IN THE UPPER TRIBUNAL **Case Nos.** CH/1905/2017 & CTC/1902/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway; Judge of the Upper Tribunal

For the Claimant: Ms S Naik QC (Counsel) and Mr D Rutledge (Council)
For the Respondents: Ms J Smyth (Counsel)

Decisions: The decision of the First-tier Tribunal (made at Huddersfield on 17 March 2017 under reference SC246/16/00742 did not involve the making of an error of law and shall stand.

The decision of the First-tier Tribunal (made at Huddersfield on 17 March 2017 under reference SC246/16/00679) did not involve the making of an error of law and shall stand.

These decisions have been made under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. The claimant has appealed, with my permission, from two decisions of the First-tier Tribunal (the tribunal) both made following a joint hearing of 17 March 2017. One of those decisions concerns her entitlement or otherwise to housing benefit and the right of the first respondent (the LA) to recover what is said to have been an overpayment of that benefit from her. The other decision involves entitlement to tax credits. The appeals raise issues concerning the impact of dishonestly obtained leave to remain in the UK, upon entitlement to housing benefit and tax credits which is dependent upon such leave, in circumstances where there is agreement between the Secretary of State for the Home Department (SSHD) and the relevant benefit and tax credit decision-makers that leave was obtained dishonestly. Whilst it has been suggested that the appeals raise issues of importance and broad application it seems to me that the precise circumstances of this case are unusual and are unlikely to be replicated frequently.

The relevant legislative background

2. The claimant is not a British citizen. Section 3(1) of the Immigration Act 1971 prohibits a person who is not a British citizen from entering the United Kingdom (UK) unless given leave to do so in accordance with provisions of or provisions made under that Act. It is further provided that any leave given may be for a limited or for an indefinite period and may be subject to restrictions including conditions restricting employment, studies or recourse to public funds. Section 3(2) makes provision for Immigration Rules to be laid before Parliament concerning the giving of leave and conditions which may be attached to such leave.

3. Section 115 of the Immigration and Asylum Act 1999 excludes persons from entitlement to a list of benefits if that person is subject to “immigration control”.

According to section 115(9) a person subject to immigration control is a person who is not a national of an EEA State and who requires leave to enter or remain in the UK but does not have it; a person who has leave to enter or remain in the UK which is subject to a condition that he/she does not have recourse to public funds; a person who has leave to enter or remain in the UK given as a result of a maintenance undertaking; or a person who has leave to enter or remain in the UK only as a result of paragraph 17 of Schedule 4 to that Act. It has not, in these appeals, been contended that the claimant is a person subject to immigration control but the provision has been mentioned in some of the paperwork in front of me so I refer to it for completeness.

4. Leave to enter or remain in the UK may be interfered with by the SSHD under a variety of provisions. By way of example, section 76(2) of the Nationality, Immigration and Asylum Act 2002, provides for the revocation of indefinite leave to enter or remain if such leave was obtained by deception. Pausing there, although it was once contended on behalf of the claimant that she had received a grant of indefinite leave to remain, it is now accepted that she has only ever had a grant of limited leave to remain. Leave may be curtailed under paragraph 323 of the Immigration Rules in a range of circumstances including where false representations have been made for the purpose of obtaining leave to enter.

5. Paragraph 334 of the Immigration Rules provides for a grant of asylum in the UK if the Secretary of State is satisfied, amongst other things, that the claimant is a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006. According to regulation 2 of those Regulations, the term “refugee” means a person who falls within Article 1(A) of the Geneva Convention and to whom regulation 7 does not apply. Essentially, according to the Article, a person is a refugee if owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, that person is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of that country. Regulation 7 of the Qualification Regulations relates to persons who are excluded from being a refugee due to the commission of serious crimes or conduct. It has no application here.

6. According to paragraph 335 of the Immigration Rules, if the SSHD decides to grant asylum to a person who has entered without leave (as did the claimant in this case), limited leave to remain will initially be given. But a person’s grant of asylum under paragraph 334 will be revoked or not renewed in certain circumstances including where the Secretary of State is satisfied he/she has misrepresented or omitted facts which were decisive for the grant of asylum (Paragraph 339AB).

7. Turning to the question of entitlement to tax credits (that is working tax credit and child tax credit) section 3 of the Tax Credits Act 2002 provides that entitlement is dependent upon the making of a claim. As to who may claim the section provides as follows:

> **3.** - …
>
> (3) A claim for a Tax Credit may be made –

> (a) jointly by members of a couple both of whom are aged at least sixteen and are in the United Kingdom and neither of whom are members of a polygamous unit; or
>
> (aa) …
>
> (b) by a person who is aged at least sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) (jointly with another) ….

8. According to regulation 3 of the Tax Credits (Residence) Regulations 2003, in order to be "in the United Kingdom" a person must be ordinarily resident in the United Kingdom.

9. As to awards of tax credits and entitlement to tax credits, there is a distinction between an award of and entitlement to tax credits. Put simply: (a) an award is made during the relevant tax year (see section 14 of the Tax Credits Act 2002); (b) entitlement is then checked and determined at the end of the tax year (sections 17 and 18). A declaration is completed at the end of the tax year which: (c) enables Her Majesty's Revenue and Customs (HMRC) to determine entitlement for that year; (d) enables the claimant to be treated as having made a new claim for the next tax year.

10. Often, therefore, a decision made under section 18 of the Act as to entitlement for the relevant tax year will be the end of the decision-making process in relation to that tax year. But section 19 permits HMRC to enquire into the entitlement of a person where a decision under section 18 has previously been made. Further, section 20 relevantly provides as follows:

> **Decisions on discovery**
>
> **20.** – (1) …
>
> (4) Where the Board have reasonable grounds for believing that
>
> (a) a conclusive decision relating to the entitlement of a person, or the joint entitlement of persons, to a tax credit for a tax year is not correct, and
>
> (b) that is attributable to fraud or neglect on the part of the person, or of either of the persons, or on the part of any person acting for him, or either of them,
>
> the Board may decide to revise that decision….

11. But section 20(5) limits HMRC to revising decisions which were not taken after the period of five years beginning with the tax year to which the relevant conclusive decision relates.

12. Section 28 of the Tax Credits Act 2002 provides for HMRC to decide that the difference between the amount of a tax credit awarded and paid, as against the amount of tax credit to which a claimant is entitled under a final decision about entitlement, will be recovered from the claimant. Such a decision, as opposed to decisions regarding awards and entitlement, does not carry a right of appeal to the First-tier Tribunal.

13. Turning then to housing benefit, put simply, to be entitled a claimant must be liable to make payments in respect of a dwelling which he/she occupies as his/her

home (section 130 of the Social Security Contributions and Benefits Act 1992). Regulation 10 of the Housing Benefit Regulations 2006 has the effect of excluding certain categories of persons ("persons from abroad") from entitlement to housing benefit by deeming them not to be liable to make payments in respect of their home. There may in the case of some claimants, however, be a prior question as to whether such a claimant is excluded from benefit altogether under section 115 of the Immigration and Asylum Act 1999 (see above). But, if not, then it is necessary to consider whether a person who would otherwise be a person from abroad is able to fit within one of the exceptions set out at regulation 10(3B). According to regulation 10(3B)(g) a refugee is such a person. As to overpayments of housing benefit and consequent recoverability, regulation 100 of the Housing Benefit Regulations 2006 relevantly provides:

> **Recoverable overpayments**
>
> **100.** – (1) Any overpayment except one to which paragraph (2) applies, shall be recoverable.
>
> (2) Subject to paragraph (4) this paragraph applies to an overpayment which arose in consequence of an official error where the claimant or a person acting on his behalf or any other person to whom the payment is made could not, at the time of receipt of the payment or of any notice relating to that payment, reasonably have been expected to realise that it was an overpayment.

14. Sub-paragraph 100 (4) has no application in this case.

The background circumstances

15. The relevant history is somewhat lengthy and convoluted. Not all of it is directly relevant but I have taken some time to set it out in order to place matters into context.

16. The claimant was born in what is now the Democratic Republic of Congo (DRC), in 1971. When she was aged about twenty years she went to South Africa and claimed asylum there. It appears that she was granted some form of permission to stay in South Africa. In 1996, she met and married a man with whom she had two children. Her first child was born in 1997 (child A) and her second child was born in 2000 (child B). In 2005 she and the father of those children divorced. She then commenced online contact with a man I shall simply call J. He is a citizen of Grenada. In due course they commenced a relationship and he joined her in South Africa where, on 11 April 2008, they married. It is not a matter of dispute that she acquired Grenadian citizenship as a result. On 19 March 2010 the claimant gave birth to their child (child C). In due course J moved back to Grenada and in February 2011 she joined him there though, as I understand it, child A and child B remained in the care of others in South Africa. The relationship ran into difficulties as, it is said, J was abusive to the claimant and she wished to rid herself of him. She came to the UK, seemingly intending to make a claim for asylum upon arrival, but did not make such a claim straightaway. But she did so later, asserting as part of her claim that she is a national of the DRC and giving what I think is her maiden name as her surname. It appears to be common ground that she did not reveal, in seeking asylum, that she has Grenadian citizenship but, rather, presented herself as a person who had travelled straight from the DRC to the UK having fled persecution in the DRC. It does not appear that she said anything about

her previous residence and any entitlement she had to reside in South Africa. She did not, as I understand it, say anything about her marriage to J.

17. On 22 November 2011, believing her to have fled the DRC to come to the UK and not knowing that she has another nationality, the Secretary of State accepted the claimant as a refugee and, in accordance with normal practice, granted her leave to remain, on that basis, for an initial period of five years. It is not, I think, controversial to say that the expectation in such circumstances is that unless something unusual occurs a grant of indefinite leave to remain will follow.

18. On 13 December 2011 the claimant applied, as a single person, for tax credits. On 25 January 2012 she was awarded tax credits presumably under section 14 of the Tax Credits Act 2002. On 13 February 2012 she started to receive housing benefit. As I understand it she was "passported" to housing benefit through receipt of income support. It was not surprising that the claimant was awarded tax credits because, as a refugee, there was no reason to think she was not ordinarily resident in the UK and no reason to think her claim was in any sense fraudulent. Nor was it surprising that she was awarded housing benefit. She was, on the face of it, liable to pay rent in order to occupy her home and, although otherwise she would have been a "person from abroad", she was a refugee (regulation 10(3B)(g) of the Housing Benefit Regulations 2006). Again, there was no reason to suspect any fraud.

19. J arrived in the UK. Around the same time (though I think this was unconnected) child A and child B arrived. I think child C had arrived with the claimant herself. From the claimant's perspective J was unwelcome. It seems he did not take kindly to this and informed the Home Office about her true immigration history. This was, I think, around August of 2013. In November 2013 the claimant was arrested on suspicion of having obtained leave by deception. She was charged and, on 2 May 2014, pleaded guilty to an offence of obtaining leave to remain by deception and an offence of making dishonest representations with a view to obtaining asylum benefit. At some point around that time she and J divorced, a development which she must have found welcome. On 14 April 2015 the claimant married a British citizen who I shall simply call R. On 4 August 2015 the claimant was interviewed under caution by persons acting on behalf of the Department for Work and Pensions. On 3 December 2015, having learnt the above history, the LA decided, by way of revision, that the claimant had not been entitled to housing benefit for the period from 13 February 2012 to 31 May 2015 and that the amount she had received to which she had not (it was said) been entitled was recoverable from her. On 9 December 2015 HMRC issued what it called "revised notice awards" for the period from 11 September 2011 to 5 April 2015, effectively deciding under section 20(4) of the Tax Credits Act 2002, that she had not been entitled to any of the payments of tax credits she had received as a single claimant. It followed that she had been overpaid tax credits to that extent.

20. On 3 February 2016 the claimant was convicted of making a dishonest statement or representation to the Department for Work and Pensions and of making a false statement for the purposes of obtaining tax credits. The Home Office had been investigating the claimant's immigration background and had written to the UNHCR, as it was required to do as a preparatory step, indicating it was considering revoking her refugee status. On 16 January 2017 the Secretary of State wrote to the claimant informing her that it had been concluded that she had gained leave in the UK by

deception, that her refugee status and leave on that basis was to be revoked, but that she was to be given a grant of thirty months leave outside of the Immigration Rules under Article 8 of the European Convention on Human Rights (ECHR) "pending checks and following the mandatory appeal period allowed with this decision to revoke refugee status". No appeal was pursued and the formal grant of thirty months leave to remain followed on 14 November 2017.

21. The claimant appealed the above decisions which had been made with respect to Housing Benefit and Tax Credits.

The arguments put to the tribunal and its decision

22. The tribunal had the benefit of written submissions from all parties. It heard oral evidence from the claimant. All parties were represented before it. It heard the two appeals by way of a joint hearing. It is worth pointing out that although the SSHD had not revoked refugee status by the date of either decision under appeal to the tribunal, it had done so by the time the tribunal came to hear the appeals.

23. HMRC argued that the claimant had been residing with J, in the UK, at the relevant times and had not, therefore, been entitled to claim tax credits as a single person. HMRC also argued that the claimant was not entitled because she had been guilty of fraud. The LA argued that the claimant was in effect a "person from abroad" because the grant of leave which had the consequence that she was not, had been obtained by fraud. The claimant argued that, as a person with a grant of leave, she was not debarred from entitlement to benefits and tax credits; that she had not made any false representations to either respondent her having simply said, truthfully, that she had a grant of leave; and that the respondents had been required to follow a decision to the effect that the claimant was entitled to income support.

24. The tribunal dismissed the claimant's appeals. It explained why, first of all, in a decision notice of 17 March 2017 (page 159 to 161 of the Upper Tribunal bundle) and then in a statement of reasons for decision (statement of reasons) of 13 April 2017 (pages 163 to 170).

25. The tribunal accepted that the claimant (notwithstanding that it also accepted she had fraudulently obtained her status as a refugee) had been a credible witness to it. It accepted her explanation that she and J had always been separated throughout his residence in the UK, notwithstanding his wish that the situation be otherwise, so it rejected the argument that she had not been entitled to claim tax credits as a single person. But, essentially, it disagreed with the claimant's argument that since leave had been granted (notwithstanding dishonesty) so the LA and HMRC had to assess entitlement on that basis. Having summarised the arguments put to it it said this:

> "40. That then brings us to what is the most complicated aspect of these appeals which simply put, is *should or can the Appellant be permitted to benefit from her own deceit in dishonestly claiming that she was an asylum seeker and failing to disclose her true circumstances which would have resulted in an entirely different outcome.* It should be noted that there was not a one-off deception. The deception continued see for example the change in circumstances report to [the LA] dated 18/7/12 when a [the claimant's maiden name] reports that her two daughters, [child A and child B] had joined her from the Congo on 24/6/12

whereas in fact they had come from South Africa and the appellant was more correctly to be described as [the claimant's married name] in consequence of her marriage to J (see pages 46/47 of KB).

41. In both bundles the parties set out their arguments and counter-arguments together with a wealth of authorities. Miss Thompson [the LA's representative] confirmed that in the fourth paragraph of her supplemental response at page 100 KB the regulation quoted should read 10(3)(B).

42. As I indicate in my Decision Notice after reviewing the authorities I take the view that Mr Power's [the claimant's representative] interpretation is too narrow. Having read in particular the Hillingdon Decision it is clear to me that given the circumstances [the LA] were entirely justified in going behind the DWP decision and coming to its own conclusions namely that the application for Housing Benefit was tainted by fraud and dishonesty further compounded by the change in circumstances notice at page 46/47 KB.

43. So far as HMRC is concerned unfortunately they were unable to produce the applications for tax benefits but I accept and find as facts the matters set out in Section 5 (pages D to I of the HMRC bundle). The initial application for Tax Credit was made on 13/12/11 in the name of [the claimant's maiden name] describing herself as a single person with the responsibility of one child holding the right to remain in the UK under refugee status. She did not disclose that she was in fact [the claimant's married name in consequence of her marriage to J] who had arrived in the UK from Grenada and had given false information to the Immigration Authorities in that she was not a refugee. When that came to light naturally HMRC reviewed their position.

44. At the hearing Miss Thompson on behalf of [the LA] pointed out that [the LA] had withdrawn entitlement and sought to recover monies paid because the DWP had withdrawn passporting benefits. She said, as argued in her submissions filed, that [the LA] say that although the DWP changed its mind [the LA] can go behind that and make their own decision on the basis of facts now known. Dishonesty was involved and that dishonesty affects the Appellant's entitlement to Housing Benefit. The dishonesty was that the application for leave to remain was based on false claims. She confirmed that [the LA] made no submissions concerning "living together" and that such was not the basis for their decision.

45. Simply put I accept the submissions made by [the LA] as set out in the bundle.

46. Mr Hunter on behalf of HMRC submitted that there were two bases for their decision. The first was that the Appellant was not entitled to make her claim as a single person when in fact she was living with her husband in the marital home with their child when the claim for Tax Credit was made on or about 13/12/11. Pausing there I have dealt with this submission in my Decision Notice and above and simply put, I do not believe that HMRC have succeeded on this point. The second reason for the decision it was submitted by Mr Hunter was that the Appellant had gained the benefit by deception by misrepresenting herself as an asylum seeker when she was not. Leave to remain was obtained by false claims and had HMRC known the true circumstances relating to the Appellant no Tax Credit benefits would have been paid. I was reminded that in the communication at page 121 HMRC asked for their original decision to be varied. It was explained that the false representation made was that made to obtain leave to

> remain. HMRC took the leave to remain at face value. Mr Hunter pointed out that in the transcripts of the interview under caution (his bundle page 54/55) it appeared that the Appellant was maintaining the fiction that she travelled directly from the Congo to the UK when in fact she holds at Grenada citizenship and travelled from Grenada. Mr Hunter was unable to produce the Tax Credit application forms themselves but pointed out that the Appellant confirmed in the IUC that in her dealings with HMRC she had given her nationality as Congolese and that she had arrived directly from the Congo.
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> 47. Again simply put, I accept the submissions made by HMRC and the reason given in the paragraph above as a valid varied decision.
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> 48. As there has been criminal convictions the Tribunal took into account the dicta in AM v SSWP 2013 [CDLA/759/2012] and Newcastle City Council v LW 2013 [CH/471/2012].
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> 49. The amount of Housing Benefit overpaid and the amount of Tax Credit overpaid amounted to £14,093.55 and £27,419.05 respectively. These amounts set out at Section 3 of KB and page G of HMRC were not challenged as amounts. For the reasons stated above I find that these sums are recoverable from the Appellant".

26. So, in essence, the tribunal was seeking to rely on a public policy principle (the principle) to the effect that "*no-one should take benefit from his own wrong*". That, it effectively decided, entitled it to consider not only the fact of the grant of leave but the accepted dishonesty which had led to it. I would also point out that by the time the case had reached the tribunal there was no disagreement or difference of opinion between the SSHD and the relevant decision-makers to the effect that the claimant had not been entitled on the basis of the true circumstances, to leave as a refugee. That must follow from the SSHD's decision to revoke refugee status notwithstanding the separate decision to grant limited leave under article 8 of the ECHR which had been given in light of her then current circumstances.

The public policy principle

27. Ms Smyth, for both the LA and HMRC, argued before me that the tribunal had been right to rely upon the principle in order to resolve both appeals against the claimant. Reference was made to a number of cases in which the principle had been invoked.

28. As to that, in *R (Connor) v Chief National Insurance Commissioner* [1981] 1 QB 758, it was decided that a claimant could be refused a widow's allowance under the terms of section 24 of the Social Security Act 1975 in circumstances where she had been guilty of her husband's manslaughter, on public policy grounds. It was said that manslaughter, which varied in its seriousness, would not necessarily always result in disentitlement but that since her act had been deliberate, conscious and intentional, it was sufficient in the circumstances of that case. That was notwithstanding the fact that under the straightforward terms of the legislation there would have been entitlement.

29. In *R v Secretary of State for the Home Department Ex parte Puttick* [1981] QB 767, one Astrid Proll a German national and an individual of some notoriety, who had absconded whilst on bail and entered the UK using a passport which was not hers, had

then married "a domiciled Englishman", and who had committed both perjury and forgery to facilitate that UK marriage, had sought registration in her true identity as a UK citizen under section 6(2) of the British Nationality Act 1948, in order to stave off action taken by the German authorities to secure her extradition. The SSHD had refused registration and it was decided, notwithstanding the mandatory terms of the relevant legislation, that the SSHD had been justified in doing so notwithstanding apparent entitlement. Weight was given to the successful attempt to mislead the registrar who had performed the marriage ceremony into believing that he was marrying a female person of a different identity. In *R v South Ribble DC HBRB ex p Hamilton* [2000] 33 HLR 102, a claimant had dishonestly obtained income support and had relied upon that entitlement as also establishing entitlement to housing benefit. The Court of Appeal held that the statutory phrase "a person on income support" must be read as meaning a person who was lawfully entitled to income support. The Court of Appeal stated:

> "There are two reasons why this appeal should fail. First, it accords with common sense and the intention and structure of the legislation, that where, as here, entitlement to Housing Benefit is dependent on the receipt of [IS], that [IS] must have been lawfully obtained; that is, lawfully in the sense of neither by fraud, nor dishonestly. Secondly, the principle apparent from cases such as Shah dictates that legislation should not be construed as to enable a man to profit from his own fraud. I would therefore dismiss the appeal".

30. There is then the judgment of the Supreme Court in *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government and another* [2011] UKSC 15. In this perhaps slightly unusual case, a builder had obtained planning permission to construct a barn. That permission had been given subject to a condition that the barn was to be used only for the storage of agricultural products. The construction which the builder actually produced in reliance upon that grant had the external appearance of a barn but was fitted out internally as a small dwelling house. Just over four years after the "barn" had been constructed, the builder applied under section 191 of the Town and Country Planning Act 1990 for a certificate of lawfulness of the existing use, as a dwelling house, relying on section 171B(2) of the same Act which provided for a four year time limit for enforcement action against a breach of planning control consisting in the change of use of any building to use as a single dwelling house.

31. It was decided, amongst other things, that the principles to be applied when giving effect to the intention of the legislator were that a person should not benefit from his own wrongdoing and that a person was precluded from succeeding if he/she had to prove an unlawful act to claim a statutory benefit. Lord Mance, agreed with the reasoning in the Connor and Hamilton cases cited above and said:

> "Here, Mr Beesley's [the builder] conduct, although not identifiably criminal, consisted of positive deception in matters integral to the planning process… and was directly intended to and did underline the regular operation of that process. Mr Beesley would be profiting directly from this deception if the passing of the normal four-year period for enforcement which he brought about by the deception were to entitle him to resist enforcement. The apparently unqualified statutory language cannot in my opinion contemplate or extend to such a case".

Lord Brown stated:

> "On a true analysis, however, there is nothing in this point. If, as was held in R v Chief National Insurance Commissioner, ex p Connor [1981] 1 All ER 769, monetary payments, or, as decided in R v Secretary of State for the Home Department, ex p Puttick [1981] 1 All ER 776, registration as a United Kingdom citizen, could lawfully be withheld on public policy grounds–respectively from a widow who had manslaughtered her husband, and from a German woman whose qualifying marriage to a United Kingdom citizen she had procured by fraud – despite in each case their having acquired an ostensibly absolute statutory right to these respective benefits, so too a statutory bar on enforcement action can in my judgement be disapplied on similar public policy grounds. Logically a statutory prohibition on enforcement action is simply the other side of the coin from a statutory requirement to make a payment or to register citizenship: the one prevents public authority from terminating a benefit; the other requires a public authority to confer a benefit. Public policy may operate to negate both".

32. Those cases illustrate various ways in which the principle has been applied in the past.

The arguments in this case

33. I have had the benefit of considering the claimant's grounds of appeal and various written submissions provided by the parties. In considering and deciding these appeals I have focused primarily upon arguments put on behalf of the LA and HMRC in written submissions of 16 August 2018 prepared by Ms Smyth and in her oral submissions to me. As to the claimant's arguments, I have focused largely upon what is said in a detailed skeleton argument prepared by Mr D Rutledge (who also drafted the grounds) and what was said on the claimant's behalf by Ms S Naik at the oral hearing.

34. One point made in ground 1 of the grounds of appeal to the Upper Tribunal and built upon in the skeleton argument of Mr Rutledge and the oral submissions of Ms Naik, was that decisions as to immigration status are purely in the province of the SSHD. It followed, it was argued, that decision-making bodies adjudicating upon entitlement to benefits and to tax credits are simply not entitled to do anything other than make their decisions in light of the leave status conferred by the SSHD. In other words, it is not open to any such decision-maker, or indeed the First-tier Tribunal, to enquire into the circumstances in which a grant of leave came about or to apply any findings purportedly made about that when deciding entitlement. The legislation relating to the granting, curtailment or revocation of any leave made it abundantly clear that such was a task for the SSHD only.

35. Ms Naik pointed out that, as a matter of fact, the claimant has at all material times had a grant of leave to remain in the UK without the imposition of any condition restricting entitlement to benefits. Further (though this was not in issue before me) she has not at any time been a person subject to immigration control.

36. Ms Smyth though, made it clear she was not suggesting it was open to either of the respondents to take immigration decisions. As she put her position at the oral

hearing, the respondents had not been making decisions about leave, they had, instead, been refusing benefit/tax credits on public policy grounds.

37. The claimant also argued that if decision-makers and indeed tribunals had the freedom to look at circumstances behind the fact of a grant of leave which triggered potential entitlement to benefits or tax credits, confusion and chaos would ensue. In general terms I am very much attracted to that argument. Speaking generally, it does seem to me that it is in the interests of clarity and certainty that once a potential benefit claimant's immigration status has been authoritatively been decided by the SSHD, that status decision should or must be respected by such decision-makers. Indeed, as Ms Naik argued, it is very likely that housing benefit decision-makers and tax credit decision-makers will lack the expertise, experience or knowledge to be able to reliably make decisions as to the appropriateness or otherwise of a grant of immigration status for themselves. So, there is in this area, the potential for there to be different and competing public policy considerations. To that extent I would certainly agree with Ms Naik.

38. Having said the above though, whilst those might have been powerful and relevant arguments against the decisions taken by each respondent at the time they had been taken, by the time the appeals had reached the tribunal, the SSHD had taken her own decision to revoke refugee status on the grounds of misrepresentation. That was something which the tribunal was clearly aware of. None of the representatives specifically addressed me about that intervening event or its significance but it did mean that by the time the appeal was heard all the relevant immigration, housing benefit and tax credit decision-makers were of one view. That does seem to me to be a matter of real significance. It is one thing to say a tribunal deciding an appeal should not seek to go behind a grant of leave for public policy reasons where the SSHD has done nothing to suggest she thinks a relevant grant of leave was obtained by fraud. But it is another to say such a tribunal should not decide entitlement and apply public policy in light of and in circumstances where the SSHD herself has accepted she has been misled and has acted upon that to revoke status previously given (even if that status has then been replaced by another grant of status based upon current circumstances).

39. There is a related argument to the effect that the claimant had not been dishonest with respect to her claims for benefit or tax credit because she had done no more, in making her claims than present herself as a claimant with a grant of leave. So, there had, in fact, been no dishonesty or at least no direct dishonesty involved in the claims process. But as Ms Smyth points out, there is no dispute about the fact that the leave was obtained by fraud. Even if one were to completely disregard the criminal convictions (to which I shall refer in a little more detail below) the fact of the dishonesty in claiming to be a refugee is not disputed and the claimant herself, at the time she claimed, would have known that even if nobody else did. Ms Smyth argues, in effect, that the submission that, in those circumstances, there was no dishonesty involved in the claiming of benefits and tax credits loses connection with reality. I agree. The claimant knew she had obtained leave on the basis of fraud and she knew she was relying upon that fraudulently obtained grant of leave in order to unlock potential entitlement to what she was claiming. The tribunal was, therefore, entitled to proceed on the basis that there had been dishonesty involved in the claiming of benefits and tax credits.

40. Much has been said in argument put on behalf of the claimant to the effect that leave, once granted, cannot be retrospectively revoked. I do not have to say very much about that argument other than that, on the basis of the material I have been shown, it is correct as far as it goes. But the contrary has not been argued by Ms Smyth and the tribunal did not decide that leave could be retrospectively revoked anyway. The tribunal did not find that the leave which had been granted on the basis of the false claim to be a refugee had somehow disappeared. It proceeded on the basis that there was a grant of leave at the material times when it found benefits and tax credits had been paid in circumstances where the claimant had not been entitled to receive them. It simply applied the principle notwithstanding the grant of leave.

41. In the written arguments, the claimant had sought to rely upon a decision of the Social Security Commissioners in *R (SB) 25/85* for the proposition that a grant of leave is always conclusive for benefit purposes however obtained. But I do not read that decision in that way. The claimant in that case had been granted leave to enter, had accordingly entered the UK with leave, and on the expiry of that leave had applied for fresh leave. However, no extension or variation of that leave had been granted. Nevertheless, it appears that a tribunal had decided that her presence in the UK was legal on the basis of the fact that she had married whilst in the UK. The key point made by the Social Security Commissioner was that it was the task of the SSHD to give or refuse leave and that if leave is not granted to a non-patrial he/she cannot be in the UK lawfully. The decision, as I read it, is not authority for the proposition Mr Rutledge contends it is.

42. Ground 2 of Mr Rutledge's original grounds of appeal to the Upper Tribunal was to the effect that it had failed to have regard to the judgment of the Court of Appeal in *R (Hysaj and others) v SSHD* [2015] EWCA Civ 1195. The case was, in fact, subsequently appealed to the Supreme Court. The Supreme Court gave judgment in *R (Hysaj and others) v SSHD* [2017] UKSC 82 prior to these appeals coming before me. Ms Naik argued, before me, that the judgment represented a strong statement of the importance of the public policy principle of legal certainty which she said, 'was at the heart of this case'. Ms Smyth argued that it was irrelevant. The case involved three claimants all of whom had arrived in the UK, made asylum claims with varying degrees of dishonesty, had obtained indefinite leave to remain and had then obtained British Citizenship. As it turned out, despite being contested below, the appeals of each claimant were all allowed by way of consent. But the key issues, on my reading, related to whether, given the nature and detail of the dishonesty, it could be said that the grants of British Citizenship which had been made were nullities or whether the claimants had British Citizenship obtained by fraud such that they were liable to be deprived of their status (if the SSHD so chose) under Section 40 of the British Nationality Act 1981 (as amended). That was an important distinction because if the latter position was the correct one, those claimants would have a right of appeal. In the circumstances there was, unsurprisingly given the agreement, only a single short judgment. On my reading the Supreme Court accepted a revised position put to it by the Secretary of State to the effect that nullity should be reserved for the situation where a claimant (person a) has, in seeking citizenship, impersonated a different real person (person b) for the purpose of obtaining that citizenship in circumstances where person b has the characteristics required for citizenship but has simply never applied for it. In such a situation, reasoned the Secretary of State, it cannot be said that citizenship has been

granted to either person a or person b and that, in consequence, there is no grant of citizenship at all. But nullity would not be appropriate in situations where a claimant had not sought to impersonate another real person but had simply invented details regarding matters such as nationality and date of birth.

43. I do not see the support for Ms Naik and Mr Rutledge's position in the above judgment that they themselves do. As I understand it the argument is to the effect that *Hysaj* can be taken to have overruled the previous authorities regarding the principle or, at least, it is powerful authority which going the other way. Ms Smyth rather pithily observed, no doubt having in mind the *Welwyn Hatfield BC* case, that the Supreme Court would be surprised to be told that it had overruled itself.

44. It does seem to me that in *Hysaj* the Supreme Court was, as Ms Smyth argues, dealing with a discrete and narrow issue concerning circumstances in which a grant of citizenship fraudulently obtained would be a nullity or would simply be susceptible to a decision as to deprivation of citizenship with a right of appeal. The Supreme Court did not refer to any of the above public policy decisions and, in particular, did not refer to its own decision in *Welwyn and Hatfield BC*. I accept that that is because it was regarding itself as simply deciding, by consent, the nullity of citizenship issue.

45. Mr Rutledge, in his skeleton argument, and Ms Naik in her oral submissions, contended that even if there was potential in general terms for the principle to apply in cases where a claimant had obtained benefit through fraudulently obtained leave, the cases relied upon by Ms Smyth could be distinguished. Mr Rutledge referred me to Section 26.6 of Bennion on Statutory Interpretation (7th Edition) at page 697 where it is said that the principle a person should not benefit from his/her own wrong, "is not a rigid and unbending rule but a guiding principle that may give way to other considerations…". Turning then to the cases themselves, it was argued by Mr Rutledge that *ex p Hamilton* was not "directly applicable to the facts in this case" and the tribunal had been wrong in thinking it was. The instant case he suggested was concerned with the question of whether someone must be treated as not being subject to immigration control when they have been granted leave. The issue in *ex p Hamilton* had been how to interpret a provision in the Housing Benefit Regulations for treating a person as having no income for housing benefit purposes if in receipt of income support. In my judgement that is really an attempt to drill too deeply into the minutia of the respective cases in order to seek a distinguishing point which is not, in truth, one of substance. In any event, at the risk of seeming to be pedantic, this is not a case where it was argued before the tribunal or before me that the claimant was a person subject to immigration control.

46. In *ex p Hamilton* circumstances were such that, had the literal wording of the regulations been applied, the claimant would have been treated as not having income for housing benefit purposes because he was in receipt of income support, notwithstanding the fact that it had become apparent that he was not entitled to that income support in the first place because he did have income. I am finding it difficult to meaningfully distinguish that situation from the one obtaining in this case with respect to entitlement to housing benefit, where the claimant had leave, which unlocked the potential for her to claim that benefit, but had used deception to obtain it in circumstances where, by the time of the tribunal's decision, all parties including the SSHD recognised that she had. Essentially it seems to me *ex p Hamilton* is authority

for the proposition that, in circumstances where there has been dishonesty, diversion from the literal meaning of the rules of entitlement and the otherwise inevitable logical application of those rules is permissible on public policy grounds. I do not see why that cannot be so, in principle, in the circumstances of this case.

47. Mr Rutledge did not deal with the *Connor* or the *Puttock* cases but Ms Naik did. She said those cases along with *ex p Hamilton*, were all cases which involved a claimant seeking something or asserting entitlement to something. So, said Ms Naik, whereas public policy considerations might be relevant in such situations to enable a decision-maker to effectively say to a claimant "you're not entitled so you don't get it". But those were, as she put it, all "seeking something" cases. That was not, however, the situation here. That is because in the claims which had ultimately led to these appeals, the claimant already had leave which entitled her to what she was claiming. It was only much later, after awards had been made, that the relevant decision-makers had sought to rely upon public policy "to take the benefits back". Ms Naik argued that that was a "critically important distinction".

48. I cannot, for myself, see that distinction. I agree that the protagonists in the above three cases were "seeking something". But then so was this claimant when she made the applications for benefit and tax credits which she did. So to that extent matters were the same. The only real or meaningful difference I can see is one of timing with respect to the decisions which became subject to challenge. But that says nothing about any difference in the potential application of the principle. Nor can I see why, if it was justified to apply public policy to prevent the above three protagonists in the cases Ms Naik seeks to distinguish, gaining what they wanted (by way of benefits or citizenship) it should not be justified, in principle, to apply the same public policy considerations in seeking to make retrospective entitlement decisions and consequential decisions to recover.

49. As to the *Welwyn and Hatfield BC* case, again Mr Rutledge did not say very much about that in the context of an attempt to distinguish. But Ms Naik suggested that it had been an exceptional case and that whilst the way in which it had been decided was not necessarily wrong on its own facts, there had not been the competing public policy considerations that there were in these appeals. A court or tribunal, in such situations she argued, must decide which one to apply. I was also taken to paragraph 73 of the judgment in which it was said, in the context of planning, that it would be impossible to superimpose upon the statutory scheme any sort of broad principle to the effect that no one guilty of wrongdoing can be allowed to benefit from the limitation provisions of the 1999 Act.

50. I agree that the *Welwyn and Hatfield BC* case was somewhat extreme on its facts given that the claimant, in that case, had clearly concocted and implemented a dishonest plan from the outset in order to circumvent planning law restrictions. Some may see the facts of this case as being similarly extreme and others may well not. But I do not see the extremity or otherwise as being, of itself, a basis for distinguishing the cases in the context of the underlying legal principles. There was, of course, deception and dishonesty in both. As to the question of conflicting public policy principles, I accept that in many cases where leave has been obtained by dishonesty, the desirability of certainty and finality may well arise. But it seems to me that is less a consideration in

circumstances where, as here, the SSHD herself has accepted the fraud upon which the decision-makers had relied.

51. I conclude, therefore, that the various cases relied upon to demonstrate that it was open to the tribunal to apply the principle are not genuinely distinguishable.

52. I indicated I would come back to the matter of the claimant's convictions. Mr Rutledge argued, in writing, that the tribunal had attached too much significance to the fact of the conviction for benefit fraud and that in fact it had treated that conviction as being 'determinative of all of the issues raised in this appeal'. Ms Naik pointed out that the fact of the conviction did not bind the Upper Tribunal and, indeed, I would accept that it did not, of itself, bind the First-tier Tribunal either. But I do not agree that the tribunal did what Mr Rutledge says it did.

53. I have set out what I regard as the tribunal's key reasoning above. Prior to setting out that reasoning it had, at paragraph 32 of its statement of reasons which I have not found it necessary to reproduce, referred to the history of the convictions in relation to benefit matters and immigration matters. But it seems to me clear that what was significant for it in the context of the public policy aspect was the fact of the dishonesty (undisputed) rather than the convictions for it. The tribunal's reasoning was not to the effect that the claimant must have been guilty of dishonesty in claiming benefits simply because there was a relevant conviction. So, I would conclude it did not err in the specific manner Mr Rutledge has argued it did with respect to its treatment of the convictions and particularly the conviction in relation to benefit claims.

54. There was a third ground of appeal contained in Mr Rutledge's original grounds to the Upper Tribunal. That was to some extent tied in with what was said to be the tribunal's reliance upon the fact of the convictions. But the matter was not pursued, at least to any real extent, before me. In any event if the claimant cannot succeed with respect to her other legal arguments I cannot see that it can properly be said that the tribunal failed to provide adequate reasons for its decision.

So, did the tribunal err in law?

55. The decision-makers had arrived at their respective decisions at a time prior to the SSHD deciding to revoke the claimant's refugee status. But that had been done before the tribunal heard and decided the two appeals and it knew about it. In consequence of section 12(8)(b) the tribunal, in deciding the appeals, was not permitted to take into account circumstances not obtaining at the date when the decisions appealed against had been made. But that did not prevent it from considering material which shed light on the situation as at the date of those decisions. It did not expressly say it was attaching particular weight to the SSHD's decision on revocation but it formed a key component of the factual background against which it was deciding the appeals. And it seems to me that the decision of the SSHD made after no doubt careful consideration and made by the expert decision-making body in the field, informed as to the true circumstances regarding deception.

56. The housing benefit situation is, perhaps, a little more complicated than the tax credit situation so I shall deal with that first. There is no doubt that, if the legislation had simply been literally applied, the claimant would have established entitlement to

housing benefit when the decision was taken because, given her refugee status, and the leave she had been granted as a result, she fell within the scope of Regulation 10(3B) (g). But the tribunal, as is clear from what it had to say at paragraph 40 of its statement of reasons, considered that the public policy principle that a person should not benefit from his/her wrong had potential application. The tribunal did not take the simplistic approach of saying that because deception could be identified it necessarily followed that the principle should apply. Rather, as again is clear from what it had to say about paragraph 40, it carried out an assessment as to the nature of the deception noting that it was not 'a one-off deception' and that it had continued when a change of circumstances had been reported to the LA. I am satisfied in light of the line of relevant authorities identified above and which in my view have not been meaningfully distinguished, that it was open to the tribunal to apply the principle. But I accept there were, here, competing public policy considerations given the desirability for consistency and predictability in circumstances where leave has been granted and applications for benefit are made in reliance of that leave. I am not at all sure the relevant decision-makers appreciated that or, if they did, took it into account when arriving at the decisions they did arrive at. But it is the decisions of the tribunal which are before me. It was satisfied there had been dishonesty and it would have been fortified in that view by the stance ultimately taken by the SSHD. That lessened the impact of the competing public policy arguments in the particular circumstances of this case. Where it not for that, it seems to me the tribunal's application of public policy might have been much more difficult to justify but it did have the SSHD's decision. In those unusual and specific circumstances the argument that the tribunal's approach would create uncertainty and chaos loses much force. That is because, in effect, the tribunal was agreeing with the SSHD rather than going behind a decision she had taken. The tribunal's decision and its reasoning was in line with the various authorities set out above including the judgment of the Supreme Court in the *Welwyn and Hatfield BC* case. Notwithstanding what would have been the result had a straightforward literal approach been taken, I have concluded that the tribunal's decision was not precluded as a matter of law, was open to it and has been adequately explained. So, I dismiss the claimant's appeal to the Upper Tribunal with respect to the housing benefit issue.

55. I then turn to the Tax Credits issue. I have indicated that, as I see it and no other interpretation has been offered, the decision as to the lack of entitlement for the relevant tax years must have been taken under Section 20(4) of the Tax Credits Act 2002 on the basis that there were reasonable grounds for believing that a conclusive decision as to a tax credit was not correct and that such was attributable to fraud by the claimant (see sections 20(4)(a) and (b)). The tribunal did not identify that section of that Act as underpinning HRMC's decision and I am not wholly sure that HMRC itself ever did. But the tribunal found that the dishonesty that there had been in seeking refugee status had carried over into the claim for tax credits through reliance upon the fraudulently obtained immigration status and grant of leave. That clearly brought the case within the terms of Section 20(4). As such, this was not a case where the relevant decision-maker had a need to argue that public policy ought to dictate departure from what the position on a literal reading of the legislation would be. It follows from the tribunal's findings that Section 20(4) must have application and although the tribunal did not refer to that piece of legislation no other result, it seems to me, could have been available. In any event, even if I am wrong about that and it was necessary for the tribunal to rely upon the principle, it did that anyway. So, although its approach to the

tax credits aspect could perhaps have been slightly different, the tribunal did not err in law with respect to that either.

56. It follows from the above that I must dismiss both the claimant's appeals to the Upper Tribunal.

57. I would add, though, that I would not expect the public policy grounds relied upon in this case to be successfully relied upon save in very rare and indeed perhaps exceptional circumstances. That is because of the strength of the countervailing public policy considerations with respect to consistency and certainty as identified by Ms Naik and Mr Rutledge. This case was most unusual in that by the time it came before the tribunal it had the benefit of the SSHD's decision which the tribunal was able to and was entitled to take into account as informing as to the claimant's dishonesty. Had it not been for that, the outcome may well have been different.

58. Finally, it has taken me much longer than it should have done to prepare this decision. I would offer my apologies to the parties for that.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated **12 September 2019**