DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 15 January 2018 at Blackburn under reference SC063/17/00551) 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 the claimant's claim for a personal independence payment that was made on 5 December 2016 and decided on 20 March 2017.

C. In doing so, the tribunal must apply the decision of the Upper Tribunal in *MH v Secretary of State for Work and Pensions* [2016] UKUT 531 (AAC), which is in the papers starting at page 162, and must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

1. In *MH v Secretary of State for Work and Pensions*, a three-judge panel of the Upper Tribunal gave its interpretation of mobility component activity 1 in Part 3 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013. The Secretary of State decided to reverse the effect of *MH* by amending the legislation. This was done by the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 (SI No 194) with effect from 16 March 2017. The validity of those amendments was challenged in *FR v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin), in which Mostyn J quashed the regulations. He gave judgment on 21 December 2017.

2. The issue for me is this: were the amendments valid in respect of the period when they were purportedly in force regardless of the fact that they were subsequently quashed? The answer is: no.

3. The issue arises because the claimant had claimed a personal independence payment on 5 December 2016 and the Secretary of State decided the claim on 20 March 2017 after the amendments had come into force. The First-tier Tribunal heard the claimant's appeal on 15 January 2018. It was aware of Mostyn J's

decision, but decided that it had to apply the legislation as amended. As the judge subsequently explained in the tribunal's written reasons:

> 46. That part of the High Court Order was stated not to take effect until a future date in order to wait and see whether or not the Secretary of State for Work and Pensions (the Secretary of State) sought permission to appeal to the Court of Appeal.
>
> 47. If the Secretary of State did not file notice seeking permission to appeal, that part of the order would take effect on 20 January 2018.
>
> 48. [This] appeal was heard by the First-tier Tribunal on 15 January 2018 after the High Court Judgment was handed down but before the deadline for the Secretary of State to seek permission to appeal.
>
> 49. The Secretary of State subsequently announced that she would not be seeking permission to appeal.

4. The judge invited the claimant to consider applying for permission to appeal to the Upper Tribunal, which he did. The judge then gave him permission to appeal.

5. The tribunal's decision was made in error of law by virtue of the retrospective operation of Mostyn J's order when it came into force. Lord Diplock explained the legal position in *Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 365:

> **The legal status of the order**
>
> My Lords, in constitutional law a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both Houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted outwith the legislative powers conferred upon him by the previous Act of Parliament under which the order purported to be made, and this is so whether the order is ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects). …
>
> Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another party or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law

> declared by it are presumed. It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any lesser consequence in law than to render the instrument incapable of ever having had any legal effect upon the rights or duties of the parties to the proceedings (cf *Ridge v Baldwin* [1964] AC 40). Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instrument Purported to declare.

So, although the tribunal applied the legislation in force at the time of the hearing, that legislation was subsequently deprived of any effect and, as Lord Diplock explained, that had retrospective effect. With the benefit of hindsight, the tribunal acted in error.

6. What should the tribunal have done on 15 January 2018? One possibility was to adjourn the hearing, although the tribunal was reluctant to do that given the effort the claimant had made to attend. A second possibility was to hear evidence and then make a decision once it was clear whether Mostyn J's order would come into effect. Finally, the judge could have exercised the power to review a decision under section 9 of the Tribunals, Courts and Enforcement Act 2007 when the claimant applied for permission to appeal to the Upper Tribunal.

7. As it is, the judge gave permission to appeal and I have decided that the tribunal's decision must be set aside. The case will now be reheard and the tribunal will apply the law as set out in *MH*.

Signed on original
on 25 July 2018

Edward Jacobs
Upper Tribunal Judge