



2025UT72

Ref: UTS/AS/25/0046

**DECISION OF**

Lady Poole

**IN AN APPEAL**

**IN THE CASE OF**

Social Security Scotland

Appellant

- and -

FR

Respondent

FTS Case Reference: FTS/SSC/AE/24/01932

Representation

Appellant: Samuel Bingham, Scottish Government Legal Directorate

Respondent: Paul McCormack, Welfare Rights Officer, North Lanarkshire Council

23 September 2025

**DECISION**

The appeal is ALLOWED. The decision of the First-tier Tribunal for Scotland in a decision notice dated 9 December 2024 is quashed. The decision of the FTS is re-made as follows:

“The appeal is refused. The re-determination decision of Social Security Scotland dated 20 March 2024 is confirmed. The appellant is not entitled to Adult Disability Payment in respect of an application made by her on 2 November 2023”.



## REASONS FOR DECISION

### Summary

1. This is an appeal about the powers of the First-tier Tribunal for Scotland (“FTS”). It decides that, if the FTS decides to dispose of an appeal before it by making its own determination of an individual’s entitlement to social security assistance, the FTS must still apply relevant statutory conditions of entitlement for the form of assistance under consideration. Section 49(1) of the Social Security (Scotland) Act 2018 (the “**2018 Act**”) does not confer a general discretion entitling the FTS to disapply relevant statutory provisions, such as those governing the date from which awards are payable following a successful application for adult disability payment (“**ADP**”). The FTS misinterpreted *Social Security Scotland v HK* 2024 UT 53 (“**HK**”), when relying on that case as confirming the existence of a general discretion of that nature.

### Background

2. The respondent (“**FR**”) was diagnosed with cancer. She applied for ADP on 2 November 2023, submitting her full name and date of birth, and a completed application. Social Security Scotland (“**SSS**”) decided on 21 December 2023 that FR was not entitled to ADP. That was essentially because, although SSS accepted FR had cancer, it was not yet causing sufficient functional limitations to qualify for an award. FR asked for a re-determination on 26 January 2024. On re-determination on 20 March 2024, SSS’s decision remained that FR was not entitled to ADP.
3. On 4 March 2024, shortly before the re-determination was carried out by SSS, FR telephoned SSS. In that telephone call, she told SSS that she had started cancer treatment on 1 March 2024, which was causing side effects limiting her functioning. SSS did not explain to FR that she could submit a new claim at that point, which the FTS later found “would be reasonable to expect in these circumstances”. SSS concedes this was contrary to its operational processes. However, as set out in paragraph 18 below, FR did commence a fresh application for ADP on 10 April 2024.
4. Meantime, FR appealed SSS’s re-determination decision of 20 March 2024 to the FTS. The FTS heard the appeal on 22 November 2024 by teleconference. In a decision notice dated 9 December 2024, the FTS noted that FR had started cancer treatment on 1 March 2024 which caused significant physical side effects, likely to continue for some time. There had also been a decline in mental health. The FTS made an award of both components of ADP at the enhanced rate (descriptors 1(d), 2(d), 4(c), 6(c), and 9(c) for the daily living component, and descriptors 1(d) and 2(c) for the mobility component, all in part 2 of schedule 1 of the Disability Assistance for Working Age People (Scotland) Regulations 2022 (“**the ADP**”).



**Regulations”)).** The FTS stated, “the period of the award is from 31 May 2024, that being thirteen weeks after the Appellant started cancer treatment to 1 March 2026”.

5. SSS sought to appeal the decision of the FTS to the Upper Tribunal for Scotland (“**UTS**”), on the basis that regulation 35 of the ADP Regulations governs the start date of awards where there has been an application for ADP. SSS argued that the FTS had erred in law by failing to apply regulation 35. The FTS refused permission to appeal on 25 March 2025. In its refusal decision, the FTS said it had a broad power “to put back the start date” of the award of ADP, derived from section 49 of the 2018 Act as applied in the case of *HK*. The FTS considered that regulation 35 of the ADP Regulations only applied to the Scottish Ministers, not the FTS.
6. The decision of the FTS to refuse permission to appeal to the UTS was surprising. The proposed grounds of appeal raised points of law. The test for granting permission to appeal in section 46(4) of the Tribunals (Scotland) Act 2014 (the “**2014 Act**”) requires that there be “arguable grounds” for the appeal on a point of law. The test is not whether the FTS accepts it was wrong. It does not follow from a grant of permission that an appeal will be allowed. The grant of permission means only that the UTS will further consider the points of law raised in the appeal, and will decide the appeal after giving parties an opportunity to make representations about any grounds of appeal on which permission has been granted. It has been helpful to the UTS to understand why the FTS considered it had powers to proceed as it did. Nevertheless, as the UTS found when granting permission to appeal on 12 May 2025, the ground of appeal SSS sought to advance clearly met the statutory test of arguability.
7. Procedural directions were made by the UTS at the beginning of this appeal and during it, including inviting parties to address particular matters. This resulted in helpful submissions from both parties, together with supporting authorities. Having taken into account all of the information before it, the UTS considers that it is just and fair to determine the appeal on the papers.

## **Section 49 of the 2018 Act**

8. Although the ground of appeal before the UTS primarily concerns regulation 35 of the ADP Regulations and start dates of awards, it is appropriate to start by considering section 49 of the 2018 Act and the *HK* decision. That is because the approach that the FTS took to the start date of the award it made proceeded on its view of what *HK* decided about section 49. At the time of the appeal before the FTS, section 49 provided as follows:

### **“49 First-tier Tribunal's power to determine entitlement**

In an appeal under section 46 against a determination of an individual's entitlement to a particular type of assistance, the First-tier Tribunal may —

- (a) uphold the determination, or



(b) make its own determination of the individual's entitlement to the type of assistance in question”.

These provisions remain part of section 49, although after amendment they are renumbered as subsection (1), and subsections (2) and (3) have been added. The effect of the amendments in section 49(2) and (3) is to reverse the part of the decision in *HK* which held the FTS should consider circumstances at the time of the re-determination decision, as opposed to the initial determination, or time of the appeal (paragraph 10, and confirmed at paragraph 10 of the decision of the UTS dated 19 November 2024 refusing permission to appeal to the Court of Session against *HK*). The statutory amendments to section 49 are discussed in *SSS v DC* 2025 UT 66 (para 20); broadly speaking, they provide that the “relevant time” the FTS must consider is the time entitlement fell to be determined by SSS in its original determination (not the time of re-determination). Those amendments do not directly affect this appeal, because they postdate the decision of the FTS under appeal (the statutory amendments to section 49 came into force on 10 May 2025).

9. The positions of the parties about what is now section 49(1) of the 2018 Act were ultimately similar. SSS submits, in summary, that section 49 contains nothing entitling the FTS to disapply statutory conditions of entitlement. On behalf of FR, it is candidly accepted that the wide and discretionary powers the FTS claimed for itself raise a number of issues. FR submits that the history leading to the introduction of section 12(8)(b) of the Social Security Act 1998 (the “**1998 Act**”) suggests that the FTS’s powers may not be quite as wide as it appeared to think. Section 12(8)(b) of the 1998 Act applies to the UK welfare system (which includes PIP, similar to ADP), and has the effect that tribunals should consider circumstances at the date of the original decision by the Department for Work and Pensions, not the date of the appeal. The restrictions in section 12(8)(b) of the 1998 Act were not in section 49 of the 2018 Act in its original form. Nevertheless, FR accepts that it does not necessarily follow that section 49 (now 49(1)) confers a wide and unfettered discretion to determine entitlement.
10. Section 49(1) of the 2018 Act is set out above, and is essentially about the FTS’s powers of disposal in an appeal before it. The FTS may uphold the determination of SSS, or it may make its own determination of entitlement (rather than sending the case back to SSS to look at again). Or, as put in *HK*, in a passage unaffected by the later statutory amendments to section 49:

“Section 49 makes express provision for what powers are available to the FTS ... on hearing an appeal in respect of ADP. Viewed in that context, it is apparent that the power in section 49(b) is intended to make it clear that if the FTS considers the appeal to be well founded, it can determine the entitlement itself rather than merely quashing the existing decision and remitting it back to the Scottish Ministers” (para 7).



Section 49(b) (now section 49(1)(b)) empowers the FTS to make its own determination of entitlement to ADP, for example, if it considers SSS erred. The FTS may look at entitlement afresh, and is not constrained by SSS's conclusions or reasoning. Section 49(1)(b) does not, however, confer the type of "broad discretionary power" the FTS in this particular case appeared to think it does, and it is a misreading of *HK* to suggest that is what that case found. Section 49(1)(b) does not provide that in making its own determination the FTS is entitled to disregard all the normal conditions of entitlement to ADP, and proceed in a discretionary manner. ADP is a creature of statute, and the 2018 Act and ADP regulations set out provisions which govern entitlement. Nothing in section 49 disapplies applicable conditions of entitlement.

11. It is perhaps worth explaining why the FTS must make any determination in accordance with statutory conditions. Payments of ADP engage public funds. Democratically elected institutions are in a better position than individuals sitting in tribunals and courts to reflect a collective sense of what is fair and affordable. Accordingly, it is primarily for legislators to strike the balance of when ADP should be available, and that includes when public funds become engaged with the start of an award. The duty of courts and tribunals is to apply the law as enacted.
12. There is now a consistent line of authority from the UTS, which finds that the FTS must apply the relevant statutory rules which govern entitlement when making determinations (*CD v SSS* 2024 UT 12 (para 14), *SSS v AM* 2025 UT 29 (para 2), *SSS v PV* 2025 UT 45 (para 4)). It is implicit in section 49(1)(b) that, if the FTS elects to make its own determination of entitlement, it is to do so in accordance with legislation governing the basis on which an individual may become entitled to ADP. The statutory rules which govern the start date for an award should be applied by the FTS if making its own determination under section 49(1)(b), as well as by SSS when making its determinations. Those rules include regulation 35 of the ADP Regulations, which concerns the date on which entitlement to ADP starts, in cases such as FR's where an application has been made (*GK v SSS* 2024 UT 71, a decision issued the day after the decision of the FTS in this case). The FTS erred in suggesting in its decision on permission that the provisions about commencement dates only applied to the Scottish Ministers, not the FTS, and that section 49(1) of the 2018 Act conferred a discretion to "put back" start dates.

## **Regulation 35 of the ADP Regulations**

13. The appeal is brought on the basis that the FTS erred in its approach to regulation 35 of the ADP Regulations and the commencement of any award of ADP. SSS argues that the FTS was not entitled simply to ignore regulation 35, and make up its own start date for an award. Rather, the impossibility of applying the provisions of regulation 35 to the period for which the FTS wished to make an award indicated that the FTS lacked the powers to make such an award.



14. Regulation 35 of the ADP Regulations governs situations where entitlement to ADP is being determined after an application has been made, as in this case. Under regulation 35(3), the date on which entitlement begins is to be identified in accordance with regulations 35(4) to (6). In this particular case, those provisions point to 2 November 2023 as the date on which any entitlement might begin, or alternatively, another date within the 13 week period from then up to the beginning of February 2024 if other conditions of entitlement only became satisfied then (regulation 35(2)). There is no general discretion in regulation 35, where an application for ADP has been made, entitling the FTS to pick a commencement date for an award outwith the parameters of regulation 35 (such as 31 May 2024, the date picked by the FTS in this case).
15. The difficulty with the decision of the FTS is that there is no finding that the various conditions of entitlement for ADP, including the daily living and mobility components, were satisfied as at 2 November 2023, or at any time in the 13 week period after that ending in February 2024. The reasoning of the FTS makes it plain that it was only after treatment started on 1 March 2024 that sufficient functional limitation existed for an award of ADP. No commencement date could be identified when the governing law in regulation 35 was applied. That pointed strongly to the FTS not being entitled to make the award of ADP it wished to.
16. The FTS purported to rely on *HK* as confirming it had a general discretion conferred by section 49(1) of the 2018 Act to pick a commencement date of 31 May 2024. But, as discussed above, *HK* did not find there was any such broad discretion, and it is a misreading of *HK* for the FTS to suggest it did. Another aspect of *HK* was its finding that the FTS should consider circumstances at the time of the re-determination decision under appeal. By the time of the re-determination in FR's case, SSS had been told of the cancer treatment and its side effects. However, the finding in *HK* that the relevant time to consider was the time of the reconsideration decision turned on the combined effect of section 49 (now section 49(1)) of the 2018 Act, and regulation 48 of the ADP Regulations (which imposes an obligation on SSS to make a determination without application following a change of circumstances of which it has become aware (*HK* para 6)). Regulation 48 does not apply in the present case, because in its terms it only applies "where the individual has an ongoing entitlement" to ADP. FR had no such ongoing entitlement, because there was no pre-existing award of ADP. Even though FR had told SSS about the debilitating cancer treatment she had started on 1 March 2024, which was prior to SSS's re-determination of FR's application for ADP on 20 March 2024, FR had not at any time been found entitled to ADP. Accordingly, even if it is assumed that *HK* was correctly decided at the time, the present case falls to be distinguished from it.
17. In the circumstances, the FTS should have concluded in the appeal before it that SSS's re-determination decision was correct. The FTS ought to have refused the appeal. The decision





of the FTS was based on errors of law, and is quashed. The decision is re-made as set out at the start of this decision, under section 47 of the 2014 Act.

## **Second application after FR's condition worsened**

18. Although FR's application of 2 November 2023 has not resulted in entitlement to ADP, there is still a further ADP application to be determined by SSS. FR telephoned SSS on 10 April 2024. Afterwards, SSS wrote to FR to say that FR had started an ADP application on the phone that day. FR has confirmed she wishes her contact with SSS to be viewed as her commencing a second application after her condition had worsened, and for SSS to determine that application. SSS, for its part, has indicated that it can regard the information provided on the phone on 10 April 2024 as FR having submitted part 1 of a further application for ADP, and that this amounts to the "required data" referred to in section 35(4) of the ADP Regulations. SSS did not make a process decision to reject this second application for assistance, nor has it made any decision to treat it as withdrawn. SSS confirms that, if FR now submits part 2 to complete the second ADP application, it can now proceed to determine it as a new claim. FR will have an opportunity to submit evidence to SSS about the functional limitations caused by the cancer and its treatment relevant to this second application. If SSS should find, after considering all of the evidence, that FR scores sufficient points for an award of ADP, SSS also states that the unusual circumstances of this case can be taken into account when considering the start date of any such award, and "good reason" under regulation 35(6) of the ADP Regulations.

Lady Poole

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*