**Please read before using this template:**

* *To complete this template:*
  + replace any RED text in [square brackets], then return the text to black, without brackets. Look out for all instances of [s/he] [her/his] [her/him]. Consider the claimant’s name or ‘The Appellant’ as an alternative.
  + Consider, address and then delete all prompts/comments and the square brackets surrounding them before sending. If you have deleted paragraphs that do not apply in your case, check numbering is still sequential.
* *After the appeal decision, WARNING:*
  + If the appeal is allowed, DWP *may* not accept it and may seek to appeal to the Upper Tribunal (and suspend payment under the First-tier Tribunal decision whilst they do so).
  + If the appeal is dismissed, then the claimant may wish to seek permission to appeal to the Upper Tribunal and then to appeal to that Tribunal on the grounds the First-tier Tribunal was wrong not to accept the argument.
  + In either case, advisers can contact CPAG for further support with the appeal by getting in touch with the [Upper Tribunal Project](https://cpag.org.uk/welfare-rights/support-advisers/support-advisers-england-and-wales/support-upper-tribunal-case), or via the [testcases referral mechanism](https://cpag.org.uk/welfare-rights/test-cases/refer-test-case#:~:text=CPAG%20intervenes%20in%20existing%20cases,our%20test%20case%20referral%20form%20.).

**Delete box before posting**

|  |  |
| --- | --- |
| **First-tier Tribunal  (Social Entitlement Chamber)** | **Tribunal Ref: [TRIBUNAL REFERENCE NUMBER]** |

**BETWEEN**

|  |  |
| --- | --- |
| **[FULL NAME]** | **Appellant** |
| **-and-** |  |
| **Secretary of State for Work and Pensions (“SSWP”)** | **Respondent** |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Reply for appellant**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Decision appealed and outcome sought**

1. [Title. Last Name], the Appellant, appeals against the decision dated [date of supersession decision under appeal] which superseded [his/her] Universal Credit (“**UC”**) award, which had, up to that point, included a carer element (“**CE”**). That supersession was made up of a determination that [his/her] transitional element (“**TE”**) was to ‘erode’ by an amount equivalent to the limited capability for work related activity (“**LCWRA”**) element.
2. The First-tier Tribunal (“**FTT”**) must, applying the case of *SSWP v MJ* [2025] UKUT 35 (AAC), decide that the TE is instead to erode only by the difference between the LCWRA and carer elements.

**Relevant Facts**

1. [Date migration notice was issued xx/xx/xx] – [Title. Last Name] was issued with a managed migration notice informing [her/him] that all ‘legacy’ benefits to which [s/he] was entitled were due to end and that [s/he] must make a claim for UC if [s/he] wished to continue to receive social security benefit.
2. [Date of UC claim xx/xx/xx] – [Title. Last Name] claimed UC. [s/he] declared that [her/his] health conditions restricted [her/his] ability to work, the SSWP referred [her/him] for an assessment to determine whether [s/he] had LCWRA.
3. [Date of decision awarding uc, typically soon after the first assessment period xx/xx/xx ] – The SSWP made an award of UC which included a CE and a TE.
4. [Date of LCWRA determination xx/xx/xx] – The SSWP determined that [Title. Last Name] had LCWRA.
5. [Date of supersession decision under appeal xx/xx/xx]– The SSWP superseded [Title. Last Name]’s award. The SSWP decided that [Title. Last Name]’s UC award was to be superseded, effective from [effective date of supersession decision under appeal xx/xx/xx] to:
   1. include the LCWRA element;
   2. remove the CE from the award; and
   3. erode the TE by an amount equivalent to the LCWRA element.

As a consequence of the supersession [Title. Last Name]’s UC award *reduced* from £[amount of award in assessment period preceding assessment period in which the supersession under appeal took effect] prior to the supersession down to £[amount of award in assessment period from which the supersession under appeal took effect] after the supersession took effect.

1. [Date of request for revision xx/xx/xx] - [Title. Last Name] requested a revision of the decision of [xx/xx/xx]
2. 29/01/2025 – The Upper Tribunal (“**UT”**) decides the case of *SSWP v MJ* [2025] UKUT 35 (AAC).
3. [Date that SSWP issued mandatory reconsideration notice xx/xx/xx] – the SSWP refused to revise the decision.
4. [xx/xx/xx] – [Title. Last Name] submitted an appeal.

**Submissions**

*This case is on all-fours with the case of MJ*

1. [Title. Last Name] is in the same position as was the respondent in *SSWP v MJ* [2025] UKUT 35 (AAC). UTJ West set out MJ’s circumstances as follows[[1]](#footnote-1) :

*5. On 13 October 2020, the Secretary of State converted the transitional SDP amount to the TSDPE. On 18 June 2021 MJ notified the Secretary of State of a relevant change in circumstances, namely that she had been diagnosed with polymyalgia.*

*6. At the time of the erosion decision, MJ’s UC award comprised a carer element of UC. On 25 October 2021, with effect from 10 October 2021, the Secretary of State decided to add a LCWRA element to MJ’s UC award and in consequence the carer element of the UC award was removed, pursuant to regulation 29(4) of the 2013 Regulations.*

*7. By virtue of regulation 55 of the 2014 Regulations, the effect of the addition of the LCWRA element was to erode MJ’s TSDPE to nil. Overall, the amount of her UC award went from £975.20 for the earlier assessment period (10 September 2021 to 9 October 2021) to £879.98 for the following UC assessment period (10 October 2021 to November 2021, i.e. the assessment period which is the subject of the appeal)*

1. [Title. Last Name]’s UC included a managed migration transitional element, under reg.52 of the 2014 Regulations, rather than, as in *MJ*’s case, a transitional SDP element under reg.63 2014 Regulations. However, ‘erosion’[[2]](#footnote-2) operates on both of those transitional elements in exactly the same way – by means of reg.55(2) 2014 Regulations[[3]](#footnote-3). Thus, the judgment in *MJ* applies equally to the erosion of a managed migration transitional element.
2. As in *MJ*, [Title. Last Name]’s UC award included a carer element of UC. As in *MJ*, the SSWP decided to add a LCWRA element to [Title. Last Name]’s UC award and in consequence the carer element of the UC award was removed. As in *MJ*, the effect of the addition of the LCWRA element was to erode [Title. Last Name]’s transitional element with the consequence that [s/he] was worse off after the addition of the LCWRA element to [her/his] award. [Title. Last Name]’s case is on all-fours with that of *MJ*.
3. UTJ West’s judgment in *MJ* held that the erosion of the full amount of MJ’s TSDPE was discriminatory and contravened her Convention rights. Regulation 55(2)(c) and Regulation 55(4) of the 2014 Regulations were to be interpreted and/or disapplied to avoid the discriminatory outcome. MJ’s TSDPE was to be eroded by the difference between the CE of UC and the LCWRA element of UC from the assessment period in which the LCWRA was added to the calculation of the award and for each subsequent assessment period.

*SSWP approach is wrong but hints at the real issue [edit this subtitle and paras 16 & 17 as appropriate. This section is in reply to the SSWP response in the case for which this document was initially drafted]*

1. When [Title. Last Name]’s representative brought the case of *MJ* to the SSWP’s attention she dismissed its relevance. The SSWP response refers, erroneously, to the judgment in *MJ* as legislation and states that the ‘change’ did not apply as the decision (i.e. the supersession decision under appeal) ‘was made prior to the date the change in legislation occurred’. That statement is wrong for two reasons:
   1. firstly, because the *MJ* case was not “legislation” but rather a testcase;
   2. secondly, the *MJ* case did not bring about a “change” to the law but rather pronounced what the law had always been. That in deciding testcases about the meaning of statutes the Courts and Tribunals *discover what the law has always been rather than changing the law* is a basic principle for which no authority is needed)
2. In so far as it is possible to discern meaning from the SSWP’s misconceived, if brief, response regarding this point it appears that the SSWP is alluding to the ‘anti-test case rule’.
3. As Underhill LJ said in *SSWP v Reilly* [2016] EWCA Civ 413, this is a rule within the social security system which, where it applies, means that “*the usual rule that the decision of the court establishes what the law has always been does not apply*”. The question for the Tribunal in the present case is whether the anti-testcase rule bites on the decision against which [Title. Last Name] has appealed - for the reasons given below it does not.

*The anti-test case rule does not apply to this case*

1. S.27 Social Security Act 1998 (“**the SSA**”), in so far as it is relevant, is as follows:

***27. Restrictions on entitlement to benefit in certain cases of error***

*(1) Subject to subsection (2) below, this section applies where—*

*(a)* *the effect of the determination, whenever made, of an appeal to the Upper Tribunal or the court (“the relevant determination”) is that the adjudicating authority’s decision out of which the appeal arose was erroneous in point of law; and*

*(b)* *after the date of the relevant determination a decision falls to be made by the Secretary of State in accordance with that determination (or would, apart from this section, fall to be so made)—*

*(i) in relation to a claim for benefit;*

*(ii) as to whether to revise, under section 9 above, a decision as to a person’s entitlement to benefit; or*

*(iii) on an application made under section 10 above for a decision as to a person’s entitlement to benefit to be superseded.*

*[…]*

*(3)* *In so far as the decision relates to a person’s entitlement to a benefit in respect of—*

*(a) a period before the date of the relevant determination; or*

*(b) in the case of a widow’s payment, a death occurring before that date,*

*it shall be made as if the adjudicating authority’s decision had been found by the Upper Tribunal or court not to have been erroneous in point of law.*

*[…]*

*(6) It is immaterial for the purposes of subsection (1) above—*

*(a) where such a decision as is mentioned in paragraph (b)(i) falls to be made, whether the claim was made before or after the date of the relevant determination;*

*(b)where such a decision as is mentioned in paragraph (b)(ii) or (iii) falls to be made on an application under section 9 or (as the case may be) 10 above, whether the application was made before or after that date.*

*(7) In this section—*

*“adjudicating authority” means—*

*(a) the Secretary of State;*

*(b) any former officer, tribunal or body; or*

*(c) any officer, tribunal or body in Northern Ireland corresponding to a former officer, tribunal or body;*

*“benefit” means—*

*[…]*

*(f) universal credit;*

*[…]*

*[…]*

1. Considering how that rule applied to [Title. Last Name]’s case, at the stage [s/he] applied to SSWP for revision, it can be seen that:
   1. the effect of the determination of *MJ*’s appeal to the Upper Tribunal is that the adjudicating authority’s (i.e. the SSWP’s) decision out of which the *MJ* appeal arose was erroneous in point of law - and so the condition at s.27(1)(a) SSA was met; and,
   2. when [Title. Last Name] applied for a mandatory reconsideration of that decision (i.e. a revision) then while the SSWP’s supersession decision, was made before UTJ West’s decision in *MJ,* when the SSWP was faced with an application to revise that decision then s.27(1)(b)(ii) also applied (that is “a decision [fell] to be made by the [SSWP] in accordance with [the *MJ*] determination […] as to whether to revise, under s.9 [SSA], a decision as to [Title. Last Name’s] entitlement to benefit”).
2. Therefore, at the mandatory reconsideration stage, s.27(3) applied and, in so far as the decision related to [Title. Last Name]’s entitlement to UC in respect of a period before the decision in MJ (the date of the relevant determination) the SSWP was obliged to make that decision as if her decision in *MJ* had been found by the Upper Tribunal not to have been erroneous in point of law.
3. The Tribunal will note, however, that s.27 only applies where a decision falls to be made by the SSWP (all the s.27(1)(b) heads refer to when the SSWP is the one making the decision). S.27 does not apply when a decision falls to be made by a tribunal. While the SSWP is correct that she was bound, when considering an application for revision of the decision by s.27 that does not apply to the Tribunal.
4. Crucially, that is because [Title. Last Name]’s appeal is not against the decision which SSWP made refusing to revise the supersession decision[[4]](#footnote-4). Rather it is against the supersession decision itself, s. 12(1) SSA does not confer a right of appeal against a refusal to revise. Authority for this can be found at para.17 of R(IS) 15/04:

*“It is common ground that a decision under section 9 to revise or not revise is not itself made appealable by the 1998 Act; the only decision which can be appealed is the original decision as either revised or not revised. […]”*

and also at para.38 of R(IB)2/04:

*“38. So far as decisions under section 9 (revision) are concerned, section 12(1) provides a right of appeal, not against the decision under section 9 as such, but only against the original decision as either revised or not revised. […]”*

1. If the Tribunal was dealing with an appeal against a decision where s.27 applied it too would be caught by s.27 (as the Tribunal powers are to make any decision which it was open to the SSWP to make when SSWP made the decision under appeal and therefore if the SSWP was caught so too is the Tribunal). However, the Tribunal are not dealing with an appeal against the refusal to revise but an appeal against the supersession decision.
2. Turning to whether s.27 applied to the supersession decision made on [date of supersession decision under appeal xx/xx/xx] then it did not. That is because s.27(1)(b) does not apply as that decision was made *before* the decision on the testcase. It is not a case where “*after the date of the [MJ decision] a decision falls to be made by the Secretary of State in accordance with that determination”.* Rather it is a case where after the date of MJ a decision falls to be made by a Tribunal about a decision made by SSWP before MJ.
3. It may seem odd that [Title. Last Name] is able to achieve an outcome on appeal that [s/he] was not able to achieve on revision. However, the Tribunal will note:
   1. This is consistent with the aim of s.27 which, according to the authors of the commentary at 1.516 of Sweet and Maxwell’s Social Security Legislation (vol.3) 2024/25*[[5]](#footnote-5)*, was to limit the application of the pre-2000 power to revise on the ground of official error (which had, until 2000, applied at any time, even in cases where the error had been shown to be an error by the Upper Tribunal or a court – the definition of official error was then changed to exclude errors shown to have been an error by the Upper Tribunal or a court);
   2. The SSA is fastidious in identifying the circumstances in which a decision falls to be made when setting out the scope of the powers available to the bodies involved – for example, s.9 SSA states that the SSWP may revise any decision *of the SSWP* under ss.8 or 10 (i.e. she may not revise a decision of a First-tier Tribunal), this can be contrasted with s.10 which states that the SSWP may supersede decisions under ss.8 & 9 *and also* decisions made by the First-tier Tribunal. Had Parliament intended s.27 to apply to decisions which fall to be made by tribunals then it would have specified this in the SSA.
4. Prior to the 2013 introduction of the “mandatory reconsideration requirement” then [Title. Last Name] would simply have filed a (late) appeal against the supersession decision. That would perhaps have made it easier to see that s.27 does not bite. Now that revision must be sought before that right of appeal arises the matter appears at first glance confusing. However, that confusion disappears as soon as one grasps that the mandatory reconsideration requirement does not mean that the appeal which follows is then against the refusal to revise (where s.27 applied) but rather against the original supersession decision- mandatory reconsideration is a gateway to appeal rather than something which, where it is refused, becomes the subject of the appeal.
5. The anti-test case rule does not apply when a decision falls to be made by the First-tier Tribunal. The Tribunal is not required to act in accordance with s.27(3) SSA. The Tribunal is, however, required to decide [Title. Last Name]’s appeal in accordance with the case of *MJ*.

**Conclusion**

1. .The Tribunal must apply *SSWP v MJ* [2025] UKUT 35 (AAC) and uphold [Title. Last Name]’s appeal, so that [Title. Last Name]’s transitional element erodes only by an amount equivalent to the difference between the carer and LCWRA elements.

[Representative’s Name and Organisation]

[DATE]

1. note: UTJ West refers to the Universal Credit Regulations 2013 at ‘**the 2013 Regulations’** and refers to the Universal Credit (Transitional Provisions) Regulations 2014 as ‘**the 2014 Regulations’** – both abbreviations are adopted for the purposes of these submissions [↑](#footnote-ref-1)
2. The reduction of a transitional element when a new element is included in the calculation of an award or an existing element is increased. [↑](#footnote-ref-2)
3. Para.6 of sch.2 2014 Regulations makes clear that reg.55(2) applies to a transitional SDP element. [↑](#footnote-ref-3)
4. The SSWP’s guidance to her decision makers (DMs) on MJ lookalike cases falls into this trap. The guidance distinguishes between those cases in which the FTT may decide an appeal in favour of the claimant and an appeal in which the FTT may not decide an appeal in favour of the claimant **by reference to the date of the mandatory reconsideration decision**, not the date of the supersession decision under appeal. That is wrong for the reasons set out in the submissions.

   The FTT will note that the guidance correctly states that, for a specified class of case (though the guidance wrongly defines the class of case), the FTT may provide a remedy that the SSWP’s DM may not.

   ‘*Guidance and operational instructions about SSWP v MJ [2025] UKUT 35 (AAC)*’, Freedom of Information response, 26/08/2025, available at <https://www.whatdotheyknow.com/request/guidance_and_operational_instruc#incoming-3135186> [↑](#footnote-ref-4)
5. Rolt, W. and Ward, C. (2024) *Social Security Legislation 20245/25: Administration, Adjudication and the European Dimension (vol.III)*, published by Sweet and Maxwell [↑](#footnote-ref-5)