



**JC -v- SSWP (ESA)
[2024] UKUT 13 (AAC)**

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2023-000926-ESA

Tribunal: First tier Tribunal (Social Entitlement Chamber)

Tribunal venue: Nottingham

Tribunal Case No: SC053/21/00719

Tribunal decision date: 18 August 2022 (decision notice/statement of reasons)

Between:

JC

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge Jones

Decision/Hearing date: N/A

Decided on consideration of the papers on 8 January 2024

Representation:

Appellant: Glenn Brooks, Disability Claims

Respondent: Lauren Foody, on behalf of the Secretary of State

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal (FTT) made on 18 August 2022 under number SC053/21/00719 was made in error of law.

Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set aside the FTT's decision and remake it allowing the Appellant's appeal against the decision of the Respondent dated 10 September 2020 that the Appellant was not entitled to Income Related Employment Support Allowance from 4 September 2020. The Respondent's decision of 10 September 2020 was wrong in law and the Appellant is entitled to the benefit from 4 September 2020 as he had been since 11 November 2019.

REASONS FOR DECISION

1. The Appellant appeals the decision of the First-tier Tribunal ("the FTT") dated 18 August 2022. By that decision the FTT dismissed an appeal against the decision of the Secretary of State ("the Respondent") dated 10 September 2020.

Background

2. On 23 December 2019 the Respondent decided that the Appellant was entitled to Income Related Employment and Support Allowance ('ESA(IR)') from 20/11/2019. The Appellant had previously been in custody from 10/10/2019 until 18/11/2019 but the Respondent accepted he met the criteria for IR ESA when he reclaimed on 20/11/2019.

3. On 3 September 2020 the Appellant was arrested on a civil warrant issued at Walsall County Court on 08/08/2020 and found guilty of contempt of court in relation to an injunction issued by that court in March 2019.
4. Thereafter, the Appellant was admitted to HMP Birmingham on 04/09/2020 until 14/10/2020 pending sentence and from 14/10/2020 until 02/11/2020 under the sentence imposed by the court.
5. Having been released from custody on 02/11/2020, the Appellant subsequently requested that his award of ESA(IR) be reinstated following his release. The Appellant was advised by the Respondent that his award of ESA (IR) could not be reinstated and he would have to make a claim to Universal Credit (UC).
6. The Secretary of State had earlier decided on 10/09/2020 to end the Appellant's entitlement to ESA(IR) from 04/09/2020 on the basis of Regulation 69(2) of the Employment and Support Allowance Regulations 2008 on the basis he was a prisoner – detained in custody pending trial or sentence on conviction or under a sentence imposed by a court.
7. On 21/09/2021 a Mandatory Reconsideration was carried out by the Respondent of the decision made on 10/09/2020 but the decision was not changed.
8. The Appellant lodged an appeal to the FTT on 04/10/2021. The decision of the Respondent was confirmed when the appeal was dismissed by the FTT on 18 August 2022. The FTT provided a notice of decision and statement of reasons for decision ("SOR") dated and issued on 18 August 2022. The FTT judge (District Tribunal Judge Brassil) refused permission to appeal to the Upper Tribunal on 22 June 2023 (issued on 27 June 2023).
9. The Appellant submits that the FTT erred in law in making its decision.

Summary of my decision

10. I allow this appeal for the reasons set out in the Appellant's grounds of appeal dated 5 July 2023 which were drafted by the Appellant's representative, Mr Brooks. In the Respondent's submission dated 13 October 2023, Lauren Foody on behalf of the Secretary State, supported the appeal and consented to the appeal being decided without an oral hearing and the case being remitted to a fresh First-tier Tribunal for decision.
11. The Appellant was informed of the Respondent's support for the appeal and his representative made written submissions dated 23 October 2023. He consented to the appeal being decided without an oral hearing but invited the Upper Tribunal to re-make the decision in the Appellant's favour and award the benefit without remitting the case to the First-tier Tribunal for a re-hearing.
12. For the same reasons that the Appellant and Respondent submit, I am satisfied that the First-tier Tribunal has erred in law in a material manner in making its decision and that its decision should be set aside.

Determining the appeal to the Upper Tribunal on the papers without a hearing

13. I am satisfied that I should proceed to decide this appeal on the papers without any further hearing pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I have taken into account the parties' preferences in making this decision. Neither party requested an oral hearing of the appeal to the Upper Tribunal and consented to me deciding the matter on the papers.
14. In light of the parties' consent, it is not in the interests of justice to hold a hearing of this appeal to the Upper Tribunal. Furthermore, I am not satisfied that I should conduct an oral hearing of the substantive appeal because it is on a point of law only and both parties agree that there has been a material error of law in the FTT's decision. The only dispute between the parties is whether the appeal should be remitted to the FTT to be reheard, as the Respondent

submits, or whether I should remake the decision in his favour, as the Appellant submits.

15. Both parties had an opportunity to present their cases in writing. I have considered all the arguments of the parties in full. The Appellant and Respondent have had a reasonable opportunity to make arguments as to issues of law both in writing and orally. I have fully considered the written evidence and arguments on behalf of the parties in making my decision.
16. In respect of the First-tier Tribunal's decision, I had all the relevant papers and arguments in the bundle before me in order to determine this appeal, the issue was an appeal on a point of law only. A further hearing would not therefore assist in determining issues of law. Further, to hold a hearing would only have caused further delay in a case that is already old (the decision of the First-tier Tribunal under appeal being nearly eighteen months old and the Respondent's original decision being over three years old).
17. Most importantly, the Appellant will understand that I am allowing his appeal which is an outcome in his favour. My holding a further hearing in relation to this appeal before the Upper Tribunal would only cause further delay if I were then to remit the case thereafter for a further hearing before the First-tier.
18. As above, I am satisfied that it is in the interests of justice to proceed to determine the appeal without a hearing and issue a decision to the parties. Therefore, I am satisfied it is just and fair and in accordance with the overriding objective not to hold an oral hearing of this appeal. I therefore proceed to decide the appeal on the papers pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Reasons for allowing the appeal

19. The FTT at paragraph 8 of the Decision Notice and statement of reasons dated 18 August 2022 stated that it applied the definition of prisoner given in regulation 69(2) of the Employment and Support Allowance regulations 2008.
20. For the purpose of Regulation 69(2), a prisoner means a person who is detained in custody pending trial or sentence on conviction or under a sentence imposed by a court.
21. The Appellant's representative, Mr Brooks, argues that the FTT used the wrong legislation to establish the meaning of 'prisoner' in relation to the Appellant's entitlement to ESA (IR).
22. Mr Brooks relied on the fact that the Appellant was arrested on a civil warrant issued at a County Court.
23. Section 113(1)(b) of the Social Security Contribution and Benefits Act states that benefits under Parts II to V of that Act shall not be payable in respect of any person for any period during which the person:

'is undergoing imprisonment or detention in legal custody'.
24. There is authority for reading into s.113(1)(b) of the Act that a person shall not be disqualified under these provisions unless the court the imposed imprisonment was exercising a criminal jurisdiction – see the decision of the Commissioner in R(S) 8/79:

"imprisonment in the section means imprisonment imposed by a court exercising criminal jurisdiction."
25. Given the Appellant was arrested on a civil warrant issued by a civil court, Mr Brooks submits that the FTT erred in law in interpreting Regulation 69(2) of the 2008 Regulations and construing the meaning of 'prisoner' and overlooked the relevant case law.

26. The Respondent agrees.
27. I allow the Appellant's appeal and set aside the FTT's decision for the same reasons that the parties agree upon.
28. The FTT in its decision applied the definition of 'prisoner' provided by regulation 69(2) of the Employment and Support Allowance Regulations 2008 which is set out below:

"prisoner" means a person who—

(a) is detained in custody pending trial or sentence on conviction or under a sentence imposed by a court; or

(b) is on temporary release in accordance with the provisions of the Prison Act 1952 or the Prisons (Scotland) Act 1989,

other than a person who is detained in hospital under the provisions of the Mental Health Act 1983 or, in Scotland, under the provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995

29. I am satisfied that the definition of a prisoner in section 113(1)(b) of the Act and Regulation 69(2) of the Regulations should be interpreted consistently. The wording of Regulation 69(2) ('detained in custody pending trial or sentence on conviction or under a sentence imposed by a court') is potentially narrower than that of the section 113(1)(b) of the Act ('is undergoing imprisonment or detention in legal custody') yet the section has been given a restrictive interpretation.
30. I am satisfied Regulation 69(2) should be interpreted as providing a restricted definition of a prisoner as being one detained or sentenced for a criminal offence or detained or sentenced to imprisonment by a criminal court rather

than including a finding of guilt and sentence by a civil court in respect of a civil contempt of court (in this case, disobedience of a court order).

31. Even if the contempt of court also attracts a sentence of imprisonment, and on a broad view could fall within 'or under a sentence imposed by a court', given the authority in relation to the Act, I consider that the second phrase in Regulation 69(2): 'other sentence imposed by a court' should be given a narrow interpretation to mean sentences of imprisonment imposed for a criminal offence or in a criminal jurisdiction or by a criminal court.
32. Reading Regulation 69(2) as a whole, the first phrase ('detained in custody pending trial or sentence on conviction') covers detention pending trial, conviction or sentence in the criminal courts and the second phrase ('or under a sentence imposed by a court') covers the sentence that the criminal court may thereafter impose. There may also be other or separate sentences of imprisonment that a criminal court might impose that do not directly follow criminal conviction but that are imposed thereafter (for example, a default sentence for non-payment of a confiscation order which is imposed following conviction).
33. I do not consider that the phrase 'or under a sentence imposed by a court' should be given a broader meaning to capture all sentences of imprisonment including those imposed by a civil court such as for a civil contempt of court. The Respondent does not argue for such an interpretation and there are public policy reasons to distinguish imprisonment imposed by the criminal courts from imprisonment imposed by the civil courts when assessing entitlement to benefits. I therefore consider that the authority in R(S) 08/79 should be applied and a consistent interpretation be given to the 2008 Regulations.
34. The Appellant in this case was arrested on a civil warrant, issued by a Civil Court (para 5, Page 1, Addition H, FtT bundle). The authority in R(S) 08/79 explained that claimants who are imprisoned because of civil proceedings are not disqualified from Social Security benefits. Commissioner Monroe held in this case that:

1. the claimant's imprisonment had nothing to do with a criminal offence, but was for a civil form of contempt of Court;

2. the claimant should not be disqualified for receiving invalidity benefit for the period of his imprisonment under section 82(5) (b) of the Social Security Act 1975, as the Court was not exercising a criminal jurisdiction;

3.. the decision awarding invalidity benefit was properly reviewed but should not have been revised.

35. Commissioner Monroe in para 8 further decided that:

'...imprisonment in the section means only imprisonment imposed by a court exercising criminal jurisdiction...'

36. Applying a consistent interpretation to that set out by R(S) 08/79 in relation to the Act to the definition of a prisoner under the Regulations, the Appellant was not a prisoner under reg 69(2) of the Employment and Support Allowance Regulations 2008.

37. Therefore, the Appellant's entitlement to ESA (IR) should not have been disallowed on the Appellant's admittance to prison on 4 September 2020 and his entitlement should have continued.

Conclusion

38. I am therefore satisfied that the First-tier Tribunal erred in law in a material manner in the decision it came to on 18 August 2022.

39. I therefore allow the appeal and set aside the First-tier Tribunal's decision.

Disposal - Remaking or remittal

40. In the Appellant's submissions dated 23 October 2023, his representative makes no comments on the substance on the Respondent's submissions supporting the appeal except he invites me to re-make the decision in the Appellant's favour. The Respondent has given no reasons why it submits that the matter needs to be remitted to the FTT for a further hearing before a fresh tribunal.

41. There appears to be no other issue in dispute in the proceedings or any factual issue or evidential issue that needs to be considered. It appears to be conceded that the Appellant would otherwise be entitled to the benefit but for his imprisonment by the civil court, as he had previously been from November 2019. I am therefore satisfied that I can justly and fairly remake the decision in his favour overturning the Respondent's decision of 10 September 2020 and awarding him the benefit from 4 September 2020. This avoids any further delay in a case which is already old.

JUDGE RUPERT JONES

Judge of the Upper Tribunal

Authorised for issue on 8 January 2024