

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CH/539/2016

Before Upper Tribunal Judge Rowland

Decision: The local authority's appeal is dismissed.

REASONS FOR DECISION

1. This is an appeal, brought by Rossendale Borough Council with my permission, against a decision of the First-tier Tribunal dated 21 September 2015 whereby it allowed the claimant's appeal against the local authority's decision, originally made on 5 August 2014 but revised on 11 November 2014, to supersede awards of housing benefit and council tax benefit with effect from 22 June 2009 and find that an overpayment of housing benefit, amounting to £12,922.69 in respect of the period from 31 August 2009 and 15 June 2014, and a credit of excess council tax benefit, amounting to £1,749.56 in respect of the period from 31 August 2009 to 31 March 2013, were recoverable from the claimant. The First-tier Tribunal found that there had been no overpayment.

The procedural history

2. The claimant was in receipt of income support as a single parent from 30 March 2006 until 26 June 2014. That benefit was awarded by the Secretary of State for Work and Pensions. The claimant was awarded housing benefit and council tax benefit by the local authority from 7 August 2006 and payment continued in respect of three successive addresses. The award of council tax benefit came to an end on 31 March 2013, as a result of section 33(1)(e) of the Welfare Reform Act 2012 coming into force and abolishing council tax benefit, but housing benefit continued to be paid to the claimant until 15 June 2014.

3. On 2 July 2014, the award of income support was superseded by the Secretary of State and it was decided that the claimant was not entitled to income support from 17 June 2009 on the ground that she was a member of an unmarried couple, rather than being a single parent, and did not satisfy any of the conditions of entitlement for members of unmarried couples. The Secretary of State also decided that £16,033.07 had been overpaid from 17 June 2009 to 26 June 2014 and that that sum was recoverable from the claimant. The local authority was informed of that decision and, on 4 July 2014, wrote to the claimant to say that payments of housing benefit had been suspended until she provided up-to-date details of her income. She was given until 31 July 2014 in which to do so. She did not reply to that letter.

4. In consequence, the awards of housing benefit and council tax benefit were superseded on 5 August 2014, when it was decided that the claimant was not entitled to either housing benefit or council tax benefit in respect of any period from 22 June 2009 and that an overpayment of housing benefit amounting to £18,337.69 and excess council tax benefit amounting to £3,430.72 were recoverable from her. The local authority's decision letter said –

“Underlying Entitlement could help reduce the amount of overpaid benefit that you need to pay back. To apply for underlying entitlement you must provide evidence of all your household income, savings and investments for the period of the overpayment. We can then assess the amount of benefit that you would have been entitled to if we had known your correct circumstances at the time. If your claim for Underlying Entitlement is successful, the amount you qualify for will be deducted from your overpayment and you will be notified of the new balance.”

The claimant had not been provided with an opportunity to provide that evidence before the supersession decision was made in respect of the past period, because the letter of 4 July 2014 had asked only for details of current income.

5. The evidence on which that decision was made consisted of the reasoned decision of the Secretary of State of 2 July 2014 and transcripts of two interviews of the claimant under caution, carried out by officers of the Department for Work and Pensions in the presence of her solicitor, in which prepared statements by the claimant were read out but she otherwise said “No comment” in reply to a number of questions put to her in the light of evidence that was held by the investigators but had not been made available to the local authority. That evidence was listed in the Secretary of State’s decision, which also referred to the substance of some of it. In the first of the prepared statements, the claimant admitted that her alleged partner was the father of her children but she denied that he lived at her address and said that he had no permanent home address and that, for that reason and because he had regular contact with the children at her home, it made sense for him to use her address for important paperwork. She accepted that they had been on holiday together with the children. In her second statement, she said that she “denied the allegations except for a brief period when I could have claimed more benefit than I was getting”. As it appears in the transcript of the interview, which is not a completely accurate rendering of the statement (now available at doc 95), she said

“... I did agree he could use my address for a curfew release, he has nowhere to go. He started to use drugs and stay out, he was violent and he was seeing other women. In the end I threw the tag box out of the window and got him sent back to prison. I intended to notify the change in circumstances but it was difficult because of his behaviour. This was the only time he lived at my house. I could have claimed for him, I had, he had no income and a joint claim would have given us more money. I could not do that because he would have taken all the money and used it on drugs probably disappearing till it was spent. ...”

6. On 19 August 2014, the claimant’s solicitor wrote a letter of appeal to the local authority. Although, on 8 October 2014, the local authority wrote to the claimant, apparently in response to a letter dated 19 September 2014 that is not before me, to say that it was “preparing your case ready to be sent to the Tribunals Service”, it decided on 11 November 2014 instead to revise the decision of 5 August 2014 on the basis that there had been periods when the claimant’s alleged partner had been entitled to income-related employment and support allowance and also a period when she was entitled to income support and so it decided that there had been no overpayment of housing benefit or crediting of excess council tax benefit during those periods and the total overpayment of housing benefit from 31 August 2009 was £12,922.69 and the total excess council tax benefit credited was

£1,749.56. Consequently, the claimant's original appeal lapsed under paragraph 3(6) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 but the claimant was entitled to bring a new appeal by virtue of paragraph 3(5).

The proceedings before the First-tier Tribunal

7. On 18 November 2014, the claimant's solicitors duly lodged a new appeal but failed to state the grounds, which were provided on 17 December 2014 when it was stated that the claimant relied on the grounds set out in her previous statements, read out in the interviews. The local authority refused, on 7 January 2015, to revise the decision and so the claimant's appeal, the local authority's response and the documents relied upon by the local authority were provided to the First-tier Tribunal, with a request expressed as follows –

“The authority has based its decision on a DWP decision using information received during an investigation by the DWP fraud investigation service. The authority therefore respectfully requests that any appeal is listed for joint hearing with the DWP hearing.”

In its response, the local authority stated =-

“The authority is bound to apply decisions as made by the DWP in respect of entitlement to income support. Therefore the decision that [the claimant] is not entitled to income support automatically passporting her on to full entitlement to Housing Benefit and Council Tax Benefit is correct based on the information provided.”

It was stated that the decision notices had invited the claimant to provide details of her alleged partner's income and it was explained that, in the absence of her doing so, it had been decided that the claimant's income was too high for entitlement to either housing benefit or council tax benefit except, it appears, for the periods when it was known that he had been claiming income-related benefits. What was not explained was the basis for this approach, but it was simply that sections 136 and 137 of the Social Security Contributions and Benefits Act 1992 have the effect between them that, where a man and a woman are living together as husband and wife, their income is aggregated and treated as that of whichever of them makes a claim.

8. On 5 February 2015, the claimant's solicitor was informed that the case had been listed for hearing on 23 February 2015. She asked that the hearing be vacated because she did not have funding for the case and had transferred it to a welfare rights service. (For reasons of which I am unaware, the welfare rights service in fact played no part in the subsequent proceedings.) A judge refused a postponement but, on the day of the hearing, neither party attended or was represented and the claimant telephoned to say that she was too ill to attend. A different judge adjourned the hearing. He asked a clerk to ascertain whether there was an income support appeal that should be linked but it was established that there was not.

9. The case was listed for a further hearing on 30 March 2015, when again neither party appeared, although the claimant had requested a further postponement. The appeal was adjourned again, this time the judge directing –

“3. The Local Authority is to confirm how far, if at all, any criminal proceedings have progressed and confirm also whether the investigation leading to this decision was jointly undertaken by the Local Authority and the DWP.

4. If there was a joint investigation with the DWP the Local Authority is asked to supply the documentary evidence (e.g. that listed in the DWP decision at page 17 – 18).

5. It would be extremely helpful if a Presenting Officer were to attend the next hearing.”

10. On 13 April 2015, the local authority replied to the effect that it was unaware whether the case was subject to criminal proceedings and that the investigation had been carried out by the Department for Work and Pensions who had only passed on its decision and the transcripts that were already before the First-tier Tribunal. It added –

“The authority has followed normal procedure by following the decision of the DWP based on their evidence and decision.”

11. On 14 May 2015, the case came before a third judge. Again, neither party attended. The judge recorded that the “Respondent has not fully complied with previous Directions” and decided to adjourn the case yet again, issuing further Directions –

“3. The Respondent shall within 28 days of today’s date:

a. Make enquiries of the DWP and inform the Tribunals Service whether or not any criminal proceedings have been instituted or are to be instituted and, if so, when.

b. Obtain from the DWP copies of all the evidence referred to in the transcripts of interviews and pages 17 and 18 of the bundle and file the same. The Respondent was a party to the proceedings and therefore is entitled to have copies of those documents.

4. A Presenting Officer shall attend the next hearing to explain why the evidence has not been filed if that is the case.

The appeal was adjourned today as neither party attended and the Respondent has failed to comply with paragraph 4 of the direction of 30/3/2015.”

12. On 2 June 2015, the local authority wrote to the First-tier Tribunal disputing that it had failed to follow a direction. It said –

“The authority was asked to confirm why it had not provided evidence referred to in the DWP decision notice. The authority responded to this direction and confirmed that it did not have that evidence available and had not been informed of any date for trial regarding [the claimant’s] criminal proceedings.

The authority has again been asked to supply this evidence. This has been requested from the DWP but none has been forthcoming. The authority cannot produce evidence that it has not been given by the DWP.

It is perfectly normal practice for the Local Authority to rely solely upon the decision notice provided by the DWP and the evidence they state they have used to make their decision.

The authority has now received a response from the DWP confirming that [the claimant] is due before Court on the 08.06.15 at Burnley Crown Court.

This is the only information that has been forthcoming from the DWP other than to confirm that they have not received any appeal request from [the claimant].”

13. In the light of that letter, the judge issued directions on 23 June 2015, requiring the parties to inform the Tribunals Service of the outcome of the appearance at Burnley Crown Court and, if the case was adjourned, when the matter was next to be heard. He also directed that the case be listed for hearing “after 6 weeks or upon compliance whichever is the earlier” and that a presenting officer “shall attend on behalf of the respondent”. On 24 July 2015, the local authority wrote to the First-tier Tribunal to say that the claimant had pleaded not guilty and was due to stand trial in September. It added –

“It should be noted that one of [the claimant’s] grounds for pleading not guilty is that Rosendale Borough Council had paid [he alleged partner] Housing Benefit in respect of properties within the borough. The decisions awarding [him] Housing Benefit were revised following the investigation into [the claimant’s] claim and overpayments in respect of those periods were raised.”

It provided a copy of a decision letter sent to the alleged partner on 20 August 2014, superseding awards of housing benefit and council tax benefit in respect of two addresses and deciding that he had not been entitled to housing benefit from 22 June 2009 to 19 December 2010 because he and the claimant had been living together as husband and wife. It was explained to the First-tier Tribunal, but had not been stated in the decision letter, that the allegation was that he had been living at her address rather than at the addresses in respect of which he had made his claims.

14. On 19 August 2015, the local authority informed the First-tier Tribunal that the Secretary of State had, on 11 August 2015, revised the decision in respect of income support, deciding that the claimant remained entitled to income support until 22 June 2009 and was also entitled from 8 September 2009 to 9 November 2009, while her alleged partner was in prison and from 9 June 2010 to 12 December 2010, when she would have been entitled to the rate for a couple subject to a reduction due to her alleged partner being in receipt of income-based jobseeker’s allowance. It also reduced the amount of the claimed recoverable overpayment to reflect those periods of entitlement and also to reflect the fact that the alleged partner had been in receipt of income-based jobseeker’s allowance from 16 November 2009 to 8 June 2010 and could have made a claim in respect of her and, it would seem, to accept that income support had not actually been paid in respect of 25 and 26 June 2014. The result

was that the recoverable overpayment of income support was said to be £11,414.81 in respect of various periods from 23 June 2009 to 24 June 2014. In consequence, the local authority had further revised the decision in respect of housing benefit and council tax benefit, deciding that housing benefit amounting to £12,377.47 had been overpaid in respect of various periods from 31 August 2009 to 15 June 2014, and that excess housing benefit amounting to £1,569.34 had been credited to the claimant's council tax account in respect of various periods from 31 August 2009 to 31 March 2013 and that those sums were recoverable from her. Pragmatically, no-one suggested that the appeal lapsed due to that revision (see R(IS) 2/08 at [31]).

15. On 21 September 2015, the claimant's appeal came before the First-tier Tribunal for the fourth time and before a fourth judge. This time, the claimant attended but the local authority was not represented. The claimant produced a bundle of documents. These included a letter from her solicitor to her, dated 28 August 2015, referring to the Crown's intention to offer no evidence against her in the criminal proceedings (presumably communicated in the document submitted by the claimant on this appeal – doc 222), her formal defence statement in the criminal proceedings, together with a rather longer handwritten statement addressing some of the specific evidence against her, and some documentary evidence which she presumably relied upon as suggesting that her alleged partner had been living at other addresses during the relevant period.

16. The First-tier Tribunal allowed the appeal without asking the claimant to give oral evidence. In its decision notice, it stated that the local authority had failed to comply with directions issued on 30 March, 14 May and 23 June by failing to provide evidence and failing to ensure that a presenting officer attended. It said –

“3. The Respondent has been given numerous opportunities to discharge the burden of proof but has failed to co-operate with the Tribunal and has repeatedly breached directions. The Tribunal notes that the Respondent has indicated that they have written to the DWP to obtain information but that this information has not been forthcoming.

4. In the circumstances the only evidence before the Tribunal is an interview under caution which proceeded on a no comment basis. None of the information that was referred to in the interview is now before the Tribunal. The Tribunal accordingly finds the Respondent has failed to prove its case.

5. As a result the decision dated 11 November 2014 is quashed. The Respondent has failed to prove on a balance of probabilities that the appellant was living with [her alleged partner] between 22.06.09 – 15.06.14 and the Housing Benefit overpayment of £12,922.69 and the Council Tax Benefit overpayment of £1,749.56 are not proven and not recoverable.”

17. On 2 October 2015, the local authority applied for the decision to be set aside. Having referred to the history, it said –

“Although the local authority had made numerous requests to the DWP for the supporting evidence, this was not accessible whilst criminal proceedings were ongoing.

The local authority has today (02/10/15) received the supporting evidence required, so please confirm whether this decision may be set aside, before the supporting evidence is provided.

Please accept my apologies for the non-attendance of the appeal hearing. Due to a change in staffing arrangements this hearing date was overlooked.”

The First-tier Tribunal refused to set aside its decision on the ground that none of the conditions set out in rule 37(2) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) was satisfied.

18. The local authority then applied for a statement of reasons for the decision of 21 September 2015 but also renewed its application for a setting aside, arguing, it appears, that rule 37(2)(a) – “a document relating to the proceedings ... was not received at an appropriate time by a party or a party’s representative” – had been satisfied. It said –

“As explained on 02/06/05, in the local authority’s response to the Tribunal’s Direction Notice of 14/05/15, the local authority could not supply the requested evidence. The DWP held the evidence, which was secure and could not be obtained by the local authority, whilst there were ongoing criminal proceedings.

...

... The local authority believes setting aside would be in the interests of justice; as the supporting documents were not received at the appropriate time. ...”

The 108 pages of evidence were enclosed, although this included some documents already before the First-tier Tribunal including the interviews under caution and documents that the claimant had produced at the final hearing. On 20 November 2015, the First-tier Tribunal again refused to set aside its decision, rejecting what it understood to be an argument that rule 37(2)(b) – “a document relating to the proceedings was not sent to the Tribunal at an appropriate time” – was satisfied.

19. On 30 November 2015, it sent the parties its 44-paragraph statement of reasons for the substantive decision. At paragraphs 4 to 12, it reiterated its point that the local authority had failed to comply with directions and that there were no grounds for a setting aside. It also noted that, when the claimant’s appeal and its response had first been sent to the First-tier Tribunal, the local authority had said that a presenting officer would attend. At paragraphs 14 to 21, it referred to decisions of the courts and Upper Tribunal as to the meaning of “living together as husband and wife”. At paragraphs 13 and 22, it stated that the burden of proof had been on the local authority and that it had not discharged it. At paragraphs 23 to 34, it referred to the limited evidence that had been before the First-tier Tribunal when it made its decision, although curiously omitting reference to the documents handed in by the claimant. It referred to the two interviews under caution and the fact that the evidence mentioned in them had not been available. It also referred to two documents relating to the alleged partner and noted that “this relates only to June – August 2009” (*i.e.*, before the period of the alleged overpayment of housing payment and credit of excess council tax benefit). It said that the documents recording the decisions of the Secretary of State did not amount to “evidence which proves or

disproves any particular position” but were “based upon [his] interpretation of the evidence”. The kernel of its reasoning then appears at paragraphs 35 to 36 –

“35. The burden of proof lies with the decision maker. In the instant case the decision maker relies without more on mere assertion. It does not produce the evidence which forms the basis for that assertion. It relies on an interview where documents are referred to but not placed before the Tribunal. It relies on an interpretation of the evidence where the Tribunal cannot see that material and reach a judgment as to whether the decision maker’s interpretation is sound or otherwise.

36. I considered whether the no comment interview was a sufficient basis to uphold the appeal and considered that this would not be appropriate. It is clear from the pre-prepared statement that the Claimant has provided an explanation as why [her alleged partner] might have links at the property. However the burden of proof is not on her. If, as I find, the Respondent has not produced the material in support of its case to prove it on a balance of probabilities then her defence becomes academic.”

At paragraphs 37 to 43, it finally dealt with the failure to provide the evidence or apply for a postponement, concluding –

“43. In the instant appeal there was in fact no request for an adjournment or variation [of a direction]. It is not quite clear what the Respondent actually expected the FTT to do at the appeal other than proceed with the appeal on the basis of the papers that it had in its possession. In those circumstances the Tribunal proceeded to hear the appeal on the basis of the evidence before it.

44. For these reasons, the Tribunal allowed the appeal.”

20. On 22 December 2015, the local authority applied for permission to appeal. It reiterated the history regarding the documentary evidence and then said –

“The local authority acknowledges its failure to request an adjournment/postponement to this hearing. However, I can confirm that the former local authority Appeals Officer ... left the authority in August 2015; and the further evidences [sic] from the Department for Work & Pensions did not become available to the local authority until 02/10/15.

Furthermore, the decision to allow the appeal contradicts the Department for Work & Pensions decision on ‘living together’ for which the authority had requested a joint hearing with the DWP. [The claimant] has not appealed the DWP decision, on which the local authority had based its overpayment decision, which leaves a contradiction on her claims.”

The First-tier Tribunal refused permission to appeal.

The proceedings before the Upper Tribunal

21. The local authority renewed its application to the Upper Tribunal, setting out the history and then saying –

“The overpayment of Income Support has not been disputed; and therefore only the Housing Benefit overpayment and excess benefit of Council Tax was appealed; despite resulting from the same DWP investigation.

The authority contends that the tribunal had insufficient evidence to consider the facts adequately as the additional evidence requested previously by Tribunal(s) was still not available at the time of the hearing and has therefore made an error of law.”

22. I gave permission to appeal, saying –

“There is some force in the Appellant’s argument that it was not at fault in not providing the documents required by the First-tier Tribunal. The First-tier Tribunal had the power under rule 16(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) to order the Secretary of State for Work and Pensions to produce the documents and arguably ought to have considered using that power.

On the other hand, the Appellant has failed to provide any explanation for its refusal to attend the hearing before the First-tier Tribunal and it made no suggestion to the First-tier Tribunal as to what it wished it to do in the absence of the documents that the First-tier Tribunal had directed to be produced. Unless the First-tier Tribunal erred in failing to consider whether to order the Secretary of State to produce the documents, it is difficult to see why it erred in proceeding to determine the case in the local authority’s absence. Moreover, I note that the Appellant has not sought to argue that, if the First-tier Tribunal was entitled to proceed in the absence of the documents, it erred in law in dismissing the appeal for the reasons that it did without apparently asking the claimant any questions.”

23. I also gave the Secretary of State an opportunity to explain why he had apparently refused to provide to the local authority the documents that the First-tier Tribunal had directed it to provide and also an opportunity to apply to be joined as a party to the proceedings. I said –

“If, as seems likely, those documents had been disclosed to the claimant in the criminal proceedings, I have some difficulty in seeing how those proceedings could have been prejudiced by them being provided to the local authority so that they could be provided to the First-tier Tribunal. There is no rule precluding the First-tier Tribunal from considering an appeal while related criminal proceedings are pending (see *Mote v Secretary of State for Work and Pensions* [2007] EWCA Civ 1324 (reported as R(IS) 4/08)).”

24. The Secretary of State does not dispute that the documents could have been provided but he does not accept that he refused to provide them. His representative says that he has spoken to the departmental fraud investigator involved in the claimant’s case –

“She is baffled by the suggestion that the department refused to provide the local authority with relevant material. Her records do not cover the documents she did or did not send to the local authority. However, she has no recollection of having refused to provide material to the local authority, and she is adamant that there would have been no reason for her to do so. She insists that if she had received a request from the local authority for copies of material held by the department, she

would have happily complied with it. As far as she is concerned, this would be standard procedure.”

Having provided that information, the Secretary of State did not ask to be joined as a party, taking the view that the case did not appear to raise any questions of general importance.

25. The claimant, understandably, has not addressed the points of law arising on this appeal but has reiterated that her alleged partner and she were not living together at the material time and she has provided a statement from him, dated 18 August 2015, which was presumably made in connection with the criminal proceedings and may have contributed to their demise.

26. In an out-of-sequence reply (prompted by a misunderstanding and therefore made before the Secretary of State’s submission was received but unfortunately not added to the documents until much later in the proceedings), the local authority enclosed email correspondence between it and the Department for Work and Pensions. An email of 21 April 2016 states that a “Mandatory Reconsideration”, presumably in relation to the claimant’s income support case, “was disallowed on 11/8/2015” and that there was no appeal. Of more direct relevance, it appears that on 29 May 2015, the local authority forwarded to the Department an email from its appeals officer asking–

“Can you find out for me if the DWP are prosecuting this case and whether or not they’ve sent any appeals to the Tribunal Service?”

Also can you ask them to send their evidence over – I’ve had a Tribunal Service direction to request it.”

The departmental fraud investigator replied within an hour –

“[The claimant] asked for reconsideration on 17/9/14 and on 17/11/14 a Written Statement of Reason request was sent to Stirling on 17/11/14. No more details available.

As far as the prosecution is concerned [she] has PCMH at Burnley Crown Court on 8/6/15.

I have contacted Stirling today and they have checked their system and have confirmed that no appeal has been lodged.”

The local authority comments –

“It appears [the claimant] only appealed the local authority’s decision following the revised overpayment decision of 11/11/14. However, the grounds for appeal were against the Secretary of State for Work & Pensions’ decision to treat [her and her alleged partner] as ‘living together as husband and wife’, which has caused the housing benefit overpayment.

The appeal was submitted to the First-tier Tribunal, with a recommendation that this was to be jointly listed with any Secretary of State for Work and Pensions appeal. However, there was no appeal against the DWP's decision.

[The claimant] has not appealed the DWP decision, and is now outside the permitted timescale, which leaves a contradiction in her claim, namely that she is disputing the authority's decision to treat her as 'living together as husband and wife with [her alleged partner] as she states that was not the case yet she has accepted and not disputed the DWP decision to treat her as 'living together as husband and wife with [her alleged partner] which was based upon the same evidence available."

27. Following receipt of the claimant's response, the local authority submits that the claimant "now accepts they were a couple for the period 16/6/09 – 27/08/09 ... which contradicts the First-tier Tribunal's decision" and makes further comments on the evidence and the conflicts within it. In reply to the Secretary of State's submission, reference is made to the 2015 email exchange mentioned above and a further email from the local authority dated 7 July 2015, referring to the court proceedings and then saying –

"Also, we have still not had any response to the DWP evidence referred to in email of 29/05/16."

That was met by an "out-of-office" message. The local authority says –

"As there was more than one request for evidence by email, the local authority has referred to there being numerous requests."

It is explained that telephone calls might not have been recorded.

Discussion – the failure to provide evidence

28. I do not consider that the local authority was in breach of the direction to provide evidence made on 30 March 2015. In paragraph 4 of those Directions, the local authority was directed to provide evidence only if there had been a joint investigation with the Department for Work and Pensions. There plainly was not a joint investigation involving investigators from both the Department and the local authority. It seems probable that the judge had in mind that the direction should be effective only if the local authority had the information in its possession and that a further direction would be required if it did not. Moreover, in those Directions, the local authority was not directed to provide a presenting officer.

29. However, a further direction was made on 14 May 2015 and the local authority was, in my view, in breach of paragraph 3b of those Directions. I am not quite sure what the First-tier Tribunal meant by the local authority being a "party to the proceedings" but it is now quite clear that the Secretary of State accepts that the local authority was entitled to ask for the documents. There seems to be no basis whatsoever for the local authority's assertions when applying for the setting aside of the First-tier Tribunal's decision that the evidence could not be provided to the First-tier Tribunal before the conclusion of the criminal proceedings. There is no evidence that any officer of the Department ever said any such thing. Obviously the

local authority could not provide the First-tier Tribunal with documents that it did not have, but it had been directed to “obtain” those documents from the Department and its attempts to do so appear to have been half-hearted at best. In particular, its request for evidence in its email of 29 May 2015 was very vague and, unless there was an unrecorded telephone call, it failed to chase up the lack of response at any time between 7 July 2015 and 21 September 2015. Its allegation in its application for the setting aside that there had been “numerous” requests for the documents seems to be simple exaggeration. That may not entirely excuse the Department for failing to respond fully to the email of 29 May 2015 but there was an obligation on the local authority to obtain the evidence and it did not comply with it. Had the Department actually refused to provide the evidence, the local authority could have informed the First-tier Tribunal, which could have considered issuing an order to the Secretary of State under rule 16(1)(b) of the 2008 Rules, but the First-tier Tribunal was not obliged to consider issuing such an order when it had had no explanation from the local authority for its failure to obtain the documents.

30. What seems to have underlain the local authority’s lack of action is a belief that it was not really necessary to provide further evidence because the local authority was entitled to follow the decision made by the Secretary of State against which the claimant had failed to appeal. That, however, betrays a fundamental misunderstanding of the nature of the appeal.

31. The decision of the Secretary of State was, as the local authority submitted in its response to the appeal, binding on it to the extent that it decided that the claimant was not entitled to income support during the relevant periods. However, the Secretary of State’s finding that the claimant’s alleged partner and she were living together as husband and wife was not binding on the local authority and therefore it was also not binding on the First-tier Tribunal. I accept that the local authority was quite entitled to rely on that finding when making its initial decision, on the basis that it was probable that the Secretary of State had formed a reasonable view of the evidence before him and, indeed, the local authority was aware of the general thrust of much of the evidence through the interviews under caution and the Secretary of State’s reasoning which it had in its possession. Moreover, the local authority is quite right to argue that the claimant’s ground of appeal implied that she considered that the Secretary of State’s decision was also wrong and I can understand it assuming that the claimant would also have appealed against the Secretary of State’s decision and therefore it suggesting to the First-tier Tribunal that the two cases should be heard together, in which case the Secretary of State’s evidence would have been before the First-tier Tribunal and the Secretary of State would have been able to make the running in defending both his decision and the local authority’s.

32. However, once the local authority became aware that there had been no appeal against the Secretary of State’s decision, it became incumbent on the local authority to obtain the necessary evidence itself if it wished to defend its decision. It was not entitled to aggregate the claimant’s alleged partner’s income with hers and treat it as hers unless she was living with him as his wife and, if it was not entitled to aggregate his income with hers, there was no ground for supersession and there had been no overpayment. It could not assume that the First-tier Tribunal would

follow the Secretary of State's decision and, indeed, the First-tier Tribunal would have been wrong to do so without considering its merits in the face of submissions from the claimant that it was wrong. It is nonsense to argue, as the local authority has done in one of its submissions, that the claimant "has accepted" the Secretary of State's decision – she plainly considers it to be wrong – but the local authority is right that there is an apparent contradiction in the claimant's position. However, the consequence of that contradiction was merely that the Secretary of State's decision would stand even if the local authority's did not, which is the sort of inconsistency that can arise where there are procedural errors. (I have no idea why the claimant did not appeal against the Secretary of State's decision, although I note that by the time her solicitor wrote the letter of appeal to the local authority, there would have been no right of appeal against the Secretary of State's decision without the claimant first asking for a revision – known as mandatory reconsideration – and an application for revision "on any ground" would have been out of time, although time could have been extended, and she would have been even further out of time by 17 September 2014.) The fact that there was such an inconsistency had no bearing whatsoever on the correctness of the local authority's decision. The local authority could reasonably expect the Department for Work and Pensions to co-operate in enabling it to defend its decision and that is why it was quite reasonable for the First-tier Tribunal to direct the local authority to obtain the evidence that the Department held.

33. The local authority having failed to do so, and having failed without any explanation to send a representative despite having originally said that it would and having twice been directed to do so in circumstances where the nature of the case plainly called for a presenting officer, the First-tier Tribunal was, in my judgment, clearly entitled to proceed to determine the case on the evidence before it and in the absence of the local authority.

Discussion – setting aside

34. The local authority has not expressly appealed against the First-tier Tribunal's refusal to set aside its decision but it seems obvious that the First-tier Tribunal erred in finding that none of the grounds in rule 37(2) of the 2008 Rules was satisfied because, even if neither subparagraph (a) or (b) was, subparagraph (c) – "a party, or a party's representative, was not present at a hearing related to the proceedings" – clearly was. However, rule 37(1) requires that not only must one or more of the conditions of paragraph (2) be satisfied but it must also be "in the interests of justice" to set aside the decision. The local authority may not have relied on rule 37(2)(c) because it recognised that it did not have much of an excuse for not being represented and, in any event, it seems plain that the First-tier Tribunal considered that it was not in the interests of justice to set aside the decision and that reference to paragraph (2)(c) would not have made any difference to its decision. I will therefore not treat the appeal as having been brought against the refusal to set aside.

Discussion – the merits of the First-tier Tribunal's substantive decision

35. The local authority has argued this case only on procedural grounds, but I consider that I should comment briefly on the legal merits of the First-tier Tribunal's decision.

36. First, it seems to me that the First-tier Tribunal failed expressly to address the question whether there were grounds for supersession of the awards of housing benefit or council tax benefit during the period covered by the local authority's revised decision. On the other hand, its finding that there was no overpayment implies that there were no grounds for supersession and its decision ought, in my judgment, to be read in that light. Moreover, it seems probable that the local authority would in any event have been entitled to terminate the awards with effect from the date when payment was suspended, because the claimant had failed to comply with an "information requirement" contained in the letter of 4 July 2014 (see regulation 14(1)(a) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001/1002), in which case there would be no question of the awards continuing after the period of the alleged overpayment.

37. Secondly, I do not entirely agree with the First-tier Tribunal's analysis in paragraphs 34 and 35 of the statement of reasons. It is not, I think, quite accurate to state that the local authority relied on mere assertion without producing any evidence at all. The questions asked in the interviews under caution and the Secretary of State's reasoning in his decision were both capable of amounting to evidence of the existence and content of the documents or other evidence mentioned in them and, indeed, the claimant's prepared statements acknowledged the existence and contents of much of the evidence. Consequently, I do not agree that "her defence becomes academic". If the claimant had not made the prepared statements, evidence of which was also contained in the interviews, and if she had not provided the documents that she did at the final hearing, it seems to me that the First-tier Tribunal could well have drawn inferences from her refusal to answer the questions put to her, added those inferences to the indirect evidence in the interviews and concluded that she was, throughout the relevant periods, living with her alleged partner as his wife.

38. However, given that the claimant had advanced what the First-tier Tribunal plainly regarded as a plausible case that addressed the existence of the evidence mentioned in the interviews, the First-tier Tribunal was entitled to take the view that the indirect evidence of the interviews and the Secretary of State's decision was not sufficient to satisfy it, on a balance of probabilities, of the correctness of the local authority's decision. The "best evidence rule" scarcely applies these days even in the courts, but indirect evidence may be of less weight than direct evidence and an inadequately explained failure to produce direct evidence when it could have been obtained may result in indirect evidence being given even less weight than might otherwise be the case.

39. Even in a case where there is no reason to suspect a deliberate intention to deceive by the person who has failed to provide direct evidence, it is obvious why indirect evidence may carry less weight than direct evidence. Indirect evidence may not fully and accurately convey the effect that the direct evidence has and therefore may be regarded as unreliable. That was likely to be particularly important in

relation to at least some of the documents in the present case. For instance, the Secretary of State had drawn the inference from documents sent to the claimant's alleged partner at her address that he was living there. Given that there were documents before the First-tier Tribunal suggesting that he had made claims for benefit from other addresses, that there was some other evidence of him using other addresses and that the claimant had said that he had a nomadic lifestyle and that she had allowed him to use her address for some purposes, the dates of those documents could well be regarded as important and at least might have shown that the Secretary of State and the local authority had weaker cases in respect of some parts of the relevant periods than others. Moreover, some of the evidence consisted of statements, or records of statements, allegedly made by the claimant's alleged partner and his mother to the effect that he was living with the claimant. Such evidence might in any event be regarded as unreliable in circumstances where the maker of the statement might not have had direct knowledge of the fact stated or might have had a motive for lying. For instance, it would not be surprising if an arrested person who had had involvement with drugs and illegal money-lending should give a false address when arrested, so as to avoid another address being searched, and a person claiming income-related benefits might wish to state that a person was living at a different address to avoid an enquiry into her continued entitlement to those benefits. Indirect evidence that fails to record exactly what was said or the circumstances in which it was said or the manner in which the alleged statement was recorded might be regarded as even less reliable.

40. It seems reasonably clear that the inherent unreliability of some of the indirect evidence was what the First-tier Tribunal had in mind when it said in paragraph 35 of the statement of reasons that the local authority "relies on an interpretation of the evidence where the Tribunal cannot see that material and reach a judgment as to whether the decision maker's interpretation is sound or otherwise". In my judgment, it erred in saying that there was *no* evidence against the claimant, but its decision should be read as a finding that there was *insufficient* evidence against her.

41. Was the First-tier Tribunal nonetheless entitled to allow the appeal in the way that it did, without asking the claimant any questions? In my judgment, this case is distinguishable from R(IS) 17/04. In that case, the Secretary of State had failed to arrange to be represented by a presenting officer, but he had supplied all the necessary documentary evidence and the investigating officers had even attended as witnesses. The Tribunal of Commissioners held the appeal tribunal to have erred in law in summarily allowing the claimant's appeal on the ground that the absence of a presenting officer made it impossible to conduct a fair hearing. The absence of a presenting officer did not weaken the evidence against the claimant, which plainly, in the view of the Tribunal of Commissioners, called for an answer from the claimant. Here, on the other hand, the claimant had given answers to much of the evidence and the First-tier Tribunal was not required to ask her to do so again if satisfied that the answers were sufficient to overcome the indirect evidence provided by the local authority.

42. Also, in R(IS) 17/04, the Tribunal of Commissioners was unable to read the appeal tribunal's decision as being in substance a determination of the facts and merits. However, in the present case, the First-tier Tribunal plainly did address the

merits of the case. In referring to the case law, it expressly referred to the difficulties of showing that two people are living together as husband and wife. At paragraph 17 of the statement of reasons, it said –

“17. ... it is necessary to remind oneself that the modern relationship has changed. Some relationships consist of parties who ‘live-out’. As such I need to consider whether ‘in the opinion of a reasonable person with normal perceptions, it could be said that the two people in question were living together as husband and wife but, when considering that question, one should not ignore the multifarious nature of marital relationships’ (per Neuberger J (as he then was) in *Re Watson deceased*, Chancery Division, 27.11.98)”.

At paragraphs 20 and 21, it also referred to *JP v Secretary of State for Work and Pensions (IS)* [2014] UKUT 17 (AAC), where reference was made to “a publicly acknowledged committed emotional loving relationship”. (Public acknowledgement cannot be determinative, although it may be relevant, but the nature of the relationship is important and, for instance, some degree of commitment seems to me to be necessary.) Then, at paragraph 27, it referred to what the claimant had said in her second prepared statement about the nature of her relationship with her alleged partner during the period when she accepted that he lived with her. Thus, when one reads the decision as a whole, it seems to me to be fairly clear that the First-tier Tribunal was not prepared on the only evidence available to it to find that the facts were other than the claimant had said they were and that in those circumstances it was not prepared to find that she had been living with her alleged partner as his wife.

43. As to the local authority’s submission that the claimant had in fact admitted that her alleged partner lived with her from 16 June 2009 to 27 August 2009, it seems to me that she has not admitted that they lived together as husband and wife and that the First-tier Tribunal was not satisfied that the nature of their relationship during that period was such that they were doing so. In particular, it was plainly entitled to find that there was not the commitment necessary to show such a relationship. (Indeed, the fact that the claimant’s alleged partner had been claiming income-based jobseeker’s allowance and then income-related employment and support allowance from another address at that time could perhaps be thought to support her case.) In any event, the local authority had not found there to be any overpayment of housing benefit or credit of excess council tax benefit in respect of any period before 31 August 2009, presumably because the benefits that the claimant’s alleged partner was claiming indicated that his income was too low to affect entitlement, and so it was not directly material to the appeal before the First-tier Tribunal whether or not they were living together as husband and wife during that period.

Conclusion

44. For these reasons, while I accept that the First-tier Tribunal did err in some respects, I am not satisfied that it made a material error of law. It is not necessary for me to consider whether the local authority’s case would have been significantly stronger had the evidence that was provided after the First-tier Tribunal’s decision

was made had been available before then. I therefore dismiss the local authority's appeal.

Mark Rowland
5 September 2017