THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2021-000272-CA

Secretary of State for Work and Pensions v BC

Decided without a hearing.

Representatives

Appellant	Decision Making and Appeals (Leeds)
Respondent	Not legally represented

DECISION OF UPPER TRIBUNAL JUDGE SCOLDING KC

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference:	SC053/20/01026
Decision date:	22 February 2021 at Wolverhampton
Hearing:	Decided on the papers

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE. I find that the date from which Ms. BC may claim carer's allowance is the 28 June 2020, and not before that date.

REASONS FOR DECISION

A. What the appeal is about

1. This is a case concerning whether someone was entitled to carer's allowance from the date of their 16th birthday, rather than the date upon which they were treated a ceasing to be in full time education in law (which is the last Friday in June of the academic year where the young person becomes 16 as I set out below). I find that the First Tier Tribunal made an error of law in deciding that the date upon which such allowance could be paid was from someone's 16th birthday.

The parties

1. The parties to this appeal are the Secretary of State for Work and Pensions ("SSWP") and Ms. BC .

B. Reasons

Introduction

2. Ms. BC is a young person who became 16 on 22 January 2000. She has been caring for her brother since 20 November 2019. At that time, she was 15. She applied for Carer's allowance . The SSWP decided on 24 Jun 2020. that she could not qualify for Carer's allowance until 29 June 2020, which was the day after she would be entitled to leave full time education as she would no longer be of compulsory school age. Ms. BC appealed this decision to the First Tier Tribunal. The First Tier Tribunal in a decision dated 22 February 2021, decided , someone may receive carer's allowance if they are not in full time education, even if they are under compulsory school age but are 16.

3. The SSWP appealed this decision on the basis that Ms BC should be deemed to be in full time education until she stops being of compulsory school age. The fact that she was not, in fact , receiving full time education does not mean that carer's allowance should be paid. The First Tier Tribunal granted permission for this appeal on 13 July 2021.

Facts

4. The facts are not in dispute. At the time of Ms. BC's claim , she was being 'home-schooled'. She was also providing fulltime care for her brother, which she had been doing since November 2019. She says in her submissions to this Tribunal that she was receiving tuition or engaged in learning for only one hour per day, but for seven days a week during 2019/2020 ; the rest of her time was spent caring for her brother. She accepts that she was not receiving full-time education but says that here is no law set out for anyone who is home schooled to comply with a certain number of hours in education.

5. BC further accepts that until she turned 16, she was not entitled to claim carer's allowance , as those under 16 may not claim it . But she says that from January 2019, she was entitled to CA as she was neither under the age of 16 nor "receiving full-time education".

The Statutory Framework.

6. Carer's allowance is payable if the conditions set out in section 70 of the Social Security Contributions and Benefits Act 1992 are met. For the purposes of this appeal, the other conditions are not relevant. Section 70 (3) however says that:

   "(3) A person shall not be entitled to an allowance under this section if he is under the age of 16 or receiving full-time education."

7. Under s70(8) of the SSCBA 1992, the following is said:

   "*Regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this section as engaged, or regularly and substantially engaged, in caring for a severely disabled person, as gainfully employed or as receiving full-time education*."

8. The relevant regulations in this case are the Social Security (Invalid Care Allowance) Regulations 1976. These have laid down the "*Circumstances in which person are to be treated as receiving full-time education*" under Regulation 5. Which are :

   5.—*(1) For the purposes of section 70(3) of the Contributions and Benefits Act, a person shall be treated as receiving full-time education for any period during which he attends a course of education at a university, college, school or other educational establishment for twenty-one hours or more a week.*

   (2) In calculating the hours of attendance under paragraph (1) of this regulation–

   (a)there shall be included the time spent receiving instruction or tuition, undertaking supervised study, examination or practical work or taking part in any exercise, experiment or project for which provision is made in the curriculum of the course; and

   (b)there shall be excluded any time occupied by meal breaks or spent on unsupervised study, whether undertaken on or off the premises of the educational establishment.

   (3) In determining the duration of a period of full-time education under paragraph (1) of this regulation, a person who has started on a course of education shall be treated as attending it for the usual number of hours per week throughout any vacation or any temporary interruption of his attendance until the end of the course or such earlier date as he abandons it or is dismissed from it."

9. The issue therefore is whether or not Ms. BC should be "treated as receiving full time education" even though she was not in receipt of such.

Education legislation

10. Section 7 of the Education Act 1996 says:

"The parent all of every child of compulsory school age shall cause him to receive efficient full-time education suitable

a. to his age, ability and aptitude, and

b. to any special educational needs, he may have

either by regular attendance at school or otherwise.

11. The responsibility for securing full time education lies therefore with parents. They can choose to discharge this duty by arranging for their child to attend a school or can educate at home. It should be noted, however, that this education must be "efficient" , "full time" and "suitable for the age, ability and aptitude" of the young person in question.

12. A local authority has a power to look at the provision made by parents in a home setting, and if they do not consider that it meets the obligations of section 7 (set out above), to seek what is known as a "school attendance order", under s436A and s437 of the Education Act 1996.

13. I note from the bundle I was given that the parents of Ms. BC were served with such an order on 3 April 2019 . After November 2019, their local authority sent a letter saying that they were not going to pursue legal proceedings arising from the failure to comply with the School attendance order (letter from Council 19 11 2019) . Under s443 of the EA 1996,

"*(1) If a parent on whom a school attendance order is served fails to comply with the requirements of the order, he is guilty of an offence, unless he proves that he is causing the child to receive suitable education otherwise than at school".*

14. The absence of legal proceedings in this case does not equate to acceptance that the education provided by the parents of Mr and Mrs BC meet the criteria under s7. The relevant statutes, regulations and guidance are set out and discussed in *The Queen on the Application of: Christina Goodred v Portsmouth City Council v The Secretary of State for Education* [2021] EWHC 3057 (Admin). The government has produced guidance in 2019 , cited in

Goodred which (at paragraphs 19 – 25) which says, inter alia of the requirements of home education:

> "*2.4 There are no specific legal requirements as to the content of home education, provided the parents are meeting their duty in s.7 of the* Education *Act 1996. This means that education does not need to include any particular subjects and does not need to have any reference to the National Curriculum; and there is no requirement to enter children for public examinations. There is no obligation to follow the 'school day' or have holidays which mirror those observed by schools. Many home educating families do follow a clear academic and time structure but it should not be assumed that a different approach which rejects conventional schooling and its patterns is unsatisfactory, or constitutes 'unsuitable'* education. *Approaches such as autonomous and self-directed learning, undertaken with a very flexible stance as to when* education *is taking place, should be judged by outcomes, not on the basis that a different way of educating children must be wrong."*

15. Paragraph 3.5 provides:-

> "3.5 *The current legal framework is not a system for regulating home* education per se *or forcing parents to educate their children in any particular way. Instead, it is a system for identifying and dealing with children who, for any reason and in any circumstances, are not receiving an efficient suitable full-time education. If a child is not attending school full-time, the law does not assume that child is not being suitably educated. It does require the local authority to enquire what education* is *being provided and local authorities have these responsibilities for all children of compulsory school age. Local authorities should ensure that their enquiries are timely and effective. Depending on the results of those enquiries, the law may require further action by the local authority and the department believes that this is the case for an increasing number of children. Local authorities must take such action where it is required, within the constraints of the law. Local authorities have the same safeguarding responsibilities for children educated at home as for other children. They should be ready to use safeguarding powers appropriately, when warranted. This flows from the general responsibilities which local authorities have for the well-being of all children living in their area."*

16. Ms. BC is therefore correct that those educated at home do not need to sit in a replica classroom between 9am – 3.30pm , but they do need to receive "full time efficient education". That could include self-directed learning, autonomous study, work-based study or some form of online classes, as well as any sort of "teaching" whether by parent or other individual. However, this education does need to be "full time". Whilst it is not for this Tribunal to determine if what is described by Ms. BC would or would not amount to full time efficient education, the policy guidance makes it clear that this is what is required.

17. Education is compulsory from the age of 5 until 16 in England and Wales. The Education Act 1996 defines the end of 'compulsory school age' in section 8(3) as follows:

"a person ceases to be of compulsory school age at the end of the day which is the school leaving date for any calendar year –

a. if he attains the age of 16 after that day but before the beginning of the school year next following

b. if he attains that age on that day, or

c. (unless paragraph a applies) if that day is the school leaving date next following his attaining that age."

18. The school leaving date is specified by the Education (School Leaving Date) Order 1997 as being the last Friday in June, i.e. 28 June 2020 in the year with which this appeal is concerned.

19. When s70(3) was passed, as well as the 1976 Regulations referred to above, the school leaving age was 16 (and not the end of the academic year in which someone was 16). See s35 of the Education Act 1944 (this section was repealed by the Education Act 1996) :

"*In this Act the expression "compulsory school age" means any age between five years and sixteen years, and accordingly a person shall be deemed to be of compulsory school age if he has attained the age of five years and has not attained the age of sixteen years and a person shall be deemed to be over compulsory school age as soon as he has attained the age of sixteen years…"*

20. When the SSCBA was enacted in 1992, there would therefore be no situation where someone would be over 16 but still be of compulsory school age. (As an aside, the rationale for introducing the end of the academic year when someone was 16 was to ensure that they remained in education until the end

of their GCSE year- prior to that young people could leave school without taking their exams).

21. The leading case on the provisions of s70(3) is *Secretary of State for Work and Pensions v Deane* [2010] EWCA Civ 699, in which the Court of Appeal held that the Regulations are not exhaustive. Ward LJ (with whom the other members of the Court agreed) stated:

"*the circumstances described in Regulation 5 prescribe only when a person is receiving full-time education and Regulation 5 does not dictate that a person will not be deemed to be in receipt of full-time unless those conditions are met. If, therefore, a person may, on other criteria, be in full-time education even if the criteria in Regulation 5 are not satisfied, then Regulation 5 cannot be exhaustive. If it is clear on the ordinary meaning to be given to section 70(3) that a person is in fact receiving full-time education, then one need not resort to Regulation 5 to see whether he is to be so treated. (Para 40).*"

22. There is no authority that has discussed the issues that might be raised by home schooling in the context of carer's allowance that I can find.

Analysis

23. Does the fact that Ms. BC was not, in fact "receiving" full time education mean that she qualifies if over 16, even if of "compulsory school age"?

24. A literal reading of the words of s70(3) would focus on the factual issue of whether the young person was "receiving" full-time education, albeit that the focus of examination would be on the offer of education, rather whether it was actually being taken up. In *Deane*, the court found that someone would be treated as receiving full time education if the course (in that case a university course) was seen to be "full time" even if the actual contact hours or study hours undertaken by the student fell below that which may be considered to be "full time" . To give an example, the fact that someone said that they could undertake a course in fewer hours than the university had identified as needed did not mean that someone was not receiving "full time education" as it was the description of what was regarded as full time course by the university which was important – *SSWP v ZC* [2011] UKUT 2.

25. The First Tier Tribunal looked at Regulation 5 when making its decision in this case, but did not find it helpful, and considered that it was not applicable to a regime of home schooling (paragraph 6 of the FTT decision). Regulation 5 speaks of education an "other educational establishment". Does this include

education at home? I do not consider that one's home could be considered to be an "establishment". Reading the regulation, my view is that this was meant to incorporate places such as hospital schools, pupil referral units or the like. It may be said that the fact that home schooling is not mentioned as "education" in these regulations means that it should not be considered. I note that it might be said that, had it been intended that home-schooling for those of compulsory school age should 'count' whatever the hours actually studied at home, specific provision could have been made for this in the Regulations. However, I am not persuaded that such a suggestion takes the matter any further, however, since the point depends on whether it was thought that there was a potential gap in the provisions of s70(3) or not.

26. The FTT determined that "receiving full time education) means actually receiving such at paragraph 7 of its decision. It reached this conclusion , at least in part on the basis that Parliament did not , as it could have done, set out or used the terms "compulsory school age" as the relevant reference point for receipt of an allowance under s70(3) (i.e., "A person shall not be entitled to an allowance under this section if he is of compulsory school age or receiving full-time education").

27. I have referred to the provisions of s35 of the Education Act 1944. It is apparent that when the Social Security Contributions and Benefits Act 1992 was passed, there was no potential gap: a young person who had reached 16 might be in fulltime education but was under no compulsion to remain. A potential 'gap' only opened up with the extension of the school leaving age contained in the 1996 Education Act, when it appears that no corresponding changes were made to s70(3) or the underlying Regulations. It is a small gap, but it affects young people such as C (whose parents were not supplying fulltime education), or, in principle, those such as the applicants in *R. (on the application of KS) v Croydon LBC* [2010] EWHC 3391 (Admin), who were not offered fulltime places by the local authority.

28. Against that background, I have considered whether there is any reason to give the words of s70(3) anything other than a plain and literal reading, not least as this is the interpretation that keeps s70(3) easy to understand and to apply. The suggestion of the SSWP is that I should give s70(3) a different meaning.

29. I determined that "over 16" in the context of s70(3) means "over compulsory school age" , and that the change in the law enacted in 1996 should be reflected in the ability to access carer's allowance which should be restricted to those "over compulsory school age".

30. Whilst the word "school" is used in the regulations, the intention of Parliament in s7 of the Education Act 1996 is that full time suitable education should be provided for every child between the ages of 5-16, and that this is compulsory. How it is to be provided is at the choice of parents, but it must be suitable and full time. That is a very strong policy imperative.

31. It seems to me that the situation in this case was not anticipated by the draftsman and could therefore not have been foreseen as the law in question in 1992 did not provide a gap between the age of 16 and the end of compulsory schooling.

32. In the case of *R(Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, the court had to consider whether various parts of legislation aimed at regulating embryos covered various forms of emerging treatments. Lord Bingham, at paragraphs 7-11 said this about statutory interpretation:

"*Such is the skill of parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the courts, or at any rate the appellate courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings, or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision.*

8 *The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect*

some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So, the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.
***9** There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of "cruel and unusual punishments" has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so. The courts have frequently had to grapple with the question whether a modern invention or activity falls within old statutory language: see Bennion, Statutory Interpretation, 4th ed (2002), Part XVIII, Section 288. A revealing example is found in Grant v Southwestern and County Properties Ltd [1975] Ch 185, where Walton J had to decide whether a tape recording fell within the expression "document" in the Rules of the Supreme Court. Pointing out, at p 190, that the furnishing of information had been treated as one of the main functions of a document, the judge concluded that the tape recording was a document.*
***10** Limited help is in my opinion to be derived from statements made in cases where there is said to be an omission in a statute attributable to the oversight or inadvertence of the draftsman: see Jones v Wrotham Park Settled Estates [1980] AC 74, 105 and Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586. This is not such a case. More pertinent is the guidance given by the late Lord Wilberforce in his dissenting opinion in [2003] 2 AC 687 Page 696*

Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800. The case concerned the Abortion Act 1967 and the issue which divided the House was whether nurses could lawfully take part in a termination procedure not known when the Act was passed. Lord Wilberforce said, at p 822:
"In interpreting an Act of Parliament, it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if

there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question 'What would Parliament have done in this current case—not being one in contemplation—if the facts had been before it?' attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself."

33. I consider that in this case that, the alteration of the age from which compulsory education has ceased is something which was a "fresh set of facts" which bears upon the policy which was set out in the SSCBA 1992. In my view, the draftsman intended that carer's allowance should be paid from the end of compulsory education. In 1992, that meant someone's 16th birthday. In 2020 (the relevant date) that means 28 June 2020. The fact that someone is not actually receiving full time education before the end of their compulsory schooling cannot be something which should enable benefits to be collected.

34. As far as possible, legislation should be read as in harmony with , and consistent with other enactments (although that does not mean that the statute can be read to mean what it could not be intended to mean). Parliament cannot have intended that those who are educated at home should be in any different position to those at school when it comes to the receipt of carer's allowance, and given the policy position on the need for all children to receive full time education , I cannot envisage that Parliament should have intended that those who do not receive such education should be in a different position. The fact that Ms. BC was not receiving full time education at home was something that could have led to enforcement action being taken. It cannot be the case that Parliament can have intended that those under compulsory school leaving age should, in effect, care full time for their siblings or parents rather than receiving an education and by encouraged to do so by the receipt of benefits.

35. The statutory purpose of the reference to age 16 in s70(3) is to refer to the compulsory school leaving age. Now that is has changed (as it did in 1996), it seems to me to be consistent with the Parliamentary purpose to continue to

treat the reference as being to that age. The language of the statute needs to be extended beyond the expressed purpose to give effect to the true meaning of what Parliament had intended .

Disposal

36. Having identified an error of law in the tribunal's decision, I set it aside. Under s12(2) , the Upper Tribunal has power to remit the case or remake the decision. As the facts are agreed and would not change at any further hearing, and as the issue is one of statutory interpretation, I consider that another hearing is not required. I therefore remake the decision and determine that Ms. BC can only claim carer's allowance from 29 June 2020.

Authorised for issue
on 6 January 2023

Fiona Scolding KC
Upper Tribunal Judge