

**IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

JR/1249/2018

IN JUDICIAL REVIEW PROCEEDINGS

BETWEEN:

MR DAVID SMITH

Claimant

and

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Defendant

ORDER

UPON reading the Claimant's claim form and evidence;

AND UPON the parties indicating their consent to the terms of this order and requesting that the Upper Tribunal dispose of these proceedings without a hearing pursuant to rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("**the Rules**");

AND UPON reading the draft Consent Order agreed between the parties and the Secretary of State's evidence, and Mr Matthew Alderton's letter of 31 July, received in the Upper Tribunal on 5 August, and in particular the following passages:

"The Secretary of State therefore now accepts that prior to the Upper Tribunal's decision in LH in October 2014, the Department was aware that: (i) Employment Support Allowance ("ESA") is one benefit with two elements; (ii) no separate claim is required for entitlement to one or other of the elements; (iii) the Secretary of State was obliged to consider a person's entitlement to ESA(IR) from the date of conversion and in order to do so would be obliged to seek information about that person's income, that (iv) the failure by the Secretary of State to seek such financial information and thus consider Mr Smith's entitlement to ESA(IR) in circumstances where he was in the support group and thus, subject to that financial information,

would be entitled to a higher rate of ESA(IR) from the date of conversion (by virtue of the inclusion of EDP in his applicable amount) was an official error, such that the decision in his case fell to be revised back to the date of conversion.

Accordingly, the Secretary of State accepts that her decision made on 25 January 2018 in respect of Mr Smith did not "fall to be made... in accordance with" LH so as to come within the scope of s.27 of the Social Security Act 1998."

"The Secretary of State accepts that the decision of the Upper Tribunal in SK v Secretary of State for Work and Pensions CSE/33/2017 (Upper Tribunal, 18 January 2018) contained an error of law for the reasons contained in the signed consent order in these proceedings. Accordingly, the Secretary of State will seek to agree an appropriate order to this effect with the Appellant for the consideration of the Court of Session."

AND UPON the Defendant indicating that she will within 14 days of the date of this order revise on the grounds of official error her decision dated 25 January 2018 (by which she superseded her original decision effective from 14 September 2012 in respect of the Claimant's conversion from incapacity benefit to employment and support allowance (ESA) and awarded him the income-related element with effect from 21 October 2014 only) and replace it with a decision revising her original decision for official error and including the income-related element of ESA from the date of conversion. (For the avoidance of doubt, to avoid a duplication of payment, it will be necessary to offset the income-related element already paid under the supersession decision against arrears due under the conversion decision as revised);

AND UPON the three-judge panel of the Upper Tribunal being satisfied, having regard to the agreed summary reasons for disposal without a hearing set out in the schedule to this order, that it is appropriate to make an order in these terms pursuant to rule 39 of the Rules:

IT IS HEREBY ORDERED THAT:

1. Permission to apply for judicial review is granted, and the claim is allowed on ground 1. In the circumstances, ground 2 does not arise.
2. It is DECLARED that:
 - a. the decision effective from 14 September 2012 was made pursuant to an official error within the meaning of Reg 1 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999; and
 - b. *SK v Secretary of State for Work and Pensions CSE/33/2017* (Upper Tribunal, 18 January 2018) is not to be followed, insofar as it held to the contrary at paragraphs 9-17.
3. The Defendant shall pay the Claimant's costs of the claim on the standard basis, to be assessed if not agreed.
4. There shall be a detailed assessment of the Claimant's publicly funded costs.

Signed (on the original) Christopher Ward
Judge of the Upper Tribunal

Stewart Wright
Judge of the Upper Tribunal

Paula Gray
Judge of the Upper Tribunal

Dated 10 August 2018

SCHEDULE

Summary reasons for disposal without a hearing

1. The Claimant's award of incapacity benefit was, by a decision of the Defendant effective from 14 September 2012 ('the 2012 decision'), converted to an award of employment and support allowance ('ESA'). The Claimant was awarded the contributory element of ESA under s 1(2)(a) Welfare Reform Act 2007, but not the income-related element under s 1(2)(b) of the 2007 Act.
2. The Claimant asked the Defendant to revise the 2012 decision, on the ground of official error, on 15 December 2017.
3. On 25 January 2018 the Defendant refused to revise the 2012 decision, and instead superseded it, adding entitlement based on the income-related element of ESA from 21 October 2014. The Defendant's reasoning was as follows:
 - a. the 2012 decision was erroneous in point of law because the Defendant ought to have determined the Claimant's entitlement to both parts of ESA;
 - b. the 2012 decision had been shown to have been an error by virtue of a subsequent decision of the Upper Tribunal; it now fell to be made in accordance with that subsequent decision;
 - c. in respect of a decision 'shown to have been an error by virtue of a subsequent decision of the Upper Tribunal', the Defendant has no power to revise under Reg 3(5) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999

for official error, because of the Reg 1 definition in the 1999 Regulations of 'official error';

- d. in respect of a decision erroneous in point of law, which 'falls to be made... in accordance with' a subsequent decision of the Upper Tribunal, s 27 of the 1998 Act applies and the appropriate outcome is therefore supersession of the original decision under Reg 6(2)(b) and Reg 7(6) of the 1999 Regulations, from the date of the relevant 'subsequent decision'.

4. Step (b) in the above reasoning is agreed now to have been wrong in the circumstances of this case. Subsequent to the 2012 decision, there was an Upper Tribunal judgment, decided on 21 October 2014, which concerned the issues in (a) above (in the context of a new claim for ESA as opposed to a conversion case): *LH v Secretary of State for Work and Pensions* [2014] UKUT 480 (AAC), [2015] AACR 14. However, it is now agreed that *LH* did not 'show' the 2012 decision to have been erroneous because it was already clear prior to *LH* that the 2012 decision was erroneous in point of law. Thus the Defendant's decision in 2018 did not 'fall to be made... in accordance with' *LH*.
5. The decision in *SK v Secretary of State for Work and Pensions* CSE/33/2017 (Upper Tribunal, 18 January 2018) which determined (at paragraphs 9-17) that *LH* was a relevant determination pursuant to section 27 of the 1998 Act and accordingly made findings as to the consequential application of Regs 3 and 6-7 of the 1999 Regulations, should accordingly not be followed.