DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The claimant's appeal to the Upper Tribunal is allowed. The decision of the Durham First-tier Tribunal dated 12 September 2017 involved errors on points of law and is set aside. The case is remitted to a differently constituted tribunal within the Social Entitlement Chamber of the First-tier Tribunal for reconsideration in accordance with the directions given in paragraphs 17 to 19 below and any further case management directions given by a First-tier Tribunal judge (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)).

REASONS FOR DECISION

1. The claimant was given permission to appeal against the tribunal's decision of 12 September 2017 by Upper Tribunal Judge Mitchell on 21 May 2018, who drew attention to a number of potential deficiencies in the tribunal's findings of fact and reasons. The submission dated 19 July 2018 on behalf of the Secretary of State supported the appeal to the Upper Tribunal, but on a basis that, as I explain below, I find to be fundamentally flawed. The claimant's representative, Aleksandra Turner, a welfare rights officer for Durham County Council, had nothing to add in her reply received on 17 August 2018. The case has now been referred to me for decision. I am afraid that the claimant's letter received on 30 August 2018, in which among other things she asked why her case was taking so long, was simply issued by the AAC office to both parties on 1 October 2018 without any reply being given to say that the case was waiting its turn to reach the head of the queue of other cases that were also ready to be decided.

2. A long time has indeed elapsed since the date of the decision (25 May 2016) that was under appeal to the tribunal sitting on 7 September 2017 ("the FtT"). A lot of the time prior to 7 September 2017 is accounted for by the fact that the Secretary of State's initial approach in the decision of 25 May 2016 and in the written submissions on the appeal to the First tier was incoherent and inadequately connected to the terms of the relevant legislation. There was then a process in which the tribunal judge who constituted tribunals sitting on 17 January 2017 and 11 May 2017, in combination with the Department's presenting officer, by questioning and further investigation gradually produced a much more coherent and reasoned base for the case being made on behalf of the Secretary of State. That culminated in the detailed written submission dated 3 August 2017, which pointed out a number of flaws in the decision of 25 May 2016 and submitted in paragraph 11 that the tribunal should adopt the approach set out there, which was to some extent, but not very much, more advantageous to the claimant. The FtT purported to disallow the claimant's appeal and to confirm the decision of 25 May 2016, but in fact adopted the conclusions suggested in paragraph 11 of the submission of 3 August 2017.

3. Since I have concluded that the claimant's appeal against the decision of 25 May 2016 has to go back to another First-tier Tribunal for a complete rehearing, I shall only sketch in the background in sufficient detail to explain where I have concluded that the FtT went wrong in

law. It will be for the new tribunal to establish the facts as a matter of its independent evaluation of all the evidence and nothing I say in the present decision is to be taken as constraining it in that task.

4. The claimant was awarded employment and support allowance (ESA) with effect from, it seems, 31 May 2013. She was, after assessment, placed in the support group. The amount of benefit payable was attributable both to a contribution-based allowance and an income-related allowance. She was also entitled, at least immediately before April 2015, to disability living allowance (DLA) and housing benefit. There is nothing in the papers to show the precise amount of the income-related allowance being paid to the claimant, taking account of the appropriate premiums etc. The claimant turned 55 on 4 March 2015. She decided to take advantage of the "pensions freedoms" newly made available to persons of that age from 6 April 2015. She evidently had a personal pension of some kind with Scottish Widows (although no documents from that firm are in the papers). The claimant's bank statements show three major transfers from Scottish Widows: £11,121.75 received on 30 April 2015, £11,653.56 received on 11 May 2015 and £9,590.87 received on 13 August 2015. There was also a payment of £510 on 18 May 2015 from Scottish Widows that has been treated as part of that same series of payments, but might possibly have a different explanation. Real time income (RTI) information sent to the Department by Her Majesty's Revenue and Customs (HMRC) on 31 March 2016 (pages 24 and 25) shows that tax was deducted by Scottish Widows from the gross amounts payable on 8 May 2015 (£18,364.81) and 7 August 2015 (£14,996.67). That information did not cover the April 2015 payment. The claimant has also produced a HMRC tax summary for the year 2015/16 (page 161) showing what is described as taxable personal pension income of £33,361.48 and income tax payable of £12,117.05, i.e. exactly what was shown on the RTI information. That suggests that the payment received on 30 April 2015 was the 25% tax-free lump sum (the amount is just about 25% of a fund constituted by that amount plus the gross amounts represented by the later payments) and that the two other large payments (with or without the £510) made up the other 75% and were subject to tax.

5. The claimant did not tell the Department about the receipt of those payments, or about the receipt of a number of other apparently lump sum deposits into her bank account down to the end of 2015. The Department did not find out until the RTI information was received, and then the claimant responded promptly to requests for copies of bank statements. The claimant has described why she wanted to access her pension funds. In brief it was so that she could pay off her own and family debts, help her brother set up home, improved her own rented home, buy a car etc. I go into no more detail because the claimant's knowledge and intentions at the time will be central to what the new tribunal will have to investigate. The claimant transferred or spent the money fairly quickly. The Department in the decision of 25 May 2016 took the view that for some of the time from 30 April 2015 to the end of the year and beyond, the claimant had actual capital that exceeded the income-related ESA limit of £16,000 or was between £6,000 and £16,000 and so was to be treated as producing tariff income, but that more importantly the claimant was to be treated as still possessing amounts that she had transferred and spent ("notional capital") which when added to actual capital for most of the period in question took the claimant over the £16,000 limit. There was reliance, not always made explicit, on regulation 115(1) of the Employment and Support Allowance Regulations 2008:

> "(1) A claimant is to be treated as possessing capital of which the claimant has deprived himself or herself for the purpose of securing entitlement to an employment and support allowance or increasing the amount of that allowance, or for the purpose of securing entitlement to, or increasing the amount of, income support or a jobseeker's allowance except—
> [(a) – (c) exceptions not applicable in the present case]."

6. The record of the decision of 25 May 2016 (pages 71 - 2) describes itself as a revision, but could only in substance have been a supersession of whatever was the operative decision awarding ESA immediately prior to April 2015 on the ground of relevant change of circumstances (receipt of capital). There was no mention in the decision of any ground of revision or supersession. The decision was that the claimant was not entitled to income-related ESA from 6 May 2015 and was entitled to a reduced amount (reduced by £24) for the week from 29 April 2015 to 5 May 2015. As already mentioned, the FtT accepted that the conditions for treating the claimant as having notional capital were met, but adopted the much more sophisticated calculations in the submission of 3 August 2017.

7. The FtT took the view, saying that it had been agreed by all parties, that the claimant had received capital payments of £45,182.05 (the pence vary from place to place) from Scottish Widows. That total amount was never said by the presenting officer all to have come from Scottish Widows, but was said to include other lump sum receipts as detailed on pages 210 and 211. Then it was all spent within a short time. It is not all clear what expenditure the FtT considered was not caught by the regulation 115(1) rule because it talked in terms of disregards and whether expenditure was accepted. But in accepting that the claimant had notional capital of £38,273.75 by 26 January 2016 the FtT must have regarded most as being caught. It said this towards the end of its statement of reasons (I have corrected some typing errors without specific indication):

> "21. The Tribunal considered R(SB) 40/85 which stated that the purpose of securing benefit or increasing it is not necessarily the sole purpose but must be a significant operative purpose and CIS/124/90 shows clearly that while the appellant is saying that she did not know the rules she did not make any enquiry although given her background in care and the length of time she had been claiming benefit the Tribunal found as on the balance of probabilities it was unlikely the appellant would not know the benefit rules and it follows she would know the effect of her capital on her benefits. The Tribunal found that on the balance of probabilities the amount of capital the appellant had was such that she would be aware that this would affect her income related benefits.
> 22. The appellant should not be entitled to income related ESA as the amounts exceeded the prescribed limits as outlined in the submission of the Presenting Officer. Consideration was given to the ESA Regulations 2008 regulation 110, Welfare Reform Act 2007, Schedule 1, paragraph 6.
> 23. In the Commissioner's decision [R(SB) 38/85] it was held once the capital had been received by the claimant the onus of proving and providing a satisfactory explanation sat with the claimant.

> 24. The claimant here had been a care supervisor/manager. The Tribunal found as a fact that she would be aware that people's capital and savings affected their State benefit. The appellant stated that she did not consider that the capital she received would affect her benefit entitlement and this was not accepted by the Tribunal. At the very least the appellant should have known she would have to advise the DWP of the capital amounts received. At no time did she disclose to the Department the amounts she had received from Scottish Widows.
> 25. The Presenting Officer argued that her continued failure to inform the DWP as further tranches of money were received shows a continuing significant operative purpose to retain benefit payments. The Tribunal considered the amount the appellant had received and the short time in which she spent it supported the position that this appellant had a significant operative purpose to retain benefit payments by spending her capital as soon as possible.
> 26. On the balance of probabilities the Tribunal found that given the appellant's capital spent in such a short time was because of her awareness of her effect of capital upon benefits. The Tribunal found that the appellant had not satisfied the burden of proof concerning her expenditure of capital and that she had received various tranches of money and disposed of that money very quickly. Many of the payments were one off payments and fall to be treated as capital and given the monies were spent over a 9 month period the Tribunal found as a fact that the appellant no longer had the capital and the disposal of the capital was done for the significant purpose of securing her entitlement to ESA (IR)."

8. On the appeal to the Upper Tribunal, the representative of the Secretary of State in the submission of 19 July 2018 sought to cut through the detailed points raised by Judge Mitchell with a radical argument. I need to set out the actual words reasonably fully. Starting in the middle of paragraph 6 they are as follows:

> "After she received the money and while she was spending it the claimant was receiving her maximum entitlement to Income Related ESA. Therefore, the requirements of regulation 115 cannot have been satisfied. The claimant was receiving as much ESA as she could possibly aspire to, so it could not have entered her thought processes that spending the money would have increased the amount of her allowance and therefore I submit it would not be appropriate to fix the claimant with 'notional capital'.
> 7. In reaching the decision that the claimant should be fixed with notional capital in addition to the undisputed actual capital [the FtT] failed to take account of the decision of Judge Mark in [CIS/2570/2007]. When considering the case of a claimant who had spent an insurance settlement of which the Secretary of State was unaware until after the money had been spent Judge Mark concluded (paragraphs 27 & 28):
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> > 'Although it is unnecessary for me to consider the point further in this decision, I have some difficulty in seeing how, when the claimant was already in receipt of income support, any capital expenditure could be considered to be for the purpose of securing or increasing entitlement to income support at least before he became aware that he was under investigation.
> > It follows from the above that I consider that the tribunal erred in its directions to

> the Secretary of State as to the calculation of the overpayment, but it is unnecessary for me to go into further detail in that respect.'
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> 8. I submit that in her failure to take account of the fact that, given the timing of the expenditure during a period in which the Secretary of State was unaware of the money's existence and the claimant had no reason to believe that the Secretary of State would become aware of it, securing or increasing entitlement cannot have been an operative purpose at all let alone a significant one. The claimant could reasonably have assumed that the rapid deprivation of this capital would have no impact on the amount of benefit that she was receiving. I submit therefore that [the FtT] erred in law."

9. That argument for the Secretary of State does not hold water. First, the approach in paragraph 8 of the submission appears to give a large advantage to claimants who fail to carry out their obligations under regulation 32(1A) and (1B) of the Social Security (Claims and Payments) Regulations 1987 to furnish such information as the Secretary of State may require in connection with the payment of benefit and to notify the Secretary of State as soon as practicable of any change of circumstances that they might reasonably be expected to know might affect the continuance of entitlement to or payment of benefit. Such an unpalatable result is not to be allowed unless absolutely unavoidable under the plain words of some legislation. In the present context, the result is far from unavoidable.

10. Second, the reasoning in paragraphs 6 and 8 of that submission takes far too narrow a view of what is entailed in "securing entitlement to" benefit. It is a necessary part of the context in which the meaning of that phrase is to be considered that the particular claimant concerned has a sufficient knowledge of the capital rules for the relevant benefit. If the claimant does not have sufficient knowledge of those rules in the circumstances of the case, then regulation 115(1) of the ESA Regulations (and the equivalent provisions in other regulations) will not bite. A claimant who has that sufficient knowledge must then at least have in contemplation that, if actual capital is disposed of so as to reduce the amount below the limit (£16,000 for income-related ESA) or below the level at which tariff income is assumed (£6,000), the consequence of loss of entitlement or reduction in the amount of benefit would not follow from the date of the relevant reduction if the Secretary of State were to find out about the possession of the actual capital either immediately or at some later time, e.g. by the claimant carrying out the legal obligations mentioned in the previous paragraph or through one of the various matching systems operated by the Department with other authorities. It is not correct to say that, just because the claimant in the present case was already receiving all the income-related ESA she could aspire to (without having had her capital taken into account) it could not possibly have been part of her purposes in disposing of the capital payments to secure entitlement to income-related ESA for weeks after the disposals if the Department found out about the actual capital.

11. Third, the remarks of Mr Deputy Commissioner Mark, as he then was, in paragraphs 27 and 28 of decision CIS/2570/2007 cannot be taken as any sort of authority in support of the argument made for the Secretary of State. What he said in paragraph 27 was explicitly not necessary to the decision itself and was not thought out in relation to any clearly established facts or to any directions to be given to a new tribunal or to the established case-law on notional capital through deprivation. What was said in paragraph 28 was in my judgment more directed

to the question of the diminishing capital principle in calculating the amount of a recoverable overpayment, that was the subject of the whole section from paragraph 16 on. It was not intended to indicate that the tribunal in that case had made an error of law in relation to what was said in paragraph 27.

12. Paragraphs 27 and 28 of CIS/2750/2007 thus standing in no way to the contrary, I reject the Secretary of State's submission for the reasons given in paragraphs 9 and 10 above. I must therefore go on to consider whether the FtT went wrong in law in some other way(s).

13. There are two general errors beyond the detailed matters of reasoning mentioned by Judge Mitchell when giving permission to appeal. The first is that the FtT failed to take account of what was entailed in the decision under appeal being in substance a supersession decision in which the Secretary of State's superseding decision was less advantageous to the claimant than that previously in existence. It is fundamental that on appeal in such circumstances it is for the Secretary of State to show both that a ground of supersession has been made out (here no material problem because there were clearly relevant changes of circumstances in the acquisition of actual capital, although it would have been better if the issue has been expressly dealt with in the decision notice and statement of reasons) and that the proper superseding decision is one that is less advantageous to the claimant. Here, the Secretary of State had shown that the claimant had acquired capital. I accept that, even in a supersession case, the onus would then shift to the claimant to show that she no longer had any particular amounts, so that they ceased to be part of her actual capital. Although in paragraph 18 of decision R(SB) 38/85 Mr Commissioner Hallett said that that followed from a claimant having to establish title to benefit, and here the question was whether the Secretary of State had established a lack of title to benefit, the fact and circumstances of disposal, and documentary or other evidence about that, are peculiarly within the knowledge of the claimant. Thus, applying the principle in *Kerr v Department for Social Development* [2004] UKHL 23, [2004] 1 WLR 1372, also reported as R 1/04 (SF), suggesting that notions of the burden of proof should rarely be decisive in social security cases, it was for the claimant to come forward with explanations of how the capital had been disposed of, with such supporting evidence as could reasonably be required. To that extent, the FtT was correct in directing itself in paragraph 23 of its statement of reasons. However, once one reaches the stage of accepting that capital has been disposed of, so that it then has to be asked whether that was with the purpose of securing or increasing entitlement, the burden then shifts back to the Secretary of State in a supersession case. Or if, under the *Kerr* principle, there is not a formal burden on the Secretary of State, but the matter is to be determined through the exercise of the tribunal's inquisitorial jurisdiction, at least it cannot be said that the burden is on the claimant to show that her purpose was not to secure or increase entitlement to benefit. Here, the FtT in paragraph 23 of the statement went too far in directing itself that once capital had been received the onus of proving and providing "a satisfactory explanation" sat with the claimant. Because the FtT went on immediately after paragraph 23 to discuss the claimant's knowledge of the capital rules and whether securing entitlement to benefit was a significant operative purpose, I am satisfied it was contemplating not just a satisfactory explanation of the mere fact of disposal of capital but also a satisfactory explanation of the purposes of the disposal. There was a material misdirection of law in that the result was to require a higher standard for the success of the claimant's case than the law allows.

14. Second, paragraph 21 of the statement of reasons appears to misstate or at least obscure what decision CIS/124/1990 stands for. It is not particularly clear from paragraph 21 what the FtT was taking from that case, but the main proposition that it is commonly cited for, as followed in decision R(IS) 12/91, is that, for the purpose of securing or increasing benefit to be established, it must be shown that the person in question actually knew of the capital limit rule. It is not enough that the person ought to have known of the rule. The FtT referred in several places to what the claimant in the present case should have known or what she was likely to have known. There is doubt whether the FtT applied the proper test and whether there was a clear enough positive finding that the claimant did know of the capital limit and its effect on entitlement.

15. In addition, I agree in general with Judge Mitchell that the FtT failed in explaining its conclusions (and possibly applied a wrong test) in adopting a rather global approach in concluding that the claimant's significant operative purpose was to secure or increase entitlement to income-related ESA (she spent thousands of pounds in a very short time without telling the Department, so that must have been her purpose), rather than dealing with the reasons for each disposal. There was also a tendency when discussing individual disposals to talk in terms, particularly when the payments were for the benefit of members of the claimant's family, of her actions being laudable, but that they could not be done at the taxpayers' expense. That is to apply a different test than the proper one of what was the claimant's subjective significant operative purpose at the time. It does seem to me also that some weight should have been given to the particular source of the payments from Scottish Widows. The funds in the personal pension scheme were originally there primarily to provide the claimant with an income when she became eligible to take the benefits of the scheme, although there was from the outset an option of a tax-free lump sum. It was only when access to the funds themselves was opened up for the over-55s in April 2015 that those of the claimant's age were able to get at all of the funds immediately. It seems to me that in those circumstances, when people may well not have regarded the funds in a personal pension scheme as savings or capital, they may not have regarded the lump sums drawn out as capital (even though in law that is how they have to be regarded once in the person's hands). Possibly that should have been considered in evaluating the claimant's contention that she did not think that payments out of the pension scheme were to be taken into account in relation to entitlement to income-related ESA.

16. I do not, having found that the FtT went wrong in law in the ways identified above, need then to discuss the other concerns that the claimant has raised about its decision.

Conclusion and directions

17. For the reasons given above, the decision of the tribunal of 7 September 2017 is to be set aside as involving errors of law. The claimant's appeal against the Secretary of State's decision of 25 May 2016 is remitted to a differently constituted First-tier Tribunal for reconsideration in accordance with the following directions. Neither the tribunal judge who constituted the tribunals of 17 January 2017 and 11 May 2017 nor the tribunal judge who constituted the tribunal of 7 September 2017 is to constitute the new tribunal. There must be a complete rehearing of the appeal on the evidence produced and submissions made to the new tribunal,

which will not be bound in any way by any findings made or conclusions expressed by the tribunal of 7 September 2017. I need give no other directions of law beyond that to take into account the points made in paragraphs 13 to 15 above and not to adopt the erroneous approach put forward in the Secretary of State's submission of 19 July 2018.

18. The Secretary of State may wish to revise and up-date the submission dated 3 August 2017, since that submission seems to embody an approach to the burden on the claimant to prove her case that I have disapproved in paragraph 13 above. Such a revision may also need to include the proper application of regulation 116 of the Employment and Support Allowance Regulations 2008. The salaried tribunal judge who deals with the arrangements for the rehearing should consider whether to give directions setting a timetable for any such revised submission to be made and to be issued to the claimant's representatives.

19. The evaluation of all the evidence will be entirely a matter for the judgment of the new tribunal. The decision on the facts in this case is still open.

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 15 November 2018