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| In The First Tier Tribunal (Social Entitlement Chamber) | Case No: 6 |
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| BETWEEN: |
|  | MR X | **Appellant** |
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| - and - |
|  | SECRETARY OF STATE FOR WORK AND PENSIONS | **Respondent** |
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|  | APPELLANT’S SUBMISSIONS FOR THE HEARING  |  |

1. The PIP descriptors are not in dispute. The only issue in this appeal is the Respondent’s decision to replace an indefinite award with a finite one.
2. The Respondent’s decision dated 26/10/2018 determined that Mr X was entitled to the standard rate of the daily living component indefinitely. **It can therefore be inferred that the Respondent considered that Mr X’s condition would not improve.**
3. The Respondent has not departed from his position on that point but he has nevertheless included several stock phrases that he uses in cases where the Descriptors are in dispute and the Response appears to have been written on a pre-populated template. The Respondent’s submission writer appears to have forgotten to remove the irrelevant phrases.
4. The Respondent **(S4(2) of the Response page D**) avers

The decision notification issued 31/07/2019 was issued due to a change in the law relating to the descriptors not length of award ( docs 86-91)**.**

* 1. The document at p86 is dated 31January 2019. It does refer to changes in law and explains that the changes relate to
* how we assess someone’s ability to plan and follow a journey
* how we decide whether someone can carry out an activity safely or not.
	1. I presume that the Respondent’s reference to “31/07/2019” in S2 was a typing error, but I note that the decision issued maintained the indefinite award..
1. The Respondent is arguably being somewhat disingenuous when he refers to supposed changes in the law, as I can show with the history behind the decision as issued on 31/01/2019

5.1 A Three Judge Panel issued its decision in MH v Secretary of State for Work and Pensions (PIP) [2016] UKUT 0531 (AAC) on **28 November 2016.**

5.2 The 3JP hearing MH set out the law as it always had been as it applied to PIP Mobility Descriptor 1

5.3 The Respondent did not seek to appeal MH but instead decided to amend the Regulations from 8 March 2017 to reverse the effect of MH.

5.4 Her action was challenged in the High Court (RF [2017] EWHC 3375 (Admin)). Judgement was issued on 21 December 2017 and the amended Regulations were consequently quashed.

5.5 A 3JP held in [2017] AACR 32 ( RJ, GMcL and CS v Secretary of State for Work and Pensions (PIP) [2017] UKUT 105 (AAC)) that an assessment under paragraph 4(2A)(a) of the PIP Regulations that an activity cannot be carried out safely did not require that the occurrence of harm was “more likely than not”, a tribunal must consider whether there was a real possibility that could not be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. Both the likelihood of the harm occurring, and the severity of the consequences were relevant The 3JP also held that if, for the majority of days, a claimant was unable to carry out an activity safely or required supervision to do so, then the relevant descriptor applied. That may be so even though the harmful event or the event which triggered the risk actually occurred on less than 50 per cent of the days.

5.6 The 3JP issued its decision on 9 March 2017. It was again a statement of the law as it always had been as regards the application of Regulation 4(2A)

5.7 The Respondent did not challenge the 3JP’s decision in RJ.

5.8 The consequence of the events surrounding MH and RJ is that the Respondent was effectively forced to admit that claimants may have been wrongfully denied benefit and that their cases must be revisited and revised (*the ground for revision would be official error)*

1. The Respondent is arguably acting in the same manner when he avers (S4(2) page D)

Under the law relating to the benefit the claimant cannot be awarded an indefinite award if he has limited a end date of his leave to remain in the country therefore the award is limited to that date i.e. 30/11/2024

1. I take issue with the Respondent’s statement that as a matter of law Mr X cannot be awarded an indefinite award.
2. The Respondent has not cited any legislation which provides that an indefinite award cannot be made in the circumstances although I concede that there will be practical consequences for the Respondent if such an award were made.
3. There are equally practical consequences for Mr X every time the Respondent makes a finite award which is due to end on the supposed end date of Mr X’ s leave to remain and this is compounded by the way the Respondent deals with any renewal claim.
4. Mr X always applies for a variation of his leave to remain before it expires but there is always a delay by the Immigration Authorities in processing that application.
5. This is of no consequence from an Immigration point of view because S3C of the Immigration Act 1971 as amended provides in so far as is relevant (the emphasis is mine)

**Continuation of leave pending variation decision**

(1) This section applies if—

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,

(b) the application for variation is made before the leave expires, and

(c) the leave expires without the application for variation having been decided.

**(2) The leave is extended by virtue of this section during any period when—**

**(a) the application for variation is neither decided nor withdrawn,**

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought [ while the appellant is in the United Kingdom] against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or

(c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).

1. The Respondent on the other hand inevitably refuses to extend Mr X’s PIP award pending the variation decision, regardless of whether Mr X has submitted a new claim. This means that the award is not reinstated until some time after the variation decision even though Mr X has ongoing leave to remain under S3C of the 1971 Immigration Act. **It goes without saying that Mr X and his wife experience significant hardship every time his PIP comes up for renewal and that this arises solely because of the Respondent’s intransigence and his refusal to recognise the provisions of S3C**
2. The Respondent has not included a copy of any notice that was issued to Mr X to inform him that his award was now time limited. The notice dated 10/08/2021 (**p110 of the bundle**) is merely a statement of entitlement and does not include an end date. The subsequent so-called reminder notice issued on 07/01/2022 **(p113 of the bundle**) does have an end date (07/07/2022) but there seems to be no record of any notification of the actual replacement of the indefinite award as notified on 26/10/2018.
3. This raises some procedural matters because it seems that the date of the actual disputed decision is not known (although the clock as regards time limits for appeal will not have started given that the decision has not been notified and it is consequently inchoate)
4. A decision is final unless and until it is revised or superseded, and the decision in the present case appears to a supersession rather than a revision given that the effective date is after 26/10/2018 and there have been several uprating decisions after that time which otherwise remain effective.
5. Regulation 23 of the Universal Credit (etc) Decisions and Appeal Regulations 2013 m provides that a decision can be superseded where there has been a relevant change of circumstances (or (Reg 23(1)b where it is expected that a change will occur) but I submit that in the circumstances of the present case there has been no such change because Mr X has at all relevant times either been granted leave to remain by the Immigration Authorities or that leave had been extended under S3C of the 1971 Immigration Act.
6. The Respondent avers **(S4(2) page D**)

Having noted all the evidence it is clear that the decision dated 26/10/2018 erred in regard to awarding an indefinite award given that Mr X did not have leave to remain on a permanent basis.

17.1 I read the above as suggesting that the ground for supersession was an error of law and that the Respondent was aware at the time of the decision to make an indefinite award that Mr X’s leave to remain was time limited.

* 1. The alternative ground would have been mistake as to a material fact and I make the following observations for avoidance of doubt

17.3 I am reminded that in the context of revision and supersession, a material fact is a primary fact as opposed to a secondary fact which is a conclusion deduced or inferred from a primary fact thus a difference of opinion as to conclusions to be drawn from a primary fact cannot be grounds for revision (or for that matter supersession) (see R(S)4/86, RH v Secretary of State for Work and Pensions (DLA) [2015] UKUT 0453 (AAC))

* 1. I will add for completeness that if the Respondent is in any way implying that the Habitual Residence Test (HRT) (carried out when Mr X made his claim) was incomplete and there was consequently a lack of consideration of the issues, his position is arguably untenable . I find support from what Mr Commissioner Mitchell held at paragraph 11 of R(SB)4/92 (the emphasis is mine)

An alternative submission is made on behalf of the claimant that the tribunal decision could be reviewed on the ground of mistake as to a material fact “in that they did not give consideration of the [claimant’s] flat as being exceptionally difficult to heat adequately, nor having unsuitable washing/ drying facilities.” It is in my judgment impossible to sustain this alternative submission. **Such alleged failures of consideration are not equivalent to the mistakes of fact**. In any event as regards the first point the tribunal of 20 February 1987 in fact awarded an additional requirement for heating at the higher rate appropriate to that circumstance from the date which, as a matter of fact, they found appropriate. On the second point the tribunal of 15 September 1987 awarded an additional requirement for laundry as claimed by the claimant and backdated it for the then maximum period of one year

1. S88 of the Welfare Reform Act 2012 in so far as is relevant provides

Supplementary

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Claims, awards and information

(2) An award of personal independence payment is to be for a fixed term except where the person making the award considers that a fixed term award would be inappropriate.

(3) In deciding whether a fixed term award would be inappropriate, that person must have regard to guidance issued by the Secretary of State.

1. It is axiomatic that the Respondent considered that a fixed term award was inappropriate when the decision was made on 26/10/2018 *( and nothing had changed the Respondent’s mind when the subsequent decision was made on 31/01/2019)*
2. There is no specific provision in S88 which requires a fixed term award to be made, but I concede that S88(3) requires the decision maker to have regard to guidance issued by the Secretary of State.
3. The issues were considered by Judge Mitchell in RS v Secretary of State for Work and Pensions [2016] UKUT 0085 (AAC). Judge Mitchell held at [1]-[3] (the emphases are mine

REASONS FOR DECISION

Introduction and summary of reasons

1. This appeal raises two questions of general importance. Firstly, what is the start date of an award of Personal Independence Payment (PIP) granted to a transfer claimant (a person who was previously entitled to Disability Living Allowance (DLA))? Secondly, what is the legal framework for deciding whether a PIP award should be an indefinite award or for a fixed term?

2. The answer to the first question is that PIP transfer awards have effect from a date determined by reference to the Secretary of State’s entitlement decision, not the date of the transfer claim.

3. The second question raises a number of issues. In summary, my conclusions in this respect are:

(a) the Welfare Reform Act 2012 (“the 2012 Act”) enacts a qualified requirement that PIP awards are to be for a fixed term;

(b) the statutory qualification to the requirement for fixed term awards is that a fixed term award would be “inappropriate”. In deciding whether a fixed term would be inappropriate, **a key consideration is the likely persistence of an individual’s limiting** **conditions**. A further consideration in favour of fixed term awards is the relative ease with which the DWP may reopen the question of a PIP recipient’s entitlement even if s/he has an indefinite award;

(c) **if a fixed term award would be inappropriate, an indefinite award is to be made**;

(**d) the First-tier Tribunal has jurisdiction to hear an appeal against a decision not to make an indefinite award**;

(e) if the Secretary of State issues guidance under section 88(3) of the 2012 Act about deciding whether a fixed term award would be inappropriate, the First-tier Tribunal is required to have regard to the guidance. **But the guidance must not be treated as if it were a rule;**

(f) in fixing the duration of a fixed term award, relevant considerations will include the likely persistence of an individual’s limiting conditions and the relative ease with which PIP entitlement may be re-opened before the end of the fixed term. Generally, the likely persistence of limiting conditions and duration of a fixed term award are positively related;

(g) rigid categories for the duration of fixed term awards are not compatible with the purpose of the 2012 Act;

(h) the First-tier Tribunal has jurisdiction to hear an appeal against the duration of a fixed term award.

1. Mr X claimed PIP on 28/04/2016. RS was decided on 11/02/2016, some 2 months before Mr X made his claim. Notice of the Respondent’s decision to make an indefinite award was issued to Mr X on 26/10/2018, more than 2 years after RS. The Respondent reviewed the decision making the indefinite ward on 31/01/2019, almost 3 years after RS.
2. The dates are significant because RS confirms that the Secretary of State’s guidance must not be treated as if it were a rule.
3. I also note that Judge Mitchell found that the Secretary of State had not issued any guidance under S88(3) at the time he made his decision, **and I have not been able to find any guidance issued by the Secretary of State subsequent to RS**.
4. I therefore submit that RS supports my case that there was no error in the decision dated 26/10/2018 making the indefinite award. The decision dated 26/10/2018 was not based on any mistake as to any material fact (Cf paragraphs 17.2-17.4 above). The decision was not wrong in law for the reasons I outlined at paragraphs 18-21 above i.e., there is nothing in S88 which specifically prohibits making an indefinite award in the circumstances of the present case. There has been no change in Mr X’ s circumstances which would provide the basis under Regulation 23 of the Decisions and Appeals for superseding the decision. (Cf paragraphs 10-11 and 16 above)
5. **The Respondent has therefore failed to provide any grounds to supersede the decision dated 26/10/2018 making the indefinite award.**
6. I am reminded Regulation 38 (2) of the Universal Credit (etc) Claims and Payments Regulations 2013 provides.

(2) Subject to regulation 8 of the Personal Independence Payment Regulations, a person to whom this regulation applies must supply in such manner as the Secretary of State may determine and within the period applicable under regulation 45(4)(a) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 such information or evidence as the Secretary of State may require for determining whether a decision on the award of benefit should be revised under section 9 of the Social Security Act 1998 or superseded under section 10 of that Act.

1. The Respondent may have reason to confirm from time to time that Mr X continues to have leave to remain in the UK given that his leave has been time limited. (*It is common practice for the Immigration authorities to successively grant time limited leave before eventually allowing indefinite leave*), although it is arguable following Kerr v Department for Social Development for Northern Ireland [2004] UKHL 23 that the Respondent could access this information for itself.
2. It is strongly arguable notwithstanding Kerr that Regulation 38(2) is a far more appropriate mechanism for the Respondent to maintain the integrity of Mr X’ s award rather than forcing him to periodically make a fresh claim and undergo a full assessment, even more so given that there had been an indefinite award in place.
3. I therefore ask the Tribunal to allow the appeal and restore Mr X’ s indefinite award for the reasons outlined.



Derek Stainsby

Welfare Rights Adviser

Plumstead Community Law Centre For the Appellant

18 April 2023

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| Attachment  |
| RS v Secretary of State for Work and Pensions [2016] UKUT 0085 (AAC).  |