

Upper Tribunal for Scotland



2025UT74

Ref: UTS/AS/25/0042

DECISION OF

Lady Carmichael

ON AN APPEAL IN THE CASE OF

Social Security Scotland
per Scottish Government Legal Directorate

Appellant

- and -

SF

Respondent

FTS Case Reference: FTS/SSC/AE/23/00552

Appellant: Graham Crombie, Scottish Government Legal Directorate
Respondent: No appearance

23 September 2025

Decision

The appeal is allowed. The Upper Tribunal for Scotland quashes the decision of the First-tier Tribunal for Scotland dated 12 February 2024 insofar as relating to the entitlement of the respondent to an award of the mobility component of adult disability payment under the Disability Assistance for Working Age People (Scotland) Regulations 2022. The Upper Tribunal for Scotland remakes that decision and finds that the respondent is not entitled to an award of the mobility component.

Reasons

Introduction

1. This appeal relates to a decision made by the First-tier Tribunal for Scotland (“FTS”) regarding the entitlement of the respondent to adult disability payment (“ADP”) under the Disability Assistance for Working Age People (Scotland) Regulations 2022 (“the ADP regulations”).
2. The FTS found that the respondent was entitled to the standard rate of the daily living component of ADP from 13 October 2022 until 12 October 2025 and to the standard rate of the mobility component of ADP from 1 July 2023 until 12 October 2025.
3. The appellant has appealed, arguing that the FTS erred in law in purporting to determine that the respondent’s entitlement to the daily living component and the mobility component began on different dates.
4. To provide the context in which the FTS reached its decision, it is necessary to set out the chronology in some detail. The respondent applied for ADP in 2022. He started the process by telephone on 13 October 2022, and completed it by way of a written application on 1 November 2022. On 2 January 2023 he completed a change of circumstances form and sent it to the appellant to tell them that a change had taken place on 21 November 2022 which had resulted in a deterioration in his ability to carry out the activities.
5. There is a note of a call from the appellant to the respondent on 22 March 2023 the aim of which was to gather further information regarding the daily living activities. The caller recorded that she had asked the respondent for more information on any changes that had occurred since he had notified the respondent of a change of circumstances.
6. On 13 April 2023 the appellant determined the respondent’s entitlement to ADP and found that the respondent was not entitled to an award of ADP. The respondent



scored a total of 6 points for the daily living activities and a total of 4 points for the mobility component.

7. On 17 May 2023 the respondent requested a re-determination. The appellant re-determined the matter and concluded that the respondent was not entitled to ADP. The appellant informed the respondent of the decision on 6 July 2023.
8. The respondent appealed against the re-determination. A hearing took place on 24 January 2024. The FTS made its own determination of entitlement under section 49(b) of the Social Security (Scotland) Act 2018 ("the 2018 Act").

The decision of the FTS

9. In the response to the appeal that was before the FTS, the (now) appellant articulated its present position, namely that the relevant date was 13 October 2022. It went on to invite the tribunal to make its own determination under section 49 of the 2018 Act to make its own determination to the appellant's entitlement to ADP, and narrated that "not all of the available evidence relevant to the mobility component of the award was taken into account and the eligibility criteria were not properly applied at redetermination stage". Its position was that the respondent satisfied descriptor 2(c) in relation to the mobility activities. Its position must, then, have been that the information that it obtained from the respondent after his application was not information about a change of circumstances, but information which cast light on the true state of affairs as at the date when he made his original application.
10. The FTS – as it was entitled to do – did not accept that position. It found that the descriptor was satisfied, but only from 1 April 2023.
11. The reasoning of the FTS appears at paragraphs 31 to 35 of its decision:

"31. In relation to mobility activity 2 the Tribunal noted that in the respondent's appeal response it was said that 8 points should be awarded under mobility activity 2C. The Tribunal had some difficulty with this. The appellant, in his oral evidence, spoke of walking from his house up a hill for a distance of about 160 yards to reach a bus stop. He also said that he stopped 2 -3 times on the walk up the hill. He would then take the bus to a hospital appointment which, presumably, involved some walking at the other end. The Tribunal regarded that level of functionality as being consistent with mobility activity 2B.

32. The Tribunal noted that the appellant gave evidence of falling on numerous occasions but the Tribunal did not regard that as established on the balance of probabilities. The Tribunal noted that the GP had not taken any action in that regard and, also, that there was no evidence of the appellant having sustained any injury. Neither of the above factors were determinative but the Tribunal also noted that the appellant had, presumably, been confident enough in his walking to travel on public transport to hospital in Aberdeen. On balance the Tribunal was not satisfied that the “safety” test was established as being of importance in relation to mobility activity 2.

33. Distinguishing between mobility activity 2B and 2C can often be a marginal decision. What was very clear was that the appellant complained of worsening symptoms and this was unsurprising given that the kidney -related disease was progressive. Also the respondent conceded in the appeal response that 2C was appropriate.

34. The Tribunal, in the exercise of its judicial function, could not close its eyes to the level of functionality to which the appellant referred when he talked of taking public transport to a hospital appointment. On the other hand at pages 138 and 140 the appellant is noted as saying to a member of the respondent's team that his walking ability had deteriorated and he could now walk less than 50 yards.

35. That conversation took place in late March 2023. After some deliberation the Tribunal decided that, on the balance of probabilities, it had been established that the appellant satisfied the statutory requirements for an award of points under mobility activity 2C but only from 1/4/2023 which meant that the award of the standard rate of the mobility component ran not from the date of application but rather from 1/7/2023.”

12. The decision does not include any specific consideration of the competency of proceeding in that way. The point was focused for the first time in an application for review/permission to appeal. The FTS assigned an oral hearing on that application and made an order seeking to focus matters. Its order referred to the difficulties arising from the lack of any specific legislative provision specifying, by reference to a date or time period, the matters to which the FTS must have regard in



an appeal. It highlighted also the difficulties which might arise when the time taken by the appellant to make a decision was a lengthy one, and a claimant's condition deteriorated. During the time that the FTS was considering the application, this tribunal made a decision in *Social Security Scotland v HK* 2024 UT 53, and further submissions followed in the light of that. The FTS ultimately refused permission to appeal, but this tribunal granted permission.

Relevant legislation.

13. Section 37(1) of the 2018 Act provides:

37. Duty to make determination

The Scottish Ministers are to make a determination of an individual's entitlement to a type of assistance described in Chapter 2—

- (a) on receiving an application for that type of assistance from the individual, or
- (b) when required to do so by regulations under section 52.

14. Regulation 35 of the ADP regulations makes provision for when an application is to be treated as made, and as to the beginning of entitlement to assistance. At all times with which this appeal is concerned, it was in the following terms.

35. When an application is to be treated as made and beginning of entitlement to assistance

- (1) An application for Adult Disability Payment is to be treated as made—
 - (a) on the day it is received by the Scottish Ministers, or
 - (b) if applicable, on the day identified by the Scottish Ministers in accordance with paragraph (2).
- (2) If, before making a determination on the basis of an application, the Scottish Ministers consider that the individual in respect of whom the application is made—
 - (a) would not satisfy a requirement in—
 - (i) regulation 5 (daily living component),
 - (ii) regulation 6 (mobility component),

(iii) regulation 11 (required period condition: daily living component),

(iv) regulation 12 (required period condition: mobility component),

(v) Part 5 (residence and presence conditions), or

(vi) regulation 22 (age criteria),

if the application were treated as made on the day it was received, and

(b) would likely be entitled to receive Adult Disability Payment if those requirements were satisfied within a 13-week period beginning on the day it was received,

the Scottish Ministers may choose the date within that 13 week period on which the application is to be treated as made.

(3) Where, on the basis of an application (other than where regulation 58(1) applies), a determination is made that an individual is entitled to Adult Disability Payment, the date on which entitlement begins is to be identified in accordance with paragraphs (4) to (6).

(4) Where an application is made within 8 weeks of the day on which the full name and date of birth of an individual ("the required data") is submitted by, or on behalf of, the individual to the Scottish Ministers for the purpose of an application for Adult Disability Payment, entitlement begins on whichever is the later of the day—

(a) on which the required data was submitted, or

(b) identified in accordance with paragraph (2).

(5) Subject to paragraph (6), where an application is made after the 8 week period described in paragraph (4), entitlement begins on the day on which the application is treated as made in accordance with paragraph (1).

(6) Where the Scottish Ministers are satisfied that there is a good reason why an application was made after the 8 week period described in paragraph (4), they may treat the application as having been made within that period.

(7) For the purposes of section 38(3) of the 2018 Act, the period covered by an application for Adult Disability Payment—

(a) under paragraph (1)(a)—



- (i) begins on the day on which the application is treated as having been made, and
- (ii) ends on the day on which the determination of entitlement is made, and

(b) under paragraph (1)(b)–

- (i) is deemed to begin on the day before the determination of entitlement is made provided that the requirements are satisfied, and
- (ii) ends on the day on which the determination of entitlement is made.

15. Section 52 of the 2018 Act makes provision for regulations providing that in certain circumstances the Scottish Ministers are to make a determination of an individual's entitlement to a particular type of assistance without receiving an application. Regulation 48 of the ADP regulations is a regulation made under that section. It imposes a duty to make a determination of entitlement to ADP without an application where the individual has ongoing entitlement and the Scottish Ministers become aware either or a change of circumstances or that its determination was made in ignorance of a material fact. The date on which, as a result of such a determination, payment is increased, or entitlement to a component is awarded, is set by reference to regulation 45.

16. In their written case the appellant made detailed submissions as to the basis on which *HK* might be distinguished, and as to the categories of case in which the reasoning in *HK* would apply. There are some differences between the present case and *HK*. Regulation 48, which was significant in the reasoning in *HK*, was not engaged in this case. What was in issue in *HK* was not entitlement to different components from different dates, but the introduction of an enhanced rate from a particular date. The resolution of this appeal does not, however, depend on any point of distinction between it and *HK*. It turns on the conclusion I have reached as to the correct construction of section 49 of the 2018 Act and regulation 35 of the ADP regulations.

17. Section 49 refers to a determination of entitlement, whether by the Scottish Ministers or by the FTS. There is nothing in the language used to suggest that the determination by the Ministers on the one hand and the FTS on the other should be at different dates. The date on which entitlement is to begin where there has been determination by the Scottish Ministers of an application is determined by reference

to regulation 35(3) to (6). On whichever basis that date is set, it is a single date. There is no basis in regulation 35 for determining that the entitlement to one component of ADP commenced at one date, and that the entitlement to the other component commenced at a different date. Regulation 35(3) refers to entitlement to ADP, not to a particular component of it.

18. There are sound policy reasons why the FTS should not enter into what is in effect a freestanding jurisdiction to make a decision on circumstances which did not exist at that single date, but which did exist at a later date. Lord Lake set them out at paragraph 8 in *HK*:

“It is understandable that Regulation 48 [of the ADP regulations] imposes an obligation to make a determination in the absence of an application on the Scottish Ministers. This obligation sits alongside the obligation to make determinations and redeterminations in response to applications. It is hard to see why such an obligation would be placed on the FTS, an appellate body. It is not equipped or staffed to fulfil the duty to carry out an assessment of entitlement when it becomes aware of a relevant change of circumstances. It would lead to a situation in which it would be making a first decision to which there would be no right to a redetermination and from which the right of appeal – to the Upper Tribunal – would be limited.”

19. I have therefore concluded that the FTS erred in law in determining entitlement to the mobility component on the basis that they did.

Disposal

20. It is clear that the FTS concluded on the evidence that the respondent satisfied descriptor (c) for mobility activity 2 only from 1 April 2023. The FTS concluded that his circumstances had changed at a date after the date of his application. It held that he was not entitled to the mobility component as at 13 October 2022. Having made that finding, it erred in law in finding him entitled to the mobility component from a later date. On the basis of what it found in fact, it should have found that the respondent did not score any points in relation to either of the mobility activities, and should have found him not entitled to payment of the mobility component. I have re-made the decision to that effect.



21. As must be apparent from the chronology and background set out above, there is information available to the appellant which will require it to consider whether to make a determination without application under regulation 48 in respect of the circumstances reported to it on and after 21 November 2022.

Postscript

22. From 10 May 2025, subject to the transitional provisions contained in the Social Security (Amendment) (Scotland) Act 2025 (Commencement No 1 and Saving and Transitional Provisions) Regulations 2025 (SSI 2025/119), section 49 of the 2018 Act has been amended. It remains the case that in an appeal under section 46 of the Act the FTS may either uphold the respondent's determination or make its own determination of the individual's entitlement to the type of assistance in question. Section 49(2) makes it clear that in exercising that power the FTS must not take into account any circumstances which did not exist at the relevant time, but may take into account circumstances which existed but were not known at the relevant time. The relevant time is now defined in section 49(3) as being the time at which the individual's entitlement fell to be determined under the applicable regulations by the Scottish Ministers in making the original determination under section 37. I refer to, and agree with, the observations made by Lady Poole at paragraphs 19-21 in *Social Security Scotland v DC 2025 UT 66*.

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.

Lady Carmichael
Member of the Upper Tribunal for Scotland