IN THE UPPER TRIBUNAL **Case No.** CH/1718/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 31 March 2017 is set aside and the case is remitted to the First-tier Tribunal to be re-decided by a different judge.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 31 March 2017, whereby it dismissed her appeal against a decision of the local authority dated 9 June 2016, but revised on 28 July 2016, disallowing her claim for housing benefit dated 5 May 2016.

2. The claimant formerly lived in a property that she owned, subject to a mortgage, but she moved to her present address, which is rented, and made her first relevant claim for housing benefit from 17 February 2012. That claim was successful. The value of her former home was presumably disregarded while it was being sold. However, it was sold on 12 March 2012 and, when she received the proceeds of sale (amounting it was decided at the time to £138,000 although the sum actually transferred to her bank account was £139,272 (see doc 477)), she ceased to be entitled to housing benefit and her award was superseded and terminated.

3. On 24 May 2012, the claimant made a second claim for housing benefit on the ground that she had paid off various debts and now had savings of only £5,340.22. That claim was disallowed on 10 August 2012 on the ground that the claimant had notional capital of £102,830. Her appeal against that decision was dismissed by the First-tier Tribunal on 5 March 2013 (docs 16 to 22). The claimant's case at that time was that she had paid the £102,830 to her children. At the hearing before the First-tier Tribunal, she conceded that £22,830 had been paid by way of gifts and the First-tier Tribunal rejected her argument that the remaining £80,000 had been paid to clear a debt to a daughter. In those circumstances, the First-tier Tribunal found that the claimant had deprived herself of £102,830 for the purpose of securing entitlement to housing benefit and that that sum was therefore to be treated as notional capital in her hands.

4. On 15 July 2014, the claimant made a third claim for housing benefit, which, in a decision dated 29 September 2014 but revised on 7 November 2014, was rejected by the local authority on the ground that, applying the diminishing capital provisions, the claimant still had notional capital of £93,002.46. The claimant again appealed to the First-tier Tribunal, which dismissed her appeal on 18 May 2015 on the ground that the facts found by the First-tier Tribunal on 5 March 2013 were *res judicata* and that new evidence produced by the claimant was evidence that could have been produced before the earlier hearing (docs 39 to 44).

5. On 5 May 2016, the claimant made a fourth claim for housing benefit, which is the claim giving rise to this appeal. In a decision dated 9 June 2016, the local

authority again rejected the claim. The claimant applied for revision saying that she had spent the money on gambling and providing medical evidence of treatment for compulsive gambling and a leaflet relating to medication that she was taking which, in relation to possible side effects, said: "Postmarketing reports: Impulse control disorders included pathological gambling …". The local authority revised its decision on 28 July 2016 to the extent of deciding that, applying the diminishing capital provisions, her capital was now £84,776.31 but it relied on the earlier decisions of the First-tier Tribunal as a reason for not considering the new arguments advanced by the claimant. The claimant again appealed. She gave new explanations for giving some of the money to her children and, in particular, said that the £80,000 had been given to a daughter to keep for her and that it had been paid back to her for living costs when she had lost money gambling (docs 124 and 126 to 127). On 31 March 2017, the appeal was dismissed (docs 560 and 562 to 565). The First-tier Tribunal said –

> "14. The appellant raises an issue that she wishes to appeal on the basis that the evidence that she gave to the first tribunal is not true but findings of fact had been made in the first tribunal hearing on the basis of the claimant's evidence. The evidence she is now seeking to put before the tribunal namely that she told a whole pack of lies as to the disposition of the funds was available to her at the first tribunal and she chose not to produce it.
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> 15. I find in the circumstances that the only outcome of this application has to be that the notional capital rules apply and it would only be if the first tribunal decision made on 5 March 2013 were set aside that I would be able to make any decision different from that reached by Judge Macdonald on both the first and the second occasion."

6. Following an oral hearing, I gave permission to appeal because I considered that it was arguable that the First-tier Tribunal erred in law in those paragraphs (and, indeed, that the First-tier Tribunal sitting on 18 May 2015 had also erred, although I said that that decision could not be the subject of this appeal). I gave the Secretary of State an opportunity to be joined as a party, which was accepted. The Secretary of State supports the appeal, essentially agreeing with the view I expressed when giving permission to appeal. The local authority agrees with the Secretary of State. Both the claimant's representative and the claimant herself have replied to the responses, although the former has made no additional comment. The claimant has expressed some disagreement with the Secretary of State, but I do not think she understands that the Secretary of State's submission is helpful to her. It is unclear from doc 623 whether or not she wants an oral hearing before the Upper Tribunal but, in any event, I am satisfied that this appeal can properly be determined in her favour without a hearing. It is concerned only with points of law. Questions of fact will more appropriately be determined by the First-tier Tribunal and the claimant will have the right to attend a hearing before that tribunal.

7. I am satisfied that the First-tier Tribunal erred I law. It effectively applied the principle of estoppel *per rem judicatam*, but, as has been made clear in CH/704/2005, to which the Secretary of State has referred, that has little application to the determination of social security claims generally and none to the determination of housing benefit claims. Although paragraph 11 of Schedule 7 to the Child

Support, Pensions and Social Security Act 2000 has the effect that decisions of tribunals are *final*, subject to supersession, formal setting aside or correction by the tribunal itself or appeal, it does not provide that determinations embodied in them are *conclusive*. The distinction between finality and conclusiveness is clearly apparent from section 17 of the Social Security Act 1998, upon which paragraph 11 of Schedule 7 to the 2000 Act is clearly based. Unlike the 2000 Act, the 1998 Act permits regulations to provide that certain determinations will be conclusive, with the clear implication that otherwise they are not. See R(SB) 8/04, to which the Secretary of State has also referred. It is obvious why that should be so. Decision-making in relation to social security is generally fairly summary. Revision and supersession provide ways of correcting errors and there is no reason why errors should not equally easily be corrected in new claims. As was pointed out in CH/1210/2003, decisions are final for the period to which they relate, but a new decision made in respect of a different period, whether on supersession or a new claim, need not perpetuate any error made in an earlier decision in respect of an earlier period.

8. That is not to say that earlier decisions in respect of claims made by the same claimant are irrelevant; it may be difficult for a claimant to persuade a local authority or a tribunal to take a different view from that previously taken, particularly when the claimant has admitted lying and, as it would seem in this case, committing criminal offences by making false statements for the purpose of obtaining benefits. However, as the Secretary of State submits, the possibility that the claimant is "an untruthful person, telling the truth on this issue" (*Onassis v Vergottis* [1968] 2 Lloyds Rep 403 at p 431, *per* Lord Pearce) must be recognised and so, in this case, the First-tier Tribunal ought to have considered whether the claimant was now telling the truth and, if so, what the legal implications were.

9. The claimant has objected to the Secretary of State being allowed to refer to other cases when she says that she was not allowed by the First-tier Tribunal to refer to a press report about a case that she considered was similar to hers. However, it is perfect proper to refer to cases that set legal precedents. Such cases are binding on tribunals as regards points of legal principle if made by a more senior tribunal or court and may be persuasive if made at the same, or a lower, level. Press reports are less likely to be helpful than full copies of decisions because the legal principles behind decisions are seldom explained in them. Anyway, the cases cited by the Secretary of State in this case are helpful to the claimant because they show that the First-tier Tribunal erred in law.

10. The claimant has also questioned my statement, when giving permission to appeal in this case, that the decision of the First-tier Tribunal sitting on 18 May 2015 could not be the subject of this appeal. In the present case, the claimant has applied for permission to appeal only against the decision dated 31 March 2017. She has not applied to the Upper Tribunal for permission to appeal against the decision dated 18 May 2015. She was refused permission to appeal against that decision by the First-tier Tribunal and was sent the notice of refusal on 13 July 2015. She had the right to renew her application to the Upper Tribunal within one month but did not do so. If she were to do so now, consideration would be given to admitting the application but it would be three years' late.

11. The present case is concerned with entitlement from 9 May 2016 (the Monday after receipt of the relevant claim). I am satisfied that it should be remitted to the First-tier Tribunal for it to consider afresh what the facts were. When I gave permission to appeal, I said –

> 8. …. It is arguable that, if [the claimant] gave money to her daughter to look after for her, that money remained actual capital of hers, rather than notional capital, until it was spent. There may then be a question whether money lost through gambling is money that the claimant can be said to have deprived herself for the purpose of securing entitlement to benefit, although I have some doubt about that. There would also be questions as to the amount of the proven gambling losses, which I have not attempted to calculate from the evidence already provided, and the amount of money repaid to the claimant by her daughter. The claimant may not have documentary evidence as to the latter but, if she is telling the truth, she ought to be able to obtain from her daughter bank statements corroborating her account and at least showing over what period and in what amounts the £80,000 was dissipated. All these are issues that will need to be investigated if this appeal is allowed and it is by no means certain that success for the claimant on the point of law on which I am giving permission to appeal would mean ultimate success on the facts.

The Secretary of State and local authority have expressed agreement with that approach and it should be adopted by the First-tier Tribunal in this case. In particular, capital lost through gambling should not be treated as capital of which the claimant has deprived herself for the purpose of securing entitlement to benefit.

12. I suggest that the local authority investigate the case itself before there is a hearing before the First-tier Tribunal, with a view either to revising its decision if satisfied that the claimant is now telling the truth or explaining in a submission to the First-tier Tribunal why it is not so satisfied. In particular, I suggest that it ask the claimant to provide such documents as it considers that, if she is telling the truth, she ought to be able to provide in order to support her case.

Mark Rowland
25 September 2018