IN THE UPPER TRIBUNAL **Case Nos.** CJSA/2194/2017 & CJSA/2195/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

For the Claimant: Mr J Yetman (Counsel)
For the Secretary of State: Mr M Armitage (Counsel)

Decision: The decision of the First-tier Tribunal which it made at Fox Court in London on 10 February 2017 under reference SC242/16/02767 (the entitlement decision) did not involve the making of an error of law and shall stand.

The decision of the First-tier Tribunal which it made at Fox Court in London on 10 February 2017 under reference SC242/16/02768 (the overpayment decision) involved the making of an error of law and is set aside. Further, the case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions set out below.

REASONS FOR DECISION

Introduction

1. On 10 February 2017, after a hearing, the First-tier Tribunal (the tribunal) decided that the claimant had not been entitled to income-based jobseeker's allowance (IBJSA) from 30 May 2011 to 5 November 2014 (the entitlement decision). It also decided that she had, during that period, received a recoverable overpayment amounting to £12460.09 (the overpayment decision). The tribunal further decided that she had received a recoverable overpayment of housing benefit. However, since I refused the claimant's application for permission to appeal the housing benefit decision, that matter is no longer before me. I did grant permission on limited grounds with respect to the tribunal's decisions concerning IBJSA, though the basis for my grant related primarily if not exclusively to the overpayment aspect rather than the entitlement aspect. Indeed, the primary question for me turned out to be whether the tribunal had been entitled to conclude the claimant had misrepresented the amount of capital belonging to her when she had claimed IBJSA.

2. I held an oral hearing of the appeal at the request of the claimant. Representation at that hearing was as stated above. I received written submissions from the parties both before and after the oral hearing. I have taken all of what has been argued in writing and all of what was said at the oral hearing into account. I am grateful to counsel on both sides for their considerable assistance.

The background

3. The claimant has family in Malaysia. She was previously employed in the United Kingdom but, in September of 2010, she opted to take early retirement. Over the following months, she made a number of claims for various types of benefit. First, she applied for employment and support allowance (ESA). She did so by way of a "telephone claim" which, it is clear, involved her giving information relevant to her claim, over the telephone, to a person employed to process such claims by the Department for Work and Pensions. The

information that she provided was also used for the purposes of a claim for housing benefit. As the Secretary of State put it in a supplementary submission to the tribunal, the information she gave when claiming ESA "was then pulled through onto a housing benefit form and sent to [the claimant] to sign and return to the local authority". All of this appears to have been done in September or October of 2010. No transcript of the telephone conversation which constituted the claim for ESA has been produced. But a copy of the housing benefit form which was populated (perhaps a more elegant term than "pulled through") with the information said to have been provided by the claimant was before the tribunal and is before the Upper Tribunal. There are three questions of potential relevance with respect to capital and therefore three potentially relevant answers on that form. They are as follows:

Have saving and investments?	Yes
Approximate total:	£3010.15
Have savings and investments been greater than £5500 in the six months before the date of the claim in question?	No

4. The claimant was awarded ESA and housing benefit.

5. On 29 November 2010 the claimant claimed and was subsequently awarded contribution-based jobseeker's allowance (CBJSA). As its name suggests, that is not a means tested benefit. However, entitlement to CBJSA is time limited and so it became necessary for her to make a claim for IBJSA, which is means tested, which she did. That benefit was awarded to her from 30 May 2011. It is not a matter of dispute that, for her to have been awarded those benefits, she would have had to have claimed them. But the Secretary of State has been unable to produce a copy of the form she would have been required to complete when applying for IBJSA. Understandably, the claimant did not keep a copy herself. So, the Secretary of State was not able to place a copy of the completed form before the tribunal. Nevertheless, the Secretary of State asserted that the claimant had not been truthful about her level of savings when completing the form. The type of standard form used to claim IBJSA is known as form JSA3. It has always been the Secretary of State's position that the claimant would have completed such a form and that she must have disclosed an inaccurately low amount of savings for her to have received IBJSA. The claimant herself says that she has no recollection of having completed such a form though it does not appear that she has ever positively asserted that she did not do so. On 9 December 2014 the claimant made an application to her local authority for a discretionary housing payment (DHP). That is a form of discretionary payment administered by local authorities and which is intended to assist certain persons who have difficulty in paying what is commonly referred to as "the bedroom tax". Her completed application form for a DHP was before the tribunal (and is before the Upper Tribunal) and there was a single question contained in it regarding capital. The question reads as follows:

> Do you have any savings or property (including holiday homes or timeshares) abroad?
> If yes, give details:

6. Pausing there, the way in which that question should be construed has been the subject of some argument before me. But anyway, the claimant's reply was as follows:

> No, most of savings were used for expenses during the four years of unemployment and could not save when divorce as no maintenance for myself and children. What I earned each month all goes to full rent and c tax and family expenses.

7. The term "c tax" is an abbreviation for council tax. As to capital which is possessed by the claimant, it is not the subject of any dispute that, on the various occasions when she has claimed the above benefits, she has had a level of savings which, if beneficially hers, would preclude her from entitlement. She has had many bank accounts in her own name (at one point as many as twelve) and the tribunal was to go on to find that, as of 17 June 2011, the amount in those bank accounts totalled £54,321.98. It also found that around the time she had sought a DHP that sum had increased to £66,027.37. The accuracy of those findings as to the amounts in the accounts has not been subsequently disputed.

8. The claimant's position, though, is to the effect that only a small amount of the money in those various accounts was ever genuinely hers. She has a sister in Malaysia whom I shall simply refer to as K. The claimant says that all but around £9000 of the money, at the material times, was beneficially owned by K. She explains that the money came to be in accounts in her own name because, prior to any claim for benefit having been made by her, K had sent to her £30000 by way of a loan. Indeed, that loan was made as long ago as 1984. The loan was made because, says the claimant, she was, at the time it was made, considering purchasing a flat. However, she changed her mind about that but did not return the money because K said that she should retain in in case K herself or any of her family wished to come to the United Kingdom (I am not sure whether for settlement or for a temporary stay) at some point in the future. Then from around 1999 or 2000 until 2009, K would send additional sums of money, or give the claimant additional sums when she visited Malaysia, with a view to that money being used by K's daughters if they were ever to be educated in the UK.

9. In due course the Secretary of State and indeed the local authority's housing department became aware of the true amount of the capital contained within the various accounts. Neither body accepted the claimant's explanation that she did not have beneficial ownership of the bulk of that capital. That is why the Secretary of State made the above decisions concerning entitlement to IBJSA and recovery of an overpayment of IBJSA. The local authority also made adverse decisions regarding entitlement to housing benefit and its entitlement to recover overpaid housing benefit.

10. The claimant appealed all the decisions to the tribunal. Each appeal was eventually dismissed. It is necessary though, at this stage, to say something about the Secretary of State's approach as to the legal basis for recovery of the IBJSA which it had said had been overpaid. In an initial written submission prepared for the purposes of the appeal to the tribunal, the Secretary of State had asserted that the claimant had "failed to disclose" that she had capital exceeding £16,000 (that being the upper limit beyond which there could be no entitlement to IBJSA at all). The hearing took place on 30 September 2016 but the tribunal did not decide the appeal on that day. Instead it issued directions seeking further written submissions from the Secretary of State and the local authority and permitting a reply from the claimant. The tribunal specifically directed the Secretary of State, amongst other things, to clarify the basis for recovery it was relying upon (that is to say misrepresentation or failure to disclose). In a short submission of 17 October 2016 prepared in response to those directions, the Secretary of State identified the basis for recovery as being misrepresentation. However, in a later (but not very much later) submission of 18 October 2016, the Secretary of State said that because she was unable to produce the JSA3 form, which was of course the form in which it was alleged the claimant had given inaccurate information as to the level of her capital for the purposes of the claim for IBJSA,

"the overpayment cannot be based on a misrepresentation". So, it was said, once again, that the basis for recovery was an alleged failure to disclose a material fact, that material fact being that the claimant in fact possessed capital more than the prescribed upper limit of £16,000 during the relevant period.

The tribunal's decision

11. The hearing of 30 September 2016 encompassed all the appeals regarding IBJSA and housing benefit. The claimant attended the hearing and, in looking at the tribunal's record of proceedings, it appears that she gave quite extensive oral evidence. She was represented at the hearing, by her former representative, and written submissions had been sent to the tribunal on her behalf in advance of the hearing. She also relied upon some documentary evidence including a statutory declaration said to have been made by K on 20 May 2016 and two letters said to have been written by K on 12 February 1984 and 20 July 2001. Both the Secretary of State and the local authority were represented before the tribunal. Having heard the appeal, and having received the further written submissions it had directed (see above) the tribunal dismissed each appeal.

12. The tribunal's key finding underpinning its decisions was that the capital held in the various accounts in the name of the claimant was her capital and was not beneficially owned by K. It explained its reasoning in a single statement of reasons for decision (statement of reasons) which it sent to the parties on 7 April 2017. Under the heading "Findings of fact" it said:

> "21. [the claimant] misrepresented the true amount of her savings on the JSA3 form at the time she was transferred to JSA (IB)".

13. Under the same heading, and as to the DHP, it said:

> "28. On 9.12.14 [the claimant] made an application to the Local Authority for a discretionary housing payment ("DHP") (HB bundle p 176). There is a question about savings on p 180; the question is not worded entirely clearly but in any event [the claimant] has answered "no" to the question. Furthermore, over all the way in which [the claimant] has completed the form clearly suggests she has no savings".

14. The tribunal then went on to summarise the claimant's case, as put to it, in this way:

> "32. [the claimant's] version of events is set out in the papers, in her letters of appeal and in her submission by her representative s (p 87-89).
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> 33. She states that she held most of the capital at issue on trust for her sister [K]. There is a Statutory Declaration submitted by her sister (p 90-92).
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> 34. [the claimant] provided further explanation in oral evidence.
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> 35. She stated that her sister regularly sent money to her for her (sister's) daughters education, in the event they wished to study in the UK. The money was mostly sent in cash with friends. On occasions [the claimant] would visit Malaysia and her sister would give her money to bring back to the UK.
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> 36. On average the transactions would be of £800 - £1000.
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> 37. In total her sister sent her £44800 (p 119). This money remained her sister's. [the claimant] (p114) accepted that around £9000 of the money in her accounts belonged to her.

> 38. She kept a record of each payment received. Initially she would write this down and then transfer it onto her computer. Later, she would record it direct onto her computer.
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> 39. She has not been able to recover any of these computer records (p 180).
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> 40. Additionally her sister sent her two letters regarding the payments. These were dated 19.02.84 (p 99) and 20.07.01 (p 98).
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> 41. She produced the original letters at the hearing.
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> 42. When questioned by Mr Scarlett (page 127) she provided additional information. She explained that in 1984 a lump sum of around £30000 was paid by her sister. This money was sent to [the claimant] as she was thinking of buying a flat. When she decided not to proceed with the flat purchase her sister asked her to retain the money in case her sister or her family wanted to come over to the UK (p127).
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> 43. She then provided a further explanation that the small payments only commenced in around 1999 or 2000 and continued until 2009. The bulk of the money she held for her sister was accounted for by the initial loan of £30000 for the flat".

15. The tribunal then went on to explain why it was dismissing all the appeals before it. It said this:

> "44. As stated above I am satisfied that [the claimant] provided the amount of her savings in her application for HB made in or around 17.09.10 and understood this was about an application for HB. The form is at p 144-155. I accept [the claimant's] submission that the form contains some significant inaccuracies, for instance her date of birth is wrong. Nonetheless the savings figure provided is quite precise - £3010.15 - and I see no reason to doubt this figure was provided by [the claimant].
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> 45. The JSA3 form which [the claimant] completed in or around May 2011 cannot now be located.
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> 46. [the claimant] herself states that she cannot recollect completing this form (p 115). However, bearing in mind the information which the Secretary of State has provided regarding the history of the claim I regard it as overwhelmingly likely that she did so.
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> 47. Furthermore on the basis of all the evidence I am satisfied that when she completed this form she did not declare the true amount of her savings when she applied for housing benefit. Furthermore, there is clear evidence that she did not declare the true amount of her savings when she applied for DHP in December 2014.
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> 48. I did not accept [the claimant's] account that the bulk of the money in her accounts was beneficially owned by her sister.
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> 49. This was based on all the evidence in the case, but in particular in view of the following:
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> a. There were inconsistencies between the account given by [the claimant] at the hearing and that contained in the Statutory Declaration of her sister [K]. In particular the Statutory Declaration states clearly that the money was transferred in small amounts and makes no mention of the £30,000 loan;
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> b. The letters dated 19.02.84 (p99) and 20/07/01 (p 98) were produced at the hearing. Mrs Lamptey-Muhammad submitted that the originals did not appear to be of the age stated and in particular were not discoloured. I do not make any formal finding as to whether the letters were created at a later date. However I do not consider they strengthen [the claimant's] case significantly, bearing in mind

> their overall content and tone and in particular the inconsistencies with what is stated in the Statutory Declaration;
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> c. The fact [the claimant] did not declare the true amount the savings she accepts were hers when she made her application for DHP. In my view this goes to [the claimant's] credibility.
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> 50. Whilst this did not weigh heavily in my assessment, I also took in to account the fact that none of [the claimant's] daughters was in the event educated in the UK.
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> *Conclusions*
> *(1) JSA*
> 51. [the claimant] is not entitled to JSA (IB) from 30.05.11 to 05.11.14 as she had capital in excess of £16,000.
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> 52. In or around May 2011 she misrepresented the material fact that she had capital in excess of £16,000.
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> 53. Bearing in mind my findings of fact the period of, and amount of, the overpayment have been calculated correctly.
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> 54. She has been overpaid JSA (IB) totalling £12460.09 in respect of the period 30.05.11 to 05.11.14 and this amount is recoverable from her".

16. To clarify, Mr Scarlett was the Secretary of State's representative before the tribunal and Mrs Lamptey Muhammad represented the local authority. The reference at paragraph 50 of the statement of reasons to the claimant's daughters was an intended reference to K's daughters.

The proceedings before the Upper Tribunal

17. I granted permission to appeal after holding an oral hearing of the application but only in relation to the decisions concerning IBJSA and even then on limited grounds. Having explained why I was refusing permission on certain grounds, I went on to say this:

> "5. I now turn to why I am granting permission to appeal albeit on a limited basis. It follows from what I have already said about housing benefit, this grant of permission relates only to the F-tT's decision concerning Income-based Jobseeker's Allowance. It had initially been asserted by the Secretary of State that the claimant had misrepresented with respect to her level of capital when completing form JSA3. No copy of that form has been retained so no copy was in evidence before the F-tT. Further, given that no copy could be found the Secretary of State had accepted, in a supplementary submission which it had sent to the F-tT on 18 September 2016, that it could not rely upon misrepresentation as opposed to a failure to disclose. In my judgement and against that background it is arguable that the F-tT erred in the following ways:
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> a. In deciding there had been a misrepresentation in circumstances where the central evidence as to such a contention (the form) could not be produced;
> b. Alternatively, in failing to adequately explain why it was concluding there had been misrepresentation in the absence of that form (though I note what is said at paragraph 47 of the Statement of Reasons);
> c. In not accepting or at least not explaining why it was not accepting the Secretary of State's concession with respect to misrepresentation
>
> 6. Permission to appeal is granted then, on the limited grounds explained above and is expressly refused on all other grounds".

18. The Secretary of State, in a response to the appeal provided on 26 February 2018, argued in effect that the tribunal had been entitled in principle to conclude that false information had been provided by the claimant despite the absence of the JSA3 form. However, it was accepted at that stage (though the Secretary of State was later to change her mind) that the tribunal had erred through failing to explain "its finding of misrepresentation more thoroughly". The then representative for the Secretary of State invited me, in those circumstances, to set aside the tribunal's decision but to remake the decision myself and to reach the same outcome. In a reply of 16 April 2018, Mr Yetman for the claimant argued that it had not been open to the tribunal to find that there had been a misrepresentation on the evidence available to it. He suggested, at that stage, that I should set aside the tribunal's decision and remit so that further evidence could be considered as to the issue of whether there had been "an actionable non-disclosure on which to base any recovery". He also invited me to consider holding an oral hearing of the appeal and, as indicated above, that is what I did.

19. At the hearing of the appeal, Mr Yetman invited me to set aside the tribunal's decision. His primary contention was that I should do that because the evidence before the tribunal had, as a matter of law, been insufficient to enable it to rationally conclude that there had been a misrepresentation. In the event of my doing so on that basis, I should go on to remake the decision in the claimant's favour. Alternatively, I should decide even if it had been open to the tribunal to conclude there had been a misrepresentation, I should decide it had not given adequate reasons for so deciding. If I were setting aside the decision on that basis I should remit. But Mr Yetman accepted that, in principle, there could be circumstances where a finding of misrepresentation based on what had been said in a claim form could be made, absent the completed claim form itself or a copy of it, if there was sufficient secondary evidence available to justify such a finding.

20. As to the question of the sufficiency of the evidence, he noted that the tribunal had relied upon the information given by the claimant when she had sought a DHP. But on a proper construction the question seeking information about capital only related to capital and assets abroad. Since there was no evidence that the claimant had such capital or assets abroad, her answer should not have been relied upon by the tribunal as evidence of a propensity to mislead about her level of capital. Essentially, the point was that she had given a truthful answer to that specific question. The only other material evidence relied upon by the tribunal had been the content of the housing benefit application form. But that was not persuasive evidence because the form had simply been populated with information from a telephone claim relating to a different benefit. There was no transcript of the telephone conversation regarding the claim for ESA. In those circumstances the tribunal had not had sufficient evidence to justify its key conclusion that there had been a misrepresentation.

21. Mr Armitage, for the Secretary of State, urged me to consider matters in the context of the claimant having been found by the tribunal to have been dishonest regarding the beneficial ownership issue. There was no live challenge to its findings as to that. In *MK v Secretary of State for Work and Pensions (DLA)* [2011] UKUT 12 (AAC), the Upper Tribunal had accepted that there might be circumstances in which it would be possible to rely on a misrepresentation in a claim form without the claim form itself being available, so long as there was sufficient secondary evidence. Although there had not been sufficient secondary evidence in *MK* there was here. So, the tribunal was acting rationally in finding there had been a misrepresentation. The finding of dishonesty had been significant. It would have

been surprising if the claimant had been honest about her capital in form JSA3 where she had been dishonest about it elsewhere. The tribunal's reasoning had been adequate. As to the Secretary of State's written concession prior to the hearing that she could not rely upon misrepresentation absent the claim form, the tribunal had not been required to explain each and every aspect of its decision. It might have been helpful had it specifically addressed why it was going behind the concession but the obvious inference was that it was satisfied, in the circumstances, that there had been a misrepresentation.

22. Mr Yetman in having the final word at the hearing, disagreed that the tribunal had made findings of dishonesty. It had, he argued, simply found that there had been no trust under which the monies were held by the claimant for the benefit of K. It had not made it clear why it was going behind the Secretary of State's concession that misrepresentation could not be relied upon.

23. After the hearing, and in accordance with directions, I received further written submissions from the representatives. Those submissions were primarily concerned with the absence before the tribunal of a blank copy of form JSA3 which would have revealed the specific questions which had been asked of the claimant. Mr Armitage argued that there was no necessity for a blank form to be placed before the tribunal in evidence; that the decision of Social Security Commissioner Williams in *CG 3049 2002* should not be treated as authority for the proposition that a blank form must always be available; and that there was sufficient secondary evidence without it. Mr Yetman took the point that without a blank form the tribunal could not have known what had been asked about capital and had made no finding as to what would have been asked. Without knowledge of what had been asked there was insufficient evidence before it to enable it to make the finding it had about there having been a misrepresentation.

My analysis

24. I shall deal, first of all, with the question of whether the tribunal erred in law in deciding the overpayment aspect of the case on the basis of misrepresentation when the Secretary of State's most recent position had been that she was unable to rely upon it.

25. Section 71 of the Social Security Administration Act 1992 relevantly provides:

> **Overpayment – general**
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> **71.** – (1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose any material fact and in consequence of the misrepresentation or failure –
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> (a) a payment has been made in respect of a benefit to which this section applies; or
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> (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,
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> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.

26. So, that provides two bases for recovery of an overpayment. But the two are different and as Mr Yetman has pointed out, the distinction was of potential importance in the

proceedings before the tribunal because where it is said something is not disclosed on a claim for benefit which results in an overpayment, then the basis for recovery under section 71(1) can only be misrepresentation. That is because the duties which give rise to a failure to disclose relate to beneficiaries. At the point of claim, a person is a claimant and not a beneficiary (see *CPC/196/2012*). No-one has suggested in these proceedings, that the claim for IBJSA should be viewed, in the context of the availability of failure to disclose, as the mere switching from CBJSA to IBJSA. The two are different if related benefits and one is means tested whereas the other is not. So, even if such an argument had been raised I would not have found it persuasive.

27. Although the Secretary of State had shifted her position at various times, as noted above, there is no doubt that in her final written submission to the tribunal she was seeking to rely upon a failure to disclose and was positively asserting an inability to rely upon misrepresentation. The tribunal, in its statement of reasons, said nothing about the Secretary of State's concession that she could not rely upon misrepresentation. Nor did it say anything, by way of explanation, as to why in those circumstances it was itself finding that there had been a misrepresentation. That is surprising because ordinarily, one would expect a tribunal, if consciously deciding to rely upon a different basis for recovery than had been relied upon before it, to expressly recognise it was doing so and to say why.

28. Mr Yetman did not, at the hearing of the appeal, go so far as to suggest it was legally impermissible for the tribunal to rely upon a basis for recovery which differed from that relied upon by the Secretary of State. I am sure he was right not to do so. But he did argue that, in the face of the Secretary of State's concession, an explanation of the tribunal's thinking as to that was required. I am aware that in *R(SB) 40/84* Commissioner Edwards-Jones decided that it was, in principle, open to a tribunal to rely upon a different basis for recovery to that which had been relied upon by the Secretary of State. Such is uncontroversial and I respectfully agree. But in such circumstances, it was said that a tribunal could not simply "uphold" a decision on an overpayment where a different basis had been relied upon though it could, in appropriate circumstances, substitute a decision of its own based upon misrepresentation if the facts justified that, even where that had not been the basis relied upon by the Secretary of State. But if it was to do that, continued Commissioner Edwards-Jones, a tribunal would have had to have:

> "(i) indicated to the claimant that it had such a course under consideration;
> (ii) identified the misrepresentation(s) to be relied upon;
> (iii) afforded the claimant adequate opportunity to meet the altered case without being disadvantaged by surprise".

29. It does not appear, in looking at the record of proceedings and the statement of reasons, that the tribunal did take all of those steps.

30. Mr Armitage at the oral hearing of the appeal, I remind myself, argued that it was clear that the tribunal was satisfied on the material in front it that there had been a representation. I accept it must have been so satisfied. But that does not, of itself, mean it was entitled to base its decision upon misrepresentation in the way that it did. The tribunal does not seem to have raised the question of the basis for recovery at the hearing (I say that having looked at the record of proceedings) but it did raise it in the directions of 30 September 2016. The Secretary of State, as noted, responded by the provision of two submissions the latter of which made it clear misrepresentation was not being relied upon.

The claimant's then representative provided a reply of 28 November 2016 which did contain reference to the basis for recovery. But importantly, in my view, the representative did not address the question of whether, given the Secretary of State's most recent stance, it would or would not be legally permissible for the tribunal to, nonetheless, rely upon misrepresentation if it so chose. I do not think the former representative could be criticised for that because it would not have been unreasonable to have assumed, absent any further signal from the tribunal, that it would, in the face of a clear statement by the Secretary of State as to the position she was taking, simply decide the appeal on the basis of whether there had been a failure to disclose. It is possible that a different representative might have anticipated the possibility of the tribunal switching the basis for recovery of its own volition, particularly as misrepresentation had been relied upon by the Secretary of State at one stage, but I cannot say that such could properly have been expected. Really, it was for the tribunal to inform the claimant such switching was being contemplated and for it to invite her, through her then representative, to address that specific issue.

31. So, the tribunal did not take the necessary steps to ensure there was no disadvantage to the claimant in its switching the basis for recovery. It might I suppose, be said that even if it had taken all of the steps set out in *R(SB) 40/84* it could not, in light of the evidence, have made a difference to the outcome. In other words, even if a signal of its intentions had been sent to the claimant and the representative, there would have been nothing they could have said which had not been said already which would have been capable of changing the outcome. Any such argument would be based upon a contention that the real issue was simply whether the truth had or had not been told when form JSA3 had been submitted. The claimant and her representative had it seems, prepared for the hearing on that basis anyway. But it may be that the claimant's representative, if given such a signal, would have deployed different legal arguments. Without my needing to express a view as to the merits of any such argument myself, it might have been, for example, that the representative would have argued that given the Secretary of State's concession, the question of whether of the claimant had misrepresented a material fact was not or was no longer a matter raised by the appeal so that the tribunal had to exercise judicial discretion as to whether to deal with it and that such discretion ought not to be exercised in favour of the Secretary of State (see Section 12 (8) of the Social Security Act 1998). It might have been argued, even if the question of misrepresentation was a matter raised by the appeal that the tribunal ought to limit itself to considering the basis for recovery actually relied upon given the express disowning of misrepresentation. Had the tribunal accepted any such argument it would have been left with the question of whether the claimant had failed to disclose a material fact which, in light of what I have said above regarding failure to disclose not being available at the outset of the claim, would have been a difficult if not impossible argument for the Secretary of State to have made. In the circumstances, therefore, I have concluded that the tribunal erred through failing to signal its intention to rely upon misrepresentation, and consequently, through failing to act fairly in giving the claimant, via her representative, an opportunity to address the question of the appropriateness of the switching of the basis for recovery. I have concluded that the error was a material one in that it was capable of impacting upon the outcome.

32. That is sufficient for me to set aside the tribunal's decision as to the lawfulness of the recovery of the overpayment. But, nevertheless, since there was a good deal of focus upon this at the oral hearing, I shall deal with the question of whether or not it was open to the tribunal, on the evidence, and bearing in mind in particular the lack of a copy of the relevant claim form, to conclude there had been a misrepresentation.

33. Of course, where it is being asserted that there has been a failure to disclose or a misrepresentation in a claim form, the primary evidence will be a copy of the completed form if available. That will I suppose often be determinative. That is because such a copy will reveal both what was asked of a claimant and what the claimant said either by way of response to specific questions or perhaps by way of the provision of additional information. There will be times, as here, when it is not possible for either party to produce such a copy. That might be, for example, because documents have been routinely destroyed after a fixed period of time or because they have simply been misplaced.

34. I respectfully agree with Upper Tribunal Judge Ward's comments in *MK*, cited above, to the effect that there may be circumstances in which it is possible to rely on misrepresentation absent a copy of the relevant claim form said to contain the misrepresentation. I further agree that for a tribunal to do so there will have to be sufficient secondary evidence available to it.

35. I do not agree with Mr Yetman's submission that, in this case, there was insufficient material before the tribunal to enable it to safely or lawfully conclude that there had been a misrepresentation. In other words, I do not agree that it was not open to it, on the particular material before it, to decide there had been a misrepresentation. That said, I would accept that a differently constituted tribunal, properly directed, might have come up with a different answer to that which this tribunal came up with. But that is not the point.

36. There was, to repeat, no copy of the completed form. There was not, to repeat again, even a copy of a blank form which would have demonstrated, at least, that questions regarding capital had been asked. But I agree with Mr Armitage that *CG 3049 2002* is not authority for the proposition that in every single case where the original claim form cannot be located, it is necessary that a blank one be provided. Obviously, in the absence of an original completed claim form, it is of assistance if a blank one is provided and, indeed, ordinarily one should be. But the central point which Commissioner Williams was making was that a tribunal, faced with the absence of an original form, ought to do its best to reconstruct that form. It was not being said that an inability to do that, through lack of direct evidence as to the actual content would inevitably be fatal to recovery. It is right to say as Mr Yetman points out, that the absence of a blank form meant that it was not apparent on direct evidence that a question had been asked about savings and capital at all. But since IBJSA is a means tested benefit with entitlement conditions relating to both income and capital, it was inevitable that the claim form would contain questions about capital and savings and the tribunal was entitled, as a matter of common sense and drawing upon its experience and expertise, to proceed on that basis. As to the evidence contained in the DHP application form, the question about capital is an unusually framed one. I suspect that it was intended that the closing brackets would appear after rather than before the word abroad. Had the question appeared in that form it would have been a question about savings or property either in the UK or abroad. It seems quite obvious that that must have been what was intended. But Mr Yetman is right in pointing out that, on a literal reading, the question only seeks information about savings or property abroad. The tribunal, though, was alert to the difficulty in the way the question was phrased and it addressed that at paragraph 28 of its statement of reasons which I have set out above. Given the content of the claimant's reply, also set out above, it was open to the tribunal to conclude that the way in which she had completed the form as a whole, including what she had said in response to that specific question, suggested (given its findings as to beneficial ownership) she was

untruthfully asserting a lack of savings generally. So, the tribunal was entitled to take that evidence into account in so far as it demonstrated a propensity to mislead when making claims.

37. As to the other sources of evidence which the tribunal specifically indicated it was relying upon, there was the housing benefit claim form. It is right to say that the information contained in that form had been populated with information said to have been given by the claimant during the course of a telephone claim for ESA in respect of which there was no transcript. But it was open to the tribunal, in my judgement, to conclude that what was recorded in the housing benefit claim form regarding the level of savings disclosed was an accurate reflection of what would have been said during the course of the ESA telephone claim. It is also clear that, since the tribunal was expressly rejecting the contention that the bulk of the monies were held on trust for K, it was finding that she had been dishonest about that (see paragraph 47-49 of the statement of reasons).

38. I appreciate there was a lack of direct evidence as to precisely what the claimant had been asked and what she had actually said when completing form JSA3. It might be that in very many cases where there is no direct evidence as to that it will be very difficult indeed to show that there has been a misrepresentation or a failure to disclose. But here, on the tribunal's findings, the claimant had given inaccurately low figures for her level of savings when seeking ESA, housing benefit and, albeit some years later, a DHP. It did not necessarily follow from that, that she had given inaccurately low figures when claiming IBJSA but the evidence of her propensity to understate her level of savings when claiming other benefits was not an irrelevant consideration. Nor was what amounted (despite Mr Yetman's argument to the contrary) to a conclusion that she had sought to mislead it and the Secretary of State. So, in the specific and particular circumstances of this case, perhaps very unusually absent direct evidence as to the misrepresentation, there was sufficient evidence before the tribunal to make it legally permissible for it to conclude as it did. That is to say there was enough to permit it to decide (though such was by no means an inevitable conclusion) there had been an inaccurate indication, on the JSA3 form, regarding the capital and that that inaccuracy had led to payment of IBJSA in circumstances where, had the true figure been given, there would have been no entitlement.

39. So, I now have to ask where that leaves matters. I return to the point that the tribunal had made two decisions, one concerning entitlement to IBJSA during the disputed period and the other concerning recoverability of the consequent overpayment. The bases upon which I granted permission related only to the overpayment and recoverability aspect. The basis upon which I have decided the tribunal erred in law relates only to the overpayment and its recoverability. That means there is no basis for me to interfere with the tribunal's decision concerning the claimant's lack of entitlement to IBJSA for the disputed period and I do not do so. That decision shall, therefore, stand. But of course, the tribunal's decision on the overpayment and its recoverability cannot stand for the reasons I have explained. I must, therefore, either remake that decision myself or remit.

40. I have decided to remit. Since I have not found fault with the tribunal's decision on entitlement that decision remains in place. So, the claimant shall not have another opportunity to argue that the capital in her bank accounts was not beneficially owned by her throughout the period in issue. The entitlement issue is closed. But there will be a complete rehearing as to the appeal which the tribunal previously decided under reference SC242/16/02768. So, the scope of that appeal will include but will not be limited to whether

(assuming the Secretary of State's position as to the basis for recovery remains as it was on 18 October 2016) the tribunal should limit itself to failure to disclose; and if it does not do so whether it considers the evidence before it (which may include evidence additional to that before the previous tribunal) does or does not show there has been a misrepresentation.

41. As to additional evidence, the Secretary of State did provide the Upper Tribunal with a blank copy of form JSA3 and that now appears from pages 255-292 of the Upper Tribunal's bundle. As to the basis for recovery relied upon, it will be open to the Secretary of State to change her stance from that taken in the submission of 18 October 2016 but regard should be had to my directions below. If the Secretary of State does not communicate any change of stance it will be open to the tribunal, if it wishes, to simply consider the question of whether recovery may be grounded on the basis of a failure to disclose though I am not saying it will actually be required to so limit itself.

Directions for the rehearing

A. The tribunal must undertake a complete reconsideration of the issues raised by the appeal previously decided by the tribunal under reference SC242/16/02768 and, subject to its discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. As matters stand, the Secretary of State's most recent indication to the tribunal is that she relies solely upon a failure to disclose as the basis for recovery of an overpayment. If the Secretary of State wishes to argue that there is any other basis for recovery, that must be notified to the tribunal in writing, with reasons, within one month of the date of issue of this decision of the Upper Tribunal. If the Secretary of State does not do so it will be open to the tribunal, if wished, to limit itself to considering failure to disclose as the sole basis for recovery.

C. These directions may be replaced, amended or supplemented at any time by any District Tribunal Judge or Regional Tribunal Judge of the First-tier Tribunal in the Social Entitlement Chamber.

(Signed on the original)

MR Hemingway
Judge of the Upper Tribunal

Dated: **19 June 2019**