IN THE UPPER TRIBUNAL **Appeal No.** CJSA/2077/2013
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

MB

Appellant

- v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 15 March 2021
Decided on consideration of the papers

Representation:
Appellant: The appellant represented himself.
Respondent: Decision Making and Appeals Section, Leeds.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

1. This appeal is one of a number of appeals which were stayed to await the outcome of Parliament addressing the declaration of incompatibility made by the High Court and then upheld by the Court of Appeal in *Reilly (No 2) and TJ and others* [2016] EWCA Civ 413; [2017] QB 657; [2017] AACR 14. I will not set out here the legal challenges and legislative changes which predated *Reilly (No.2)*. Their effect, however, means that this appeal by the claimant against the First-tier Tribunal's decision of 20 December of 2012 ("the tribunal") concerning (non)payability of his jobseeker's allowance for the last two weeks of February 2012 can only now be determined.

2. The Secretary of State's decision under appeal to the tribunal was dated 13 February 2012 and was to the effect that the appellant's jobseeker's allowance ("JSA") was not payable from 16 February 2012 to 29 February 2012 because the appellant had failed, without good cause, to participate in the 'Work Programme'

under the Employment, Skills and Enterprise Scheme. Importantly for present purposes, this decision was made under the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 ("the 2011 Regs"). The tribunal upheld the decision that the appellant had not shown good cause.

3. After many stays in the proceedings, I gave the appellant permission to appeal against the tribunal's decision on 13 December 2017. The proceedings were then stayed again to await the Remedial Order in Council under section 10 of the Human Rights Act 1998.

4. The Remedial Order was eventually made on 2 October 2020 and came into effect the next day. The Secretary of State then contacted the Upper Tribunal (AAC) to suggest how the stayed appeals, including this one, should be progressed. As I was concerned that what the Secretary of State was suggesting was not correct, on 24 November 2020 I issued directions on this appeal. I set out the detail of the material part of those directions. The Secretary of State subsequently agreed with them.

> "1. This appeal……has been stayed at the Upper Tribunal for a considerable period of time. It was stayed in order to await the making of a Remedial Order (in Council) pursuant to section 10 of the Human Rights Act 1998 following the declaration of incompatibility affirmed by Court of Appeal in *Reilly (No 2) and TJ and others* [2016] EWCA Civ 413; [2016] 3 WLR 1641 in respect of the Jobseekers (Back to Work Schemes) Act 2013.
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> 2. The Remedial Order was made on 2 October 2020 and came into effect the next day (SI No. 1085 of 2020). I deal below with its relevant terms. For present purposes, however, I simply emphasise that it appears accepted that the substantive changes brought into effect by that Remedial Order should lead to a decision being made in [the appellant's] favour in his challenge to the First-tier Tribunal. The point with which these directions is concerned is whether it is for the Secretary of State, rather than the Upper Tribunal, to make that decision under the Remedial Order.
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> 3. The Secretary of State drew to the Upper Tribunal's attention that the Remedial Order had come into effect in a letter to the Chamber President of the Upper Tribunal (AAC) - Mrs Justice Farbey – dated 23 October 2020. The terms of that letter, insofar as is relevant, are as follows.
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> > "**Upper Tier Tribunal appeals stayed following the Court of Appeal's decision in *Reilly and Hewstone and Jeffrey and Bevan***
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> > **Background**
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> > The Court of Appeal in *R (Reilly & Hewstone) v Secretary of State for Work & Pensions; Jeffrey and Others v Secretary of State for Work & Pensions* [2016] EWCA Civ 413 ruled that the Jobseekers (Back to Work Schemes) Act 2013 ("the 2013 Act") is incompatible with article 6 (1) (the right to a fair hearing) of the European Convention on Human Rights.
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> > The Declaration of Incompatibility affects a limited group of individuals: Jobseeker's Allowance ("JSA") claimants who had live appeals against a sanction decision made under the Jobseeker's Allowance (Employment,

Skills and Enterprise Schemes) Regulations 2011 ("the ESE Regulations") on 26 March 2013 (the date the 2013 Act came into force).

The Declaration of Incompatibility does not have any impact on the continuing validity of the 2013 Act, which the Court of Appeal found effectively validates the ESE Regulations and all notifications and sanctions decisions made under the ESE Regulations.

The Government's response

The Secretary of State decided to use a Remedial Order (under Section 10 of the Human Rights Act 1998) to amend the 2013 Act and remedy the declaration of incompatibility.

The Remedial Order

The Department first laid a draft proposal for a Remedial Order in Parliament between 28th June 2018. During this first 60 day laying period, the Joint Committee on Human Rights (JCHR) also sought stakeholder views and published its report on the Order on 31st October 2018. As the Upper Tribunal will be aware, consideration was also given to the question of whether a small number of claimants who appealed a sanction decision under the Mandatory Work Activity Regulations 2011 ("the MWA Regulations"), would also benefit from the Remedial Order.

Following careful consideration of all representations made, the Secretary of State decided to revise the proposed draft Remedial Order to include those claimants who had a live MWA appeal in the Tribunal system when the 2013 Act came into force.

The revised draft Remedial Order was laid in Parliament on 5th September 2019. The JCHR scrutinised the revised draft Remedial Order and published its report on 13th March 2020.

As no substantial concerns were raised, the draft Remedial Order was debated in the House of Commons on 14th July 2020 and, following a recommendation that it should be approved, was debated in the House of Lords on 3rd September 2020, where it was also supported.

The Remedial Order was made on 2nd October 2020 and came into force on 3rd October 2020.

The effect of the Remedial Order

The Remedial Order amends the 2013 Act to remedy the incompatibility of the 2013 Act with Article 6(1) of the European Convention on Human Rights.

In the case of appeals against a sanction imposed on a JSA claimant for a failure to comply with the ESE Regulations which were pending as at 26 March 2013, the Secretary of State now has a power to revise the relevant sanction decision.

In the case of appeals against a sanction imposed on a JSA claimant for a failure to comply with the MWA Regulations, where the claimant received a notification that was validated by the 2013 Act, which were pending at 26 March 2013, the Secretary of State now has a power to revise the relevant sanction decision.

Where the Secretary of State does so, it must be done on the basis that the ESE & MWA Regulations were invalid or the notices sent to JSA claimants advising them that they were required to take part in these work

programmes were inadequate. An appeal against a sanction which is revised will lapse as a result of section 9(6) of the Social Security Act 1998.

The Remedial Order also provides that where a tribunal has already heard an appeal against a sanction and upheld the sanction (in whole or in part) for the Secretary of State to supersede the tribunal's decision, on the same basis. This power of supersession is similar to the existing power in section 10 of the Social Security Act 1998, and a decision made under this power is treated for all purposes as if it had been made under section 10 of the Social Security Act 1998.

Where the Secretary of State does not revise the sanction or supersede the tribunal's decision, or where a claimant appeals that revision or supersession, a court or tribunal is able to overturn the sanction on the same basis. That is on the basis that the ESE & MWA Regulations were invalid or the notices sent to JSA claimants advising them that they were required to take part in these programmes were inadequate. In any event, the result is that the appeal should be decided in the claimant's favour.

The effect on appeals in the Upper Tribunal

At the Annex of this letter there is a list of current appeals in the Upper Tribunal which are against a sanction imposed for a failure to comply with the ESE Regulations. I now invite the Upper Tribunal to use the powers in section 1A of the Remedial Order and overturn the original sanction decision in each case. Once those decisions have been made, and the relevant decision notices have been received by the Department, the sanctions in each case will be repaid in full.

According to our records there are no appeals caught under the MWA Regulations in the Upper Tribunal system.

As the Upper Tribunal is aware, the Department continues to deal with an increased number of benefit claims, as a result of the ongoing Covid-19 crisis. In consequence of this resourcing is under pressure and many staff have been redeployed to frontline processing areas to manage this demand, however we have endeavoured to ensure that specialist teams remain in place to process cases caught by the Remedial Order. I anticipate that the Upper Tribunal cases in the annexes of this letter will be re-paid within 1 month of receipt of the decision notice. The Department is content for appellants to be informed of its proposed handling of these appeals."

(the underlining is mine and has been added for emphasis)

4. The important effect of the Remedial Order on these appeals is to insert a section 1A into the Jobseekers (Back to Work Schemes) Act 2013 ("the 2013 Act). That section 1A provides as follows:

"**1A Certain appeals against penalties under the 2011 Regulations**

(1) This section applies where—

(a)the Secretary of State has made a decision imposing on a claimant for jobseeker's allowance a penalty for failing to comply with the 2011 Regulations ("the penalty decision"), and

(b)the claimant lodged an appeal against the penalty decision before 26 March 2013, and the appeal had not been finally determined, abandoned or withdrawn before 26 March 2013.

(2) If the Secretary of State revises the penalty decision under section 9 of the Social Security Act 1998, in making the revised decision, the Secretary of State must disregard subsections (1) to (6) of section 1 of this Act and subsection (12) of section 1 so far as it relates to those subsections.

(3) Subsection (4) applies where a tribunal has decided the appeal before this section comes into force.

(4) In a case where the tribunal decided to uphold the penalty decision (in whole or in part), the Secretary of State must make a decision superseding the tribunal's decision.

(5) In making a superseding decision under subsection (4), the Secretary of State must disregard subsections (1) to (6) of section 1 and subsection (12) of section 1 so far as it relates to those subsections.

(6) Section 10(1)(b) of the Social Security Act 1998 (power of the Secretary of State to supersede a tribunal decision) does not apply in a case where subsection (4) applies.

(7) A superseding decision made under subsection (4) is to be treated for all purposes as if it were a superseding decision made under section 10 of the Social Security Act 1998.

(8) Subsection (9) applies where, after this section has come into force, a court or tribunal is considering—

(a)the appeal mentioned in subsection (1)(b),

(b)an appeal against a revised decision made under section 9 of the Social Security Act 1998 by virtue of subsection (2), or

(c)an appeal against a superseding decision made under subsection (4).

(9) In considering the appeal, the court or tribunal must disregard subsections (1) to (6) of section 1 and subsection (12) of section 1 so far as it relates to those subsections.

(10) A revised decision made by virtue of subsection (2) and a superseding decision made under subsection (4) are to be treated as having effect from the date on which the penalty decision had effect (other than for the purposes of any rule as to the time allowed for bringing an appeal).

(11) In this section—

"the 2011 Regulations" has the same meaning as in section 1;

"court" means the Court of Appeal, the Court of Session or the Supreme Court;

"tribunal" means the First-tier Tribunal or the Upper Tribunal."

5. The difficulty I have at present, and the point the directions below require the Secretary of State to address, is why the **duty** under section 1A(4) does not apply to the Secretary of State and require her to supersede the First-tier Tribunal decision, dated 20 December 2012, [the appellant] has sought to further appeal? On the face of it, section 1A(4) places a legal requirement on the Secretary of State to supersede the First-tier Tribunal's decision here.

What is it that absolves the Secretary of State from meeting this requirement, and which she has seemingly accurately described in the passage I have underlined in her letter above? The mere fact that a decision of the First-tier Tribunal is under appeal to the Upper Tribunal does not affect its current status as a decision of the First-tier Tribunal. It would only lose that status *if* set aside by the Upper Tribunal (per section 12(2)(a) Tribunals, Courts and Enforcement Act 2007 and section 17 of the Social Security Act 1998), but that has yet to occur. It therefore, as far as I can see at present, falls squarely within section 1A(4) of the 2013 Act.

6. I should add that in any event it is not clear to me that anything in section 1A of the 2013 Act empowers the Upper Tribunal to change the First-tier Tribunal decision under appeal here on the basis that, in effect, the 2013 has no bite: per section 1A(8) and (9). I say this because it appears that 'the appeal' with which section 1A(1)(b) (and therefore section 1A as a whole) is concerned) is the appeal to the First-tier Tribunal against the sanction decision. If that is the case then section 1A(8) (and therefore subsection (9)) only has any application in respect of the Upper Tribunal if the Upper Tribunal is "considering the appeal [to the First-tier Tribunal against the original sanction decision]". However, unless it has set aside the First-tier Tribunal's decision and is remaking the First-tier Tribunal's decision, the Upper Tribunal is not considering that appeal. On the appeal to the Upper Tribunal the consideration is with whether the First-tier Tribunal erred materially in law in its consideration of the appeal against the Secretary of State's sanction decision. The Upper Tribunal's error of law consideration in respect of the First-tier Tribunal does not (at least obviously) involve any consideration of the appeal against the sanction decision.

7. Putting this another way, it is well arguable that nothing in section 1A of the 2013 Act is concerned with the Upper Tribunal's appellate function in respect of the First-tier Tribunal and whether that lower tribunal erred in law. In other words, on the face of it nothing in section 1A vests in the Upper Tribunal a power or duty to find the First-tier Tribunal erred in law because the 2013 Act is to be treated as no longer having any legal effect. Accordingly, unless there is another basis for the Upper Tribunal setting aside the First-tier Tribunal's decision and then going on to remake the First-tier appeal decision, there appears to be nothing in section 1A to enable the Upper Tribunal to take the action the Secretary of State has asked it to take in her letter of 23 October 2020.

8. All of this, assuming it is correct, is arguably logical and consistent with the structure of section 1A of the 2013 Act, and leaves the appellant here with an effective remedy. That remedy is for the Secretary of State to supersede the First-tier Tribunal decision, under section 1A(4). The duty found in section 1A(8) arises only where the First-tier Tribunal, Upper Tribunal or court is itself seized of consideration of the merits of the appeal against the penalty decision. And if the appeal has yet to be decided by the First-tier Tribunal then the Secretary of State can revise her sanction decision before it is considered by the First-tier Tribunal (under section 1A(2) of the 2013 Act), though she is not required to do so and can leave it to the First-tier Tribunal to act under section 1A(8) and (9) of the 2013 Act instead. Where, however, the First-tier Tribunal had already decided the appeal before section 1A of the 2013 Act came into effect, the supersession duty in section 1A(4) applies.

9. The exact same point arises in respect of a number of other appeals, involving different claimants, which the Upper Tribunal has also stayed. Similar directions are being issued for those other appeals. However, for the

> purposes of the direction below only one substantive response from the Secretary of State is needed which can apply to all cases. To avoid the unnecessary sharing of claimants' names, it may be best for there to be one 'blind' substantive response (i.e. which does not name any clamant), which is then covered in each case by a covering note naming the claimant.
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> 10. If the Secretary of State accepts that it is for her to supersede the First-tier Tribunal's decision, a mechanism will need to be put in place for her to inform the Upper Tribunal when this has taken place. If and when any such supersession decision has been made, it would appear that the appeal to the Upper Tribunal would in effect lapse, as a fresh right of appeal would (in theory) arise against Secretary of State's supersession decision and the decision of the First-tier Tribunal under appeal to the Upper Tribunal would seem to no longer have any operative effect. It would assist, however, if the Secretary of State would address this issue as well in the submission directed below."

5. In a response dated 11 December 2020 the Secretary of State agreed that under the terms of section 1A of the Jobseekers (Back to Work Schemes) Act 2013 (as inserted by the Remedial Order) she was under an obligation to supersede the tribunal's decision of 20 December 2011, and she had in fact done so the previous day and superseded the sanction penalty decision upheld by the tribunal in favour of the appellant.

6. I therefore issued further directions on this appeal on 14 December 2020. These were in the following terms.

> "1. My last directions of 24 November 2020 refer.
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> 2. The Secretary of State's response to those directions is now attached, dated 11 December 2020. That response shows that the First-tier Tribunal's decision of 20 December 2012, which upheld the initial JSA sanction decision, has been overturned by way of a supersession decision, dated 10 December 2020. The effect of that supersession decision on its face is that there is no longer any dispute about the sanction decision (as the sanction has been overturned) and the First-tier Tribunal's decision no longer has any continuing or operative effect.
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> 3. In the light of the 10 December 2020 supersession decision, I invite [the appellant] within one month of the date of issue of these directions to make any observations he may wish to make on the supersession decision of 10 December 2020 and the Secretary of State's submission of 11 December 2020. Those observations should address: (i) whether [the appellant] accepts that the legal effect of the 10 December 2020 decision superseding the First-tier Tribunal's decision is that this further appeal lapses, and if not why not; (ii) what, if anything of substance, is to be gained from this appeal continuing; and (iii) whether in the light of the sanction decision having been overturned, [the appellant] would in any event now wish to withdraw this appeal from the Upper Tribunal, and if not why not."

7. The appellant has made no response.

8. I am satisfied that the Secretary of State has in fact complied with her duty under section 1A(4) of the Jobseekers (Back to Work Schemes) Act 2013 and superseded the tribunal's decision of 20 December 2012 so as to overturn the 'sanction' decision it upheld. It is common ground that the 'sanction' decision is the decision which the tribunal upheld that JSA was not payable to the appellant from 16 February 2012 to 29 February 2012. The effect of superseding the tribunal's upholding of this sanction decision has been to decide that JSA is payable to the appellant from 16 February 2012 to 29 February 2012.

9. This result is the inevitable consequence of the mandatory disapplication of section 1(1) to 1(6) of the Jobseekers (Back to Work Schemes) Act 2013 found in section 1A(5) of that same Act. The effect of that disapplication is that the Jobseekers (Back to Work Schemes) Act 2013 Act does *not* apply to this appellant. That nullifying of the impact of the main provisions in the Jobseekers Back to Work Schemes Act 2013 thus restores the judgment of the Supreme Court in *R(on the application of Reilly and another) –v– the Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] AC 453; [2014] AACR 9 ("*Reilly (No.1*"). This has the clear consequence that, as the 2011 Regs were declared unlawful (i.e. *ultra vires*) by the Supreme Court in *Reilly No.1*, on the Secretary of State's supersession under section 1A(4) of the Jobseekers (Back to Work Schemes) Act 2013 there is no lawful basis for sanctioning payment of the appellant's JSA under the 2011 Regs for the inclusive period 16 February 2012 to 29 February 2012.

10. In substance the legal effect of the Secretary of State's supersession decision of 10 December 2020 is therefore to remove the very consequence the appellant was appealing to the tribunal about (namely, being paid his JSA for the weeks in issue). The decision has been overturned in the appellant's favour on this point and the contrary decision of the tribunal no longer has any legal effect as to outcome, regardless of whether it was soundly arrived at as a matter of law. In these particular circumstances, it seems to me that the proper course is simply to dismiss the appellant's appeal from the tribunal's decision. The focus of my grant of permission to appeal was on the possible legal consequences of any Remedial Order. For the reasons set out above, the legal effect of the Remedial Order was to compel the Secretary of State to supersede the tribunal's decision in the appellant's favour as there was no lawful basis for that decision. In so doing, although the tribunal's decision still has sufficient legal existence to enable this appeal to be decided, the tribunal's decision no longer has any operative effect. In these circumstances, and given that no other issue of wider importance or principle remains to be considered and decided on this appeal, dismissing the appeal is in my judgment the most appropriate decision for the Upper Tribunal to make.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 15 March 2021