Upper Tribunal for Scotland

2024UT12
Ref: UTS/AS/23/0031

DECISION OF

Lady Poole

ON AN APPEAL
IN THE CASE OF

CD

Appellant

- and -

Social Security Scotland

Respondent

FTS Case reference: FTS/SSC/AE/23/00077

Representation
For the appellant: Mr Lee Oliver, Glasgow City Welfare Rights
For the respondent: Edwards, Advocate; Anderson Strathern

5 March 2024

DECISION

The decision of the First-tier Tribunal for Scotland dated 26 June 2023 is quashed.

The decision is re-made as follows.

> "The appeal against the decision of Social Security Scotland to refuse the appellant's application for funeral expense assistance on 9 January 2023, and confirmed on redetermination on 14 February 2023, is allowed. The appellant is entitled to funeral expense assistance".

The case is remitted to Social Security Scotland to proceed as accords.

REASONS FOR DECISION

Overview

1. This appeal is about funeral expense assistance (“**FEA**”), and time limits for making applications. The issue in the appeal is whether the First-tier Tribunal for Scotland (“**FTS**”) erred in law, when it upheld a decision of Social Security Scotland (“**SSS**”) rejecting an application for FEA because it was made too late. It is not in dispute between the parties that the appellant meets all other conditions of eligibility for FEA.

2. In this decision the background facts are set out, then the governing law. It then addresses four grounds of appeal advanced by the appellant, and allows the appeal on the second of those grounds. The decision finds that a particular statutory provision allowed the appellant’s application for FEA to be treated as made in time, when construed and applied in accordance with the Scottish social security principles.

Factual background

3. The appellant’s partner died on 3 May 2020, a time when the UK had recently been struck by the Covid-19 pandemic. His funeral took place on 2 June 2020. The appellant contacted the Department of Work and Pensions (“**DWP**”) to claim assistance with funeral costs. The date she contacted the DWP was 29 May 2020, considerably before the date 6 months after her partner’s funeral. Her claim was acknowledged in a text sent to her that day saying:

   > “Your Funeral Expenses Payment claim has been received. DWP is continuing to deliver essential services, but it may take us longer than usual to process your claim. We will contact you if we need any more information, you do not need to contact us again”.

   Considerable restrictions were in place in the UK at the time this text was sent as a result of the pandemic, and public services were adversely affected.

4. What the DWP should have done was refer the claim on to SSS. Funeral expenses assistance had previously been administered on a UK wide basis by the DWP. This changed on 16 September 2019 when, following devolution of certain powers in relation to social security under section 23 of the Scotland Act 2016, SSS started to administer FEA. The Scottish Ministers and the Secretary of State for Work and Pensions entered an agreement covering what should be done if, after SSS had taken over, the DWP was contacted about funeral expenses support in Scotland. The agreement was called the

"Funeral Support Payment in Scotland: Service Level Agreement". Under the terms of that agreement (in particular clauses 8.1.1, 8.1.12- 8.1.14), the appellant should have been handed over by the DWP to SSS.

5. The appellant proceeded on the basis of the text sent to her by the DWP. She assumed her claim was being dealt with, until she was contacted by funeral directors in 2022 about an unpaid bill. At that point she made further enquiries. The DWP told the appellant that it could not pay funeral support, because the introduction of Scottish FEA meant she was no longer eligible for a payment from the DWP. The DWP apologised for its erroneous handling of the appellant's claim, and made a £50 consolation payment to her (a sum considerably less than the FEA she sought to claim). The appellant's MSP took up her case. In a letter dated 4 April 2023, the DWP accepted that the appellant should have:

> "been advised to apply for the Scottish Funeral Support and given the telephone number to ring, or the call transferred. We are unable to explain why this happened, but can confirm that due to Covid-19, we were receiving a high volume of calls. To manage this, new members of staff joined the bereavement team, so this mistake could have been due to training needs or their lack of experience".

6. After the DWP had told the appellant they would not pay funeral support and that she had to apply to SSS, the appellant made an application to SSS for FEA dated 22 November 2022. On 9 January 2023, SSS refused the appellant's application for FEA, because it was made more than 6 months after the date of the funeral. On redetermination on 14 February 2023, the same decision was reached. The appellant appealed SSS's refusal of FEA to the FTS. On 26 June 2023, the FTS refused the appellant's appeal because the application had not been made to SSS before the date 6 months after her partner's funeral. On 1 August 2023, permission to appeal to the Upper Tribunal for Scotland ("**UTS**") was refused by the FTS. Permission was sought from the UTS, and after an oral hearing on 23 October, I granted permission.

Governing law

7. The parent Act for FEA is the Social Security (Scotland) Act 2018 (the "**2018 Act**"). The 2018 Act sets out Scottish social security principles.

> "1 **The Scottish social security principles**
>
> The Scottish social security principles are—
>
> (a) social security is an investment in the people of Scotland,
>
> (b) social security is itself a human right and essential to the realisation of other human rights,
>
> (c) the delivery of social security is a public service,
>
> (d) respect for the dignity of individuals is to be at the heart of the Scottish social security system,

(e) the Scottish social security system is to contribute to reducing poverty in Scotland,
(f) the Scottish social security system is to be designed with the people of Scotland on the basis of evidence,
(g) opportunities are to be sought to continuously improve the Scottish social security system in ways which -

(i) put the needs of those who require assistance first, and
(ii) advance equality and non-discrimination,

(h) the Scottish social security system is to be efficient and deliver value for money".

8. The intended effect of the social security principles is set out in section 2 of the 2018 Act.

"2 **Effect of the principles**

(1) The Scottish social security principles are set out in section 1 so that—

(a) they can be reflected in the Scottish social security charter as required by section 15(3), and
(b) the Scottish Commission on Social Security can have regard to them as required by section 97(6).

(2) A court or tribunal in civil or criminal proceedings may take the Scottish social security principles into account when determining any question arising in the proceedings to which the principles are relevant.
(3) Breach of the principles does not of itself give rise to grounds for any legal action."

9. FEA is one of the various forms of social security enabled by the 2018 Act. Section 34 and Schedule 8 of the 2018 Act set out the framework for funeral expenses assistance in Scotland. Eligibility conditions for FEA are contained in the Funeral Expense Assistance (Scotland) Regulations 2019 (the "**2019 Regulations**").

10. Regulation 3(1) of the 2019 Regulations makes entitlement to FEA conditional on application within the period specified in regulation 5. Regulation 5(3) of provides:

> "No application for funeral expense assistance may be made after the day falling six months after the day on which the funeral takes place…"

There are limited exceptions in the 2019 Regulations. An example is where backdated awards of a qualifying benefit result in eligibility conditions for FEA being met (Regulation 5(5)). Another example is under regulation 4, where there was a previous determination by the Scottish Ministers undermined by official error, but that provision does not apply where there has been an appeal to the FTS (Regulation 4). Neither of these provisions apply to the present case.

11. During the Covid-19 pandemic, the 2018 Act was amended, as part of a series of measures introduced by the Coronavirus (Scotland) Act 2020 (the "**2020 Act**") to deal with the effects of the pandemic. Sections 52A and 52B were amended into the 2018 Act

under a heading “Coronavirus: relaxation of deadlines”. Section 52B provides (with additional comments in square brackets):

> “52B **Applications for assistance**
> (1) Subsection (2) applies where regulations under Chapter 2 make an individual's eligibility for assistance in respect of a period or event depend (in any way) on an application being made by a particular time. [Chapter 2 contains provisions about FEA]
> (2) The person determining an individual's entitlement to the assistance may treat the individual's application as having been made by that time if satisfied that the reason for its not being made sooner is related to coronavirus.
> …. (4) In this section, "coronavirus" has the meaning given by section 1 of the Coronavirus (Scotland) Act 2020” [severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), now more commonly known as Covid-19].

The social security principles

12. The appellant argued that the FTS erred in law because it failed to use the social security principles in section 1 of the 2018 Act as good cause to override and disapply the time limit for making an application for FEA contained in regulation 5(3) of the 2019 Regulations. In particular, it was argued that principle (b), by providing that social security is a human right, and principle (g), which refers to putting the needs of those who require assistance first, and non-discrimination, gave a basis to disapply the 6 month time limit. It was also argued that the principles were a checklist that the FTS should go through when making decisions about social security.

13. These arguments fail to take into account the wording of the 2018 Act, and are rejected. Principles are a feature of a number of Scottish Acts, for example sections 1 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adults with Incapacity (Scotland) Act 2000, as well as the 2018 Act. The wording of all of these Acts is different. Care has to be taken to apply the provisions of the particular Act within which principles appear. The effect of principles depends on the wording of the Act enacting them, and the decision being taken (*G v Scottish Ministers* 2014 SC (UKSC) 84 (paragraphs 12-13, 39-41), *McCann v State Hospitals Board for Scotland* 2017 SC (UKSC) 121 (paragraphs 22, 39-41), *K v Argyll and Bute Council* 2021 SLT (Sh Ct) 293 paragraphs 22-24).

14. In broad terms, the social security principles in the 2018 Act were intended to guide a particular ethos for a Scottish social security system. But there is nothing in the 2018 Act to say the effect of the social security principles is that conditions of entitlement can be disapplied or ignored. The legislation setting out conditions of entitlement to social security is crafted having regard to many factors. These include availability of public funds, where scarce resources are best targeted, and the efficient and effective administration of social security. It is the obligation of tribunals to apply the statutory

conditions governing entitlement. The 2018 Act makes specific provision about the proper use of the social security principles by tribunals in section 2, set out above.

15. The position as far as the FTS (and UTS) is concerned is that breach of principles does not of itself give rise to grounds for any legal action (section 2(3) of the 2018 Act). In this case, the essence and effect of the appellant's argument is that because two of the social security principles are breached by refusing FEA, the remedy is to disapply the 6 month time limit for submitting applications for FEA. Given the terms of section 2(3) of the 2018 Act, these are not competent grounds of appeal.

16. The proper scope for consideration by tribunals of the social security principles is specified in section 2(2) of the 2018 Act. The words "may", take "into account" and "relevant" in section 2(2) have been carefully selected by the Scottish Parliament. Section 2(2) recognises that often the principles provide no real assistance in determining the issue most commonly before tribunals, of whether particular statutory conditions of entitlement are met on the evidence before them. The wording of section 2(2) operates to ensure finite public resources do not have to be spent considering the social security principles in cases where they provide no practical assistance with determining the matters in issue.

17. Given that the word "may" is used in section 2(2) of the 2018 Act rather than "must", it follows that the appellant's submission that the principles are a checklist that tribunals should work through cannot be accepted. The wording in section 2(2) of the 2018 Act is permissive rather than mandatory. Further, what the tribunal can do is "take into account" principles. It may be that a tribunal, faced with a statutory provision with competing constructions or applications to a set of facts, might be pointed towards the correct construction or application by taking into account the social security principles. This is very different from saying a tribunal can ignore or disapply statutory conditions of entitlement.

18. Finally, it is only when a principle is "relevant" to the proceedings that it may be taken into account by the tribunal (section 2(2) of the 2019 Act and *R v Social Security Scotland* 2021 SLT (Tr) 23 paragraph [44]). A principle is relevant if it has a reasonably direct bearing on an issue which the tribunal has to determine. Often principles may be at too high a level of generality to be of real relevance to a particular issue before the tribunal. They may be directed at a different aspect of the social security system not before the tribunal (eg principle (f) about how the system should be designed). Or they might already be given effect through the rules governing the tribunal (eg dignity and respect (principle (d)) is part of the overriding objective of the FTS and UTS social security rules). In particular, it does not follow from social security being recognised as a human right (principle (b)), that people who do not meet eligibility conditions for a particular benefit

are entitled to that benefit. Any right to assistance arises only where an applicant has met the conditions of entitlement.

19. Accordingly, before referring a tribunal to the principles, parties should be clear which live issue a particular principle is relevant to and why, and the proper scope for use of social security principles before tribunals set out in section 2 of the 2018 Act. Tribunals should apply the wording of sections 2(2) and 2(3) when the social security principles are raised. They should not feel obliged to address the social security principles in all decisions about Scottish social security benefits. It is only when the effect of a particular principle on a case is a "substantial question in issue" that it would be necessary to address it in reasons for a decision (*Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345).

Did the FTS err in law when it found the application for FEA was brought too late?

20. At paragraph 10 of its decision, the FTS said:

> "The Tribunal is satisfied that the reason for the Appellant's application not being made sooner is not related to coronavirus, and that accordingly there is no power under section 52B(2) to treat her application as being made timeously".

The FTS's reasons for its conclusion about section 52B are not clearly stated, but from reading the rest of the decision, they appear to be (i) the reason for lateness was the appellant's own mistake in applying to DWP not SSS, and (ii) no mention was made of coronavirus being a factor in lateness until the case was before the FTS.

21. The appellant invited the UTS to find the FTS had erred in law, because on the facts the reason the claim was not made earlier to SSS was related to coronavirus given the background in paragraphs 3-5 above. The respondent on the other hand argued that the FTS had been correct to find the reason for lateness was not related to coronavirus. This was because the essential failure was that of the appellant, in contacting the DWP to make an application rather than SSS. There was an insufficient link between the reason for not making the application sooner and it being related to coronavirus.

22. In this particular case, in deciding whether the FTS erred in its approach to section 52B, assistance can be gained from taking into account the social security principles in section 1 of the 2018 Act (under section 2(2) of that Act). Both the appellant and SSS advanced competing constructions and applications of section 52B. The social security principles help point towards the approach which is to be preferred. The undisputed facts of this particular case are that if the claim is timeous, the appellant satisfies all conditions of entitlement to FEA, including the means test in the 2019 Regulations. It is also not in dispute that she contacted DWP well before the date 6 months after her partner's funeral,

that the DWP was in error not referring her to SSS at that time, and when she was referred in 2022, she submitted a valid application to the Scottish Ministers. Given that background, if there is a construction and application of section 52B that gives effect to the policy and intention underlying principles (b) (social security is a human right), (c) (the delivery of social security is a public service) and (e) (that the Scottish social security system is to contribute to reducing poverty in Scotland), it is to be preferred over one which does not.

23. The question for the FTS under section 52B(2) was whether the reason for the application not being made to the Scottish Ministers sooner "is related" to coronavirus. That required the FTS first to identify "the reason" why the application was not made sooner. Having identified the reason, it had to consider whether that reason was "related" to coronavirus.

24. The provision requires the FTS to identify "the reason", not "a reason". A reason could be illness of the appellant or others. It could be effects of bereavement (although the 6 month period in the 2019 Regulations seeks to take that into account). It could be the claimant not knowing what they had to do, or applying to the wrong body. It could be because of inadequate service by public bodies. A combination of factors might have led to lateness. What "the reason" is for the purposes of section 52B(2) will be a question of inference from the particular facts of a case. Ascertaining "the reason" may necessitate the FTS looking behind explanations that are offered, to ascertain the true reason why an application was not made sooner. If there are multiple factors which have assisted in lateness, the social security principles ((b), (c) and (e) in this case) may assist in pointing towards what "the reason" is on the facts, for the purposes of section 52B(2).

25. Once "the reason" has been ascertained, the lateness can only be excused if it "is related" to coronavirus. That test requires a connection between the reason for lateness and coronavirus. The general background of section 52B is that it is part of a number of measures in the 2020 Act to recognise the disruption in public services as a result of the pandemic. It aimed to prevent injustice where timescales were not met due to coronavirus. An interpretation of the words "is related" that does not impose impossibly high standards of connection furthers the policy and intention both of the amendments to the 2018 Act made by the 2020 Act and the social security principles as they apply in this case (paragraph 22 above). Section 52B does not apply only to situations where the appellant themselves suffered from coronavirus. It can also apply to situations where lateness is a result of disruption in public services due to coronavirus.

26. Turning to the facts of this case, both the FTS and SSS took the approach that "the reason" the application was not made sooner was because the appellant made a mistake by contacting the DWP not SSS. It may be true that, if the appellant had contacted SSS instead of the DWP, her application would probably have been within the 6 month deadline. But to find that to be "the reason" the application to SSS was not submitted

sooner would fail to give effect to the policy and intention behind principles (b), (c) and (e) in the circumstances of this case. SSS's guidance on its website states that clients can apply for FEA by calling SSS directly or via DWP (although the DWP will only take their name, postcode and NI number before passing the claimant to SSS). The appellant took one of the routes suggested in this guidance of contacting the DWP. Had DWP done what is suggested in this guidance, and as it ought to have done under the Service Level Agreement, the appellant would have been referred to SSS, and made an application to the Scottish Ministers prior to 6 months after her partner's funeral. It was DWP's errors that resulted in no application being made to the Scottish Ministers at that time, rather than the claimant's approach to the DWP in the first place. When the legal test is properly applied to the facts of this case, "the reason" for the purposes of section 52B that the application was not made sooner was DWP's service failures.

27. The next question is whether the reason, DWP's service failures, was related to coronavirus. DWP's letter of 4 April 2023 acknowledges that in May 2020, during the Covid-19 pandemic, the bereavement service within DWP was experiencing an unusually high volume of calls, and that it had to resort to new staff who may have lacked experience or training, and may not have received as much supervision as in an office when having to work from home. It is a reasonable inference from the undisputed facts that coronavirus was responsible for the DWP's errors. The reason for the delay in making the application is sufficiently strongly connected to Covid-19 to "relate to" coronavirus, again having regard to the background of the social security principles (in particular (b), (c) and (e)). That state of facts is not negated because the issue of coronavirus was raised for the first time before the FTS (the FTS' second reason for rejecting the argument that the application was timeous due to the application of section 52B). If there is a delay in raising coronavirus as an explanation for lateness, no doubt there will be close scrutiny of whether as a matter of fact that is the true explanation. But if on the facts, the reason is related to coronavirus, as in this case, section 52B applies. The application can be treated as being made within the time limits in the 2019 Regulations.

28. Accordingly, the FTS erred in law in its interpretation of section 52B of the 2018 Act, and the application of its provisions to the facts of the appellant's claim. Its reasons in relation to section 52B were also inadequate. The FTS ought to have found section 52B applied so that the application for FEA was treated as being made in time.

Other arguments

29. There were two other bases on which the appellant argued the FTS was wrong to refuse the appeal. I did not accept either of these arguments, for reasons set out below.

The date the application for FEA was made

30. The appellant argued that the date of the application for FEA should be taken as 29 May 2020, the date when the appellant contacted the DWP (which was before the time limit of 6 months after the funeral). This argument fails to take into account the provisions of section 38 of the 2018 Act and regulation 3(7) of the 2019 Regulations. They provide that nothing counts as an application for assistance unless it is (a) made to the Scottish Ministers in the form they require, and (b) accompanied by such evidence as they require. These provisions exist to help with the efficient administration of social security assistance in Scotland, so that SSS is provided with the information it needs to determine claims, and finite resources are not unnecessarily diverted into administration. An application in the right form accompanied by the necessary evidence was not made to the Scottish Ministers until 22 November 2022.

Convention rights

31. Finally, the appellant argued that application of the 6 month time limit in the 2019 Regulations to her claim was contrary to her Convention rights. Articles 8, 14 and Article 1 of Protocol 1 were relied on as protecting a legitimate expectation to entitlement to FEA.

32. Convention rights tend to be expressed at a high level of generality, and are fulfilled primarily through the detailed rules and principles expressed in domestic law (*Re Reilly's Application for Judicial Review* [2013] UKSC 61 at paragraph 55). It is only where provisions of domestic law fail fully to reflect the requirements of the Convention that there is need to have recourse to Convention rights.

33. Given that a provision of Scots domestic law, section 52B of the 2018 Act, has the effect that the appellant's claim was not out of time, there is no need to consider the Convention rights challenge in any detail in this case. It is sufficient to observe that there is now a considerable body of law dealing with human rights challenges in the context of social security. Refusal of a claim because a claimant does not meet an eligibility condition does not necessarily entail a violation of the claimant's Convention rights. It may be "legitimate for the legislature to adopt a general rule, even if it may have unfortunate consequences in some individual cases" (*R(SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at paragraph 206). This is because "democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies" (paragraph 208).

Conclusion

34. The appeal is allowed for reasons set out in paragraphs 20-28 above. The decision of the FTS is quashed.

35. Under section 47 of the Tribunals (Scotland) Act 2014, the case may be remitted to the FTS or re-made. In this case it is appropriate to re-make the decision. The only condition of eligibility for FEA in dispute is the time limit, and it is agreed all other conditions are met. The facts relevant to determination of this issue are not in dispute. The UTS is in as good a position as the FTS to apply the provisions of section 52B, properly interpreted, to those facts. Re-making the decision will also avoid further delay, given that considerable time has elapsed since 29 May 2020 when the appellant first contacted a public body for assistance with funeral expenses.

36. The reason the application to SSS was not made sooner than 22 November 2022 is related to coronavirus, as explained in paragraphs 26-27 above. The application ought to be treated as having been made within the period described in regulation 5 of the 2019 Regulations. As the appellant meets all other eligibility conditions, she is entitled to FEA. The decision of the FTS is re-made as set out at the start of this decision.

Lady Poole
5 March 2024

*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.*