Secretary of State for Work and Pensions v AD (UC)
[2023] UKUT 272 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2023-000542-USTA**
ADMINISTRATIVE APPEALS CHAMBER **UA-2023-000543-USTA**

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

Between:

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant

- v –

AD

Respondent

Before: Upper Tribunal Judge Eleanor Grey KC

Decision Date: 20 October 2023
Decided on consideration of the papers.

Representation:
Appellant: Mr S. O'Regan (DWP).
Respondent: In Person

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 27 October 2022 under numbers **SC173/22/00147 and SC173/22/00174** 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:

The appeals brought by Ms D against the Secretary of State for Work and Pensions' decision of (i) 20 November 2021 (the entitlement decision) and (ii) 31 December 2021 (the overpayment decision) are dismissed.

REASONS FOR DECISION

Background to the Appeal

1. The Respondent to this Appeal, Ms D, is a student. She brought an appeal to the First-tier Tribunal ("the F-tT") against two decisions of the Secretary of State for Work and Pensions, in relation to her awards of Universal Credit ("UC"). The first appeal was against an entitlement decision; the second was in relation to the overpayment decision that followed, whereby the Secretary of State decided that the sum of £764.30p was recoverable from her.

2. The facts were set out in the Secretary of State's Submissions to the F-tT and were essentially not in dispute. Ms D and her partner made a claim for UC from 25 February 2020. In October 2021, Ms D explained that she was starting a full-time course and had received a student loan in the sum of £12645.00. It was a maintenance loan, but she needed to pay £9250 for her course fees in that academic year and had done so. Because she had two previous years of study as a student (in 2008 and 2009) she was not eligible for a tuition fee loan for each of the three years of her course; she was restricted to a further two full years of tuition fees funding only. Pages 6 and 11 of the F-tT bundle contains the Student Finance England decision, which confirms that the payment to her was a Maintenance Loan.

3. On 20 November 2021, a decision-maker acting on behalf of the Secretary of State assessed the impact of the student loan of £12,645 and decided that it resulted in a student income of £1295 per assessment period; this would affect her entitlement to UC over the period from 25 September 2021 to 24 June 2022. This was the entitlement decision that is now under appeal. On 31 December 2021, the decision-maker reached a further decision, deciding that over the assessment period from 25 September 2021 – 24 October 2021, there had been a failure to deduct the calculated Student Income (£1295) from her UC award and that as a result there had been an overpayment of £764.30, which was recoverable from her. This was the "overpayment decision".

4. After mandatory reconsideration confirmed these decisions, Ms D appealed to the F-tT. On 27 October 2022 the First-tier Tribunal (F-tT) heard appeals against the entitlement and overpayment decisions. It allowed both appeals for reasons explained in a single statement of reasons of 10 February 2023. The Secretary of State ("the Appellant") now appeals, with permission granted by Upper Tribunal Judge Hemingway on 22 May 2023.

The Issues in the Appeal

5. The appeal concerns a single point, on the status of the loan made to the applicant by Student Finance England ("SFE") for the purposes of the rules for the calculation of income made under the Universal Credit Regulations 2013 ("the Regulations"). The Secretary of State's submissions refer to Regulation 68 of the Regulations. This provides, so far as material:

> *"(1) …..*
> *(2) Where a person has a student loan (or a postgraduate loan), their student income for any assessment period referred to in paragraph (1) is to be based on the amount of that loan.*
> *……*

> *(4) Where paragraph (2) does not apply, the person's student income for any assessment period in which they are treated as having that income is to be based on the amount of their grant.*
>
> *(7) In this regulation and regulations 69 to 71—*
>
> *"grant" means any kind of educational grant or award, excluding a student loan or a payment made under a scheme to enable persons under the age of 21 to complete courses of education or training that are not advanced education;*
>
> *"student loan" means a loan towards a student's maintenance pursuant to any regulations made under section 22 of the Teaching and Higher Education Act 1998…."*.

6. The Secretary of State also points to Regulation 69(1):

> *"(1) Where, in accordance with regulation 68(2), a person's student income is to be based on the amount of a student loan for a year, the amount to be taken into account is the maximum student loan (including any increases for additional weeks) that the person would be able to acquire in respect of that year by taking reasonable steps to do so".*

7. I should also set out the relevant part of Regulation 70, which was referred to by the F-tT:

> *"Where, in accordance with regulation 68(4), a person's student income is to be based on the amount of a grant, the amount to be taken into account is the whole of the grant excluding any payment —*
>
> *(a) intended to meet tuition fees or examination fees;…."*

8. The Secretary of State submits that it is not in doubt that the loan that the claimant received was a maintenance loan within the meaning of Regulation 68(7). It was labelled and identified as such by Student Finance England. I note that in its Decision Notice, the F-tT accepted that the FTE had given this characterisation.

9. However, the F-tT rejected the argument based on Regulations 68 and 69. It held that it should look beyond the names attached to the payments to their reality, and what they were to be used for. This argument is supported by Ms DA in her submissions to the Upper Tribunal. She repeats that £9250 was paid to her university for its fees, and only the remaining £3395 was used as income. The F-tT's decision was based on the reality of her situation; she did not have a disposable income of £12,645. She could not have afforded the fees without using the maintenance loan to pay them.

10. To reach its conclusion, the F-tT relied on Reg. 70, stating:

> *"Turning next to Regulation 70 of the [Regulations] and the calculation of student income, I have had regard as I must to Regulation 70(a). This states that any payments intended to meet tuition fees or examination fees are to be excluded from income for the purposes of income calculation." (para 24).*

11. The Tribunal then went on to note that there was nothing in the legislative provisions or commentary to stipulate that the tuition fees had to be paid directly to the University by SFE; it did not exclude the possibility that fees might be paid directly by Ms D, as here. Nor was it said that a student maintenance loan could not be used to pay fees. The F-tT then held that *"on balance this was an arrangement reached between the appellant and SFE to permit her to undertake this three year course of study by facilitating indirectly the payment of the tuition fees. Awarding a maintenance loan to a student who would otherwise by unable to pay the tuition fees would be futile."* It was a decision based on special circumstances.

Discussion

12. The language used by Regulation 68(2) is clear, requiring assessment of UC entitlement to be based on the "*amount of*" the loan. It applies to a "*student loan*", which is what the applicant received from SFE. The definition of a student loan is based on the assessment of entitlement under the Regulations made under section 22 of the Teaching and Higher Education Act 1998. As might be expected, Section 22 distinguishes between "grants" and "loans". It is an enabling section, authorising detailed regulations; these are the Education (Student Support) Regulations 2011/1986. They make provision for fee loans, "loans for living costs" and maintenance grants. Ms D's maintenance loan was made in accordance with these Regulations.

13. The definitions used in Reg. 68(7), read with these underlying provisions, seem to me to make it clear that the characterisation of the nature and amount of the financial payment made to a student is based on objective criteria relating to the source of the funds and their characterisation under the Student Support Regulations, rather than how each applicant intends to apply or actually uses the funds granted. This interpretation is consistent with the title of the regulation ("Persons *treated as* having student income….", italics added).

14. Even if it might be said that £9250 of the loan should not be characterised as a "loan towards a student's maintenance" as it was not used for that purpose, Regulation 69(1) also bases the assessment of UC on the maximum loan that a student would reasonably be able to acquire (i.e., £12645). If the applicant had only sought a loan of £3395 she would still be assessed for UC as if the loan had been for £12645. The assumption that the loan income of £9250 was available to support her therefore applies whether or not she borrowed in the first place, or, having borrowed it, she applied it towards the tuition fees.

15. The F-tT however relied on Reg. 70 to reach a different conclusion. The requirements of Regulation 68(2) relating to loans stand in contrast to Regulation 70, which, to repeat its contents, provides:-

> *"Where, in accordance with regulation 68(4), a person's student income is to be based on the amount of a grant, the amount to be taken into account is the whole of the grant excluding any payment —*
>
> *(b) intended to meet tuition fees or examination fees;…."* (underlining added).

16. Regulation 68(4), to which this refers, has already been set out above at paragraph 5. It makes provisions about grants, and is clear that it applies only when Regulation 68(2) (covering student loans) is not applicable. So the condition for the application of Regulation 70(a) was not met. In addition, the language of Regulation 70 also makes it plain that it is referring to grants. It therefore seems to me that it was not open to the F-tT to place reliance on Reg 70. The paraphrase of the Regulation at paragraph 24 of the F-tT's Statement of Reasons (see paragraph 10 above) obscures the exact language of Regulation 70 and, as a result, does not acknowledge that it applies to grants and not loans, and only comes into play if there is no loan.

17. As a matter of detail, I note that the Education (Student Support) Regulations 2011/1986 used to make provision for the payment of grants towards tuition fees in certain circumstances; see Part 4 of these Regulations, in force until 25 November 2020, concerning the availability of a grant for fees to "old system students". So it would have been necessary to ensure that the tuition element of a grant made for dual purposes under the Student Support Regulations was catered for in the UC Regulations. Regulation 70(a) achieves this purpose. But these are not the provisions relating to maintenance loans.

18. After looking at Reg. 70, the F-tT went on to note that there was nothing in the legislative provisions or commentary to stipulate that the tuition fees had to be paid directly to the University by SFE; neither excluded the possibility that fees might be paid directly by Ms DA, as here. Nor was it said that a student maintenance loan could not be used to pay fees.

19. I agree with these statements, so far as they go. However, they do not address the UC rules which the UC Regulations lay down about how income is to be calculated. They do not provide a reason to overrule the plain statutory language of Regulation 68(2), coupled with the definition of a student loan at Regulation 68(7).

20. The F-tT then held that *"on balance this was an arrangement reached between the appellant and SFE to permit her to undertake this three year course of study by facilitating indirectly the payment of the tuition fees. Awarding a maintenance loan to a student who would otherwise by unable to pay the tuition fees would be futile."* I have some difficulty with this conclusion, as it seems to me that there was no evidence to support the inference made, about SFE's intentions. SFE awarded the applicant the support to which she was entitled, but there is no evidence – as far as I can see – in the bundle to show that it reached conclusions on how the tuition fees might be paid or the maintenance loan applied. In any event, the SFE's intentions do not affect the characterisation of the money as a maintenance loan (as the F-tT had accepted in its Decision Notice) under the Education (Student Support) Regulations.

Conclusions – Entitlement

21. For all the reasons set out above, I have reached the conclusion that the F-tT erred in law in holding that the payment made to the applicant could be treated as a tuition loan and disregarded for the purpose of assessing her income for UC calculations, and in allowing Ms D's appeal. The decision-maker acting for the Secretary of State was, in law, correct to take into account the full amount of the student loan that had been obtained.

Overpayment Decision

22. The entitlement and overpayment decisions have been treated as dependent on one another. Overpayments may, in law, be recovered even if it is the Secretary of State's decision-makers who have made a mistake. It follows that I must also set the decision to allow the overpayment appeal aside.

Retaking the Decision.

23. Given the conclusions on the law that I have reached, there is no purpose served in remitting this decision back to the F-tT. Rather, the Secretary of State's original decisions on both the entitlement and overpayment decisions must be reinstated, as they follow from the statutory provisions that I have discussed above.

Comments

24. I am very conscious of the fact that this decision will be a great disappointment to Ms DA and of the stress, hardship and obstacles to study that she has described. However, it seems to me that the language of the UC Regulations is clear and does not allow for exceptions based on her specific circumstances, or the consequences that followed from the fact that she had already had two years study in 2008 and 2009 and so was not eligible for a further tuition loan.

Eleanor Grey KC
Judge of the Upper Tribunal
Authorised for issue on 20 October 2023