DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeals by the Appellant in CH/251/2017, CIS/248/2017, CIS/249/2017, CJSA/247/2017 and CTC/250/2017.

The decision of the Romford First-tier Tribunal dated 5 July 2016 under file references SC154/15/02979, SC281/15/00059, SC281/15/00060, SC281/15/00058, and SC320/15/00788 does not involve any error of law. The decision of the First-tier Tribunal stands.

These decisions are given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

However, the DECISION of the Upper Tribunal is to allow the appeal by the Appellant in CJSA/464/2017.

The decision of the Romford First-tier Tribunal dated 5 July 2016 under file reference SC281/15/00057 involves an error of law. The decision of the First-tier Tribunal in that appeal only is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's original decision dated 18 November 2014 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the re-hearing of appeal SC281/15/00057:

(1) The appeal should be considered at an oral hearing;

(2) The new First-tier Tribunal should not involve the Tribunal Judge previously involved in considering this appeal on 5 July 2016;

(3) The Secretary of State should provide a supplementary submission in the appeal under reference SC281/15/00057, which should include a copy of the Appellant's JSA claim form dated on or about 17 October 2012. This supplementary submission is to be sent to the HMCTS regional tribunal office in Sutton within one month of the date this decision is issued.

(4) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. This case technically involves six separate appeals. The appeals were heard together by the First-tier Tribunal (from now on simply "the Tribunal") and were very sensibly dealt with together in its single statement of reasons. I propose to do the same in this Upper Tribunal decision.

The result in outline

2. I am dismissing five of the Appellant's six appeals. In relation to each of those five decisions, I conclude the Tribunal's decision does not involve any material error of law. Each of those five decisions accordingly stands. I am, however, allowing one appeal, which relates to jobseeker's allowance (JSA), where the appeal is supported by the Secretary of State's representative in these proceedings. There will need to be a fresh hearing of that one appeal (CJSA/464/2017) before a new First-tier Tribunal.

The six appeals in outline

3. There are four appeals relating to DWP benefits (two appeals about income support (IS) and two about JSA), one about housing benefit (HB) and one about tax credits. The Respondents to the various appeals are therefore the Secretary of State for Work and Pensions (for the first four appeals), the local authority and Her Majesty's Revenue and Customs (HMRC) respectively.

The issue on the appeals

4. The fundamental issue was the same for all the appeals; the question was whether, at all material times, the Appellant was living together as husband and wife (LTAHAW) with a man (Mr S). The Appellant said she was not. The Respondents said that she was. That was the primary and binary factual issue the Tribunal had to decide.

5. The six appeals concerned the following decisions:

UT reference	FTT reference	Date of decision(s) under appeal to FTT	Type of decision
CIS/248/2017	SC281/15/00059	20 November 2014	Overpayment of IS 02.11.2009-12.11.2012
CIS/249/2017	SC281/15/00060	18 November 2014	LTAHAW and so no entitlement to IS as lone parent from 02.11.2009
CJSA/247/2017	SC281/15/00058	18 November 2014	LTAHAW and so no entitlement to JSA from 30.10.2012
CJSA/464/2017	SC281/15/00057	18 November 2014	Overpayment of JSA 13.11.2012-31.10.2013
CH/251/2017	SC154/15/02979	26 November 2014	LTAHAW and overpayment of housing benefit from 02.11.2009
CTC/250/2017	SC320/15/00788	20 January 2015, 26 February 2015 & 2 March 2015	LTAHAW and overpayment of tax credits from 02.11.2009

6. It is plain from the Table above that the gist of the six decisions under appeal to the Tribunal, when taken together, was that the Appellant and Mr S had been living together as husband and wife since 2 November 2009. The cumulative effect of the six decisions was that from that date the Appellant had been found not to be entitled at various dates to claim income support and subsequently JSA as a single person (or housing benefit or tax credits).

7. Following a lengthy oral hearing, the Tribunal confirmed the various decisions that had been made respectively by the DWP, the local authority and HMRC.

8. In summary, therefore, the Tribunal found as follows:

CIS/248/2017 & CIS/249/2017
The Appellant and Mr S had been a couple LTAHAW; Mr S was in full-time work; there was no entitlement to IS from 02.11.2009 and a recoverable overpayment resulted.

CJSA/247/2017 & CJSA/464/2017
The Appellant and Mr S had been a couple LTAHAW; Mr S was in full-time work; there was no entitlement to JSA from 30.10.2012 and a recoverable overpayment resulted.

CH/251/2017
The Appellant and Mr S had been a couple LTAHAW; Mr S was in full-time work; there was no entitlement to HB and council tax benefit from 02.11.2009 and a recoverable overpayment resulted.

CTC/250/2017
The Appellant and Mr S had been a couple LTAHAW; she was not entitled to claim as a single person and it followed there had been recoverable overpayments of tax credits in each year from 02.11.2009.

9. As already noted, although separate decisions notices were issued, the Tribunal prepared a composite statement of reasons that covered all six cases.

The grounds of appeal against the Tribunal's decision
10. The Appellant's representative sets out five grounds of appeal, which may be summarised thus:

(1) The Tribunal's alleged breach of natural justice;
(2) The Tribunal's reliance on surveillance evidence;
(3) The Tribunal's failure to consider section 71(5A) of the SSAA 1992;
(4) The Tribunal's failure to consider regulation 32 of the Claims and Payments Regulations;
(5) The Tribunal's failure to consider grounds for supersession of the HB and CTB decisions.

11. Grounds (1) and (2) potentially affect all the decisions under appeal. Grounds (3) and (4) can only affect the IS and JSA decisions. Ground (5) can only affect the HB (and council tax benefit) decision.

12. It is perhaps noteworthy that none of the grounds of appeal challenges the approach of the Tribunal to the real issue in the appeal, namely the question as to whether the Appellant and Mr S were indeed living together as husband and wife at all material times.

The Respondent's responses to the grounds of appeal

13. Representatives of the Secretary of State and HMRC have filed responses to the appeals. Regrettably, there has been no response at all from the local authority ('the Council'). One unfortunate consequence of this is that determination of the case has been seriously delayed in the Upper Tribunal.

14. Mr Wayne Spencer has filed a response on behalf of the Secretary of State. His response deals with the first four grounds of appeal (i.e. those that relate to the DWP benefits, namely IS and JSA). He opposes the appeal with the sole exception of the appeal in CJSA/464/2017 (the JSA overpayment decision), which he supports.

15. Mr A Hignett has filed a response on behalf of HMRC. This response focuses on Ground 1, as the main ground which concerns the tax credits appeal. The HMRC response supports the reasoning of Mr Spencer for the DWP in resisting this ground of appeal.

The Upper Tribunal's analysis

Ground 1: alleged breach of natural justice

16. This ground of appeal potentially affects all aspects of the Tribunal's decision. In her original application for permission to appeal, the Appellant wrote that "the man representing the Inland Revenue was allowed to have a private conversation with the judge before the tribunal started". In the more developed grounds of appeal, the Appellant's representative referred to well-established case law demonstrating that the appearance of partiality or unfairness in the procedure adopted at the tribunal hearing (e.g. where a presenting officer is already in the tribunal room with the judge when the claimant is shown in) may well amount to a breach of natural justice. Those decisions include C.P. 127/49 (K.L.), R(IS) 15/94 and more recently *TA v LB of Islington (HB)* [2014] UKUT 71 (AAC).

17. The relevant principles to apply when such allegations emerge are helpfully summarised in the commentary in *Social Security Legislation 2017/18, Volume III: Administration, Adjudication and the European Dimension* at p.1559:

> "Claims that there has been a breach of the rules of natural justice need to be particularised – i.e., the details of what is alleged need to be spelled out clearly – and, if they are, the Upper Tribunal will admit evidence to prove them (*R(M) 1/89*). The need to obtain proper evidence as to what occurred at the hearing from those who were present has been reiterated in *Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492. In particular, the Upper Tribunal will usually obtain statements from members of the First- tier Tribunal, unless the appellant's case is clearly contradicted by, or is adequately supported by, other evidence such as a full record of proceedings (which the Upper Tribunal will be slow to go behind if it contradicts the appellant's case (*CS/343/1994*)) and, even if the allegation appears to be supported by other evidence, the members will be given an opportunity to comment if allegations of personal misconduct are made (*CDLA/5574/2002*)."

18. There was no indication on the file that any formal complaint had been lodged by the Appellant with the Regional Tribunal Judge in the First-tier Tribunal. I therefore issued directions inviting the Appellant (and those accompanying her), the Tribunal Judge, the Tribunal clerk and the DWP and HMRC presenting officers to provide statements setting out their recollection of what had happened at and especially before the hearing started. As a courtesy I also notified the Regional Tribunal Judge that I was so acting.

19. The Appellant provided three statements. The Appellant herself described how "the presenting officer for HMRC came out of the room he was waiting in and asked the clerk to ask the judge if he could have a quick word before we got started; the clerk went into the tribunal room then come back out and the presenting officer for HMRC went into the tribunal room". The Appellant's father provided a letter stating that he had heard the HMRC presenting officer ask the tribunal clerk "if he may see the judge quickly before we get started, which she did and [the presenting officer] went in to see the judge." The Appellant's alleged partner stated that he had "heard the man from the Inland Revenue ask the clerk if he could have a private word with the judge" – but he concedes he did not see the presenting officer enter the room as he himself had gone to get a coffee.

20. The Tribunal Judge provided a lengthy and detailed statement setting out her recollection of the day. She explained that she remembered the case well because of the particularly complex and lengthy hearing. She dealt with the natural justice allegation in these terms:

> "It has been stated by [the Appellant] that I had a private conversation with [the HMRC presenting officer] before the hearing started. I am fully aware of the potential for perceived bias that such a scenario might create (regardless of the content of any exchange). I can categorically say that I have no recollection of asking [the HMRC presenting officer] to come into the courtroom on his own for any purpose, nor of him asking to see me privately. Nor do I have any recollection of being in the room with him on his own. I do not recall any conversation about any topic taking place with him alone. I cannot think of any circumstances in which I would have thought it appropriate to speak to [the HMRC presenting officer] in the absence of [the Appellant] and [the DWP presenting officer]. I can say as a matter of general principle that I would never discuss any case with one party in the absence of the other parties."

21. The Tribunal clerk has provided a much shorter statement, confirming he recalled the case but concluding "to the best of my knowledge the Judge never had a private conversation with 'the man representing the Inland Revenue' before, during or after the hearing".

22. The HMRC presenting officer's statement confirmed he was fully aware of the need "not to discuss cases with judges prior to the hearing". He made two further observations. The first was that he "checked with the clerk that the tribunal had a copy of the response from HMRC dated the previous day. I do not recall having a private meeting with the judge before the hearing". It should be noted this additional written response was essentially a compilation of further documentary evidence supplied by the Appellant after an earlier adjournment. The second observation was his recollection that in her opening remarks the Judge had said that she had met him previously when hearing an appeal at another venue.

23. The DWP presenting officer stated that he had not seen the HMRC presenting officer in any sort of dialogue with the Judge other than during the hearing. He added that he and the HMRC presenting officer had discussed their tactics for the hearing in a private ante room; he did not recall the other officer leaving that room or the Judge entering it but thought the clerk may have come into the toom. His recollection was that they followed the standard protocol of following the Appellant into the tribunal room just before the hearing started.

24. Mr Spencer points out that the burden of proving a breach of natural justice rests on the Appellant (CIS/5131/1998 at paragraph 3). He submits that the Appellant in this case has failed to discharge that onus for three reasons. First, the Appellant's evidence is contradicted by that from the Judge, the tribunal clerk and the two presenting officers. There is no reason to prefer the former over the latter. Second, it is reasonable to suppose that the Appellant and her witnesses have mistakenly recollected the conversation between the HMRC presenting officer and the clerk about whether the Tribunal had received the late HMRC submission (which, as noted, primarily comprised copies of documents provided by the Appellant). Third, even if there had been a very brief conversation between the Judge and the HMRC presenting officer, this did not necessarily amount to a breach of natural justice. As Mr Commissioner (now Upper Tribunal Judge) Rowland explained in CIS/5131/2008, and notwithstanding official advice to presenting officers, "it does not follow that there is a breach of the rules of natural justice every time that a presenting officer is seen alone with a tribunal in unexplained circumstances".

25. The Appellant's representative has not made any further submissions in reply to Mr Spencer.

26. The onus is on the Appellant to make out her natural justice challenge. I agree in particular with the first two of Mr Spencer's arguments. The statements by the Judge, the clerk and the presenting officers are generally more detailed and more cogent. Moreover, I consider it highly likely that the HMRC's presenting officer's inquiry to the clerk, checking that the late submission had arrived, has been misinterpreted, perhaps coloured by the Judge's introductory remarks that he had appeared before her on an earlier occasion. There is no independent evidence to support the claim that the HMRC presenting officer entered the tribunal room alone and in the absence of the other parties. Mr Spencer's third point does not take us much further than saying that it is always a question of fact in each case. On the evidence before me, I find that no such private conversation as alleged took place. It is much more likely that the HMRC presenting officer simply asked the clerk to check the Judge had the very late submission.

27. It follows I dismiss Ground 1.

Ground 2: surveillance evidence

28. This ground of appeal can be dealt with much more shortly. The Tribunal relied in part on surveillance evidence (see statement of reasons at [31]). The Appellant's representative argues that the Tribunal failed to establish whether such surveillance was properly authorised. He relies on observations in my decision in *DG v Secretary of State for Work and Pensions (DLA)* [2011] UKUT 14 (AAC).

29. This ground of appeal is wholly unpersuasive for three reasons. First, the context of *DG v Secretary of State for Work and Pensions (DLA)* was very different. That was a case in which the appellant had explicitly mounted a human rights

challenge to the lawfulness of the surveillance. There was, and has been, no such challenge in this current case so the point had not been put in issue. Second, the relevant evidence is in principle admissible (see *BS v Secretary of State for Work and Pensions (DLA)* [2016] UKUT 73 (AAC)). Third, and in any event, the surveillance in question was in fact appropriately authorised, as shown by the copy documentation subsequently provided by Mr Spencer. The surveillance was a joint operation between the DWP and the Council, which had successfully made a formal application to the local magistrates' court for authority.

30. I therefore dismiss Ground 2.

Ground 3: the IS and JSA entitlement decisions

31. This ground of appeal can only affect the IS and JSA decisions under appeal. The Appellant's representative contends that the Tribunal went wrong in law by failing to refer to section 71(5A) of the Social Security Administration Act (SSAA) 1992. This section requires a separate decision on entitlement to benefit to be made before an overpayment recoverability decision can follow. It is clear from the appeal bundles (and indeed from the summary in the Table above) that the DWP decision-makers made separate decisions on the issue of entitlement to IS and JSA respectively before making consequential decisions on the recoverability of the resulting overpayments. So, to that extent an argument based on an alleged breach of section 71(5A) faced some difficulty.

32. However, it is true that the Tribunal did not in as many words make findings as to how and why the Appellant's status as a member of a couple affected her entitlement to income support. But, as Mr Spencer points out, there was clear evidence before the Tribunal that Mr S was in full-time work, and so it necessarily followed that there would have been no entitlement to income support. The Tribunal's omission to make such findings did not amount to a material error of law, essentially for two reasons. First, effectively the sole issue in dispute at the hearing of the appeals was whether the Appellant and Mr S were LTAHAW – the Tribunal therefore correctly and understandably focussed on that aspect of the case. Second, I bear in mind the observation by Lord Hope in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19 that it is:

> "well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it" (at para [25]).

33. In his detailed and helpful written response to the appeals, Mr Spencer correctly points out that the initial JSA entitlement decision was technically mistaken in referring to it as being by way of supersession, when in truth the decision was a revision of an original decision to award JSA. The Tribunal did not pick up this error, but again it had no material impact on the outcome of the case. There was, as Mr Spencer rightly points out, no useful purpose in reformulating the Secretary of State's initial decision (as a revision rather than as a supersession), given the Tribunal's clear findings on the issue of substance on the appeals. Likewise, the Tribunal's omission to deal specifically with the issue of entitlement to JSA was not fatal, for the same reason as above in relation to the income support entitlement decision.

34. I accordingly dismiss Ground 3.

Ground 4: the overpayment recoverability issue

35. This ground of appeal can only affect the IS and JSA overpayment decisions. The Appellant's representative seeks to make the argument that the Tribunal erred in law by failing to identify the nature of the obligation imposed on the Appellant (e.g. by reference to regulation 32 of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968)). Mr Spencer makes separate submissions in relation to the IS and JSA overpayment decisions respectively.

36. As regards the IS overpayment decision, Mr Spencer notes the evidence on file that IN4 advice notes were regularly issued (e.g. with each benefits uprating), which specifically require claimants to report if they are living with someone. This would suggest that the express duty to report a change of circumstances under regulation 32(1A) applied. It is unfortunate in this case that the original DWP response to the income support appeals omitted to clarify whether the Department was relying on the express duty under regulation 32(1A) or the more subjective duty under regulation 32(1B). It is certainly arguable that the Tribunal should have made a definitive ruling either way. However, realistically this was a case where the duty arose under either one or both limbs of regulation 32. Furthermore, there had been no suggestion that there was any doubt as to the existence of the duty. The focus of the appeal, as already noted, was on the substantive issue of whether (or not) the Appellant and Mr S were indeed LTAHAW, i.e. living as if they were a married couple.

37. As regards the JSA overpayment decision, Mr Spencer takes a different line. Here he supports the Appellant's appeal. He rightly points out that the DWP submissions before the Tribunal were (putting it mildly) confused. Initially, the JSA overpayment decision was put on the ground of misrepresentation of a material fact (CJSA/464/2017 at p.25). Then the basis for the decision was changed to failure to disclose a material fact (CJSA/464/2017 at pp.37 and 39). The DWP's written response to the Tribunal maintained that latter position, albeit citing the wrong legislation (regulation 32(1B) of the 1987 Regulations instead of regulation 24(7) of the Jobseeker's Allowance Regulations 1996 (SI 1996/207), although that is essentially in the same terms). It might have been possible to overlook these matters if there had been no real material prejudice caused to the Appellant. But, as Mr Spencer points out, there is a more fundamental problem. Despite its original position, the DWP had nailed its colours to the mast in terms of a failure to disclose as the basis for a recoverable overpayment of JSA. However, one cannot fail to disclose a material fact for the purposes of section 71(1) of the SSAA 1992 when making an initial claim for benefit. As Judge White ruled in CJSA/3292/2013, "The basis for recovery where there has been something not disclosed on a claim for benefit can only be that the claimant has misrepresented the factual position" (at paragraph 11). Commissioner's decision CPC/196/2012 is to the same effect. So, as Mr Spencer observes, the question is this: did the Appellant misrepresent a material fact on her JSA claim form? The JSA claim form was not put in evidence before the Tribunal (there is a Jobcentre screen-print at p.25 of CJSA/247/2017 indicating there had been a new claim for JSA, but no sign of the claim form itself) and the Tribunal failed to make any findings of fact on the point. Given the onus is on the Secretary of State to show that there is a recoverable overpayment, this was a material error of law which means the Tribunal's decision in CJSA/464/2017 must be set aside.

38. I therefore find Ground 4 made out in part, for the reason set out in the previous paragraph, and allow the appeal to the Upper Tribunal to that extent as regards CJSA/464/2017.

Ground 5: housing benefit underlying entitlement and decision-making processes

39. This final ground of appeal can only affect the housing benefit (and council tax benefit) decision under appeal. The Appellant's representative contends that the Tribunal worked on the erroneous assumption that the result of the HB and CTB appeals necessarily followed from the outcome of the decisions on the DWP benefits. He points out that such an assumption does not necessarily follow. He argues that (i) as a matter of law, entitlement to HB and CTB is not extinguished by being in full-time work or LTAHAW as a couple; (ii) there is no evidence the Tribunal considered the possibility of underlying entitlement to HB and CTB; (iii) there is no evidence the Tribunal considered whether the Council had properly complied with the correct decision-making process in terminating the original award.

40. The Council appears to have been closely involved in the original investigation into the Appellant's status (see paragraph 29 above). Latterly, however, the Council seems to have abandoned any ongoing interest in the case. The Council ignored an express direction from the Tribunal to send a presenting officer to the hearing before the FTT. The Council has also failed to respond to directions from the Upper Tribunal to make a response to the appeal. Such a cavalier approach is both highly regrettable and simply unacceptable. The Council cannot 'sit on its hands' and leave the prosecution (in the non-criminal sense of that term) of the cases to the DWP and HMRC, not least as different considerations arise as to entitlement in HB cases (as the Appellant's representative correctly points out).

41. Despite the absence of any input from the Council, I am not persuaded by the thrust of the submissions by the Appellant's representative. I do accept, of course, that entitlement to HB and CTB is not extinguished either by being in full-time work or by LTAHAW as a couple. But the question here is whether there has been any material error of law by the Tribunal. I do not consider that there was. The appeals documentation shows that the Council was aware of the potential significance of the underlying entitlement issue. The Council's written response to the original appeal before the Tribunal also explained that Mr S's income details had been obtained for the relevant period and the Council's overpayment calculations had taken that information into account (see pp.107-171 of CH/251/2017). In addition, that original appeal response sets out a detailed chronology of the decision-making process. There is no obvious indication of any procedural failure by the Council in terms of its decision-making processes. This aspect of the grounds of appeal seems to be little more than a speculative fishing expedition without any real substance.

42. It follows that I dismiss Ground 5.

Pulling together the threads of this case

43. I dismiss Grounds 1, 2, 3 and 5 respectively.

44. It follows that I dismiss the five appeals in CIS/248/2017, CIS/249/2017, CJSA/247/2017, CH/251/2017 and CTC/250/2017.

45. However, I find that Ground 4 is made out in part and to that extent I allow the appeal in CJSA/464/2017. That appeal will need to be re-heard by a new First-tier Tribunal. I make the following Directions which apply specifically to that appeal:

(1) The appeal should be considered at an oral hearing;

(2) The new First-tier Tribunal should not involve the Tribunal Judge previously involved in considering this appeal on 5 July 2016;

(3) The Secretary of State should provide a supplementary submission in the appeal under reference SC281/15/00057, which should include a copy of the Appellant's JSA claim form dated on or about 17 October 2012. This supplementary submission is to be sent to the HMCTS regional tribunal office in SUTTON within one month of the date this decision is issued.

(4) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

Conclusion

46. For these reasons, I conclude the decision of the First-tier Tribunal does not involve any material error of law in five of the appeals. I accordingly dismiss those five appeals (Tribunals, Courts and Enforcement Act 2007, section 11). However, I conclude that the appeal in CJSA/464/2017 succeeds as the Tribunal's decision involves an error of law in that one instance. I therefore set aside the Tribunal's decision in CJSA/464/2017. That appeal will need to be re-heard by a new First-tier Tribunal, subject to the Directions above (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a) and (b)(i)).

Signed on the original
on 5 July 2018

Nicholas Wikeley
Judge of the Upper Tribunal