[2020] UKUT 247 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CUC/1773/2018**

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

EAM

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 7 August 2020
Decided on consideration of the papers

DECISION

The appeal does not succeed.

The making of the decision of the First-tier Tribunal given at Darlington on 16 January 2018 under reference SC262/17/00644 did not involve the making of a material error on a point of law.

That decision therefore continues in effect and the appellant and her partner are not entitled to universal credit with effect from 4 January 2017.

REASONS

Introduction

1. This appeal is about what happens when someone claiming or receiving universal credit ("UC") has received money from the sale of a former home but does not immediately use that money to purchase a new home.

2. It is unnecessary for me to go into the facts in any detail. The claimants were a new couple who had both received substantial sums from the sale of their respective former matrimonial homes. They said that much of that money had been used to pay off their debts. However, on the version of events that is most favourable to their case, they still had £25,000 in capital when they claimed UC on 4 January 2017 and that sum represented what was left of the proceeds of sale of the female claimant's former matrimonial home in the second half of December 2016.

3. On 13 March 2017, the Secretary of State's decision maker refused the claim because, it was said, the couple had capital in excess of £16,000. That decision was not revised on mandatory reconsideration and the female claimant (from now on, "the appellant") appealed to the First-tier Tribunal on 24 May 2017.

4. On 16 January 2018 the First-tier Tribunal refused the appeal and confirmed the Secretary of State's decision.

5. The appellant now appeals to the Upper Tribunal against that decision with the permission of the District Tribunal Judge who made it.

The First-tier Tribunal's decision

6. The Tribunal's written statement of reasons correctly identified the statutory provision on which the appellant was relying (see paragraph 20 below). However, the interpretation of that provision has been the subject of case law (see paragraphs 22–27 below), none of which was mentioned.

7. That would not matter if the statement as a whole demonstrated that the correct test had been applied. In this case, however, the statement is inconsistent. It suggests that the Tribunal applied a number of slightly different tests, none of which really reflected the case law that was binding on it, and only one of which reflects the law as I now hold it to be at paragraphs 30–35 below.

8. At [8], the statement describes the test as follows:

> "money attributable to a house sale can be disregarded for a period of 6 months if it is intended for the purchase of a property to be occupied by the Claimant".

9. Then, at [10], the statement says that:

> "The Tribunal found that the legislation although loosely worded, 'to be used for the purchase', requires more than just a hope or wish but imposes an intent to purchase in the near future. The legislation otherwise makes little sense."

10. Then, at [12b], the statement records that:

> "b. The Tribunal found that it is for the Claimant to establish that they [are] actively seeking to purchase a property and that they have a reasonable prospect of acquiring a property."

11. At [16], there is a finding that:

> "… on the balance of probability the extent of the [appellant's and her partner's] debts alone would prohibit the obtaining of mortgage finance in the foreseeable future."

12. Finally the Tribunal found (at [17]) that to be disregarded as money to be put toward the purchase of a property the proceeds of sale of the former property "have to be clearly and effectively identifiable as the monies 'earmarked'" and that that was not so in this case.

The relevant law

Statute law

13. The relevant law is to be found in the Welfare Reform Act 2012 ("the Act") and the Universal Credit Regulations 2013 ("the Regulations").

14. The capital limit for UC is £16,000 for both single claimants and couples.[1] Claimants with more than £16,000 in capital are not entitled to UC.[2]

15. In addition, where a claimant's capital does not exceed £16,000, but does exceed £6,000, she is treated as having a monthly income in the form of an "assumed yield"

[1] Welfare Reform Act 2012, s.5 and Universal Credit Regulations 2013, reg.18(1).
[2] Welfare Reform Act 2012, ss 3(1)(a) and 5(1)(a) and (2)(a).

from that capital.[3] That monthly income is taken into account as unearned income and reduces the rate at which the claimant is entitled to UC pound for pound.[4]

16. When assessing whether either of those limits has been exceeded, the general rule is that:

> "The whole of a person's capital is to be taken into account unless—
>
> (a) it is to be treated as income …; or
>
> (b) it is to be disregarded (see regulation 48)."[5]

17. A lump sum payment from the sale of a former home is a capital payment and the Regulations do not treat it as income.[6]

18. Therefore, unless it is to be disregarded, it will form part of a claimant's capital and may either disentitle her to UC altogether, or lead to her benefit being reduced on the basis that she has an "assumed yield" from the capital.

19. Capital disregards are dealt with in regulation 48 of, and Schedule 10 to, the Regulations.

20. Regulation 48 states:

> "**Capital disregarded**
>
> 48.—(1) Any capital specified in Schedule 10 is to be disregarded from the calculation of a person's capital (see also regulations 75 to 77).
>
> (2) Where a period of 6 months is specified in that Schedule, that period may be extended by the Secretary of State where it is reasonable to do so in the circumstances of the case."

and paragraph 13(a) of Schedule 10 specifies:

> "**Amounts earmarked for special purposes**
>
> …

[3] Universal Credit Regulations 2013, reg.72.
[4] Welfare Reform Act 2012, s.8(3)(b) and Universal Credit Regulations 2013, reg.22(1)(a).
[5] Universal Credit Regulations 2013, reg.46(1).
[6] Universal Credit Regulations 2013, reg.46(3) and (4).

> **13.** An amount received within the past 6 months which is to be used for the purchase of premises that the person intends to occupy as their home where that amount—
>
> (a) is attributable to the proceeds of the sale of premises formerly occupied by the person as their home; …"

21. Regulations 75-77 (to which reference is made in regulation 48(1)) do not apply in the circumstances of this case. So, the requirements of the disregard are satisfied if:

(a) the capital is attributable to the proceeds of sale of the claimant's former home; and

(b) the capital was received either "within the past 6 months" or within that period as extended by the Secretary of State or the Tribunal under regulation 48(2); and

(c) the capital "is to be used for the purchase of premises"; and

(d) the claimant intends that, once the premises have been purchased, she will occupy them as her home.

Case law

22. Paragraph 13 of Schedule 10 to the Regulations is a successor provision to paragraph 3 of Schedule 10 to the Income Support (General) Regulations 1987. Paragraph 3 specified an income support capital disregard that is equivalent to the UC disregard that is in issue in this case.

23. The wording of paragraph 3 was not exactly the same as the wording of paragraph 13. However, paragraph 3 did include the words "is to be used" in the same way as paragraph 13 does.

24. Paragraph 3 was considered by Mr Commissioner Rowland (as he then was) in *R(IS) 7/01*. He held that (in the words of the head note):

> "the essence of the words "to be used" in paragraph 3 was the need for *an element of certainty*, so that, to satisfy paragraph 3, a claimant must show not only that he or she intends to use the capital sum to buy another home but also that it is *reasonably certain* that he or she will in fact do so …" (my emphasis).

25. The language of "certainty" derives from the decision of Mr Commissioner Howell QC (as he then was) in *CIS/8475/1995*. Mr Howell stated:

> "28. … I now have to consider whether the £35,000 held on deposit at the date of claim, and the £10,000 (or the reducing balance) from May 1995 onwards, satisfied the condition in para 3 that they were sums "to be used" for what I have held was the purchase of other premises intended for occupation by the claimant as his home. In my judgment Miss Hartridge [who was the solicitor representing the Department] was right in pointing to the difference between the wording "to be used" in para 3 and the tests of intended occupation in for example paras 2, 27 and 28. It seems to me that the claimant has to demonstrate something more than just a genuine intention on his part to use the money from his old house to acquire a new one. Otherwise there would be the absurd result that the out of work millionaire could insist on the whole sale proceeds of his lavish home being disregarded for at least 6 months by saying that he planned to buy another equally lavish one as soon as he found one he liked: even though not in any way committed to do so, and easily able to buy a perfectly satisfactory home at once for less with the balance released for living expenses to take him off income support.
>
> 29. I therefore accept Miss Hartridge's submission that the words "is to be used" in para 3 require *an element of practical certainty* as well as subjective intent. It would be unusual for any sum of money to be set aside or earmarked sufficiently to be impressed with a trust to use it only for the purchase of another home, and para 3 is not in my judgment restricted to cases where there is a binding legal obligation. Nevertheless the claimant must in my view be able to demonstrate at the time relevant for his claim a practical commitment to a purchase that is bound in the normal course of events to involve using the money he is keeping aside for the purpose. Such a commitment can be demonstrated for example by a binding contract for purchase which is not yet completed, or by a firm commitment (e.g. an agreement "subject to contract") in circumstances where the tribunal is satisfied the money could not reasonably be expected to be withdrawn from the project and used for other purposes such as living expenses instead" (my emphasis).

26. Paragraph 3 was also considered by Mr Deputy Commissioner Jacobs (as he then was) in *CIS/15984/2016*. Speaking of the words "to be used" in that paragraph, Mr Jacobs said:

> "11. The only Commissioner's Decision [in] which the meaning of these words was discussed in detail is *CIS/8475/1995*, paragraphs 28 to 30. The Commissioner held that they were to be interpreted strictly and that more than a genuine intention to use the proceeds for the purchase of new premises was required. It was necessary for there to be an element of certainty involved. The Commissioner held that a binding obligation so to use the proceeds was not required, but that there should be a practical commitment to purchase. He gave as examples of

> the necessary certainty and practical commitment the existence of a contract awaiting completion and an agreement subject to contract.
>
> …
>
> 13. The Commissioner correctly captures the essence of those words in the need for an element of certainty. His comments must, however, be read in their context. These are ordinary English words and as such they do not fall to be interpreted as a matter of law. The only question that arises is their application in the circumstances of the case as a question of fact. The examples given by the Commissioner are no more than that. The concept of practical commitment is readily shown by the existence of a contract or an agreement subject to contract. It was established in that case because by the date of claim for Income Support the claimant had identified a plot of land, obtained planning permission and engaged the services of a builder. It will be less easy to demonstrate practical commitment in the days immediately following the sale of the former home. It may not be feasible to begin immediately to seek alternative accommodation, for example because the location will depend on outstanding job applications. Much will depend on the circumstances of the case. It will not always be easy to draw a line between this and a mere genuine intention. This task becomes easier once the 26 weeks has expired, because there is then an interplay between the degree of certainty required and the reasonableness of any extension. The greater the degree of uncertainty the less reasonable any extension. There is no scope for this approach in the initial 26 weeks.

27. Following both *CIS/8475/1995 and CIS/15984/1996* in *R(IS) 7/01*, Mr Rowland stated at [8]:

> "The test enunciated in the first sentence of paragraph 29 of [*CIS/8475/1995*] was precisely the test used by the tribunal in the present case, which suggests that they may well have known of the decision. It is important to note that the claimant in *CIS/8475/1995* succeeded despite the apparent strictness of the Commissioner's approach. In *CIS/15984/1996* the Commissioner warned against regarding the examples of evidence of commitment given in paragraph 29 of that decision as being exhaustive and pointed out that there were circumstances where, for example, a person could not sensibly look for a home because the location depended on outstanding job applications but where nonetheless the necessary commitment might be demonstrated even though providing the evidence might be more difficult. He said that the Commissioner in *CIS/8475/1995* had captured the essence of the words "is to be used" in the need for an *element of certainty*. I gratefully adopt that approach. It seems to me that a claimant must satisfy a tribunal not only that he or she intends to use the capital sum to buy another home but also that it is *reasonably*

> *certain* that he or she will in fact do so within the material time" (again, my emphasis).

In re B (Children)

28. During the course of these proceedings, I raised the question of whether, to the extent that *R(IS) 7/01* required claimants to establish that it was practically or reasonably "certain" that the disputed capital "is to be used" to purchase a home—or an "element of certainty" as to whether that is the case—it should no longer be followed in the light of the subsequent decision of the House of Lords in *In re B (Children)*.[7]

29. The facts and legal issue in *In re B (Children)* were far removed from the present case. However, the proceedings in that case were, as here, civil proceedings to which, again as here, the civil standard of proof applied. At paragraph 13 of his opinion, Lord Hoffman (with whom Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe agreed) stated:

> "I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

Although the decision in *In re B (Children)* was given nearly eight years after that in *R(IS) 7/01*, it clarifies the law as it has always been.

30. In her further response to this appeal, the Secretary of State submits that nothing in *R(IS) 7/01* should be regarded as implying a degree of certainty greater than the civil standard of proof. I do not accept that submission. The civil standard of proof does not involve *any* form of certainty. It is about "whether a fact more probably occurred than not". Although it is usually unhelpful to reduce the standard to percentages, it is illustrative in this case that the civil standard is satisfied if there is a 50.1% chance that the money will be used to buy a new home and a 49.9% chance that it will not. That is a very long way from any form of "certainty", no matter what adjective is used to qualify that word.

31. I regret I am therefore unable to reconcile the decision in *R(IS) 7/01,* and the preceding decisions in *CIS/8475/1995* and *CIS/15984/1996*, with that in *In re B (Children)*, What is true about the standard of proof that a fact occurred in the past must apply equally to the standard of proof that a state of affairs exists at the date of a decision or is likely to exist in the future. In short, I consider that the specification in paragraph 13 of Schedule 10 to the Regulations that an amount "is to be used for the purchase of premises that the person intends to occupy as their home" does not require the claimant to establish reasonable certainty, or practical certainty, or any form of

[7] [2008] UKHL 35.

certainty. It only requires that she should establish that it is more probable than not that the money "is to be used" for that purpose.

32. I do not say that *R(IS) 7/01* or the earlier cases were wrongly decided. In particular, it seems from paragraph 9 of *R(IS) 7/01* that, even if what—following *In re B (Children)*—I judge to be the correct test had been applied, the outcome would have been the same.

33. Nor do I disagree with what Mr Rowland and the other Commissioners said about the phrase “is to be used for the purchase of premises” requiring more than a mere intention on the part of the claimants so to use the disputed capital. Those words are not merely about what the claimants *intend* but, rather, what, in all the circumstances of the case (including the claimant’s intentions), *is likely to happen in practice*. That part of the test is about what will probably happen in fact and not what the claimants hope or intend to happen.

34. However, to the extent that *R(IS) 7/01*, CIS/8475/1995 and CIS/15984/1996 decide that what is now paragraph 13 of Schedule 10 requires a claimant to establish any fact to any standard other than the balance of probabilities, then those decisions are incompatible with *In re B (Children)* and—to that extent only—I respectfully decline to follow them.

35. Similarly, I would respectfully re-phrase what Mr Jacobs said at the end of paragraph 13 of *CIS/15984/1996* about the extension of the (then) 26-week period as follows:

> “…there is … an interplay between the degree of probability and the reasonableness of any extension. The lesser the degree of probability the less reasonable any extension.

Did the Tribunal make a legal mistake?

36. Yes and no.

37. Although I have declined to follow *R(IS) 7/01* in its entirety, that decision was binding on the First-tier Tribunal and it was therefore obliged to apply the “reasonable certainty” test set out in that decision. The statement of reasons does not make it clear that it did so and the alternative tests suggested were not legally correct:

(a) to the extent that the Tribunal held that the disregard applies “if it is intended for the purchase of a property to be occupied by the Claimant” (see paragraph 8 above), a consistent line of authority—which also now includes this decision—

holds that that is incorrect: the effect of the words "is to be used" is that mere intention to purchase is not enough;

(b) the modified version of the "intent to purchase" test—namely an "intent to purchase in the near future": see paragraph 9 above—is incorrect for the same reason. The words "in near future" are also an incorrect paraphrase of the law unless they mean "within six months from the receipt of the disputed capital or within that period as extended by the Secretary of State or the Tribunal under regulation 48(2)", which in my judgment they do not. A correct, albeit more legalistic, paraphrase would have been "within the material time";

(c) the Tribunal's requirement that the appellant should establish that she was actively seeking to purchase a property (see paragraph 10 above) is also incorrect. The authorities acknowledge that it may be possible to say that that the disputed capital "is to be used" to purchase a property even though a claimant may not be taking steps to do so. As Mr Jacobs said in *CIS/15984/1996* at [13] (in a passage approved by Mr Rowland in *R(IS) 7/01* at [8]):

> "It may not be feasible to begin immediately to seek alternative accommodation, for example because the location will depend on outstanding job applications. Much will depend on the circumstances of the case."

The Tribunal came closer to the correct test with its statement (at paragraph 10 above) that the appellant must show a "reasonable prospect of acquiring a property" but it was not quite there, not least because what has to be shown is not that an appellant will probably acquire a property but that the disputed capital "is to be used" for that purpose.

38. In my judgment the statement's lack of clarity and seeming inconsistency about the test it was applying amounted to an error of law: the Tribunal's reasons for its decision were inadequate.

39. However, I have not set aside its decision because I accept the submission from the Secretary of State's representative that the error was not material: the decision would have been the same even if the mistake had not been made.

40. The reason for that conclusion is the Tribunal's finding that, on the balance of probability, the claimants would not be able to obtain a mortgage in the foreseeable future because of the level of their indebtedness (see paragraph 11 above). That finding was made to what I judge to be the correct standard of proof, was supported by evidence, and was sufficient on its own to justify the Tribunal's decision.

41. The amount of the disputed capital was clearly not enough to buy another property: the claimants needed to obtain additional capital from another source. No other possible source than a mortgage was suggested. It was therefore the inevitable consequence of the Tribunal's finding that the claimants would not be able to obtain a mortgage, that they could not establish that it was more probable than not that the disputed capital would in fact "be used" for the purchase of a new home.

42. Given that finding of fact, and on the law as I hold it to be, the First-tier Tribunal made the only decision legally open to them. This appeal therefore fails.

"Earmarking"

43. As this decision will appear on the website of the Administrative Appeals Chamber, I should also note that, had I not upheld the First-tier Tribunal's decision on other grounds, I would not have accepted its alternative ground that appeal must fail because the disputed capital was not "clearly and effectively identifiable as the monies 'earmarked' for the purchase of the property.

44. That is not what paragraph 13 says. It only requires that the disputed capital should be "attributable to the proceeds of the sale" of a claimant's former home. It does not say it must "be" the proceeds of sale, or even that it must "represent" those proceeds but only that it should be "attributable" to them. And whether or not the disputed capital is so attributable is again to be decided on the balance of probabilities.

45. In my judgment, that does not mean that the proceeds of sale have to be earmarked by (say) keeping them in a separate account. If they have been mixed with other money belonging to the claimant, then there are rules of law and accountancy that allow them to be unmixed and "traced" to their source.

46. But I anticipate that in most UC cases it will be unnecessary to rely on those rules. Where the proceeds of sale are paid into the claimant's current account, they are likely to represent a residual balance while other money—including benefits—is paid in and flows out to defray living expenses. Even when money attributable to the proceeds of sale is used to pay off debts or to fund a higher standard of living than would otherwise be possible, it does not follow that the reduced balance of that money ceases to be attributable to the proceeds of sale.

47. Everything will depend on the facts of the individual case. For example some adjustment may be necessary to distinguish capital in the account from income for the current month, or if the capital balance on the account has increased since receipt of the proceeds of sale rather than reduced.

48. But whether or not capital is attributable to the proceeds of sale of a former home will not normally be a difficult question. Had it been necessary to do so, I would have decided that the disputed capital in this case was so attributable.

Transitional protection for tax credit claimants

49. There is one final issue I must mention. In her application for permission to appeal, the appellant has drawn attention to *Universal Credit Policy Briefing Note 3* dated 12 September 2011 on the *Treatment of Capital*. Under the heading, *Our Proposals*, the *Note* states (at [4(e)]):

> "e) People with capital of £16,000 or more who are entitled to Tax Credits before migrating to Universal Credit will receive transitional protection to protect their cash income. …"

50. That note was not drawn to the attention of the First-tier Tribunal before it decided the appeal. In those circumstances, the Secretary of State's representative submits that the issue was therefore not one that was raised by the appeal and that the First-tier Tribunal did not make an error of law by omitting to deal with an issue that was not before it.

51. If anything had turned on the point, I would not have accepted that submission. If, on the facts as the Tribunal found them to be during the period between the claim for UC and the decision under appeal, the law had provided for the appellant to be transitionally protected from the UC capital rules, then in the exercise of its inquisitorial and enabling role, the Tribunal should have recognised that and dealt with the issue. Social security law generally—and the law on the transition from the so-called "legacy" benefits to UC in particular—is complex. Claimants cannot be expected to be familiar with it. The whole point of having social security appeals decided by a specialist tribunal is so that the tribunal can recognise such issues when they arise and enable claimants to deal with them.

52. However, nothing does turn on the point because in the circumstances of—and at the time relevant to—this case, the law did not entitle the claimants to transitional protection.

53. A briefing note does not make law; the passage relied on by the appellant is expressly described as a proposal; and that proposal was made more than 18 months before UC first came into effect. In the event, the proposal was not implemented in quite the same terms as it appeared in the *Note*.

54. A claimant who is, or was, entitled to one of the benefits that are being replaced by UC can move to UC in one of two different ways.

55. The first is known colloquially as “natural migration”. It occurs when a claimant’s circumstances change, Examples of that might be where (in the past) a claimant moved to an area where UC was in force from an area where it was not, or (in the past and the present) she needed to make a new claim for benefit—or for a different benefit—and in the meantime UC had come into force in the area where she lived.

56. There is no entitlement to transitional protection against the effect of the UC capital rules where a claimant moves from an existing benefit to UC as a result of natural migration.

57. The second is called “managed migration”. It occurs without any change in the claimant’s circumstances if the Secretary of State serves her with a notice known as a migration notice. Managed migration gives rise to an entitlement to transitional protection along the lines suggested in the *Briefing Note*.

58. When the claimants claimed UC, there was no managed migration: it began, on a pilot basis only, for claimants in Harrogate in the Summer of 2019. Further, even if the rules for managed migration had been in force at the relevant time, the circumstances in which the claimants claimed UC meant that the rules on natural migration applied.

59. The claimants therefore had no entitlement to transitional protection and the issue of whether or not they did was not clearly apparent from the evidence. The First-tier Tribunal cannot be criticised for not having dealt with the point.

Signed (on the original)
on 7 August 2020

Richard Poynter
Judge of the Upper Tribunal