



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2022-000802-ESA

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

Between:

SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant

- v -

NC

Respondent

Before: Deputy Upper Tribunal Judge Rowland

Decision date: 26 May 2023

Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the Secretary of State's appeal. The decision of the First-tier Tribunal made on 29 September 2021 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remake it as follows:

1. The claimant was disqualified for receiving payments of contributory employment and support allowance from 3 January 2020 to 21 December 2020.
2. The claimant's award of contributory employment and support allowance is superseded on the ground that there have been material changes of circumstances.
3. From either 3 January 2020 or 14 February 2020 to 21 December 2020, the claimant was to be treated as not having limited capability for work and, therefore, he was not entitled to contributory employment and support allowance from either 3 January 2020 or 14 February 2020 to 21 December 2020.
4. To the extent that it has not already been done, the Secretary of State must now make a decision –

- (a) as to the claimant's entitlement to income-related employment and support allowance from 3 January 2020 to 21 December 2020 (which may be nil) and
- (b) as to the claimant's entitlement to employment and support allowance from 22 December 2020.

REASONS FOR DECISION

1. This is an appeal, brought by the Secretary of State with permission given by the First-tier Tribunal, against a decision of the First-tier Tribunal dated 29 September 2021, allowing the claimant's appeal against the Secretary of State's decision, dated 18 January 2021 and maintained on "mandatory reconsideration", to the effect that the claimant was not entitled to employment and support allowance from 3 January 2020 because he had been in prison. The First-tier Tribunal held that the claimant not only had an underlying entitlement to employment and support allowance from that date but also that employment and support allowance remained payable to him.

Employment and support allowance and imprisonment – the relevant legislation

2. Until certain amendments made by the Welfare Reform Act 2012 come into force in relation to a claimant, Part 1 of the Welfare Reform Act 2007 makes provision for employment and support allowance in two forms, a contributory allowance and an income-related allowance. Under section 1(3)(a), it is a basic condition of entitlement to employment and support allowance that the claimant "has limited capability for work". Section 18(4)(b) provides –

"Except where regulations otherwise provide, a person shall be disqualified for receiving a contributory allowance for any period during which he is –

- (a) ..., or
- (b) undergoing imprisonment or detention in legal custody.

Paragraph 1(a) of Schedule 2 provides –

"1. Regulations may make provision –

- (a) for a person to be treated in prescribed circumstances as having, or as not having, limited capability for work;
- (b) ...;
- (c)"

3. Insofar as is material, regulations 159 to 161 of the Employment and Support Allowance Regulations 2008 (SI 2008/794), as in force at the time of the Secretary of State's decision, provided –

"Treating a claimant as not having limited capability for work

159.—(1) Subject to paragraph (2), the claimant is to be treated as not having limited capability for work if the claimant is disqualified for receiving a contributory allowance during a period of imprisonment or detention in legal custody if that disqualification is for more than 6 weeks.

(2)

Exceptions from disqualification for imprisonment

160.—(1) Notwithstanding section 18(4)(b) of the Act, a claimant is not disqualified for receiving a contributory allowance for any period during which that claimant is undergoing imprisonment or detention in legal custody—

- (a) in connection with a charge brought or intended to be brought against the claimant in criminal proceedings;
- (b) pursuant to any sentence; or
- (c) pursuant to any order for detention,

made by a court in such proceedings, unless paragraph (2) applies.

(2) This paragraph applies where—

- (a) a penalty is imposed on the claimant at the conclusion of the proceedings referred to in paragraph (1); or
- (b) in the case of default of payment of a sum adjudged to be paid on conviction a penalty is imposed in respect of such default.

(3)

(4)

(5) For the purposes of this regulation—

- (a) ...;
- (b) ...;
- (c) “penalty” means a sentence of imprisonment or detention under section 90 or 91 of the Powers of Criminal Courts (Sentencing) Act 2000 or section 250 or 259 of the Sentencing Code, a detention and training order under section 100 of the Powers of Criminal Courts (Sentencing) Act 2000 or Chapter 2 of Part 10 of the Sentencing Code, a sentence of detention for public protection under section 226 of the Criminal Justice Act 2003 or an extended sentence under section 228 of that Act or, in Scotland, under section 205, 207 or 208 of the Criminal Procedure (Scotland) Act 1995;

(d) ...;

(e)

(6)

Suspension of payment of a contributory allowance during imprisonment

161.—(1) Subject to the following provisions of this regulation, the payment of a contributory allowance to any claimant—

- (a) which is excepted from the operation of section 18(4)(b) of the Act by virtue of the provisions of regulation 160(1), (3) or (6); or
- (b) which is payable otherwise than in respect of a period during which the claimant is undergoing imprisonment or detention in legal custody,

is suspended while that claimant is undergoing imprisonment or detention in legal custody.

(2)

(3)”

4. When the relevant amendments to the 2007 Act made by the 2012 Act come into force in relation to a claimant, they abolish income-related employment and support allowance (replacing it with universal credit), so that employment and support allowance becomes a wholly contributory benefit. As a consequence, the 2008 Regulations are replaced by the Employment and Support Allowance Regulations 2013 (SI 2013/379). The terms “old-style” and “new-style” are used to distinguish between, on one hand, the contributory and income-related allowances that may be awarded under the unamended form of the 2007 Act and the 2008 Regulations and,

on the other hand, the single, contributory form of employment and support allowance that may be awarded under the amended form of the 2007 Act and the 2013 Regulations. Making a new claim for employment and support allowance or for universal credit now generally brings the relevant amendments into force for that claimant, but there are other reasons why they may come into force. It should, however, be noted that, although it is sometimes said that an award of “old-style” contributory employment and support allowance has been “converted” into an award of the “new-style” allowance, they are technically the same benefit.

5. It is also important to note the differing effects of, on one hand, section 18(4)(b) of the 2007 Act and, on the other hand, regulation 159 of the 2008 Regulations, which is presumably made under paragraph 1(1)(a) of Schedule 2 to the 2007 Act. Where a person is merely “disqualified for receiving” a benefit, under section 18(4)(b) or equivalent provisions in other legislation, he or she retains an underlying entitlement to the benefit. However, because having limited capability for work is a basic condition of entitlement to employment and support allowance, regulation 159, which applies only when a person is disqualified for receiving contributory employment and support allowance for more than six weeks, has the effect of removing such underlying entitlement.

The facts and the procedural history

6. The underlying facts are not in dispute, although there is some uncertainty about some details. The claimant was awarded employment and support allowance in 2014, having previously been entitled to incapacity benefit. In 2017, he emigrated to Romania, where he continued to be entitled to both contributory employment and support allowance and personal independence payment. It appears that he was arrested there on criminal charges and was brought back to England for trial. On 13 February 2020, he was sentenced to a total of two years’ imprisonment. He was released on 21 December 2020. He had been in custody from 3 January 2020 until he was sentenced. The First-tier Tribunal pointed out that his release date appears to have been calculated on the basis that he had previously been remanded in custody for an additional 12 days, but, if that is so, it is possible that he was released on bail between the two periods and he seems to have been in hospital at some stage, so there may have been a good reason for ignoring the earlier period, whether it was in Romania or the United Kingdom. In any event, the Secretary of State has proceeded on the basis that the only relevant period of imprisonment was from 3 January 2020 until 21 December 2020, and I am content to do so as well.

7. The Secretary of State was notified that the claimant had been remanded or committed in custody and, on 15 January 2020, payment of contributory employment and support allowance was suspended (although the Secretary of State erroneously refers to “the claim” having been suspended). No further action appears to have been taken by the Secretary of State until the claimant informed her of his release. On 18 January 2021, the Secretary of State decided that the claimant was not entitled to employment and support allowance from 3 January 2020 and she stated that the claimant “must make a new claim for benefit”, apparently on the basis that “entitlement to credits will also be lost”. On the same day, the claimant wrote a letter (misdated 18 February 2020) that was taken by the Secretary of State as an application for a revision (“mandatory reconsideration”) of the decision of 18 January 2021. In that letter, the claimant did not suggest that he had been entitled to receive

employment and support allowance while he had been in prison. However, he did ask for his payments to be reinstated so that he could return to Romania. The Secretary of State refused to revise his decision, stating that the claimant's "claim was closed correctly and you are required to make a new claim for benefit".

8. The claimant had in fact already submitted what purported to be a new claim for employment and support allowance on 31 December 2020, before the Secretary of State had made the decision on 18 January 2021. It had been treated as a claim for "new style" employment and support allowance and the Secretary of State appears to have taken the view that the claimant would not satisfy the contribution conditions for an award of the allowance but that the existing "credits" award could be left open (see page 22). However, no formal decision was made on the new claim at that time because no decision had been made that had the effect of terminating the previous award of employment and support allowance. The decision of 18 January 2021 having been made but challenged, the making of a decision on the new claim was further deferred to await the conclusion of the challenges, and it may still be awaiting the decision on this appeal. Meanwhile, the claimant was awarded universal credit from 18 January 2021.

9. The claimant appealed against the employment and support allowance decision of 18 January 2021 only on the ground that payments of contributory employment and support allowance should have been reinstated when he was released from prison so that he could exercise his "right" to return to his home in Romania. However, the First-tier Tribunal was not satisfied that the claimant had ceased to be entitled to contributory employment and support allowance while in prison and requested a further submission from the Secretary of State addressing this issue. It was not persuaded by that submission and, on 29 September 2021, decided that the claimant had not been disqualified for receiving contributory employment and support allowance while in prison and that he had therefore remained entitled to the allowance, and to receive payments of it, throughout his imprisonment. It also said in its statement of reasons that, had it decided that the claimant had been disqualified for receiving payments, it would nonetheless have held that he retained an underlying entitlement to contributory employment and support allowance during the first six weeks of his imprisonment. However, it did not address the claimant's original ground of appeal, presumably because, as it had decided that the claimant had remained entitled to receive payments of that allowance while in prison, no question of reinstatement arose. On 8 March 2022, the First-tier Tribunal gave the Secretary of State permission to appeal, although the parties were not notified until 12 April 2022.

10. In a helpful appeal submission drafted by Jack Anderson of counsel, the Secretary of State argues that the claimant was not only disqualified from receiving employment and support allowance throughout the period of his imprisonment but he was also not entitled to that allowance throughout that period.

11. The claimant has not responded to the Secretary of State's appeal. He did contact the Upper Tribunal by telephone on 23 January 2023 to ask what he should do and he was told that a direction would be issued to him explaining how the case would proceed. He asked for it to be sent to him by email and said that he would provide an email address, which he either did or had done already by sending two emails on the same day, one with proof of his identity and the other again asking for advice and stating that he was disabled and had a cognitive impairment. Subsequently, a direction was issued, extending time for making a response and

suggesting to the claimant that he seek advice from a citizens' advice bureau. Unfortunately, that direction was issued only by post and not also by email, despite the claimant's request, but I have no reason to suppose that he did not receive it. The lack of response is not surprising, since the appeal turns entirely on technical points of law upon which the claimant may have thought that he could not usefully comment. Accordingly, I decide this appeal without giving the claimant a further opportunity to submit a response. If, contrary to my expectation, he suffers any injustice by my doing so, he may apply for my decision to be set aside.

The effect of imprisonment in this case

12. As the Secretary of State submits and the First-tier Tribunal decided, it is clear that, notwithstanding section 18(4)(b) of the 2007 Act, regulation 160 of the 2008 Regulations has the effect that a person "undergoing imprisonment or detention in legal custody" is not disqualified for receiving contributory employment and support allowance (and so remains entitled to that allowance because regulation 159 does not apply) unless a "penalty" within the meaning of regulation 160(5)(c) is imposed at the conclusion of relevant criminal proceedings.

13. The First-tier Tribunal decided that no "penalty" had been imposed in this case. The judge was critical of the submission made by the Secretary of State in response to his direction on the ground that the Department had chosen "to reassert its position baldly, without deigning to explain itself", but that seems a little unfair because the direction had shown that the judge had the relevant statutory provisions in mind and he had not indicated why he considered that the definition of "penalty" was "narrow". Insofar as it might nonetheless be said that the Secretary of State had not explicitly explained why she thought the definition was in fact broad in its scope, she more than made up for that on this appeal through Mr Anderson's 11-page submission.

14. What the First-tier Tribunal appears to have done when considering the definition of "penalty" is read the words "under section 90 or 91 of the Powers of Criminal Courts (Sentencing) Act 2000" (and, perhaps, all of the following part of the definition) as describing both "imprisonment" and "detention". Because it understood that those sections of the 2000 Act and the other statutory provisions applied only to those under the age of 18, the First-tier Tribunal appears to have concluded that no "penalty" had been imposed on the claimant because he was well above that age. The First-tier Tribunal also said it would be a nonsense for regulation 160(1)(b) to provide that there was no disqualification for payment for someone serving a sentence but for regulation 160(2) then to say the opposite.

15. However, the Secretary of State argues that, because sections 90 and 91 of the 2000 Act (which have now been repealed) and the other statutory provisions mentioned were concerned only with detention, the effect of the First-tier Tribunal's construction is to render the reference to "imprisonment" entirely otiose.

16. Moreover, section 18 of the 2007 Act and regulation 160 of the 2008 Regulations are clearly derived from section 113 of the Social Security Contributions and Benefits Act 1992 (which may be traced all the way back to section 87(3) of the National Insurance Act 1911) and regulation 2 of Social Security (General Benefit) Regulations 1982 (SI 1982/1408) (which may be traced back to regulation 6 of the National Insurance (General Benefit) Regulations 1948 (SI 1948/1278), which was

amended by the National Insurance (General Benefit) Amendment Regulations 1960 (SI 1960/1282) so as to introduce the present structure and the concept of a “penalty”). The definition of “penalty” in regulation 2(8)(c) of 1982 Regulations and its predecessors, which applied to incapacity benefit and earlier predecessors of contributory employment and support allowance, always clearly included imprisonment. The Secretary of State argues that it is unlikely that it was intended that imprisonment should effectively be excluded from the scope of the definition in the 2008 Regulations, particularly as there is no discernible policy reason for a distinction being drawn between those under 18 and adults to the disadvantage of the former.

17. I broadly agree with the Secretary of State’s submissions. It seems obvious that the definition of “penalty” is intended to include all sentences of imprisonment and those forms of detention for persons under 21 that may be regarded as equivalent. I accept that the relationship between regulation 160(1)(b) and regulation 160(2) (presumably derived from the drafting of regulation 2(2) of the 1982 Regulations) appears unsatisfactory, but other ways of drafting the regulation might have had other disadvantages in terms of clarity and at least the outcome, as construed by the Secretary of State, makes sense in policy terms, which the First-tier Tribunal’s construction does not.

18. The drafting of the definition of “penalty” itself could perhaps have been clearer and may have contributed to the First-tier Tribunal’s error, and there may be a lacuna, to which I draw attention although it is not relevant to these proceedings. Section 89(1)(a) of the 2000 Act, which has now been replaced by section 227(1) of the Sentencing Code, prohibited a court in England and Wales from passing a sentence of imprisonment on a person for an offence if he or she was aged under 21 when convicted of the offence. I would therefore have expected a reference in the definition of “penalty” in the 2008 Regulations to section 96 of the 2000 Act and section 262 of the Sentencing Code, which respectively provided and provide in England and Wales for the detention of a person aged at least 18 but under 21 in a young offenders institution, particularly as there is a reference to the equivalent Scottish provisions (sections 205(3) and 207 of the Criminal Procedure (Scotland) Act 1995). I also observe that, contrary to the submission of the Secretary of State and the view of the First-tier Tribunal, one of the statutory provisions mentioned in the definition of “penalty” does provide for imprisonment. Section 205(1) of the Criminal Procedure (Scotland) Act 1995 provides that the punishment for murder where the perpetrator is aged at least 21 is “imprisonment for life”. Only subsections (2) and (3) provide for detention of those under 21 and so the reference to that section should perhaps be confined to those subsections, although it is not actually wrong to refer to “detention ... under section 205”).

19. In any event, I am satisfied that, reading the definition of “penalty” as a whole and in its context, with due regard to its antecedents, it is clear that any sentence of imprisonment imposed at the end of criminal proceedings is a penalty. The First-tier Tribunal erred in law in deciding otherwise. On the undisputed facts, the claimant was disqualified for receiving contributory employment and support allowance from 3 January 2020 to 21 December 2020, because a sentence of imprisonment was imposed upon him at the end of the relevant criminal proceedings.

20. It follows that, by virtue of regulation 159, the claimant fell to be treated as not having limited capability for work and so lost his entitlement to contributory employment and support allowance. However, there is potentially an issue as to

whether entitlement was lost only from 14 February 2020 (the 43rd day of his imprisonment), which was the view favoured by the First-tier Tribunal in its statement of reasons, or from the first day of that period, as the Secretary of State submits.

21. I incline towards the Secretary of State's construction of regulation 159, which has the considerable virtue of being consistent with a literal reading of that regulation. I do not find the First-tier Tribunal's reason for rejecting that construction – "[w]e do not wait upon some contingent happening to discover if a claimant was entitled to benefit in the past" – compelling in this context, where there must often in any event be a suspension of payments until a "penalty" is imposed because it is only then that it is possible to decide whether the claimant has been disqualified for receiving payments. On the other hand, the alternative construction was accepted by a Tribunal of Commissioners in CIB/3645/2002 at [30] on the materially indistinguishable language of regulation 4(b) of the Social Security (Incapacity Benefit) Regulations 1994 (SI 1994 No 294), although that appears to have been without argument and the point was not essential to the Tribunal of Commissioners' conclusion that disqualification from receiving payments was not a decision as to the claimant's entitlement to incapacity benefit which, as the Tribunal of Commissioners held, was in any event clear from the language of section 113 of the Social Security Contributions and Benefits Act 1992. (The point was not raised in the subsequent appeal to the Court of Appeal (*Campbell v Secretary of State for Work and Pensions* [2005] EWCA Civ 989)).

22. It is not strictly necessary to resolve this issue in this case, because it can make no practical difference to the claimant which construction of regulation 159 is accepted. Even on the First-tier Tribunal's construction, he was still disqualified for receiving payments from 3 January 2020 and he was still treated as not having limited capability for work from 14 February 2020, so that he lost his underlying entitlement to contributory employment and support allowance for the last ten months of his imprisonment which, importantly (see paragraph 29 below), was a period of more than twelve weeks. In all the circumstances, I prefer not to resolve this issue of law in this case. It is sufficient that I decide that the claimant is to be treated as not having had limited capability for work from either 3 January 2020 or 14 February 2020 to 21 December 2020 and that, therefore, he was not entitled to contributory employment and support allowance from either 3 January 2020 or 14 February 2020 to 21 December 2020.

Reinstatement

23. The claimant's original reason for appealing to the First-tier Tribunal was to obtain the reinstatement of payments of contributory employment and support allowance. That issue did not need to be considered by the First-tier Tribunal, because it decided that the claimant had never lost his right to payments, but it arises again now that I have decided that the First-tier Tribunal erred in so deciding. Although this issue has not been addressed by the Secretary of State on this appeal, it is clear – even if partly only by inference – from her submission to the First-tier Tribunal what her position was then and I have no reason to think it is any different now.

24. She effectively argued that, because the claimant had lost his underlying entitlement to contributory employment and support allowance while he was in prison, payments could not be reinstated unless he was entitled to employment and

support allowance after his release, and any question of such entitlement had to be determined in a new claim which would be for “new-style” employment and support allowance. One inference to be drawn was that, if she was right that the claimant had lost his entitlement to employment and support allowance, the First-tier Tribunal had no jurisdiction, when deciding the appeal before it against her decision of 18 January 2021, to consider the issue of his entitlement after his release. On the other hand, she had not been able to, or she considered that it was not appropriate to, make a formal decision on the purported new claim made by the claimant on 31 December 2020 until she had made her decision of 18 January 2021 as to the claimant’s entitlement to employment and support allowance under his previous award and any appeal against that decision had been determined.

25. Had the Secretary of State made her decision while the claimant was still in prison, but after he had been sentenced, I would accept her argument. Such a decision would have terminated the former award by way of supersession on the ground that there has been a change of circumstances that had the effect that the claimant was to be treated as having ceased to have limited capability for work and so lost his entitlement to employment and support allowance. Following such a termination of his award, it would indeed have been necessary for the claimant to make a new claim upon his release if he was to regain entitlement and therefore his right to receive payments, and his entitlement would then have been determined in that claim. The making of a claim is generally a condition of entitlement to employment and support allowance (see section 1(1) and (4)(ac) of the Social Security Administration Act 1992).

26. I am not sure why the Secretary of State delayed making her decision until the claimant had been released. It may simply have been because she was relying on the claimant to provide information as to the result of the criminal proceedings and he did not do so until he was released, in which case the suspension was permissible under regulation 16 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991) but it need not have been for as long. The length of the delay does not appear to have been either required or permitted by regulation 161 of the 2008 Regulations (which is clearly derived from regulation 3 of the 1982 Regulations). A suspension under that provision generally lasts until the end of a claimant’s imprisonment or detention if the claimant is not disqualified for receiving payment. However, once the claimant in this case had been sentenced, it could be determined that he was not “excepted from the operation of section 18(4)(b) of the Act by virtue of the provisions of regulation 160(1), (4) or (6)”, so that the need for any suspension, and the power to maintain a suspension under regulation 161, came to an end and it could be decided that the claimant was disqualified for receiving payments. Once it became clear whether the period of imprisonment would last, or had lasted, for more than six weeks – which, in the present case, was obvious as soon as the claimant was sentenced – it could have been decided whether he also lost any underlying entitlement to contributory employment and support allowance.

27. In any event, because the claimant had been released by the time the decision was made in this case, it cannot be correct to say that he had to make a new claim in order to have his current entitlement determined. He had a subsisting award, albeit that payments under it were suspended, and the award could be terminated only on revision or supersession (under section 9 or 10 of the Social Security Act 1998 and regulation 3 or 6 of the 1999 Regulations). A decision that the award should be superseded because the claimant had not been entitled to contributory employment

and support allowance during a period that had ended before the supersession decision was made cannot justify a decision that he had no entitlement during a later period or at the date of the decision merely because he had not made a new claim. A person who has a current award of a benefit cannot be expected to, and is neither obliged nor entitled to, make a new claim for the same benefit, even if payments have been suspended. A supersession decision must therefore determine entitlement up to the date of the decision itself without a new claim having been made.

28. Thus, in the present case, the Secretary of State erred in not determining within her supersession decision the claimant's entitlement to contributory employment and support allowance between 22 December 2020 and the date of her decision. This must now be remedied save to the extent that that has already been done. It follows that the new claim for employment and support allowance, purportedly made on 31 December 2020, was both unnecessary and impermissible, and it should be ignored.

29. It may be that this error will prove to be academic, because it seems doubtful that the claimant satisfied both of the contribution conditions in Part 1 of Schedule 1 to the 2007 Act following his release. The relevant tax years in respect of which contributions had to have been paid or credited would, as I understand it, have changed as a result of one period of limited capability for work having come to an end and another one having started more than 12 weeks later. (Under regulation 145 of the 2008 Regulations, periods of limited capability for work that are separated by not more than 12 weeks are linked and treated as a single period.) Those tax years appear to be "the last two complete tax years before the beginning of the relevant benefit year", which is "the benefit year which includes the beginning of the period of limited capability for work which includes the relevant benefit week". The "benefit year" (as defined in section 21(6) of the Social Security Contributions and Benefits Act 1992 – see paragraph 3(1)(a) of Schedule 1 to the 2007 Act) is more or less the same as a calendar year, save that it starts on the first Sunday of the calendar year. The "relevant benefit week" is "the week in relation to which the question of entitlement to an employment and support allowance is being considered". Because it appears that a new period of limited capability of work would have started when the claimant was released from prison, it appears that the relevant tax years would have been 2017-18 and 2018-19, while the claimant was in Romania, and so it seems unlikely that he would have actually paid sufficient National Insurance contributions in either of them so as to satisfy the first contribution condition. This appears to have been what the Secretary of State thought, although she did not make a formal decision. However, that contribution condition is relaxed in certain circumstances (see regulation 8 of the 2008 Regulations), and I have not explored whether any such relaxation might be relevant here.

30. There is also a further point. I am not aware of any reason why the subsisting award of "old-style" employment and support allowance should have been "converted" to an award of "new-style" employment and support allowance before 18 January 2021. If it remained "old-style", the Secretary of State further erred in not considering the claimant's possible entitlement to income-related employment and support allowance if he was not entitled to the contributory allowance (see my decision in *LH v SSWP (ESA) [2014] UKUT 480 (AAC)*; [2015] AACR 14). That may again be academic as regards the period of the claimant's imprisonment (as I suspect that his entitlement then was nil).

31. However, it may well not be academic as regards the period between the claimant's release on 21 December 2020 and the date of the Secretary of State's supersession decision, 18 January 2021, which was also the date from which universal credit was awarded. The fact that the claimant qualified for universal credit from the latter date suggests that he might have satisfied the conditions for income-related employment and support allowance immediately following his release, four weeks earlier.

32. I do not consider that I am in a position to determine any question of the claimant's entitlement to employment and support allowance that has not already been decided by the Secretary of State, without giving the parties an opportunity to comment and provide further information, and there is no point in remitting such questions to the First-tier Tribunal without similarly requiring the Secretary of State to make a further submission as to what decision should be made. In these circumstances, the simplest and most proportionate approach for me to take – for the parties as well as for the Upper Tribunal and the First-tier Tribunal – is to leave the making of any outstanding decision to the Secretary of State. If the claimant is dissatisfied with the decision and considers it to be wrong, he will have a right to apply for revision ("mandatory reconsideration"), and then a fresh right of appeal to the First-tier Tribunal against the decision if he is still dissatisfied with it.

Disposal

33. For these reasons, I allow the Secretary of State's appeal, but I am also satisfied that the Secretary of State's original decision was defective. I set aside the decision of the First-tier Tribunal, and substitute the decision set out above.

Mark Rowland
Deputy Judge of the Upper Tribunal
Authorised for issue on 26 May 2023