IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2022-001764-ESA
& UA-2022-001765-ESA
[2024] UKUT 131 (AAC)

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

Between:

Secretary of State for Work and Pensions

Appellant

- v -

M.A.

Respondent

Before: Upper Tribunal Judge Wikeley

Hearing date: 18 April 2024
Decision date: 8 May 2024

Representation:

Appellant:	Mr Jack Castle of Counsel, instructed by the Government Legal Department
Respondent:	Mr Joshua Yetman of Counsel, instructed by the Free Representation Unit

DECISION

The decision of the Upper Tribunal is to allow the Secretary of State's appeal. The decisions of the First-tier Tribunal made on 3 May 2022 under file numbers SC242/16/08567 and SC242/16/00329 were made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set those decisions aside and remit the appeals for re-hearing by a fresh tribunal in accordance with the following directions.

DIRECTIONS

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **The new First-tier Tribunal should not involve the tribunal judge previously involved in considering this appeal on 3 May 2022.**

3. **If either party has any further written evidence to put before the tribunal, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.**

4. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The subject matter of this appeal to the Upper Tribunal

1. This Upper Tribunal appeal, in a nutshell, is about whether a claimant who buys and sells stolen bikes on 'an industrial scale' is entitled to income-related employment and support allowance (ESA). More specifically, the questions raised by the appeal are whether, for the purposes of a claim for income-related ESA, (i) the activity of buying and selling stolen bikes counts as 'work'; and (ii) the moneys received from that activity qualify as 'income'.

2. Putting it another way, as did the District Tribunal Judge when giving the Secretary of State permission to appeal to the Upper Tribunal, "these appeals essentially turn on the issue as to whether a person engaged in criminal activity (handling stolen goods) which is fuelled by substance abuse and addiction issues can be said to be self-employed for the purposes of permitted work whilst in receipt of Income Related Employment and Support Allowance."

3. The position of the Department for Work and Pensions (DWP) was that the claimant was still engaged in a trade, albeit an illicit one, and so was to all intents and purposes a self-employed person. Furthermore, the DWP argued, the cash payments he received qualified as 'income' under the ESA regime. In short, however, the First-tier Tribunal (FTT) found that the claimant's criminal activity did not amount to 'work' and neither did his cash receipts count as 'income' under the relevant regulations.

The parties to this appeal

4. The Secretary of State appeals against the FTT's decision and so is now the Appellant in the current appeal before the Upper Tribunal while the claimant is the Respondent. To avoid any confusion occasioned by their reversal of roles in these proceedings, I refer to them in this decision as the Secretary of State (or the DWP) and the claimant respectively.

The oral hearing of the Upper Tribunal appeal

5. I held an oral hearing of this appeal on 18 April 2024. The Secretary of State was represented by Mr Jack Castle of Counsel, instructed by the Government Legal Department. The claimant was represented *pro bono* by Mr Joshua Yetman instructed by the Free Representation Unit (FRU). I am indebted to both counsel for their written and oral submissions and am especially grateful to Mr Yetman and FRU for the advice, representation and general support they have provided to the claimant throughout these Upper Tribunal proceedings.

A summary of the factual background

6. The claimant was addicted to drugs and alcohol and also suffered from long-term depression. Although initially claiming jobseeker's allowance, in early 2014 a DWP official referred him for an ESA assessment as he was attending his Job Centre in an intoxicated state. The claimant subsequently attended a treatment centre for his addiction and was placed in supported housing. Later in 2014 he suffered a relapse and began to fund his addictions, including cocaine use, by knowingly handling and selling on stolen bicycles as part of a criminal conspiracy. The claimant was arrested in a London market in possession of stolen bikes. Subsequently, a DWP fraud investigator noted that in the period of just over a year between 1 October 2014 and 29 November 2015 the claimant

had deposited £29,911.78 in cash into his bank accounts. At that time his only known sources of income were social security benefits in the order of £6,500 a year. In October 2016 the claimant was sentenced to four years' imprisonment for offences related to the bicycle handling conspiracy, of which he served just over two years. Separately the DWP instigated criminal charges for benefit fraud, but it later discontinued those proceedings.

The Secretary of State's decisions

7. The Secretary of State's decision-makers made an entitlement decision and an overpayment decision in respect of the claimant's award of ESA. The entitlement decision was made under what became the FTT case reference SC242/16/08567 (UT reference UA-2022-001764-ESA) and the overpayment decision under FTT case reference SC242/16/09329 (UT reference UA-2022-001765-ESA).

8. The entitlement decision, taken on 8 April 2016, was that the claimant had no entitlement to income-related ESA for the period from 1 October 2014 to 5 April 2016. This was on the basis that he was working throughout this period in work which had not been declared to the DWP and which was above the permitted work limit.

9. The overpayment decision, taken a few days later on 19 April 2016, was that the claimant was liable to repay the consequential overpayment for the period of that entitlement decision, amounting to some £9,842.50.

10. The claimant appealed to the FTT against both decisions. In his notice of appeal he stated that "the DWP have failed to provide any evidence of self-employed work. The DWP has referred to me as a market trader, this is incorrect and untrue."

The First-tier Tribunal's decision

11. The FTT allowed both appeals following a hearing on 3 May 2022. The essence of its decision was captured in its summary Decision Notice for the entitlement appeal, the material parts of which read as follows:

> 3. … The Tribunal has however decided that during this period [the claimant] was not "working" in any accepted sense of the word. He had been claiming ESA since 2013 upon the basis that he had addiction and mental health issues during this period. As such he remains entitled to IRESA during this period and therefore there is no overpayment.
>
> 4. Having considered all the available evidence and applied the law the Tribunal finds that [the claimant] during this period engaged in criminal activity. He fully accepts he was handling stolen goods during this time and was sentenced to over 4 years in prison in October 2016 for which he served just two years. Since his release he has been receiving UC upon the basis of his continuing incapacity.
>
> 5. The issue the Tribunal had to consider however was whether criminal activity might still be considered as work for benefit purposes. [The claimant] was illegally buying and then selling stolen bikes. He knew they were stolen and accepted as much in his oral evidence today. He explained however that whilst he sometimes made over a £1,000 weekly, all his money was then spent on funding his drug and alcohol addiction.

> During this period he was in supported accommodation with a support worker and was a vulnerable person. The Tribunal decided this was not "work" and whilst all "income" is considered for means tested benefit purposes, the Tribunal concluded this was not "income" in the normal sense of the word, rather it was criminal activity for which he has served time in prison.

12. In summary, therefore, the FTT decided that the claimant's admitted activities in buying and selling stolen bikes were not 'work' for the purposes of income-related ESA and as such the receipts did not count as 'income'. That being so, the FTT held that the claimant was not above the 'permitted work' limit but rather had no 'income', such that his appeals against the Secretary of State's entitlement decision and the consequential overpayment decision were both allowed.

The Secretary of State's grounds of appeal in the Upper Tribunal

13. The Secretary of State advances two grounds of appeal before the Upper Tribunal.

14. The first ground of appeal is that the FTT erred in law in its interpretation of the term 'work' in regulation 40 of the Employment and Support Allowance Regulations 2008 (SI 2008/794; 'the ESA Regulations 2008'), such that the claimant was engaged in 'work' at the relevant time.

15. The second ground of appeal is that the FTT erred in law in its approach to the definition of 'income' for the purposes of the ESA Regulations 2008, such that sums received in the course of his buying and selling stolen bikes should be counted in the means-test applied for the purposes of ESA.

Some preliminary definitional issues

16. Before turning to consider the grounds of appeal in more detail it is relevant to note a number of definitions which crop up in the context of exploring one or both of those grounds.

17. Regulation 2(1) of the ESA Regulations 2008 defines 'employed earner' and 'self-employed earner' by reference to section 2(1)(a) and (b) respectively of the Social Security Contributions and Benefits Act (SSCBA) 1992:

> (a) "employed earner" means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with ... earnings; and
>
> (b) "self-employed earner" means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment).

18. In this context it should be noted that section 3(1)(a) of the SSCBA 1992 provides that 'earnings' includes "any remuneration or profit derived from an employment" while section 3(1)(b) provides that 'earner' "shall be construed accordingly".

19. Finally as regards these preliminary definitional terms, and notably, regulation 2(1) of the ESA Regulations 2008 also defines 'employment' in expansive terms, and certainly in far broader terms than salaried employment:

> "employment" includes any trade, business, profession, office or vocation and "employed" has a corresponding meaning.

Ground 1: the 'work' issue

The legislative framework for Ground 1

20. The first of the so-called basic conditions for entitlement to ESA is that the claimant "has limited capability for work" (Welfare Reform Act (WRA) 2007, section 1(3)(a)). Although the primary legislation defines what is meant by "limited capability for work" (see WRA 2007, ss.1(4) and 24(1)), it does not define the term 'work' itself. However, section 22 of the WRA 2007 introduces various enabling powers, one of which provides that "Regulations may prescribe circumstances in which a person is to be treated as not entitled to an employment and support allowance because of his doing work" (Schedule 2, paragraph 10).

21. To that end, the heading to regulation 40 of the ESA Regulations 2008 declares that "A claimant who works to be treated as not entitled to an employment and support allowance". Regulation 40(1) lays down the general rule while regulation 40(2) (as amended) provides for various exceptions to that overarching principle:

> **40.**—(1) Subject to the following paragraphs, a claimant is to be treated as not entitled to an employment and support allowance in any week in which that claimant does work.
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> (2) Paragraph (1) does not apply to—
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> (a) work as a councillor;
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> (b) duties undertaken on either one full day or two half-days a week as—
>
> (i) …
>
> (ii) a member of the First-tier Tribunal where the member is eligible for appointment to be such a member in accordance with article 2(3) of the Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008.
>
> (c) domestic tasks carried out in the claimant's own home or the care of a relative;
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> (d) duties undertaken in caring for another person who is accommodated with the claimant by virtue of arrangements made under any of the provisions referred to in paragraphs 28, 29 or 29A of Schedule 8 (sums to be disregarded in the calculation of income other than earnings) or where the claimant is in receipt of any payment specified in those paragraphs;
>
> (da) duties undertaken in caring for another person who is provided with continuing care by a local authority by virtue of arrangements

made under section 26A of the Children (Scotland) Act 1995 and is in receipt of a payment made under that section of that Act;

(e) any activity the claimant undertakes during an emergency to protect another person or to prevent serious damage to property or livestock; or

(f) any of the categories of work set out in regulation 45 (exempt work).

22. Furthermore, it should be noted that regulation 40(7) provides that 'work' means "any work which a claimant does, whether or not that claimant undertakes it in expectation of payment."

23. The general principle in regulation 40(1) is reinforced by regulation 44(1), which relevantly provides that ''Where a claimant is treated as not entitled to an employment and support allowance by reason of regulation 40(1) … the claimant is to be treated as not having limited capability for work."

24. As well as referring to 'work', the ESA regime also deploys the concept of 'remunerative work'. Thus, in order to qualify for income-related ESA, a claimant must meet the financial conditions as well as the basic conditions of entitlement. One of those financial conditions is that the claimant "is not engaged in remunerative work" (WRA 2007, Schedule 1, paragraph 6(1)(e)). This concept is further defined by regulation 41 of the ESA Regulations 2008:

> **Meaning of "remunerative work" for the purposes of paragraph 6(1)(e) of Schedule 1 to the Act**
>
> **41.**—(1) For the purposes of paragraph 6(1)(e) of Schedule 1 to the Act (conditions of entitlement to an income-related allowance), "remunerative work" means any work which a claimant does for which payment is made or which is done in expectation of payment, other than work listed in paragraph (2) of regulation 40.
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> (2) Subject to paragraph (3), a claimant who was, or who was being treated as—
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> (a) engaged in remunerative work; and
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> (b) in respect of that work earnings to which regulation 95(1)(b) and (d) applies are paid,
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> is to be treated as being engaged in remunerative work for the period for which those earnings are taken into account in accordance with Part 10 of these Regulations.
>
> (3) Paragraph (2) does not apply to earnings disregarded under paragraph 1 of Schedule 7 (sums to be disregarded in the calculation of earnings).

25. I now turn to summarise the parties' submissions on Ground 1.

<u>The parties' submissions on Ground 1</u>

26. Mr Castle, for the Secretary of State, made three introductory points. The first was that on any ordinary reading the activity of selling bikes in a market amounted to 'work'. For example, the claimant could have a pitch next door to someone buying and selling legitimately-acquired bikes in the same market.

That neighbouring stall-holder would be excluded from entitlement to ESA because he was in 'work'. Why then, asked Mr Castle, should criminality entitle the claimant to ESA? The illegality of the claimant's trade was irrelevant, as the statutory scheme included illegal 'work'. Mr Castle's second point (in truth a variant on his first) was that, as he put it in his oral submissions, "work was work and income was income and too much of either meant an individual lost the right to ESA" – the scheme applied equally and alike to both law-abiding and criminal claimants. Third, there is "a general and fundamental principle of public policy that a person should not be entitled to take advantage of his own criminal acts to create rights to which a Court should then give effect" (*Best v Chief Land Registrar* [2014] EWHC 1370 (Admin) at [44] per Ouseley J). This principle of public policy could yield to competing public policy interests, but none such arose in the present context.

27. Turning specifically to Ground 1, Mr Castle advanced three principal submissions. First, as regards the overriding statutory purpose, ESA "is primarily provided for those who cannot work or who are on the borderlines due to some disability or past episode in their lives" (*Alhashem v Secretary of State for Work and Pensions* [2016] EWCA Civ 395 at [42]). Accordingly, claimants qualify if they cannot work and so they lose entitlement if they are either assessed as being fit for work (or rather as not having limited capability for work) or actually working (see regulation 40). Work is in effect a proxy for ability to participate in the labour market and the legality (or otherwise) of selling bikes is irrelevant to making that determination. Secondly, Mr Castle stressed the wide legislative definition of 'employment' so as to include a 'trade', and it was perfectly possible to have an illegal trade. The Secretary of State was not normalising illegality but rather refusing to make an exception for a criminal trade. Thirdly, and lastly, Mr Castle relied on the revenue case law and in particular *Inland Revenue Commissioners v Aken* [1988] STC 69, where it was held that a trade did not cease to be a trade simply because it was unlawful.

28. Mr Yetman, for the claimant, argued that the FTT had correctly interpreted 'work' and 'income' so as to exclude criminal activity and made five main points by way of response. First, he contended there was no absolute principle of law that disentitled a criminal claimant from qualifying for ESA. Moreover, *Best v Chief Land Registrar* [2014] EWHC 1370 (Admin) was on all fours with the present case and so supported the claimant's submissions. Second, Mr Yetman submitted that the FTT's findings of fact were unassailable and its interpretation was entirely consistent with the statutory purpose of the ESA scheme. Third, the FTT's reading was consistent with the meaning of relevant terms in the SSCBA 1992 and WRA 2007 as well as the ESA Regulations 2008. Whether applying a literal meaning or a purposive approach, the statutory terminology was all aligned with work being carried out in a lawful workplace. Fourth, Mr Yetman argued that the Secretary of State's reading cut across the common law principle of illegality, in that treating legal and illegal conduct as equivalent would in effect fasten contractual duties and obligations on illegal agreements (cf *Okedina v Chikale* [2019] EWCA Civ 1393; [2019] ICR 1635 at [12]). Finally, *Inland Revenue Commissioners v Aken* [1988] STC 69 was decided under the Taxes Management Act 1970, a wholly separate legislative regime. The FTT's approach, he argued, was consistent with the Court of Appeal's decisions in *Hakki v Secretary of State for Work and Pensions* [2014] EWCA Civ 530 and

French v Secretary of State for Work and Pensions [2018] EWCA Civ 470, where it had been held that 'professional' gamblers were not engaged in a trade for the purpose of being assessed on their earnings as a self-employed earner in the context of the child maintenance scheme.

Discussion of Ground 1

29. Was the claimant 'doing work' for the purposes of regulation 40(1) of the ESA Regulations 2008 (and so to be treated as not being entitled to ESA) when he was buying and selling bikes? Put simply like that – and that is the way the question is posed by regulation 40 – then it admits of only one answer: yes, he was. 'Work' is an ordinary word of the English language and whether a person 'does work' is ultimately a question of fact and degree. So a claimant who sells a single tricycle that their child has outgrown in a one-off garage sale is not engaged in 'work' in any meaningful sense. But a claimant who has a turn-over in the order of £30,000 a year in buying and selling stolen bikes at markets is doing 'work' just as much as the proprietor of a legitimate second-hand bike shop 'does work', albeit the latter may well generate much less of a profit. Taken together, the various activities involved in sourcing bikes, negotiating prices for purchases and sales, carrying out any necessary repairs and dealing with customers all constitute 'work'. Those activities are essentially the same irrespective of whether the bikes in question are stolen or lawfully acquired. I therefore agree with Mr Castle, subject to one necessary proviso, that 'work' must be given a meaning that includes both legal and illegal activity for the purposes of the ESA scheme. The proviso is that the activity in question must still be capable of being characterised as a form of 'work'. So, for example, a pickpocket is not doing 'work' (although in principle their illicit takings would presumably count for the purposes of the ESA means test as income other than earnings).

30. The interpretation of 'work' as including illegal activity is supported by the way the term is used and defined in the ESA scheme. Thus, the deeming rule in regulation 40(1) – that "a claimant is to be treated as not entitled to an employment and support allowance in any week in which that claimant does work" – is made subject to regulation 40(2). This paragraph lists various activities which do not count as 'work' for the purposes of regulation 40(1), such as work as a councillor (regulation 40(2)(a)). However, there is no exclusion in regulation 40(2) for work that involves criminal activity. More significantly still, 'work' itself is defined by regulation 40(7) as meaning (emphasis added) "<u>any</u> work which a claimant does, whether or not that claimant undertakes it in expectation of payment". There is, accordingly, no suggestion in the legislation that the term 'work' necessarily excludes any work that involves criminal activity. On the contrary, all the indications are that 'work' carries a broad meaning.

31. The broad meaning attributed to 'work' is likewise reflected in the expansive definition of 'employment' within the ESA scheme as meaning "any trade, business, profession, office or vocation". In particular, a self-employed earner is someone who is gainfully 'employed' other than under a contract of service (and so the term 'employed' is not a synonym for 'salaried': see paragraph 19 above). Furthermore, a self-employed earner's earnings include "any remuneration or profit derived from an employment". It follows that income consisting of any profit or remuneration from any trade, business, profession,

office or vocation made otherwise than under a contract of service is to be counted as part of a self-employed earner's income for the purposes of the ESA means test. That being so, it would make no sense for 'work' to constitute a narrower category of activity than income-generating 'employment'. On the contrary, and given the respective statutory definitions, 'work' must be at least as broad a category of endeavour as 'employment'.

32. In this context it is also relevant that the revenue case law shows that the concept of a 'trade' is not limited to legitimate activities. Notably, the High Court in *Inland Revenue Commissioners v Aken* [1988] STC 69 was tasked with considering whether profits from prostitution – which may be immoral but is not itself illegal – were subject to income tax. Piers Ashworth QC, sitting as a Deputy Judge of the High Court, ruled (albeit strictly *obiter*) as follows (in a passage which was not questioned, and was by implication approved, in the Court of Appeal's decision in the same case: [1990] 1 WLR 1374):

> various courts have repeatedly rejected the argument that a trade ceases to be a trade for the purposes of the Taxes Acts because it is illegal. The reason why they have said that profits of burglary are not taxable is not because burglary is illegal but because burglary is not a trade. Conversely, if the activity is a trade, it is irrelevant for taxation purposes that it is illegal. Further, I am sure that in common parlance an activity does not cease to be called a trade just because it is illegal. For example, the slave trade continued to be referred to as such long after it became illegal. Similarly, in 1939 the Trading with the Enemy Act made it illegal to trade with the enemy; it did not provide that trade should cease to be regarded as trade because it was made illegal. I do not think that the word 'trade' in itself has any connotation of lawfulness. There may be lawful trade; there may be unlawful trade. But it is still trade.

33. Mr Yetman sought, in his fifth and final submission, to distinguish *Aken* on the basis that it concerns the application of the Taxes Management Act 1970, a wholly separate statutory regime underpinned by very different policy considerations. The difficulty with that submission lies in the Court of Appeal decisions in *Hakki v Secretary of State for Work and Pensions* [2014] EWCA Civ 530 and *French v Secretary of State for Work and Pensions* [2018] EWCA Civ 470. In both cases the Court of Appeal in effect ruled that the revenue law jurisprudence on what constituted a trade was equally applicable to assessing liability under the child maintenance scheme. Thus, in *Hakki* the Court defined the question before it as ‘"whether Mr Hakki had sufficient organisation in relation to his poker playing to constitute a trade in the sense that the word is used in the tax cases" (at [19]). The Court was even more explicit in *French*: "For the purposes of a child support maintenance assessment, the scope of self-employed earnings is the same as it is for the assessment of welfare benefits and income tax" (at [20(i)]). It follows that there is no satisfactory answer to the proposition that the claimant in the present case was engaged in a trade, albeit one tainted by illegality.

34. The other four overarching submissions advanced by Mr Yetman in support of the FTT's decision fare no better, notwithstanding the combination of both the elegance and vigour with which they were put forward.

35. The first was that there was no absolute principle of law that disentitled a criminal claimant from qualifying for ESA and that *Best v Chief Land Registrar* [2014] EWHC 1370 (Admin) and [2015] EWCA Civ 17 was on all fours with the present case. In *Best* the Court of Appeal held that an illegal squatter (thereby committing a criminal offence under the Legal Aid, Sentencing and Punishment of Offenders Act 2012) could nonetheless claim title to a residential property based on adverse possession (under the Land Registration Act 2002). I do not consider the two situations (the illegal squatter and the stolen bike handler) are properly analogous, not least as there was a clear competing public interest in play in *Best*, namely the underlying purpose of the law of adverse possession. In the instant case there is no such competing public interest such as to bypass the 'work' and 'income' requirements of the ESA scheme.

36. The second submission was that the FTT's findings of fact were unassailable and its interpretation of the legislation was entirely consistent with the statutory purpose of the ESA scheme. I take those points in reverse order. The FTT's approach was inconsistent with the purpose of ESA for the reasons identified both above and further below in relation to Ground 2. The FTT's fact-finding was also deficient. There is, for example, an inherent contradiction between the finding that the claimant " was not selling the 'odd' stolen bicycle, but rather had some £30K passing between his accounts between October 2014 to October 2015" (statement of reasons at [11]) and the conclusion that "he was not fit to do anything other than to feed his addiction, He was not fit to work" (statement of reasons at [13]). As Mr Castle argued, the claimant may well have been mired in a cycle of addiction but what he did to feed that addiction was 'work'. The FTT misdirected itself by focussing exclusively on the claimant's impairment when considering whether what he was doing was 'doing work'.

37. Third, the FTT's reading was said to be consistent with the meaning of the relevant terminology in the SSCBA 1992 and WRA 2007, as well as in the ESA Regulations 2008, which all aligned 'work' with work being carried out in a lawful workplace. I reject this submission essentially for the reasons set out above. It was not for the Secretary of State to show that illegal work was included within the scope of the statutory definition of 'work'. Rather, it was for the claimant to demonstrate that illegal work was necessarily excluded from its scope. However, Mr Yetman's arguments necessarily involved putting a gloss on the statutory language to avoid what Mr Castle accurately characterised as "the brick wall of the deeming provisions".

38. Mr Yetman's fourth submission was that the Secretary of State's reading cut across the common law principle of illegality and involved fastening contractual duties and obligations on illegal agreements. Both counsel advanced erudite albeit competing submissions on the nature and effect of the common law principle involved in the enforcement of illegal contracts. However, I need not rehearse those submissions here for the simple reason that the Secretary of State's decisions that the claimant was in 'work' and generating a considerable 'income' has no wider repercussions as to the enforceability of the contracts involved.

39. For all those reasons I conclude that the Secretary of State has made good Ground 1.

Ground 2: the 'income' issue

The legislative framework for Ground 2

40. Part 10 of the ESA Regulations 2008 provides for the treatment of income and capital in a series of Chapters. So far as income is concerned, the relevant parts appear to be Chapter 2 ('Income', in regulations 90-94), Chapter 4 ('Self-employed Earners', in regulations 97-99) and Chapter 6 ('Other Income', in regulations 104-109).

41. Regulation 90 deals with the calculation of income and materially provides as follows:

> **Calculation of income**
>
> **90.**—(1) For the purposes of paragraph 6(1) of Schedule 1 to the Act (conditions of entitlement to an income-related allowance), the income of a claimant is to be calculated on a weekly basis—
>
> (a) by determining in accordance with this Part, other than Chapter 7, the weekly amount of the claimant's income; and
>
> (b) by adding to that amount the weekly income calculated under regulation 118 (calculation of tariff income from capital).
>
> …
>
> (3) For the purposes of paragraph 10 of Schedule 2 to the Act (effect of work), the income which consists of earnings of a claimant is to be calculated on a weekly basis by determining the weekly amount of those earnings in accordance with regulations 91(2), 92 to 99 and 108(3) and (4) and Schedule 7.

42. The general principles governing the attribution of income to particular periods of time is governed by regulation 91, which provides in part:

> **Calculation of earnings derived from employed earner's employment and income other than earnings**
>
> **91.**—(1) Earnings derived from employment as an employed earner and income which does not consist of earnings are to be taken into account over a period determined in accordance with the following provisions of this regulation and at a weekly amount determined in accordance with regulation 94 (calculation of weekly amount of income).

43. The particular position of self-employed earners is dealt with by regulation 92. Subject to an exception which does not apply on the facts of this case (and which relates to payments of royalties), regulation 92(1) provides for an annual assessment to be the default position:

> … where a claimant's income consists of earnings from employment as a self-employed earner the weekly amount of the claimant's earnings is to be determined by reference to the claimant's average weekly earnings from that employment—
>
> (a) over a period of one year; or
>
> (b) where the claimant has recently become engaged in that employment or there has been a change which is likely to affect the normal pattern of business, over such other period as may, in any

> particular case, enable the weekly amount of the claimant's earnings to be determined more accurately.

44. The earnings of self-employed earners are then defined (again, subject to various exceptions which do not apply here) by regulation 97(1) as follows:

> …"earnings", in the case of employment as a self-employed earner, means the gross receipts of the employment and include any allowance paid under section 2 of the Employment and Training Act 1973 or section 2 of the Enterprise and New Towns (Scotland) Act 1990 to the claimant for the purpose of assisting the claimant in carrying on the claimant's business.

45. Regulation 98 deals with the calculation of net profit for self-employed earners while regulation 99 concerns the deduction of tax and national insurance contributions for self-employed earners.

46. Finally, for present purposes, regulation 104 deals with the calculation of income other than earnings and provides in relevant part as follows:

> **104.**—(1) For the purposes of regulation 91 (calculation of earnings derived from employed earner's employment and income other than earnings) ... the income of a claimant which does not consist of earnings to be taken into account will, subject to paragraphs (2) to (7), be the claimant's gross income and any capital treated as income under regulation 105 (capital treated as income).
>
> (2) There is to be disregarded from the calculation of a claimant's gross income under paragraph (1), any sum, where applicable, specified in Schedule 8.

47. There is no disregard in Schedule 8 for monies received as a result of criminal activity.

<u>The parties' submissions on Ground 2</u>

48. Mr Castle, for the Secretary of State, submitted that the FTT had erred in holding that 'income' only referred to legitimately obtained monies. There was, he argued, nothing to suggest that the ESA Regulations 2008 presupposed a lawful source for any 'income'. The purpose of the means-test in the ESA regime was to ensure that only those persons whose incomes were below the relevant threshold received State support. In that context it would be absurd if a claimant's reliance on the cash proceeds of crime in effect exempted them from the operation of the ESA means-test. Accordingly, just as the term 'work' carried no stipulation that it was confined to lawful work, so the meaning of 'income' was subject to no stipulation that it referred solely to moneys that had been legitimately obtained.

49. Mr Yetman, for the claimant, submitted that just as 'work' meant lawful work, so also 'income' necessarily referred only to legally acquired income. It was impermissible to submit that legislative silence as to the distinction meant that criminally acquired income was included under the ESA Regulations 2008. The purpose of ESA was to facilitate the reintegration of disabled workers into legal participation in the workplace. It was inconsistent with that policy objective to apply the ESA regime in such a way as to exclude a vulnerable claimant with disabilities who happened to have a criminal record.

Discussion of Ground 2

50. Mr Yetman made a number of submissions as to both the narrower issue of the construction of the ESA Regulations 2008 and the wider context of the policy goals of the overall ESA scheme. As to the former, there is no warrant for reading in a qualification that 'income' means 'income acquired from legitimate sources'. As to the latter, those submissions on behalf of the claimant did not address the elephant in the room, being the purpose of the means-test under the ESA regime. At its simplest, the means-test is designed to ensure that only those individuals with income and/or capital below certain set limits receive assistance from the State. None of Mr Yetman's submissions dealt satisfactorily with what Mr Castle described as "the unanswerable question", namely why a claimant engaged in criminality should in effect be exempt from the means-test and so entitled to benefit when a person undertaking precisely the same activity but in a lawful fashion should be excluded from benefit.

51. In this context it is also relevant to go back to two fundamental principles about the assessment of an individual's resources for the purposes of the legacy means-tested benefit schemes (including ESA). The first such principle is that money resources are subject to a binary classification as being either capital or income – thus, there is nothing in between and so no 'third way' (see Social Security Commissioner decisions *R(IS) 3/93* at paragraph 20 and *R(IS) 9/08* at paragraph 23). The second such principle is that the category of unearned income in the ESA scheme (and in the schemes for the other means-tested legacy benefits) encompasses all forms of a person's income which do not count as the income of an employed or self-employed earner. This all-embracing inclusionary approach stands in stark contrast to the newer state pension credit (SPC) and universal credit (UC) regimes, which specify what types of income are to be included as unearned income (see sections 15 and 16 of the State Pension Credit Act 2002 and regulations 15, 16 and 18 of the State Pension Credit Regulations 2002 (SI 2002/1792) as well as regulation 66 of the Universal Credit Regulations 2013 (SI 2013/376)). It follows that if a type of income is not listed as included within the ambit of either scheme then it is ignored and does not affect entitlement to either SPC or UC. For ESA, however, as for the other legacy benefits, all forms of income count in the application of the means-test, unless they are subject to a specific statutory disregard.

52. In the present case there are therefore arguably two alternative ways in which the DWP could take into account the claimant's cash receipts for selling stolen bikes as income for the purpose of the ESA means-test.

53. The first way is as the earnings of a self-employed earner. Regulation 92(1) provides for an assessment "where a claimant's income consists of earnings from employment as a self-employed earner". As to whether the claimant in this case was a 'self-employed earner' the same considerations apply as in the discussion above relating to 'work'. 'Earnings' here "means the gross receipts of the employment" [as a self-employed earner] – see regulation 97(1). As noted above, regulation 98 then deals with the calculation of net profit for self-employed earners while regulation 99 concerns the deduction (where paid) of tax and national insurance contributions for self-employed earners. But as Mr Castle submitted, in principle at least this is not a complex calculation in the claimant's case – on one side of the equation sat the gross receipts from sales

of stolen bikes, while on the other side was the cost of acquiring such unlawfully-sourced bikes. Deducting the latter amount from the former sum provided a figure for the net profit generated by this criminal trade. I acknowledge such a calculation may undoubtedly prove evidentially challenging to undertake, but the principle is clear enough.

54. The second way, if there is some reason as to why assessment as a self-employed earner is inappropriate, is by way of an assessment of 'income other than earnings.' As Mr Castle submitted, regulation 91(1) distinguishes between "earnings derived from employment as an employed earner" and "income which does not consist of earnings". Given other statutory definitions, the latter category can be reformulated as "income which does not consist of any remuneration or profit derived from any trade, business, profession, office or vocation". There is no express or implied limitation on such a broad category. The question ultimately is whether the cash receipts in issue have the quality of being income as opposed to being capital – and, as noted above, they must logically be either one or the other. Regulation 104(1) then provides that "the income of a claimant which does not consist of earnings to be taken into account will … be the claimant's gross income", subject to any applicable disregards in Schedule 8 (not that any would appear to be relevant).

55. I simply interpose here that (in theory at least) it might potentially be to the claimant's advantage for his receipts to be regarded as earnings from self-employment rather than as income other than earnings. This is because earnings from self-employment are based on net profits (see regulations 92 and 98) whereas the assessment of income other than earnings is premised on gross income subject to any applicable disregards (see regulation 104 and Schedule 8). However, this may be a distinction without a difference if the principle in *Parsons v Hogg* [1985] 2 All ER 897, reported as an appendix to *R(FIS) 4/85*, applies in this context (namely that expenditure necessary to produce income is to be deducted to produce a figure for gross income).

56. Ground 2 of the Secretary of State's appeal accordingly succeeds.

Disposal

57. The First-tier Tribunal's decision involves an error of law (or rather two errors of law) and must be set aside (Tribunals, Courts and Enforcement Act (TCEA) 2007, section 12(2)(a)).The case must be remitted to a differently-constituted First-tier Tribunal for re-hearing (TCEA 2007, section 12(2)(b)(i)), given that entitlement to ESA must be assessed on a week-by-week basis. This means the new tribunal will have to do its best on the available evidence to assess whether the claimant was working and/or receiving income on a weekly basis over the relevant period.

Conclusion

58. The Secretary of State's two appeals to the Upper Tribunal, in relation to the First-tier Tribunal's entitlement and overpayment decisions respectively, are allowed on both grounds.

Nicholas Wikeley

Judge of the Upper Tribunal

Authorised for issue on 8 May 2024