

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

As the decision of the First-tier Tribunal (made on 15 March 2018 at Sutton under reference SC154/17/06025) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

- A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under paragraph 6(9)(a) of Schedule 7 of the Child Support, Pensions and Social Security Act 2000, any other issues that merit consideration.
- B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).
- C. In particular, the tribunal must investigate and decide whether the claimant had a right to reside at the time of the local authority's decision.
- D. The District Tribunal Judge will need to consider what directions to give to the claimant and her representative about further evidence. By this decision, the claimant is on notice of the risk that she runs by not providing the evidence that the tribunal requires or by not attending the hearing of her appeal.

REASONS FOR DECISION

1. The Secretary of State has introduced a condition of entitlement to housing benefit and other benefits that claimants must have a right to reside in the United Kingdom. Citizens of one member State have a right to reside in another member State have if they are self-employed persons there. See Article 7(1)(a) of Directive 2004/38/EC and regulation 10(3B)(za) of the Housing Benefit Regulations 2006. In order to be a self-employed person, the employment must be genuine and effective and not marginal or ancillary.

A. The local authority misunderstood the Minimum Earnings Threshold

2. The Department for Work and Pensions has issued a Circular to help local authorities decide whether a person's self-employment is genuine and effective: HB Circular A3/2014. I set out paragraphs 5 and 6 of that Circular, because there is no evidence that either the local authority's decision-maker or the Tribunal Judge who decided the appeal ever read them. If they did read them, they misunderstood them. This is what the paragraphs say:

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5. The Minimum Earnings Threshold has been set at the level at which workers start to pay National Insurance Contributions (NICs), currently £149 a week (or £153 a week in the 2014/2015 tax year). If an EEA national can prove that they have been earning at least this amount for a period of 3 months immediately before they claim HB their work can be treated as genuine and effective and they will have a right to reside as a worker or self employed person.
 6. If they do not satisfy the Minimum Earnings Threshold criteria, a further assessment will be undertaken against a broader range of criteria (such as hours worked, pattern of work, nature of employment contract etc) to determine whether their employment is genuine and effective.
3. The Circular is not law, but there is nothing wrong with it when it is read and understood. Paragraph 5 is in effect a concession that work will be genuine and effective if the claimant's earnings meet the Threshold and paragraph 6 says that the other criteria need only be applied if they do not. The other criteria accurately record the approach required by EU law.
4. The problem arises when paragraph 5 is read as a rule of law and paragraph 6 is ignored. That is what the local authority did in this case. The claimant was originally awarded housing benefit on the basis that she was a self-employed person with a right to reside. She later reported that she had reduced her hours of work. This led the local authority, after some enquiries, to make this decision:

I have terminated your Housing Benefit claim from 10 April 2017. Full rent is now payable.

The reason for this adjustment is because your earned income has decreased to an amount below the required threshold for EEA Nationals for your work to be considered 'genuine and effective'. These Regulations were introduced in April 2014. As a result, you are not entitled to Housing Benefit.

This was not just a mistake by the decision-maker. The local authority's representative before the Upper Tribunal has written:

So in order to help ensure benefits only go to those who are genuinely working a minimum earnings threshold was introduced as part of the government's long-term plan to cap welfare. Which was that they had to be earning amount over the threshold which shows that self-employment is 'genuine and effective'.

The reasoning on which the decision was based was wrong. So is the submission to this tribunal.

B. The First-tier Tribunal misunderstood the Minimum Earnings Threshold

5. The First-tier Tribunal dismissed the claimant's appeal. Paragraph 1 of the written reasons is headed **The decision**. It records that the claimant did not have a right to reside and goes on:

Further, it has been determined that [her] self-employment is not "genuine and effective".*

** As introduced by the Minimum Earnings Threshold with effect from 1 March 2014.*

That repeats the same mistake made by the local authority. It is wrong and one reason why the decision has to be set aside. Sadly, there is another reason.

C. The First-tier Tribunal denied the claimant a fair hearing

6. In order to understand the tribunal's second mistake, I need to give some more of the background to the appeal.

7. The claimant is Polish and had been receiving an amount of housing benefit that took account of her work as a cleaner. On 15 November 2016, PL Bureau wrote on her behalf to tell the local authority that her working hours had reduced. The Bureau handled her finances and acted as her social security representative. The local authority gave the decision I have quoted in paragraph 4. The Bureau then wrote further to explain that the claimant's gross income had increased but that she was having to sub-contract the work to Ms S, thereby reducing her net income. Some of the evidence provided involved a company called Cleaning Ladies Ltd.

8. The claimant had asked for an oral hearing of her appeal. In the event, she did not attend, nor did her representative. The judge made findings that were sceptical and critical of the evidence, before saying:

Had [the claimant] appeared at the appeal hearing to give oral evidence, the issues identified above could have been clarified with her. However, in the absence of oral evidence to support the appeal the tribunal is not satisfied on the balance of probabilities that the documents/invoices/statements produced by Cleaning Ladies Ltd or Ms S are genuine. Further, the tribunal is not persuaded that there is a genuine business relationship between [the claimant] and her sub-contractor Ms S as there is no evidence produced, other than the invoices to establish this. In any event, [the claimant] appears not to be providing the services of cleaning herself for the majority of the time, yet no medical evidence has been produced to support [her] assertions of ill-health.

9. That passage is tantamount to a finding of fraud and deceit. Even if the claimant had not applied for the hearing to be postponed, the tribunal should at least have considered whether an adjournment was appropriate in order to put the claimant on notice that such findings were possible. That would also have given the tribunal the opportunity to give directions to the claimant on the

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evidence that it would like to see in order to investigate its concerns further. She did, of course, have a representative, but the documents I have seen suggest that the representative is not perhaps experienced in presenting appeals to tribunals.

10. The tribunal did consider whether to adjourn, but decided that it was 'reasonable and appropriate to proceed in [the claimant's] absence'. Its reasons do not explain how it took its concerns about the genuineness of the claimant's case into account in coming to that conclusion. The result is that by proceeding as it did the tribunal denied the claimant a fair hearing. This is the second reason why its decision must be set aside.

**Signed on original
on 12 February 2019**

**Edward Jacobs
Upper Tribunal Judge**