



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE No: UA-2023-000362-USTA
[2023] UKUT 279 (AAC)
THE SECRETARY OF STATE FOR WORK AND PENSIONS V SV**

Decided without a hearing

Representatives

Secretary of State

DMA Leeds

Claimant

Derek Stainsby, Plumstead Community Law Centre

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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

Reference: 1639153439326814

Decision date: 27 July 2022

Hearing: East London

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)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

- A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
- B. In particular, the tribunal must investigate and decide whether there are grounds to revise the decision made on 10 March 2020 awarding universal credit from and including 18 February 2020.
- C. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998 and *R(IB) 2/04* at [188]. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

1. This appeal explains the correct approach for the First-tier Tribunal to take when the Secretary of State has decided to revise a decision awarding universal credit on the ground of a mistake of material fact.

A. The Secretary of State awarded universal credit in March 2020

2. SV is Bulgarian. She came to this country on 21 October 2019 and made a claim for universal credit on 18 February 2020. On 10 March 2020, the Secretary of State decided that she was entitled to an award.

3. One of the conditions that the claimant had to satisfy was that she was ‘in Great Britain’ (section 4(1)(c) of the Welfare Reform Act 2012). Regulation 9 of the Universal Credit Regulations 2013 (SI No 376) makes detailed provision about when persons are treated as not being in Great Britain. This is often referred to as the ‘habitual residence test’.

4. The Secretary of State summarised the decision on page C of the submission to the First-tier Tribunal:

On the 10/03/20 a decision was made that SV had passed the Habitual Residence Test, her employment was accepted as genuine and effective and she was afforded worker status based on the evidence she had provided and held on Departmental records. Her UC claim went into payment.

The finding that SV’s employment was ‘genuine and effective’ refers to one of the conditions imposed by the European Court of Justice on the work that a claimant must undertake in order to be accepted as a worker.

5. The evidence that SV had provided consisted of a letter from Nadmir Ltd, which described itself as ‘Best cleaning services in Town’, and a payslip from the same company. The letter said that the claimant had been employed as a cleaner of residential and commercial premises for 16 hours a week from 1 November 2019 at the national living wage of £8.21 an hour. The letter also confirmed that cash payments of £569.20 were made to the claimant at the end of November 2019, December 2019 and January 2020. It was signed by Mrs Nadezhda Mircheva, who described herself as ‘Director’. The payslip recorded payment of £569.20 to SV on 31 January 2020.

B. The Secretary of State decided that SV was not entitled to an award in August 2021

6. In May 2021, the Secretary of State reviewed SV’s claim and asked her to provide evidence of her employment. She provided a payslip and a P45 both from Zahra Fast Food Ltd. On 20 July 2021, the Secretary of State decided that SV had not satisfied the habitual residence test from the date of her claim.

7. On 17 August 2021, the Secretary of State wrote to the claimant:

We have decided that you have failed the habitual residence test. This is because you do not have/have not demonstrated a right to reside that qualifies you for Universal Credit.

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The letter also said:

We will implement this decision and you will receive a further letter confirming your Universal Credit outcome.

The formal decision as presented to the First-tier Tribunal was this:

SV has failed to show that she has a right to reside in Great Britain and therefore is not treated as habitually resident in GB from 18/02/20.

SV applied for a mandatory reconsideration of that decision, which was refused.

C. The First-tier Tribunal's first mistake – the decision under appeal

8. SV lodged an appeal with the First-tier Tribunal. The tribunal treated this as an appeal against the decision of 17 August 2021 and decided that there were no grounds to revise the decision of 10 March 2020. The tribunal was right to identify the issue as whether there were grounds to revise the 2020 decision, but wrong to treat the appeal as against the 2021 decision. The correct analysis was that the appeal was against the decision of 10 March 2020 as revised on 17 August 2021. This is why.

9. The Secretary of State is responsible for deciding a claim for universal credit under section 8(1)(a) and (3)(aa) of the Social Security Act 1998 ('SSA' from now on). That decision was made on 10 March 2020.

10. The Secretary of State is authorised to change a decision, either by revision under section 9 SSA or by supersession under section 10 SSA. The Secretary of State did not identify the authority on which the decision of 17 August 2021 was made in: (a) the letter notifying the claimant of the new decision; (b) the mandatory reconsideration decision; or (c) the Secretary of State's submission to the First-tier Tribunal. The tribunal identified the authorising power as regulation 9(b) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI No 381):

9. A decision may be revised where the decision-

...

(b) was made in ignorance of, or was based on a mistake as to, some material fact and as a result is more advantageous to the claimant than it would otherwise have been.

The Secretary of State has not challenged the tribunal's decision on that point.

11. That means that the appeal could not be against the decision of 17 August 2021. The right of appeal to the First-tier Tribunal is conferred by section 11 SSA. There is a right of appeal against decisions made on claims under section 8 SSA and on supersession under section 10 SSA, but there is no right of appeal against a decision that revised an earlier decision under section 9 SSA. The right of appeal arises against the original decision as revised, although the time for appealing runs from the date when the revision was made (section 9(5) SSA).

12. That in turn is important for section 12(8)(b) SSA. This provides that on an appeal the tribunal 'shall not take into account any circumstances not obtaining at the time

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when the decision appealed against was made.’ The ‘decision appealed against’ was the decision of 10 March 2020, so the tribunal was limited to the circumstances obtaining between the date of claim (18 February 2020) and the date of the decision awarding universal credit (10 March 2020): see *R(IB) 2/04* at [188]. It could take account of evidence that was not available at that time, provided that it related to the time that the decision was made (*R(DLA) 2 and 3/01*).

13. As far as I can tell, this mistake did not affect the outcome of the appeal. I have dealt with it in order to explain my Directions B and C for the rehearing. It may also help to dispel any misunderstanding about this in the First-tier Tribunal.

D. The witness statement

14. The Secretary of State produced to the First-tier Tribunal a witness statement from T. Wilson dated 12 April 2022. It contains the result of searches conducted in documents held by the Department for Work and Pensions, its systems and open-source information relating to SV’s employment. This is the section that deals with Nadmir Ltd. The rest deals with employers whom SV said she worked for after 10 March 2020.

The RTI [Real Time Information] feeds for SV show she received payments as follows:

Nadmir Ltd from 30/11/2019 to 28/02/2020 – each month’s payments were submitted on the same date 29/02/20 not at the time of payment.

SV declared in on 18/07/2020 to the department that she was employed from June 2019 to February 2020 earning £600.00 per month. However she stated on 18/03/2020 that she received £569.20 (no NI or Tax deductions) from Nadmir Ltd for the assessment period of 18/02/2020 to 17/03/2020.

Nadmir Ltd, 185b Town Road, London, England, N9 0HL. Companies House confirms that this company incorporated on 16/10/2019 and dissolved on 29/06/2021. A change of registered address occurred on 08/03/2020, both addresses supplied are residential. No accounts were submitted during the time of trading. This company has links to other UC claims where these have been linked to fraudulent activity. Payment confidence level held on Searchlight for this employer on other accounts is 4 – HMRC state payment cannot be confirmed.

• Companies registered at

- 185 Town Road
- 185A Town Road
- 185B Town Road
- 185C Town Road

These are residential premises and none of the employers / directors of the companies are associated with the properties. Companies House show over 86,000 hits for the address 185 Town Road N9 0HL. Google maps confirms it is a multi – residential premises.

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185B Town Road is a small block of residential flats. On 07/05/2021 officers of the DWP and the Police attended the premises as part of a largescale ongoing investigation. The communal hallway at the entrance to the property had a wall cabinet with 6 lockers/letter boxes, these were labelled ground office, 1st flat 1, 1st flat 2, 2nd flat, misc and one was unnamed and open. A large quantity of post was found in multiple stacks on a large wooden cabinet in the downstairs communal hallway. This post was addressed to numerous companies and was seized by a Police Officer. Upon later examination of the post this was found to be from various government departments such as HMRC, HM Courts and Tribunals Service, Companies House and DWP (regarding attachment of earnings) to around 40 different companies. There was also post from a number of companies such as Barclays, BT and Sky addressed to various companies. Most of the letters were dated from mid March 2021, indicating they were collected on a regular basis. Officer's spoke to a number of the residents at both 185A and 195B [this must be a mistake for 185B] Town Road and none are believed to be linked to any of these companies. The residents advised they had no knowledge of any business running at the address. Residents advised any post for companies was left on the unit in the communal area, none of the residents took ownership of the post found and they advised they were unaware if anyone or who collected it.

3 letters were seized addressed to Nadmir Ltd at 185B Town Road, 2 were regarding authentication codes for companies house account and the third was confirming Nadmirs Ltd was struck of and dissolved.

This information held would support the decision that this company could be a shell company.

E. The tribunal decided there were no grounds to revise the original decision

15. The tribunal decided that there were no grounds to revise the decision made on 10 March 2020. Its decision notice read:

SV had the right to reside in the UK, and was therefore habitually resident in the UK, such that she was entitled to Universal Credit (providing all other conditions were met) both at the date of her claim on 18 February 2020 and at the date of the initial decision on 10 March 2020. There were no grounds to revise the decision of 10 March 2020. For the avoidance of doubt, SV also had the right to reside in the UK, such that she was entitled to Universal Credit (all other conditions being met), at the date of the decision under appeal, being 17 August 2021.

16. The relevant part of tribunal's reasoning is in paragraph 11 of its written reasons. The key passage is at the end of that paragraph. The judge referred to the witness statement and continued:

The information gathered concentrates on the legal status of various companies who employed SV at various times. This witness statement, and the detail in it, also cannot form the basis for an argument that the initial decision should be revised on the grounds that it was based on a mistake as to some material fact –

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the searches had not been undertaken and the witness statement did not exist until almost 8 months after the Respondent [the Secretary of State] made the decision under appeal, and so the information cannot have been in the mind of the decision-maker.

SV gave evidence to the tribunal, but the tribunal did not make any findings of fact on her evidence.

F. The First-tier Tribunal's second mistake – the approach to revision

17. The tribunal's reasoning shows that it misunderstood regulation 9(b). The tribunal assumed that the application of regulation 9(b) depended on the state of the decision-maker's mind. That was wrong. The regulation applies if 'the decision ... was based on a mistake'. There is no reference to the Secretary of State or a decision-maker. It does not matter whether the decision was made by: (a) the Secretary of State acting through an official as decision-maker, who has a mind; or (b) a computer under section 2 SSA, which does not have a mind. It does not matter how the mistake came to be made. It could have occurred, for example, because the officer overlooked evidence held by the Department, or because the Department was not aware of the evidence, or because the claimant had deliberately concealed it. In all those cases and others, the decision could be based on a mistake. It is not necessary for the decision to be made *by* mistake. The power to review is triggered by the mistaken conclusion on a particular fact, not by a flaw in the decision-making process. The decision may have been the only one that could properly have been made on the evidence available at the time. It may only be shown to be mistaken when evidence becomes available later. In these circumstances, the decision-maker would have made a mistaken finding without being in any way at fault and despite not having the other evidence in mind.

18. Combined with that, the tribunal confused evidence and fact. The witness statement was not a fact; it was merely a document containing evidence. That evidence may or may not have existed at the time the decision was made. But it would still be possible for a fact to be found on the basis of that evidence if it related to the time of the claim and showed that the facts on which the decision was based were mistaken.

G. How the tribunal should apply regulation 9(b) at the rehearing

19. The Secretary of State made a decision on 10 March 2020. The decision was based on the evidence provided to show SV's employment by Nadmir Ltd. The Secretary of State accepted that evidence and accordingly found that SV was: (a) working for 16 hours a week; and (b) earning the monthly amount shown. Both facts were material to establish that the claimant satisfied the requirement that she must be in Great Britain.

20. On appeal, the Secretary of State relied on the witness statement to show a mistake in (a) or (b) or both. As presented, the content of the statement is only relevant as evidence and only as relevant to SV's employment at the time of her claim. It may, or may not, form the basis for findings of fact.

21. The tribunal must decide whether the contents of the statement show that the findings on which the 2020 decision was based on a mistake as to some material fact.

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In order to do that, it must assess the whole of the evidence before it that is relevant under section 12(8)(b) SSA. That will include the evidence presented in support of the claim, the evidence in the witness statement, and any other evidence presented at the rehearing that relates to the relevant time.

22. If the Secretary of State's argument succeeds, the result will be a finding (say) that SV was not employed by Nadmir Ltd. Applying regulation 9(b), that will provide grounds to revise the 2020 decision in accordance with that finding.

23. In response to the appeal, the claimant's representative has accepted that the activities of the companies 'could be considered suspicious but there is no evidence that SV has been involved in any fraudulent activity. It is just as likely that she has been exploited by these companies ...' That is a possibility and the tribunal will assess it in the context of the evidence as a whole.

H. Expedition

24. This appeal has been expedited on account of the claimant's precarious financial circumstances. I have not directed the First-tier Tribunal to expedite the rehearing, as I do not know the claimant's present circumstances. I leave it to her representative to make an application to the First-tier Tribunal if expedition is still required.

**Authorised for issue
on 11 November 2023**

**Edward Jacobs
Upper Tribunal Judge**