**IN THE UPPER TRIBUNAL** **Case No. CE/2388/2015**
**ADMINISTRATIVE APPEALS CHAMBER**

## FINAL DECISION

1. In this decision I shall for convenience refer to the issue whether the Claimant and his wife were members of the same household as 'the living together issue', and to the issue whether (if they were) the Secretary of State was entitled, in his decision of 7 October 2014, to change (by revision or supersession) whatever was the relevant decision awarding ESA to the Claimant as a single person as 'the supersession issue'.

2. By my interim decision dated 31 May 2016 I set aside the decision of the FTT dated 21 May 2015 as wrong in law, and with a view to re-making the FTT's decision I found that the Claimant and his wife were at all material times members of the same household, but made further directions in order to assist me in deciding the supersession issue.

3. By my Direction dated 7 September 2016 I set out, for the assistance of the parties, some provisional views on the supersession issue and directed a further oral hearing and that the Secretary of State provide further information as to the adjudication history.

4. Apart from the brief references in the 'conversation history' set out in the Secretary of State's submission at p.117 the Secretary of State has been unable to provide any additional information as to (i) what information was before the decision maker(s) who made the decision(s) awarding income-related ESA to the Claimant as a single person in 2009 or 2010, or (ii) the precise adjudication history, over and above that which is already in the papers and is referred to in my interim decision.

5. The further hearing took place on 17 January 2017, at which the Appellant again appeared in person, but the Secretary of State was represented by Mr Ivan Hare of counsel. . Mr Hare told me, with reference to para. 4 of the further submission dated 20 December 2016 by Anna woods on behalf of the Secretary of State, that nothing further by way of record print can be provided. At the hearing, and confirmed by a written Direction issued on the following day, I directed that the Claimant was to provide within 14 days copies of any application forms or correspondence passing between him and the DWP in 2009 and 2010 and relating to his 2009 claim for ESA as a single person. The reason for that was obviously in case he may have retained any of the documentation which has been destroyed or lost by the Secretary of State.

6. The Claimant has been able to supply some additional documentation, as a result of which it is possible to expand a little on what I said in para. 23 of my interim decision about the adjudication history in 2009 and 2010. It appears from a letter from Jobcentre Plus to the Claimant dated 15 March 2010 that on around that date a decision was made disallowing ESA from 9 February 2010, partly on the

ground that the Claimant's wife (referred to as "partner" in the letter) was in full-time employment. The decision or assumption at the time of that letter therefore appears to have been that the Claimant and his wife were members of the same household. On 9 April 2010 the Claimant wrote to the Department as follows:

> *"Thank you for your letter of 15/3/2010. Further to my telephone conversation with Mrs Stacey Spike recently, first claim of 19/9/2009 and previous correspondences, I would like to inform you that I am separated from my wife since August 2009 but still live under the same roof because of our son the 5 years old still needs both mum and dad.*
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> *I would much appreciate if you can look at your decision again."*

The Claimant has also supplied a copy of part of a form which he says was completed by him and sent to the DWP in April 2010; (it must have been after 30 March 2010 because his son is referred to in the form as being 5 years old). The form is headed "Information about where you live and the people who live with you." It appears that by that time the additional bedroom had not been created because he described the flat as having 2 bedrooms. In a box for "further information" the Claimant stated as follows:

> *"Further to my telephone calls as I informed you earlier and my last one with Mrs Stacey Spike; I am separated from my wife since August 2009 but still live under the same roof because of our son [5 years old] still needs both his dad and mum."*

It is still unclear which was the first decision which awarded income based ESA on the basis that the Claimant was not living in the same household as his wife. It may have been the decision of a decision-maker which followed the FTT decision on 15 December 2010 or it may have been some earlier decision. But however that may be, it seems clear that, following the FTT's decision on 15 December 2010, a decision was made awarding income-related ESA, and that decision was made in the knowledge that the Claimant and his wife were living under the same roof, with a young child, and that his wife was working full-time.

7. It is first necessary to identify the decision which, as at the date of the Secretary of State's decision of 7 October 2014, needed to be revised or superseded if the Secretary of State was validly to terminate the Claimant's award of income-related ESA.

8. In my judgment the decision which needed to be revised or superseded was the decision notified to the Claimant on 17 September 2013 and awarding ESA with the support component (p.77). That appears to have been the subsisting awarding decision, as at 7 October 2014. Mr Hare submitted before me, initially at any rate, that the relevant decision was the (putative) decision in around December 2010 which would have been made by the Secretary of State in order to carry into effect the First-tier Tribunal's decision dated 15 December 2010 that the Claimant had limited capability for work. However, it seems to me that the decision notified on 17 September 2013 must itself have superseded the awarding decision made in around December 2010.

9. Mr Hare accepted that the basis on which the Secretary of State had purported, in the decision of 7 October 2014, to supersede the relevant awarding decision, namely a change of circumstances, was not a correct basis in that on my findings of fact there had been no material change of circumstances since September 2013 or indeed 2009/10. He accepted the view expressed in para. 58 of my interim decision that the transfer of a half share in the equity of the flat to the Claimant's wife and the entry by her into the mortgage did not constitute a material change of circumstances, for this purpose. In the living together form completed in around April 2010 (see para. 6 above) the Claimant stated that he expected to continue sharing accommodation with his wife for another year. The position has of course continued for (now) nearly another 7 years. However, that is not a change of circumstances, but rather a case of the circumstances having remained the same.

10. Mr Hare's primary submission was that I should on all the evidence infer that there was ignorance of or a mistake as to material fact by the relevant awarding decision maker. If correct, that submission would lead to the conclusion that there was a ground for revision under regulation 3(5)(d) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. He submitted, in the alternative, that I should infer that there was a failure by the relevant decision maker to inquire sufficiently into the circumstances in which the Claimant and his wife were living, and thus either an 'official error' or an error of law. Official error would provide a ground for revision under reg. 3(5)(a) and error of law would provide a ground for supersession under reg. 6(2)(b)(i). In the further alternative he submitted, in effect, that there must have been either ignorance of or mistake as to fact, or official error, or error of law, and that provided that I am satisfied that there must have been one or other of those, it is not necessary for me to be able to say which it was.

11. Mr Hare accepts that the burden is on the Secretary of State to establish a ground for revision or supersession, but subject to the limited role which burden of proof can play in relation to social security adjudication.

12. He further accepts, as I understand it, the statement in para. 9 of *R(I) 3/75* that:

> "Section 72(1)(a) [the relevant provision authorising review for mistake of or ignorance as to material fact in that case] does not authorise a review of a decision founded on [an inference of fact] merely because the insurance officer is satisfied that in the light of the evidence before the determining authority, the inference was faulty or mistaken. He must go further and assert and prove that the inference might not have been drawn, if the determining authority had not been ignorant of some specific fact of which it could not have been aware, or had not been mistaken as to some specific fact which it took into consideration."

Similarly, in *CSDLA/251/2007* at para. 9 Judge Parker said that *"a conclusion of secondary fact arising from the application of the statutory test of virtual inability to walk is not a material fact; there has to be a material or relevant primary fact about which the [decision maker] was ignorant, or mistaken."*

13. The conclusion as to whether the Claimant and his wife were or were not members of the same household is for these purposes an inference of fact, and not in itself a primary fact. My finding (in effect) that the previous decision

maker(s) were wrong in accepting that the Claimant and his wife were not members of the same household does not therefore necessarily demonstrate that those decision maker(s) were mistaken as to material fact. The main relevant primary facts are those as to the manner in which the Claimant and his wife were living in the house.

14. There is no doubt that some relevant documents are no longer available. For example, there is no copy in the surviving papers of the Claimant's application for ESA as a single person, apparently made in around September 2009, although as I have noted above the Claimant has now been able to supply copies of some information provided by him in 2010. Mr Hare submits, and I accept, that if (as I find) the September 2013 decision was the decision which needed to be revised or superseded, that decision maker should be assumed to have had the same knowledge, as regards facts relevant to the living together issue, as did the awarding decision maker(s) in 2009/2010. That was my provisional view at the time of my Direction of 7 September 2016, and I remain of that view. I think it reasonable to infer that the loss or destruction of documents and records did not occur until some time after September 2013, and thus that what was available to the decision makers in 2009 and 2010 was similarly available in September 2013. It seems (pages 33 and 106) that the 'case papers' were sent by Jobcentre Plus Office in Belfast, which made the decisions down to and including that of 7 October 2014, to the Dispute Resolution Team in Nottingham on 8 December 2014, apparently for the purpose of reconsidering the supersession decision of 7 October 2014, and that further papers were sent on 17 February 2015 and 18 April 2015. The system records apparently refer to destruction dates of 4 April 2016 and 22 June 2016, but it is not clear what documents were destroyed at that time.

15. Mr Hare submits that the Secretary of State's inability to produce at least some material documents does not of itself permit an adverse inference to be drawn against the Secretary of State. He refers me to the decision of Judge Rowland in *SSWP v HS (JSA)* [2016] UKUT 0272 (AAC), and in particular to the summary in para. 12 of the effect of previous authority:

> "Where there has been a failure to comply with a direction to provide evidence, a tribunal may well be entitled to draw an adverse inference against the offending party; that is to say it may infer from the failure that the facts are not as the offending party says they are. However, it is not entitled to do so merely as a punishment. It is appropriate to draw an adverse inference only if the tribunal is satisfied that it is probable that the reason for the failure to comply with the direction is that the evidence does not exist or would harm the offending party's case."

16. However, I note that it was considered by a 3 Judge Panel in *SSWP v TJ (JSA)* [2015] UKUT 56 (AAC), at paras. 214-7, that it is not essential for the drawing of an inference against a spoliator that there was a deliberate destruction of evidence for the purpose of preventing it being available, and that the fact that destruction occurred after the issue has arisen may be in favour of drawing an inference. Indeed, in *Kerr v Dept for Social Development* [2004] 4 All ER 385 Lady Hale, having at paras [57] to [61] outlined the process involved in the department obtaining the information necessary in order to make a social security decision, continued as follows, in words which have been cited many times since:

> "62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.
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> 63. If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it. As Mr Commissioner Henty put it in decision CIS/5321/1998: "….a claimant must to the best of his or her ability give such information to the AO as he reasonably can, in default of which a contrary inference can always be drawn.' The same should apply to information which the department can reasonably be expected to discover for itself.
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> …….
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> 66. This will not always be sufficient to decide who should bear the consequences of the collective ignorance of a matter which is material to the claim. It may be that everything which could have been done has been done but there are still things unknown. The conditions of entitlement must be met before the claim can be paid: see s.1(1) of the Social Security Administration Act 1992. It may therefore become relevant to ask whether a particular matter relates to the conditions of entitlement or to an exception to those conditions……"

17. In support of his alternative contention that there must have been either mistake of fact or official error or error of law, and it does not matter which, Mr Hare refers me, by way of example, to what Upper Tribunal Judge Parker said in para. 12 of CSDLA/25/2007:

> "If the circumstances surrounding the original award are unknown and a claimant's current non-entitlement is plain, then it may be a legitimate inference, on a balance of probabilities, that either there was an initial error of fact or a subsequent change of circumstances or that a DM must have erred in law in making the original award; so that *a* ground for supersession is justified and it does not matter too much which."

18. Mr Hare further submits, and I accept as clearly correct, that if a ground for supersession can be established it can be appropriate to revise or supersede whatever from time to time was the operative awarding decision, without necessarily being able to identify what that decision was. See, for example, CIS/4043/2002 at para. 11, and CIS/48/2004 at para. 23.

19. The Secretary of State's difficulty in establishing a ground for supersession in the present case is in my judgment that it is perfectly possible that the 2009/10 decision maker(s), and hence the 2013 decision maker, were neither mistaken as to material fact, nor in error of law by misunderstanding the meaning of the phrase 'members of the same household', nor in official error or error of law by failing sufficiently to investigate the facts or otherwise address the living together

issue. The Secretary of State's problem is in my judgment that the awarding decision makers may have correctly understood the primary facts, but simply come to a different conclusion, on those facts, as to whether the Claimant and his wife were members of the same household from the conclusion which I have reached, but without going wrong in law by misunderstanding the test or otherwise arriving at an impermissible conclusion. The conclusion on the living together issue is, as I have said, an inference of fact, rather than a primary fact in itself. Mr Hare accepted, I think, that it would have been possible for another judge, without going wrong in law, to have found the same primary facts as I did as to the manner in which the Claimant and his wife and son lived in the flat, and in particular the degree of interaction between them, but to have concluded, as a matter of judgment, that they were not members of the same household. Such a conclusion would not have been one which no reasonable decision maker could reach.

20. I am not willing to infer that the awarding decision maker was in official error or error of law in failing sufficiently to investigate or address the living together issue. In my judgment it would be wrong to infer such an error, particularly in a case where the Secretary of State has not retained the relevant documents. The presumption must be, in the absence of evidence to the contrary, that the decision makers carried out their duties properly. Such an error therefore needs to be positively established by evidence. It is clear from the documents which the Claimant has now provided (see para. 6 above) that the Secretary of State must have addressed the living together issue in 2010. It is very possible, indeed in my judgment probable, that the decision makers did not investigate the facts in as much detail as the FTT and I have been able to do. But the fact that they did not does not demonstrate an official error or error of law. Nor in my judgment does it demonstrate that there should be supersession by reason of *ignorance* as to material fact, because it is impossible to establish that whatever primary facts the decision makers were ignorant of would or ought to have made a difference. It is now clear that the 2010 decision maker was aware at least that the Claimant and his wife were living in close proximity in the same accommodation, and that the reason given by the Claimant for one of them not having left was that their son needed them both to be there. Those facts rendered it probable that there was a degree of interaction between the Claimant and his wife.

21. That then leaves the possibilities of either mistake as to a primary fact, or error of law – i.e. as to the meaning and effect of the 'members of the same household' test.

22. Mr Hare submits that it is reasonable to infer that the Claimant, when making and pursuing his claim in 2009 and 2010, exaggerated the extent to which he and his wife lived separately in the flat, to the same extent as I have found that he exaggerated it in his evidence to the FTT and before me, and therefore that I should find that the 2009/10 decision maker was mistaken as to material fact because he must have considered that there was a greater degree of separation, in terms of their daily routine, than I have found to be the case. However, I do not feel able to draw that inference. The main reasons why I found that the degree of interaction between them was greater than the Claimant was prepared to admit were based on the probabilities of the case, having regard in particular to the

Claimant's own evidence as to their joint concern for their son's welfare, and his evidence that their son would be mortified if he thought that they were separating (see paras. 46 to 49 of my interim decision). Those probabilities may well have been equally apparent to the decision makers in 2009/10 and 2013. I am not prepared to infer that they overlooked them.

23. In my judgment this is a case where the fact that the burden of establishing a ground for supersession is on the Secretary of State is important. Neither the Secretary of State nor the Claimant are able to produce the documents which would show precisely what knowledge the decision maker had when the awarding decision was made. The Claimant asserts that he made full disclosure at the time of his claim, and the Secretary of State is unable to rebut that contention. The fact that an award of benefit can generally only be terminated if there is a ground for revision or supersession, and that it is therefore not sufficient simply that a later decision maker finds the conditions of entitlement not to be satisfied, is of course an important reason for retaining the evidence on the basis of which an award is made. The mere fact that the department appears to have destroyed the relevant documents and records may not of itself require an inference to be drawn against the Secretary of State, but it does in my judgment add weight to the reasons for concluding that the Secretary of State should be found, on the facts of this case, not to have discharged the burden of establishing a ground for supersession.

24. My final decision of this appeal is therefore as follows. I allow the Claimant's appeal against the FTT's decision made on 21 May 2015 and set aside that decision as wrong in law. In exercise of the power in s.12 of the Tribunals Courts and Enforcement Act 2007 I re-make the FTT's decision as follows:

> **The Claimant's appeal against the decision of the Secretary of State made on 7 October 2014 is allowed. Although the Claimant and his wife were members of the same household the Secretary of State has not established a ground for revising or superseding the decision(s) awarding income-related employment and support allowance.**

25. Although this does not form part of my decision, the consequence of what I have decided seems to be that the Secretary of State will not be able to supersede the award of income-related ESA until there is some relevant change of circumstances.

**Charles Turnbull**
**Judge of the Upper Tribunal**
**2 May 2017**