



Neutral Citation Number: [2019] EWCA Civ 839

Case No: C3/2018/2391

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL**  
**(ADMINISTRATIVE APPEALS CHAMBER)**  
**Upper Tribunal Judge A.L. Humphrey**  
**CPC/3/2016**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16 May 2019

**Before:**

**LADY JUSTICE KING**  
**LORD JUSTICE DAVID RICHARDS**  
and  
**LORD JUSTICE LEGGATT**

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**Between:**

**THE SECRETARY OF STATE FOR WORK AND  
PENSIONS**  
- and -  
**IAN KEITH GOULDING**

**Appellant**

**Respondent**

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**Fiona Scolding QC** (instructed by **the Government Legal Department**) for the **Appellant**  
**Katherine Barnes** (instructed pro bono by **the Free Representation Unit**) for the **Respondent**

Hearing dates: 2 May 2019  
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**Approved Judgment**

**Lord Justice David Richards :**

1. In determining entitlement to state pension credit (SPC), account is taken of the claimant's actual and "notional" income. Notional income is defined by reg. 18 of the State Pension Credit Regulations 2002 (SI 2002/1792). In the case of a person with a personal pension scheme, a claimant, who is entitled to but has not yet drawn the whole of any income payable under the scheme, is treated under reg. 18(3) as receiving "the maximum amount of income which may be withdrawn from the fund". It is the meaning of that phrase and the associated phrase "income foregone", and in particular the word "income" as there used, that is the subject of this appeal.
2. The Upper Tribunal (Upper Tribunal Judge Humphrey) held that, where withdrawals had not been made under a personal pension policy and the value of the fund was less than the amount of the policyholder's contributions to it, a withdrawal could not be "income" for the purposes of reg. 18 but was a return of capital. The Secretary of State for Work and Pensions (SSWP) appeals with permission granted by the Upper Tribunal.
3. The relevant facts are as follows. The respondent, Ian Goulding, who was born in March 1950, invested £91,329 in a personal pension plan with a company in the Aviva group (Aviva) in 2010 (the Plan). The value of the Plan fund was £90,818 in July 2013 and £90,410 a year later. Although entitled under the terms of the Plan to purchase an annuity or to receive income withdrawal, he was not obliged to do so and, as a result of a complaint by him that Aviva had invested the Plan moneys in the wrong type of fund, he says that he was advised by the Financial Services Compensation Scheme not to withdraw any funds from the Plan. It is not suggested that this advice has any bearing on the issue on this appeal.
4. Subsequently, Mr Goulding applied for SPC and, on 13 February 2013, the Department for Work and Pensions (DWP) awarded him SPC with effect from 14 November 2012. Following the supply of information by Aviva as to the maximum amount that Mr Goulding could withdraw under the Plan, the DWP disallowed the claim for SPC from 21 August 2013. Mr Goulding appealed against that decision which was allowed on 14 July 2014 by the First-tier Tribunal (the FtT), which held that he was entitled to SPC from 21 August 2013 to 11 February 2014. Although the SSWP takes the view that this decision was wrong as a matter of law, it was not appealed to the Upper Tribunal. We are not therefore concerned with that decision on this appeal.
5. On 10 February 2014 Mr Goulding ceased part-time work and became fully retired. He re-applied for SPC. On 13 February 2014, the DWP decided that he was entitled to SPC of £21.90 a week rather than the maximum amount of £148.35 per week, after taking into account notional weekly income of £126.45 under the Plan. Mr Goulding requested a reconsideration of this decision by the DWP and on 2 February 2015 the decision was confirmed. The present appeal is concerned with the decision of 13 February 2014 that Mr Goulding was entitled to SPC of £21.90 per week from 12 February 2014. This decision ceased to be applicable in March 2015 when Mr Goulding became of state pension age and was in receipt of state pension. We are not concerned with the position from March 2015.

6. Mr Goulding appealed against the decision of 14 February 2014 and his appeal was allowed by the FtT by a decision made on 4 September 2015. On the SSWP's appeal to the Upper Tribunal, the FtT's decision was set aside on the basis that the reasons given were wrong in law. However, on different grounds, the Upper Tribunal came to the same conclusion, that the notional income under the Plan should not be taken into account. Mr Goulding does not seek on this appeal to support the reasoning of the FtT, and so the focus is on the reasons given by the Upper Tribunal. Before addressing those reasons, I will refer to the relevant statutory provisions.
7. SPC is a social security benefit introduced by the State Pension Credit Act 2002 (the SPC Act). It comprises two categories of credit, the guarantee credit and the savings credit. This appeal concerns the guarantee credit, the purpose of which is to bring recipients' income up to a guaranteed level. It is payable to both men and women at or over the age which is the minimum qualifying age for women to receive the basic state pension. Mr Goulding was over the relevant age at the time of each of his applications.
8. Section 2(1) of the SPC Act provides that a condition for the grant of SPC is that a claimant either has no income or has income which does not exceed the appropriate minimum guarantee. Under section 2(2) a claimant entitled to SPC will receive either the appropriate minimum, if he or she has no income, or the difference between the appropriate minimum guarantee and his or her income.
9. Section 15 is the governing provision as regards income. It defines "income" to mean income of any of the descriptions set out in section 15(1) which, so far as relevant, include "retirement pension income". Section 16 defines retirement pension income so as to include "income from an occupational pension scheme or a personal pension scheme" and "income from a retirement annuity contract". A retirement annuity contract is defined in section 16(3) as a contract or scheme approved under the relevant part of the Income and Corporation Taxes Act 1988. "Personal pension scheme" is defined by section 17(1) for present purposes as "a personal pension scheme as defined in section 1 of the Pension Schemes Act 1993". It is common ground that the Plan is a personal pension scheme as so defined.
10. Section 15(3) provides that a person's income shall be calculated or estimated in such manner as may be prescribed. Section 15(6) provides that circumstances may be prescribed in which, among other things, a person is treated as possessing income which he does not possess.
11. The State Pension Credit Regulations 2002 (the SPC Regulations) were made pursuant to these, among other, provisions. Part III contains rules for calculating a claimant's income. Regulation 18 makes provision for "notional income" and is principally concerned with notional retirement pension income. The parts relevant to the present appeal are reg. 18(2)-(5) which deal with occupational and personal pension schemes and retirement annuity contracts. Those paragraphs read as follows:  
  
    “(2) Where a person who has attained the qualifying age, is a person entitled to money purchase benefits under an occupational pension scheme or a personal pension scheme, or is a party to, or a person deriving entitlement to a pension under, a retirement annuity contract, and –

(a) he fails to purchase an annuity with the funds available in that scheme where

(i) he defers, in whole or in part, the payment of any income which would have been payable to him by his pension fund holder;

(ii) he fails to take any necessary action to secure that the whole of any income which would be payable to him by his pension fund holder upon his applying for it, is so paid; or

(iii) income withdrawal is not available to him under that scheme; or

(b) in the case of a retirement annuity contract, he fails to purchase an annuity with the funds available under that contract,

the amount of any income foregone shall be treated as possessed by him, but only from the date on which it could be expected to be acquired were an application for it to be made.

(3) The amount of any income foregone in a case to which either head (i) or (ii) of paragraph (2)(a) applies shall be the maximum amount of income which may be withdrawn from the fund.

(4) The amount of any income foregone in a case to which either head (iii) of paragraph (2)(a) or paragraph (2)(b) applies shall be the income that the claimant could have received without purchasing an annuity had the funds held under the relevant scheme or retirement annuity contract been held under a personal pension scheme or occupational pension scheme where income withdrawal was available and shall be determined in the manner specified in paragraph (3).

(5) In paragraph (2), “money purchase benefits” has the meaning it has in the Pensions Scheme Act 1993.”

12. Regulation 18(5) refers to the definition of “money purchase benefits” in section 181(1) of the Pensions Schemes Act 1993 which, in relation to a member of a personal pension scheme, is “benefits the rate or amount of which is calculated by reference to a payment or payments made by the member or by any other person in respect of the member”.
13. As the Upper Tribunal judge said at [43], the policy behind reg. 18(2)-(5) is to prevent successful claims for SPC by those who could, but do not, apply for pension income which would put them outside the limits for SPC or, it may be added, which would reduce the level of SPC payable to them. These provisions do not, however, deem a claimant to have a retirement pension income when one is not available to him or her, because reg. 18(2) applies only if a claimant is entitled to purchase an annuity with the scheme funds and has not done so.
14. SPC was introduced with effect from 6 October 2003. In addition to the Regulations, which came into force on that date, other steps were taken for the introduction of

SPC. These included amendments to the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) (the 1987 Regulations) which contain general provisions relating to a number of different social security benefits. Regulation 7 requires claimants and others to provide relevant evidence and information. Paragraphs (4)-(7) of reg. 7 relate to personal pension schemes and retirement annuity contracts and were first introduced in 1995 with the introduction of personal pension schemes in that year. They apply to claimants for specified types of social security benefit and they were amended in 2003 to include claimants for SPC.

15. Under reg. 7(4), a claimant who has attained the qualifying age and is entitled to a pension under a personal pension scheme or under a retirement annuity contract must, if so required by the SSWP, provide the name and address of the pension fund holder (ie the provider, in this case Aviva) and details such as a reference or policy number to enable the scheme or contract to be identified. The pension fund holder must, if required to do so by the SSWP, provide the information required by reg. 7(6):

“The information to which this paragraph refers is –

(a) where the purchase of an annuity under a personal pension scheme has been deferred, the amount of any income which is being withdrawn from the personal pension scheme;

(b) in the case of –

(i) a personal pension scheme where income withdrawal is available, the maximum amount of income which may be withdrawn from the scheme; or

(ii) a personal pension scheme where income withdrawal is not available, or a retirement annuity contract, the maximum amount of income which might be withdrawn from the fund if the fund were held under a personal pension scheme where income withdrawal was available,

calculated by or on behalf of the pension fund holder by means of tables prepared from time to time by the Government Actuary which are appropriate for this purpose.”

16. In February 2013, Aviva provided to the DWP the information required under reg. 7(6) in relation to the Plan. Aviva stated that the Plan was an income drawdown policy which allowed income to be withdrawn at any time up to a maximum annual income withdrawal of £6,575.70. It was the weekly equivalent of this sum that the DWP decided was deductible from the SPC otherwise payable to Mr Goulding.
17. The Upper Tribunal held that all the conditions for the application of reg. 18(2) applied but, as mentioned above, held that any amount that Mr Goulding could receive under the Plan would not be “income”. Thus, (i) Mr Goulding was entitled to “money purchase benefits” under the Plan; (ii) he had failed to purchase an annuity, in the sense that he was entitled to purchase an annuity but had not done so; and (iii) he fell within reg. 18(2)(a)(ii) because he did not take any necessary action to secure that any income that would be payable to him under the Plan was so paid. The Upper

Tribunal's finding on this last point is necessarily premised on the assumption that reg. 18(2)(a)(ii) applies even if there is no "income" payable under the Plan in the sense decided by the Upper Tribunal. Mr Goulding does not challenge any of these findings.

18. At [55] of the Decision, the judge summarised "the tax and pensions regime in the case of capped drawdown", referring to provisions in primary and secondary legislation. The SSWP submitted that the tax and pension rules were determinative of the "maximum amount of the income which may be withdrawn from the scheme", there being no express definition of that phrase in the SPC Act or the SPC Regulations.
19. The judge rejected this submission on two grounds. First, she pointed to the presence of additional words in equivalent regulations dealing with other social security benefits, such as income support and jobseeker's allowance. Those words, coming at the end of the equivalent provision to reg. 18(3), are: "and shall be determined by the Secretary of State who shall take account of information provided by the pension fund holder in accordance with regulation 7(5) of the Social Security (Claims and Payments) Regulations 1987". The absence of such words in the SPC Regulations had the effect, it was held, that the tax and pension rules did not apply. Second, the judge rejected any attempt to read those words across into the SPC Regulations, on the basis that it did not meet the tests for adding words to a statutory provision as laid down by the House of Lords in *Inco Europe Ltd v First Choice Distribution* [2000] UKHL 15, [2000] 1 WLR 586.
20. On this basis, the judge concluded at [61] that she would "have no regard to the provisions of tax legislation as they can have no application in the context of SPC unless specifically incorporated into the SPC regime which they were not".
21. The judge had directed the SSWP to file expert evidence by an actuary as to how, in the absence of any express method of calculation, the "maximum amount of income which may be withdrawn from the fund" would be determined in this case. The SSWP filed a witness statement of Mark Shaw, an actuary employed by the Government Actuary's Department. Mr Shaw identified two ways in which the maximum amount could be determined. Option B was that the policyholder would withdraw a fixed proportion of the fund each year, increasing with age to use up 100 per cent of the fund's capital, and any generated interest, over the policyholder's expected lifetime.
22. The judge concluded at [64] that:

"In the absence of a definition of the amount of income foregone and taking into account what Mr Shaw said about what he called Option B (summarised at paragraph 62 above) I agree with the FtT's reasoning that any sums withdrawn from the Plan at the relevant time would have been withdrawals of capital by instalments as the assets of the Plan were less than the respondent's initial investment. The fact that these withdrawals could be made periodically or from time to time does not alter matters."

23. In approaching the issue arising in this case, there are in particular three principles of statutory construction that are of direct relevance. The first is that legislation should be read in its legal, social and historical context. The legislature intends the language of a statute, or statutory instrument, to be given an informed, rather than a literal meaning. The second is that technical words are to be construed in the light of their technical or generally understood meaning. The third is that legislation which is *in pari materia* should be read and construed together.
24. In my judgment, the Upper Tribunal was wrong in law not to apply these principles to the interpretation of reg. 18 of the SPC Regulations. Paragraphs (2)-(5) of reg. 18 are concerned with occupational pension schemes, personal pension schemes and retirement annuity contracts. These are not words of ordinary meaning but, as the definitions of each of them in the SPC Act show, they are phrases with a clear and technical statutory meaning. These types of schemes and contracts exist by virtue of the statutory regimes that created them and govern them. While some of the relevant provisions are contained in pensions legislation, many appear in tax legislation. This is readily explicable, because the tax treatment of contributions to them, of investments held within them and of benefits paid under them are critical to such schemes and contracts.
25. Focusing specifically on the word “income”, the payment of “income” to members of personal pension schemes is governed by legislation. Further, the word “income” as it appears in various parts of these paragraphs must, as it seems to me, carry the same meaning as it does in the phrase “income withdrawal”. That, too, is a phrase used and defined in the applicable legislation.
26. A personal pension scheme is a defined contribution pension scheme between an individual and a pension provider. Such schemes replaced retirement annuity contracts as a vehicle for individual pension provision as a result of statutory changes which took effect in 1988. They were initially governed by the Income and Corporation Taxes Act 1988 (the 1988 Act). The concept of “income withdrawal” from a personal pension scheme was introduced by the Finance Act 1995 as a means whereby a member could, after attaining a qualifying age, obtain a return from a personal pension scheme without committing the fund to the purchase of an annuity. It was not a phrase that otherwise had any meaning or application to such schemes. Schedule 11 to the Finance Act 1995 amended the relevant part of the 1988 Act. Section 630(1) was amended to include a definition of “income withdrawal” as “a payment of income, under arrangements made in accordance with a personal pension scheme, otherwise than by way of an annuity”. Section 634A(1) provided that where a member elected to defer the purchase of an annuity “income withdrawals may be made by him during the period of deferral”. Section 634A(4) provided that:

“The aggregate amount of income withdrawals by a member in each successive period of twelve months beginning with his pension date must be not less than 35 per cent or more than 100 per cent of the annual amount of the annuity which would have been purchasable by him on the relevant reference date.”
27. When the 1987 Regulations were amended in 1995 to include reference in reg. 7 to information concerning personal pension schemes and the maximum amount of income withdrawals, there can be no doubt that this was done in the light of the

introduction that year of the ability to make income withdrawals from personal pension schemes. A definition of “personal pension scheme” by reference to the relevant legislation was introduced into the 1987 Regulations: section 1 of the Pension Schemes Act 1993 as regards employed earners and the 1988 Act as regards self-employed earners. In the absence of a clear indication to the contrary, it would be perverse to think that the references in those amendments to “income withdrawal” were not to be understood in the context of the pensions and tax legislation governing personal pension schemes.

28. Equally, when SPC was introduced in 2002, “personal pension scheme” was defined in the SPC Act by reference to its definition in the Pension Schemes Act 1993 which by then extended to self-employed as well as employed earners. Provision was made in reg. 18 of the SPC Regulations to deal with actual and deemed entitlements to income withdrawal. “Income withdrawal” in this context has no meaning unless it is a reference to the provisions contained in the applicable legislation, particularly the 1988 Act as amended by the Finance Act 1995.
29. “Income withdrawal”, and “income” as used in that context, were unconnected with the financial performance of a scheme fund. The permissible amount of “income withdrawal” was not measured by the extent, if any, to which the value of the fund had increased since its inception. The amount was fixed by reference to the amount of an annuity which could be purchased with the fund. If the fund stood at 100 on the relevant date and it could have been used to purchase an annuity of 5, the figure of 5 determined the maximum amount of any income withdrawal. The extent, if any, to which the fund value of 100 derived from appreciation in the value of the fund was irrelevant.
30. The legislation governing personal pensions, including income withdrawals, was overhauled by the Finance Act 2004. Section 165(2) defined “pension”, in relation to a registered pension scheme (which in practice embraced all personal pension schemes including Mr Goulding’s Plan) as (a) an annuity and (b) “income withdrawal”. “Income withdrawal” was defined in paragraph 7 of schedule 28 as, so far as relevant, “an amount (other than a payment of an annuity) which the member is entitled to be paid from the member’s unsecured pension fund in respect of an arrangement”. Immaterial amendments to this definition have since been made with effect from 6 April 2011 and 17 December 2014. The Act provided for an increase in the maximum amount of income withdrawal from 100% to 120% of the annuity that could be purchased with the fund. The omission of the word “income” and the substitution of “amount” in the definition did not introduce a significantly different feature in the statutory concept of “income withdrawal”. Even if it did, the undefined references in the SPC Regulations to “income withdrawal” and other technical words and phrases fall to be construed in accordance with changes in their meanings, in the absence of express or necessarily implied provision to the contrary: see *R (on the application of ZYN) v Walsall Metropolitan BC* [2014] EWHC 1918 (Admin), [2015] 1 All ER 165 at [39]-[48] and [52]-[59] and *Bennion on Statutory Interpretation* (7<sup>th</sup> ed 2017) Chap. 14.
31. Other factors underline that reg. 18 is to be read consistently with the regime governing personal pension schemes and income withdrawals.



32. First, as earlier mentioned, the 1987 Regulations were amended in 1995 to coincide with and reflect the introduction of income withdrawal and were further amended with the introduction of SPC. Regulation 7(6) requires pension fund holders such as Aviva to state “in the case of a personal pension scheme where income withdrawal is available, the maximum amount of income which may be withdrawn from the scheme, calculated by or on behalf of the pension fund holder by means of tables prepared from time to time by the Government Actuary which are appropriate for this purpose”. Clearly, the pension fund holder will calculate the maximum amount of income withdrawal in accordance with the terms of the scheme and the provisions of the applicable tax legislation. The only purpose of this calculation, in the context of SPC or any of the other social security benefits to which reg. 7 applies, is the determination of notional income under reg. 18 of the SPC Regulations or the equivalent provisions of regulations applicable to other benefits.
33. Second, it ensures equivalent treatment with pension income by way of an annuity. Whether the annuity is purchased under a personal pension scheme or a retirement annuity contract income, the annuity will be purchased with the proceeds of the fund. As in the case of income withdrawal, the amount of the annuity will be directly related to the fund’s value when the annuity was purchased and unconnected with any increase or decrease in the value of the fund since contributions were made to it. If an annuity is treated as retirement pension income, as it clearly is, there is no reason why income withdrawal should not be treated in the same way.
34. Third, the alternative meaning of “income” found by the Upper Tribunal would require a continuing examination of the financial performance of personal pension schemes, producing volatility in entitlements for claimants depending entirely on the scheme’s performance as against the amount of the contribution(s) made to them. It is unlikely that such a complex and unpredictable approach was intended.
35. The only reason given by the Upper Tribunal for its rejection of the tax and pensions legislation as determining the meaning of the words in issue in reg. 18(3) was the absence of the additional words found in the equivalent provisions in the regulations governing income support and some other benefits. That appears to me to be a very slender basis on which to reject the application of well-established principles of construction. There is nothing in the SPC Regulations themselves, or in the SPC Act, to support this approach. The relevant tax legislation is directly related to the subject-matter of reg. 18, whereas the regulations governing other benefits, while not irrelevant, are only indirectly related. The absence of words is not a strong indicator of meaning of the words in fact used and, in any event, in my judgment, the words included in the other regulations do no more than express what is the true meaning and effect of reg. 18. I am inclined to think that they were omitted by the drafter as unnecessary.
36. The Upper Tribunal judge gave a carefully prepared Decision but, for the reasons given in this judgment, I conclude that she failed to apply the correct legal principles to the construction of reg. 18 and that the SSWP’s appeal should be allowed. As the only outstanding point on Mr Goulding’s appeal against the DWP’s decision dated 14 February 2014 is the issue of law addressed in this judgment, the appropriate disposal in my view is for this court to dismiss Mr Goulding’s appeal against the DWP’s decision, rather than remitting it for decision by the FtT or Upper Tribunal.

37. I would like to record my thanks to both counsel for their helpful written and oral submissions. Ms Barnes appeared *pro bono* for Mr Goulding and it was of great assistance to the court to have the benefit of her well-focused and economic submissions.

**Lord Justice Leggatt:**

38. I agree.

**Lady Justice King:**

39. I also agree.