



**DECISION OF**

Lady Poole

**IN THE APPEAL  
IN THE CASE OF**

Social Security Scotland

Appellant

- and -

DC

Respondent

FTS Case Reference: FTS/SSC/AE/24/02555

Representation

Appellant: Samuel Bingham, Scottish Government Legal Directorate

Respondent: No appearance

26 August 2025

**DECISION**

The appeal is allowed. The decision of the First-tier Tribunal for Scotland in a decision notice of 23 December 2024 and statement of reasons dated 4 February 2025 is quashed. The decision is remade as follows:

“The appeal is refused. The re-determination decision by Social Security Scotland dated 25 April 2024 is upheld. The respondent is entitled to Adult Disability Payment with the daily living component at the standard rate and the mobility component at the enhanced rate from 10 August 2023, with a review date of 29 January 2028”.



## REASONS FOR DECISION

### Summary

1. This is an appeal about adult disability payment (“**ADP**”). It finds that the First-tier Tribunal for Scotland (“**FTS**”) erred in law by making an award based on changes in circumstances disclosed for the first time for an appeal hearing before it. Those changes in circumstances fell to be considered first by Social Security Scotland (“**SSS**”) in a separate determination of entitlement to ADP, attracting its own re-determination and appeal rights. That is sufficient to determine the appeal, without the need to decide all matters raised by the FTS in its grant of permission.

### Background facts

2. The respondent (“**DC**”) is a 47 year old woman who suffers from epilepsy and mental health issues. She also complains of continence problems, and the focus of this appeal is how the FTS approached those problems in its decision.
3. It is necessary to go into the background in some detail. DC was in receipt of personal independence payment (“**PIP**”). She received the daily living component at the standard rate, and the mobility component at the enhanced rate. A transfer to ADP was triggered because DC’s PIP award came up for review. SSS gave DC a notice of intention to transfer her to ADP on 12 December 2022. A transfer determination was intimated by SSS in a letter dated 31 March 2023, to the effect that PIP ended on 30 March 2023 and ADP started on 31 March 2023, at the same rates as the previous PIP award. The transfer determination letter also explained that after the move to ADP, the award would be reviewed on 30 May 2023. That was only a short period away, because the transfer had been triggered by a review date arriving, and that review still needed to be carried out.
4. When the date for the review arrived, a scheduled review pack was sent to DC by SSS. DC filled in the form it contained, which is standard for all reviews and is headed “change of circumstances”. The submitted form was dated 14 June 2023, and stamped as received by SSS on 21 June 2023. DC stated in relation to continence, “Sometimes I have no control over my bowels and I end up having an accident...every couple of days”. Declarations by DC intended to accompany the completed form were not received by SSS until 17 August 2023, when a short form dated 10 August 2023 also reported that DC’s needs had changed.
5. On 29 January 2024, SSS made a determination of entitlement (under regulation 47 of the Disability Assistance for Working Age People (Scotland) Regulations 2022 (the “**ADP Regulations**”), rather than regulation 12 of part 3 of schedule 2 as the FTS mistakenly thought). Based on the information before it, SSS found that DC scored no points for daily



living activity 5 in part 2 of schedule 1 of the ADP Regulations (managing toilet needs and incontinence). SSS found there was no indication of a medical condition that would result in incontinence affecting DC on the majority of days. However, SSS found other point-scoring descriptors were satisfied for different activities. The effect of SSS's determination was that the award of ADP was confirmed at the same level as before; standard rate daily living and enhanced rate mobility components. The start date for the award was 29 January 2024 (the date of the determination), and a review date was set for 29 January 2028.

6. On 1 March 2024, DC requested SSS to carry out a re-determination. In the form DC completed for the request, she indicated that she had bladder and bowel incontinence since the menopause and wore pads daily. SSS again determined, based on all of the information before it, that it was reasonable to conclude that DC could manage her toilet needs and incontinence unaided. By a re-determination decision dated 25 April 2024, SSS assessed DC as qualifying for the same components as before. The award started on 10 August 2023 and was to be reviewed on 29 January 2028.
7. DC appealed the re-determination decision to the FTS. In a letter accompanying her appeal dated 21 September 2024, DC stated that for the past few months she had been losing control of her bladder and was having to wear nappy pants. She indicated she had an appointment with her GP on Monday 23 September 2024 for an internal examination to see if she had a prolapse; if not she would be referred to the incontinence team.
8. On 23 December 2024, following a hearing on 18 December 2024, and for reasons given in a decision dated 4 February 2025, the FTS decided that DC was entitled to:
  - 8.1 the standard rate of the daily living component of ADP and the enhanced rate of the mobility component from 10 August 2023 to 31 March 2024 (descriptors 1c, 3b, 4c, 6c, 9b and 10b and mobility 1f)
  - 8.2 the enhanced rate of both components from 1 April 2024, on the basis that she started needing to use pads to manage urinary incontinence on 1 January 2024, and so satisfied the required period condition for the enhanced award on 1 April 2024, adding descriptor 5b to the earlier ones.
9. In its decision, the FTS found as a fact that from about 1 January 2024, DC reasonably needed to use pads to manage urinary incontinence. This was a change in circumstances. Before then, she had been incontinent due to epileptic seizures every couple of weeks. But now it was every day or other day, unrelated to seizures. The new situation had started after DC became unwell with a chest infection and Covid-19 between Christmas and New Year 2023/2024. It was then that her bladder control worsened. After that DC continued to lose control of her bladder every day or other day. Her condition worsened again in June 2024 so that she started taking a change of clothing if she went out as well as pads. She had been referred to the incontinence service. The FTS observed that DC did not wear



pads as a matter of routine between 1 January 2024 and June 2024 (with the implication she did so afterwards), but found it would have been reasonable for her to do so to manage her incontinence. The FTS found that after suffering this increased level of incontinence for three months (having regard to the required period condition) she scored 2 points under descriptor 5b, which tipped her into the enhanced rate of the daily living component of ADP.

## Procedure to determine this appeal

10. SSS suggested that a 3-judge panel be convened because there are a number of appeals pending before the Upper Tribunal for Scotland (“UTS”) raising the decision in *HK*, including this one. SSS also suggested that an oral hearing be fixed in this case. However, DC has elected not to appear in this appeal, and if a 3-judge panel were to be considered necessary, it would be more appropriate in a different case where there is a contradictor. The UTS has full written submissions and authorities from SSS, including helpful responses to particular questions from the UTS, and an oral hearing is unlikely to assist the UTS further in this particular case. In all the circumstances, the appeal is determined on the papers because it is just and fair to do so.

## Did the FTS err in law in making two awards within its decision?

11. At the heart of this appeal is the decision of the FTS to proceed on the basis of information provided by DC when appealing, and at the appeal hearing (which post-dated SSS’s review determination by about 11 months and the re-determination decision under appeal by about 8 months). The consequence of having taken into account this new information is that the FTS decided to make a stepped award, with the first part covering one period, and an increased award covering a later period after a change of circumstances.

12. In *SSS v HK* 2024 UT 53 (“*HK*”) the UTS considered the situations in which the FTS might make a decision based on a change of circumstances. The UTS said at paragraph 8:

“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 also 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”.

Expanding slightly on these helpful observations, although the FTS has a range of procedural powers to call for evidence, SSS is a body with functions of gathering evidence as well as decision making. Its remit under its charter includes assisting claimants to gather evidence, and supporting them. It may be better placed than the FTS to assemble information on which to assess entitlement on a reported change of circumstances. If SSS makes a new determination after investigating a change in circumstances, that means an



individual retains the full range of challenges to the determination. They have rights to re-determination and a full appeal to the FTS. However, if the FTS decides what impact a change of circumstances has on entitlement, those rights are lost. There are still rights to ask the FTS to review its decision, or to seek permission to appeal to the UTS on a point of law, but those are more restricted. As a result, care has to be taken by the FTS before proceeding on the basis of any change of circumstances presented at the hearing of a case before it.

13. It is to be expected that at an appeal hearing before the FTS, there will be some new information and clarification about functional limitations. Some of this evidence may cast light on what the position was at a particular time in the past which the FTS is considering. But when the new information is of the nature of a change of circumstances which could affect an award, and SSS has not previously been made aware of it nor able properly to consider or investigate it, then for reasons in the previous paragraph, the FTS should exercise caution. This is such a case. From the background facts set out above, there are clear differences between the information that was disclosed by DC to SSS, prior to SSS making its decisions under appeal (see paragraphs 4 and 6 above), and the information DC provided to the FTS about incontinence for the purposes of the appeal (see paragraphs 7 and 9 above). The FTS heard evidence of a serious deterioration in continence from 1 January 2024 after DC contracted Covid-19 and a chest infection, which persisted, worsening in June 2024 so that there were investigations in September 2024 for a prolapse. None of this was information that had been provided to SSS at the time of its decisions. While it may be a question of fact and degree, and much will depend on context, in this particular case the new information did not simply cast light on what the situation was at the time of determination (or re-determination). It amounted to a marked change of circumstances. It was an error of law for the FTS to make a stepped and increased award on the basis of this type of change of circumstances, not all of which existed at the time SSS determined the review of ADP entitlement.
14. It follows that the decision of the FTS to make a stepped award was incorrect. The increased award for a second period cannot be sustained, as it was made on the basis of a change of circumstances that the FTS should not have considered. The decision is quashed under section 47(1) of the Tribunals (Scotland) Act 2014 (the “**2014 Act**”) because it was based on an error in law.
15. The question then arises whether to make any further order under section 47(2) of the 2014 Act in disposing of the appeal. Relevant to that decision is the acceptance by the FTS that the re-determination decision of SSS was correct, until the change of circumstances from 1 January 2024. The increased award was based on an unlawful approach, but the first part of the award was not. The start date of the first part of the award was the date of the re-determination decision, which was appropriate in this case because it was based on continuing entitlement at the same level after a review. Furthermore, SSS, in paragraph



33 of its initial application to the FTS for review and permission to appeal, accepts DC has now made it aware of the change in circumstances in relation to continence, and that this will be taken into account by it in a separate determination to be made under regulation 48 of the ADP Regulations. That is a decision which will generate its own re-determination and appeal rights. In all of those circumstances, and having regard to the disposals available to the FTS under section 49 of the Social Security (Scotland) Act 2018 (the “**2018 Act**”), it is appropriate to re-make the decision of the FTS, so it upholds the re-determination decision of SSS. In due course it is to be expected that this re-made decision will be superseded (at least to some extent) by the new regulation 48 decision SSS intends to make, under section 27 of the 2018 Act (*SSS v VH 2025 UT 52*).

## Observations

16. That is sufficient to dispose of the appeal, but there are two further matters which arise.

### *The permission decision of the FTS*

17. SSS sought permission to appeal to the UTS on one narrow ground, concerning the start of the award. The FTS granted permission on 25 March 2025 on one general ground and six further grounds of appeal, as follows:

“whether the FTT was in error of law in connection with its decision as to the date on which the Appellant’s entitlement to assistance began and to determine inter alia as follows:

- (i) Whether the decision of the Respondent of 29 January 2024 was made under regulation 47(a) of the ADP Regulations or otherwise;
- (ii) Whether the Respondent was under a duty to make a determination under regulation 48(a) of the ADP Regulations and, if so, whether it discharged that duty;
- (iii) Whether the Upper Tribunal decision in *Social Security Scotland v HK UTS/AS/24/0038* is distinguishable from this appeal;
- (iv) Whether the Upper Tribunal decision in 2024 UT 53 refusing leave to appeal *HK* modifies *HK* or creates any binding precedent;
- (v) Whether the reasons for the decision of the FTS are consistent with the facts found; and
- (vi) Whether the Tribunal misdirected itself in law as to its powers or the date of the Appellant’s entitlement to the daily living component of ADP”.

18. Appeals to the UTS proceed under section 46 of the 2014 Act. The 2014 Act makes no provision for an appeal by way of stated case. While it is open to the FTS or the UTS to grant permission on grounds not identified by parties, any additional grounds should meet the normal requirements for grounds on which permission may be granted. Those requirements include materiality. Not all additional matters identified by the FTS in this





case meet that test, because they would make no difference to the outcome (eg para (iv)). Tribunals should also bear in mind the overriding objective in rule 2 of both the First-tier Tribunal for Scotland Social Security Chamber Rules of Procedure 2018, and the Upper Tribunal for Scotland Social Security Rules of Procedure 2018. The overriding objective of handling cases fairly and justly includes dealing with cases proportionately to a list of matters, which include the resources of parties. The FTS should bear in mind that parties (including claimants) will have to bear the burden of addressing grounds of appeal upon which permission has been granted before the UTS (and cost may be a factor in whether they elect to participate in an appeal to the UTS). It may be of assistance to the UTS if the FTS, when determining applications for permission to appeal, elucidates its decision (as distinct from providing supplementary fact finding or reasoning; *SSS v CB* 2025 UT 63 para 10). That might include drawing the UTS's attention to particular matters troubling the FTS. Alerting the UTS of particular concerns does not necessarily have to be done by drafting and including multiple additional grounds of appeal, which parties will bear the expense of addressing in notices of appeal, responses and replies before the UTS.

## *Statutory amendments*

19. It is not necessary in this case to determine the six grounds added by the FTS. It is sufficient to make some general observations. On 10 May 2025, amendments to section 49 of the 2018 Act came into force. These were intended to reverse some aspects of the *HK* decision. (The amendments do not reverse the observations in paragraph 8 of *HK*, quoted above, which express policy considerations which also underlie those amendments). The amendments reverse the part of the decision in *HK* that the FTS should consider circumstances as at the time of the re-determination decision (which allowed it to consider changes of circumstances between the determination and re-determination, one outcome of which could be stepped awards). The amendments do not have retrospective effect, so do not apply to the decision under appeal in this case. However, the amendments make it clear that ordinarily the FTS will be considering the circumstances which existed at the time of the original determination by SSS, not the time of the re-determination decision under appeal. The FTS is entitled to take into account circumstances which existed but were not known at the relevant time. The effect of these amendments is likely to be that there will be no more stepped awards, covering different but successive periods, in the same appeal decision of the FTS. Rather, there will be one award for a specified period.
20. The amendments to section 49 of the 2018 Act were presented, when introduced, as clarifications of the law, and in line with the original policy intention for the Scottish Social Security system (Official Report, 3 December 2024, column 36 and 37). The amendments make explicit that the general position is broadly similar to that in the UK system under section 12(8)(b) of the Social Security Act 2018 (which covers PIP and other benefit appeals). There, it is provided that the tribunal shall not take into account any circumstances not obtaining at the time when the decision appealed against was made. (However, tribunals



are entitled to take into account information arising later that casts light on the circumstances at the time of the decision). The UK system also has inbuilt re-determinations, known as mandatory reconsiderations. The aim is the same – that there should be a speedy and inexpensive way of giving the state the opportunity to redress well founded criticisms of an initial decision where appropriate, before the state bears the expense of a tribunal to consider an appeal. Nevertheless, changes in circumstances after the date of the initial decision by the Department for Work and Pensions are properly the subject of a new application and decision, rather than to be taken into account by an appeal tribunal. Given that ADP replaces PIP in Scotland, and is very similar to it, express provision might have been expected, if there was an intention to change the long standing position of the time on which to focus in these types of cases.

21. Prior to the amendments to section 49, the 2018 Act was silent as to the relevant time at which the FTS should assess entitlement. *HK* represented one particular interpretation of what the relevant time should be, for the reasons given in the decision. The position has now been put beyond doubt by the statutory amendments. There remain a small number of appeals before the UTS about the pre-amendment position. This is one of them, the outcome of which reflects the particular context in which it is made.

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.*