IN THE UPPER TRIBUNAL **Appeal No. CE/40/2019**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the District Tribunal Judge made on 12th October 2018 refusing to set aside the decision of the First-tier Tribunal made on 4th July 2018 under number SC064/17/01824 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of 12th October 2018 and remake it as follows:

> **1. The decision of the First-tier Tribunal given at Blackpool on 4th July 2018 is set aside under rule 37(1) and (2)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.**
>
> **2. The appeal against the Respondent's decision of 9th November 2017 is to be decided by the First-tier Tribunal in accordance with the following directions:**
>
> **a) There should be an oral hearing of the appeal.**
>
> **b) The judge should not be the same judge who made the decision of 4th July 2018.**
>
> **c) The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**
>
> **d) The new tribunal is not bound in any way by the decision of the previous tribunal.**
>
> **e) These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.**

REASONS FOR DECISION

Background

1. The Appellant appealed to the First-tier Tribunal against a decision of the Secretary of State dated 9th November 2017 that he was not entitled to Employment and Support Allowance because he had more than £16,000 capital. The Appellant claimed to have spent the majority of the capital but the First-tier Tribunal found that he had provided insufficient proof of his expenditure and on 4th July 2018 it dismissed the appeal. In these Reasons I refer to that decision as "the substantive appeal decision".

2. The Appellant applied to the First-tier Tribunal for permission to appeal. He also sent documents which he said had been in the possession of the Home Office and

had not been returned to him until after the tribunal hearing, and which he said could have led the tribunal to reach a different decision.

3. The application for permission to appeal was considered by the District Tribunal Judge ('DTJ') who made the substantive appeal decision of 4th July. On 12th September 2018 the FTT wrote to the Appellant, on the direction of the DTJ, asking for a copy of the Home Office letter which had been attached to the additional documents. The letter from the FTT was not received by the Appellant because it was sent to the wrong address even though the FTT had been notified of the Appellant's correct address.

4. In a Decision Notice dated 12th October 2018 (issued on 30th October) the DTJ noted that the Appellant had not provided the Home Office letter. It is apparent that the DTJ did not realise that the Appellant had not received the letter from the FTT asking him to send the Home Office letter. The DTJ wrote that, had the letter been provided, he would have set aside the substantive appeal decision but that, as the Appellant had "ignored" the direction to provide the letter, no procedural irregularity had occurred and he dismissed the set aside application. I refer to this as "the set aside decision". The DTJ also refused permission to appeal.

5. The Appellant applied to the Upper Tribunal for permission to appeal against the substantive appeal decision of 4th July 2018.

6. In written Observations of 12th February 2019 I said that it may have been procedurally unfair for the judge to have refused to set aside the substantive appeal decision in the above circumstances. I said that I might treat the application as an application for permission to appeal against the set aside decision, and directed the Appellant to send the letter from the Home Office if he had it. In response, the Appellant said that the Home Office had not sent a letter along with the documents, that he had sent copies of all the letters that had been sent to him, and that it is common for the Home Office to take months to return documents.

7. I determined the application for permission to appeal on 22nd February 2019.

8. I did not give permission to appeal against the substantive appeal decision because it could not have been an error of law for the First-tier Tribunal to have made its decision without having seen documents which were not available at the time: *R(S) 1/88* at [3]. It would be an error of law if the tribunal made a material mistake of fact which, amongst other things, could be established by objective and uncontentious evidence: *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [9]-[10]. I concluded that the new evidence in this case did not fulfil that criterion. Even adopting a less strict approach in the tribunal context (see *Hussain v. SSWP* [2016] EWCA Civ 1428**)**, in the circumstances of this case (where the FTT was not even told that there was other material in the hands of the Home Office) I concluded that any mistake of fact could not amount to an error of law.

9. I gave permission to appeal against the set aside decision, the substance of the of the Appellant's application for permission to appeal having been directed to that decision on the basis that he had not received the FTT's direction to send the Home Office letter. That approach was consistent with that in *CS v Secretary of State for Work and Pensions (DLA)* [2011] UKUT 509 (AAC) and which has been endorsed in subsequent decisions of the Upper Tribunal.

10. In written submissions, the Secretary of State supports the appeal. Her representative agrees with my indication that the set aside decision should itself be set aside and requests that the case be remitted to the same judge to reconsider. The representative has also added that, as the further evidence was not being withheld by the Appellant, she recommends that the First-tier Tribunal "look at the Capital held to consider the appellant's entitlement to ESA" and so requests that the case be remitted to a new First-tier Tribunal for re-hearing. Although there is some inconsistency between those two requests by the Secretary of State, standing back it appears that the Secretary of State's position is that the substantive appeal decision should be set aside and reconsidered in the light of the further evidence. The Appellant agrees with the Secretary of State's request that the case be remitted for rehearing.

11. Neither party requested an oral hearing and I am satisfied that I can determine the appeal without a hearing. I do not need to hear oral evidence and the parties have made written representations. I would not be assisted by having an oral hearing.

Discussion and conclusions

12. Under Rule 37(2) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008, the grounds for setting aside a decision of the First-tier Tribunal (along with set aside being in the interests of justice) include that a document relating to the proceedings was not sent to the Tribunal at an appropriate time or that there has been some other procedural irregularity. The DTJ rightly considered whether to set aside his decision in the light of the new material provided by the Appellant. He did not set it aside because the Appellant did not provide a letter from the Home Office accompanying the new material. The DTJ said that, had that letter been provided, "the FtT would have set aside the decision on the basis of procedural irregularity over which the appellant had not control". The DTJ decided that the Appellant had "ignored" the direction for the letter to be sent.

13. The only reason for the decision was the Appellant's failure to provide the Home Office letter. Had the DTJ interrogated the file, he would have seen that the request to the Appellant to send that letter had not been sent to the correct address. In those circumstances the DTJ could not have concluded that the Appellant had ignored the direction. He would, at the very least, have had the direction sent to the correct address to give the Appellant a chance to respond. It follows that the set aside decision was unlawful in that it was made unfairly. Alternatively it was made on the basis of a material error of fact: see *Iran* above. I therefore allow the appeal and set aside the decision of 12th October 2018 (the set aside decision).

14. I have considered whether I should remake the set aside decision or remit it to the First-tier Tribunal. I have decided on the former. In many cases the judge who made the appeal decision in the First-tier Tribunal will be best placed to decide whether a procedural irregularity would or may have made a material difference to the outcome and to consider the interests of justice. However in the present case, having seen the new material, the DTJ said that he would have set aside the decision had the Appellant responded to the direction.

15. I acknowledge that the DTJ wanted to see the Home Office letter, presumably in order to verify that the material had not been available at the time of the First-tier Tribunal appeal hearing. I accept the Appellant's explanation for not producing a Home Office letter. It is plausible that no accompanying letter would have been sent

with the documents when returned by the Home Office. It is not likely that the DTJ could make further fruitful enquiries in this regard if the set aside decision were to be remitted to him. The Secretary of State does not take issue with the Appellant's claim in this regard.

16. It can be inferred from the DTJ's observations on 12th October that he considered that the new documentation was relevant to the appeal and that it would have been in the interests of justice to set aside the appeal decision had the Appellant complied with the direction. I am satisfied that the new documents were relevant to the substantive appeal. They relate to the expenditure which the previous First-tier Tribunal had found not to have been established on the evidence. I am not in a position to say whether they are sufficient for the Appellant's purposes, but in fairness the Appellant should have an opportunity to rely on all relevant evidence at a hearing. The Secretary of State supports that approach. Accordingly, I am satisfied that it is in the interests of justice to set aside the substantive appeal decision so that it can be remade by the First-tier Tribunal.

17. The appeal should not be heard by the DTJ who previously decided it. Although I have found no error in his decision of 4th July on the evidence which was before him, he had reached a concluded view at that time and it is right that the Appellant should have an opportunity to present his case to a different judge in the light of all the evidence now available.

Signed on the original
on 20th August 2019

Kate Markus QC
Judge of the Upper Tribunal