THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2021-000150-PIP

YA v SECRETARY OF STATE FOR WORK AND PENSIONS [2022] UKUT 143 (AAC)

Decided without a hearing

Representatives

Claimant	Islington People's Rights
Secretary of State	DMA Leeds

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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

Reference:	SC242/20/01371
Decision date:	10 May 2021
Venue:	Online

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).

C. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment in accordance with the analysis below.

REASONS FOR DECISION

A. Background

1. This case was part of a LEAP exercise. The acronym stands for Legal Entitlements and Administrative Practices. It refers in this case to the exercise by the Department for Work and Pensions to identify cases in which a person may have been denied entitlement to a personal independence payment following the failed attempt to amend the Social Security (Personal Independence Payment) Regulations 2013 (SI No 377). This is what happened.

2. In *MH v Secretary of State for Work and Pensions* [2016] UKUT 531 (AAC), reported as [2018] AACR 12, a three-judge panel of the Upper Tribunal gave a decision on the interpretation of activity 1 in the mobility component of a personal independence payment. That activity deals with planning and following a journey. In particular, *MH* was concerned with the circumstances in which overwhelming psychological distress would be relevant. It was only mentioned in descriptors b and e, but the Upper Tribunal decided that it was also relevant to descriptors d and f.

3. The Government decided to amend activity 1 with effect from 16 March 2017 and attempted to do so by the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 (SI No 194). However, subsequently Mostyn J decided that the amendments to activity 1 were unlawful: *RF v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin), reported as [2018] AACR 13. The Secretary of State for Work and Pensions had also appealed to the Court of Appeal against the decision in *MH*. That appeal was withdrawn following Mostyn J's decision. the result is that activity 1 was to be applied as interpreted by the Upper Tribunal in *MH*.

4. In the meantime, some cases, including some appeals, were decided on the basis of the activity as amended. The purpose of the LEAP exercise was to identify those cases and to remedy them insofar as the decision-maker legislation allowed.

B. What has happened in this case

5. So much for the background. I now come to what happened in this case.

6. YA claimed a personal independence payment on 20 January 2014. The Secretary of State made an award consisting of the daily living component at the standard rate for the inclusive period from 20 January 2014 to 12 July 2017. In accordance with standard procedure for personal independence payment, YA's entitlement was considered before the end of the award and, on 23 January 2017, was terminated on supersession from and including that date. YA did not exercise his right of appeal to the First-tier Tribunal.

7. Following Mostyn J's decision in *RF*, a decision-maker looked again at YA's entitlement, but decided on 19 December 2019 that he did not qualify for a personal independence payment. YA applied for a 'mandatory reconsideration' of that decision. This is not a statutory term. Technically, he applied for the refusal to be revised pursuant to regulation 7 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI No 381). This was essential in order to allow YA to exercise his right of appeal to the First-tier Tribunal, which he duly did.

8. On appeal, the tribunal decided that the claimant was entitled to a personal independence payment consisting of the daily living component at the standard rate and the mobility component at the enhanced rate for the inclusive period from 28 November 2016 to 22 January 2017. However, the First-tier Tribunal gave the claimant permission to appeal against its decision on the ground that 'the award should extend beyond 22 January 2017' The judge added:

> Separately, the Upper Tribunal may wish to consider whether it is appropriate to make some general observations about the appeal, since LEAP cases are increasingly coming before the First-tier Tribunal.

9. The Secretary of State's representative has supported the appeal, saying that there was an error of law in the tribunal's decision and inviting the Upper Tribunal to send the case back to the tribunal for rehearing. The claimant has agreed and invited the Upper Tribunal to remit his case to the First-tier Tribunal for decision at a paper hearing. I have remitted the case to the First-tier Tribunal, but have not directed it to proceed by way of a paper hearing. that is a matter for the tribunal to decide and the claimant is free to change his mind and ask for an oral hearing if he wishes.

C. The error of law

10. I now need to explain what that error was. the best way to do that is to set out the relevant parts of the submission made by the Secretary of State's representative:

> 4.1 In my submission, the decision dated 23/01/17 was also before the FtT. It is clear from the notification on pages 136 – 140 that the DM reconsidered the decision of 23/01/17 but stated that they cannot award PIP from that date and so therefore refused to revise. It would appear this was in response to the claimant's application for revision in December 2019. In light of *MH v SSWP,* which pre-dated the disallowance decision, it was open to the DM to consider revision on the grounds of official error.
>
> 4.2 Having refused to revise the decision of 09/12/19 (which was a decision not to supersede the original decision) together with the refusal to revise the decision of 23/01/17, both decisions were before the FtT. In relation to the latter decision, I submit it was open to the FtT to consider if official error was made out on the facts [*PH v SSWP (DLA) [2018] UKUT 404 (AAC) [2019] AACR 14].*
>
> As far as is relevant to this case, the Upper Tribunal Judge in *PH v SSWP said*:
>
>> *5. By contrast, the ground of application for mandatory reconsideration in CSJSA/513/2016 (SM) was expressly an allegation of official error. If official error was made out on the facts, then the tribunal would have had jurisdiction to determine the appeal on its merits, even though the original decision was on 24 November 2014 and the application for mandatory reconsideration was made on 21 January 2016. ………………………… Parties were agreed that whether or not there was official error was a matter of fact for the tribunal. It is necessary to set aside the decision and remit to the tribunal to consider the following: 1. Was there official error within the meaning of Regulation 3(5) (read with Regulation 1) of the 1999*

> *Regulations? If the tribunal is not satisfied that there was such official error, it should strike out the appeal under Rule 8(2) for want of jurisdiction, unless it is satisfied that Adesina may apply to extend the time period in Regulation 3(1) of the 1999 Regulations (……) and that the requirements for application of the Adesina principle are satisfied on the facts. ……….*
>
> *38. ……………… In contrast to PH's case, the substance of SM's request for mandatory reconsideration made on 21 January 2016 was a complaint of official error. It was an "any time" application. Subject to official error being made out on the facts, the tribunal had jurisdiction to hear the appeal.*
>
> *40. ………. Given the differences between the parties on the facts, it will be necessary for the tribunal rehearing this case to consider whether the decision of 24 November 2014 arose from official error so that it has jurisdiction*; …."

4.3 When making their decision on 09/12/19, the DM was bound by Section 27 of the Social Security Act 1998. This means that the original decision could only be superseded, on the grounds of error of law, from 28/11/16, which is the date of the relevant determination in *MH v SSWP*. As the DM was bound by Section 27, so was the FtT, hence the effective date of its decision.

4.4 In relation to the decision of 23/01/17, whilst *MH v SSWP* applied, by the time of the FtT hearing, a second UT PIP decision was also applicable. This was *RJ, GMcL and CS v SSWP (PIP) [2017] UKUT 105 (AAC)*J [*RJ v SSWP]*, which was a relevant determination dated 09/03/17. *RJ v SWWP* dealt with the meaning of 'safely' as per regulation 4(4)(a) of the Social Security (Personal Independence Payment) Regulations 2013, confirming that when assessing each descriptor consideration must be given as to whether there is a real possibility that cannot be ignored of harm occurring (having regard to the nature and gravity of the feared harm in the particular case). Of course, at the date of the original decision, 23/01/17, *RJ* had not been decided and so was not a consideration for the DM. Accordingly, as a matter of law, the DM could not be bound by Section 27. It then follows that the FtT, who I submit did have jurisdiction to consider *RJ,* would equally not be bound by Section 27. Therefore, in my submission, the FtT could not only have considered *RJ* but could have applied it for the whole of the period before it [from 28/11/16] if it decided that the evidence met the criteria. I make no submission on this because as explained below, this is a question that I believe should be considered at a remitted hearing.

4.5 In summary, I submit that the FtT's failure to consider the decision dated 23/01/17 and *RJ v SSWP* constitutes an error in law. If the Upper Tribunal Judge accepts my submission that the FtT have erred in law, I invite them to set aside

their decision and remit the appeal for rehearing by a differently constituted Tribunal, with appropriate directions for its determination.

11. The Tribunal Judge, when giving permission to appeal, invited the Upper Tribunal to make any observations it could on LEAP cases. My experience of those cases is that they arise in a variety of ways. I do not think there is anything I could usefully say beyond the analysis of the circumstances in this case.

Authorised for issue on 31 May 2022	**Edward Jacobs Upper Tribunal Judge**