IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal Nos. CJSA/2368, 2373, 2377 & 2381/2017
CE/2384 & 2388/2017
CIS/2390, 2395, 2396 & 2397/2017

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

Between: ED (claiming as "AA") Appellant

and

The Secretary of State for Work and Pensions Respondent

Before: Upper Tribunal Judge Perez

Representation:
Appellant: Ms Sonali Naik QC and Mr Desmond Rutledge of counsel
Respondent: Ms Zoë Leventhal and Mr Paul Skinner, both of counsel

DECISION

1. The appeals are dismissed.

Appeals

2. I held an oral hearing of these 10 appeals. Three of them relate to decisions which removed entitlement: CJSA/2368/2017, CE/2384/2017 and CIS/2396/2017 ("the entitlement appeals"). The other seven appeals relate to the corresponding recoverable overpayment decisions ("the recoverable overpayment appeals"). I thank all counsel for their helpful and clear written and oral submissions.

Issue

3. Was it open to the Secretary of State for Work and Pensions to revise (by removing) entitlement to benefits where the benefits had been awarded to a person's false identity (a fictitious identity and not an impersonation of another, real, person) in the Secretary of State's ignorance of the fact that the identity was fictitious? That is the question in the entitlement appeals. Whether there are recoverable overpayments depends on the answer to that question.

4. There are two parts to the question—

   (1) Was it open to the Secretary of State to remove entitlement in relation to the period when the false identity AA had indefinite leave to remain?

   (2) Was it open to the Secretary of State to remove entitlement in relation to the period, following on from that period, when the false identity AA had British citizenship?

5. My answer is yes to each, for the following reasons.

REASONS FOR DECISION

Introduction

6. The appellant is ED. ED came to the UK clandestinely between about 1999 and 2001. She claimed asylum using a false name whose initials are AA, a false nationality: Kosovan, and a false date of birth: 17 February 1984. It is common ground that ED was not impersonating another, real person and that the entire AA identity was fictitious.

7. The fictitious identity, AA, was on 4 January 2002 granted refugee status and indefinite leave to remain ("ILR"). After the grant of ILR, the appellant – using that fictitious identity and the national insurance number she had obtained in that fictitious identity – claimed and was awarded benefits. The benefits in question in these appeals are an income-based jobseeker's allowance, income support, and an income-related employment and support allowance. The fictitious identity AA was on 25 May 2006 granted British citizenship by naturalisation.

8. It was common ground however that the appellant is in fact ED, an Albanian national born on 17 February 1983. That AA was a fictitious identity was not discovered until after the grant of citizenship.

9. After that discovery, the Secretary of State for Work and Pensions revised decisions which had awarded a jobseeker's allowance, income support and an employment and support allowance, removing entitlement to those benefits for certain periods. The revisions were done under section 9 of the Social Security Act 1998 and regulation 3(5)(b) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999[1]. The revisions were done on the ground that the claims were not valid because not made by the person to whom they related – "AA" – but by ED, a person who had no standing or authority to make the claims and who did not satisfy the conditions of entitlement of the award. The Secretary of State also made a series of corresponding recoverable overpayment decisions. Combined, these entitlement decisions and recoverable overpayment decisions led to 10 appeals to the First-tier Tribunal. The First-tier Tribunal dismissed all 10. The appellant appeals to the Upper Tribunal in all 10 cases, with my permission. Dates, and the subject of each appeal, are listed in the **Annex** to this decision. Nothing turns however on those details.

The parties' positions as to indefinite leave to remain and British citizenship

10. The Secretary of State for Work and Pensions accepts that the fact that the ILR was granted to a fictitious identity did not render the ILR a nullity from the start. She accepts that the ILR was instead merely voidable and could be only prospectively revoked[2]. That acceptance comes in light of a concession made for the Home Department in the Court of Appeal in *R (Kaziu, Hysaj and Bakijasi) v*

[1] Statutory instrument number 1999/991, as amended.
[2] Under section 76(2)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41).

Secretary of State for the Home Department [2015] EWCA Civ 1195, [2016] 1 WLR 673 (Mr Bakijasi had, like this appellant, been granted ILR in a false name as well as with a false date of birth and false nationality).

11. The Secretary of State accepts similarly that the fact that the citizenship was granted to a false identity did not render the citizenship a nullity from the start either, and that it too could be only prospectively revoked[3]. That was because the Supreme Court held (by consent) in that same case (*R (Hysaj and Bakijasi) v Secretary of State for the Home Department* [2017] UKSC 82, [2018] 1 WLR 221[4]) that citizenship would be rendered a nullity from the start only where another, real person's identity was being impersonated and not where the false identity used is totally fictitious. (The Secretary of State for the Home Department had previously purported in the present case to declare the citizenship a nullity (a declaration, in other words, that it had been void from the start). But she had withdrawn that declaration in light of the distinction the Supreme Court drew in *R (Hysaj and Bakijasi)* between, on the one hand, impersonation of a real person (citizenship void from the start) and, on the other hand, the use (as here) of an entirely fictitious identity.)

12. In other words, it is common ground that neither the ILR nor the citizenship were in this case automatically void from the start and that each was rather (prospectively) voidable. Notice of Deprivation of Citizenship dated 20 January 2020 has since been served on the appellant, depriving the fictitious AA of British citizenship. But that came after the end of all of the periods for which benefits were awarded to which these appeals relate. So, it is common ground that, for those periods, there was valid ILR followed by valid British citizenship. Each, although prospectively voidable, had not been revoked at any time in the periods to which these 10 appeals relate.

The appellant's case

13. That the ILR and citizenship were only prospectively voidable, and had not been revoked, is crucial to how the appellant puts her case. By virtue of section 115(1) and (3) of the Immigration and Asylum Act 1999, a person is not entitled to, among others, the benefits in question on these appeals while she is "a person subject to immigration control". A person is not however "a person subject to immigration control" if she has leave to enter or remain in the United Kingdom[5] and if that leave is not subject to a condition that she does not have recourse to public funds (section 115(9)(b)). The ILR in the appellant's case was not subject to such a condition[6]. So, that the ILR was not void despite being given to the fictitious identity AA means, as the Secretary of State for Work and Pensions accepts, that ED was not for the period of the ILR "a person subject to immigration control" within the meaning of section 115(9). And she was not "a person subject to immigration control" once she was granted British citizenship either. That the appellant was not "a person subject to immigration control" for any of the periods in issue means, as the Secretary of State also accepts, that the appellant was not by that section 115

[3] Under section 40 of the British Nationality Act 1981 (c. 61).
[4] The official report uses the name Kaziu, although Mr Kaziu had by then dropped out.
[5] Section 3(1)(a) of the Immigration Act 1971 (c. 77) imposes the basic requirement for leave to enter if you are not a British citizen. The rest of section 3(1) deals with power to grant leave to enter or remain.
[6] Home Office letter 4/1/02, page 52, CJSA/2368/2017 bundle.

disentitled to an income-based jobseeker's allowance, income support, or an income-related employment and support allowance.

14. The appellant argues that it was not therefore open to the Secretary of State to remove entitlement to those benefits. The appellant argues that "she was entitled to claim benefit using a false identity in circumstances where she was granted refugee status, ILR and British citizenship in that identity by the [Secretary of State for the Home Department], and where the appellant was not impersonating another person in order to claim another person's benefits as an imposter" and that "the benefits were lawfully awarded to the appellant as [ED] (X) using the false identity of [AA] (Y)".

15. For completeness, the appellant also points out that a "claimant who has been granted refugee status…is exempt from the habitual residence test and cannot be treated as a 'person from abroad' for benefit purposes". She cites regulation 21AA(4)(g) of the Income Support (General) Regulations 1987[7], regulation 85A(4)(g) of the Jobseeker's Allowance Regulations 1996[8] and regulation 70(4)(g) of the Employment and Support Allowance Regulations 2008[9]. Those provisions provide that, for refugees, the applicable amount cannot by virtue of the persons from abroad provisions[10] be nil. The income support and jobseeker's allowance provisions that the appellant cites for the exceptions were not in force until 30 April 2006 (25 days before the grant of citizenship). And the appellant made no submissions as to the applicable amount provisions in force before that date. The Secretary of State does not however seek to argue in the alternative that the appellant was entitled to a nil applicable amount. The Secretary of State's position is simply that there was no entitlement at all.

16. The appellant does not suggest that her circumstances were materially similar to those of the fictitious identity AA that caused the Secretary of State for the Home Department to recognise AA as a refugee and to grant ILR to AA. And the First-tier Tribunal said, "It was acknowledged by those acting for the Appellant that the Appellant would not have been awarded benefits if the Appellant had made the claims for benefits as ED. The Appellant's position was rather that she remained entitled to benefits, as ILR had not been revoked" (paragraph (4), page 570, CJSA/2368/2017 bundle). I am not suggesting that my decision would necessarily be different if ED's circumstances had been materially similar to those of the fictitious AA. But it is relevant to how far my decision extends. I return to that at paragraph 84 below.

The Secretary of State's case

17. Given the Secretary of State's acceptance that the ILR and the citizenship were not in this case void from the start and were only voidable (and not yet voided at the relevant times), the Secretary of State accepts that the First-tier Tribunal erred in law. She says the error of law was that the First-tier Tribunal placed reliance on what it wrongly understood to be a lack of immigration status (and she submits that,

[7] Statutory instrument number 1987/1967, as amended.
[8] Statutory instrument number 1996/207, as amended.
[9] Statutory instrument number 2008/794, as amended.
[10] Regulation 21(1) and (3) of, and paragraph 17 of Schedule 7 to, the Income Support (General) Regulations 1987 (S.I. 1987/1967); regulation 85(1) and (4) of, and paragraph 14 of Schedule 5 to, the Jobseeker's Allowance Regulations 1996 (S.I. 1996/207); regulation 69(1) and (2) of, and paragraph 11 of Schedule 5 to, the Employment and Support Allowance Regulations 2008 (S.I. 2008/794).

in light of that acceptance, questions (1), (2) and (4) in my grant of permission fall away).

18. But, argues the Secretary of State, that was not a material error because, had the First-tier Tribunal correctly applied the law, that tribunal would still have dismissed the appeals. This is, she submits, because not being disentitled to benefit by virtue of being "a person subject to immigration control" was not relevant to the other requirements of the statutory benefits scheme, in particular, section 1 of the Social Security Administration Act 1992 ("the Administration Act").

19. The Secretary of State relies on section 1(1), (1A) and (1B) of the Administration Act. She submits that she awarded benefit in ignorance of the facts that AA was not a real person and that the actual person to whom benefit was to be paid was not in fact AA (it was ED). The Secretary of State argues that these facts were material because they meant that the fundamental requirement in section 1(1) was not met – that is, that a person must make a claim for benefit in order to be entitled to the benefit. She submits that the conditions in regulation 3(5)(b) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 – empowering her to revise an award – were therefore met. She says those conditions were that, as a result of her ignorance of those material facts, the decisions awarding benefit were more advantageous to the appellant than they would have been but for that ignorance. The Secretary of State submits that she was therefore entitled to reverse the awards under section 9 of the Social Security Act 1998 and under that regulation 3(5)(b).

20. In relation to section 1(1A) and (1B) of the Administration Act, the Secretary of State submits that the appellant ED was, by virtue of section 1(1B)(a), not entitled in any event. The Secretary of State submits that this is because the claim was not accompanied by a statement of the national insurance number of the real person, ED, or by information enabling the national number allocated to "the person" ED to be ascertained. Instead, the claim was accompanied by a statement of the national insurance number of the fictitious identity, AA.

21. The Secretary of State submits that, in accordance with common sense, public policy and the statutory scheme, a person is not "entitled to claim benefit fraudulently using a false identity". She submits that, even if a plain reading of the statutory scheme does not produce that result, the public policy principle that no-one should benefit from their own wrongs – recognised, she says, in *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government and another* [2011] UKSC 15, [2011] 2 AC 304 – plainly applies and requires the statutory scheme to be read in that way.

Discussion

Removal of entitlement

Introduction

22. Section 1(4) of the Administration Act specifies the benefits to which that section applies. It is not disputed that section 1 applies to the benefits in question in these appeals.

23. I accept that it would be circular merely to say that, because the Secretary of State would have reversed the awards had she known that the AA identity was fictitious, that renders material the fact that it was fictitious. Although that was how Ms Leventhal's oral submissions were couched in places, it was clear that her case, underneath that broad description, was that section 1 of the Administration Act was not satisfied.

24. I accept too that being who you say you are is not one of the express conditions of entitlement within the entitlement provisions specific to each of a jobseeker's allowance, income support and an employment and support allowance. But that does not mean that using a false identify to claim those benefits is not a material fact. And it does not mean that the decision was not more advantageous to the appellant than the decision would have been had the Secretary of State for Work and Pensions known that AA was a fictitious identity. I say that because there were more fundamental facts, in section 1 of the Administration Act, to which I now turn.

Section 1(1) of the Administration Act

25. Section 1(1) of the Administration Act provided, at the relevant times (as it does now)—

> "**1.**—(1) Except in such cases as may be prescribed, and subject to the following provisions of this section and to section 3 below, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied—
>
> (a) he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations under this Part of this Act; or
>
> (b) he is treated by virtue of such regulations as making a claim for it.".

26. I have underlined the parts that Ms Leventhal underlined for the Secretary of State.

27. "No person shall be entitled" in section 1(1) can be converted to "a person shall not be entitled" in order to apply it to a particular person (otherwise it would say "no [name] shall be entitled"). "A person shall not", when applied to the appellant, becomes "ED shall not". Slotting that into subsection (1) produces: "ED shall not be entitled to any benefit unless she makes a claim for it…".

28. Section 1(1) is not in my judgment satisfied. There are two ways of looking at it, and a potential third (paragraph 35 below). The first two deal with the provisions on the face of section 1(1). The potential third deals with the provisions made under section 1(1)(a). Taking them in turn:

The provisions on the face of section 1(1) of the Administration Act

29. These are the two ways of looking at the case in light of the provisions on the face of section 1(1) of the Administration Act—

(1) The first way of looking at it is that the benefits were awarded to "AA", the name ED gave in claiming them. AA did not however make a claim for them (because AA did not exist). It was ED who made the claims.

By virtue of section 1, AA cannot "be entitled to any benefit" that she has not claimed. The material fact on this analysis is that ED and not AA made the claims.

(2) A second way of looking at it is that the fictitious identity AA purported to make the claims and the real person ED did not make the claims. That means that ED cannot be entitled to the benefits because she did not make the claims and so section 1 is not satisfied in relation to ED (and AA cannot be entitled to them because she does not exist). The material fact on this analysis is that the fictitious identity AA purported to make the claims and the real person ED did not make the claims.

30. I acknowledge that each of these two analyses uses the fact that AA is a fiction while at the same time referring to AA as if she were real. But that necessarily arises from the fact that ED has presented a false identity in relation to which I am trying to apply the legislation. Section 1 did not expressly provide for a situation where a false identity is used. But it is clear from the face of the legislation that that was not because a person using a false identity is intended to benefit from section 1; it was simply because section 1 was drafted on the implied assumption that a person making a claim will not use a false identity. Where that assumption is wrong, the legislation must be made to work despite that. The appellant says that the way the legislation is to be made to work is that she, ED, is entitled to the benefits awarded to the fictitious AA. If however section 1 can work in a different way, which does not accept and reward a fiction for which that section was not designed, then I consider that it should. In my judgment, section 1 can and does work so as not to accept and reward such a fiction. That in my analysis I refer to AA as both fictitious and real, is not a bar. It is not as if the legislation prima facie contains that inconsistency and I am asked to overlook it. The inconsistency arises from an analysis that has to take account of something that it should not have to take account of – that is, the appellant's use of a fictitious identity.

Public policy

31. However, if and so far as the above is not the plain and ordinary meaning of section 1(1), I nonetheless construe it that way, for two reasons. First, that construction is at least open to me on the words used in section 1(1), for the reasons set out above (if it were not, I am not sure how far public policy could be used entirely to undo section 1(1)). Second, I accept the Secretary of State's submission that section 1 should be construed in a way that does not allow the appellant to benefit from her own wrongdoing.

32. It was argued for the appellant that the scheme for adjudicating entitlement to benefits should be interpreted so far as possible to avoid any conflict between that scheme and the statutory scheme for the granting and withdrawal of immigration and nationality status. It was argued that "there is an important public policy consideration in the benefit authorities continuing to recognise and act on a grant of leave and/or British nationality made by the SSHD upon which entitlement to benefits depends, even when leave to remain and /or British nationality has been obtained by deception". Two points were made in support. First, the appellant cited "the desirability of innocent third parties having a stable and certain immigration status conferred upon them which is not undone unless and until the SSHD issues a further decision on their status which does not undo their previous status" (citing the Court

of Appeal in *Kaziu*). Second, the appellant argued that, "if benefit decision-makers had the freedom to treat a grant of leave or British citizenship by the SSHD as invalid this would create a risk of administrative chaos and generate legal uncertainty and imprecision as to the basis of entitlement".

33. Two points about that submission: First, it follows from what I have said earlier in this decision that (a) the Secretary of State has not failed to recognise and act on the grant of ILR or on the grant of nationality, and (b) she has not treated either of them as invalid. As the Secretary of State says, it misses the point to focus on the validity of the ILR and of the nationality.

34. Second, I accept that reversing a benefits award on the ground that a fictitious identity was used to claim that award visits the appellant's wrongdoing on her in a way that the Supreme Court in *Hysaj* (by consent) declined to do in the immigration context – that is, by reversing the past situation. That does not however persuade me to allow the present appeals, for three reasons—

(1) First, the Supreme Court's judgment that the citizenship could be only prospectively revoked was based partly on the potential for otherwise adverse effects on innocent third parties whose own status derived from the citizenship in question (the Supreme Court in *Hysaj* agreed that *R v SSHD ex parte Ejaz* [1994] QB 496 had been rightly decided[11]). But in asking me not to uphold the reversal of benefits entitlement, the appellant did not cite any dependence of other people's benefits awards on her benefits awards. The appellant cited only the stability and certainty of innocent third parties' "immigration status".

(2) But second, even if the benefits awards of innocent third parties did depend on this appellant's benefits awards, the wide-ranging financial consequences to the public purse of not disturbing those others' awards would need to be weighed against the effect on those innocent parties of having their benefits awards reversed (if those awards were then reversed).

(3) Third, consideration would also need to be given to whether it is right not to deprive this appellant retroactively of benefits entitlement simply because of any dependence of others' awards on that entitlement in circumstances where, had the material facts been known from the outset, the benefits awards in these appeals would not have been made.

A potential third way of looking at it: making a claim "in the manner prescribed" by provisions made under section 1(1)(a) of the Administration Act

35. If my above analyses are wrong, and in any event, section 1 of the Administration Act seems still not to have been satisfied. That is because a potential third way of looking at the case is that the claims were not made "in the manner…prescribed", contrary to section 1(1)(a) of the Administration Act. I have decided not to make a formal finding to that effect, however, as I will explain.

[11] Paragraphs 12, 19 and 20 of the Supreme Court judgment in *Hysaj*. And *Ejaz* [1994] QB 496 at 506D-E and 508C-D.

36. Failure to claim in the manner that has been prescribed under section 1(1)(a) had not been the way in which Ms Leventhal had put the Secretary of State's case; she emphasised that the terms of section 1 of the Administration Act sufficed in her submission, without a need to descend to the matters prescribed under it. But on my enquiry, she submitted that regulation 4(1) of the Social Security (Claims and Payments) Regulations 1987[12] ("the Claims and Payments Regulations") prescribed the manner in which claims for all benefits except income support and a jobseeker's allowance were to be made. She submitted that regulation 4(1A) prescribed the manner in which claims for income support, and claims for a jobseeker's allowance, were to be made.

37. Over time, however, the prescribed ways of making a claim were amended. When the appellant made her first claim – the jobseeker's allowance claim on page 54, signed on 28 February 2002 – regulation 4(1A)(a) of the Claims and Payments Regulations required income support claims, and jobseeker's allowance claims, to be made in writing on a "form approved for the purpose by the Secretary of State". Regulation 4 was later amended to enable income support claims, and jobseeker's allowance claims, to be made by telephone in certain circumstances and unless the Secretary of State directed that the claim be made in writing[13]. Later amendments enabled jobseeker's allowance claims to be made electronically[14], and required them to be made in a form "approved" for that purpose[15]. Employment and support allowance claims could be made in writing or by telephone[16].

38. It seems to me that, whether a person is asked on a paper form, by telephone or online ("electronically") to supply the name and date of birth of the person making the claim and in respect of whom the claim is made, that must be a requirement to supply the real name and real date of birth. But how that emerges might differ according to the way in which the questions were asked, in the various ways in which the claims were made in this case. For example, the first form the claimant completed, dated 28 February 2002, said "You and your partner, if you have one, must fill in all parts of the form that apply to you" (my emphasis). Although it did not say "fill in truthfully", that was implied. Questions asked online appeared, from the printouts in the present case (paragraphs 47 and 48 below), to have asked "Could you tell me your full name?" and "Please could you tell me your date of birth?". Again, they must have been required to be answered truthfully. In the employment and support allowance claim form on the gov.uk website[17] at the time of drafting this decision – "ESA1 08/20" – there is the additional question: "Any other surnames you have been known by". It is not clear whether the form in force when the appellant claimed an employment and support allowance said this or whether, if she claimed by telephone, she was asked that over the telephone. Although I cannot see that

[12] Statutory instrument number 1987/1968.
[13] Amendment of regulation 4(1A), and insertion of new paragraphs (11A) and (11B), from 30 October 2008 (S.I. 2008/2667), and substitution of new paragraph (12) by S.I. 2009/1490 from 13 July 2009.
[14] Regulation 4ZC of, and Schedule 9ZC to, the Claims and Payments Regulations and regulation 3 of, and Schedule 2 to, the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (S.I. 2013/380, as amended).
[15] Paragraph 2(5) of Schedule 9ZC to the Claims and Payments Regulations and paragraph 2(4) of Schedule 2 to the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013.
[16] Regulations 4G and 4H of the Claims and Payments Regulations and (but after the date of the appellant's employment and support allowance claim), regulations 13 and 15 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (S.I. 2013/380, as amended).
[17] https://www.gov.uk/government/publications/employment-and-support-allowance-claim-form.

any differences between the questions, or between the ways in which they were asked, could be material, I received no submissions on that.

39. Moreover, there were provisions for the Secretary of State to tell a person who had purported to make a claim that the claim was "defective". The provisions included steps to be taken aimed at remedying that. Such provisions included, for example, regulation 4(7A) and (7B) of the Claims and Payments Regulations. Both those paragraphs of regulation 4 were in force at the time the appellant signed and submitted the jobseeker's allowance claim form on page 54, dated 28 February 2002. It seems to me highly unlikely that the claims in this case could have been rescued by anything the Secretary of State or appellant could have done when the Secretary of State discovered, several years after the claims were made, that the name and date of birth given in them were for the fictitious AA. But I did not receive argument on that. Moreover, the claims in this case were made in various different ways, potentially attracting different legislative treatments of "defective claims", and I did not receive argument on that either.

40. If a decision is to be made that any claim was not made "in the manner prescribed" for the purposes of section 1(1)(a) of the Administration Act, it is preferable for that decision to be made with the benefit of argument on the point. It may also be preferable that it include an analysis of how each claim failed to satisfy the "manner prescribed" for making that claim. And since I need not make a decision on that point given my view of the requirements on the face of section 1(1), I do not make a decision on the point.

41. A decision on that point may however come to be made on appeal if my reasoning based on section 1(1) (and on subsections (1A) and (1B)) is found to be wrong. I am therefore setting out, for ease of reference, the way in which each claim was made.

The ways in which the claims were made

42. There were four jobseeker's allowance claims, three income support claims, and one employment and support allowance claim. It was common ground that, in all of them, the appellant gave her name, and her date of birth, as those of the fictitious AA.

43. Those claims were made in the following ways.

The claim relating to the first jobseeker's allowance award period: 23/2/02 to 30/7/03

44. In relation to the first jobseeker's allowance award period, the appellant made the claim by completing a paper form in pen on 28 February 2002 and submitting it (page 54 of the CJSA/2368/2017 bundle). Mr Rutledge for the appellant said that this was the first benefits claim she had made. The parties agreed at the hearing that this had been the "form approved" for the purposes of regulation 4(1A)(a) of the Claims and Payments Regulations for claiming a jobseeker's allowance. (The appellant had written on that form the temporary national insurance number that had been allocated to the fictitious AA. Mr Rutledge explained that the crossing-out of that temporary number on page 54, and the annotation of a new number on that

page, had been done by the Department for Work and Pensions once the new number had replaced the temporary number. Nothing turned on that.)

45. There was also a completed claim form dated 17 September 2002 (pages 57 to 60 of the CJSA/2368/2017 bundle). It was completed in pen and appeared to have been completed in the presence of an interviewing officer. Like the other claims in that bundle, the appellant gave in that form the name of the fictitious AA. But no misrepresentation was cited for this and no award decision cited. No point was taken as to there being no reversal of any separate jobseeker's allowance award decision relating to that form.

The claims relating to the second and third jobseeker's allowance award periods: 25/8/14 to 5/9/14 and 17/2/15 to 1/3/15

46. In relation to the second and third jobseeker's allowance award periods, the appellant first gave the information to make her claims by entering it online. The information the appellant had entered online was then printed out and sent to her on paper, for her to sign as being correct and then return.

47. The printout for the claim relating to the second jobseeker's allowance award period said "Please find below details of the information that you gave us online on the 25 August 2014. This is called your statement" (page 61). The appellant signed the printout on 29 August 2014 (page 75) to say that the statement – the printout, as amended by her in manuscript – was correct and complete so far as she knew and believed. She had made no manuscript amendments to the fictitious name and fictitious date of birth (those of the fictitious AA) that she had initially entered online.

48. Similarly, the printout for the claim relating to the third jobseeker's allowance award period said "Please find below details of the information that you gave us online on the 10 February 2015. This is called your statement" (page 78). (The decision maker's submission to the First-tier Tribunal had said that the misrepresentation for that award period was made on 9 February 2015 and not 10 February. But nothing appears to turn on that.) The appellant signed the printout on 16 February 2015 (page 93) to say that the statement – the printout, as amended by her in manuscript – was correct and complete so far as she knew and believed. She had made no manuscript amendments to the fictitious name and fictitious date of birth (those of the fictitious AA) that she had initially entered online.

The claim relating to the first income support award period: 3/9/03 to 24/11/11

49. The papers in the First-tier Tribunal entitlement appeal bundle numbered SC312/16/00943 (CIS/2396/2017) did not contain the completed claim form for the start of the first income support award, which started on 3 September 2003 (when regulation 4(1A) of the Claims and Payments Regulations had not yet been amended to enable telephone claims); the First-tier Tribunal found that that form had been destroyed (paragraph 26 of the statement of reasons, page 249 of that bundle). But it was common ground that a claim form had been completed, in relation to the first of the three income support award periods, and that the form had been completed with the details of the fictitious identity AA.

The claims relating to the second and third income support periods: 25/6/12 to 24/8/14 and 6/9/14 to 12/2/15

50. For the second and third income support award periods, there were printouts at pages 17 to 29 and 30 to 43 of the First-tier Tribunal entitlement appeal bundle numbered SC312/16/00943 (CIS/2396/2017). Those printouts were records of information that the appellant had given over the telephone (and were called on pages 17 and 30 "your statement"). The printouts appeared to show at pages 18 and 31 that the person for whom each telephone claim had been made was required[18], in making that claim, to give the person's full name and date of birth (and national insurance number). The appellant then signed each of the two printouts to say that it was – as amended by her in manuscript – correct and complete so far as she knew and believed (signatures dated 13 July 2012 on page 29 and 10 September 2014 on page 43). The appellant had made no manuscript amendments, in either printout, to the fictitious name and fictitious date of birth (those of the fictitious AA) that she had initially given by telephone.

The employment and support allowance claim

51. There is no evidence before me of whether the employment and support allowance claim form in force when the claimant claimed an employment and support allowance required, as the current one does, "Any other surnames you have been known by". Nor is it clear whether the employment and support allowance claim was made in writing or by telephone. The mandatory reconsideration notice on page 10 of the First-tier Tribunal bundle numbered SC312/16/00939 (CE/2384/2017) said "The original claim documents are not available, however award notices relative to this claim, taken from your home address, confirmed that the claim was made in the name of [AA] with National Insurance number [and it gave the number]". The First-tier Tribunal found that "the form…in relation to the claim for the employment and support allowance made on 25/11/2011 had…been destroyed" (statement of reasons, paragraph 26). The tribunal did not however say whether "the form" had been a claim form completed by the appellant or a record of a telephone claim, the record having been completed by the Department for Work and Pensions and sent to the appellant for approval. At pages 17 and 18 of the First-tier Tribunal bundle numbered SC312/16/00939 (CE/2384/2017) there was what the Department for Work and Pensions called, in the schedule of evidence, an "Extract from ESA Claim input document". The second page of that extract, on page 18, says next to "*Method:" "Teleclaim".

52. Those were the ways in which the claims were made in this case, so far as I could see from what was before me. That information may be needed for any future consideration of whether the claims were made in the "manner prescribed" under section 1(1)(a) of the Administration Act. I return now to my decision as to the effect of the provisions on the face of section 1(1).

Section 1(1) conclusion

53. So, because the requirements on the face of section 1(1) of the Administration Act were not met – and regardless of whether the requirements prescribed under

[18] By the Secretary of State under regulation 4(11A) and (12) of the Claims and Payments Regulations.

section 1(1)(a) were not met – the outcome is that section 1(1) of the Administration Act was not in my judgment satisfied. That in turn means that the appellant was not entitled to a jobseeker's allowance, income support, or an employment and support allowance for the periods covered by these appeals. The Secretary of State was therefore entitled to reverse the awards of those benefits for those periods.

Section 1(1A) and (1B) of the Administration Act: national insurance number

54. But I accept that subsections (1A) and (1B), also cited for the Secretary of State, also disentitle the appellant. Those subsections (along with subsection (1C)) were inserted by section 19 of the Social Security Administration (Fraud) Act 1997. Subsections (1A) and (1B) provided at the relevant times (as they do now)—

> "(1A) No person whose entitlement to any benefit depends on his making a claim shall be entitled to the benefit unless subsection (IB) below is satisfied in relation both to the person making the claim and to any other person in respect of whom he is claiming benefit.
>
> (1B) This subsection is satisfied in relation to a person if—
>
> (a) the claim is accompanied by—
>
> (i) a statement of the person's national insurance number and information or evidence establishing that that number has been allocated to the person; or
>
> (ii) information or evidence enabling the national insurance number that has been allocated to the person to be ascertained; or
>
> (b) the person makes an application for a national insurance number to be allocated to him which is accompanied by information or evidence enabling such a number to be so allocated.".

55. I have underlined the parts that Ms Leventhal underlined for the Secretary of State.

56. Mr Rutledge submitted for the appellant that the national insurance number that she had used for her benefits claims was properly obtained in accordance with regulation 9 of, and paragraph 3(f) of Schedule 1 to, the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001[19] ("the 2001 Regulations"). That paragraph 3(f) specified, as a document that could be supplied in support of an application for the allocation of a national insurance number—

> "(f) an Immigration Status Document issued by the Home Office or the Border and Immigration Agency to the holder with an endorsement indicating that the person named in it is allowed to stay indefinitely in the United Kingdom or has no time limit on their stay in the United Kingdom.".

[19] Statutory instrument number 2001/769, as amended.

57. That Schedule 1, and the reference in regulation 9(1A) to it, were inserted from 29 February 2008[20]. The predecessor requirements[21] in the previous version of regulation 9(1A)[22] were in force from 11 December 2006. But that too was after the date on which the appellant first claimed benefits. I have not however invited submissions as to what was required for applying for a national insurance number at the time when the appellant applied for hers. The submission in relation to the new Schedule 1 to the 2001 Regulations does not avail her. So an equivalent submission based on materially similar predecessor requirements would not avail her. And no submission was made as to different predecessor requirements.

58. Mr Rutledge's point seemed to be that the appellant had properly obtained the national insurance number because the immigration status document that she had submitted in applying for it did indicate, as required by that paragraph 3(f), that the person named in it was allowed to stay indefinitely in the United Kingdom, albeit that the "person named in it" was the fictitious identity AA.

59. The appellant's case was that, in any event, she was the person in reality who had been given the national insurance number that she gave in her claims and that it was therefore her number to give in the claims.

60. I find that subsections (1A) and (1B) of the Administration Act nonetheless disentitle the appellant, for the following reasons.

61. In order to apply subsection (1A) to a particular person, its phrase "no person…shall be entitled…unless" can be converted to "A person…shall not be entitled…unless" (otherwise it would say "no [name]…shall be entitled…unless"). Section 1(1) applies to the benefits, and to the appellant, in this case. So, "no person shall", as converted to "a person shall not", becomes when applied to the appellant "ED shall not". Slotting that into subsection (1A) produces (my emphasis)—

> (1A) ED, whose entitlement to each benefit in this case depends (by virtue of subsection (1)) on her making a claim (for it) shall not be entitled to the benefit unless subsection (1B) below is satisfied in relation both to the person making the claim and to any other person in respect of whom she is claiming benefit.

The national insurance number of "the person making the claim"

62. Taking the first part of the subsection (1A) requirement, that is, that subsection (1B) has to be satisfied in relation to the person making the claim, there are two ways of looking at it—

---

[20] By the Social Security (National Insurance Numbers) Amendment Regulations 2008 (S.I. 2008/223), consequential on the commencement of the Immigration (Restrictions on Employment) Order 2007 (S.I. 2007/3290), which replaced the Immigration (Restrictions on Employment) Order 2004 (S.I. 2004/755, "the 2004 Order").

[21] That the documents required by regulation 9(1A) to accompany an application for a national insurance number included "A passport or other travel document endorsed to show that the holder is exempt from immigration control, has indefinite leave to enter, or remain in, the United Kingdom or has no time limit on his stay" (paragraph 6 of Part 1 of the schedule to the 2004 Order), and "an Immigration Status Document…which indicates that the holder has been granted indefinite leave to…remain" (paragraph 1(b)(v) of Part 2 of the schedule to the 2004 Order).

[22] Inserted by the Social Security (National Insurance Numbers) Amendment Regulations 2006 (S.I. 2006/2897) from 11 December 2006.

(1) "The person making the claims" was ED, since AA did not exist. The claims were required by subsection (1B)(a)(i) to be accompanied by a statement of the national insurance number of the person making the claims (as well as by information or evidence establishing that that number has been allocated to the person). The national insurance number accompanying the claims in this case was the number allocated to the name of the fictitious AA, and not a number allocated to the name of the real person making the claim, ED. (It seems to have been common ground that, for the periods in issue in these appeals, there was no national insurance number allocated to the name of the real person, ED.) That the number was not allocated to the name ED means, in my judgment, that it was not allocated to the real person ED – like the benefits awards, the number was allocated to "a person" who did not exist. So the material fact, of which the Secretary of State was ignorant, was that the claims were not accompanied by a statement of the national insurance number of ED, who was the person making the claims. (Subsection (1B)(a)(ii) could not in the alternative have been satisfied either; there was no information or evidence enabling the number that had been allocated to ED to be ascertained because no number had been allocated to ED in the name of ED. Nor was it suggested that subsection (1B)(b) was satisfied by ED having applied for a national insurance number to be allocated to the name of the real person, ED.)

(2) Another way of looking at it is that the claims were purportedly made by the fictitious AA, and were accompanied by a statement of AA's national insurance number. But subsection (1B)(a)(i) requires the claim to be accompanied by a statement of "the person's" national insurance number. AA did not exist and so was not a person. The national insurance number allocated to AA was not, therefore, "the person's national insurance number". So the material fact, of which the Secretary of State was ignorant, was that the claims were not accompanied by a statement of the national insurance number of a person.

63. Either way, the first part of the subsection (1A) requirement – that subsection (1B) be "satisfied in relation…to the person making the claim" – was not met. That suffices to mean that the entire subsection (1A) requirement was not met, because both parts of the requirement have to be met.

64. If I did have to decide whether the other part of the subsection (1A) requirement was satisfied – that subsection (1B) be "satisfied in relation…to any other person in respect of whom he is claiming benefit" – I would decide that it was not. That part of the subsection (1A) requirement applies only where there are two persons, those being "both" the person making the claim and the person in respect of whom he is claiming benefit. So it would apply only if ED and AA were considered two persons (which would mean the fictitious AA was considered "a person"). But in any event, the plain and ordinary meaning of subsection (1A) is clearly in my judgment that two national insurance numbers must be supplied: one for the person making the claim and one for the person for whom he is claiming. That did not happen in this case. Nor could it have happened; there was only one national insurance number. Whether it is viewed as a failure to provide the number of the

person, ED, making the claim or as a failure to provide the number of AA, "the person" in respect of whom the claim was made (if AA could be said to be a person), the outcome would be the same: the supply of just the one national insurance number did not in my judgment satisfy subsection (1A) of the Administration Act.

Application to exclude the national insurance number arguments

65. It was submitted for the appellant that the respondent's arguments relating to the national insurance number requirements in section 1(1A) and (1B) were new, were added *ex post facto* and did not appear in the First-tier Tribunal's reasons. It was submitted that it was therefore impermissible for the Upper Tribunal to entertain those arguments prior to deciding whether the First-tier Tribunal's decision should be set aside for a material error of law.

66. But the Secretary of State's national insurance number arguments were not new. They were made right at the start, in the decision maker's submissions to the First-tier Tribunal. See paragraph 1 on page 5 and paragraph 3 on page 6 of the CJSA/3268/2017 bundle, paragraph 1 on page 5 and paragraph 3 on page 6 of the First-tier Tribunal bundle in SC312/16/00939 (CE/2384/2017), and paragraph 3 on page 5 and paragraph 4 on page 6 of the First-tier Tribunal bundle in SC312/16/00943 (CIS/2396/2017[23]). I doubt in any event that I would have been persuaded that those arguments could not be made because new, as long as the appellant had had enough time to prepare for them.

Generally

67. The appellant argues that the Secretary of State was obliged to apply the benefits provisions regarding eligibility on the basis that the appellant did have ILR and citizenship. But, as Ms Leventhal submits, that is what has been done; she accepts that the ILR and the citizenship were valid for the purposes of the awards, and the award periods, in question in these appeals. As she points out, however, not being subject to immigration control is not the only pre-condition to benefits entitlement. The decision to revise had nothing to do with the fact that ILR and citizenship had been granted to a false identity; the decision was based on the benefits claims having been made using an identity which did not exist, which in turn meant that the conditions of entitlement in section 1 of the Administration Act were not met. It is argued for the appellant that "the SSWP was obliged to award benefit to the appellant on the same basis as a British citizen" (my emphasis). I disagree. The Secretary of State was obliged, for the reasons at paragraphs 10 to 12 above, to consider whether to award benefit to ED on the basis of the British citizenship (and prior to that, on the basis of the ILR). But merely being a British citizen – or having ILR – does not of itself entitle a person to a benefits award.

Conclusion: entitlement appeals

68. Therefore, had the First-tier Tribunal correctly understood what the material facts were, it would still – if acting properly – have upheld the revision decisions which removed entitlement. The entitlement appeals are therefore dismissed.

[23] No separate Upper Tribunal bundles were made for CE/2384/2017 and CIS/2396/2017, the issues being common to all 10 appeals.

Recoverable overpayments

69. The benefits in question in these 10 appeals are an income-based jobseeker's allowance, income support and an income-related employment and support allowance. It is common ground that those benefits fall within section 71 of the Administration Act. There was a separate First-tier Tribunal decision relating to housing benefit, overpayments of which are not covered by section 71. But there is no appeal before me in respect of that First-tier Tribunal decision (it succeeded before the First-tier Tribunal because there had been no revision of the underlying entitlement decision). It appeared also to be common ground that no part of this case falls within the new automatic recoverability provisions introduced by the Welfare Reform Act 2012.

70. We are therefore dealing only with section 71 of the Administration Act. That section provides, so far as relevant—

> "**71 Overpayments—general**
>
> (1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—
>
> (a) a payment has been made in respect of a benefit to which this section applies; or
>
> (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,
>
> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.
>
> […]
>
> (3) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it.
>
> […]
>
> (5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1)…unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or…revised...".

71. There are broadly three questions in the recoverable overpayment appeals: (1) Was there an overpayment? (2) Is the amount of the overpayment recoverable? (3) From whom is it recoverable? The answers to the first two questions depend on my answer to the question in the entitlement appeals, as I said at paragraph 3 above. The appellant argues however that the answer to the third question is that any recoverable overpayments are not in any event recoverable from her, the real person, ED. I take each of the three questions in turn.

(1) Was there an overpayment?

72. Yes, the awards were reversed and, in view of my above decision in the entitlement appeals, lawfully reversed. So the payment made pursuant to each of those awards was an overpayment.

(2) Is the overpayment recoverable?

73. Yes, the amount of each overpayment is recoverable, for the following reasons.

74. The appellant argues that "the appellant's action of adopting the false identity of [AA] when she applied for ILR, and later citizenship, does not amount to a 'material fact' under social security legislation as it did not have [sic] prevent the appellant from being entitled to the benefits claimed based on that leave or on being a British citizen".

75. I agree with the appellant. The use of the false identity AA to claim asylum, ILR and later citizenship was not the material fact either for the purposes of the revision provisions in section 9 of the Social Security Act 1998 and regulation 3(5)(b) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 or for the purposes of section 71. The overarching material fact – both for the purposes of the revision of entitlement provisions and for the purposes of the section 71 recoverable overpayment provisions – was the use of the fictitious identity to claim welfare benefits, not its use to claim asylum, ILR and citizenship. The specific facts are those at paragraphs 29 and 62 above. Those facts are material for the reasons set out above.

76. Those material facts were misrepresented in the making of the misrepresentation that there was a person called AA who was making the claims. For the reasons set out above in relation to the revision decisions which removed entitlement, it is clear in my judgment that the Secretary of State made payments in consequence of the misrepresentation of those material facts, and that she would not have made those payments but for that misrepresentation. The determinations in pursuance of which the payments were made have all – as required by section 71(5A) – been revised (by being reversed; see the **Annex** to this decision for the revision decisions' file references and periods[24]). The Secretary of State is therefore entitled, under section 71(1) of the Administration Act, to recover the amount of those payments.

(3) From whom is the overpayment recoverable?

77. Each overpayment is recoverable from the appellant, for the following reasons.

78. By virtue of section 71(3), "An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it".

[24] The Upper Tribunal entitlement appeals are CJSA/2368/2017, CE/2384/2017 and CIS/2396/2017. The periods covered by the recoverable overpayment determinations on the other seven Upper Tribunal appeals covered by this Upper Tribunal decision match exactly the periods for which entitlement was removed.

79. It is argued for the appellant that "under s71 the claimant misrepresenting material facts and the person paid benefit must be one and the same. Accordingly the SSWP's approach creates the absurd situation where having said that [AA] "*has never been entitled to benefit, as she does not exist*", the Respondent maintains that the SSWP is entitled to recover money paid to [AA] from [ED]" (emphasis in original[25]). That citation is taken from paragraph 50 of Ms Leventhal's submission for the respondent dated 21 March 2019. That paragraph 50 did not however refer to AA as if she did exist; it included AA's name in inverted commas. The inverted commas were not reproduced in the appellant's citation of that text at paragraph 35(ii) of the appellant's skeleton dated 22 January 2020. Ms Leventhal did not, in other words, say that money had in fact been paid to AA.

80. More importantly, and in any event, money could not have been paid to AA, since AA did not exist. The money was paid to ED.

81. More importantly still, the money is recoverable from the person who made the misrepresentation. I agree with the Secretary of State that the person making the misrepresentation could not be the fictitious AA because the fiction that AA existed <u>was</u>, broadly, the misrepresentation. It was ED who made that misrepresentation. It was ED, therefore, who misrepresented the material facts mentioned at paragraphs 29 and 62 above. And so, by virtue of section 71(3) of the Administration Act, it is from ED – the appellant – that the amounts recoverable under section 71(1) are recoverable.

<u>Conclusion: recoverable overpayment appeals</u>

82. Therefore, had the First-tier Tribunal correctly understood what the material facts were, it would still – if acting properly – have found that there were recoverable overpayments and that they were recoverable from ED.

Conclusion

83. It is for all these reasons that all 10 appeals are dismissed.

<u>The limits of this decision</u>

84. In this case, a wholly fictitious identity was used – that is, name, date of birth and nationality. And it has not been suggested that the circumstances of the real person, ED, behind the fictitious identity were such that those circumstances would have merited the grant of ILR to ED had she applied for asylum in her own, real identity. I am not to be taken as deciding that – in another type of case, where for example a person's circumstances apart from the use of a false name <u>would</u> merit ILR – section 1 of the Administration Act must be construed as I have construed it. The circumstances might be such that the person using a false name (for instance because of a well-founded fear of persecution in her own name for a Refugee Convention reason) might still be said to be one and the same person for the purposes of section 1 of the Administration Act. I do not say that that would be so or

[25] That part of the appellant's skeleton referred me to paragraph 50 on page 277 of the CJSA/2368/2017 bundle for that citation. "Page 277" was a typographical error for "Page 722".

even that it would probably be so. I merely emphasise that I am not deciding that point.

CTC/1902/2017 and CH/1905/2017

85. It was argued for the appellant that two decisions of the Upper Tribunal in respect of another appellant are wrongly decided: the decisions of Upper Tribunal Judge Hemingway in CTC/1902/2017 and CH/1905/2017. I make no finding as to whether those decisions are wrongly decided. And those decisions have not influenced my above decision.

Rachel Perez
Judge of the Upper Tribunal
15 December 2020

Annex to Upper Tribunal decision

Appeal references and periods

Upper Tribunal reference	First-tier Tribunal reference	Relating to which Secretary of State decision	Period for which entitlement reversed	Corresponding UT and FTT overpayment references & overpayment periods
CJSA/2368/2017	SC312/16/00935	Entitlement (revised and reversed)	23/2/02 to 30/7/03 (The start date of the reversal was changed on mandatory reconsideration from 2/4/02 to 23/2/02. SOR, paragraph 1, page 625.)	CJSA/2381/2017 SC312/16/00938 23/2/02 to 30/7/03
			25/8/14 to 5/9/14	CJSA/2373/2017 SC312/16/00936 25/8/14 to 5/9/14
			17/2/15 to 1/3/15	CJSA/2377/2017 SC312/16/00937 17/2/15 to 1/3/15
CE/2384/2017	SC312/16/00939	Entitlement (revised and reverse)	25/11/11 to 21/6/12	CE/2388/2017 SC312/16/00940 25/11/11 to 21/6/12
CIS/2396/2017	SC312/16/00943	Entitlement (revised and reversed)	3/9/03 to 24/11/11	CIS/2397/2017 SC312/16/00944 3/9/03 to 24/11/11
			25/6/12 to 24/8/14	CIS/2395/2017 SC312/16/00942 25/6/12 to 24/8/14
			6/9/14 to 12/2/15	CIS/2390/2017 SC312/16/00941 6/9/14 to 12/2/15