IN THE UPPER TRIBUNAL **Case No.** CJSA/3075/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway; Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (which it made at Lincoln on 31 March 2016 under reference SC315/15/00735) involved the making of an error of law it is set aside. Further, the case is remitted to the First-tier Tribunal for rehearing by a differently constituted tribunal panel.

DIRECTIONS FOR THE REHEARING:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. In doing so, the tribunal must not take account of circumstances that were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided that it relates to the time of the decision: *R(DLA) 2 & 3/01*.

REASONS FOR DECISION

1. This appeal, brought by the claimant with my permission, arises from a decision made by the Secretary of State, on 4 August 2015, that the claimant had failed to participate, without good cause, in the work programme which is a scheme under the Jobseekers Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 (the 2013 Regulations), as a result his Jobseekers Allowance (JSA) was sanctioned. Regulation 5 of the 2013 Regulations imposes a requirement upon a claimant selected under regulation 4, to participate in the scheme so long as the Secretary of State has given such a claimant a notice in writing complying with requirements set out in paragraph 2 of Regulation 5. But a sanction will not be imposed where a claimant has "a good reason" for any non-participation. Regulation 17 authorises the Secretary of State to contract out certain functions relating to the operation of the scheme to organisations normally referred to as "scheme providers". That had happened in this case and the relevant scheme provider was Ingeuos UK Ltd. It has not been argued in this case that there was anything unlawful about the claimant's selection or participation in the scheme; nor that inadequate notice under regulation 5(2) had been given; nor that the contracting out under regulation 17 had been unlawful or improper.

2. By way of background, the claimant had been required to attend the work programme on 14 July 2015. According to his version of events (at least according to my understanding of his version) the following occurred on that date: He turned up at the offices of the relevant provider on the required date. His attendance was recorded in a fire register upon attending the relevant building. He showed an "appointment letter", which presumably had his name and address contained within

it. He did so upon or shortly after his arrival. A member of the providers staff accessed his details on a computer screen and asked him to confirm the accuracy of information which appeared on the computer screen including his full name, his National Insurance number, his date of birth and the social security benefits he was in receipt of. That is said to be normal practice for the provider and it appears that the purpose of the request was so the provider could verify the person in front of its staff member was the claimant. The claimant refused to confirm the accuracy of the information on the computer screen. He has been perfectly frank and consistent about that. He refused, he says, because he has concerns about the keeping of such personal data and, in particular, has concerns about what he regards as the "unlawful sharing of data" between the Department for Work and Pensions and the provider. He has explained that he is anxious that his data might be lost or stolen and he does not believe that the provider at least should be in possession of any personal data relating to him. Since he would not confirm the accuracy of the information on the computer screen the provider proceeded on the basis that he was unwilling to confirm his identity and refused to let him progress to active participation in the scheme. It was in consequence of all of that, that the Secretary of State took the above decision on the basis that he had, without good reason, failed to participate in the scheme.

3. The claimant appealed to the First-tier Tribunal (the tribunal) and, in his written grounds of appeal, he suggested (in effect) that since he had attended as required and when required, and since he had not actually refused to take part, it could not be said that he had "failed to participate".

4. The tribunal held an oral hearing of the appeal on 31 March 2016. The claimant attended unrepresented. There was no attendance on behalf of the Secretary of State. In looking at the record of proceedings, it is apparent that the claimant raised his concerns regarding data protection issues and alleged there had been a breach of the provisions of the Data Protection Act 1998 (which was then in force) concerning the possession by the provider of information about him. In its statement of reasons for decision (statement of reasons) the tribunal addressed a specific contention he had made that there had been a breach of section 10 of that Act but (whilst the tribunal's handwritten record of proceedings is understandably fairly difficult to read in parts) it seems he had also made reference to certain other sections as well. A point he has subsequently made. Ultimately though, nothing turns on that.

5. The tribunal dismissed his appeal because it thought he had failed to participate and that he did not have a good reason for that failure. Having noted that the "basic facts" (by which the tribunal meant the fact of the claimant's failure to give confirmation concerning the information held by the provider and the provider consequently not allowing him to take part) were not the subject of dispute and having said (quite correctly it seems to me) that the only issues were whether there had been a failure to participate and, if so, whether three was a good reason for that, it said this:

> "6. I was satisfied that by not confirming his identity, the appellant had not participated in the scheme. I was of the view that it is totally reasonable for the respondent to require someone attending a work programme to confirm their identity. By not doing so, the appellant has not participated in the scheme.

7. The appellant gave me his reasons at the hearing for not confirming his identity when he attended the work programme on 15 July 2015. His reasons can be summarised in the following way.

8. The appellant argued that asking for personal details contravenes s.10 of the Data Protection Act 1998. S.10 provides as follows:

> (1) Subject to sub-section (2), an individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons –
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> (a) The processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another, and
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> (b) That damage or distress is or would be unwarranted.
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> (2) Sub-section (1) does not apply –
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> (a) In a case where any of the conditions in paragraphs 1-4 of Schedule 2 is met, or
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> (b) In such other cases as may be prescribed by the Secretary of State by order
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> (3) The data controller must within twenty-one days of receiving a notice under sub-section (1) ("the data subject notice") give the individual who gave it a written notice –
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> a. stating that he has complied or intends to comply with the data subject notice, or
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> b. stating his reasons for regarding the data subject notice as to any extent unjustified and the extent (if any) to which he has complied or intends to comply with it.
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> (4) If a court is satisfied, on the application of any person who has given a notice under sub-section (1) which appears to the court to be justified (or to be justified to any extent), that the data controller in question has failed to comply with the notice, the court may order him to take such steps for complying with the notice (or for complying with it to that extent) as the court thinks fit.
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> (5) The failure by a data subject to exercise the right conferred by sub-section (1) or section 11(1) does not affect any other right confirmed on him by this Part.

9. I was satisfied that it could not be reasonably be said that the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another, and that damage or distress is or would be unwarranted. The thrust of the appellant's argument was that his details would be lost. When asked, he could not point to any time when this has occurred in the past. I could see no reasonable grounds to suggest that it would happen now and I was satisfied that asking for his details does not violate the 1998 Act.

> 10. The appellant also argued that paying travel expenses amounts to blackmail. I did not accept this. The payment of travel expenses is a legitimate way of ensuring those in receipt of JSA are able to participate in and gain the benefit of the scheme and thus have a better chance of obtaining employment.
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> 11. The appellant also argued that he would participate in the actual work, that is lectures and modules, undertaken in the scheme. However, a necessary precursor to this is the appellant confirming his identity to ensure that the right person is on the scheme.
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> 12. He also argued that it was not necessary to confirm his details as such details are already on the computer screens at the venue. I was of the view that the respondent is entitled to ensure that the appellant's details are the same as the details they have and that the appellant is the person who should be on the programme.
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> 13. I was quite satisfied that the appellant does not have good reason for not participating in the scheme".

6. The claimant applied for permission to appeal to the Upper Tribunal and requested an oral hearing of his application. I granted that request. Putting together all of what the claimant had to say in writing and all he had to say to me his grounds of appeal (I summarise) were as follows:

(a) The tribunal had erred because it had failed to cite any case law and statute law in its statement of reasons;
(b) There was no "written information" to show that there was a legal requirement upon a claimant to confirm his/ her identity;
(c) The tribunal's decision was irrational;
(d) The tribunal's decision was perverse.
(e) There had been a breach of Data Protection rules;
(f) The tribunal had deliberately misunderstood the point the claimant had been seeking to make with respect to expenses and blackmail. His point had been that the provider had wanted him to confirm the information as a condition of the payment of expenses;
(g) There had been a breach of the requirements of natural justice because the tribunal clerk had not taken a note of the proceedings and although the Tribunal Judge had done so, his notetaking was punctuated by his asking questions of the claimant to the extent that it "broke up the flow of my deposition and made it difficult to make my case".

7. I was not persuaded that any of those grounds had arguable merit. But I thought, that nevertheless, the case raised some issues which merited the further attention of the Upper Tribunal. In granting permission I said this:

> "6. Nevertheless, it does seem to me that the tribunal might have erred in the following ways;
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> (a) In failing to sufficiently inquire into and make sufficient findings of fact as to precisely what happened when the applicant attended at the work programme venue and what was said concerning his identity. For example, was he willing to provide some sort of verification other than confirming the accuracy of information by reference to the computer

screen? (that might have involved the production of something like a credit card or a passport). Was he invited to do so? If so did he decline? If he did produce his appointment letter was that rejected as insufficient evidence of his identity? It is arguable that without clearer or fuller findings there may not have been a sufficient basis to conclude that he had failed to participate as alleged.

(b) In failing to adequately explain why, given that he was present at the correct place and at the correct time, and given that he had not actually and in terms refused to participate (as opposed to refusing to either confirm his identity or confirm that identity details already held were correct) it could properly be said that he had failed to participate. This point may require consideration of what might be meant by "participate" .

8. I did not, though, limit my grant of permission. On reflection, it might have been better had I done so but, as matters have turned out, the grounds which the claimant himself had sought to rely upon have not been actively pursued by his representative Mr A Malik of the Coventry Law Centre, who was instructed some time after permission had been granted.

9. Having granted permission, I received two written submissions from two different representatives for the Secretary of State being Mr A Peel and Ms K Harris, one submission from the claimant himself and one submission provided on his behalf by Mr Malik. I stayed the appeal, at the request of the Secretary of State (a request which was not opposed) to await the decision of the Upper Tribunal in *SN v SSWP (JSA)* [2018] UKUT 279 (AAC).

10. In the end the Secretary of State's position to the Upper Tribunal was quite simple. It was to the effect that the provider had been perfectly entitled to ask the claimant to evidence of his identity; that his conduct had amounted to a refusal to do so; that that conduct translated into a failure to participate; and that it had been confirmed by the Upper Tribunal in *SN* that where conduct is relied upon as amounting to a failure to participate, it is the reasonableness of that conduct "is the key". In this case, it was argued, the claimant had behaved in a way which was unreasonable and so the tribunal had been entitled to conclude, as it had, that there had been a failure to participate. Additionally and in any event, the Secretary of State argued that the tribunal had also been correct in concluding that requiring proof of a person's identity was not something which contravened the terms of the Data Protection Act 1998. The claimant himself, in his submission to the Upper Tribunal, sought to re-state what he had asserted earlier regarding data protection. He asked me to hold an oral hearing of the appeal. Mr Malik, however, in a later submission provided on behalf of the claimant, did not seek to rely upon any data protection points nor, indeed, any of the other points which the claimant had himself made in seeking permission and then pursuing his Upper Tribunal appeal. Rather, Mr Malik contended that the tribunal had erred through failing to make the sorts of findings I had suggested it might have been required to make when I granted permission to appeal. He did not request an oral hearing of the appeal but did not actually withdraw the request the claimant himself had made.

11. I have asked myself whether I should hold an oral hearing of the appeal before the Upper Tribunal. But, having reminded myself of the content of rule 2 and rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I have decided not to

do so. That is because, whilst I note the wishes of the claimant, they have not been reiterated by his representative who was not involved in the case at the time that request was made; because matters seem to me to be relatively straightforward; because there is no reason to think that the holding of a hearing would be likely to take matters any further; and because I am satisfied I can justly decide this appeal without one.

12. I shall deal first of all with the various grounds other than the data protection ground, which the claimant himself had relied upon. I can do so briefly. As to those grounds, a tribunal is not required to specifically refer to legislative provisions nor to cite case law so long as it demonstrates, through its reasoning, that it has adopted the correct approach and has applied the correct legal tests. Whilst it might be the case that there is no legislative provision nor any decided case which expressly states that a claimant is obliged to confirm his or her identity as a necessary prelude to participating in a work programme, conduct is potentially relevant in deciding whether there has been a failure to participate. A decision is not irrational nor perverse simply because it is suggested that it is. Here, there has never been anything capable of suggesting irrationality or perversity. It is possible that the tribunal might have misunderstood what the claimant was seeking to argue with respect to expenses and blackmail. But there is nothing to suggest that, if it did so misunderstand, that was deliberate. Indeed, there is no apparent reason why a tribunal would seek to deliberately misunderstand an argument put to it. In any event, the question of the payment or otherwise of expenses was not relevant to the threshold question as to whether the claimant had or had not refused to participate. As to the point about note-taking at the hearing, as the claimant's representative may by now have explained to him, it is usual for a Tribunal Judge to take a note of the proceedings in circumstances where, as here, those proceedings are not being recorded. It is not necessarily an easy task but it is by no means impossible. Although the claimant argues that what was being done effectively broke up the flow of his arguments, there is nothing in the material before me to suggest that he did not get his points across. Further, he has not specified any points which he says he failed to get across due to the interruption to his flow. It may be significant that the claimant's representative, once instructed, did not seek to make anything of the above points at all. But anyway, I am satisfied that they are not meritorious.

13. As to the data protection point, once again I note that this was not actively pursued by Mr Malik in his own submissions to the Upper Tribunal though I accept that it was not abandoned. But I have concluded that, in any event, it was a red herring and the tribunal need not have spent the time upon dealing with the argument which it did. At the date of the Secretary of State's decision under appeal the Data Protection Act 1998 was still in force. It has subsequently been replaced by the Data Protection Act 2018. But both of those Acts of Parliament provide enforcement provisions in order to deal with circumstances where it has been claimed that there has been a breach of data protection requirements, duties and obligations. So, it was open to the claimant to pursue matters through different and indeed entirely appropriate channels if he had wished. Whilst I appreciate the mere fact that there might be an alternative way of dealing with claimed concerns does not, of itself, mean a refusal to participate based on those concerns will not amount to good reason (see *DH v SSWP (JSA)* [2016] UKUT 0355 (AAC), it does not seem to me that against a backdrop of an available but unused statutory remedy, it was seriously

open to the claimant to argue he was justified in refusing to simply give confirmation of the accuracy of the details on the screen such that (assuming for the moment there was a failure to participate) he had good reason for not participating. In any event, of course, the tribunal concluded there had been no breach of data protection requirements and I detect no flaw in its reasoning as to that.

14. I now turn to the approach of the tribunal generally and to the matters which I had raised when granting permission to appeal and which have subsequently been pursued on behalf of the claimant by Mr Malik.

15. It had not been argued, before the tribunal, that the claimant had not received proper notification in writing requiring him to participate in the scheme. So, the tribunal was entitled, as it did, to ask itself, first of all, whether the claimant did or did not "participate" and if he had refused to do so whether he had had good reason. Further, the tribunal clearly concluded that conduct, even before the commencement of any intended participation, could be relevant as to whether there had been a refusal to participate or not. It did not, for that, have the benefit of the Upper Tribunal's decision in *SN* but, nevertheless, in my judgment it got that right. The relevance of conduct with respect to the issue of participation had already been identified by the Upper Tribunal in *PH v SSWP (ESA)* [2016] UKUT 0119 (AAC) and *JW v SSWP (ESA)* [2016] UKUT 0207 (AAC) which concerned refusals to co-operate with the examination process involved in the assessment of entitlement to employment and support allowance. But in the context of schemes similar to the one relevant to this appeal the Upper Tribunal in *SN*, having referred to those cases, said that:

> "60….It seems to me that the reasonableness spoken of in these "failure to submit" cases is akin to the term as to behaviour of conduct that ought necessarily or reasonably to be implied as one of the requirements of which the appellant in this case had been notified he had to do by way of participation in the mandatory work activity scheme".

And then:

> "62. Moreover, and contrary to the appellant's argument, I do not see why the conduct should be limited to that which occurs after the placement has in fact started….".

16. So, the tribunal did not err in proceeding on the basis that conduct, including conduct before the actual commencement of the activities involved in the scheme, was a relevant consideration with respect to the question of failure to participate.

17. Nor do I detect any error of law in the tribunal's reasoning to the effect that requiring a person to confirm his or her identity before participating or being asked to participate is of itself unreasonable or objectionable. It seems to me it is entirely legitimate to say that a provider is entitled to verify the person actually turning up is the person who should be turning up and is required to turn up. The scheme would lose its integrity if it were possible for a person lawfully selected for participation to avoid that by sending along a substitute. And anyway, a provider is entitled to know who it has on its premises or who is otherwise participating in a scheme it is running. All of that seems to be obvious as a matter of common sense.

18. Notwithstanding the above, though, I have concluded that the tribunal did err in law. The conduct it relied upon as amounting to a failure to participate was a failure by the claimant to confirm his identity. It effectively decided that his refusal (for which I accept there was no obviously sound basis notwithstanding his subjective concerns) to confirm the accuracy of the information held by the provider and appearing on the computer screen, did amount to a refusal to confirm his identity. I have no doubt that a refusal to confirm identity is obviously capable of amounting to a refusal to participate. But as I indicated when granting permission, it might have been the case that the claimant offered or was willing and able to offer if asked, an alternative but still satisfactory way of confirming his identity. Such might have been, I suppose, the production of a passport or a driving licence. He might have had sufficient alternative evidence of his identity with him. However, the tribunal does not appear to have enquired into the question of whether he did offer alternative evidence of identity or, indeed, whether such a course of action, in the face of his refusal to confirm the accuracy in the information on the computer screen, had been offered to him. It might even have been the case (though I am not at all certain) that his possession of the appointment letter, and seeming production of it, might have been sufficient evidence that he was who he claimed to be. Without looking into these possibilities and without making findings as to them, it does not seem to me that the tribunal had a proper evidential basis to conclude that there had been a refusal to confirm identity as opposed to a refusal to confirm the accuracy of the details on the screen. It is possible that the claimant had been asked for other forms of identity and had refused to provide it but that is not apparent from the material in front of me.

19. In light of the above then I am satisfied that the tribunal's decision has to be set aside for material error of law because of its failure to enquire into, more precisely, the circumstances said to amount to a failure to participate with a subsequent failure to make clear findings of fact, backed up be adequate reasoning, as to whether there was a genuine refusal on the part of the claimant to confirm his identity such that it could properly be said that he had failed to participate in the scheme.

20. Since there are further facts to be found, and since the tribunal is the expert fact-finding body in the field, it seems to me appropriate to remit rather than for me to re-make the decision myself on the material before me which, as it stands, is inadequate for me to confidently make the necessary findings of fact I have said should be made. So, there will be a rehearing of the appeal. But I hope what I have said in this decision will assist with respect to the significance or otherwise of the data protection based arguments. But the tribunal, on remittal, will not be bound by anything which has gone before and will reach its own decision on matters both of fact and law. Further, it will not be limited to the evidence before the previous tribunal but will be entitled to take into account any further written or oral evidence it may receive.

21. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated: **11 July 2019**