DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Maidenhead First-tier Tribunal dated 18 November 2017 under file reference SC301/15/00955 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated 24 September 2015 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve either of the two tribunal judges who were previously involved in considering this appeal on 16 February 2016 and 18 November 2017.

(3) The Appellant should now provide further evidence for the new Tribunal, to be sent to the regional tribunal office in Birmingham within one month of the date this Upper Tribunal decision is issued, and dealing with the matters specified in paragraph 66 of the reasons below.

(4) If the Appellant has any other further written evidence to put before the tribunal this should also be sent to the regional tribunal office in Birmingham within one month of the date of issue of this decision.

(5) The Secretary of State's representative should next prepare a supplementary submission for the new Tribunal, to be sent to the regional tribunal office in Birmingham within two months of the date this Upper Tribunal decision is issued, and dealing with the matters specified in paragraph 68 of the reasons below.

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

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

REASONS FOR DECISION

A summary of the issues raised by this appeal

1. This case concerns entitlement to income support and in particular the significance of capital held in the claimant's name in two previously undisclosed bank or building society accounts. The First-tier Tribunal had to decide (a) whether those funds indeed belonged to the Appellant, or whether they were impressed with a trust by family members, the purpose of which had failed; and (b) whether those funds were still possessed by the Appellant or whether they had been returned to those same family members and, if the latter, whether refunding the monies amounted to deprivation of capital by the Appellant for the purpose of claiming income support.

2. The First-tier Tribunal had a stab at answering question (a) as set out in the previous paragraph but entirely neglected to address question (b). The Secretary of State for Work and Pensions accepts that for that reason alone the case has to go back to a new Tribunal for a fresh hearing. The parties are agreed on that point, although the claimant's case is that the First-tier Tribunal went wrong in other ways too. Notwithstanding the agreement on the narrow basis as to the outcome of this appeal to the Upper Tribunal, I am giving reasons both for the benefit of the next Tribunal and for other tribunals that may be faced with similar issues.

The oral hearing before the Upper Tribunal

3. I held an oral hearing of this appeal on 14 February 2018. The Appellant attended, represented by Mr Joshua Yetman of the Free Representation Unit. The Secretary of State was represented by Ms Julia Smyth of Counsel. I am grateful to them both for their well-crafted submissions, both on paper and at the oral hearing.

The Appellant's background and the two undisclosed bank accounts

4. The Appellant was aged 19 at the time in question. She describes herself as coming from "a very strict Catholic family". She became pregnant in early 2015 as a result of what she herself said was a "one night stand". Moreover, "what I had done by getting pregnant and not being with my baby's father was disgraceful and embarrassing in my family's eyes; they were very angry and upset with me." The Appellant says, in effect, that she was disowned by her family. Several family members have confirmed this account in written statements witnessed by the Travellers Education Resources and Inset Centre.

5. The Appellant claimed and was awarded income support in April 2015. She also received carer's allowance for looking after her sister. She attended a compliance interview at the Job Centre on 3 July 2015. She made a written statement in which she said that her only two accounts were a Santander account (into which her benefits were paid) and a Barclays account ("opened a year ago so that a woman who stole £500 from me could pay me back into it. She repays £10 p.w."). She declared that she was not aware she had savings over £6,000. The inference is that the interviewing officer had other evidence to the contrary.

6. The Appellant returned to the Job Centre on 6 August 2015 and made a further statement. She produced bank statements for two further accounts. The first was a TSB account which was closed on 20 July 2015 when the credit balance of £6,199.87 was withdrawn. She explained in her signed statement at the second interview:

> "This account was opened in 2002 when I was aged 7. This account my Mum tells me was used for family members, aunts, uncles, to deposit gifts of money with the intention to use if I went onto further education. But because I didn't do

> this all but £2,000 was returned by my Mum to family members. I was allowed to keep £2K which I've kept in cash to buy things for my expected baby. It was taken out at the time. I was not aware of the existence of the accounts."

7. The second was a Nationwide account which was also closed on 20 July 2015. This bank statement showed cash withdrawals of £1400 and £500 in March and April 2015 respectively, followed by three withdrawals each of £2,000 in July 2015 and a closing withdrawal of £1,169.60. She explained in her signed statement:

> "Again an account from childhood that I knew nothing about until I was alerted by Compliance, again same thing, family members putting in for my future. Each of the accounts was from either my Dad's side or my Mum's side. I'm not sure which is which. In fact the £2K I kept was from Nationwide and not TSB."

8. In her second statement the Appellant reiterated that she "had no idea of savings, or the accounts, hence why I did not declare savings". She added that her mother was "unable to read or write, so I have accompanied her to banks; she's asked me to sign some things and blindly I have done, never questioned why." In other correspondence she has stated that she had been taken out of primary school at the age of 10 to act as carer for her mother. She further explained that:

> "after the first Compliance interview I confronted my Mum about the accounts and it's only then she admitted the accounts existed. She would not tell me what was in there … when I disclosed the balances, I went back to her and she was angry as she said the money was there to better myself. She's upset I'm pregnant and feels let down and said I did not deserve money and gave it back to family."

9. It is not in dispute that the TSB account showed a credit balance of £6,199.87 on 7 July 2015 and the Nationwide account (before the July 2015 withdrawals) showed a credit balance of £7,161.25 on 30 April 2015, making a total of £13,361.12. Income support had been in payment from 23 April 2015.

The decision-maker's revision of the 23 April 2015 income support decision

10. On 24 September 2015 a decision-maker set out what was known (in summary) and concluded as follows (emphasis as in original):

> "Having considered the above evidence, [the Appellant] has just informed the compliance officer that she has got savings of £13,361.12. This was not declared when she initially made her claim on the 23/04/15. Therefore [the Appellant] would have a tariff income calculation from the 23/04/15 as she had capital in excess of £6,000. However, I find [the Appellant] still in possession of the capital due to the high level of cash withdrawals not accounted for. The deprivation decisions may be reviewed should the claimant produce the necessary evidence to support reasonable deprivation. **Overpayment has occurred from the 23/04/15 to 25/09/15**."

11. The Appellant wrote asking for an appeal, a request treated as an application for a mandatory reconsideration. She stated that "I explained everything in my compliance interview about my situation and how I was not aware of these funds and how the funds have been taken back off me since I became aware of it." She stated that she had recently moved from her mother's address as "she and the rest of my family don't want anything to do with me over becoming pregnant. They feel I have shamed the family." She also included four letters from family members, which explained how a total of £11,000 had been put in the accounts for the Appellant's

"future career and education". All four individuals stated how upset they were. One example will suffice: "I gave £1,500 towards her education over many years. As she did not continue her education I requested for the funds to be returned to myself as she has also brought shame to our family as well."

12. On 20 November 2015 the mandatory reconsideration decision-maker confirmed the earlier decision of 24 September 2015. He concluded that the Appellant was the beneficial owner of the funds in question. Furthermore:

> "There is no evidence to support a claim that these payments were made with conditions attached. I find it highly improbable that 4 members of your family would independently request return of money previously gifted to you at the same time and for the same reasons."

13. The mandatory reconsideration decision-maker also doubted the Appellant's claim that she was unaware of the accounts until after the first compliance interview in July 2015. This was because the Nationwide account statement in the Appellant's name showed two withdrawals prior to that date.

14. The Appellant then lodged her appeal to the First-tier Tribunal. She elected for the case to be dealt with on the papers and so without an oral hearing.

The First-tier Tribunal proceedings

15. On 2 February 2016 a First-tier Tribunal Judge adjourned the appeal for an oral hearing. In doing so the Judge made a direction that the Appellant was, within 28 days, to provide:

> "evidence from Nationwide, Santander, TSB and any other banks linked to the money deposited to show a direct link between the family members making the payments and the bank deposits made. She is also asked to provide the same evidence for payments made from her accounts to evidence her statement that the money was returned to the relatives/friends."

16. On 16 February 2016 the case was listed as a paper case again. The District Tribunal Judge on that occasion decided to go ahead and deal with the appeal. He concluded that there was no evidence the accounts in question were other than ordinary accounts and no evidence of any trusts. He concluded the Appellant had an absolute right to the funds in question and confirmed the decision-maker's decision under appeal. A statement of reasons was issued some time later, expanding on the reasons given in the decision notice.

17. On 19 September 2016, following correspondence from the Appellant, the same District Tribunal Judge refused permission to appeal to the Upper Tribunal but set aside his own decision and directed a re-hearing. The District Tribunal Judge set aside the 16 February 2016 decision in the light of both the Appellant's right to an oral hearing under Article 6 of the European Convention and the fact that the 2 February 2016 ruling that there be an oral hearing had not been revoked. He might have added for good measure that he had dealt with the Appellant's appeal only a fortnight after that direction had been issued, and before the time had expired for the Appellant to comply with the direction about producing further evidence. I acknowledge that in the event the Appellant had not complied with that direction – but I return to that issue later.

18. A new First-tier Tribunal held an oral hearing on 18 November 2016. The Appellant and her sister both attended and gave evidence. None of the four letter-

writers attended to give oral evidence. The record of proceedings notes the Appellant's first statement as being "Relatives won't give evidence. Shame on family. Been cast out." The Appellant then gave evidence along the lines of her previous written statements. The sister gave brief evidence at the close of the hearing, stating that the Appellant was "under a lot of stress. I was outcast 13 years ago. Try to help her. .. I can understand what she is going through. [The family has] Not accepted me for 13 years." The Tribunal dismissed the appeal.

The First-tier Tribunal's decision notice and statement of reasons

19. In the decision notice issued on the day of the hearing, the Tribunal Judge stated he was refusing the appeal and confirming the Department's decision taken on 20 November 2015 (in fact that was the date of the mandatory reconsideration decision, whereas he was by law affirming the original decision of 24 September 2015). The Tribunal judge expressed his summary reasons as follows:

> "3. The Appellant had a number of accounts in her sole name (TSB, Santander, Nationwide). She would have had to complete paperwork to open those accounts and in my view she would have been aware of the balances in those accounts. She was the beneficial owner of that money and she could use it as she pleased.
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> 4. If her mother or other family members wished to put money aside for her they could have opened a trustee account for her.
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> 5. There was no reason for the Appellant not to report the existence of all the accounts in her name if she was maintaining that the money was not hers. She had not produced bank statements or other official documentation showing the transfers of the sums to her.
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> 6. The Appellant initially denied knowledge of the accounts and I was satisfied that it was more likely than not that she knew of them. She had opened the accounts. There were withdrawals before the date of the interview where the appellant had denied knowledge of the accounts. Her evidence was not plausible."

20. I have underlined two passages in the extract above. The reason for doing so is to highlight at this stage that there was simply no hard evidence to support a finding of fact that the Appellant herself had opened the TSB and Nationwide accounts.

21. I accept that the Judge may have been relying on his own knowledge that, as the District Tribunal Judge had put it in the statement of reasons for the original decision that was set aside, "since the UK government had become aware of the dangers of money laundering, assisting organized crime and terrorism legislation has been introduced to crack down on it which means that opening a bank account requires the person opening an account in a particular name to prove that they are that named person." I therefore acknowledge that judicial notice may have a part to play in fact finding.

22. However, the actual evidence in the case is always a good place to start. The Appellant's evidence was that the TSB account was opened in 2002 when she was aged 7 (see paragraph 6 above). The Nationwide account, she said, was also opened when she was a child. The Appellant gave a detailed account of visiting banks and building societies as a child with her illiterate mother and signing documents for her. It is entirely unclear why the Tribunal rejected that evidence as to the opening of the accounts, whatever it made of the Appellant's evidence as to other

matters. There was nothing in the Tribunal's subsequent statement of reasons to shed any further light on this finding which had underpinned the Tribunal's credibility findings.

23. On that basis alone there is sufficient to find that the First-tier Tribunal's decision involves the making of a finding of fact for which either there was no evidence or for which there was no adequate explanation as to why that finding had been made.

24. The Tribunal's statement of reasons adopted the reasons given on the day in the decision notice. In summary it found that the Appellant was the legal and beneficial owner of all the funds in question; it was unclear why monies were said to have been transferred by relatives for her education but in any event the monies were gifts; the Appellant had withdrawn funds from the accounts before the first compliance interview at which she had denied knowledge of the accounts; the fact she had spent £2,000 on her baby was evidence she had control of the funds; and the account statements would have been sent to her so she would have known about the monies. Finally, and as regards the withdrawal of £1,400 from the Nationwide account in March 2015, the Judge concluded that:

> "16. The Appellant told me that she withdrew £1,400 with her mother. She said that she did not realise that the money was hers. This sounded improbable and implausible. If the money was for her education I could not understand why she would give £1,400 of it to her mother."

25. The Appellant then applied for permission to appeal to the Upper Tribunal. The Regional Tribunal Judge refused permission, while at the same time expressing some concern that the Tribunal Judge had recorded that he had accepted the facts as set out in the Department's written response to the appeal as they were "not in dispute" – when there plainly <u>was</u> a dispute about the ownership of the funds. However, the Regional Tribunal Judge considered that overall there were sufficient and sustainable findings of fact and adequate reasons.

The application for permission to appeal to the Upper Tribunal

26. I then gave permission to appeal on the papers. I explained as follows:

> "2. The First-tier Tribunal (FTT) dismissed the Appellant's appeal. Essentially, the FTT did not believe the Appellant. I am giving permission to appeal as I am concerned that the FTT may not have given proper and full consideration to the Appellant's case. In particular, I think it possible that the Appellant's background as coming from the Traveller community may not have been taken into account. The case has equal treatment implications. For example, cultural differences may significantly affect the way that evidence is viewed. A state of affairs that may be regarded as literally incredible by one community may be regarded as quite ordinary by a member of another community. For example, the Appellant says she was disowned by family members for becoming pregnant. Such disowning was very common at one time in the majority population; it may well still be common in minority communities. The Tribunal appears to have ignored that aspect of her explanation for the events in question.
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> 3. This appeal may raise some complex legal issues relating to the true ownership of funds in bank accounts (and how the Traveller community may operate accounts may be different to that of others). The Appellant is advised to seek help from e.g. Citizens Advice, a law centre or welfare rights body."

The proceedings in the Upper Tribunal

27. Mr Warren Benton provided a written response to the Upper Tribunal appeal on behalf of the Secretary of State. He translated the Appellant's case that the funds in her accounts were not hers into legal terms as a *Quistclose* argument (based on *Barclays Bank v Quistclose Investments Ltd* [1970] AC 567). This applies where A transfers money to B on condition that B uses it for a specified purpose; but if B does not spend the funds on that purpose, then the monies are due to be repaid to A. In such circumstances, as a matter of law the money never belongs beneficially to B – it may be in her bank account, but it is held on a *Quistclose* trust for A who retains beneficial or equitable ownership.

28. However, Mr Benton did not support the appeal. He submitted that the First-tier Tribunal simply did not accept the Appellant's evidence about the origins of the funds as being credible. As such, this was a case where the tribunal was not satisfied that any such trust had been created (he cited, as other examples, Social Security Commissioners' decisions *CSB/1137/1985* and *R(IS) 1/90*). Mr Benton also helpfully provided a copy of the Equality and Human Rights Commission (EHRC)'s research report on *Inequalities experienced by Gypsy and Traveller communities: A review* (by S. Cemlyn and others, 2009).

29. This was on any basis an appeal with a number of complex issues arising. I therefore directed an oral hearing and am grateful to the Free Representation Unit, and to Mr Yetman in particular, for providing the Appellant with assistance and representation. Mr Yetman and Ms Smyth for the Secretary of State exchanged skeleton arguments before the hearing, which helped to narrow down the issues. Ms Smyth's skeleton argument involved a modest change of position on behalf of the Secretary of State as compared with the stance originally taken by Mr Benton.

30. First, Ms Smyth argued that whether there was a trust of the monies provided was ultimately a question of fact for the First-tier Tribunal to determine. Moreover, the Tribunal had committed no error of law in deciding that the Appellant was the sole beneficial owner of the funds in question – the evidence, she argued, simply did not support the existence of a *Quistclose* trust.

31. Second, the Secretary of State's decision covered the entire period from 23 April 2015 to 25 September 2015. The accounts in question had been closed on 20 July 2015. Ms Smyth submitted that accordingly there were two periods that needed to be distinguished. In the first period, before the accounts were closed, the issue was whether the funds in the accounts belonged beneficially to the Appellant. In the second period, after 20 July 2015, the Tribunal should have made findings as to the fate of those monies. In particular, had the Appellant (contrary to her version of events) retained the funds? If she had not, what had happened to them and had she unreasonably deprived herself of funds for the purposes of securing entitlement to income support? Ms Smyth argued that the Tribunal's failure to address the issues around the second period meant that there had been a material error of law. She supported a remittal for a fresh hearing on that basis, but on that basis alone.

32. Mr Yetman naturally welcomed Ms Smyth's concession on behalf of the Secretary of State, at least as far as it went. I note that Ms Smyth explicitly submitted that the Secretary of State sought to maintain the original decision under appeal. I then heard further argument on a number of issues thrown up by the appeal.

Pausing there and taking stock of where we are

33. I observed above (at paragraph 23) that there was, on reflection, a plain error of law on the face of the decision notice regarding the finding that the Appellant had herself opened the TSB and Nationwide accounts. I did not put that specific point to

the parties' representatives and so do not rely on that observation at this stage. However, I agree that the Tribunal's failure to make findings about the second period involves an error of law. This matter had been raised in the original decision under challenge (see paragraph 10 above). Of course, if the Tribunal had found the Appellant still had the funds in question, then the outcome would have been no different, on the assumption that no trust was found to have been created. However, if on that scenario the Tribunal had found that the monies had been returned to family members, then the tests under regulation 51 of the Income Support (General) Regulations 1987 (SI 1987/1967) should have been addressed.

34. For the present, therefore, I conclude that the First-tier Tribunal's decision involves an error of law as set out at paragraph 31 above. I accordingly allow the appeal and set that decision aside. I had initially hoped that I may have been able to re-decide the appeal myself, but further fact-finding is required to a degree that is best done by the First-tier Tribunal. So the case now needs to be reheard by a new First-tier Tribunal. I cannot predict what will be the outcome of that re-hearing. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee that the re-hearing of the appeal before the new Tribunal will succeed *on the facts*. So the new Tribunal may reach the same, or a different, outcome to that of the previous Tribunal. It all depends on the findings of fact that the new Tribunal makes. To that end I hope that the following observations will assist the new Tribunal.

35. As noted above, Ms Smyth helpfully distinguished between what she described as the first and second periods. I adopt that taxonomy for the purpose of this guidance.

The first period (up until the accounts were closed) – some guidance

Introduction

36. Capital is obviously relevant to entitlement to income support. A person who has capital in excess of £16,000 is not entitled to income support at all (section 134(1) of the Social Security Contributions and Benefits Act 1992 and regulation 45 of the Income Support (General) Regulations 1987). That does not seem to be the case here. But capital of between £6,000 and £16,000 is treated as producing tariff income at the rate of £1 for every £250 over the £6,000 limit (regulation 53). On the Secretary of State's and the First-tier Tribunal's findings, that would be the case (at least for the first period).

37. There can be no dispute in this case that the Appellant was the legal owner of the funds in her bank and building society accounts as those accounts were held in her sole name. To date the main focus of the proceedings has been the TSB and Nationwide accounts. However, it should not be forgotten that the Appellant had two other accounts which were properly disclosed at the outset of the claim.

38. The first was a Santander account which on 23 April 2015 had a credit balance of £570.53 (although the photocopy of the statement on file is of poor quality, so that may need to be checked). It is clear from the transactions recorded on that account that the Appellant used it on a regular basis for day to day income and expenditure.

39. The second was the Barclays account, which is referred to above at paragraph 5, about which there appear to be no details on file. I accordingly make some directions in this connection for the rehearing.

40. The presumption is that equity follows the law. So as regards all these accounts in the Appellant's sole name, but in practice in relation to the TSB and Nationwide

accounts, it was for her to show that she was not the beneficial owner of the money in her accounts: see, for example, *MB v Royal Borough of Kensington and Chelsea (HB)* [2011] UKUT 321 (AAC) at paragraph 42, where I remarked that it was the claimant's "responsibility to marshal what evidence she can to show that she was not the sole beneficial owner, as well as being the legal owner, and the new tribunal will then have to make a judgment as best it can on the balance of probabilities on the evidence before it." See also *Secretary of State for Work and Pensions v London Borough of Tower Hamlets & CT (IS & HB)* [2018] UKUT 25 (AAC) and the discussion therein (at paragraphs 30-47) of the earlier Deputy Commissioner's decision in CH/715/2006.

The conditions for a Quistclose trust

41. So the central issue before the First-tier Tribunal was whether or not the Appellant had shown that while she was the legal owner she was not also the beneficial owner. This would only be the case if some form of trust were found to be in place. If the Appellant held any funds on trust for other persons, then it followed she would not be the beneficial owner of those funds. As Mr Benton identified, the only type of trust which might be relevant in the present context is that type of resulting trust known as a *Quistclose* trust, as refined in *Twinsectra v Yardley* [2002] 2 AC 164. As Ms Smyth submitted, the relevant principles were reaffirmed by Briggs LJ in the Court of Appeal's decision in *Bellis v Challenor* [2015] EWCA Civ 59:

> "56. *Quistclose*-type trusts are a species of resulting trust which arise where property (usually money) is transferred on terms which do not leave it at the free disposal of the transferee. That restriction upon its use is usually created by an arrangement that the money should be used exclusively for a stated purpose or purposes: see *Twinsectra* at paragraph 74.
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> 57. There must be an intention to create a trust on the part of the transferor. This is an objective question. It means that the transferor must have intended to enter into arrangements which, viewed objectively, have the effect in law of creating a trust: see *Twinsectra* at paragraph 71.
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> 58. In this respect, *Quistclose*-type trusts are no different from any other trusts. In particular, they are not presumed to exist unless a contrary intention be proved, as in the case of the traditional type of resulting trust where a person makes a gratuitous transfer of property to an apparent stranger.
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> 59. A person creates a trust by his words or conduct, not by his innermost thoughts. His subjective intentions are, as Lord Millett said, irrelevant. In the *Twinsectra* case, a *Quistclose* trust was established despite the transferor having no subjective intention to create a trust. But the objectivity principle works both ways. A person who does subjectively intend to create a trust may fail to do so if his words and conduct, viewed objectively, fall short of what is required. As with the interpretation of contracts, this process of interpretation is often called the ascertainment of objective intention. In the contractual context the court is looking for the objective common intention, whereas in the trust context the search is for the objective intention of the alleged settlor.
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> 60. Usually, the question whether the essential restrictions upon the transferee's use of the property have been imposed (so as to create a trust) turns upon the true construction of the words used by the transferor. …
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> 61. …

62. …

63. Where property is transferred on terms that do not leave it at the free disposal of the transferee then the *Quistclose*-type trust thereby established is one under which the beneficial interest in the property remains in the transferor unless and until the purposes for which it has been transferred have been fulfilled: see *Twinsectra* at paragraph 100. That beneficial interest ceases to exist if and to the extent that the property is used for the stated purposes, but not otherwise. The application of the property for the stated purpose is a power vested in the transferee, not (usually at least) a primary purpose trust.

64. It follows from that analysis (as Mr. Sutcliffe was at pains to point out) that if the property cannot be applied for its stated purpose due to some lack of clarity in the identification of purpose, then the transferor's beneficial interest continues in existence. As Lord Millett put it, in *Twinsectra* at paragraph 101:

> ‘Uncertainty works in favour of the lender, not the borrower…’

But Lord Millett did not mean thereby that uncertainty whether the property was to be at the free disposal of the transferee also worked in favour of the transferor. In *Twinsectra*, the denial of any such freedom to the transferee was crystal clear. Nor indeed was the power to dispose of the money within the confines of the transferee's undertaking in *Twinsectra* uncertain in the relevant sense: see per Lord Hoffmann in paragraph 16.

65. Finally, where it is not demonstrated that money apparently advanced by way of loan is not to be at the free disposal of the transferee, the ordinary consequence is that the money becomes the property of the transferee, who is free to apply it as he chooses, leaving the lender at risk of his insolvency: see *Twinsectra* at paragraph 68. This is the true default position, in which the transfer of the legal title carries with it the beneficial interest. Although Lord Millett speaks of the *Quistclose*-type trust as one under which the transferor ‘does not part with the entire beneficial interest in the money’ (*Twinsectra*, paragraph 100), he was not, I am sure, intending thereby to depart from the following well-known dictum of Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington Borough Council* [1996] AC 669, at 706 E-F:

> ‘A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estate, there is no separate equitable title. Therefore to talk about the bank "retaining" its equitable interest is meaningless. The only question is whether the circumstances under which the money was paid were such as, in equity, to impose a trust on the local authority. If so, an equitable interest arose for the first time under that trust.’"

42. It follows that the test for a *Quistclose*-type trust is relatively demanding. In summary:

- The funds must be transferred on terms, typically for a stated purpose, which do not leave them at the free disposal of the transferee;
- There must be an intention to create what is, viewed objectively, a trust;
- A person creates a trust by their words or conduct, not their innermost thoughts;

- If such a trust is created, then the beneficial interest in the property remains in the transferor unless and until the purposes for which it has been transferred have been fulfilled;
- If such a trust is not created, then the ordinary consequence is that the money becomes the property of the transferee, who is free to apply it as they choose.

43. Similarly, as Judge Ovey observed in *YH v Secretary of State for Work and Pensions (IS)* [2015] UKUT 85 (AAC) (at paragraph 25), "if there is no evidence that the lender lent otherwise than on terms that the loan became part of the borrower's general assets, the case does not fall within the *Quistclose* principle."

44. As the commentary in the annotated *Social Security Legislation 2017/18* Vol II (J. Mesher *et al*) observes (at p.431), there may well be evidential difficulties in establishing the components of a *Quistclose* trust in the context of family arrangements, not least because there is often no contemporary documentation. However, the absence of a paper trail is not necessarily determinative. In principle a *Quistclose* trust can be created informally and by word of mouth. That said, a gift of money which is made with a hope (whether expressed or not) that it will be used for a particular purpose is insufficient, not least as it is in the nature of a gift that the funds transferred are not impressed with a trust. Careful fact-finding is required to see which side of the line the case falls, as is illustrated by a comparison of the decisions by the same Social Security Commissioner in *R(SB) 53/83* and *CSB/1137/1985*.

A comparison of (RSB) 53/83 and CSB/1137/1985

45. In *R(SB) 53/83* the claimant's son had transferred £2,850 to him to be used for a holiday in India. The claimant died without either taking the holiday or declaring the existence of the money to the Department. Mr Commissioner Rice held that there was a resulting trust or, in the alternative and applying the *Quistclose* principle (at paragraphs 8 and 9), there was a trust to return the money to the son if the primary purpose of the loan was not carried out. Thus in that case the claimant held the funds in question on trust to use it for the specified purpose or to return it. Accordingly, the money was not part of the claimant's resources. Although the actual decision in *R(SB) 53/83* was by consent reversed in the Court of Appeal (as the Commissioner had differed from the appeal tribunal on a point of pure fact), Mr Commissioner Mitchell subsequently held in *R(SB) 1/85* (at paragraph 16(b)) that this did not affect its authority on the issue of principle.

46. *R(SB) 53/83* can be usefully contrasted with *CSB/1137/1985*, which demonstrates that evidence that the transferor later thinks better of a transfer of funds and wishes to recoup the money does not itself establish that there is a trust. In *CSB/1137/1985* the claimant had received two loans of £1,000 and £500 respectively, again for the purpose of funding a trip to India. Both transferors provided letters saying that as the trip had not been undertaken, they had asked for, and had received, their money back. The first instance tribunal, applying *R(SB) 53/83*, concluded that the claimant did not hold the beneficial interest in the funds. However, Mr Commissioner Rice held that the tribunal had erred in law as on the facts of this case there had been no imposition of a trust, merely the expression of a motive for the transfer of funds. More generally, the Commissioner observed as follows:

> "8. Although the decisions in *R(SB)53/83* and *CSB/911/1985* correctly emphasised the need to apply the Quistclose principle where the circumstances justified it, it must, nevertheless, be stressed that the circumstances calling for the application of that principle will be met with but rarely. If A makes a loan to B,

he normally does so without restriction on the use to which such a loan may be put. The motive for making the loan available has no bearing on the issue. It does not give rise to a trust. As was said with reference to gifts by Page Wood V.-C. In re Sanderson's Trust (1857) 3 K. & J. 497, 503 (cited with approval in In re Andrews Trust [1905] 2 Ch. 48):-

> '11. ...there are two classes of cases between which the general distinction is sufficiently clear, although the precise line of demarcation is occasionally somewhat difficult to ascertain. If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be.'

The passage cited above was further approved by Goff L.3. in re Osoba, dec'd (C.A) [1979] 1 WLR at p.252, subject to the qualification that it was 'not a rule of law, but in the absence of context, to which of course it must yield, or perhaps very special circumstances, it is a long established and oft applied principle which I would not seek to whittle away'.

9. To attach a trust to a loan is a sophisticated concept, fully understandable in a commercial arrangement such as occurred in the Quistclose case, but not normally something to be found in private transactions, particularly where there is a family background or something analogous to a family background. The two loans in the present case would appear to have arisen in the context of the latter type of background. For the chairman's note of evidence attributes the following statement to the claimant:-

> 'People from same village always help each other and regarded as daughter of village. Borrowed from friends in same way as he would lend to them or may have lent to them. No letters, no agreement. Community sanctions and therefore no way he would fail to repay.'

It must also be remembered that the two letters referred to above, setting out the circumstances in which the loans were made, were written after the event, when the initial arrangements had become the subject of scrutiny."

47. The final point in that passage about the 'after the event' correspondence was also a factor that weighed with the First-tier Tribunal in the present appeal, as was the fact that the letter writers could not be questioned on their letters. It is axiomatic that the weight to be attached to any particular piece of evidence is a matter for the first instance tribunal. However, it is important that the evidence is considered in its wider social context. There are two factors which should be borne in mind by the new Tribunal here. The first is that in practice it is unusual for informal family arrangements to be *contemporaneously* evidenced in writing (whether within the Traveller community or elsewhere). The second is that if the Appellant's account about being cast out by the community is accepted, that in itself may explain the failure of witnesses to attend an oral hearing to support her.

48. In short, the task of the new Tribunal when considering the first period is to decide whether the funds had been gifted or loaned with a particular purpose in mind (and so more like *CSB/1137/1985*) or rather had been transferred subject to a *Quistclose* trust (and so analogous to *R(SB) 53/83*). I acknowledge that there appears to be a very fine line between the facts (as reported) of both those cases. It may be significant that in *CSB/1137/1985* the transfer was clearly described in terms

of the funds being borrowed or being a loan. In *R(SB) 53/83*, however, arguably the purpose was more specific and the son had transferred the funds in advance in part because he was too busy and in part because he thought it would be therapeutic for his father to know the funds were immediately available for the agreed and defined purpose.

49. In determining this point, the new Tribunal will be assisted by further information about both the Nationwide and TSB accounts. I accordingly make the detailed directions at paragraph 66 below for the Appellant to provide further information.

Other considerations

50. The new Tribunal should not fall into the trap of assuming that the Appellant had full beneficial ownership of all funds in both accounts simply because £1,400 was withdrawn on 23 March 2015 (before the income support claim). The new Tribunal will need to receive evidence and make its own findings about the circumstances and nature of that withdrawal.

51. As a matter of principle, however, it should be noted that Miss Smyth accepted for the Secretary of State that a bank account may contain funds subject to a trust mixed with funds which are not so subject. Mr Yetman relied on *Cooper v PRG Powerhouse Ltd (In Liquidation)* [2008] EWHC 498 (Ch) as authority for the principle that funds subject to a *Quistclose* trust and so subject to use for a specific purpose can be mixed with other funds. Mr Yetman submitted that as the family members had claimed to have provided £11,000, the withdrawal of £1,400 would not have been inconsistent with that £11,000 still vesting beneficially in those relatives (given the capital was in total in excess of £13,000). However, as Ms Smyth pointed out, that possibility does not itself go to prove the existence of a *Quistclose* trust, which must be determined on the basis of the principles outlined above and helpfully summarised in the Court of Appeal's decision in *Bellis v Challenor*.

52. The new Tribunal will also need to consider carefully the implications of any other transactions on the Nationwide and TSB accounts, especially those before July 2015, and what may be inferred from that as regards to the beneficial ownership of the funds therein.

The second period (after the accounts were closed) – some guidance

If the new Tribunal finds that a Quistclose trust applies in the first period

53. If the new Tribunal's decision on the first period is that the case is more analogous to *R(SB) 53/83*, then it follows that the beneficial interest in the monies concerned remained with the transferors and did not form part of the Appellant's capital. As such the tariff income rule should not have been applied in the assessment of the Appellant's income support claim.

If the new Tribunal finds that a Quistclose trust does not apply in the first period

54. If, however, the new Tribunal's decision on the first period is that the case is more analogous to *CSB/1137/1985*, then it follows that the Appellant enjoyed the beneficial interest in the monies concerned, which accordingly formed part of her capital. This would be the case even if the new Tribunal accepts that the Appellant was unaware of the existence of the TSB and Nationwide accounts until the first compliance interview. For present purposes the question is whether she was the beneficial owner of the funds in the Nationwide and TSB accounts, not whether she knew she was the beneficial owner.

55. But that would not be the end of the matter. Funds were withdrawn from both accounts and the accounts closed on 20 July 2015. If a person deprives herself of

capital for the purpose of securing entitlement to income support (or increasing their entitlement to income support) then she is treated as still possessing that capital (see regulation 51(1)). As a matter of general principle, and failing a satisfactory account of the way in which money has been disposed of, it will be open to the new Tribunal to find that the claimant still has, in some form or other, that resource: see *R(SB) 38/85* and *WR v SSWP* (IS) [2012] UKUT 127 (AAC). If, however, the new Tribunal finds that a claimant no longer has the funds in question, it will be necessary to consider, and make findings of fact in relation to, the various factors in regulation 51: see *R(SB) 38/85*, *R(SB) 40/85* and *WR v SSWP* (IS).

56. In that context, Miss Smyth drew my attention to the helpful analysis of Upper Tribunal Judge Rowland in *WR v SSWP* (IS) at paragraph 8:

> "8.In truth, there are at least five different possibilities that must be considered in respect of any capital sum. The first is that the claimant has it as actual capital in his or her hands. In such a case the money is taken into account for income support purposes as actual capital. The second, which does not arise in this case, is where the claimant has the money but it really belongs to someone else because, for instance, the claimant is a trustee. In such a case, the money is not taken into account for income support purposes. The third is where the claimant has transferred money to someone else for a purpose other than securing entitlement to income support by, for instance, paying a debt that is due at the time. In such a case, the money is again not taken into account for income support purposes. The fourth is where the claimant has transferred money to someone else for the purpose of securing entitlement to income support. In such a case, the money is taken into account for income support purposes as notional capital. The fifth is where the claimant has transferred money to someone else but really still owns it because, for instance, it is held in trust for him. In such a case, the money is taken into account for income support purposes as actual capital."

57. The new Tribunal will have to decide which of these scenarios applies. If it decides against the Appellant's case on the first period, then clearly the second scenario cannot apply. In principle in those circumstances any of the other four scenarios posited by Judge Rowland may be relevant. Which of those actually applies depends on the new Tribunal's fact finding. It may well be that the first scenario is unlikely (or why else would the Appellant have been rehoused by the local authority in mother and baby accommodation and be in such straitened circumstances?). Likewise the fifth scenario seems somewhat improbable on the facts as known. That being so the new Tribunal is likely to be faced with a binary choice. Either the Appellant transferred (or returned) the funds to the relatives as a result of e.g. community and family pressure (the third scenario) or she transferred the funds for the significant operative purpose of securing or increasing entitlement to income support (the fourth scenario).

The cultural context and issues of credibility

58. In my grant of permission to appeal I expressed some concern that the First-tier Tribunal had not properly considered the Appellant's explanations for certain events in the context of the community to which she and her family members belonged. As noted above, Mr Benton helpfully provided a copy of an EHRC research report on the Traveller community.

59. Mr Yetman made a number of potentially wide-ranging submissions about the implications of the Traveller community's culture, and in particular its attitudes (e.g.

towards lone parenthood), beliefs (e.g. as to motherhood) and practices (e.g. as to a reliance on a cash economy).

60. In reply, Ms Smyth emphasised that the Secretary of State did not accept that the First-tier Tribunal could depart from the evidence in the case on the basis of suppositions about community values. Moreover, the First-tier Tribunal could not fairly be criticised for omitting to investigate such issues.

61. I accept entirely Ms Smyth's point that the appeal has to be decided on the basis of the evidence. I also readily accept that e.g. the principles governing the identification of a *Quistclose* trust cannot be relaxed in some way simply because the Appellant hails from a Traveller background.

62. Nonetheless, reading this First-tier Tribunal's decision notice and statement of reasons creates a lingering concern that the Tribunal approached the question of the Appellant's credibility solely by reference to some objective criterion of reasonableness. However, the question cannot be: what would a High Street solicitor have recommended to a client who made enquiries about how to set up an educational trust for a child in the family? This seems to have been the benchmark used by the First-tier Tribunal – see point (4) of the decision notice (at paragraph 19 above). Most people (whether from the Traveller community or not) do not take professional advice about such matters. Rather, they do what is customary within their particular community. To that extent I agree with Mr Yetman that Upper Tribunal Judge Markus QC's decision in *JH v HMRC (TC)* [2015] UKUT 397 (AAC) provides some invaluable assistance. Mr Yetman referred me specifically to paragraph 10 of that decision, but I rather think the full extract merits repetition:

> "5. The Upper Tribunal will be slow to interfere with the First-tier Tribunal's findings of fact. It may only do so if those findings were made in error of law. This includes making perverse or irrational findings on material matters, which includes findings which are not supported by the evidence; failing to take into account material matters; or taking into account immaterial matters. See **R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982** at [9] – [11].
>
> 6. The assessment of the credibility or plausibility of a witness's evidence is primarily a question of fact for the tribunal. In **HK v Secretary of State for the Home Department [2006] EWCA Civ 1037** Neuberger LJ said, at [30], that rejection of an account on grounds of implausibility must be done "on reasonably drawn inferences and not simply on conjecture or speculation". In addition, a tribunal may properly draw on its common sense and ability, as practical and informed people, to identify what is or is not plausible.
>
> 7. In **Gheisari v Secretary of State for the Home Department [2004] EWCA Civ 1854** (with which Neuberger LJ agreed) the Court of Appeal emphasised that an account that is unlikely may nonetheless be true, just as a likely account may turn out to be untrue. Faced with an account which a tribunal considers to be improbable, its task is to appraise the evidence and the individual who gave the evidence, and decide whether it is true – **Gheisari** at [12], [13] and [16]. It may not be necessary for a tribunal to carry out a strict two stage test (improbability followed by truth), but:
>
> > "What would be wrong would be to say …. that because evidence is inherently unlikely it inevitably follows that it is wrong. An unlikely description may, upon a consideration of the circumstances as a whole, including the judge's

> assessments of the witness and any explanations he gives, be a true one." (Pill LJ in **Gheisari** at [21])
>
> 8. The above discussions were made in the context of asylum appeals, where inherent improbability may be particularly unhelpful because "[m]uch of the evidence is referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience." (**HK** at [29]). It follows that inherent improbability may be more helpful in cases where the evidence is closer to the experiences of the tribunal, but it will nonetheless only be a component of the overall task which is to decide whether a witness's account did occur not whether it was likely to have occurred. The general approach set out in **HK** and **Gheisari** is apt in cases such as the present. I note that it was followed by the Court of Session Outer House in an appeal concerning a decision relating to the educational needs of a learning disabled child: **G v Argyll and Bute Council [2008] CSOH 61** at [157].
>
> 9. It also follows from this approach that it will generally be inappropriate for a tribunal to appraise evidence by reference to what a reasonable person would have done. The question for the tribunal is what the individual in question is likely to have done, not what some other (hypothetical or actual) person would have done. As both Sedley LJ and Pill LJ said in **Gheisari**, the fact-finder should appraise the person giving the evidence (paragraphs [13] and [21] respectively).
>
> 10. Judged by reference to this guidance, the tribunal's decision in the present appeal was made in error of law. The tribunal did not accept the appellant's evidence because it considered that it was improbable. It did so on the basis of what the tribunal would have expected a person in her position to have done, and in one instance the tribunal expressly applied the test of a "reasonable" person in the appellant's position. The tribunal did not, whether as part of a single fact-finding process or by considering the evidence in stages, consider whether the appellant's account was true rather than improbable. Had it done so, the tribunal would have had to consider matters such as the appellant's particular circumstances and her explanation for her actions or those of Mr W, and would have had to assess what it was likely that she or he would have done. Unfortunately, because of the underlying error in the tribunal's approach, in a number of respects it either did not ask the appellant to provide an explanation for her actions and choices."

63. It follows, therefore, that even if the new Tribunal finds that there was no *Quistclose*-type trust, that is not the end of the matter. It may be the evidence here is insufficient to found a conclusion that funds were transferred subject to a trust. However, that is not inconsistent with a finding that funds were transferred with a motive or expectation and that those funds were subsequently returned principally as a result of family and community pressure because of the events which the Appellant claims led to her being made an outcast. However, those are ultimately issues of fact for the new Tribunal to determine.

64. The new Tribunal must pay heed to Judge Markus QC's guidance in *JH v HMRC (TC)*, cited above. I put the same point in this way in *AB v SSWP and Canterbury CC (IS and HB)* [2014] UKUT 212 (AAC) (and see also *KW v Secretary of State for Work and Pensions (IS)* [2012] UKUT 350 (AAC)):

> ' 3. The second theme is the importance of having a proper evidential basis for an adverse credibility finding against a claimant. It may well be that as a general

rule the more implausible an account is, the less likely it is to be true. However, this is at best a useful rule of thumb and not an absolute proposition. So decision makers and tribunals need to bear in mind the cautionary words of Neuberger LJ (as he then was) that often "some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue" (*HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037 at paragraph 28). Equally, as Chadwick LJ observed in his judgment in the same case, tribunals need to be wary of rejecting an applicant's account "simply because the facts that he describes are so unusual as to be thought unbelievable". More particularly, this was "not a safe basis upon which to reject the existence of facts which are said to have occurred within an environment and culture which is so wholly outside the experience of the decision maker as that in the present case" (at paragraph 72). It is important to recognise that those judicial observations were made in the context of an asylum appeal. However, those statements may well have purchase in some social security appeals in a domestic context, at least where the alleged factual matrix of the case involves issues which are wholly outside the everyday experience of most tribunal judges.'

Preparation for the re-hearing before the First-tier Tribunal

65. A number of steps need to be taken both by the Appellant and on behalf of the Secretary of State before this appeal is ready for re-hearing before a new First-tier Tribunal.

66. First, the Appellant should provide the following evidence for the new Tribunal, to be sent to the relevant regional tribunal office within one month of the date this Upper Tribunal decision is issued. This supplementary evidence should include the following matters:

- copies of bank statements for the Barclays account covering the period from 1 April 2015 to 30 September 2015;

- a letter from the Nationwide Building Society with regard to closed account ending 9476 detailing the following information:
    - (i) the date this account was opened;
    - (ii) the date and nature of any changes made to the details of the account holder;
    - (iii) copies of monthly or quarterly account statements for the calendar year 2014;
    - (iv) the name and address to which account statements were sent in 2014 and 2015;
    - (v) the frequency with which account statements were sent in 2014 and 2015;

- a letter from the TSB with regard to closed account ending 1060 detailing the following information:
    - (vi) the date this account was opened;
    - (vii) the date and nature of any changes made to the details of the account holder;
    - (viii) copies of monthly or quarterly account statements for the calendar year 2014;
    - (ix) the name and address to which account statements were sent in 2014 and 2015;
    - (x) the frequency with which account statements were sent in 2014 and 2015.

67. I have confined these directions to those 'hard' bits of information itemised. It seems to me completely unrealistic to expect those financial institutions to be able to produce any evidence complying with the terms of the directions laid down by the First-tier Tribunal on 2 February 2016 (see paragraph 15 above).

68. Second, the Secretary of State's representative should prepare a supplementary submission for the new Tribunal, to be sent to the relevant regional tribunal office within two months of the date this Upper Tribunal decision is issued. This supplementary submission should:

- clarify precisely what decisions were taken in relation to the Appellant's income support entitlement in 2015 (the decision dated 24 September 2015 seems to be an entitlement decision only; although it refers to a consequential overpayment, any such overpayment does not appear to have been quantified);

- include copies of all relevant documentation and other supporting evidence (e.g. a copy of the Appellant's original income support claim form from April 2015 and a schedule showing how the Appellant's entitlement had been calculated once the tariff income had been found to apply);

- contain a response to the Appellant's appeal covering the second period, namely the period after the accounts were closed on 20 July 2015, and in particular dealing with the application of regulation 51 of the Income Support (General) Regulations 1987.

Conclusion

69. I conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new Tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

70. Given the undoubted legal and evidential complexities of this case, I hope that the Free Representation Unit will be able to continue to provide its invaluable help to the Appellant, both by way of preparation for, and representation at, the First-tier Tribunal rehearing.

Signed on the original
on 22 February 2018

Nicholas Wikeley
Judge of the Upper Tribunal