

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**CIS/1094/2017  
CIS/1609/2017**

**Before: Upper Tribunal Judge K Markus QC**

The decision of the Upper Tribunal **is to allow the appeals**. The decisions of the First-tier Tribunal made on 21 December 2016 under numbers SC122/16/00475 and SC122/16/00536 were made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set those decisions aside and remit the cases to be reconsidered by a fresh tribunal in accordance with the following directions.

### **Directions**

- 1. These cases are remitted to the First-tier Tribunal to be reconsidered together at an oral hearing.**
- 2. The members of the First-tier Tribunal who reconsider the cases should not be the same as those who made the decision which has been set aside.**
- 3. The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**
- 4. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the cases entirely afresh and it may reach the same or different conclusions to the previous tribunal.**

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

### **REASONS FOR DECISION**

1. One of the conditions of entitlement to income support is that a person “falls within a prescribed category of person”: section 124(1)(e) of the Social Security Contributions and Benefits Act 1992. The prescribed categories are set out in Schedule 1B of the Income Support (General) Regulations 1987, and include in paragraph 2:  
“A single claimant or a lone parent with whom a child is placed –  
(a) by a local authority or voluntary organisations within the meaning of the Children Act 1989;”

2. In *JS v Secretary of State for Work and Pensions (IS)* [2015] UKUT 306 (AAC), Upper Tribunal Judge Perez decided that “placed...within the meaning of the Children Act 1989” meant that the child must be living with the claimant in discharge of the local authority’s functions under that Act.
3. Sections 14A-F of the Children Act 1989 provide for special guardianship orders, which are orders in family proceedings. The making of a special guardianship order discharges a care order with respect to the child: section 91(5A).
4. The Appellant’s great nephew, C, was subject to a care order and had been placed by the local authority with the Appellant as his foster carer. As such she fell within a prescribed category of person and was entitled to income support. The latest relevant decision that she was entitled to income support was made on 12 April 2013. In or around December 2013 the Appellant obtained a special guardianship order in respect of C. This had the effect of discharging the care order. As a result she was no longer a person to whom paragraph 2(a) of Schedule 1B of the 1987 Regulations applied. She did not fall within any of the other prescribed categories of person. Consequently she ceased to be entitled to income support.
5. The Appellant did not notify the DWP of this change. She continued to receive income support. On 27 October 2015, at a Work Focused Interview at the jobcentre, she disclosed that she had been awarded child benefit for C in May or June 2014. She also informed the DWP that she had received guardianship allowance although was unsure if she still received it. On 17 November 2015 the Secretary of State decided that she had become a guardian for C on the date of the award of child benefit, which was 3 February 2014, and so the Appellant was not entitled to income support.
6. On 18 March 2016 the Secretary of State decided to supersede the decision of 12 April 2013 on the ground of a change of circumstances, with effect from 3 February 2014. The Secretary of State also decided that the Appellant had received an overpayment of £9309.77 which was recoverable, and imposed a civil penalty of £50 on the ground that without reasonable excuse she had failed to notify a relevant change of circumstances resulting in an overpayment of benefit.
7. The Appellant appealed on the ground that she had received payment of a kinship allowance from the local authority when she was a foster carer, that the guardianship allowance was the same amount and that she continued to be C’s main carer, and so to her there had been no change of circumstances to report. She said that she had been advised by the local authority that the change from foster carer to guardian would not affect her existing benefits.
8. The tribunal dismissed the appeals. It found that the Appellant’s income after she ceased to be a foster carer, which comprised a maintenance allowance, child benefit and child tax credit, amounted to a substantial increase in her income, that she had failed to disclose the increase, and that as a result she had been overpaid benefit. It decided that the overpayment was recoverable. In addition there was no reasonable excuse for the failure to disclose the increased income and so the civil penalty was confirmed.
9. The Appellant appealed on the basis that the evidence did not support the tribunal’s finding that the payments had substantially increased when the special

guardianship order was made, that she reasonably relied on the local authority regarding the allowances and benefits, and that the tribunal made insufficient findings of fact to support its decision.

10. I gave permission to appeal because it seemed to me that the FTT may have misunderstood the evidence as to the amounts of the payments received by the Appellant and that there was evidence that the local authority may have advised the Appellant that the special guardianship order would not affect her benefits.
11. The Secretary of State, in written submissions, supports the appeal, although not on the above grounds, and requests that the case is remitted to another tribunal. The Appellant has not responded.

### **Recovery of overpayments: legal framework**

12. Section 71 of the Social Security Administration Act 1992 provides for recovery of an overpayment as follows:

“(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—

- (a) a payment has been made in respect of a benefit to which this section applies; or
- (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.”

13. The relevant disclosure duties are contained in regulation 32 of the Social Security (Claims and Payments) Regulations 1987, as follows:

(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such information or evidence as the Secretary of State may require in connection with payment of the benefit claimed or awarded.

(1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom or on whose behalf sums by way of benefit are receivable shall notify the Secretary of State of any change of circumstances which he might reasonably be expected to know might affect—

- (a) the continuance of entitlement to benefit; or
- (b) the payment of the benefit,

as soon as reasonably practicable after the change occurs by giving notice [of the change to the appropriate office—

- (i) in writing or by telephone (unless the Secretary of State determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or
- (ii) in writing if in any class of case he requires written notice (unless he determines in any particular case to accept notice given otherwise than in writing).”

14. The Tribunal of Commissioners (affirmed by the Court of Appeal) in B v SSWP [2005] EWCA Civ 929 (reported as R (IS) 9/06), held that the duty to disclose is found not in section 71 but in regulation 32. It was common ground that a failure to disclose under section 71 can be wholly innocent, for example because the claimant does not appreciate that a fact is material, but a claimant cannot fail to disclose a material fact unless that fact is known to them, a question which is to be judged subjectively.
15. The Tribunal of Commissioners explained the nature of the duties in regulation 32 as it was then (now regulation 32(1A) and (1B), which are not materially different for present purposes). The former duty arises where a claimant has been given an unambiguous instruction to disclose a particular matter. While a claimant cannot disclose what she or he does not know, the reasonableness of expecting disclosure is irrelevant. The latter duty is to notify a change of circumstances which a claimant might reasonably be expected to know might affect entitlement to or payment of benefit. The duty does not depend on there being instructions to make disclosure, although whether and what instructions were given may be relevant to deciding what is reasonably expected of a claimant.

### **Discussion and conclusion**

#### **The decision that the overpayment was recoverable.**

16. There is no dispute that there was an overpayment. Where a special guardianship order is in place, the child is not placed by the local authority under the Children Act. The guardian looks after the child pursuant to the parental responsibility conferred by the order. It is common ground that the Appellant did not fall within any of the prescribed categories in Schedule 1B from the date on which the special guardianship order was made. It was also common ground that the payment of income support to which she was not entitled continued after that date because the Secretary of State was not aware of the fact that the child was no longer placed with the Appellant under the provisions of the Children Act 1989. The question for the FTT was whether that overpayment was recoverable on the ground that the Appellant had failed to disclose the fact of the special guardianship order.
17. As the Secretary of State has pointed out, the initial decision wrongly stated that the claimant failed to disclose that she no longer met the conditions of entitlement. That was not a fact. The submission to the tribunal was that the Appellant had failed to disclose that she had started to receive child benefit. The tribunal decided that the Appellant had failed to report an increase in her income when she obtained the special guardianship order and then went on to conclude:

“The documentation she received from the DWP in relation to her Income Support stated quite clearly that she must tell the Jobcentre if she starts getting more or less money. Whilst I accept that her domestic arrangements underwent no change, her financial situation changed drastically and I do not accept therefore that she could have reasonably been unaware that there had been a change in her circumstances.”
18. I am satisfied that the issues identified by me when I gave permission do not give rise to any error of law in the decision under section 71. On further examination of the evidence, I am satisfied that it did show a substantial increase in the

Appellant's income. The tribunal referred to the specific instruction from the DWP to provide information - leaflet INF4(IS) 10/14 - which made it clear that a claimant is required to tell the DWP if she starts to receive money from somewhere else, starts to get other benefits or tax credits, or starts to get more money. The tribunal found that the Appellant had started to receive more money and had not informed the DWP, contrary to the instructions. This was in substance a decision that the Appellant was in breach of the duty under regulation 32(1A).

19. It was unnecessary for the tribunal also to consider whether the Appellant could reasonably have been expected to disclose the increased income, an issue which arises only under regulation 32(1B), but the fact that it did so did not undermine its conclusion that there had been a breach of the obligation in regulation 32(1A).
20. It also follows from the tribunal's finding in relation to regulation 32(1A) that I need not pursue the issue raised by me when giving permission as to the advice given by the local authority as that was relevant only to the application of regulation 32(1B). However, it may have been relevant to the civil penalty question, as to which see below.
21. The Secretary of State correctly identifies two different errors by the tribunal.
22. First, the obligation to disclose the increased income would not arise until the Appellant's income had actually increased and she was aware of the increase. There were three changes to the Appellant's income: the change from the allowance paid to her as a foster carer and the allowance paid as a special guardian, and the receipt of child benefit and child tax credit. The tribunal did not identify the date on which the new payments actually commenced nor the date on which the Appellant knew of them. Although the award of child benefit started on 3 February 2014, this may not have coincided with the date on which the relevant change of circumstances occurred because, consequent on the application of regulation 19(2) and (3) of the Claims and Payments Regulations, the date of an award and the date of the claim may be different. There was insufficient evidence before the tribunal to show that the Appellant had received child benefit from 3 February or that she knew about the payment from that date. There was no evidence as to the relevant dates in relation to the other two changes.
23. Second, section 71 requires a breach of an obligation to disclose a *material* fact in consequence of which there has been an overpayment. The fact that the tribunal based its decision on was the increase in income. However, it did not explain in what sense that fact was material. A material fact is one which, if known to and acted on by the Secretary of State, would have prevented the overpayment (R(IS) 7/94). It can include a fact which, if known and properly acted upon by the DWP, would have prevented all or part of the overpayment (CP/121/2014 at paragraph 11). The tribunal might well have taken the view that the increase in income would have prompted an inquiry by the DWP which would have revealed that C was no longer placed by the local authority, but it should have said so and explained its reasoning. It did not.
24. For these reasons I find that the tribunal's decision was in error of law and must be set aside. Further findings of fact are required and so I remit the appeal to be considered by another tribunal.

25. As I have already explained, the tribunal's consideration of reasonableness (which appeared to be directed to regulation 32(1B)) was unnecessary. However, as I have remitted the appeal to another tribunal, it may be that regulation 32(1B) will arise for consideration. For that reason, I point out that in addressing that provision the tribunal wrongly cited from the decision in R(SB) 21/82, that "A failure to disclose could only occur in circumstances in which, on moral or legal grounds, disclosure by the person was reasonably to be expected". In B v SSWP the Court of Appeal held that R(SB) 21/82 was wrong and that section 71 did not impose a "moral obligation".

### **The civil penalty**

26. A civil penalty may be imposed where a claimant fails, without reasonable excuse, to notify the relevant authority of a change of circumstances which results in the making of an overpayment and the claimant has not been charged with a criminal offence, cautioned or given notice under section 115A: section 115D(2) of the Social Security Administration Act 1992. The correct approach to "without reasonable excuse" has been set out by Judge Rowland in VT v SSWP (IS) [2016] UKUT 178, [2016] AACR 42 at paragraph 11:

"...whether a person has a reasonable excuse raises the question whether what he or she did (or did not do) was a reasonable thing for a responsible person, conscious of, and intending to comply with, his or her obligations regarding benefit but having the experience and other relevant attributes of the person in question and placed in the situation in which that person found himself or herself at the relevant time, to do (or not to do)."

27. The tribunal's decision in the present case was simply as follows:

"Further [JP] did not have a reasonable excuse to fail to provide that information and therefore the authority may impose a civil penalty of £50".

28. Although read alone this is a statement of a conclusion not an explanation for the conclusion, it is a fair reading of the decision that the tribunal relied on its prior conclusion that the Appellant could reasonably have been expected to disclose the increase in her income. But the tribunal's reasoning in that regard is problematic in that it failed adequately to explain why it reached that conclusion in the light of its findings that the Appellant had received incorrect advice from the local authority and, in particular, it did not explain why a responsible person in her position should have acted differently if she believed that the advice (which was that her change of circumstances would not affect her existing benefits) was correct.

29. Accordingly, I allow the appeal against the tribunal's decision that the Appellant was liable for a civil penalty, set the decision aside and remit to the tribunal which will determine the section 71 issue.

**Signed on the original  
on 21 December 2017**

**K. Markus QC  
Judge of the Upper Tribunal**

