DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeals by the Appellant.

The decision of the Ashford First-tier Tribunal dated 1 August 2017 under file reference SC324/17/00422 does not involve any material error of law. The decision of the First-tier Tribunal stands in all five appeals.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

A summary of the Upper Tribunal decisions

1. The Appellant's grounds of appeal against the decisions of the First-tier Tribunal ('the Tribunal') do not succeed. I therefore dismiss the Appellant's appeals to the Upper Tribunal. The Tribunal's decisions in all five appeals stand.

2. The Appellant's two grounds of appeal relate to (1) the admissibility of evidence secured following a home interview and the possible impact of the Equality Act 2000; and (2) the requirement in overpayments cases to revise earlier decisions awarding the relevant benefit.

3. Although I have not been persuaded by either of these grounds of appeal, I have identified two other potential problems with the Tribunal's decision. However, given the way the case was argued before the Tribunal, and its findings taken as a whole, these other errors did not have any material impact on the outcome of the appeals.

The background to the appeals to the First-tier Tribunal's decision

4. The Appellant, who is now aged 56, suffered pneumococcal meningitis at the age of five weeks and as such is pre-lingually deaf and primarily communicates by British Sign Language (BSL). At the relevant time for these appeals, she was living with both her parents. She was in receipt of income-based employment and support allowance (ESA) for two periods between September 2010 and March 2013 and then again from September 2013 until January 2016. On the earlier ESA claim she disclosed that she had £3,852 in savings. On the later ESA claim she reported having £4,210 in savings.

5. On 18 January 2016 a compliance officer visited the Appellant at the home she shared with her parents. The DWP response to one of the five appeals before the Tribunal (now CE/3320/2017) explained what happened as follows:

> "[The Appellant] was visited on 18/01/16 in the presence of her parents. She is profoundly deaf and very difficult to understand, and her parents assisted her. During the interview [the Appellant] became agitated when she was challenged about savings held in Leeds Building Society. [The Appellant] had copied her bank statements in advance of the visit from the DWP Compliance Officer and she provided up to date bank statements for all her accounts that she held apart from the ones with Leeds Building Society. When she was pressed by the Compliance officer about her Leeds Building Society accounts she left the room and came back with 5 statements relating to these accounts, the balance on

> these accounts totalled more than £37,000. [The Appellant's] behaviour at her interview indicates that she was aware of her actions as she had copied the statements in advance but only produced them when she was challenged by the DWP Compliance Officer."

6. This passage taken from the DWP response to the appeal is essentially a summary of an unsigned and undated DWP internal memorandum on the CE/3320/2017 file. The memorandum, which appears to be from the Compliance Officer and addressed to the ESA decision-maker, also included the following statements:

> "I pressed her regarding Leeds Building Society and with the assistance of her father I was informed by him that she had 2 accounts with Leeds BS. She left the room and came back with copies of statement for 5 accounts with Leeds BS.
>
> The current balance exceeded £37,000 and I explained benefit would be affected. She provided a current statement for all accounts held.
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> She signed a statement to this effect but was becoming more and more agitated and getting annoyed with her parents. Her speech is difficult to understand and I decided to terminate the interview."

7. The Appellant's representative has not taken issue with this account of the Compliance Officer's visit. Rather, the challenge is put on the basis that the Appellant was unfairly put at a disadvantage by the home interview being conducted without a BSL signer being present.

The Secretary of State's original decisions

8. The Secretary of State's decision-makers made a total of five separate decisions, each of which was appealed to the Tribunal after an unsuccessful request for a mandatory reconsideration.

9. Decision 1 (now Upper Tribunal file CE/3316/2017) was taken on 10 March 2016. The decision was that the Appellant was not entitled to income-based ESA for the period from 1 September 2010 to 17 March 2013 because she had capital above the prescribed limit of £16,000.

10. Decision 2 (now file CE/3317/2017) was also taken on 10 March 2016. The decision was that the Appellant was not entitled to income-based ESA for the later period from 19 September 2013 because she had capital above the prescribed limit of £16,000.

11. Decision 3 (now file CE/3318/2017), taken on 25 April 2016, was that in consequence of Decision 1 there was a recoverable overpayment of income-based ESA amounting to £4,549.61 covering the period from 29 September 2010 to 17 March 2013.

12. Decision 4 (now file CE/3319/2017), also taken on 25 April 2016, was that in consequence of Decision 2 there was a recoverable overpayment of income-based ESA amounting to £14,493.49 covering the period from 22 September 2013 to 26 January 2016.

13. Decision 5 (now file CE/3320/2017), taken on 10 March 2016, was that the Appellant was liable to pay a civil penalty of £50 in view of her failure, without

reasonable excuse, to notify a change of circumstances (a decision asserted to be taken under Social Security Administration Act 1992, section 115C and 115D(2)).

The First-tier Tribunal's hearing and its decisions on the five appeals

14. The First-tier Tribunal held a hearing on 1 August 2017. The Appellant attended with her father (and, quite possibly, with her mother too, although nothing turns on this). Also present at the hearing were her welfare rights representative, Mr J. McKenny, along with a BSL interpreter arranged by the Tribunal administration (an earlier hearing was adjourned in part so this could be organised). In addition, a presenting officer for the Department attended. The Tribunal Judge included in the statement of reasons the following concise explanation of how matters unfolded:

> "6. Prior to the commencement of the appeal I was advised that the appellant was in a particularly distraught state and having concern for her welfare and the progress of the case I asked to speak to her representative and also to the presenting officer.
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> 7. Mr McKenny considered my suggestion that the case proceed on the basis of the papers and he indicated that he did not require his client to give evidence because the issues that he was intent upon raising on her behalf related to admissibility of evidence and procedural matters.
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> 8. He said that he agreed the overpayment and that she did have capital that affected her entitlement to Employment and Support Allowance. He also agreed that nothing had been said by her or her father in relation to that capital".

15. The rest of the statement of reasons then dealt with the two matters which have formed the basis of the Appellant's grounds of appeal to the Upper Tribunal. There has, rightly in my view, been no challenge to the way that the Tribunal proceeded to deal with the hearing purely on the basis of legal submissions. The Tribunal's considerate and pragmatic approach was entirely consistent with the overriding objective.

16. The First-tier Tribunal dismissed the appeals and issued five decision notices, one for each appeal. The decision notices for Decisions 1, 2 and 5 simply recorded in bare terms that each of the appeals in question had been dismissed and the relevant decision by the Secretary of State had been confirmed. They also referred, by way of incorporation, to the more detailed decision notices provided for Decisions 3 and 4.

17. The decision notice for Decision 3 recorded (i) the concession by the Appellant's representative that entitlement and the amount of the overpayment was not in dispute; (ii) that the overpayment for the period from 29 September 2010 to 17 March 2013 was recoverable; and (iii) that the Appellant had failed to disclose full details of her savings accounts which was a material fact which had led to the overpayment. The decision notice for Decision 4 was in the same terms but for the later period.

18. The District Tribunal Judge later gave the Appellant permission to appeal, on the basis that the grounds of appeal "raise issues of general application".

The grounds of appeal and the Upper Tribunal proceedings

19. The Appellant's two-fold grounds of appeal were expressed as follows:

> "(1) The Tribunal did not address the issue that the evidence had been obtained in breach of the DWP's obligations under the Equality Act. She communicates

> using BSL. No signer was present at the interview. The evidence was inadmissible.
>
> (2) The Tribunal did not deal with the requirement under CSIS/45/1990 to review every decision."

20. Mrs G Lancaster, for the Secretary of State, resists the appeal. In short, she submits first that the DWP did not fail in its obligations under the Equality Act 2010 and the evidence obtained at the interview was both admissible and properly admitted. Secondly, Mrs Lancaster contends that the previous entitlement decisions were revised as required and that in any event the case law has moved on since the CSIS/45/1990, the Social Security Commissioner's decision relied upon by the Appellant's representative.

21. Mr McKenny, the Appellant's representative, made a further short submission expanding on his arguments in relation to the first ground of appeal. He did not make any further submissions on the second ground.

The Upper Tribunal's analysis

Ground 1

22. The record of proceedings from the Tribunal hearing shows that Mr McKenny made submissions about the admissibility of the evidence gathered at the compliance interview. It was argued that, as the interview was conducted by the DWP Compliance Officer without a BSL interpreter present, "accordingly the evidence was inadmissible". The First-tier Tribunal dealt with that argument in its statement of reasons as follows

> "10. The appellant's father was present at the interview and it was the appellant's production of the accounts listed on page 86 that were recorded by [the Compliance Officer]. The Department had already done a general matching service which have ascertained that the appellant had the capital that exceeded the prescribed amount.
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> 11. The interview was to raise the issues that the general matching service had disclosed. The appellant had clearly been made aware of the same in that she produced photocopies of the bank account to [the Compliance Officer] when he attended. Photocopies that had been made before [the Compliance Officer's] attendance.
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> 12. In relation to the admissibility of the statement whilst it wasn't absolutely necessary for the respondents to have this statement, they already having the evidence to the general matching service, I was satisfied that the evidence was admissible in any event and had regard to rule 15 of the Tribunal Rules 2008. There need be no further consideration in relation to Mr McKenny's first point."

23. There is no dispute but that the Appellant communicates using BSL. It is also incontrovertible that no BSL signer was present at the interview in her home. In that context, Mr McKenny submits that the First-tier Tribunal "did not address the issue that the evidence had been obtained in breach of the DWP's obligations under the Equality Act" and so the evidence was inadmissible. The Appellant's argument has not been further particularised.

24. This lack of further particularisation means it is somewhat difficult to evaluate this ground of appeal. There can be no argument but that the Appellant has a

disability for the purposes of section 6 of, and Schedule 1 to, the Equality Act 2010. As such, the DWP has a legal duty not to discriminate against e.g. claimants who are protected by the 2010 Act. In particular, the DWP is subject to the anticipatory duty under section 20, namely the duty to make reasonable adjustments. If a claimant has a disability and has difficulties in communicating, it follows that the DWP must make reasonable adjustments to assist communication in an appropriate manner. This could include, for example, provision of a BSL interpreter as an auxiliary service. This ground of appeal also carries the implication that it was unfair to permit the DWP to produce and rely on the evidence in question (the Appellant's signed statement and the copy bank and/or building society statements).

25. Mrs Lancaster makes several points in response on behalf of the Secretary of State. She notes (i) this was not an interview under caution; (ii) the interview was conducted at home with the assistance of the Appellant's father; (iii) it can reasonably be assumed that this familial assistance enabled the Appellant to participate fully in the interview; (iv) the Compliance Officer did not identify any barrier preventing the Appellant's involvement in the interview; (v) at no point did the Appellant make any request for a BSL interpreter to assist her; and (vi) there has been no suggestion that either the signed statement or the copies of the bank statements produced were in any way factually incorrect owing to any communication barriers.

26. I am by no means sure that I would accept all those arguments at face value. It seems from the account summarised above (see paragraphs 5 and 6 above) that the Compliance Officer appreciated from the outset of the meeting that it was going to be a difficult interview to conduct. It certainly reached a point where he felt that he had to abandon the interview as the Appellant's distress had made further communication extremely difficult, if not impossible. In addition, it may well be quite unrealistic to expect a claimant with this type of disability to 'stand on her rights' and appreciate that she could ask for the interview to be suspended until she could be provided with the assistance of a BSL interpreter.

27. Putting jurisdictional niceties to one side, the fact of the matter is that I have insufficient material before me to form a view as to whether the DWP acted in breach of its duties under the Equality Act 2010. Just to take one example, I have seen no evidence relating to the process of setting up the home interview, e.g. by way of policy documents governing such matters or individual and claimant-specific correspondence or telephone logs. In any event, as already noted, this ground of appeal is wholly unparticularised and as such falls to be dismissed.

28. But assuming, simply for the purposes of the present argument, that it is the case that a breach of the Equality Act 2010 by the DWP could be established, was the evidence inadmissible? Rule 15 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) vests the First-tier Tribunal with a very broad discretion, to be exercised in accordance with the overriding objective of dealing with cases fairly and justly:

> "(2) The Tribunal may—
> (a) admit evidence whether or not—
> (i) the evidence would be admissible in a civil trial in the United Kingdom; or
> (ii) the evidence was available to a previous decision maker; or
> (b) exclude evidence that would otherwise be admissible where—
> (i) the evidence was not provided within the time allowed by a direction or a practice direction;

> (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
> (iii) it would otherwise be unfair to admit the evidence."

29. The evidence in question – the Appellant's signed statement listing the credit balances in the various savings accounts and the copies of the associated statements – was plainly admissible in principle. It follows that the question then was whether "it would otherwise be unfair to admit the evidence". The First-tier Tribunal concluded it would not be unfair. Its reasoning is perhaps somewhat compressed, but the Tribunal took into account the fact that the DWP already had evidence gathered from what it described as the 'general matching service'. The DWP's Generalised Matching Service (GMS) is used by the Department to identify inconsistencies and, where necessary, make referrals to the local Customer Compliance field units. The GMS evidence itself was not disclosed in the appeal papers (and may well have been limited simply to the fact that the Appellant was known to be in receipt of income-related ESA at a time when she was also receiving a level of investment income which would appear to be inconsistent with such entitlement).

30. The Appellant has had the opportunity (both in writing and at the First-tier Tribunal hearing thorough her representative) to put forward arguments as to how communication problems may have impeded her ability to put forward any explanations about the savings. There has been no challenge to the accuracy of the Appellant's signed statement or the account statements produced. I bear in mind that the DWP could have applied to the First-tier Tribunal for an order directing the Appellant to produce documents. The Tribunal could also have made such directions of its own volition. In all those circumstances the First-tier Tribunal in this case was plainly entitled to come to the view that the evidence in question was properly admissible.

31. In reaching that conclusion I bear in mind the observation of Upper Tribunal Judge Lane in *BS v Secretary of State for Work and Pensions (DLA)* [2016] UKUT 73 (AAC); [2016] AACR 32:

> "18. Courts and tribunals may, not unnaturally, be reluctant to exclude evidence which is reliable and probative although unlawfully obtained; and Strasbourg jurisprudence accepts in turn that there may be no unfairness in admitting such evidence when the fairness of the proceedings are considered as a whole: *Khan v UK* [2001] 31 EHRR 45.
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> 19. It may nevertheless be important for a tribunal to decide whether the disputed evidence has been lawfully obtained. Realistically, if the evidence was lawfully obtained, the prospect of its exclusion as unfair is minimal."

32. It follows from paragraph 30 above that I reject the first ground of appeal.

Ground 2

33. It is clear from the record of proceedings that Mr McKenny made submissions at the Tribunal hearing based on (the Scottish) Social Security Commissioner's decision CSIS/45/1990. The First-tier Tribunal dealt rather peremptorily with that argument in its statement of reasons as follows:

> "18. Mr McKenny submitted that CSIS/45/1990 applied which held that where there was an overpayment over several years every decision over that period had to be identified and revised. I believe that the UC (and other benefits)

> overpayment regulations 2013 applied and all the overpayments were recoverable."

34. The representative's submission based on CSIS/45/1990 must have been made by reference to paragraph 6 of the Social Security Commissioner's decision in that case, where it was held that an adjudication officer (and on appeal a tribunal) had erred as a matter of law by purporting to revise one decision only in an overpayment case where there had been a series of decisions over a period of some five years. Mr Commissioner J.G. Mitchell held that, in those circumstances, the tribunal should have called for "the identification of the relevant decisions and a determination upon the appropriate grounds of review" in relation to each and every such decision.

35. Mrs Lancaster relies on subsequent case law to demonstrate that there is no requirement for a decision maker to identify every decision that is being superseded or revised and nor are there any formal requirements governing the way such decisions are made (on the latter point see the Tribunal of Commissioners' decision in R(IB) 2/04 at paragraph 8). On the former point she relies on Commissioners' decisions CIS/4043/2002 (at paragraph 12, *per* Deputy Commissioner Paines QC) and CSIS/73/2005 (at paragraph 16, *per* Mrs Commissioner Parker). Thus, as Judge Ramsay succinctly observed in *AR v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 358 (AAC) at paragraph 11, "there is no force to the objection that in the present case the Secretary of State failed to identify the relevant chain of decisions made under sections 9 (revision) or 10 (supersession) as this does not render the supersession decision invalid and without effect." Rather, the current position is as set out in the Tribunal of Commissioners' decision in R(IB) 2/04 at paragraph 192, which I need not set out in full here.

36. I agree with Mrs Lancaster's analysis. In fact, I go further than that. Mr Commissioner Mitchell's decision was made under the previous and now repealed statutory regime for decision-making and appeals. This is the fundamental reason why CSIS/45/1990 cannot be relied upon in the way sought by Mr McKenny. Thus, the analysis of the Commissioner in CSIS/45/1990 was based on the terms of section 53(4) of the Social Security Act 1986, which precluded recovery of overpaid benefit "unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review". That statutory formulation was re-enacted in section 71(5)(a) of the Social Security Administration Act 1992. However, new phraseology was adopted by section 1 of the Social Security (Overpayments) Act 1996, inserting in the 1992 Act a new section 71(5A) (which has since been amended, e.g. in the light of the changes made by the Social Security Act 1998). Section 71(5), the direct successor of section 53(4), was then repealed by the Welfare Reform Act 2007 (section 44(2) and Schedule 8, paragraph 1). The concept of "review", which caused so many difficulties in the adjudicatory regime in place before the Social Security Act 1998, no longer has any role to play. The new statutory test does not require the identification of each and every preceding decision, as demonstrated by the case law cited by Mrs Lancaster and referred to in the previous paragraph.

37. It follows that I also dismiss the Appellant's second ground of appeal.

Two other matters

38. There were two other matters, not raised directly by the grounds of appeal, on which I invited submissions

39. The first matter concerned the Tribunal's reference in paragraph 18 of its statement of reasons (see paragraph 33 above) to what were described as the UC (other benefits) overpayment regulations 2013. I suspect this was intended to be a reference to either the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380) or to the parallel (Decisions and Appeals) Regulations 2013 (SI 2013/381). Alternatively, it may have been a mangled reference to the Social Security (Overpayment and Recovery) Regulations 2013 (SI 2013/384). Either way, it raised the question as to whether the Tribunal had applied the wrong test for assessing the recoverability of the overpayments, i.e. the less 'claimant-friendly' test under section 71ZB of the Social Security Administration Act 1992 (as amended), rather than the standard test in section 71.

40. However, I am satisfied there was no such error by the Tribunal. Taken as a whole, the decision notices and the statement of reasons make it clear that the Tribunal was aware that the basis for the Appellant's liability to repay the overpayments of benefits lay in the fact that several of the savings accounts had not been included on the original claim for employment and support allowance. In this context it is also relevant that this misrepresentation at the outset of the claim (or rather each claim) was not disputed in the proceedings at the Tribunal. In those circumstances the Tribunal's lack of clarity or imprecision in statutory references was not material to the outcome of the appeals.

41. The second matter concerned the civil penalty appeal. The decision notice for that case dismissed the appeal and confirmed the Secretary of State's decision to impose a civil penalty of £50. However, the two decision notices in the main overpayment cases each included a line to the effect that "The Tribunal did not impose a penalty". There was no mention at all of the civil penalty issue in the statement of reasons itself. However, I am satisfied that this was a mere oversight which had no material bearing on the outcome of the appeal. The Secretary of State's decision imposing the civil penalty, which was confirmed by the Tribunal, explained the reasons for that decision. Furthermore, there had been no separate challenge to the issuing of that penalty – essentially that appeal stood or fell on the same basis as the two main grounds of appeal.

Conclusion

42. For all these reasons, the decision of the First-tier Tribunal does not involve any material error of law. I therefore dismiss the appeal (Tribunals, Courts and Enforcement Act 2007, section 11).

Signed on the original
on 17 January 2019

Nicholas Wikeley
Judge of the Upper Tribunal