A

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CDLA/3361/2012

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Name:	[redacted]
Tribunal:	First-tier Tribunal (Social Security and Child Support)
Tribunal Case No:	sc227/11/03213
Tribunal Venue:	Middlesbrough
Hearing Date:	16 July 2012

CASE MANAGEMENT DIRECTIONS

1. The appointee has applied for permission to appeal from the decision of the tribunal, held on 16 July 2012, which dismissed an appeal from a decision that her son had no entitlement to disability living allowance.

2. Permission to appeal lies only on a point of law and may be given if there is a realistic prospect of success or if there is some other good reason to do so.

3. The Secretary of State's representative should, within one month of the date of issue of this direction, provide a submission addressing the merits of the application. The appointee will, in due course, be given an opportunity to respond.

(Signed)

S J Pacey
Judge of the Upper Tribunal

(Dated) **6 November 2012**

B

SECRETARY OF STATE'S SUBMISSION TO THE UPPER TRIBUNAL (ADMINISTRATIVE APPEAL CHAMBER)

Name of appellant:	[redacted]	**Name of respondent:**	Secretary of State
Upper Tribunal Office ref:	CDLA 3361/12	**Name of mother/appointee**	[redacted]
NI number:	SJ592202C	**DMA Leeds ref:**	142952
First-tier Tribunal:	Middlesborough	**Date of decision:**	16th July 2012
Benefit:	DLA	**Type of case:**	Conditions of entitlement

APPLICATION BY THE CLAIMANT FOR PERMISSION TO APPEAL

I support this application for permission to appeal. If the Judge of the Upper Tribunal grants permission to appeal, I request that this submission be accepted as the Secretary of State's submission on the appeal and I agree to the appeal being decided at the same time as the claimant's application.

The decision

This application for permission to appeal by the claimant is against the decision of First-tier Tribunal shown in the decision notice and statement of material facts and reasons [pages 110 and 112 - 115].

If the Judge accepts my submission that the First-tier Tribunal have erred in law, I invite him to set aside their decision and remit the appeal for rehearing by a differently constituted First-tier Tribunal, with appropriate directions for its determination.

If the Judge considers it to be appropriate I consent to a decision without reasons as provided by rule 40(3)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Background

The issue before the First-tier Tribunal was whether the claimant satisfied the conditions of entitlement to DLA. The history of the case is in the decision-maker's submission to the First-tier Tribunal [pages 1 - 1H]. For the purposes of this submission I adopt that history.

Grounds of appeal

The claimant's grounds of appeal [page 125] are essentially that the Tribunal weighed the evidence incorrectly and made an error of law.

Secretary of State's submission

The Judge has directed that the Secretary of State provide a submission addressing the merits of the application.

It is submitted that the Tribunal have ignored some of the evidence about the claimant's behaviour. The claimant's mother in the record of proceedings describes violent behaviour, the claimant jumps out of windows, put his foot through a television, broken windows and damaged doors. The medical evidence is that the claimant has behaviour problems and has been prescribed medication to alleviate his behaviour.

The claimant's mother ended her oral evidence by saying things were getting worse. She is a mother of eight and is described by the consultant [redacted] s willing and competent to follow advice [page 103]. There was no reason to doubt the credibility of the evidence of the claimant's mother.

The Tribunal have considered the evidence but ended by concluding several times that the claimant's requirements were not "substantially in excess of the requirements of another child of the same age." The Tribunal have not given any explanation of why the behaviour is not substantially in excess. It is submitted that this is an error of law.

Whilst the Tribunal are entitled to weigh the evidence and arrive at a conclusion based on that evidence it does seem as though the Tribunal have not considered the evidence of the claimant's mother, nor that of the claimant's grandmother. The Tribunal have not explained why the behaviour of the claimant is not in excess of the behaviour of other children of the same age.

The Judge is asked to note that the claimant made another application for DLA and on 23rd November 2012 the decision maker made an award of the lower rate of the mobility component and the highest rate of the care component from 28the August 20 12 to 2nd September 2014. The period of this appeal is therefore from 23rd February 2011 to 27th August 2012.

The Judge is asked to set aside the decision of the Tribunal and remit the case to a new Tribunal.

Name:Mrs J Camponi
On behalf of the Secretary of State Date:29th January 2013

C

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CDLA/3235/2012

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Name: [redacted]
Tribunal: First-tier Tribunal (Social Security and Child Support)
Tribunal Case No: 102/10/00277
Tribunal Venue: Fox Court
Hearing Date: 19 January 2012

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

I give permission to appeal.

REASONS

1. The claimant, through his representative, has applied for permission to appeal from the decision of the tribunal, held on 19 January 2012, which dismissed his appeal from a decision that he was not entitled to disability living allowance because he was subject to immigration control.

2. I am grateful to the parties for their submissions following the case management directions which were issued to them on 7 January 2013. Regrettably there was a delay by the Office of the Upper Tribunal in sending those directions to the parties, the delay being about two months.

3. The central issue, of course, is whether the tribunal erred in their conclusion that the claimant was not entitled to disability living allowance because he was subject to immigration control. The relevant legislative provisions have been referred to by the parties.

4. It is clear, from documents 63 and 64, that the claimant's discretionary grant of leave to remain expired on 9 May 2005. It is also clear that, to benefit the claimant in his application for DLA, his leave to remain could only be treated as continuing if, before it expired, he applied for variation.

5. Document 66 is not, to my mind, entirely clear. First, there is no Home Office authorisation stamp. Second, and perhaps more importantly, it refers to an application for further leave having been "raised" and it is said that that was out of time. It does not unequivocally state, however, the date on which the application was treated as having been made. Set against this, in any event, is document 100. This unequivocally states that the claimant's application for further leave to remain was submitted in time. One might reasonably expect that an official letter from the UKBA to an MP (in contrast to a simple form, document 66) would contain the correct information. Unfortunately, however, only the first page of the letter is enclosed.

6. Unfortunately neither party has addressed any provisions relating to the date an application for further leave to remain is treated as having been made. Is the relevant date that on which the application is posted or when it is received? Consideration of this is crucial to the appeal. The UKBA website "Guidance – specified application forms and procedures – version 8.0 valid from 7 December 2012" says this:

"This page tells you how to assess the date an application is made on a specified application form.

The date of application or variation is either the date:

- *of posting for postal applications*
- *a Public Enquiry Office accepts the application, if it is made in person, or*
- *it is delivered to the UK Border Agency if it is sent by courier.*

You must accept the postmark as evidence of the date of posting.

If the envelope in which the application was posted in is missing, or if the postmark is illegible, you must take the date of posting to be at least one day before it is received."

The above to my mind suggests that if the application for variation had been made by post the postmark would be determinative. The extract I have quoted does not, I acknowledge, give any legislative authority but since it appears in the form of instructions to UKBA staff I would assume it is authoritative.

7. Permission to appeal is given because the grounds advanced on behalf of the claimant may be arguable.

CASE MANAGEMENT DIRECTIONS

1. The respondent is directed to provide a response to the appeal within one month of the date on which this notice is sent to the parties. If the appeal is supported, the response should set out the terms of any decision which it is suggested the Upper Tribunal should give.

2. The appellant may provide a reply to the response within one month after the date on which the response is sent to the appellant.

3. The representatives for the claimant are, within one month of the date of issue of this permission and these directions, to state by what means the application for further leave to remain was made. If they have a copy of the application form and/or any other evidence as to the date on which it was made so much the better. Copies of that evidence, as appropriate, should be provided. They are also to provide a complete copy of the letter to the MP, partially copied at document 100.

4. There is a clear conflict between documents 66 and 100. The Secretary of State's representative should attempt to resolve this conflict by contacting UKBA for an explanation of how and why it is considered that the application was in time or out of time. That explanation should be provided within one month of the date of issue of this permission and directions.

(Signed)

S J Pacey
Judge of the Upper Tribunal

(Dated) **13 May 2013**

D

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CTC/1520/2013

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Name: [redacted]
Tribunal: First-tier Tribunal (Social Security and Child Support)
Tribunal Case No: SC947/12/03271
Tribunal Venue: Rochdale
Hearing Date: 16 January 2013

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

I refuse permission to appeal.

REASONS

1. Through her representative the claimant has applied for permission to appeal from the decision of the tribunal, held on 16 January 2013, which dismissed her appeal from a decision relating to her award of tax credit.

2. Permission to appeal lies only on a point of law and may be given if there is a realistic prospect of success or if there is some other good reason to do so.

3. The grounds in the application essentially go to the adequacy of the tribunal's process of fact-finding and reasoning. Although the tribunal did not address all of the factors referred to in the submission presented on behalf of the claimant it is readily apparent, from the tenor of the tribunal's decision, that it did not find the claimant a credible witness and, then, did not accept her contention that the parties maintained separate households. The tribunal explained how and why it had reached its conclusions, in the light of the evidence before it.

4. The tribunal was entitled to reach a decision on the basis of the evidence presented. That further evidence could have been obtained is not determinative of the question of whether any reasonably arguable point of law arises from the decision of the tribunal. The tribunal had to evaluate the evidence presented to it.

5. I am not persuaded that any reasonably arguable point of law arises in relation to the alleged interpretation difficulties. It would, in my judgment, have been preferable had the tribunal, at the outset, ascertained and recorded in the record of proceedings whether the claimant and the interpreter could properly communicate. That is good practice. Nonetheless, the record of proceedings is in some detail and does not at face value betray any interpretation difficulties. Had the claimant not understood the interpreter I would reasonably have expected this to have been raised at some point during the hearing, moreover I note that the claimant was accompanied by a friend who, according to paragraph 24 of the statement of reasons, had some knowledge of Polish. Neither she nor the claimant said anything about interpretation difficulties.

6. The tribunal in my judgment reached a decision reasonably open to it and supported that decision by an adequate process of fact finding and reasoning. No reasonably arguable point of law is disclosed or otherwise arises.

(Signed)

S J Pacey
Judge of the Upper Tribunal

(Dated) **5 June 2013**

E

SJP/CW/RC/1

SOCIAL SECURITY COMMISSIONER

Commissioner's File No: CG/4442/99

SOCIAL SECURITY ACT 1998
SOCIAL SECURITY COMMISSIONERS (PROCEDURE) REGULATIONS 1999

Claimant: [redacted]

Tribunal: Romford

Reg. No.: S/45/243/1998/00110

Date of Hearing: 8 July 1998

SETTING ASIDE OF TRIBUNAL'S DECISION

Both parties have expressed the view that the decision appealed against was erroneous in point of law.

Accordingly, pursuant to the powers conferred on me by regulation 19(3) of the Social Security Commissioners (Procedure) Regulations 1999 and section 14(7) of the Social Security Act 1998 I set aside the decision appealed against and I refer the case to a completely differently constituted tribunal for a fresh hearing and decision.

The claimant should consider requesting the tribunal to hold an oral hearing and in default of such request consideration should in any event be given as to whether an oral hearing should be held.

The parties should regard themselves as being on notice to send to the clerk to the tribunal as soon as is practicable any further relevant written medical or other evidence.

The fact that the appeal has succeeded at this stage is not to be taken as any indication as to what the tribunal might decide in due course.

This setting aside should not be taken as an indication of the claimant's eventual prospects of success.

A copy of the submission dated 7 February 2000 from the Secretary of State's representative is to be issued to the claimant with this decision and is to be before the next tribunal.

(Signed) S J Pacey
Commissioner

(Date) 25 February 2000

F

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. CE/1251/2011

Before: **S J Pacey Judge of the Upper Tribunal**

Decision: The decision of the First-tier Tribunal held on 26 July 2010 is set aside for error of law and the appeal remitted for rehearing before a fresh First-tier Tribunal (Social Security and Child Support).

REASONS FOR DECISION

1. This is an appeal by the claimant, brought by my permission, and is against the decision of the tribunal which, in turn, had dismissed his appeal from a decision that he was not entitled to employment and support allowance because he did not satisfy the work capability assessment. The appeal is supported on behalf of the Secretary of State.

2. The submission provided on behalf of the Secretary of State focuses upon the reasons given for permission to appeal. This is what was said:

> *"No point of law is disclosed in the application, in which the claimant, in summary, simply contends that he is not fit for work.*
>
> *As well as physical descriptors the claimant referred to descriptors falling within Part 2 of Schedule 2 to the ESA Regulations. At paragraph 10 the tribunal said that the mental health descriptors did not apply because the claimant did not have any mental health disability. Arguably that was the wrong approach. The incapacity benefit distinction between physical descriptors attributable to a physical condition, and mental health descriptors attributable to a mental health condition, does not appear in the ESA Regulations.*
>
> *In the ESA 50 the claimant referred to activities falling within descriptors 16, 17, 20 and 21. The apparent view of the tribunal was that the lack of a mental health diagnosis meant that the claimant could not score points under Part 2. Arguably activity 16 could not have been considered because it refers to 'cognitive impairment or a severe disorder of mood or behaviour', suggesting a mental health condition. Similar phraseology does not, however, appear in descriptors 17, 20 or 21. The fact that the claimant had no mental health diagnosis was not, then, determinative."*

3. This is what is said on behalf of the Secretary of State:

> *1. This submission is made in accordance with s12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007. I agree with the error of law identified by the Upper Tribunal Judge in granting permission to appeal.*
>
> *2. The Secretary of State does not request an oral hearing of this appeal.*

3. Having regard to the directions given by the UT Judges in CE/1222/10 (paragraphs 19-22) and CE/3002/10 (paragraphs 29-32) about the scope of Schedule 2, Part 2 of the Employment and Support Regulations 2008, I would agree entirely with the UT Judge's decision to grant permission to appeal in the instant case. The tribunal was clearly wrong to state that the mental health descriptors did not apply because the claimant did not have any mental health disability. As pointed out by the UT Judge, the descriptors of the claimed Activities 17, 20 and 21 do not contain anything which might be deemed to be a mental health reference, and, whilst the evidence in relation to the above these activities might be considered slight, nevertheless, the tribunal still needed to give its views on the evidence it did have before it and assess these activities accordingly. It failed to do so, and, as a consequence, I would agree that it has erred in law.

4. I submit that further findings of fact are necessary in order to determine this case correctly. The facts to be found are whether the claimant satisfies the Work Capability Assessment.

5. I therefore request that the judge set aside the FtT's decision and remit the case to a new FT with appropriate directions for its determination. "

4. In consequence of the above matters I set aside the decision of the next tribunal and, since matters of fact and evidence are in issue, remit the case for rehearing by a fresh tribunal, which will need to have regard to this decision and what was said about mental health descriptor in KP v Secretary of State for Work and Pensions (ESA) [2011] UKUT 216 (AAC) and KN v Secretary of State for Work and Pensions (ESA) [2011] UKUT 229 (AAC), referred to in the submission provided on behalf of the Secretary of State. In fairness to the instant tribunal I acknowledge that neither of these decisions had been made at the time of its hearing. The claimant attended the last hearing and he is encouraged to opt for, and to attend, a hearing before the next tribunal but he should not take my having set aside the decision of this tribunal as necessarily indicative of his prospects of success on the substantive appeal.

(Signed on the Original)

S J Pacey
Judge of the Upper Tribunal

30 November 2011

G

CFG/923/2007

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a reference to the Commissioner by the Secretary of State to determine whether the claimant is precluded by operation of the forfeiture rule from receiving a bereavement payment under section 36 of the Social Security Contributions and Benefits Act 1992 and a bereavement allowance under section 39B of that Act. My decision is that the forfeiture rule should be modified so that it does not preclude the claimant from receiving the benefits sought. I exercise my discretion under section 4(1A) of the 1992 Act to modify the effect of the forfeiture rule in relation to the entitlement of the claimant to a bereavement payment under section 36 of the Social Security Contributions and Benefits Act 1992 and a bereavement allowance under section 39B of that Act, additionally he is not precluded by the forfeiture rule from receiving the whole or any part of any bereavement benefit or any other social security benefit or advantage dependent wholly or in part on his late wife's contributions. I remit the case to the Secretary of State to determine all relevant questions of entitlement in the light of my decision, pursuant to regulation 28 of the Commissioners Procedure Regulations.

2. By section 1(1) of the Forfeiture Act 1982 there is a rule of public policy (the "forfeiture rule") which "in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing." There is no issue as to unlawful killing in the instant reference since, by section 1(2) of the Act, unlawful killing includes "a reference to a person who has unlawfully aided, abetted, counselled or procured the death of that other ..." Jurisdiction is conferred upon the Commissioner by section 4(1) of the Act and section 4(1A) empowers the Commissioner to make a decision modifying the effect of the forfeiture rule. Under section 4(1B) the Commissioner is not empowered to make a decision under subsection (1A) "unless he is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the Commissioner to be material, the justice of the case requires the effect of the rule to be so modified in that case". A reference has been made to me on behalf of the Secretary of State under the provisions of regulation 14(2) of the Social Security Commissioners (Procedure) Regulations 1999.

3. I have determined this reference on the basis of the documents before me, neither party having requested an oral hearing and no such hearing reasonably suggesting itself to me in the circumstances of this reference.

4. The claimant made a claim for bereavement benefits on 25 October 2005. His wife died on 19 September 2005. The claimant appeared before the Crown Court at the Central Criminal Court on 14 October 2006 and on his own confession was convicted upon indictment of aiding and abetting the suicide of his wife. On 19 October 2006 he was sentenced to nine months imprisonment suspended for 12 months, there was imposed a suspended sentence supervision order for 12 months and the claimant was ordered to carry out unpaid work for 50 hours before 19 October 2007. All of this is not in dispute and appears from the certificate of conviction dated 8 January 2007.

5. I have before me the sentencing remarks of the Common Serjeant of London. He characterised the case, rightly so in my view, as tragic. Sadly, in 1984 the claimant's wife was

diagnosed with multiple sclerosis. Over the years her condition deteriorated and she attempted suicide in June 2004, again in April 2005. On 19 September 2005 the claimant returned home to find that his wife was in the middle of a suicide attempt. I need not go into the details but it is quite clear, and not disputed, that the claimant assisted his wife to end her life. The learned Judge commented that the offence occurred "within a unique set of circumstances relating to your wife's deteriorating condition and is never likely to re-occur ... your wife was determined to control and then take her own life when she felt that she had become too much of a burden." The learned Judge went on to refer to the numerous character references which led him to conclude that the claimant was "an honest, kind and thoughtful man ... a husband who not only had a deep love for his wife but also displayed a selfless devotion to her over a considerable period of time ...".

6. In the light of the conviction I conclude that the forfeiture rule applies. That rule should, however, in my judgment be modified. I am entitled (see, for example, R(P) 1/88) and, indeed, bound to take into account all relevant circumstances. They are revealed in the judge's sentencing remarks from which I have quoted.

7. It is clear from the judgment of the Court of Appeal in Dunbar v. Plant CHANF96/0046/B that the forfeiture rule is applicable for the offence of aiding and abetting suicide contrary to section 2(1) of the Suicide Act. I remind myself that in that case the court relieved the unsuccessful party to a suicide pact of all effect of the forfeiture rule. The factual scenario in the instant reference, however, is materially different. Nonetheless I exercise my discretion by modifying the effect of that rule. The evidence does not indicate anything other than that the claimant and his late wife were a devoted couple. Over a period of many years her serious condition had deteriorated and it is clear that she was intent upon ending her own life. There is nothing to indicate that when the claimant left for work that day he was aware that later that day his wife would carry that intent into effect. Nor, from the evidence of the pathologist referred to in the judge's sentencing remarks, was it possible to ascertain the extent to which the assistance of the claimant accelerated his wife's death. I also note that in sentencing the judge said that the claimant accepted that he "could not legally behave in this way but you also knew that she would continue her attempts until successful; that each attempt weakened her body, and you were concerned that she may have suffered brain damage if she survived again." These, and the other factors emerging from the sentencing remarks, are powerful and inescapably lead me to the decision set out in paragraph 1.

(Signed on the Original) S J Pacey
Commissioner

11 September 2007

H

CG/1779/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, brought by my leave, against the decision of the appeal tribunal held on 9 December 2003. I set aside the decision of the appeal tribunal for error of law. I substitute my own decision, pursuant to s.14(8)(a)(ii) of the Social Security Act 1998. My decision is that the claimant is entitled to widow's benefit following the claim made on 16 February 2003 on the basis that she is the widow of [redacted]

2. The claimant appealed to the tribunal from a decision, made on 19 March 2003, that she was not entitled to widow's benefit. The decision maker's submission to the tribunal referred to section 1A and 1B of the Social Security Administration Act 1992 which imposed an additional condition of entitlement to benefit, requiring claimants to provide a national insurance number or information or evidence enabling such a number to be allocated. The main thrust of the decision maker's submission, however, was that the claimant had not shown, on the balance of probabilities, that she was the widow of [redacted], whom she maintained had been her husband and in respect of whose national insurance contributions she was claiming widow's benefit. The decision maker reasoned that the numerous and significant inconsistencies in the evidence of the claimant, as revealed during the course of four interviews, damaged her credibility to such an extent that the relevant burden of proof had not been satisfied.

3. The claimant maintained that she was the widow of the late [redacted] The tribunal determined the appeal in the absence of the claimant as she was living in Bangladesh. The tribunal contrasted the evidence of the claimant as revealed by three interviews in 1999 and an interview in 2003. As the tribunal noted that evidence was inconsistent in relation to the number of times the claimant had been married, the date of marriage to [redacted], the circumstances surrounding the ending of any original marriage(s), the date of death of [redacted] and her relationship to him. The tribunal noted amongst other things that at the last interview the claimant said that she was in fact the sister of [redacted]. The tribunal noted that the claimant had produced a marriage certificate describing herself as a widow and a court document from 1997 indicating that a sum of money should be divided between the claimant and two other persons, that evidence being relied upon by the claimant as supporting her account. The tribunal were not persuaded by this evidence which, they reasoned, was outweighed by "the many and obvious discrepancies" which they referred to. The tribunal essentially found that the claimant's evidence was lacking in credibility and they did not accept it. The tribunal dismissed the appeal.

4. The claimant applied for leave to appeal from the decision of the tribunal. That application was refused, by myself, and in the reasons for refusal I noted that the grounds of appeal raised no point of law but were only in the form of a disagreement with the evaluation of evidence by the tribunal. That, I said, was entirely a matter for the tribunal which addressed the totality of the evidence which was not supportive of the claimant's account. The claimant subsequently applied for a setting aside of my determination refusing leave to appeal. The Secretary of State's representative subsequently conceded that the claimant's application fell within the ambit of regulation 31(1)(a) of the Social Security Commissioners (Procedure) Regulations 1999. That was because the court document, relied upon by the claimant and indicating distribution of money to herself and relatives after the death of her

husband, had not been included in the relevant bundle. On that basis I set aside the determination refusing leave and I went on to grant the claimant leave to appeal from the decision of the tribunal.

5. The submission made on behalf of the Secretary of State in connection with the setting aside application noted that there was no contemporaneous record of the interviews with the claimant nor any evidence that they had been read back to her or agreed by her. There was also speculation on behalf of the Secretary of State as to the understanding of the claimant given that she did not appear to understand what was meant by "widow". Very fairly in my view the Secretary of State's representative, addressing the court document relied upon by the claimant, did not challenge its accuracy, noting that it did not appear to have been obtained solely for the purposes of the claim and that it recorded a judicial decision consistent with the claimant being the widow of the deceased given that it ordered a distribution of monies from the estate of [redacted] between the claimant (recorded in the court order as his wife) and two children.

6. The claimant was provided, in response to the suggestion made on behalf of the Secretary of State, with an opportunity to resolve the apparent conflict in the evidence, with such supporting documentation as she might wish to adduce. That evidence is very helpfully addressed in the detailed submission subsequently provided on behalf of the Secretary of State. In that submission the Secretary of State argues that the tribunal erred in law in assessing the weight of evidence which it had not seen and then weighing it in comparison with evidence which it had seen. I accept that submission and I am influenced also by the fact that the tribunal were particularly influenced by inconsistencies in evidence that, as the Secretary of State's representative concedes, do not all appear to have been contemporaneous interview records nor indeed that were read back to the claimant and agreed by her. Indeed, in some of the interviews the claimant had disputed what she had said earlier. On that basis I set aside the decision of the tribunal. This seems to me, however, an appropriate case for me to substitute my own decision. It is unlikely that any future tribunal would be better placed than I to make a decision and all the available evidence appears to be before me.

7. The Secretary of State's representative questioned the probative value of the interviews relied upon by the decision maker. Whilst I appreciate the helpful comment made on behalf of the Secretary of State in relation to the validity of the interview evidence I do not consider that, in the circumstances of this particular appeal, I need go into that aspect. That is because the Secretary of State's representative argued that even if that evidence is not disregarded, and the interview inconsistencies taken account of, nonetheless there is other, objective, evidence which outweighs it, sufficient to result in a decision in favour of the claimant. What the Secretary of State's representative says in that regard is this:

> *"34. Since 1999 the claimant has, it seems, provided as evidence at least four 'official' documents that go towards proving that she is the widow of the deceased, and that she was monogamously married to him at the date of death. Of these, three – either originals or copies of the marriage certificate, the divorce certificate and the divorce declaration – have been destroyed in line with IPC's [*International Pensions Centre's*] policy on destruction. The 'court order' first produced by the claimant in 2002, is now at pages 41 to 45. In addition, we now have what the claimant describes as a 'Certificate of confirmation of identity', at pages 52 to 54, containing 35 signatures and two counter-signatures.*

35. Apart from the PLO's reference to it in one interview, there is no specific information about the marriage certificate. Nothing at all is known about the evidential value of the divorce certificate and the declaration of divorce. The Commissioner may wish to direct the claimant to produce further copies of these documents if she is able to do so, but I submit that if she cannot, no adverse inference should be drawn from her inability to do so, or from any surmise about the documents themselves.

36. With regard to the 'court order', as I have observed previously the translation of this document may reasonably be seen as weighing strongly in the claimant's favour. It shows her as the sole wife of the deceased, and as inheriting from him. No other wife is so provided for. No challenge to its genuineness has been raised, it does not appear to have been obtained solely for the purpose of the claim, and it records a judicial decision that is consistent with the claimant being the widow of the deceased. Taken alone and at face value, it appears to be sufficient evidence to satisfy the conditions for the benefits she has claimed.

37. In addition to this there is the claimant's 'Certificate of confirmation of identity'. This, too, appears to stand alone as substantial evidence in the claimant's favour, and I submit that there appears to be no specific reason to make any assumption to the contrary. It is an unusual form of evidence, but that is not a reason to reject it.

38. I admit to some puzzlement at how apparently explicit evidence as provided in these two documents, and possibly in those destroyed, should be weighed against inconsistencies in interview evidence. I suggest that if this documentary evidence had all been before the DM dealing with the 2003 claim, and proper regard had been given to it, then the 2003 interview should not have been required. Similarly, had the documentary evidence been available in 1999, as it seems it could have been, and proper regard had been given to it, then the 1999 interviews might also have, had the procedures usual in the UK been followed, not been arranged. Had that been so, then the recorded inconsistencies would not now be in question. However, while I would normally try to avoid reaching tentative conclusions, or making tentative submissions to the Commissioner, I will only suggest that, on the strict balance of probabilities, even if regard is to be had to the interview inconsistencies, the documentary evidence outweighs that evidence, and benefit should be awarded from the appropriate date in 2002."

8. The matter is clearly not free from doubt. On the one hand there is objective evidence (albeit produced after the adverse decision appealed against) which at face value tends to support the evidence of the claimant and on the other hand some inconsistencies, on further basic and significant matters, in unrecorded interviews although some of the answers previously given by the claimant were disputed by her. The evidence is summarised by the Secretary of State's representative above. His comments to my mind are a fair reflection of that evidence and, for the reasons he has provided, the conclusions to be drawn from it.

Accordingly I substitute my own decision, set out in paragraph 1. The decision maker will ascertain the date from which payment is to be made, and if any queries arise as to this the matter may be referred back to me.

(Signed on the Original) S J Pacey
Commissioner

1 August 2005

CIS/3748/2003
CIS/3753/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, brought by leave of the tribunal chairman, against the decisions of the tribunal held on 11 June 2003. The tribunal decisions are set aside for error of law and, since matters of fact and evidence are in issue, the cases are remitted for rehearing before a differently constituted tribunal.

2. There were two substantive issues, arising from separate decisions, before the tribunal. First, it was said by the decision maker that the claimant and her husband were a "married couple" within the ambit of section 137 of the Social Security Contributions and Benefits Act 1992. It was not disputed that at all material times the parties were married to each other. The essential argument advanced on behalf of the claimant was that she and he did not form a common household and that the relationship between them (as described in the letter of appeal, document 7) was of a "caring nature", taking into account her husband's health. In consequence of the first decision the adjudication officer went on to determine, as a second matter, that the claimant had failed to disclose the material fact that she was maintaining a common household with her husband and that an overpayment of income support in the sum of £1,726.57 had arisen for a period from 15 August 2001 to 11 December 2001, that sum being recoverable from the claimant. (It was not disputed that at all material times the husband had been in remunerative work). The claimant disputed also the overpayment decision, in consequence of her stance on the first issue.

3. The appeal first came before a tribunal on 17 July 2002. That tribunal upheld both decisions but the decisions of that tribunal were in turn set aside, on 4 November 2002, under the provisions of section 13(2) of the Social Security Act 1998. No further issue, then, arises in relation to that tribunal.

4. It was submitted before the tribunal, on behalf of the claimant, that the statement made by the claimant to a departmental interviewing officer, and the procedures adopted by that officer, were in contravention of Articles 8 and 14 of the European Convention on Human Rights. Article 8 relates to respect for private and family life and is qualified. Article 14 provides that the rights and freedoms set out in the Convention shall be secured without discrimination on any ground. The assertion that the departmental investigating officer acted contrary to Article 14 was not articulated and no element of discrimination was alleged or has subsequently been presented. The decision maker provided a supplementary submission explaining why in his or her view Article 8 was not breached. The tribunal had before them a copy of the relevant interview, dated 17 December 2001. It was also argued on behalf of the claimant before the tribunal that the interview did not comply with various codes of practice under the Police and Criminal Evidence Act 1984.

5. The record of proceedings of the instant tribunal is long, as is the statement of reasons. That to my mind demonstrates the considerable care devoted by the tribunal to the appeal and it is only after the most careful consideration that I have come to the conclusion that the tribunal erred in law. In so deciding, however, I intend no criticism of the tribunal.

6. The tribunal, in my judgment very pointedly and perceptively, addressed the arguments presented under Articles 8 and 14. The tribunal rejected those arguments, reasoning that:

> "[The claimant's representative] has argued that the collection of evidence in this case was in breach of Articles 8 and 14 of the European Convention on Human Rights. Firstly because the investigations led to [the claimant's husband] leaving the property and the couple subsequently being divorced. This seems a rather strange argument when the main thrust of the case for [the claimant] has been that they were not living together in the same household and that the marriage had, in effect, come to an end when they separated in 1997. If the tribunal were to accept that the investigations did, in fact, cause the break-up of the marriage, then this would only go to prove that [the claimant and her husband] were living together as a married couple and thus the Department's case.
>
> The tribunal did not accept this contention. [The claimant's] own evidence to the tribunal is that she told [her husband] to leave the property when she received the letter asking her to go for an interview because she knew she was in trouble as she had not disclosed that he was staying there. The tribunal therefore take the view that this was [the claimant's] reaction to the realisation that she had made an error and cannot be blamed on the investigations, and the suggestion that it caused the divorce is ludicrous and not supported by [the husband's] own evidence."
>
> Secondly, that the investigation officers failed to show respect for family life. The tribunal did not accept this. In Commissioner's decision R(DLA) 4/42, Mr Jacobs held that whether interference with a person's private life in a particular case amounts to a breach of Article 8(1) will be a question of degree, and in applying for benefit the claimant accepted interference by the Secretary of State necessary to check that she continued to satisfy the conditions of entitlement and this could include observations and videotaping. Whilst this case related to Disability Living Allowance, the tribunal considered that it also had relevance to this case; if a person is claiming as a single parent, then the Secretary of State has a legitimate interest in making enquiries if it is suspected that she is in actual fact not living alone as a single parent. [The claimant's representative] may have his own views as to how other investigations should be carried out, but they are just that and do not make any other course of action invalid."

7. At the oral hearing before me, held at the request of the claimant's representative, no argument was presented in relation to Article 8 (or, indeed, Article 14) and I take it that they will not be prayed in aid before the next tribunal. If they are, however, that matter must be approached afresh by the next tribunal. I am bound to say, however, that I see nothing wrong in the reasoning of the instant tribunal in relation to Articles 8 and 14 and the reference of the tribunal to R(DLA) 4/02 is to my mind apposite. Moreover, the reasoning of the same Commissioner in CDLA/3594/2000 is equally apposite to cases such as this. In the latter case the Commissioner noted jurisprudence of the European Court of Human Rights to the effect that ... "the claim to respect for private life was automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests. ... regard must be had to the fair balance that has to be struck between the general interests of the community and the interests of the individual, for which balance is inherent in the whole of the Convention." The Commissioner in that case was, I acknowledge, dealing with a claim to disability living allowance but the underlying principles

are no different. What the Commissioner said in paragraph 16 is eminently applicable to all public benefits:

> "The award were [sic] paid from the public purse. It was a condition of the award that the claimant satisfied, and continued to satisfy, specified criteria. By applying for an allowance, the claimant inevitably accepted a degree of interference with his private life. That interference was necessary at the outset in order to show that he satisfied the conditions of entitlement. Once the award was made, there was a legitimate interest in the Secretary of State checking whether the claimant continued to satisfy those conditions."

8. The tribunal found that the claimant and her husband were, during the period of the overpayment, members of the same household and that there was a recoverable overpayment. It is contended on behalf of the claimant that the tribunal failed to provide sufficient findings of facts and reasons in relation to the evidence before it, including a letter from the claimant's husband which, it is said, essentially supported her explanation for the domestic arrangements. The grounds of appeal took no issue with regard to matters within the ambit of the European Convention on Human Rights or the Police & Criminal Evidence Act 1984.

9. The submission provided on behalf of the Secretary of State argued that the decision of the tribunal was sustainable and founded upon an adequate factual and reasoned basis. The response of the claimant, through her representative, included the comment that that submission had not addressed human rights issues although, as I have indicated, none were raised in the grounds of appeal.

10. The parties were represented at the oral hearing before me. Miss R Topping appeared on behalf of the Secretary of State and Mr I Maka on behalf of the respondent. I am grateful to both for their assistance although in the event it transpired that there was little material difference between them.

11. Miss Topping resiled from the submission provided on behalf of the Secretary of State, commenting that the tribunal did not address all the probative evidence before them. Whilst it is, of course, trite law that tribunals do not have to address each and every argument or specific item of evidence before them they must, either expressly or by reasonable implication, demonstrate that they have taken account of the totality of probative evidence. In this case there was supporting evidence from the husband whose letter was before the tribunal and was relied upon by the claimant. Miss Topping conceded that the tribunal made no reference to this and, in my judgment, no inference can reasonably be made, from the way in which the tribunal framed their decision, that they took account of this letter or, if they did, what they made of it. Mr Maka did not dissent from that proposition and I accept that on that basis alone there is sufficient warrant for me to set aside the decision of the tribunal and I do so. I have no particular directions to give to the next tribunal on this issue save that they will need to address all of the evidence before them and make appropriate findings of fact and give reasons in relation to it and the relevant legislative provisions.

12. For the reasons set out above and articulated by the tribunal I am not in the least persuaded by any arguments in relation to Articles 8 and 14.

13. At my direction the Secretary of State's representative has responded to the matters referred to in the skeleton argument helpfully provided by Mr Maka although I think it only right to say that they did not form the central plank of his argument. Those matters relate to PACE codes. A copy of the supplementary submission provided on behalf of the Secretary of State (dated 7 April 2004) is to be before the next tribunal.

14. I accept (paragraph 5 of the supplementary submission, page 177) that the claimant was not a person "in police detention" and in any event (document 50) the investigating officer clearly informed the claimant that she was not under arrest, was free to come and go as she pleased and to obtain legal advice if she wished. Moreover (document 49) the claimant was effectively cautioned and said that she understood that and it is readily apparent from her comment at document 50 that she knew the purpose of the interview. Further, although the interview did not take place at a police station that is not in my judgment determinative given the form and substance of the interview which clearly indicates material compliance with the relevant codes. Again (page 50) the claimant was advised that she could terminate the interview at any time and obtain legal advice. I see no indication that "oppression" was used to obtain evidence and, as the Secretary of State's representative rightly submits, the PACE issues relied upon in the skeleton argument provided on behalf of the claimant were not raised before the tribunal. At the very outset of the interview (document 49) the claimant was told that at the end of the interview she would be given a notice explaining the procedure in relation to the interview tapes and the interview concludes (document 70) with further reference to the appropriate notice.

15. In my judgment the interview with the claimant substantially complied with PACE and was, then, properly before the tribunal. In any event, however, it does not appear to me that the appellant sought to distance herself from the evidence she provided at that interview. Her core account remained the same and at the interview she made no damaging admissions from which she subsequently sought to resile. Moreover I remind myself that even in criminal proceedings, with a materially higher standard of proof and potentially more serious consequences for the individual, there is nonetheless a discretion (section 78 of PACE) for evidence obtained in contravention of its codes to be admitted and considered. Further still in Customs and Excise Commissioners v. Han and Another [2001] EWCA Civ 1040 the court was dealing with a case involving civil penalty proceedings. There is, of course, no suggestion of any penalty in the instant appeal. Even within the context of civil penalties, however, the court held that even if the Police and Criminal Evidence Act 1984 were applicable "it is most unlikely that a court or tribunal would rule inadmissible under section 76 or 78 any statements made or documents produced as a result, at any rate in the absence of exceptional circumstances". In other words even if, putting the case at its highest from the appellant's point of view, the Department's case had the character of a criminal investigation that would not necessarily have engaged protections such as those provided by the Police and Criminal Evidence Act. In short, then, the instant tribunal properly had before them the transcript of the interview and were able to take account of it. The next tribunal will be in no different a position.

(Signed) S J Pacey
Commissioner

(Date) **19 July 2004**

J

CI/2623/2007

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, brought by leave of the tribunal chairman, against the decision of the appeal tribunal held on 16 February 2007. The appeal is not supported on behalf of the Secretary of State. The tribunal did not, in my judgment, err in law and in consequence I dismiss this appeal.

2. The essential issue for determination by the tribunal was whether the claimant had any continuing loss of faculty attributable to an accident at work on 2 February 1999. As the tribunal noted, there had been various assessments for different periods between 18 May 1999 and 3 November 2006. Following an examination and report on 29 September 2006, however, the decision maker decided that there was no loss of faculty from 4 November 2006. From that decision the claimant appealed to the tribunal, in summary arguing that the symptoms in his left shoulder and back (with associated low mood) were attributable to the relevant accident. The tribunal disagreed, deciding that it was more likely than not that the underlying degenerative changes would in any event have been symptomatic to the extent that they were, at the time of the decision under appeal, had it not been for the relevant accident.

3. The claimant's grounds for appealing, as set out in his letter dated 25 April 2007, are to the effect that the tribunal were wrong to conclude as they did and he draws attention to the fact that on 30 July 2003 a medical appeal tribunal assessed disability at 8% for life, from 1 June 2003. The claimant says that the decision the subject of the appeal is inconsistent with other decisions. In granting leave the chairman observed that he did so only because it might be arguable that the tribunal failed adequately to take into account the fact that a life assessment was made on 30 July 2003.

4. At one stage in the appeal process before the Commissioner the claimant indicated that he might like an oral hearing of the appeal but he has since helpfully clarified that he does not seek such a hearing and in any event I am satisfied that I can properly determine the appeal on the basis of the written submissions.

5. The submission provided on behalf of the Secretary of State is to the effect that the tribunal were entitled to conclude as they did, for the reasons which they provided, in relation to all the conditions complained of by the claimant. The Secretary of State's representative submits also that the link between the elbow problem and the underlying back problem is, at best, tenuous and unlikely, as is any link between the claimant's low mood and the physical symptoms. In relation to the life award made by the tribunal on 30 July 2003, the Secretary of State's representative notes that that decision had been changed as a result of an application by the claimant, who contended that his condition had worsened. The subsequent appeal to the tribunal, after the decision maker had refused to accept a worsening in the condition of the claimant, resulted in a higher assessment than that made by the previous tribunal but, as before, with an offset for a pre-existing back condition. Then, on renewal, it was decided by the decision maker that there was no loss of faculty from 4 November 2006. .In other words, the Secretary of State's representative says, it was the claimant himself who started the chain of events which eventually led to a cessation of the life award, the previous existence of which

was not determinative of the issues before the tribunal. Finally, the Secretary of State's representative notes that the claimant comments that he thought he recognised the medical member from a previous tribunal hearing. The Secretary of State's representative notes also that the claimant raises no particular point about this but that in any event enquiries made on behalf of the Secretary of State of the Tribunals Service (who could clearly reasonably be expected to know) revealed that the medical member on the instant tribunal was not appointed until 12 April 2006, that is after the earlier tribunals.

6. In response to the submission provided on behalf of the Secretary of State the claimant effectively reiterates his original grounds, explaining how he feels the elbow condition arose and that all his symptoms are attributable to the relevant accident. He says also that the original "life" award was based on the same evidence as that available to the instant tribunal.

7. The claimant clearly feels that there is a relevant causative link between his symptoms and the accident in question. This was clearly acknowledged by the tribunal whose decision is, if I may say so, a model of lucidity. The tribunal perfectly correctly said that, although they accepted the credibility of the claimant, he could only tell the tribunal about his condition as it actually was and could not say how it would have been if the accident had not happened. It was for the tribunal, however, as they said, to decide whether there was a relevant causative link between the symptoms and the accident. The tribunal did not, I acknowledge, specifically refer to the earlier, life, assessment. In the circumstances of this case, however, that does not translate into error of law on the part of the tribunal. In the "introduction" section of the statement of reasons the tribunal briefly recited the previous adjudication history, thereby at least implying that they were aware of the life award. The existence of that award did not in any way bind the tribunal, who had to apply their own judgment on the evaluation of evidence and medical matters. This apart, self evidently the life award had ceased to be effective following the successful appeal after the claimant's supersession application. The existence of the prior, life, award, then, was not determinative of the issues before the instant tribunal neither was that tribunal obliged to use the same process of reasoning, with the same outcome, as any previous tribunal.

8. There is nothing in the point made by the claimant that, as he (apparently incorrectly) thought the medical member had sat on the previous tribunal. Given the undisputed date of appointment of the medical member he could not have sat before and there could in those circumstances be no actual nor perceived bias on the part of the instant tribunal.

9. It is, if I may say so, perfectly understandable and, indeed, natural for many claimants to ascribe ongoing symptoms to an identifiable accident (particularly when that accident was not their fault) as opposed to constitutional changes. It is simply human nature for people to think that it is an external cause, rather than something within themselves, which accounts for their present problems. The instant tribunal was fully aware of this. The long and detailed decision they produced properly identified the burden of proof and the difficulties complained of by the claimant. The tribunal went on to note that there was objective X-ray evidence showing that the claimant had suffered from degenerative changes in his spine for many years before the date of the decision the subject of the appeal although, perfectly properly, they also made it clear that such degenerative changes were often asymptomatic. They went on to consider, however, whether the claimant had back trouble before the accident. They said, incontrovertibly, that he did and that on occasion the pain was severe enough for him to take time off work. The tribunal said, incontrovertibly again, that degenerative changes, as the

name implies, get worse and they concluded that at some point in time the claimant would in any event have suffered from back problems (leading, in turn, to the problem with his elbow and low mood) even had it not been for the relevant accident. In considering whether it was more likely than not that those problems would have been as bad as they were at the time of the decision under appeal, even had it not been for the accident, the tribunal used their own experience, expertise and the judgment of the medical member, noting relevant factors including the existence of symptomatic degenerative changes of the spine in early middle age, the age of the claimant at the time of the decision the subject of the appeal, the length of time that had passed since the accident and the relatively minor nature of the injuries sustained in the accident. Those were all relevant factors, properly to be taken into account by the tribunal, whose reasoning is transparent and comprehensive, in contrast to that of the decision of the tribunal of 30 July 2003 (which made the life assessment) since all that appears in relation to that decision is the decision notice, unaccompanied by a statement of reasons.

10. The decision of the tribunal in my judgment was one properly open to them in the light of the issues and the totality of the evidence and is supported on an exemplary basis by clear and sufficient findings of fact and reasons.

(Signed) **S J Pacey**
Commissioner

(Date) **8 April 2008**

K

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. CIB/1964/2010

Before: **S J Pacey Judge of the Upper Tribunal**

Decision: The decision of the First-tier Tribunal held on 3 March 2010 is not erroneous in point of law. The appeal of the claimant from the decision of the tribunal is dismissed.

REASONS FOR DECISION

1. This is an appeal by the claimant, brought by my permission, and is against the decision of the tribunal, which decided he did not score sufficient points to satisfy the personal capability assessment for an award of incapacity credits. The appeal is not supported on behalf of the Secretary of State.

2. In August 2006 the claimant was medically examined and it appears that the views of the doctor on that occasion were adopted by the decision-maker, in that 21 points were awarded for mental disabilities falling within Part II of the Schedule to the Social Security (Incapacity for Work) (General) Regulations 1995. Perhaps significantly, however, the doctor advised (page 91) that "... *the claimant's condition should improve significantly within 12 months ... level of disability would be expected to improve with time and appropriate treatment.*". The claimant completed an IB50 form on 19 December 2008. He indicated functional restrictions in relation to only one activity within Part I (physical disabilities) of the Schedule in that he maintained he could not hear well enough to understand someone talking in a normal voice on a busy street. If accepted that would have attracted an award of 8 points under descriptor 11(e). The claimant ticked the box to indicate that he had no problem speaking. He went on to refer, however, to depression.

3. The claimant was medically examined in January 2009. The health care professional found no functional restrictions in relation to physical activities but considered that mental stress was a factor in making him stop work. The decision-maker, then, awarded 2 points for Activity 17(a). The existing award of incapacity credits was superseded. It is trite that the provision of fresh medical evidence authorises, but does not necessarily require, the decision-maker to carry out a supersession under regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, see CIB/2865/07. The instant tribunal had before them the two medical reports in question, together with a letter, dated 16 September 2009, from the claimant's counsellor and audiometric results. The claimant, before the tribunal, argued for an award of points, as he had previously indicated in the IB50 form, under descriptor 11(e) but he added a claim to 8 points under descriptor 10(e) – strangers have some difficulty understanding speech. He also claimed the benefit of regulation 27(b) of the Incapacity for Work Regulations, in its "old" form as modified by R v Secretary of State for Social Security ex parte Moule. That referred to the issue of whether there would be a substantial risk to the mental or physical health of any person if, by reason of some specific disease or bodily or mental disablement, the claimant were found capable of work.

4. The claimant attended the hearing and gave evidence. The tribunal dismissed the appeal. They awarded 1 point for descriptor 16(e), confirmed the award of 2 points for 17(a) and added a further 2 points for 18(c), although the resulting score was still too low to enable the claimant to pass the personal capability assessment.

5. The claimant appeals from the decision of the tribunal. He has conducted a lengthy trawl through the tribunal's statement and maintains that they erred in law not only in failing to award points for the physical descriptors he claimed but also in the way in which they applied the law and addressed the evidence before them. The Secretary of State's representative says that the HCP found no difficulties with speech nor were any such apparent before the tribunal so that, in effect, the tribunal could not properly have awarded points for Activity 10. Going on to refer to regulation 27(b), the Secretary of State's representative takes the view that the tribunal did not consider an award in this regard appropriate and that in any event the evidence before the tribunal would not properly have supported any such award.

6. In considering whether the tribunal erred in relation to 10(e) or 27(b) it is in my view important to consider their statement as a coherent whole. They did not, I acknowledge, specifically mention either regulation. In the circumstances of this appeal that does not, in my judgment, amount to a material error of law. That is because it is clear from the evidential basis upon which the tribunal proceeded that they could not properly have made an award under either. The tribunal produced a long and detailed statement. There is nothing in that statement, or the record of proceedings, to show that the claimant had any speech difficulties. There was nothing in the report of the HCP, or the earlier medical report, to substantiate any such claim, neither did any such indication arise from the counsellor's letter. The claimant had previously indicated that people might have difficulty in understanding his speech if, for example, he was in a strange environment, under the influence of alcohol or in low mood. The tribunal recorded, however, that he had made significant improvements in tackling his drink problem and in overcoming his depression. They said that there had been a significant advance in his condition. Those comments appear to my mind to have been reasonably open to the tribunal in the light of the objective medical evidence before them. The totality of the evidence before them, and what they made of it in their statement, clearly does not suggest that they would have or could properly have made any award under Activity 10.

7. Similarly, in relation to regulation 27(b), the reasoning of the tribunal is simply not consistent with a positive finding in this regard. That the tribunal did not specifically mention descriptor 10(e) or regulation 27(b) does not, then, amount to a material error of law because it is quite clear from the reasoning and conclusions of the tribunal that they would not in any event have found for the claimant under these provisions.

8. The tribunal found that the claimant had impaired hearing in one ear. They found that he had sufficiently good hearing, outside, if he turned his ear towards the person speaking. They noted that the hearing had taken place in a room with air conditioning and that the claimant was able to hear the tribunal members, who had spoken in a low voice, without difficulty. The tribunal were entitled to draw appropriate inferences from these observations. Moreover they had before them the medical reports, neither of which indicated any functional limitations at all in relation to hearing.

9. The claimant maintains that his mental health condition had not changed. The tribunal, however, clearly took a different view and, as I have indicated, they were entitled to do so by the totality of the evidence before them.

10. The claimant maintained that, amongst other things, he should have been awarded 2 points under descriptor 17(b), frequently feels scared or panicky for no obvious reason. He refers to the content of the original medical report in this regard. In paragraph 8 the tribunal said that there was no indication that the claimant feels frequently scared or panicky for no obvious reason. The tribunal founded this conclusion, however, upon evidence before them about the representative activities and lifestyle of the claimant. That is clear from the way in which they framed their decision. The claimant also says that the tribunal were wrong in concluding that his mental condition did not prevent him from undertaking leisure activities previously enjoyed, descriptor 15(e). The claimant says that since he was awarded this descriptor in 2006 he is entitled to be awarded it again, unless he was able to undertake the leisure activities that the Secretary of State accepted he had been unable to undertake in 2006. I see that in 2006 the doctor recorded, in relation to this descriptor, that the claimant had lost interest in television, reading and going out. The claimant's description to the health care professional of a typical day, however, presented a materially different picture, as did his evidence to the tribunal. That evidence, and the comparison apparent from the two medical reports, to my mind reasonably entitled the tribunal to conclude as they did.

11. The claimant attacks the failure of the tribunal to award points for other mental health descriptors. In large part his comments reduce to disagreement with findings of fact that were, however, within the proper jurisdiction of the tribunal. An attempt to reargue the facts does not necessarily betray an error of law on the part of the tribunal. A fair reading of their decision to my mind demonstrates that they had regard to the totality of the evidence before them and that they drew appropriate inferences, and reached permissible conclusions, from it. I remind myself that it is not necessary that every factor which weighed with the tribunal in their appraisal of the evidence has to be identified and explained. Rather, it appears to me, the issues the resolution of which were vital to the conclusion of the tribunal had been identified and the manner in which they resolve them explained, see English v Emery Reinbold and Strick Ltd [2002] EWCA Civ. 605. The instant tribunal to my mind also complied with the guidance(to similar effect) cited with approval in paragraph 16 of H v East Sussex County Council and Others [2009] EWCA Civ. 249. Moreover, reverting to the issues under descriptor 10(e) and regulation 27(b), any error, or even errors, in the reasoning do not automatically justify setting it aside as wrong in law. In Holmes-Moorhouse v LBRUT [2009] 3 All ER 277 Lord Neuberger said that "*... a decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial (objectively, or in the eyes of the decision-maker) to affect the outcome; sometimes it is obvious from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes there is more than one reason for the conclusion, and the error only undermines one of the reasons; sometimes, the decision is the only one which could rationally have been reached. In all such cases, the error should not (save, perhaps, in wholly exceptional circumstances) justify the decision being quashed.*"

12. The claimant clearly disagrees with the conclusions, and reasoning, of the tribunal in relation to virtually all of the mental health descriptors in issue. Some of his reasons are ill-conceived. For example, referring to the audiometric tests, he says that the tribunal said there was no evidence in support of his hearing difficulty when, in fact, he had provided those

tests as evidence. That is not, however, what the tribunal said. In paragraph 3, referred to by the claimant, it is clear that they had in mind not whether the claimant had impaired hearing but whether it was impaired to such an extent that it resulted in an award of points under the descriptor argued for. Again, in relation to other descriptors, the claimant refers to his evidence to the tribunal, in the written statement he presented to them, and to the previous medical report. That did not, however, represent the entirety of the evidence available to the tribunal. They had other evidence, which they were entitled to take into account. A fair reading of their decision to my mind demonstrates that they had proper regard to the issues and evidence before them and the relevant legislative provisions. Their statement to my mind encompasses a sufficient process of fact finding and reasoning to demonstrate what the tribunal made of the evidence before them, and why, and the decision that flowed from that was to my mind within the bounds of permissible judgment. I see no reasonable basis upon which it could be said that the tribunal erred in law and therefore dismiss this appeal.

(Signed on the Original)

S J Pacey
Judge of the Upper Tribunal

26 January 2011

L

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. JR/2516/2010

Before: S J Pacey Judge of the Upper Tribunal

Decision: The applicant's application for judicial review is granted. The decision of the First-tier Tribunal which was held on 14 July 2010 is quashed. The appeal is remitted for rehearing before a fresh First-tier Tribunal (Criminal Injuries Compensation).

REASONS FOR DECISION

1. Permission to apply for judicial review was granted on 18 April 2011. The applicant had sought judicial review of the decision of the tribunal, held on 14 July 2010, in relation to an incident which was said to have occurred on 2 December 2005. The applicant maintained that on that date, whilst at a bar in the evening, her drink was spiked with a drug and that she was subsequently raped. The application form named the alleged offender. The incident was reported to the police on 13 December 2005. The authority refused to make an award because, in summary, it was not satisfied that there had been a crime of violence.

2. The first decision of the authority was issued on 23 March 2007. That decision was, at the request of the applicant, reviewed but an award was still declined, in the review decision made on 9 February 2009. The applicant subsequently appealed to the tribunal. The tribunal dismissed the appeal. Their statement of reasons is dated 18 April 2010.

3. The tribunal provided a lengthy and detailed statement of reasons. They heard evidence from the applicant and from the police investigating officer. The tribunal concluded that intercourse had taken place between the applicant and the alleged offender on the evening of 2 December 2005 and/or in the early hours of 3 December 2005, that there was only one male alleged offender (not three as the applicant had speculated), that there was no satisfactory evidence that any date rape drug had been administered or that any sexual activity (including intercourse) had been non-consensual.

4. The tribunal referred to the evidence before them, including that from the applicant and from the alleged offender. The tribunal were not satisfied (the burden of proof resting upon the applicant) that she had demonstrated she was a victim of a crime of violence. The substance of the tribunal's reasoning goes to paragraph 8(a) of the Scheme, which has the effect that a claim to compensation cannot, other things being equal, succeed unless there has been a criminal injury directly attributable to a crime of violence. The tribunal expressed the view that the evidence of the applicant was "at times contradictory or at least unclear" whilst that from the alleged offender was "frank and straightforward". The tribunal were also (albeit only in part) influenced by a lack of support from the family of the applicant (and in particular her sister) in relation to her assertion that it would have been completely out of character for her to have behaved on the evening in question as she was alleged to have done by the police and the alleged offender. The tribunal was also partly influenced by the lack of corroborating evidence to demonstrate, to the required standard of proof, that any drug had been administered.

5. The applicant complains that she had never seen the written evidence from the alleged offender which evidence was, however, relied upon to a material extent by the tribunal. Although the applicant acknowledges that she "was allowed a few minutes to read" that evidence during the hearing she says that she was placed at an unfair advantage because of her dyslexia. The applicant also indicates that she was unaware that the investigating officer "was going to use a personal letter written to my sister in her character assassination of me" and in the remainder of the grounds the applicant effectively challenges the evidential basis upon which the tribunal proceeded.

6. Although I have considered the submissions made by the applicant and by the interested party (the Criminal Injuries Compensation Authority) in connection with the substantive judicial review I remain of the views indicated in the determination of the application for permission to apply for judicial review. It does not appear to me that the tribunal relied solely or to an undue extent upon the evidence from the claimant's sister and, in any event, the claimant could hardly have been taken by surprise by the content of that letter, which appears to have been read out to the tribunal by the investigating officer. The applicant would not, I acknowledge, have known before the hearing that the investigating officer would have read the letter to the tribunal but the applicant must clearly have been aware of the contents of that letter since she was the author of it. I am not, then, persuaded that there was any breach of natural justice or procedural impropriety in that regard.

7. As to the evaluation of evidence by the tribunal it appears from a fair reading of their decision that the totality of the evidence was addressed by them. The evaluation of evidence was a matter for the tribunal. They recited the evidence and said what they made of it, and why. It does not seem to me that they overlooked or attached undue weight to any item of evidence or took into account irrelevant considerations.

8. I am, however, concerned about the way in which the tribunal dealt with the evidence from the alleged offender. This was in the form of a record of a police interview with him. It is by no means clear whether this had been included in the bundle of documents provided to the applicant. At paragraph 26 of their statement the tribunal said that "the police interview of the alleged offender was also included in the bundle of documents (not paginated)". I do not think, however, that that can really have been the case since if it had been included in the bundle of documents there would have been no need for that statement to have been copied for the tribunal and the claimant during the course of the hearing. The contemporaneous notes made by each member of the tribunal during the hearing clearly indicate that the written record of the interview with the alleged offender (on 18 December 2005) was copied during the course of the hearing. That would have been a pointless exercise if the bundle of documents provided for the tribunal and the claimant had included that interview record.

9. I acknowledge that under rule 15(2) of the Tribunal Procedure (First-tier Tribunal) Rules 2008 the tribunal had power to admit the evidence in question. That was not, however, the point I made in the determination of the application for permission. The statement of the tribunal gives no clue whether the claimant and her solicitor were given a proper opportunity to digest, and make any appropriate representations about, that witness statement. The note of evidence recorded by the tribunal judge says that the statement was 44 pages long and that it was copied for the tribunal by the clerk. The note of evidence says "document read by all in venue room (adjourned 12.32pm resumed 12.40pm)" but that manifestly would not have been

long enough for the tribunal to have read, let alone have digested and considered, the lengthy written statement.

10. I acknowledge also that there was no request by or on behalf of the claimant at the hearing for a longer period of time to consider the statement or even for an adjournment. I remind myself, however, that in R v CICA ex parte Leatherland and Others [2001] ACD13 Turner J said "It is an elementary principle of procedural fairness ... any person who may be adversely affected by a decision should be in a position effectively to prepare their own case as well as to meet the case presented by the opposing party". To my mind the production of evidence at a late stage, particularly bearing in mind that this evidence had a material effect upon the decision of the tribunal, did not comply with the guidance given in Leatherland. That the applicant's solicitor did not seek a longer postponement or an adjournment does not to my mind absolve the tribunal from complying with the basic principles of natural justice and/or Article 6 of the European Convention on Human Rights. The fact that the tribunal was entitled to admit the evidence, under rule 15(2), is not determinative of the question of the fairness of the procedure they followed. Neither does the fact that the applicant's representative did not ask for a postponement or adjournment mean that there was no breach of natural justice of Article 6. The tribunal itself still had to comply with the principles of procedural fairness. In consequence of these matters I quash the decision of the First-tier Tribunal and remit the appeal for rehearing before a fresh tribunal.

(Signed on the Original)

S J Pacey
Judge of the Upper Tribunal

10 October 2011

M

CF/4376/2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Secretary of State, brought by my leave, against the decision of the appeal tribunal held on 3 May 2002. I set aside the decision of the tribunal for error of law and substitute my own decision, pursuant to section 14(8)(a)(i) of the Social Security Act 1998. My decision is that the claimant was lawfully present in the United Kingdom on 28 March 2001, the date of the claim to child benefit.

2. The factual history is not disputed. Shortly stated it is that on 28 March 2001 a claim to child benefit was made in respect of the claimant's son. The claimant and his wife are Turkish Nationals, having arrived in the UK as asylum seekers on 11 February 1997. Their son was born in the UK on 9 August 2000. At the date of the decision under appeal the claimant had not been granted unlimited leave to enter or remain in the UK, neither had he been granted exceptional leave to enter or remain or refugee status. He was, however, working.

3. The decision maker had regard to section 115 of the Immigration & Asylum Act 1999, providing that no one was entitled to a number of benefits (including child benefit) while he was "*a person subject to immigration control*" defined, inter alia, as someone who required leave to enter or remain but who did not have it. The Social Security (Immigration & Asylum) (Consequential Amendments) Regulations 2000 provided, in essence, an exception for people who were citizens of a state which had signed up to the European Convention of Social and Medical Assistance or the Council of Europe Social Charter, these conventions requiring the UK to extend to nationals of the other contracting states the same level of social and medical assistance as was available to its own nationals, provided only that the former were "*lawfully present*" in the United Kingdom. The decision maker reasoned that the appellant was not "*lawfully present*" because he (and his wife) had only been temporarily admitted to the UK. The decision maker noted that the claimant had not been restricted from taking up employment but, in essence, argued that the claimant could not be "*lawfully working*" within the ambit of the Consequential Amendments Regulations if he was not "*lawfully present*".

4. The tribunal allowed the appeal, finding that the relevant test was not the immigration status of the claimant but whether he was lawfully working at the time the claim was made. The tribunal found that he was and, thus, that he fell within the ambit of the Consequential Amendments Regulations 2000.

5. The grounds of appeal were that the tribunal erred in failing to take account of the decision of the Court of Appeal in Kaya, to the effect that a person having been granted only temporary admission to the UK could not be lawfully present and, it followed, could not be lawfully working. That case had been referred to in a supplementary submission to the tribunal but had not been addressed by the tribunal.

6. The submission provided on behalf of the Secretary of State on the appeal relied on the original ground but also prayed in aid the decision of the Commissioner in CIS/2091/2002 in

which the Commissioner followed Kaya. I deferred further proceedings, however, pending the outcome of an appeal from CIS/2091/2002, otherwise known as Szoma. The delay in this case is accounted for because it has been necessary to await the outcome of proceedings, at different appellate levels, in Szoma.

7. The Secretary of State's representative went on to rely on the decision of the Court of Appeal in Szoma which, in summary, upheld the decision of the Commissioner. The determination of the instant appeal was further deferred pending the decision of the House of Lords in Szoma. That decision is now extant and provides a different interpretation to *"lawfully present"* from that which had been applied in Kaya and adopted by the Court of Appeal in Szoma. Giving the only reasoned decision Lord Brown held that the relevant part of the Consequential Amendments Regulations required no more by way of positive legal authorisation for the claimant's presence in the UK than that he was at large here pursuant to the written authority of an immigration officer, provided for by statute. That authority is clearly before me, in the case papers at document 12 which also, I note, provides in relation to the claimant that *"there are no restrictions on you taking employment..."* .

8. The upshot of all this is that the decision of the House of Lords undermines the original decision the subject of the appeal to the tribunal and the original arguments made on behalf of the Secretary of State. Nonetheless in my judgment the decision of the tribunal was erroneous in law because the tribunal did not address a relevant legislative authority cited to them and appear to have founded their decision on the basis that the claimant was *"lawfully working"* simply because he had a national insurance number and was paying income tax. Those are not the criteria.

9. This is not, however, a case in which I need trouble the claimant or a further tribunal with a rehearing. The facts are before me and there is no possibility of any further relevant appellate proceedings. The Secretary of State's representative concedes, rightly in my view, that following Szoma in the House of Lords the claimant was *"lawfully present"* in the UK. He also concedes, again rightly in my view, that there was nothing to indicate that the claimant was not *"lawfully working"* within the ambit of the Consequential Amendments Regulations. That being so I substitute my decision, favourable to the claimant, as set out in paragraph 1.

(signed on the original) **S J Pacey**
Commissioner
14 March 2006

N

CH/3900/2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. In this appeal the appellant, [redacted] is the housing authority; the respondent is the person who claimed housing and council tax benefit The appeal, which proceeds by my leave, is from the decision of the tribunal held on 19 May 2005. I set aside the decision of the tribunal for error of law but consider this to be an appropriate case in which to substitute my own decision, pursuant to paragraph 8(5)(a) of Schedule 7 to the Child Support, Pensions & Social Security Act 2000. My decision is that the claimant's accommodation (at [redacted]) was not provided by the appellant to the respondent, the consequence being that the accommodation is not "*exempt accommodation*" as provided for by regulation 10(6) of the Housing Benefit (General) Amendment Regulations 1995. ("The 1995 Regulations")

2. I make it plain at the outset that I regret the delay in the determination of this appeal. A number of factors contributed to the delay. First, leave to appeal was originally refused by Commissioner Levenson who, however, subsequently set aside that refusal and the matter was then placed before me for redetermination of the application for leave. Second, although the appeal was ready for determination after the oral hearing which I held there was a further delay because I considered it right to give the parties an opportunity to comment on a decision (CH/3811/2006) promulgated after the date of the oral hearing. Finally, owing to an administrative error in the Office of the Commissioners, the file was further delayed after the parties had commented on the later decision.

3. A housing/council tax benefit application had been made on behalf of the respondent in respect of property which I need only refer to as [redacted] On behalf of the respondent it had been argued that she was in exempt accommodation as defined in regulation 10(6) of the 1995 Regulations, with the result that the local reference rent (lower than the actual rent payable) did not apply in her case. The factual scenario as recorded by the tribunal is not disputed:

> "[*The claimant] has very special needs...A residential assessment of her needs carried out at the National Epilepsy Centre at Chalfont indicated that she required 24 hours support because of her severe learning disability and her uncontrolled and unstable epilepsy but that she did not need personal care.* [redacted] [who act on behalf of the respondent] *accepted that they had a duty to provide* [the respondent] *with housing because she had been assessed as not needing residential care. However, it was clear that none of the local domiciliary care agencies in* [redacted] *were able to meet* [the respondent's] *needs, so* [redacted] *engaged Independence Homes (who had been recommended by the National Epilepsy Centre) to help them find suitable accommodation for* [the respondent]. *This led to* [the respondent] *moving into* [redacted] *..The domiciliary support services are provided by Independence Homes on behalf of* [redacted] "

4. If a claimant is in exempt accommodation then he or she is not subject to the rules on rent restrictions introduced on 2 January 1996. "Exempt accommodation" is defined in regulation 10(6) of the 1995 Regulations. What is in issue in this appeal is the proper construction of regulation 10(6)(ii), under which *"exempt accommodation"* means accommodation which is *"provided by a non-metropolitan county council in England within the*

meaning of section 1 of the Local Government Act 1992, a housing association, registered charity or a voluntary organisation where that body or a person acting on their behalf also provides the claimant with care, support or supervision". It is not disputed that [redacted] is a non-metropolitan county council in England within the meaning of section 1 of the Local Government Act 1972. The issue before the tribunal, and before me, is the meaning of the words *"provided by".*

5. The tribunal correctly recorded the appellant's contention that because the respondent's obligation was to pay rent to a private landlord it followed that the accommodation could not be exempt as it had not been provided by [redacted] The tribunal reasoned, however, that *"[redacted] has the right to say who will live in [redacted] (or at least* [the respondent's] *part of it), namely* [the respondent]. *They engaged Independence Homes to act on their behalf in order to meet the council's obligation to house* [the respondent] *and to provide her with support services. It is thus [redacted] who have said it is* [the respondent] *who is to live at [redacted] ...Thus looking at the situation as a whole I have concluded that the words 'provided by' in the definition of exempt accommodation should be given a broad meaning and that* [the respondent's] *accommodation at [redacted] is being 'provided by' [redacted] in compliance with [redacted] statutory duties to* [the respondent]". The tribunal, thus, gave '*provided by*' a wide construction. It is argued on behalf of the appellants that the tribunal erred in law in adopting that construction.

6. I held an oral hearing of this appeal. The appellants were represented by Mr P Stagg, of counsel, the respondent by Mr J Zebedee, assisted by Mr A Campbell. I am grateful to them all for their help.

7. The essence of the appellant's argument is that where a local authority arranges for a third party to obtain accommodation for a person with special needs from a private landlord, it cannot properly be held that such accommodation is '*provided by*' the local authority and, on the contrary, the accommodation is '*provided by*' the individual who rents it out to a claimant, and not by any body that facilitates the provision of that accommodation. Mr Stagg draws attention to the contrast between the requirements in respect of accommodation (which must be provided by the relevant body) and services (which may be provided by *or on behalf of* the relevant body), suggesting, he contends, that a body only provides accommodation if it does so directly, not through some other provider. I am referred by Mr Stagg to the definition of '*provides*' in the Shorter Oxford English Dictionary (1993 Edition):

> "*Equip or fit out with what is necessary for a certain purpose; furnish or supply with something...Supply or furnish for use; make available; yield, afford...Make provision for the maintenance of a person...Supply necessary resources.*"

Mr Stagg argues that "*furnish*" or "*supply*" suggests the direct provision of a resource to a person as opposed to an indirect arrangement for another person to provide that resource.

8. Mr Stagg also prays in aid Command Paper 2920, to which I am entitled to have regard as an aid to construction since its contents form part of the "enacting history" of the 1995 regulations. The draft of the 1995 regulations was referred to the Social Security Advisory Committee ("SSAC") for comment and in a memorandum to SSAC the Secretary of State indicated his concern that rents in the private sector payable by way of housing benefit were too high. One of the comments of SSAC was that, in relation to exempt accommodation, "*non profit making accommodation managed by housing associations and charities should be exempt from the proposed restriction".* The concern of SSAC that non profit making organisations who

"*managed*" accommodation would be adversely affected by the proposals was reflected in the response of the Secretary of State to the effect that *"we will exempt from the new proposals the following accommodation:...Accommodation provided by housing associations, registered charities or voluntary organisations where care, support or supervision is provided by, or on behalf of, the provider to residents."* Mr Stagg's argument in relation to all of this is that it cannot have been the intention that *"exempt accommodation"* should extend to property let by a private individual ([redacted] being privately owned) to a person requiring care and attention where the only role of the non-profit making body listed in the definition of *"exempt accommodation"* ([redacted]) was to find that accommodation and make the necessary arrangements for care.

9. Mr Stagg also relies upon paragraph 23 of circular HB/CTB A7/96 suggesting that accommodation is only *"provided by"* a relevant authority when and if that relevant authority is the landlord. That I am empowered to have regard to DWP guidance as an aid to interpretation (when the meaning of legislation is unclear as it is in this appeal) is, says Mr Stagg, suggested by R B Tower Hamlets LBC HBRB ex parte Kapur [2000] The Times 28 June. (See also Wicks v. Firth [1983] 2AC 214 and R Wandsworth LBC, ex parte Beckwith [1996] 1 All ER 129. Mr Stagg also refers to CH/423/2006 (to be reported as R(H)2/07) which, he acknowledges, dealt with an issue different to the one arising in the instant appeal. That is because in that appeal the accommodation provider and the care provider had been separately engaged by a local authority to meet the needs of the claimant and the Commissioner held that the care provider was not acting on behalf of the accommodation provider. Mr Stagg submits that the decision in CH/423/2006 is still of relevance in that the reasoning of the Commissioner essentially proceeds on the basis that *"provided by"* indicates direct provision of the care by the accommodation provider, not through an agent. Moreover, Mr Stagg draws attention to R(IS)2/91 in which, it is submitted, the reasoning of the Commissioner indicates that the concept of provision (of accommodation and meals in that case) supports the narrower construction offered by Mr Stagg as opposed to the wider construction accepted by the tribunal and advanced by Mr Zebedee.

10. Finally, Mr Stagg draws support from section 2(4) of the Local Government Act 2000 in considering under what power [redacted] was acting. He submits that, given that it is not a local housing authority and has no powers or duties under the Housing Act 1996 and given that the claimant had not been provided with accommodation under Part 3 of the National Assistance Act 1948, the county council must have been acting under section 2(4) of the 2000 Act which empowers the local authority *"(b) to give financial assistance to any person (c) to enter into arrangements or agreements with any person or (d) cooperate with, or facilitate or coordinate the activities of, any person."* Mr Stagg submits that in engaging Independence Homes to find accommodation for the respondent the council was acting under the provisions of section 2(4)(b), (c) and (d) and not exercising powers under 2(4)(f) to *"provide staff, goods, services or accommodation to any person"*.

11. Given that the substantive issue involves questions of interpretation I invited the Secretary of State to indicate whether he would wish to be joined as a party to the proceedings. He accepted that invitation and a submission was made, in substance concurring with the views offered by Mr Stagg. The upshot of the submission provided on behalf of the Secretary of State is that *"provided by"* does not extend to the co-ordinator of housing, as in the instant appeal.

12. For his part Mr Zebedee, in arguing for a broad construction of *"provided by"*, offers a series of examples (*"provide new uniforms for the band/provide the troops with comforts/provide the*

children with free balloons" and the like) which, he suggests, is consistent with goods, services or facilities emanating from a source other than the original *"provider"* which, he says, is consistent with a definition, from the Compact Oxford English Dictionary, of "*provide*" including "*equip or supply (someone) with*" or *"make adequate preparation or arrangements for"*. Mr Zebedee argues also that if the definition of *"exempt accommodation*" extended only to circumstances in which the rent was due to the *"relevant body"* that definition could easily have used the word *"landlord"*, such that *"provided by"* must mean something wider, and must encompass situations in which a *"relevant body"* makes arrangements to provide someone with accommodation. Mr Zebedee says that in the late 1990s the Joint Council for the Welfare of Immigrants persuaded Westminster City Council that the *"wide"* interpretation was correct but that, of course, does not bind me and I have no idea of the arguments marshalled by the JCWI or why Westminster City Council were persuaded by them. Mr Zebedee also draws support from DWP guidance in relation to regulation 2(1) of the Housing Benefit (General) Regulations 1987 which exempts from the definition of *"young individual"* a person "*who has not attained the age of 22 years and was formerly provided with accommodation under section 20 of the Children Act 1989*". The DWP guidance referred to by Mr Zebedee is to the effect that *"The young person does not have to have been housed in Local Authority owned or run property – they only need to have been provided with their accommodation by the LA in this section of the Children Act..."* Mr Zebedee also draws attention to the definition of *"exempt accommodation"* before April 2000 in which reference was made to "*the occupants"* of any relevant property instead of *"the claimant"*. That, says Mr Zebedee, indicates that *"exempt accommodation"* may exist only in part of the dwelling.

13. In my judgement the arguments of Mr Stagg are persuasive. There is force in each discrete argument and their cumulative weight leads me to the conclusion that the *"wider"* interpretation adopted by the tribunal, and urged upon me by Mr Zebedee, is not correct. If the *"wider"* meaning of *"provided by"* is indeed correct then the following words (*"on behalf of..."*) in the relevant part of the regulation would be superfluous. There is, of course, some force in the argument of Mr Zebedee that the relevant part of the regulation could have been more clearly expressed. Such an argument would equally attach to a good deal of the Byzantine complexities of social security legislation. It is not, however, a warrant for me to impose upon the relevant part of the regulation a meaning which it simply will not bear. Mr Zebedee has supported his argument by quotations from the Compact Oxford English Dictionary, a less comprehensive and authoritative source in my judgment than the Shorter Oxford English Dictionary. Moreover a good deal of the examples of *"provide"* offered by Mr Zebedee are particularly context sensitive and some of the definitions he offers relate to *"provide with"* or *"provide for"*, as distinct from *"provide"* and to that extent the definitions have subtle but significant difference of meaning. In addition the shorter OED's reference to "*furnish*" or "*supply*" to my mind is suggestive of personally arranging for a person to receive a resource, not simply facilitating arrangements for such a resource to be provided by a third party.

14. Mr Zebedee offers support for his interpretation from the definition of *"young individual"* in regulation 2(1) of the Housing Benefit (General) Regulations but I remind myself that this refers to a person who has not attained the age of 22 years *"and was formerly provided with accommodation under section 20 of the Children Act 1989"*. The comparison with a *"young individual"* in the Housing Benefit Regulations is not to my mind relevant because *"provide"* under the Children Act 1989 has an extended meaning (see section 20(1), 22(1)(b), 23(1)(a) and (2)) to such an extent that a comparison of *"provide"* in that context and in the instant appeal is not comparing like with like.

15. Mr Zebedee has drawn attention to the amendments to the regulations but the essential words *"provided by...on behalf of"* are common to all versions of the amendments, so the other changes in phraseology referred to by Mr Zebedee have no bearing on the point of interpretation now at issue.

16. For the reasons advanced by Mr Stagg I am entitled to have regard to the SSAC report as an aid to interpretation. The draft version of the regulations provided no exempt accommodation exception. The memorandum by the Secretary of State to the SSAC made clear the policy behind the new scheme because concern was expressed about higher rents in the deregulated private sector. SSAC recommended that non-profit making accommodation managed by housing associations and charities should be exempt from the proposed restrictions and this recommendation was accepted in part. From the SSAC report and the comments of the Secretary of State it is in my judgment clear that the concern of the Secretary of State was to restrict unregulated rents, and their implications in relation to housing benefit, in the private sector and the SSAC were concerned not with private individuals (like the landlords in the instant appeal) but with non-profit making organisations. Mr Zebedee, I remind myself, in referring to the legislative policy of protection of public funds says that there must be a proper closeness of relationship between the parties involved in providing the accommodation and in providing the care, support or supervision. Whilst I fully accept that there is nothing improper in the relationship between the parties in the instant appeal nonetheless there is in reality no "closeness of relationship" between [redacted] and the other parties.

17. I am also entitled to take into account circular A7/96 as an aid to interpretation and I note that paragraph 2 refers to *"accommodation provided by housing associations, registered charity or voluntary organisations"* and that in referring to the exemption under paragraph 22 it is made clear in paragraph 23 that *"this exemption will not apply where the landlord of the accommodation is any other person or organisation than those specified"*. The landlord in the instant appeal, of course, is not [redacted] but a private landlord.

18. Whilst I accept that CH/423/06 addressed a different point of interpretation I remind myself that in referring to regulation 10(6) the Commissioner said *"...That clearly connotes that the care must be provided either by the landlord or a person acting in some sense for him..."*. That to my mind supports the *"narrow"* interpretation advanced by Mr Stagg. The reasoning of the Commissioner at paragraph 52 of that decision also goes in the same direction. I also draw inferences as to the meaning of the words now in issue from R(IS)2/91 in which, in considering the meaning of *"provided"*, the Commissioner considered the concept of provision as meaning provision by the owner of accommodation where a claimant lives, not the case in the instant appeal.

19. Mr Zebedee argued that *"provide"* refers to a continuing arrangement as opposed to a sham one, there of course being no suggestion of the latter in the instant appeal. I do not accept that argument. The definition urged upon me by Mr Stagg in my judgment does not derive from or depend upon any longstanding relationship.

20. In my judgement *"provided by"* as used in regulation 10(6) will not reasonably suffer the wide interpretation adopted by the tribunal. It does not in my judgment include instructing, arranging or facilitating privately rented accommodation through a third party, as happened in the instant appeal. In this appeal it is not disputed that the local authority arranged for a third

party to obtain accommodation for the claimant, a person with special needs, from a private landlord. I hold that that accommodation was not *"provided"* by the local authority and, accordingly, was not exempt accommodation within the ambit of regulation 10(6) of the 1995 Regulations.

(Signed)	**S J Pacey** **Commissioner**
(Date)	**9 July 2007**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. CDLA/1819/2010

Before: **Judge of the Upper Tribunal S J Pacey**

Decision: The decision of the appeal tribunal held on 17 May 2010 is set aside for error of law and the appeal remitted for rehearing before a fresh First-tier Tribunal (Social Entitlement Chamber).

REASONS

1. This is an appeal brought on behalf of the Secretary of State, by my permission, and is against the decision of the tribunal which decided that the claimant was entitled to the higher rate of the mobility component of disability living allowance. The appeal is based on a point of law, namely the correct application of the relevant legislative provisions (as interpreted in caselaw) to the claimant's circumstances.

2. The claimant had indefinite awards of the lower rate of the mobility component and the middle rate of the care component of disability living allowance, running from 16 January 1999. The claimant has the tragic misfortune to be registered blind. In the first claim pack he said that because he could not see he needed a guide, to warn him, for example, of hazards, and he said that he had a need for support because he suffered from dizzy spells which could lead to him becoming anxious and panicky. He went on to refer to his need for attention in connection with bodily functions but the only issue before the Upper Tribunal is that in relation to the mobility component.

3. By an application made on 21 October 2009 the claimant sought a supersession of the awarding decision. He maintained that his various medical conditions (not limited to loss of sight) had worsened in that his vision had deteriorated, he had become unsure, nervous and depressed and his balance had been affected, exacerbating his other medical problems. The tenor of the application for supersession indicates that at the time of the original application for DLA the claimant had some, but no useful, vision and that his already limited vision had grown worse by the time of the application for supersession. In that application the claimant reiterated that he needed physical support when walking because of his lack of vision and disorientation and balance problems. The decision maker, in substance, refused to supersede the awarding decision and the claimant appealed to the tribunal.

4. The claimant attended the hearing before the tribunal and gave evidence. The tribunal recited the (undisputed) adjudication history and from the way in which they framed their decision they accepted the evidence of the claimant. They found that the claimant was not able to walk unless physically supported by another person and that since the original award he had become disorientated, resulting in falls if not supported. Clearly, then, the tribunal found that there had been a material change in circumstances in the claimant's condition, sufficient to warrant a supersession of the awarding decision. The crux of the tribunal's reasons appear in paragraph 22:

> *"The tribunal accepted the appellant's evidence that his balance had deteriorated to such an extent that he was unable to make progress on foot outside in any meaningful way unless he was able to hold on to the person guiding him. Although he could physically put one foot in front of the other to*

undertake the physical act of walking, he could not get to where he wanted to go without having someone to physically support him so that he was enabled to stay on his feet. The appellant was therefore unable to walk or at the very least virtually unable to walk."

5. The Secretary of State's representative applied to the First-tier Tribunal for permission to appeal on the essential basis that the decision of the tribunal was erroneous in point of law since, it was argued, the approach adopted by the tribunal was inconsistent with Lees v Secretary of State for Social Services (reported as an appendix to R(M)1/84). The application for permission to appeal was refused by a District Tribunal Judge. Under rule 39(4)(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 a statement of reasons has to be provided for any refusal of permission to appeal. The District Tribunal Judge simply said that permission to appeal was refused because no question of law arose. Clearly it did, given the terms of the application made on behalf of the Secretary of State. The District Tribunal Judge did not otherwise address the merits of the application other than to say that the tribunal made adequate findings of fact and provided adequate reasons for their decision. The challenge mounted on behalf of the Secretary of State did not, however, lie in this regard. I granted permission to appeal because it seemed clear to me that an obvious point of law arose.

6. The Secretary of State's representative relies upon the grounds advanced as set out in the application. A copy of that application has been sent to the claimant who, perfectly understandably if I may say so, has said that the further appellate proceedings have "*...caused frustration and trauma to an already difficult situation.*" In the determination of the application for permission to appeal I indicated to the claimant that, since matters of law were in issue, he might wish to take advice about his position and the further conduct of the appeal and I indicated possible sources of that advice. The claimant remains unrepresented and has not commented on the legal arguments put forward on behalf of the Secretary of State. I am sure that the Secretary of State's representative, like me, has no wish whatsoever to add to or exacerbate the tragic misfortunes that life has heaped upon the claimant. I hope the claimant will not think that I am patronising when I say that he clearly needs all the help and support he can get. Disability living allowance is, however, a creature of statute and whether the claimant was entitled to the higher rate of the mobility component was dependent upon a correct application of the relevant statutory provisions, as explained in the Lees case.

7. The Lees case dealt with mobility allowance. That has been replaced by the mobility component of disability living allowance. Lees also addressed the proper interpretation of section 37A of the Social Security Act 1975 and the Mobility Allowance Amendment Regulations 1979. They are, respectively, replicated in section 73(1)(a) of the Social Security Contributions & Benefits Act 1992 and regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991. Section 73(1)(a) provides for entitlement to the mobility component of disability living allowance if the claimant is suffering from physical disablement such that he is either unable to walk or virtually unable to do so. So far as is material regulation 12(1) of the DLA Regulations provides that a person shall be taken to be virtually unable to walk if his physical condition as a whole is such that "*his ability to walk out of doors is so limited, as regards the distance over which or the speed at which or the length of time for which or the manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk...*".

8. There are clear and inescapable parallels between the Lees case and the instant appeal. In that case the claimant also had loss of vision and it was accepted that "*outdoor walking is only feasible with the help of an intelligent adult to pilot her*". The tribunal in that case dismissed the appeal on the basis that the legislative provisions then in force did not provide that a blind person could qualify for an allowance in circumstances where, although in fact physically capable of walking, he could only go out when accompanied by a sighted person as a guide. The Social Security Commissioner agreed with the decision of the tribunal finding that the legislative provisions limited eligibility for the allowance to those who were incapable of the physical act of walking, or virtually so. The Court of Appeal agreed with that conclusion. So did the House of Lords, whose decision is binding upon the Secretary of State, First-tier Tribunals and the Upper Tribunal. The House of Lords agreed with the reasoning of the Commissioner. He said "*[blindness] is an affliction which is wholly unrelated to the physical power to move one leg in front of another. Of course, it affects drastically the sufferer's scope for walking, in that, outdoors at least, he or she is in need of a guide, or more practically a guide dog. But these are factors which are not directly concerned with the faculty of walking. Now, in the present case, the claimant, in addition to suffering from blindness, is inclined to disorientation in open spaces. This, in my judgment, is like blindness, a handicap totally unrelated to her capacity or otherwise to perform physical walking. I appreciate, of course, that the consequences of the claimant's tragic disability is that, although she can walk, she cannot control without assistance a direction in which she walks, she has an ability to walk, but an inability to make proper use of the faculty*".

9. The instant tribunal to my mind erred in law. That is because they found that the claimant was unable to walk but, inconsistently with that finding, accepted that he could undertake the physical act of walking. Their approach is, I am afraid, totally at variance with what was held in Lees and on that basis alone their decision must be set aside. This apart the tribunal went on to consider the question of "*virtually unable to walk*" but they did not address any of the statutory criteria as set out in regulation 12(1)(a)(ii) of the DLA Regulations.

10. I have considered whether to remake the decision of the tribunal, to whatever effect. I do not think that it is right that I should do so. Although the claimant's loss of vision cannot alone result in entitlement to the higher rate of the mobility component (since Lees, in summary, holds that the inability to direct movement is irrelevant to the statutory conditions) I note that the claimant also complained of other matters. Anxiety and panic attacks are, of course, catered for in the lower rate of the mobility component. The claimant also complained, however, of dizziness and loss of balance. These factors may be relevant because they affect the manner of walking or, in an extreme case, even the ability to walk at all. It may be, for example, in a given case that no amount of guidance or support will prevent falls, which may be of such severity and frequency that the claimant in a particular case could be said to be unable or virtually unable to walk (see CDLA/1639/2006). These are matters that require investigation by the fact finding tribunal, in relation to regulation 12. Such findings of fact are absent from the decision of the instant tribunal and, then, I must remit the appeal for rehearing before a fresh tribunal. My having done so is not an indication of the claimant's eventual prospects of success. I hope that, as before, he will opt for an oral hearing before the tribunal so that they can make a properly informed decision. They will need to adopt the approach indicated in Lees and make proper findings of fact of all matters arising for consideration under regulation 12. As they will appreciate they will, of course, also need to address supersession criteria although no issue has been taken in relation to the claimant's evidence that his condition materially deteriorated.

(Signed)

S J Pacey
Judge of the Upper Tribunal

(Date) **24 November 2010**

P

[2009] UKUT 166 (AAC)
LE v Secretary of State for Work and Pensions

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CJSA/1807/2008

Before **S J Pacey Judge of the Upper Tribunal**

Decision: The decision of the appeal tribunal held on 2 November 2007 is erroneous in point of law. I set aside that decision. I re-make that decision pursuant to s.12(2) of the Tribunals, Courts and Enforcement Act 2007. The claimant is not entitled to contribution based Jobseeker's Allowance in respect of the claim made on 23 November 2007.

REASONS FOR DECISION

1. This is an appeal by the claimant, brought by my leave (as it was then termed) and is against the decision of the appeal tribunal held on 2 November 2007. By virtue of the Tribunals, Courts and Enforcement Act 2007 and paragraph 2 of Schedule 4 to the Transfer of Tribunal Functions Order 2008 the appeal continues on and after 3 November 2008 as proceedings before the Upper Tribunal. That, however, makes no substantive difference to my decision.

2. I held an oral hearing of the appeal. The claimant attended that hearing and was represented by Mr J Coppel, of Counsel, instructed by the Free Representation Unit, and the Secretary of State was represented by Mr R Palmer, of Counsel, instructed by the Solicitor to the Department. I am grateful to the parties for their written and oral submissions.

3. A claim to contribution based jobseeker's allowance ("JSA") was made on 23 November 2007. The decision maker decided that the claim could not be backdated, as the claimant requested, for the period from 24 November 2006 to 22 January 2007. The claimant did not pursue her initial appeal against that decision and it was not an issue before the tribunal or before me. The decision maker also decided, however, that the claimant was not entitled to contribution based JSA because she had not paid sufficient national insurance contributions in the tax year 2005/2006.

4. Section 1(2) of the Jobseekers Act 1995 provides that a person shall be entitled to JSA if he or she satisfies various conditions one of which, under section 1(2)(d), relates to the satisfaction of contribution conditions as set out in section 2. Section 2(1)(a) provides that the claimant has actually to have paid Class 1 contributions in respect of one ("the base year") of the last two complete years before the beginning of the relevant benefit year and satisfies the additional conditions in sub-section (2). Section 2(1)(b) provides that the claimant also, in respect of the last two complete years before the beginning of the relevant year, has either to have paid or been credited with Class 1 contributions. It is not disputed that the claimant had paid sufficient Class 1 contributions in the tax year 2004/5. She therefore satisfied the first contribution condition. It is also not disputed that the claimant had not paid sufficient contributions in the 2005/2006 tax year and that she did not, therefore, satisfy the second contribution condition. The claimant appealed to the tribunal. The claimant said that she had not satisfied the second contribution condition because she had not at the material time worked because of child care responsibilities, and she argued that the decision the subject of the appeal had discriminatory effect, since most carers were female.

5. The claimant helpfully provided a written submission to the tribunal. She amplified her grounds of appeal, pointing out that it was anomalous that her home responsibilities protection for the tax year 2005/2006 counted towards pension entitlement but not towards contributions for JSA purposes. The claimant was referring to the Social Security Pensions (Home Responsibilities) Regulations 1994 which, in summary, provides assistance in satisfying the second contribution condition in relation to a range of benefits including category A or B retirement pension. The claimant maintained that the provisions of section 2 of the Jobseekers Act were discriminatory in not enabling HRP to count towards satisfaction of the second contribution condition. The claimant maintained that section 2 disproportionately disadvantaged more women than men and, as a result, that there was indirect discrimination contrary to Article 14 of the European Convention on Human Rights. The claimant also argued said that there was discrimination contrary to Article 4 of Council Directive 79/7/EEC.

6. The tribunal dismissed the appeal. After briefly reciting the undisputed contribution record of the claimant the tribunal went on to say that:

> *"[The claimant] agreed that she had taken time off from work because she had a family. The PO explained that this meant she would get national insurance credits for home responsibility protection. This would mean she would not be prejudiced in respect of her retirement pension in the future, but was not sufficient to entitle her to JSA. The regulations dealing with this had been set out in the written submission that both the tribunal and the appellant had received in advance of the hearing.*
>
> *I was satisfied that these regulations had been applied correctly in this case and had to confirm the decision."*

7. The grounds of appeal as originally formulated were that "*... the law governing home responsibilities protection breaches the Human Rights Act 1998, in that it constitutes indirect discrimination on the basis of sex contrary to Article 14 in conjunction with Article 1 Protocol 1 and Article 8 of the European Convention on Human Rights pursuant to the Human Rights Act 1998. In the alternative, it is argued that the statutory scheme violates Directive 79/7/EEC*".

8. The difficulty with the above argument is that although a decision on home responsibilities protection can be appealed (Schedule 3, Social Security Act 1998) it can only arise within the context of determining the contribution conditions for the benefits set out in paragraph 5 of Schedule 3 to the Social Security Contributions and Benefits Act 1992. There was, in fact, no decision on a home responsibilities protection claim neither did the calculation of contributions under section 2 of the Jobseekers Act impose a requirement on the Secretary of State to consider the claimant's HRP status for the tax year 2005/2006. Issues as to whether HRP has any discriminatory effect do not fall for consideration in the course of this appeal. In granting leave to appeal, however, I questioned whether the relevant contribution conditions were discriminatory under EU or ECHR provisions.

9. The initial submission provided on behalf of the Secretary of State conceded that the tribunal erred in law in failing to address the arguments about unlawful sex discrimination contrary both to the Human Rights Act 1998 and Article 4 of Directive 79/7. That to my mind is manifestly correct, as was conceded by Mr Palmer. I must, then, set aside the decision of the tribunal. The parties were agreed that I should remake the decision of the

tribunal (to use the parlance of section 12(2) of the Tribunals, Courts and Enforcement Act 2007) since there is no dispute as to the facts, only as to matters of law.

10. The initial grounds of appeal were effectively recast by Mr Coppel, who referred to regulation 48 of the Jobseeker's Allowance Regulations 1996. The requirement for contributions to have been paid or credited in respect of relevant years (section 2 of the Jobseekers Act) can be ameliorated by "linked periods", provided for by section 2(4)(b). The linking periods are defined in regulation 48(2) of the JSA Regulations. Under regulation 48(2) carers, those incapable of work and those entitled to a maternity allowance can be included within "linked periods" but, significantly the claimant argues, regulation 48 does not include a linking rule for women caring for children, as part of normal child care responsibilities, like the claimant. This, it is argued, has the effect that regulation 48 was not validly made because it did not go far enough towards protecting the position of those, like the claimant, with child care responsibilities. The claimant develops this argument by alleging discrimination under Article 1 of the First Protocol to the European Convention, read with Article 14 and Directive 79/7.

11. It is not disputed that contribution based JSA falls within the subject matter of Article 1, Protocol 1 and so can be read with Article 14 in order to consider whether the latter has been breached. Article 14, of course, has no independent application, being limited to secure the "enjoyment of the rights and freedoms set forth in this Convention". Following R(RJM) v. Secretary of State for Work and Pensions [2008] UKHL 63 it is clear that a claim to a contributory benefit falls within the ambit of Article 1, Protocol 1 and, thus, Article 14 must be considered. It provides for the enjoyment of the rights and freedoms set forth in the Convention without discrimination on any ground including sex.

12. Mr Coppel argued that regulation 48 had discriminatory effect in that it has disproportionate impact upon women, since more women take time off work to look after children than do men. Mr Palmer's argument was that the condition (to have made a sufficient level of contributions in each of the relevant tax years) that the claimant was required to meet was not one she was prevented from meeting by the fact that she was a woman and I remind myself that R(JSA) 4/02 indicates that a key distinction between whether a difference in treatment arises from mere choice, as opposed to indirect discrimination, is whether a person can objectively be said to belong to a group which is adversely affected by a particular provision. Mr Palmer argued that it was not clear why the "group" for comparison should include parents who had taken a career break for the purposes of child care given that voluntary breaks in employment might be taken for any number of reasons. The absence of a particular category in regulation 48(2) was, he argued, not determinative and that Mr Coppel's focus on a narrowly defined subset was not justified. Furthermore Mr Palmer drew attention to the lack of statistical evidence to support the claimant's complaint of discrimination.

13. I see the attraction of Mr Palmer's argument. It is not disputed that the claimant had a voluntary career break and it may be permissible to draw a distinction between those who were unable to comply with the contribution requirement and those unwilling to comply. An analogy may be drawn with the 38 week period of payment of statutory maternity pay, that period being a period of absence by reason of maternity, beyond which any absence would be a matter of choice. The categories of those covered under regulation 48 include those in the initial period of maternity and those who are unable to work through sickness or disability.

14. Mr Palmer sought to distinguish two cases relied upon by Mr Coppel, Schonheit [2004] IRLI 983 and Ministry of Defence v. Armstrong [2004] IRLI as they related to different factual situations and concerned the principle of equal pay. Those cases concerned part-time workers. Although each person in a group of part-time workers might make an individual practical choice about working shorter hours (for example so that they can pick up children from school, cook for the family or carry out child care), these choices are distinct from the social fact represented by the cumulative statistical and demographic picture that emerges. If that social fact demonstrates that a group (for example women) are statistically more likely not to meet the relevant conditions those conditions will be discriminatory regardless of the individual motivations of each person. That to my mind is the essence of the reasoning in the "part-time" workers cases relied upon by the claimant, including Schonheit and Armstrong. It is clear that the claimant made a decision to remain at home after the birth of her child for a period which took her beyond the statutory maternity scheme and into a benefit year which did not allow her to rely on her contributions for JSA purposes. Her individual choice, however, can be subsumed within the larger demographic picture if it can be shown that a significantly greater number of women than men take periods of time out of employment to care for children, so that they fail to meet the contribution rule in section 2 of the Jobseekers Act. The absence of statistical evidence is not to my mind determinative if the separate demographic groups and the differential treatment thus arising are accepted as existing.

15. I take the view that it is within judicial knowledge that women are more likely to take a career break than men, perhaps particularly when children are under the age of 5 (as in this case) and I remind myself that a similar view was taken by the Deputy Commissioner (as he then was) in CP/4017/2006. In my view it is more likely that more women than men will be unable to satisfy the contribution requirement in section 2 of the JSA. Focusing upon the element of choice alone would not provide a full answer, particularly bearing in mind that choice may be a reflection of general societal patterns, for example that women have a particular role in bringing up children see, for example, the opinion of the Advocate General in Enderby v. Frenchay Health Authority and Another [1993] IRLR 591, quoted with approval in Armstrong. I have not forgotten that in R(JSA) 4/02 the Commissioner (as he then was) considered to be determinative the claimant's individual choice. That case, however, to my mind depended upon its own rather unusual facts, such that it was impossible to identify a group to which the claimant belonged in relation to the provision at issue and thus to show any objective difference in treatment. The decision that it was a matter of "choice" for the claimant as to how many hours she was available for was a conclusion from that reasoning. In my judgment, then, the claimant is able to demonstrate indirect discrimination as a result of the legislative provisions in issue.

16. That raises the question of whether any discrimination that arises is justified. I remind myself that sex is one of the "suspect grounds" which requires weighty reasons for justification, see R v. Carson [2005] UKHL 37. Any discrimination has to be founded upon objective and reasonable justification, assessed in relation to the aim and effects of the measure under consideration and there has to be a reasonable relationship of proportionality between the means employed and the aims sought to be realised, see Belgian Linguistics (No. 2) 1979-80 (1 EHRR 252). It is to be remembered also that in Stec v. United Kingdom [2005] 41 EHRR SE 295 the European Court of Human Rights said that "the contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment". Mr Palmer argued that JSA was a benefit designed to assist the unemployed and was not primarily designed to protect those

who voluntarily gave up their employment, for whatever reason. Moreover, all the categories referred to in regulation 48(2) are subject to the rider in 48(2A) which, in his submission, meant that there was a requirement for "recentness" which should, then, provide the focus for looking at the periods in 48(2). All the categories in 48(2) effectively recognise that there was no real choice for the people in those categories about giving up work and the question of where to draw the line was a matter for legislative choice.

17. The open-ended linking period in regulation 48(2) effectively recognises that those who are carers or incapable of work could be out of the labour market for some considerable time and this is, then, inconsistent with the requirement of "recentness" which Mr Palmer sought to introduce into regulation 48. Although regulation 48(2A) imposes a requirement that those who fall within 48(2) have to come within a jobseeking period (or further linking period) within 12 weeks of the linking period which applies to them coming to an end, regulation 48(2A) has no bearing on how long the linking period itself might be, only on how long after it has finished the claimant might rely upon it.

18. The House of Lords recently summarised the requirements of proportionality in AS (Somalia) (FC) and Another (FC) v. SSHD [2009] UK HL 32 in which their Lordships quoted with approval what Lord Bingham had said in R(SB) v. Governors of Denbigh High School [2006] UKHL 15: "... the limitation or interference must be directed to a legitimate purpose and must be proportionate in scope and effect." It is trite that the burden of showing justification rests upon the Secretary of State. JSA is a benefit designed to assist the unemployed. It is important to bear in mind in this appeal that the claimant voluntarily gave up her employment. All the categories in regulation 48(2) effectively recognise, however, that there was no real choice for the people in those categories about giving up work. Thus, for example, provision is made for those incapable or treated as incapable of work and those whose caring responsibilities are so onerous as to justify entitlement to a carer's allowance. The whole tenor of the categories in regulation 48(2) to my mind is inconsistent with any reasonable element of choice which is, however, present in those who give up work for the purposes of child care. This has the effect of drawing a bright line between those who fall within regulation 48(2) and those, like the claimant, who voluntarily give up work. A line has been drawn and the cut-off point, in my judgment, is a matter of legislative choice. Parliament has recognised that an additional period may be necessary to reflect child care responsibilities (regulation 48(2)(c) providing for linking in respect of a maternity allowance) and the drawing of the line to my mind demonstrates a reasonable relationship of proportionality between the legitimate aim sought to be employed in distinguishing between those who have no real choice about giving up work and those who have a very real element of choice. The criteria in regulation 48(2) are strongly defined and clearly delineated. The discrimination in my judgment clearly has a rational basis, relating to social and economic policy, and that is a matter for Parliament. Moreover, there are other benefits which may be available to those with child care responsibilities, for example child tax credit and working tax credit. Any discrimination is, then, in my judgment justified.

19. Even absent the justification, that would leave the question of what remedy is appropriate. I am invited on behalf of the claimant to give "a declaration that regulation 48 was invalidly made ..." This is presumably a reference to the powers arising under section 3(1)(c) of the Human Rights Act 1998. Mr Coppel argues that regulation 48 should be "levelled", by extending the protection to include those with child care responsibilities. Mr Palmer, in contrast, argues that if regulation 48 is found to be unlawfully discriminatory

then it would fall to be disapplied altogether but that would produce no benefit to the claimant who would still be unable to meet the requirements of section 2 of the Jobseekers Act.

20. The primary source of the discrimination is, however, section 2 of the Jobseekers Act. It cannot be read in the way contended for on behalf of the claimant. Any discriminatory effect could have been removed under regulation 48 but that regulation is not to my mind ultra vires simply because it has not done so. Disapplying regulation 48 would not remove the discrimination complained of. Notwithstanding that it does not provide a linking period that would otherwise assist her it is not regulation 48 which prevents the claimant being paid JSA and without regulation 48 the claimant would have to rely on the Jobseekers Act itself. That would not in any way assist her because it contains only the rules she cannot meet. The provisions in section 2 are clear and unambiguous. They unarguably exclude the claimant from entitlement and cannot be read down in a manner compatible with her ECHR rights. Similarly, in my judgment, none of the references to linked periods in section 2(4)(b), 35(2) and Schedule 1, paragraph 3(b) can be read down as providing any particular rule which can be construed in the claimant's favour since those provisions simply provide the framework by which regulations could be introduced if the Secretary of State were so minded.

21. Regulation 48 cannot be read down so as to assist the claimant. It is not, to my mind, permissible to write in a provision benefitting a woman who has taken time out of employment for child care. Section 3(1)(c) of the Human Rights Act does not extend to writing in a provision, even in secondary legislation, which is not there. Notwithstanding that the power to prescribe a relevant category under regulation 48 exists to read such a category into that regulation would be contrary to the clear exclusionary meaning of section 2 of the Jobseekers Act and would result in a positive legislative change crossing the boundary between interpretation and amendment of a statute, see para 121 Ghaidan v. Godin Mendoza [2004] UKHL 30. I remind myself also that in R(P) 1/08 the Commissioner, referring to R v. Lambert [2001] UK HL 37 noted that resort to section 3 of the Human Rights Act would not be possible if the legislation contained provisions which expressly contradicted the meaning which the enactment would have to be given to make it Convention compatible.

22. The claimant's representative submits that "... just satisfaction in [the claimant's] case requires ... an order that the jobseeker's allowance for which she has applied is payable". The implication is that relief can be given without a statutory basis. No such power exists either in the provisions governing jobseeker's allowance, the Tribunals, Courts and Enforcement Act 1997 or the Upper Tribunal Rules, a similar view being expressed in CIS/1132/2006, paragraph 23.

23. There is, then, no remedy I am able to provide. The claimant, however, also relies upon Council Directive 79/7/EEC which, Article 1, provides for the principle of equal treatment for men and women in matters of social security and, Article 2, applies to the "working population". Article 3 provides that the Directive shall apply to specified statutory schemes. There is no dispute that the claimant falls within Article 2 and that JSA is a scheme within Article 3. Mr Coppel argues that the claimant has been discriminated against on the ground of sex, contrary to Article 4. The arguments of both parties in relation to the discrimination issue are substantially the same in relation to Human Rights Law as they are to European Union Law. I have addressed the discrimination issue above.

24 Mr Palmer argues that the respondent is entitled to rely upon the derogation in Article 7(1)(b), allowing Member States to exclude from the scope of the Directive "... the

acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children." Article 7(2) provides that "Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned." Mr Coppel argues that the respondent has not complied with the requirement for periodical review and (Francovich [1991] ECR I - 357) the respondent has failed to fulfil a minimum standard which can be derived from what he says is a requirement for a periodical review. Mr Coppel argues that the derogation is to preserve temporarily certain advantages afforded to women in order to remedy past inequalities and that the discrimination complained of against women with childcare responsibilities, is not objectively and necessarily linked to those responsibilities.

25. I remind myself, however, that the derogations in Article 7 are capable of working against women as well as in their favour. See, for example, Hepple v. Adjudication Officer [2000] ECR I - 3701 in which women suffered a cut from reduced earnings allowance to retirement allowance at age 60, as opposed to 65. To my mind the claimant cannot escape the effect of the plain wording of Article 7(1)(b). Article 7(1)(b) is clearly directed to just such disadvantages as are in issue in this appeal, that is to say relating to loss of benefit entitlement arising from a break in employment because of looking after children. Article 7(1)(b) specifically leaves it to individual Member States to decide the degree to which the different position of men and women regarding the effects of child care and employment could be ameliorated. Any comparison with Article 7(1)(a) is unhelpful since although that contains a simple rule for the purpose of pensionable ages the further "... possible consequences ... for other benefits ..." inescapably require a more complex working out on a benefit by benefit basis as is apparent from the different decisions in Thomas v. Secretary of State for Social Security [1993] ECR I - 1247) (concerning severe disablement allowance and invalid care allowance) and Secretary of State for Social Security v. Graham [1995] ECR I - 2521 (concerning invalidity benefit) and Hepple, which concerned reduced earnings allowance.

26. Article 7(2) clearly envisages that from time to time Member States would consider whether there was equality as between the sexes in terms of work and bringing up children and whether the privileged treatment of women did not need to be continued (... "in the light of social developments in the matter concerned"). Although there is no evidence that Article 7(1)(b) has been re-examined in my view this Article is neither "sufficiently clear and precise" nor "unconditional" in its terms and is therefore not directly effective. The absence of any re-examination of the position is not to my mind determinative. Even if, as the claimant maintains, women are still disadvantaged regarding work and child care in the United Kingdom there appears no basis for reviewing and removing the derogation. The basis for Article 7(1)(b) would nonetheless remain, together with its broad effect. The claimant is not assisted by Francovich [1991] since that case concerned a failure by a Member State to establish a mechanism to implement a Directive. Damages were awarded for the failure but that case presupposed that the Directive in issue gave rise to enforceable rights which in my judgment do not arise under Article 7(2). This cannot, then, be used as an aid to interpret the scope of the derogation in Article 7(1)(b). In summary the claimant cannot, in my judgment rely upon Directive 79/7 to show discrimination under EEC Law.

(Signed on the Original)

S J Pacey
Judge of the Upper Tribunal

(Date) **24 August 2009**

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CG/3958/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal brought on behalf of the Secretary of State, leave having been granted by a district chairman of tribunals, against the decision of the appeal tribunal held on 3 July 2003. I set aside the decision of the tribunal for error of law. I substitute my own decision which is given under the provisions of section 14(8)(a)(ii) of the Social Security Act 1998. My decision is that the claimant has been overpaid invalid care allowance in the sum of £2,138.45 for the period from 3 September 2001 to 12 May 2002 and that this sum is recoverable from her.

2. The claimant had been receiving invalid care allowance ("ICA") but started a full-time course of education (leading to a degree in midwifery) on 3 September 2001. The decision maker reasoned that an overpayment, in the sum and for the period set out in paragraph 1 above, had arisen on the basis that the claimant had failed to disclose the material fact that she was receiving full-time education and that the Secretary of State was not aware of the relevant course until 15 May 2002, the date of receipt of a review form completed by the claimant. Section 70(3) of the Social Security Contributions and Benefits Act 1992 provides that a person shall not be entitled to ICA if receiving full-time education. By regulation 5 of the Social Security (Invalid Care Allowance) Regulations 1976 "*a person shall be treated as receiving full-time education for any period during which he attends a course of education at a university, college, school or other educational establishment for twenty-one hours or more a week*" and, by regulation 5(2) in calculating the hours of attendance "*there shall be included the time spent receiving instruction or tuition, undertaking supervised study, examination or practical work or taking part in any exercise, experiment or project for which provision is made in the curriculum of the course ...*".

3. The tribunal accepted the evidence of the claimant that she "*informed her local authority and social security office of starting her course. As a result income support previously paid to the appellant stopped. There had been no failure by the appellant to disclose a material fact entitling the Secretary of State to recover overpayment under section 71 Social Security Administration Act 1992.*"

4. The tribunal also went on to find that the claimant was not entitled to ICA from 3 September 2001 since she was in full-time education. The tribunal went on to address the argument of the claimant relating to her work placement between January and May 2002. The claimant, through her representatives, argued that being on placement or work experience was not "*a course of education*", also that since the placement was in a hospital such an establishment was not encompassed in the phrase "*university, college, school or other educational establishment*" and that in any event during the placement the claimant was not studying for 21 hours or more per week. The tribunal rejected these arguments on the basis that "*they were periods spent working on placement (midwifery) where [the claimant] was supervised by a qualified midwife duly approved for the purpose of the course and that there was some time set aside during such placement to attend university.*" The tribunal concluded by reasoning that the work placement fell to be considered as "*practical work*" within the meaning of regulation 5.

5. In relation to the issue of failure to disclose it is apparent, from the tenor of the tribunal's decision, that they took into account the argument advanced on behalf of the claimant (see the typed submission at documents 37-40) that under Hinchy v. Secretary of State for Work and Pensions if the Secretary of State could not disclaim knowledge of his

own decisions, with the effect that there could be no recoverable overpayment on the basis of failure to disclose a material fact already known to the Secretary of State or his decision maker.

6. The Secretary of State's appeal from the decision of the tribunal was deferred pending the decision of the House of Lords in Hinchy, the principles in Hinchy that the tribunal had relied upon having been set out by the Court of Appeal. The submission provided on behalf of the Secretary of State recites relevant parts from the decision of the House of Lords in Hinchy and argues that the tribunal fell into error of law given that the obligation on the part of the claimant to disclose the material fact of her starting a full-time course of education was to make a disclosure to the office of the Department handling the transaction giving rise to the expenditure, that is to say the ICA office. There was, and never has been, any argument that the claimant did this. On that basis I am invited on behalf of the Secretary of State to set aside the decision of the tribunal and substitute my own decision, as set out in paragraph 1, above.

7. The claimant, through her representative, responds by arguing that the obligation of the claimant to notify the ICA office would not have been apparent to her since there is no evidence to substantiate the assertion of the Secretary of State that the claimant would have had information telling her about changes of circumstances which had to be disclosed including starting a full-time course of education. The representatives for the claimant thereby place in issue the question of reasonableness of disclosure. That does not, however, appear to be a matter in issue before the tribunal and in any event in B v. Secretary of State for Work and Pensions [2005] EWCA Civ. 929 the Court of Appeal, upholding the decision of the Tribunal of Commissioners in CIS/4348/2003, held that "*the statutory meaning of 'failed to disclose' admits of no qualification in favour of claimants who do not appreciate that they have an obligation to disclose something once they are aware of it*". Self-evidently the claimant was aware that she had started a full-time course of education.

8. There is no merit in my judgment in the claimant's arguments seeking to distinguish the scenario in the instant appeal from that in Hinchy. The Secretary of State's representative quite rightly points out that the notes sent to recipients of ICA were included in the bundle of documents before the tribunal. The argument before the tribunal in no way contended that these had not been received or understood by the claimant and the significance of those notes in relation to failure to disclose was not, then, challenged. Under the principles of Hinchy as set out by the House of Lords the claimant's disclosure to her local social security office was not sufficient. In relying, as they apparently did, upon Hinchy in the Court of Appeal the tribunal accepted an interpretation of the law that was incorrect although, of course, that was no fault of theirs. I set aside the decision of the tribunal and I accept that the claimant failed to disclose to the appropriate office the material fact that she had started a relevant full-time course of education.

9. The claimant maintains, the appeal now being at large before me, that the tribunal were wrong in holding that the midwifery placement did not fall within the definition provided in regulation 5 of the ICA Regulations. The Secretary of State's representative argues that in that part of their decision the tribunal correctly interpreted regulation 5, their decision also being consistent with R(G) 2/02 to the effect that "*attending a course of education at a university means engaging in the academic activities required of those who are enrolled in the course*". In response to that the claimant, through her representatives, concedes that regulation 5 is relevant but maintains that the tribunal incorrectly interpreted and applied it.

The essence of the claimant's reasoning is that "*practical work*" is materially different from a work placement, given that the claimant was required, during the placement, to attend the university for only four hours a month and that the remainder of the placement was more analogous to the situation of a trainee or apprentice than a student undertaking a much more limited period of practical work.

10. I do not agree with the arguments of the claimant's representative in relation to the interpretation and application of regulation 5. It appears from the claimant's own evidence to the tribunal (see the record of proceedings pages 48/9) that the work placement was an integral part of the course and that it was supervised and approved by the university. That is reflected in the penultimate paragraph of the tribunal's statement. The situation of the claimant is significantly different from that in which, for example, a student completes a full-time course of education and after that has to undertake a placement, see R(IS) 1/96 in which a student architect completed a BA Degree and only then needed to go on a year's placement. The claimant's representatives refer to CG/4343/98 (although conceding that it is not totally relevant) in which it was held that a university student undertaking 14 hours a week timetabled tuition but having other study to undertake was held not to be in full-time education. That case, however, was disagreed with in CG/5519/99, which case was upheld by the Court of Appeal and reported as R(G) 2/02. The work placement undertaken by the claimant was an integral part of her course of education in the sense that it was "*a unified sequence of study, tuition and/or practical training*" (see R(IS) 1/96). Regulation 5 draws no distinction between practical work of a day, a week, a month or longer. Such a distinction could easily have been imported into the regulation had it been material. That there is no such distinction is a matter that cannot easily or reasonably be ignored in construing regulation 5. Moreover, given the evidence of the claimant, and the finding of the tribunal, that the practical work was supervised and approved (as well as being an integral part of the course) the tribunal could not properly have reached a different conclusion in relation to the practical aspect of the course. The arguments of the claimant's representatives also depend upon reading into regulation 5, under "*practical work*", some difference between the type, volume and importance of work carried out. Such a distinction is clearly not present in the regulations and cannot in my judgment reasonably be read into them. The tribunal were correct to decide as they did to the effect that the work placement fell within the ambit of "*practical work*" in regulation 5.

(Signed) **S J Pacey**
Commissioner

(Date) **9 August 2005**