the need for the claimant to show they have been in Great Britain for 2 out of the last 3 years, though they still have to be habitually resident in the United Kingdom. Regulation 21 is therefore nothing to do with making exceptions to the general rule in section 83(1) of the WRA that entitlement to PIP cannot continue after pensionable age. It is thus an inapt place in which to suggest Parliament would have legislated for an extension of the regulation 27 provisions for those with a terminal illness. Indeed, the fact that neither regulation 21 nor regulation 27 of the PIP Regs provides any additional exception to section 83(1) of the WRA for those with a

terminal illness, in circumstances where regulation 21 shows that express consideration was given to providing some beneficial protection from the general provisions of the PIP legislation for those who are terminally ill, points in my judgment firmly against Parliament not having intended that regulation 27 should apply to all PIP claimants, including those who are terminally ill.

23. Secondly, omitting paragraph (3)(a)(i) from regulation 27 of the PIP Regs would render that regulation substantially incoherent as it would render meaningless the notion, as plainly expressed in paragraph (2) in regulation 27, that there are to be "restrictions" on what may be awarded on a supersession of a PIP award after a claimant has reached their pensionable age. Omitting paragraph (3)(a)(i) in regulation 27 would have the effect that there would be no restrictions on the rate of the mobility component of PIP that can be awarded, which would plainly be contrary to the restrictive exceptions to section 83(1) of the WRA that regulation 27 is intended to confer.

24. Nor can I see how a comparison with regulation 27(4) of the PIP Regs can assist the appellant because it plainly does not apply to him as he has had an award of the mobility component since the start of his PIP awards. In any event, regulation 27(4) is not a separate ground of exception to the general rule in section 83(1) of the WRA. The restrictions in regulation 27(3) must still apply on supersession of an award to which regulation 27(4) applies.

25. For these reasons, the appeal cannot succeed and could not have succeeded before the First-tier Tribunal, whatever the merit (or lack of it) in the discrimination and justification arguments.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 26 April 2023