



DECISION OF

Lord Lake

**ON AN APPLICATION TO APPEAL
IN THE CASE OF**

Social Security Scotland,
per Scottish Government Legal Directorate

Appellant

- and -

SH

Respondent

FTS Case Reference - FTS/SSC/AE/24/01386

14 October 2025

Issue for the Appeal

1. SSS appeal against a decision of the FTS dated 15 October 2024 in which SH was found to be entitled to Adult Disability Payment at the standard rate for the daily living component but not for the mobility component from 3 May 2024 for a period of 24 months. The two issues in respect of which leave to appeal was granted by FTS were:
 - (a) the Tribunal has misdirected itself in law by following *Social Security Scotland v HK* 2024 UT 53 (“HK”) when it should have distinguished that case and declined to follow it because it proceeded on a materially different set of facts.



- (b) additionally, the Tribunal has misdirected itself as to the effect of regulation 35 of the Disability Assistance for Working Age People (Scotland) Regulations 2022 (“the ADP Regulations”), and has as a result made a determination of entitlement that it did not have the power to make in terms of section 49 of the Social Security (Scotland) Act 2018, and so has erred in law.

Decision of the FTS

2. Before turning to the submissions for the parties, it is useful to summarise the key elements of FTS decision. It assessed what SH was able to do in relation to the activities to which the claim related. The Tribunal noted that no award was justified at the time of the original award. This accorded with the determination and re-determination made by SSS. The Tribunal considered, however, that SH’s condition had worsened since the date of the application. On the basis of the decision in *HK*, they concluded that they should take account of changes in her condition after the application. They determined that it was not clear exactly from when the problems that merited an award arose but noted that they were referred to in a letter of 2 February 2024 and took the view that ADP was payable from the date 13 weeks after that.

Submissions for SSS

3. In support of the first ground of appeal, it was argued that the facts in the present case were different from those in *HK* in material respects. In that case, the applicant had been found entitled to payment of some ADP and therefore at the time of the appeal had an ongoing entitlement. The issue in that case was whether by the time of the redetermination there had been a change in circumstances that had to be taken into account. It was submitted that the structure of the legislation meant that it was necessary that the change be taken into account where ADP was already being paid but not where the claimant had no current entitlement.



4. In support of the second ground, it was submitted that the FTS had erred in determining that entitlement to assistance began on 3 May 2024. The date from which an entitlement began was to be determined in accordance with the date that the application was made or other date identified within the following 13 week period identified with reference to Regulation 35. It was submitted that as SSS and FTS had found that there was no entitlement at the date of the original application, a date in the 13 week period after that could be determined to be appropriate but only if the applicant met the requirements at that time. It was noted that the date on which FTS considered that entitlement arose – 4 May 2024 – was 28 weeks after the date of the application on 20 October 2023. In terms of the Regulations, it was not open to determine that there was entitlement from that date.

Submissions for SH

5. In the Response for SH, there is an argument that FTS has erred in a completely different respect. It is claimed that a key document has been misinterpreted giving rise to a decision that is incorrect. No submissions are made regarding the issues raised by SSS.

Decision

6. There was no leave to appeal sought in respect of the matter raised in the submissions for SH. It is not part of this appeal. In addition, it is apparent that it is an appeal on the interpretation of the facts rather than a point of law. Even had permission been sought, it would not have been possible to grant it. I therefore consider it no further.
7. In relation to the submissions for SSS, the relevant part of the FTS decision states:
“27. Particularly in light of the recent decision in *HK v SSS* 2024 UT 53, the tribunal has taken the view that we can and should take account of changes in the appellant's condition after the date of application. It is clear that the appellant's condition has worsened from the stage of application. Although an award was not justified when the original application was made, and it is not clear exactly when the problems with



daily living that merit an award stem from, an award is in the tribunal's view justified. The issues justifying an award are referred to in a letter of 2 February 2024. The tribunal has taken the view that ADP is payable from the date 13 weeks after that date - 3 May 2024.”

8. It appears that there been a misunderstanding as to what was decided in *HK*. The decision there was not to the effect that information post-dating the initial decision can always be taken into account. In *HK* I noted that the issue which arose was the claimant’s entitlement as the date of the redetermination. That is what FTS had been bound to determine. The matter is not helped by a typographical error in my decision. As I noted in the application for leave to appeal, after the words, “and the issue is” in paragraph 9 of the decision, the word that follows should be “what” rather than “that”. It would then have read:

While the above conclusion means that FTS is not obliged by Regulation 48 to make a redetermination, the issue remains of what was the correct determination of entitlement in the appeal that was made.

Because the claimant there was in receipt of benefit and therefore had an ongoing entitlement, Regulation 48 of the Regulations applied. At that time, it had the effect that in making the redetermination the Ministers were required to reflect the change in circumstances of which they were aware at the time (paragraph 10). The additional information in that case was available to SSS by the date of the re-determination. FTS considered that the entitlement in terms of the redetermination that had been made was not correct and made their own decision. FTS determined that the Claimant’s condition had deteriorated *by the time of the redetermination by SSS* and was known to them (see paragraph 9). As it was available to them at that time, it should have been taken. The Upper Tribunal decision was that they were correct to do so.

9. As SSS submit, the facts in this case are different from those in *HK*. Here, there was no ongoing entitlement to ADP so regulation 49 does not apply. In addition, in this case FTS did not find that the change of circumstances existed and was known to SSS at the time they made their decision. There was accordingly no basis for taking this later information into



account and, in doing so, FTS has erred in law. The consequence is that their decision must be quashed.

10. The decision of FTS was that an award was not justified at the time of the decision (paragraph 27). That part of their conclusion remains unaffected. As the circumstances of this case do not indicate that it was appropriate to take into account changes after that date, that is the correct decision in relation to SH's entitlement. Having quashed the FTS decision it is therefore appropriate to remake it by upholding the re-determination by SSS of 28 February 2024.
11. Although the outcome does not turn on the second ground of appeal, for completeness I would add that I consider the argument made there well founded also. *HK* stated that, in respect of someone in receipt of ADP, when determining what entitlement ought to have been found due by SSS at the date of their last decision, regard should be had to the information SSS had at the time, it does not in any way remove the requirements of Regulation 35.

*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.*

Lord Lake

Member of the Upper Tribunal for Scotland