

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**EMPLOYMENT AND SUPPORT ALLOWANCE**

Appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 22 January 2018

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. The decision of the appeal tribunal dated 22 January 2018 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
2. For further reasons set out below, I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.
4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of her entitlement to Employment and Support Allowance (ESA) remains to be determined by another appeal tribunal. In accordance with the guidance set out below, the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

## **Background**

5. On 2 February 2017 a decision maker of the Department decided that the appellant was not entitled to ESA from and including 24 June 2015. Following a request to that effect, on 11 May 2017 the decision dated 2 February 2017 was reconsidered but was not changed. An appeal against the decision dated 2 February 2017 was received in the Department on 9 June 2017.
6. Following an earlier adjournment, the substantive appeal tribunal hearing took place on 22 January 2018. The appellant was present, was accompanied by her mother and was represented. There was no Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 2 February 2017.
7. On 23 May 2018 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 20 July 2018 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

## **Proceedings before the Social Security Commissioner**

8. On 27 July 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 22 August 2018 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 28 August 2018, Ms Toner, for DMS, supported the application for leave to appeal. Written observations were shared with the appellant on 18 September 2018. E-mail correspondence with attachment were received from the appellant on 1 October 2018 and was shared with Ms Toner on 3 October 2018. Further e-mail correspondence was received from the appellant on 15 October 2018 which was shared with Ms Toner on 15 October 2018.
9. On 16 November 2018 I granted leave to appeal. When granting leave to appeal I gave as a reason that it was arguable that the appeal tribunal had failed to take into account the principles set out in *R2/09 (IS)*. On the same date I determined that an oral hearing of the appeal would not be required.

## **Errors of law**

10. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
11. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered

errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

- “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
- (ii) failing to give reasons or any adequate reasons for findings on material matters;
- (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- (iv) giving weight to immaterial matters;
- (v) making a material misdirection of law on any material matter;
- (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

12. In her carefully prepared written observations, Ms Toner made the following submissions:

‘I submit however that the tribunal have erred but not for the reasons put forward by (the appellant) in her application for leave to appeal. The tribunal in its decision and statement of reasons concluded that (the appellant) had capital in excess of £16,000 however they did not go further and clarify what type of capital this was i.e. actual and or notional capital nor the specific amount she was held to possess. Whilst the tribunal have listed particular withdrawals to repay credit card debts and fund the purchase of four vehicles they have not stated whether they accept that the money has been spent in the manner described and that she is no longer in possession of said sums. The LQM has simply stated,

*“The tribunal was unable to accept that there were any other debts that the plaintiff could reasonably suggest she was obliged to pay so that **even if** one accepts that the Appellant was for the purposes of Employment and Support Allowance Regulations to reduce her capital by these amounts her remaining capital would have exceeded £16,000.”*

The LQM should have considered each of these expenditures in relation to both actual capital and notional capital. The LQM should have proceeded to provide a calculation of the amount of capital, actual and/or notional, (the appellant) was accepted as possessing as a result.

I submit that the then NI Chief Commissioner Judge Martin in his decision R2/09(IS) sets out in paragraph 17 the proper approach to be taken by decision makers and appeal tribunals, with issues of capital relevant to benefit entitlement and should be followed

...

The tribunal's reasoning is problematic with regard to (the appellant's) actual and notional capital. The statement of reasons are ambiguous in relation to whether they have accepted that (the appellant) has spent the capital in the manner she has described. It is evident from (the appellant's) request for leave to appeal that she remains unclear as to the reasons for her disallowance and how much capital she is treated as possessing. The tribunal should have made a finding of fact on both deprivation and its purpose for each item of expenditure. Instead the tribunal have lumped together the purchase of the cars totalling £19,500 (less £4,000 for insurance payment) and credit card debts of £7,235 and £1,160 and concluded that the total of the sums owed was £23,901. (The appellant) has advised that the total owed to her mother was £36,000 however there is a discrepancy of £12,009 between this figure and that of £23,901 which the tribunal have calculated and considered to be owed.

Additionally the tribunal noted that, *“even if one accepts that the Appellant was for the purposes of Employment and Support Allowance Regulations to reduce her capital by these amounts her remaining capital would have exceeded £16,000.”* It is unclear from this statement if the tribunal is satisfied that this sum of £23,901 was even repaid. In particular, the tribunal in its inquisitorial role has failed to enquire further as to where this outstanding £12,009 owed was or what it had been spent on. The tribunal failed to make key findings of fact in relation to where this remaining money was held if it did not accept (the appellant's) statement regarding how it had been depleted. The tribunal should have looked at each individual expenditure independently as the significant operative purpose could have been very different for

each. I therefore submit that the tribunal have failed to assess each piece of expenditure with regard to its significant operative purpose. Even if the Commissioner does not agree with the observations noted above and determines that the tribunal's accepted that (the appellant) had spent £23,901 the tribunal has still erred in failing to make a finding of fact in relation to the outstanding balance of £12,009 alleged to be owed to her mother. In the reasons for decision no findings of fact based on supported evidence or explanations in relation to how this remaining debt had accumulated or if they accepted that she had discharged the onus placed on her of proving that she no longer possessed the capital concerned.

Although the LQM has referenced in the statement of reasons to the acceptance that (the appellant) deprived herself of capital and that her intention was to secure entitlement to Employment and Support Allowance there was no specific finding regarding what figure they were attributing as notional capital or actual capital. Whilst they have stated that they have considered and examined the nature and reasons behind the expenditure a precise figure in terms of capital has not been ascertained. As a result if any of the sum is to be regarded as notional capital the diminishing notional capital rules cannot be correctly applied to establish when (the appellant) may become entitled to income-related Employment and Support Allowance in the future. In addition if any or all of this capital is to be regarded as actual capital consideration could have been given to the passage of time and reasonable living expenses and expenditure to allow reductions for the period of three years which has passed since she received the payment. The effect of this would be that (the appellant) could secure entitlement to benefit at a later date. I submit that the tribunal have erred in failing to satisfactorily document a precise figure for notional and actual capital simply that she had capital in excess the prescribed limit of £16,000.'

13. I accept the submissions which have been made by Ms Toner and for the reasons which she has set out agree that the decision of the appeal tribunal is in error of law.

### **Disposal**

14. The decision of the appeal tribunal dated 22 January 2018 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

15. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:

(i) the decision under appeal is a decision of the Department, dated 2 February 2017 a decision maker of the Department decided that the appellant was not entitled to ESA from and including 24 June 2015;

(ii) it will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and

(iii) it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed): K Mullan

Chief Commissioner

22 November 2018