



UA-2024-001591-UHC

Neutral Citation Number: [2026] UKUT 360 (AAC)

**Appeal Nos. UA-2024-001591-UHC
& UA-2024-001592-UHC**

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

Abdelaziz Dawod

Appellants

- v -

Secretary of State for Work and Pensions

1st Respondent

and

Darahim Khair Alla

2nd Respondent

Before: Upper Tribunal Judge Wikeley, Upper Tribunal Judge Wright and Upper Tribunal Judge Butler

Decided after an oral hearing on 3 June 2026

Representation:

Appellant

(and Second Respondent): Tom Royston of counsel

First Respondent: Jennifer McLeod of counsel

On appeal from:

Tribunal: First-Tier Tribunal (Social Security and Child Support)

Tribunal Case No: SC063/23/00165

Digital Case No : 1677866593183712

Tribunal Venue: Chester

Tribunal member: Judge S Curley

Date of decisions: 9 April 2024 and 30 August 2024

SUMMARY OF DECISION

This is a decision about the test for deciding whether, on an application, the Secretary of State has considered whether to revise an original decision, so as to give rise to a right of appeal against the original decision under section 12(1) and (3A)-(3B) of the Social Security Act 1998. It was accepted that the appellant had made an application for revision and further conceded that the basis for revising the original decision was satisfied, but the Secretary of State argued the 'consider whether to revise' test was not met because there had to be evidence showing the Secretary of State's decision-maker had actually considered whether or not to revise the original decision. The Upper Tribunal rejects this argument and decides that whether there has been the necessary consideration on an application whether to revise are issues of fact to be decided on all the relevant evidence. In this appeal the Secretary of State had considered whether to revise the original decision.

The decision comments, relatedly, on KU v SSWP (UC) [2026] UKUT 38 (AAC) and concludes that it took the wrong route to reach its (correct) decision by deciding whether time could be extended to admit a late application for revision.

The decision also considers the legislatively opaque basis upon which the FTT had purported to set aside its substantive decision on the appeal, and decides that a decision to set aside under rule 37 of the FTT's procedure rules is not an excluded decision under section 11(5)(d) or (e) of the Tribunals, Courts and Enforcement Act 2007.

REVISIONS, SUPERSESSIONS and REVIEWS (30); TRIBUNAL PROCEDURE AND PRACTICE (34); TRIBUNAL JURISDICTION (34.10)

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judges follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decisions of the First-tier Tribunal of 9 April 2024 and 30 August 2024 both involved material errors of law. Under section 12(2)(a), (b)(ii) and (3) of the Tribunals, Courts and Enforcement Act 2007, we set both decisions aside and we redecide the appeal. Our decision on that appeal is that Mr Dawod and Ms Alla are entitled to the housing costs element in their joint award of universal credit from 10 October 2022.

REASONS FOR DECISION

Introduction

1. At its simplest, this appeal concerns a claim for the housing costs element (HCE) of Universal Credit (UC) made by Mr Dawod and his partner Ms Alla.

2. In its narrowest sense, the case is about whether this couple's rent liability is covered by UC for a period of some two months. This is obviously very important for the claimants themselves but, on the face of it at least, not perhaps of any broader importance.
3. In its widest sense, however, this appeal is potentially of considerable significance. It concerns the approach taken by the Secretary of State, through his officials in the Department for Work and Pensions (DWP), where a claimant, who would in principle be eligible for the HCE of UC, makes a UC claim without declaring their housing costs (for whatever reason), is awarded benefit, and then reports their housing costs at some later date. (We use 'the DWP' throughout this decision as shorthand for 'the Secretary of State' or the 'Secretary of State's decision maker', unless we state otherwise.) The DWP in this case – and, anecdotally, in many others – adopted the approach of treating the notification of housing costs as an application for a supersession of the awarding decision rather than as a revision of that decision. The crucial difference, put crudely, is that a supersession decision takes effect from the date of disclosure whereas a revision decision takes effect from the date of the original decision.
4. The essential issue on this appeal is whether in making the supersession decision the DWP also considered whether to revise the original awarding decision. As will become apparent, that issue goes to whether the First-tier Tribunal ("the FTT") had jurisdiction on the appeal to award housing costs from the date when the UC 'couple' claim was made.

The Upper Tribunal's decision in summary

5. We allow the appeal, set aside the FTT's decisions of 9 April 2024 and 30 August 2024, and redecide the first instance appeal so as to award the HCE in Mr Dawod's and Ms Alla's award of UC from 10 October 2022. We allow the appeal because, in essence, we have decided that the DWP did consider whether to revise the 10 November 2022 decision, which was the decision made on the couple's first joint claim for UC of 10 October 2022.

The factual background: the claim for the housing costs element

6. Ms Alla was awarded UC with the HCE on 10 May 2021 following her claim as a single person. Ms Alla subsequently formed a relationship with Mr Dawod, who moved in with her. Mr Dawod then made a new couple claim for UC, linking his claim to Ms Alla's, with effect from 10 October 2022 (see regulation 9(8) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and

Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380)). On the UC claim form, Mr Dawod reported he had no housing costs. On one view, that disclosure was undoubtedly correct – the housing costs were technically those of his partner Ms Alla and he had yet to be added to the tenancy agreement.

7. On 10 November 2022 the DWP decided that the couple were jointly entitled to UC as from 10 October 2022 but with no housing costs (at all).
8. At or just before the 10 November 2022 decision was made, the DWP must have decided that Ms Alla ceased to be entitled to UC as a single person, which of course was an award with the HCE included. No real detail concerning that logically linked decision ending Ms Alla's award was before us. We therefore can form no view about whether it was the same decision maker who made both decisions. If it was the same decision maker, we confine ourselves to observing that they might at least have been curious why Ms Alla's housing cost liability had apparently ceased on Mr Dawod moving in with her. However, as we need not decide whether the FTT also erred in law in its approach to whether the 10 November 2022 decision was vitiated by official error, we do not explore this issue any further.
9. On 14 December 2022 Mr Dawod notified the DWP that his partner had (of course) continued to be liable to pay rent since the start of their joint claim. The only way he could do so on his UC journal was to report it as a change, but it was in fact no such thing. The arrangement of the online Universal Credit system meant Mr Dawod was directed to notify this as "report a change of circumstances" even if, as here, it was in fact not a change.
10. According to its response to the couple's appeal, on 20 December 2022, the DWP *"decided that the time allowed for Mr Dawod and his partner to give notice of an increase in housing costs, may not be extended and that the effective date of the change of circumstances was 10 December 2022, which is the first day of the Assessment Period (AP) in which the change was notified."* Accordingly, the DWP treated the case as a supersession on the ground of a change of circumstances, instead of conducting a revision. The couple applied for a mandatory reconsideration of this decision on 21 December 2022 but to no avail, so they lodged an appeal. The relevant terms of the mandatory reconsideration request made on 21 December 2022 read:

"I wish to apply for mandatory reconsideration of the decision not to award housing costs backdated to the beginning of my claim....."

I did not claim [housing costs] at that time because I misunderstood the form which I thought was asking about my housing costs and not my wife's which had always been paid. I am not on the tenancy agreement which only has my wife's name on it...."

The First-tier Tribunal's decisions

11. The FTT had three goes at getting this appeal right. As will become painfully apparent, it got it wrong three times.
12. First, on 3 October 2023 the FTT dismissed the couple's appeal. The first FTT's decision was set aside on 23 January 2024 for want of adequate reasons. We need say no more about that FTT decision.
13. Secondly, on 9 April 2024, a District Tribunal Judge decided the appeal 'on the papers'. That FTT confirmed the Secretary of State's decision dated 20 December 2022, namely that Mr Dawod was entitled to the housing costs element of UC with effect from 10 December 2022. This was said to be because "*there are no grounds to backdate the award.*" The FTT's Decision Notice included the following summary of the District Tribunal Judge's reasoning:

"Mr Dawod first notified the DWP of his housing costs on the 14th December 2022, the effective date is the commencement of the assessment period in which that notification occurred. There are no special circumstances which would support backdating of this award."

14. On 25 May 2024 the FTT provided a statement of reasons for the decision dated 9 April 2024. For present purposes we call that second FTT decision 'the housing costs decision'. The material parts of those reasons read as follows:

"8. It is not disputed that the 14th of December 2022 was the first date on which Mr Dawod reported his housing costs.

9. Mr Dawod, through his respondent (sic) maintains that the failure to report was an error as they were always liable for the housing costs and that the respondent was or should have been aware of this due to the previous claim by Ms Alla and therefore it was not reasonable to rely on the mistaken declaration by Mr Dawod.

11. The appeal is based on the decision being a supersession decision to include the housing costs element from the beginning of the assessment period in which the change was first notified which is to say the 10th of December 2022.

12. The representative maintains that this is an error and that the decision should have been by way of an anytime revision rather than a supersession as there was no change of circumstances in that the rent costs had always been extant and therefore this was a revision.

13. Despite the extensive submissions by both parties this is not a complex set of facts or a complex point of law.

14 Mr Dawod declared on the 10th of October 2022 that he had no housing costs. This may well have been an error on his part but nonetheless the respondent was obliged to act on it in calculating the housing costs element.

18. It should be noted at this stage that this was a new claim from the 10th of October 2022 and not a continuation of Ms Alla's single claim from the 10th of May 2021. This claim was closed (sic) and a new claim opened on the 10th of October 2022.

19. The grounds for the revision are that this was an official error in that the respondent should have realised from previous dealings with Ms Alla's claim that there were housing costs notwithstanding the nil declaration or that if there was any ambiguity then they should have sought the information to clarify.

20. This is flawed analysis and the references to a revision rather than a supersession is incorrect.

25....the respondent was entitled to rely on the declaration that there were no housing costs on the 10th October 2022. This means that the notification of the housing costs on the 14th of December 2022 was a notification of a change of circumstances for the purposes of this UC claim and this then correctly triggered a supersession decision the commencement of which was correctly calculated by the respondent.

26. The essence of this decision is that the responsibility to ensure that the information given on the claim form is that of the person making the claim which was in this case Mr Dawod. The respondent was fully entitled to rely on the accuracy of that information and had no obligation to enquire further."

15. On 6 June 2024 Mr Dawod's representative applied to the FTT for permission to appeal the housing costs decision, arguing that the FTT had erred in law in three respects. The first ground was that the FTT had misdirected itself in failing to understand that a revision on any grounds is a no-fault procedure. The second ground was that the FTT had erred in its approach to revision on the basis of official error. The third ground was that the FTT had misdirected itself in law as to when a supersession for a change of circumstances is appropriate.

16. This led to the third decision of the FTT, which it made on 30 August 2024. This decision was in the form of a 'Directions Notice'. Having referred to Mr Dawod's application for permission to appeal, the FTT concluded the Directions Notice as follows:

"6. I do not necessarily agree that an error of law has been made, however I do agree that this is a complex question and I am not satisfied that all the arguments for both sides have been advanced.

7. The decision of the 9th April 2024 must be set aside and the parties must attend an oral hearing where the matter will be reconsidered.

Directions

i The decision of 9 April 2024 is set aside.....”

17. For present purposes we call this third decision ‘the FTT set aside decision’.
18. Our concern on this Upper Tribunal appeal is with the FTT’s housing costs decision and the FTT set aside decision.
19. Finally, on 18 November 2024 the FTT stayed the re-hearing of the appeal pending the outcome of the proceedings in the Upper Tribunal.

The appeal to the Upper Tribunal

20. On 29 November 2024 Upper Tribunal Judge Wikeley granted the appellant permission to appeal, having taken the view that it was fair and just to dispense with the usual requirement for an applicant to have obtained a ruling on permission to appeal from the FTT (applying rule 7(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)).
21. The Chamber President of the Administrative Appeals Chamber of the Upper Tribunal, the Hon. Lady Poole, then directed on 16 February 2026 that the appeal be heard by a panel of three Upper Tribunal judges. This was because:

“the appeal raises a question of law of special difficulty or an important point of principle or practice, and in particular whether the reg.7(2) Universal Credit etc. (Decisions and Appeals) Regulations 2013 requirement to have “considered on an application whether to revise” requires only ‘consideration’ rather than a substantive decision; and whether what has been ‘considered’ must be construed objectively rather than subjectively, so as to include circumstances where an application to revise is made but is incorrectly treated only as an application to supersede.”

The parties’ arguments in summary

The FTT’s housing costs decision

22. The appellant argues that the FTT erred in law by failing to address, and then recognise, that there had been consideration by the DWP of whether to revise the DWP’s decision of 10 November 2022, and further erred in law by failing on the uncontested facts to correct that decision and award Mr Dawod and Ms Alla the HCE in their UC award from 10 October 2022.

23. The basis on which the 10 November 2022 decision could be revised under section 9 of the Social Security Act 1998 was either, the appellant argues, an ‘any grounds’ revision under regulation 5 of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (“the D&A Regs”) or revision for official error under regulation 9 of the D&A Regs. There was no ‘change of circumstances’ basis for superseding the 10 November 2022 decision (per regulation 23 of the D&A Regs), however, because there had been no change in Mr Dawod’s and Ms Alla’s circumstances since the 10 November 2022 decision took effect on 10 October 2022: the housing costs liability remained in place at all relevant times.
24. The appellant further contends that, although the 10 November 2022 decision could have been superseded on the basis it was based upon a mistake as to a material fact under regulation 24 of the D&A Regs, this was to ignore the terms of regulation 32 of the D&A Regs. That regulation 32 provides, in summary, that “[a] decision which may be revised under section 9 of the 1998 Act may not be superseded”. The appellant argues from this that in order to have superseded the 10 November 2022 decision the DWP had first to be satisfied that the 10 November 2022 decision could not be revised, and that supported his argument that the Secretary of State had, per regulation 7 of the D&A Regs, considered whether to revise the 10 November 2022 decision. Moreover, even a supersession under regulation 24 of the D&A Regs could only take effect from, effectively, the date when the supersession application was made (per regulation 35(4) of the D&A Regs), and so could not have taken effect from 10 October 2022.
25. The appellant argues that the DWP’s response to the applications he made on 14 December 2022 and 21 December 2022 amounted to the DWP considering whether to revise the 10 November 2022 decision. Such consideration is not the same as making a substantive revision decision: *R(CJ) and SG v SSWP* [2017] UKUT 324 (AAC); [2018] AACR 5. The only way to get the HCE awarded from 10 October 2022 was to revise the 10 November 2022 decision. No supersession ground could achieve this. And what Mr Dawod was requesting on both 14 and 21 December 2022 was for the HCE to be awarded from 10 October 2022.
26. Furthermore, to view the DWP as not having considered whether to revise the 10 November 2022 decision when faced with an obvious request for revision would amount to the DWP acting unlawfully by not even considering whether to exercise its revision powers. That was not the case, fortunately, because the DWP had

responded to Mr Dawod's obvious request(s) for revision of the 10 November 2022 decision and in the circumstances must therefore have considered whether to award the HCE element from 10 October 2022. The fact that the DWP had made a supersession decision did not detract from this "consideration". It showed the DWP had considered the request(s) as made by Mr Dawod (i.e. a revision request), but on that request and the consideration of it, the DWP had decided (only) to supersede the 10 November 2022 decision: see, further *AP v SSWP* [2025] UKUT 330 (AAC).

27. Alternatively, and if it was necessary for Mr Dawod to show the DWP had made a revision decision (albeit, a decision not to revise) on 20 December 2022, such a decision should be implied.
28. If the FTT had erred in law in failing to address if the DWP had given consideration whether to revise the 10 November 2022 decision, Mr Dawod argued the FTT's decision should be set aside as being in error of law. He further argued that on doing so the Upper Tribunal should redetermine the appeal by finding that consideration had been given by the DWP whether to revise the 10 November 2022 decision, this conferred him with a right of appeal against the 10 November 2022 decision, and that appeal should be allowed on the (undisputed) basis that he and Ms Alla qualified for the HCE in their UC award from 10 October 2022. In redetermining the appeal, Mr Dawod argued it was not for the Upper Tribunal (or the FTT) to decide whether time should be extended to admit his late application for revision, dated 14 December 2022, in respect of the 10 November 2022 decision, and *KU v SSWP (UC)* [2026] UKUT 38 (AAC) had been wrong to take this as the reasoned basis for allowing KU's appeal.
29. In response, the Secretary of State argues that under regulation 7 of the D&A Regs the DWP must "actually have considered the question of whether or not a revision decision should be taken before going on consider the supersession decision (or can be taken to have done so)". In other words, the DWP must have *in fact* considered whether to revise the decision under section 9 of the Social Security Act 1998. The Secretary of State submits that it would be divorced from reality to state that the 20 December 2022 decision of the DWP "considered" the question of revision, and it is not necessary to imply a finding that it did so.
30. The Secretary of State accepts, however, that:
 - (i) on a proper analysis, Mr Dawod's requests for backdated housing costs made on 14 and 21 December 2022 should have been treated as a request for revision of the 10 November 2022 decision;

- (ii) they were not, however, treated as a request for revision by the DWP. The 14 December 2022 request was treated instead as a request for supersession. This was unfortunate; and
 - (iii) had either request been treated as a request for revision, Mr Dawod would have been entitled to have the 10 November 2022 decision revised and the HCE awarded from 10 October 2022 under regulation 5 of the D&A Regs¹.
31. Pausing at this point in setting out the key aspects of the Secretary of State's arguments, we feel driven to make two observations. The first observation is that despite this acceptance, including about entitlement to the HCE, Mr Dawod and Ms Alla remain without it in their UC award for the one-month assessment period from 10 October 2022, nearly four years later. . The second observation is that the Secretary of State's case is founded on the DWP still, four years later, not having given any consideration to whether to revise the 10 November 2022 decision in circumstances where it is accepted that that decision ought to be revised.
32. In support of the argument that the DWP must have in fact considered whether to revise, the Secretary of State submits first that, as was explained in *R(CJ) and SG*, the essential and driving Parliamentary purpose of mandatory reconsideration was to give the Secretary of State a second opportunity to get reconsideration right. It allows the Secretary of State to "*look again at our decisions in a fair and thorough way*". The purpose of mandatory reconsideration is therefore met by the Secretary of State's own decision-makers actually considering those matters. By contrast, the appellants' interpretation, in essence, would lead to the Secretary of State's mandatory reconsideration mechanism being sidestepped.
33. From that perspective, the Secretary of State contends that it was not possible, on a fair reading, to consider the decisions made by the Secretary of State on 15 December 2022 and 21 December 2022 as containing any consideration of revision. To the contrary, those decisions were entirely focused on supersession. It would be a fiction to deem these decisions as considering revision in any sense:

¹ But the Secretary of State would argue against the 10 November 2022 decision being revised for official error. There was no official error as it was Mr Dawod who had given a wrong answer to whether he had housing costs.

they contain no reasoning to that effect. The DWP would be treated as having considered a point that had not as a matter of fact been considered at all.

34. The Secretary of State further argues that had regulation 7 of the D&A Regs when stating “*only if the Secretary of State has considered an application*” meant something else (e.g., that an application to revise had been submitted or indeed even rejected), the drafting could have said so. However, it says “considered” and the ordinary meaning of that word is that the decision-maker’s mind has indeed been turned to the question. By contrast the Appellant’s interpretation requires there to be an implication that there was a decision on revision, even if there was none, which was unprincipled. The concept of “implying decisions” was (rightly) rejected in *R(IB) 2/04*. Moreover, the appellant’s interpretation did not recognise the reality of decision making, in which decision makers do not aridly consider every possible ground for revision if they do not understand that to be the focus of the inquiry.
35. As for the appellant’s argument about unfairness arising from the Secretary of State’s stance, the D&A Regs recognise that there are circumstances where there is no actual right of appeal, but a purported appeal may be filed: per regulation 7(5) of the D&A Regs, and where, as a result of regulation 7(2), there is no right of appeal against a decision, the Secretary of State may treat any purported appeal as an application for a revision under section 9 of the 1998 Act. This therefore means that the Secretary of State can himself (or his decision makers) consider the point afresh if no appeal properly arises. This is consistent with *R(CJ) and SG*, that the starting point should be to allow the Secretary of State to have the first opportunity to consider the correctness of the decision.
36. The Secretary of State did not address us the correctness of *KU*. We understood this was because of his view that there had (still) been no consideration whether to revise the 10 November 2022 decision and therefore no right of appeal arose by this (or any) route against that decision.

The FTT set aside decision

37. The appellant’s primary argument is that the FTT did not exercise any valid power to set aside its 9 April 2024 decision, whether under section 9 of the Tribunals, Courts and Enforcement Act 2007 (“the TCEA”) or under rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (“the FTT Rules”), and the purported set aside decision should itself be set aside for error of law. As the set aside decision was not made under section 9 of the TCEA,

it was not a decision against which no appeal could be made to the Upper Tribunal under section 11(5)(d)(iii) of the TCEA.

38. Shorn to its essentials, the Secretary of State agrees with the appellant about the FTT set aside decision.

Discussion and Conclusion

39. It makes sense to deal with the challenge to the FTT's set aside decision before addressing the housing costs decision, not least because if the set aside decision survives that challenge, there is nothing left of the housing costs decision to be considered. On that hypothesis, it would have been validly set aside.

Analysis: is there an error of law in the FTT's set aside decision?

40. The answer is Yes. Why that is so requires a little unpacking.
41. The first issue we have to address is whether there can be an appeal to the Upper Tribunal against the FTT's set aside decision given the "excluded decisions" found in section 11(5)(d)(iii) and (e) of the TCEA. We are satisfied that there can be an appeal against the FTT's set aside decision.
42. Section 11(1) of the TCEA provides a right of appeal "*to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision*". Section 11(5) of the TCEA sets out a number of excluded decisions. Amongst these is, per section 11(5)(d) and (e):

"11. (5)(d) a decision of the First-tier Tribunal under section 9—

- (i) to review, or not to review, an earlier decision of the tribunal,
- (ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,
- (iii) to set aside an earlier decision of the tribunal, or
- (iv) to refer, or not to refer, a matter to the Upper Tribunal,

(e) a decision of the First-tier Tribunal that is set aside under section 9 (including a decision set aside after proceedings on an appeal under this section have been begun)."

43. Whatever set aside power the District Tribunal Judge may have considered he was using when he made the set aside decision of 30 August 2024, manifestly it cannot have been under section 9 of the TCEA, and that is sufficient to remove it from being an excluded decision under section 11(5) of the TCEA.

44. Section 9 is not in play because there is nothing to show (or even suggest) that before setting aside the decision the District Tribunal Judge had reviewed the FTT's housing costs decision of 9 April 2024 under section 9 of the TCEA and rules 39 and 40 of the FTT rules. Nor is there anything to suggest that Judge Curley was, per rule 40(2) of the FTT Rules, satisfied that there **was** an error of law in the FTT's housing costs decision. Indeed, the opposite is the case as the judge expressly stated that they did not necessarily agree that an error of law had been made. Section 9(4) of the TCEA's wording makes it clear, in our judgement, that the FTT's ability to, per section 9(4)(c), set aside a decision only arises "*[w]here the [FTT] has under subsection (1) reviewed a decision*", and that review could only have been undertaken on the basis that the FTT was satisfied there was an error of law in the housing costs decision.
45. Putting this perhaps another way, the ability to review a decision is dependent on rule 40(2) of the FTT Rules being satisfied, rule 40(2) provides that "*[the FTT] may only undertake a review of a decision....(b) if it is satisfied that there was an error of law in the decision*", and the set aside power in section 9(4)(c) of the TCEA can only arise if the FTT has reviewed the decision (because it is satisfied there was an error of law in the decision being set aside). Being satisfied there was an error of law in the housing costs decision was thus a necessary legal precondition to the FTT being able to set that decision aside under section 9(4)(c), and the FTT was not so satisfied.
46. This analysis of the section 9(4)(c) set aside power is consistent with the three-judge panel's decision in *JS v Secretary of State for Work and Pensions (DLA)* [2013] UKUT 100 (AAC); [2013] AACR 30, where at paragraph [22] the judges put the legal position as follows:
- "22. The legislation specifies conditions precedent for a review and the action that may be taken in the light of the review. The combined effect of section 9 and rules 39 and 40 is that the First-tier Tribunal may *only* review a decision on an application for permission to appeal and on the ground of error of law. These are essential conditions that must be satisfied before a review can take place. By its language, the powers under section 9(4) do not arise until there has been a review. But unless action is taken pursuant to those powers the review would have no effect."
47. This then leaves the only other set aside power available to the FTT as being the 'procedural error' set aside found in rule 37 of the FTT Rules. Rule 37 is not dependent on there being any error of law in the decision to be set aside. For that reason, it is not a decision under section 11(5)(d)(iii) of the FTT under section 9 of the TCEA to set aside an earlier decision of the FTT, and so is not an excluded decision under section 11(5). As a result, it is a (set aside) decision of the FTT

that can be appealed to the Upper Tribunal on any point of law under section 11 of the TCEA.

48. This is sufficient to determine the Upper Tribunal's jurisdiction and thus for the Upper Tribunal to decide an appeal against the FTT set aside decision. Although not a matter which it is necessary for us to decide, if for the reasons we have given above a rule 37 'procedural error' set aside is not a set aside decision under section 9(4)(c) of the TCEA, it would seem to be empowered instead by section 22 and paragraph 15(2) in Schedule 5 to the TCEA.
49. The FTT is entirely a creature of statute and has no inherent jurisdiction. On the basis that the FTT was seeking to act within its powers, and given the only other set aside power the FTT could have exercised when it made the FTT set aside decision was rule 37 of the FTT Rules, we have no hesitation in concluding the FTT erred in law in making the FTT aside decision.
50. There are two preconditions for a rule 37 set aside. The first, unsurprisingly, is that there must have been some sort of procedural irregularity (such as missing documents, absence from an oral hearing or "some other procedural irregularity in the proceedings" (per rule 37(1)(b) and (2)). The second is that it must be in the "interests of justice" to set aside the earlier decision (rule 37(1)(a)). The FTT's set aside decision dated 30 August 2024 does not contain even the slightest hint of any procedural irregularity. The possibility that the FTT may not have been "*satisfied that all the arguments for both sides have been advanced*" is not a procedural irregularity under rule 37, at least without anything to suggest that those arguments were not in fact before the FTT when it made the housing costs decision. No such arguments were advanced by Mr Dawod and Ms Alla when challenging the FTT's housing costs decision, and no such reasoning was given by the FTT as the basis for its set aside decision.
51. In *SK v Secretary of State for Work and Pensions* [2016] UKUT 529 (AAC); [2017] AACR 25 at [8]-[10], Upper Tribunal Judge Jacobs ruled that such a set aside power "*has been consistently interpreted as applying only to procedural irregularities and not as including challenges to the substance of the tribunal's decision or reasons*" (at [8]). Likewise, in our judgement, the regulation 37 set aside power is not for the FTT to have another go at considering the arguments that were before it when it made, here, the housing costs decision.
52. In summary, it is trite law that tribunals are creatures of statute. They enjoy no inherent power to set aside their own decisions. As Sedley LJ put it, "*I do not think that, slips apart, a statutory tribunal – in contrast to a superior court – ordinarily*

possesses any inherent power to rescind or review its own decisions” (*Akewushola v Secretary of State for the Home Department* [1999] EWCA Civ 2099; [2000] 1 WLR 2295 at 2301D-E). In the present case, there was no proper basis on which the FTT could exercise either rule 37 or rule 40 so as lawfully to set aside the housing costs decision. And if the FTT was not exercising either set aside power, its decision was also in error of law on the basis of exercising a set aside power it did not have.

53. It follows that the decision of 30 August 2024 is set aside, and the decision of 9 April 2024 accordingly stands and now falls to be considered on appeal.

Analysis: is there an error of law in the housing costs decision?

54. The answer here is also Yes, essentially because we agree with the appellant that in making the supersession decision, the DWP had considered whether to revise the 10 November 2022 decision. The error of law made by the FTT was in not addressing and working through this issue.
55. Given the appeal succeeds on this ground, we do not need to decide whether the appeal succeeds on any of the alternative grounds. We therefore decline to decide either: (a) whether the DWP’s decision of 20 December 2022 was also an implied decision refusing to revise the 10 November 2022 decision or (b) whether the FTT in the housing costs decision erred in deciding that there was no official error ground for revising the 10 November 2022 decision.
56. The ‘implied decision’ thesis is not free from difficulty. In *R(IB) 2/04* the Tribunal of Commissioners said of the thesis:

“Implied decisions

56. In circumstances where the Secretary of State’s decision follows an application by the claimant, it might be possible to conclude that the Secretary of State has, **by implication**, made decisions under both powers (section 9 and section 10). For example, if the claimant applies for revision to obtain a more favourable rate of benefit, and the Secretary of State expressly makes a supersession decision awarding the more favourable rate only from the date of that decision, it may be possible to conclude that the Secretary of State has also refused to revise. Because of the rule in regulation 6(3) that a decision may not be superseded when it may be revised, it could be argued that, in order to have found the power to supersede, the Secretary of State must have determined that the case was one where there should not be a revision, e.g. for official error.

57. This was the basis of Mr Drabble’s submission that such decisions could be implied - and should readily be so - thereby opening up the jurisdiction of the tribunal on appeal in more cases than accepted by Miss Lieven for the Secretary

of State. Mr Drabble submitted that if, on a claimant's application for supersession, the Secretary of State refused to supersede or made a decision superseding at the same rate, a decision not to revise should be implied, for the same reasons. He also submitted that if, on a claimant's application, the Secretary of State decided to revise the existing decision, a refusal to supersede should be implied. If, he said, a claimant in an application expressly asked the Secretary of State to consider all possible powers to change the existing decision in the claimant's favour, a decision to exercise the power of revision would imply a refusal to exercise the power of supersession. Why, he asked, should it not be the same where a claimant merely made a generic request for a change in entitlement because his condition had got worse? Mr Drabble did, however, accept that his logic could not apply in the same way where the Secretary of State acted on his own initiative (although he submitted that the exercise of the power of supersession would always imply a decision not to revise).

58. Miss Lieven submitted that there was a much more restricted scope for implying decisions. She accepted that there could be cases where, depending on the circumstances and in particular on the terms of any application by the claimant, a decision, say, not to revise could be implied in addition to an express decision to refuse to supersede. However, in general, she submitted that it was for the Secretary of State to determine the true nature of any application and to give a decision on that application. The appeal tribunal's jurisdiction would then be limited by the legal nature of the decision made by the Secretary of State.

59. These submissions raised potentially very difficult issues. Mr Drabble's submission, even in its most limited form based on the effect of regulation 6(3), would avoid some particularly harsh consequences if the parties' general submissions were right. However, if appeal tribunals were required to implement the scheme as either Mr Drabble or Miss Lieven submitted they should, that would involve detailed factual investigation of the background to applications and their administrative presentation to decision-makers, and the drawing of subtle and technical distinctions. In our judgment, the 1998 legislation could not have been intended to involve consideration of such arid technicalities and complications. It seems to us a major advantage of the construction we have adopted in relation to Issue 1A that, except possibly in unusual cases, it avoids the need to resort to the often artificial device of implied decisions. By making the scope of an appeal tribunal's powers depend on the scope of the powers available to the Secretary of State when considering the decision under appeal, the appeal tribunal's task is considerably simplified: and it is able to concentrate on the central questions of substance with which the claimant and the Secretary of State are concerned."

57. The Tribunal of Commissioners in *R(IB) 2/04* did not decide that implied decisions could not arise under the statutory scheme. It was not necessary for that issue to be decided, given the Commissioners' view as set out in paragraph [55] of *R(IB) 2/04* that;

"55.if an appeal tribunal decides that the Secretary of State's decision under section 9 or section 10 changing or refusing to change a previous decision was wrong then (subject to the restriction in section 12(8)(b), if relevant) it has jurisdiction to make the revision or supersession decision which it considers the

Secretary of State ought to have made, even if that means making a decision under section 9 when the Secretary of State acted only under section 10, and vice versa.”

58. The Tribunal of Commissioners tempered and restricted that view to an extent when they separately and later decided the linked appeal in *R(IS) 15/04*. That decision on its face, at paragraph [78], recognised that there were some revision decisions which the FTT could not substitute for a supersession decision. Paragraph [78] of *R(IS) 15/04* states:

“78....the appeal tribunal had before it an appeal against a section 10 decision in circumstances in which there had been an express refusal to revise by the Secretary of State which (as we have held) was not capable of being appealed, and which by section 17 of the 1998 Act was “final”. It seems to us that, in those circumstances, if an appeal tribunal were permitted to substitute a revision decision for the supersession decision, that would in effect be to permit by the back door what is not permitted by the front door, namely an appeal against the refusal to revise. This is another instance where an express statutory limitation on the powers of an appeal tribunal cuts into the general principle set out in paragraph 55 of *R(IB) 2/04* (see paragraph 12 of that decision). We do not therefore consider that, in dealing with the appeal against the supersession decision, the tribunal was entitled to consider whether the decision of 20 February 1998 should have been revised for official error. It would have been a different matter if the Secretary of State had not made a decision (whether express or implied) on the issue of revision for official error.”

59. We recognise that the concluding sentence in paragraph [78] of *R(IS) 15/04* may itself provide support for the implied decision thesis, although not presumably one that would have allowed an appeal for an implied refusal to revise decision in by the back door when no such appeal could exist via the front door.
60. Both *R(IB) 2/04* and *R(IS) 15/04* were decided before the changes made in 2013 so as to introduce the ‘mandatory reconsideration’ requirements found in section 12(3A) and (3B) of the Social Security Act 1998 and what is now regulation 7 of the D&A Regs. We would venture to suggest that the changes effected by these mandatory reconsideration changes render the need to identify an implied decision of limited, or no, relevance. This is because, for the reasons we explain below, the amended right of appeal conferred by section 12(3A) and (3B) and regulation 7 is not dependent on showing a revision decision (whether deciding to revise or deciding not to revise) has been made.
61. Disposing of this appeal against the housing costs decision on the first ground of appeal also renders it unnecessary for us to address the *obiter* comments made by the three-judge panel at paragraph [80]-[87] of *TR and GD v SSWP (PIP/ESA)* [2025] UKUT 332 (AAC).

62. Reverting to whether the DWP considered whether to revise the 10 November 2022 decision, the legal provision at the heart of this issue is regulation 7 of the D&A Regs. This provides as follows:

“Consideration of revision before appeal

7.—(1) This regulation applies in a case where—

(a) the Secretary of State gives a person written notice of a decision under section 8 or 10 of the 1998 Act (whether as originally made or as revised under section 9 of that Act); and

(b) that notice includes a statement to the effect that there is a right of appeal in relation to the decision only if the Secretary of State has considered an application for a revision of the decision.

(2) In a case to which this regulation applies, a person has a right of appeal under section 12(2) of the 1998 Act in relation to the decision only if the Secretary of State has considered on an application whether to revise the decision under section 9 of that Act.

(3) The notice referred to in paragraph (1) must inform the person—

(a) of the time limit under regulation 5(1) (revision on any grounds) for making an application for a revision; and

(b) that, where the notice does not include a statement of the reasons for the decision (“written reasons”), the person may, within one month of the date of notification of the decision, request that the Secretary of State provide written reasons.

(4) Where written reasons are requested under paragraph (3)(b), the Secretary of State must provide that statement within 14 days of receipt of the request or as soon as practicable afterwards.

(5) Where, as the result of paragraph (2), there is no right of appeal against a decision, the Secretary of State may treat any purported appeal as an application for a revision under section 9 of the 1998 Act.”

63. We note that regulation 7(1) also applies to the 10 November 2022 decision of the DWP not to award Mr Dawod and Ms Alla any housing costs on their couple claim for UC. Despite its importance in confirming there was, in fact, a requirement for the DWP to have considered whether to revise before an appeal could be lodged, the 10 November 2022 decision was, unfortunately, not in the papers before the FTT or before us. No point was taken by Mr Dawod and Ms Alla about this. We therefore work on the assumption that the 10 November 2022 decision complied with the requirements of regulation 7(1)(b) of the D&A Regs.
64. Regulation 7 of the D&A Regs is made under section 12(3A) and (3B) of the Social Security Act 1998. The relevant parts of section 12 read as follows:

“Appeal to First-tier Tribunal

12:- (1) This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which—

(a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or

(b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act.

(2) In the case of a decision to which this section applies, the claimant and such other person as may be prescribed shall have a right to appeal to the First-tier Tribunal, but nothing in this subsection shall confer a right of appeal....

(b) where regulations under subsection (3A) so provide.....

(3A) Regulations may provide that, in such cases or circumstances as may be prescribed, there is a right of appeal under subsection (2) in relation to a decision only if the Secretary of State has considered whether to revise the decision under section 9.

(3B) The regulations may in particular provide that that condition is met only where—

(a) the consideration by the Secretary of State was on an application,

(b) the Secretary of State considered issues of a specified description, or

(c) the consideration by the Secretary of State satisfied any other condition specified in the regulations....

(3D) in a case of a decision relating to child benefit or guardian’s allowance, the making of an appeal under this section against the decision as originally made must follow [HMRC] first deciding, on an application made for revision of that decision under section 9, not to revise the decision.

(6) A person with a right of appeal under this section shall be given such notice of a decision to which this section applies and of that right as may be prescribed.

(7) Regulations may—

(a) make provision as to the manner in which, and the time within which, appeals are to be brought;

(b) provide that, where in accordance with regulations under subsection (3A) there is no right of appeal against a decision, any purported appeal may be treated as an application for revision under section 9....”

We have set out section 12(3D) as well because of its contrasting language about the need for a decision not to revise to be made.

65. Section 12(3B) enables a number of matters to be prescribed in regulations. However, the key wording in regulation 7(2) – ‘*a person has a right of appeal under section 12(2) of the 1998 Act in relation to the decision only if the Secretary of State has considered on an application whether to revise the decision under section 9 of that Act*’ - is limited to that which is empowered by section 12(3A) and (3B)(a). It is, in any event, not disputed that Mr Dawod’s request for ‘backdated housing costs’ made on 14 December 2022, was an application for revision of the 10 November 2022 decision. The statutory question is: did DWP consider whether to revise the 10 November 2022 decision under section 9 of the Social Security Act 1998, be that on or before the DWP’s decision of 20 December 2022 or its decision of 20 January 2023?
66. In our judgement it is important to recognise that this statutory question only involves identification of “consideration” by the DWP of “whether” to revise. It does not involve an actual or implied decision by the DWP to revise or not to revise the original decision. Had it been the intention of the legislature that a revision decision actually needed to be made, it could have used such language, as it has done in section 12(3D) of the Social Security Act 1998. It did not. The statutory question is thus founded on something less than, or short of, a decision being made. It requires only that consideration has been given, and that the consideration given is only in respect of whether to revise.
67. At times, the Secretary of State’s submissions elided this distinction. Thus, when we pressed Ms McLeod to provide an example of the DWP actually considering whether to revise, she gave the example of a decision not to revise. This undoubtedly will show that consideration was given whether to revise, along the way to making the revision, but the statutory test does not require that a decision is actually made. The elision was also shown in the Secretary of State’s skeleton argument that the appellant’s interpretation requires there to be an implication that there was a decision on revision. Again, the statutory test does not necessitate a decision is made. And, as we have set out above, the appellant’s ‘implied decision’ ground of appeal arose in the alternative to this ground.
68. The appellant accepted there had to be something to show that consideration had been given whether to revise. Thus, if the DWP had simply made no response to Mr Dawod’s ‘backdating’ request of 14 December 2022, no argument could properly arise that the DWP had considered on that application whether to revise the 10 November 2022 decision: and see further on this point paragraph [120] of *TR and GD v SSWP (PIP/ESA)* [2025] UKUT 332 (AAC). But that is not what occurred.

69. Mr Dawod made what is now (correctly) accepted as an application for revision of the 10 November 2022 decision on 14 December 2022. The application was, on its face, one asking for the HCE to be awarded from 10 October 2022 and asserting that the 10 November 2022 had been wrong not to have included the HCE from that date. Even without regulation 32 of the D&A Regs, we can find no answer to the appellant's submission that the DWP must have considered that application for revision and whether to revise the 10 November 2022 decision, because the DWP's supersession decision considered whether Mr Dawod's late reporting of housing costs could be accepted. In our judgment that amounted, in substance, to the DWP *considering* whether to do that which Mr Dawod was applying to it to do, namely to award the HCE from 10 October 2022.
70. Regulation 32 of the D&A Regs only makes this conclusion clearer. Whatever the precise scope of regulation 32, in order to act lawfully in accordance with it, the DWP must first *consider* whether the disputed decision may be revised before consideration is given to whether it should be superseded. That is consistent with paragraphs 39(2), (3) and (5) of the Tribunal of Commissioner's decision in *R(IS)15/04* that when faced with obvious grounds for revision, the claimant is entitled to revision on those grounds. Even if both the revision and supersession grounds for changing a decision are, however, powers and not duties, this does not affect the statutory requirement in regulation 32 to consider revision first. If the revision power is available, it must be exercised before any supersession power and that must call for consideration whether to revise, before deciding whether to supersede.
71. Our view of regulation 32 also accords with the DWPs own Advice for Decision Makers at Chapter A4 where paragraph 4018 states:
- “A4018 A decision which can be revised should not be superseded except where there are grounds allowing revision and further grounds arise allowing supersession. This allows a decision to be revised and then superseded as part of one process.”
72. There seems little point in regulation 32 being included in the D&A Regs if it does not, at the very least, direct the DWP to first consider whether to revise a decision before considering any supersession grounds. Nor can it be disputed that what Mr Dawod was seeking on 14 December 2022 was revision of the 10 November 2022 decision not to award the HCE from 10 October 2022.
73. In *AP v SSWP* [2025] UKUT 330 (AAC) Upper Tribunal Judge Wikeley accepted the Secretary of State's argument in that appeal that the FTT had erred in law in

not finding the DWP had considered whether to revise. In granting permission to appeal Judge Wikeley had said (relevantly):

“7. The FTT has issued a Decision Notice (dated 7 October 2024) and a full Statement of Reasons (SoR dated 23 January 2025) for its decision of 7 October 2024. The FTT found that the Applicant was seeking to appeal the UC decision dated 23 April 2024. That much does not appear to be in dispute. However, the FTT struck out the Applicant’s appeal for want of jurisdiction. In short, this was apparently because – through what the FTT correctly recognised was no fault of the Applicant – the Secretary of State had not as yet undertaken a mandatory reconsideration of the UC decision in question. The request for a mandatory reconsideration had been made in time but initially not processed by the DWP as it concerned a “policy issue”. It was then belatedly registered on 10 July 2024 but had yet to be processed. The FTT explained that in the absence of a mandatory reconsideration (MR) the tribunal lacked jurisdiction. Indeed, the Applicant acknowledged that no such MR had taken place (and, so it appears, has still not taken place, even now many months later).

The proposed grounds of appeal

8. The Applicant has set out his reasons for appealing in an annex to Form UT1 and in a subsequent additional document which is undated but was received by the Upper Tribunal on 24 April 2025 (‘Additional reasons for appeal’).

9. Understandably, the Applicant’s reasons for appealing are principally directed at the DWP’s conduct of this matter. In short, the DWP initially declined to carry out a MR, arguing that the matter was a “policy issue”. I have to say that it is singularly unclear what that policy issue was or is. The DWP later changed tack and accepted that a request for a MR had been lodged (and was duly registered on 10 July 2024). However, it now appears that (well after the FTT’s decision) the DWP has changed tack yet again – on 22 April 2025 the DWP entry on the Applicant’s UC journal states that “A decision is unable to be made due to policies”. However, I bear in mind that the DWP’s conduct of the case after the date of the FTT’s decision does not necessarily mean that the FTT’s decision involves any arguable error of law.

10. Nonetheless, I consider there is sufficient here to warrant a grant of permission to appeal. This is an inquisitorial jurisdiction, meaning that the Upper Tribunal can identify potential grounds of appeal of its own initiative. For example, there is at least a potential argument that the FTT failed to have due regard to section 12(3A) of the Social Security Act 1998 (as amended). Section 12(3A) enables regulations to make provision for a right of appeal to arise “only if the Secretary of State has considered whether to revise the decision under section 9”. Notwithstanding SoR paragraphs 18 & 19, it could be argued that, in declining to make a decision as it was “policy” to take that approach, the Secretary of State had thereby considered whether to revise the original UC decision (and had decided not to) – see by analogy *R (CJ) and SG v SSWP (ESA)* [2017] UKUT 324 (AAC); [2018] AACR 5.....

74. In *AP*, the Secretary of State’s support for the appeal read materially:

“14. The appellant had asked for a Mandatory Reconsideration (MR) on 02/05/2024 of the supersession decision that was made on 23/04/2024. This

decision was made due to a relevant change of circumstance on the housing costs and led to an increase in award. On 22/05/2024 the Decision Maker (DM) updated the journal confirming to the claimant that an 'MR was not necessary as it was a policy issue' (FTT bundle SCS1 form, page 2). This is also acknowledged by the FTT in paragraph 10 in the Statement of Reasons (SOR) which states 'In his appeal, he wrote that he requested mandatory reconsideration in May, but was told by the Department that one was not necessary as this was a policy issue'.

15. In Paragraph 19 of the SOR the FTT state that 'The Tribunal did not consider this to be a refusal to carry out a mandatory reconsideration. A decision to this effect was never issued to the appellant'. The FTT concluded that they did not consider the above DM's journal entry on 22/05/2024 to be a refusal to revise and that no decision was issued to the appellant. However, there is a further journal entry not submitted in the bundles on 04/06/2024 by [Angela B]. In brief, she explains that the inaccurate housing costs calculation about which the claimant has complained is an unfortunate but inescapable result of the framing of the legislation and suggests that the remedy is a Discretionary Housing Payment.

16. The appellant undoubtedly applied for a revision of the supersession from 23/03/2024, but had the Secretary of State "considered" that application, as the MR requirement in regulation 7(2) of the Decisions and Appeals Regulations requires? The answer is surely 'yes'. As R(IB) 2/04 points out at [8]: '*neither the Act nor any regulation specifies any particular form in which decisions must be made.*' Whether a given act constitutes a refusal to revise is a matter of substance.

17. Paragraph 43 of *R(CJ) and SG v SSWP* [2017] UKUT 324 (AAC), [2018] AACR 5 states –

'The condition in section 12(3A) does not specify how the Secretary of State is to consider "whether to revise the decision under section 9"... The key words in our judgement are those that define the condition precedent that the "only if" refers to, namely "the Secretary of State has considered whether to revise the decision under section 9". The introductory word "only" emphasises the need for that condition precedent to be satisfied but does not do more'.

More precisely: has the Secretary of State looked at a request to change a decision and said 'no' to it? Framed in this way, it seems beyond doubt that the Secretary of State did refuse the application for revision to the appellant (perhaps many times over). If nothing else, Angela B's message on 4 June 2024 is an unequivocal statement that no change to the benefit awarded can be made in response to the arguments and concerns the claimant had raised. No later than then, therefore, the MR requirements of regulation 7(2) were fully and finally completed. What did and did not happen in 2025 could not change this."

75. The decision in *AP*, although given by a single Upper Tribunal judge and not after contested argument, supports our view that what has to be considered is the substance of what the DWP did in response to an application.

76. We say at this point that we were not really assisted by assessing whether the DWP's 'consideration' is to be construed objectively or subjectively. The enquiry is about whether the DWP considered whether to revise, but that is unlikely to be resolved by the FTT being privy to the inner workings of the relevant DWP official's mind. The answer will be for the FTT to assess, having regard to all relevant evidence, but bearing in mind that something short of an actual revision decision is all that is required. If there has been no response to the request/application, as we have set above it is difficult to see on the evidence how a rational FTT could conclude that there had in fact been consideration. But if there has been a response, it will be for the FTT to decide, on the evidence and the balance or probabilities, whether, in substance, an application for revision was made and has been considered by the DWP.
77. The other decision that warrants consideration is the three-judge panel's decision in *R(CJ) and SG*. We recognise at once that CJ and SG was different from this appeal because it involved the Secretary of State making a positive decision not to extend time to admit the late applications revision. Nonetheless, such decisions did show that the Secretary of State had "considered whether to revise".
78. A number of aspects of the decision in *R(CJ) and SG* are important.
79. First, it decides that nothing in the statutory architecture mandates *how* the consideration whether to revise is to be done or shown by the DWP: para: [43] of *R(CJ) and SG*. That is consistent with our view that whether there has been the statutory consideration is a matter of substance to be decided on all the relevant evidence and is not dependent on DWP saying in writing that they have or have not considered whether to revise. Even the statement "I have not considered whether to revise" might, in some circumstances, show there has been some 'consideration' whether to revise.
80. Second, although the essential and driving Parliamentary purpose was to give the DWP a second opportunity to get the entitlement decision correct, ruling out a full merits appeal on the basis that an extension of time was not granted would frustrate that essential and driving purpose. Properly concluding on the evidence that the DWP has considered whether to revise is, in our judgement, wholly in accordance with that essential and driving Parliamentary purpose and does not sidestep it.
81. Third, not extending time so as to address the merits of the revision request was in principle sufficient to show consideration of whether to revise and was not dependent on the Secretary of State saying whether they had considered to

revise. That, again, is consistent with our view that whether the DWP considered whether to revise is not dependent on evidence from the DWP official on what they have (or have not) considered but is to be decided as a matter of substance on all the relevant evidence.

82. Fourth, and perhaps as no more than a different way of putting the second point, if the legislative concern under ‘mandatory reconsideration’ scheme is to give the DWP a second opportunity to get the 10 November 2022 decision right, they had that opportunity. The DWP’s failure to make (what everyone now agrees was) the correct decision on that second opportunity should not properly act as a constraint on the right of a dissatisfied claimant to appeal to the FTT.
83. Fifth, there needs to be clear language to interfere with the general right of appeal in section 12(2) of the Social Security Act 1998: para. [65] of *R(CJ) and SG*. There is nothing in section 12(3A) of the Social Security Act 1998 or regulation 7(2) of the D&A Regs which means the right of appeal is only conferred on the basis of positive and actual evidence from the relevant DWP decision maker as to what they did consider.

Conclusion

84. We therefore conclude, for the reasons we have given above, that both the FTT’s set aside decision and its housing costs decision involved material errors of law. We allow the appeal and give the decision in the terms set out above.
85. We agree with Mr Dawod that in remaking the decision, it is no part of our, or the FTT’s, function to decide whether to extend time to enable a late revision on any grounds under regulations 5(1)(b) and 6 of the D & A Regs. This is for two reasons. First, it remains the case that there can be no right of appeal against a decision of the DWP under section 9 of the Social Security Act 1998, which includes a decision whether to extend time to allow a late application for revision on any grounds. Section 12(1) of the Social Security Act 1998 only confers a right of appeal in respect of decisions made under section 8 and 10 of that Act, not decisions under section 9: see *R(TC) 1/05*. Second, and in any event, since the ‘mandatory reconsideration’ changes introduced by section 12(3A)-(3B) of the Social Security Act 1998, all the FTT needs to be satisfied of, in terms of its ability to decide an appeal against an original DWP decision, is that on an application the DWP considered whether to revise the original decision. To this extent, although the decision in *KU v SSWP (UC)* [2026] UKUT 38 (AAC) to award the carer element in the original award of UC was correct (because the DWP had considered whether to revise the original awarding decision), we agree with Mr

Dawod that the reasoned basis on which the Upper Tribunal reached that decision was erroneous.

86. Before leaving this decision, we feel we should record our concern that Mr Royston and the solicitors instructing him had to conduct the hearing before us on a *pro bono* basis. This was because their application to the Legal Aid Agency for exceptional case funding had been refused the day before the hearing. It was fortunate that this refusal of funding did not lead to the hearing being postponed, and our decision has benefitted very significantly from Mr Dawod and Ms Alla being represented by lawyers with a great deal of experience in the field of social security law. Decisions on exceptional case funding are not, of course, a matter for us. But like the Tribunal of Commissioner in *R(H) 3/05* (at paragraphs [3]-[6]), we would suggest that timely decisions on applications for exceptional case funding are needed, not the day before the hearing. As in *R(H) 3/05*, we have benefitted very considerably from both sides being represented by experienced lawyers in a case which was listed before a panel of three judges because it raised a question of law of special difficulty.

**Nicholas Wikeley
Stewart Wright
Judith Butler
Judges of the Upper Tribunal**

Authorised by the Judges for issue on 17 September 2026