

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**CARER'S ALLOWANCE**

Appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 11 January 2016

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. The decision of the appeal tribunal dated 11 January 2016 is not in error of law. Accordingly, the appeal to the Social Security Commissioner does not succeed.

**Background**

2. On 24 November 2014 a decision maker of the Department decided that an overpayment of Carer's Allowance (CA) of £2592.45 for the period from 1 May 2006 to 20 May 2007 had occurred which was recoverable from the claimant.
3. An appeal against the decision dated 29 November 2014 was received in the Department on 26 February 2015. The appeal was received outside of the prescribed time limits for making such an appeal but the appeal was, nonetheless, accepted by a decision maker.
4. The appeal was first listed for oral hearing on 26 June 2015. The claimant was present and was accompanied by her sister. There was no Departmental Presenting Officer present. The appeal was adjourned to enable a Departmental Presenting Officer to attend and provide additional information.
5. The appeal was relisted for oral hearing on 11 January 2016. The claimant was present. There was a Departmental Presenting Officer present. The appeal tribunal allowed the appeal and decided that the overpayment of CA of £2592.45 which had occurred for the period from 1 May 2006 to 20 May 2007 was not recoverable from the claimant.

6. On 8 April 2016 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS). The Department was represented in the application by Mr McGrath of the Decision Making Services unit (DMS). On 25 April 2016 the application for leave to appeal was granted by the Legally Qualified Panel Member (LQPM).

### **Proceedings before the Social Security Commissioner**

7. On 9 August 2016 the appeal was received in the Office of the Social Security Commissioners. The notice of appeal, grounds of appeal and accompanying documentation were shared with the claimant on 12 August 2016. Written correspondence in reply was received from the claimant on 29 September 2016 which was shared with Mr McGrath on 3 October 2016.
8. On 7 March 2017 I accepted the late application for special reasons. I also gave an indication that I was minded to hold an oral hearing of the appeal and asked the Legal Officer to indicate to the appellant that she might wish to seek representation. As a result of further communications with the appellant, the Law Centre (Northern Ireland) came on record for the appellant in August 2017.
9. Correspondence containing the Law Centre's response to the Department's grounds of appeal were received on 21 September 2017 and were shared with Mr McGrath on 28 September 2017. A further submission was received from Mr McGrath on 27 October 2017 which was shared with the Law Centre on 31 October 2017. Correspondence in reply was received from the Law Centre on 13 November 2017.
10. The file was returned to me on 2 March 2018. On 14 May 2018 I requested that the parties be advised that I was minded to hold an oral hearing of the appeal. I issued a formal direction for an oral hearing on 5 July 2018. The oral hearing took place on 8 August 2018. The appellant was represented by Mr McGrath. The claimant was represented by Mr Black of the Law Centre. Gratitude is extended to both representatives for their detailed and constructive written and oral observations, comments and suggestions.

### **Errors of law**

11. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
12. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

“(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);

(ii) failing to give reasons or any adequate reasons for findings on material matters;

(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;

(iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings;

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

### **The submissions of the parties**

13. In the Case Summary, prepared for the oral hearing, Mr McGrath made the following submissions:

‘In her letter of appeal (the claimant) stated that,

“I disagree with this decision as I informed the DHSS of the change back in 2006. This is the first letter I have received (dated 24-11-14) I would like to see the wrong information that I allegedly gave and I am very distressed over all this.”

However at the hearing dated 26-2-16 (the claimant) stated that she was not aware of the (earnings) limit.

I would submit that if she was unaware of the earnings limit how could she state in her appeal letter that she had reported this change in 2006.

Despite this clear self-contradiction the tribunal has not addressed this issue and it has not stated why it has accepted (the claimant’s) statement at the hearing as opposed to her statement in the appeal letter.

No explanation as to why (the claimant) made this statement in her appeal letter was ever sought leaving it

unclear as to how and why the tribunal arrived at the decision that it did.

In the NI Commissioner's decision C16/08-09 (DLA) it was stated,

54. Nonetheless, there is a clear duty on appeal tribunals to undertake a rigorous assessment of *all* of the evidence before it and to give an *explicit* explanation as to why it has preferred, accepted or rejected evidence which is before it and which is relevant to the issues arising in the appeal.

55. In *R2/04(DLA)* a Tribunal of Commissioners, stated, at paragraph 22(5):

' ... there will be cases where the medical evidence before a particular tribunal will be unsatisfactory or deficient in an important respect. It will often be open to the tribunal hearing such a case to reject the medical evidence for that reason. Indeed, it will sometimes be its duty to do so. However, and in either case, the tribunal cannot simply ignore medical evidence which is not obviously irrelevant. It must acknowledge its existence and explain its reasons for rejecting it, even if, as will often be appropriate, such reasons are fairly short. We repeat, the decision whether a person suffers from a particular medical condition is a matter for the tribunal. That body must have regard to the whole of the evidence, including the medical evidence. Where it rejects medical evidence it must, unless the reasons are otherwise apparent, explain why it does so. Anything less is likely to result in an appeal being brought on the grounds that the tribunal has not given adequate reasons or that its decision is against the weight of the evidence.'

56. In its statement of reasons the appeal tribunal has made no reference to the medical evidence available to it, including the appellant's general practitioner (GP) records, and in the form of the medical report from his GP, dated 20 December 2006. The statement of reasons gives no indication as to how that medical evidence was assessed and whether or not it was accepted or rejected, and accordingly, the reasons are inadequate.

I would submit that based on the above that the tribunal due to its lack of explanation regarding the assessment and acceptance/rejection of the evidence contained within the letter of appeal that its reasoning is inadequate.

I would also submit that the tribunal have failed to address the conflict in the evidence and why it rejected (the claimant's) own evidence about reporting the change in 2006.

In respect of the second ground of appeal I note that in regards to regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 the tribunal stated that,

“it was not satisfied on the balance of probabilities that (the claimant) had been made aware of her duty to report the material fact that her earnings had been increased and exceeded the limit. For this reason the appeal was allowed”.

While this finding of the tribunal addresses the first duty of regulation 32 it does not deal with the second duty i.e. regulation 32 (1B) which states,

**32 (1B)** Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall notify the Department of any change of circumstances which he might reasonably be expected to know might affect—

(a) the continuance of entitlement to benefit;  
or

(b) the payment of the benefit, as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office—

(i) in writing or by telephone (unless the Department determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or

(ii) in writing if in any class of case it requires written notice (unless it determines in any particular case to accept notice given otherwise than in writing).

In the Commissioners decision C6/08-09 (IB) it was stated,

40. Firstly, as was noted above, the practical outcome of the cases referred to above is that an appeal tribunal, when determining whether an overpayment of a social security benefit is recoverable on the basis of a failure to disclose, will have to consider where the requirement to provide the relevant information came from. This will necessitate identifying whether the case comes within the first or second duty in regulation 32.

41. In the case of the first duty, it will also require the provision of proof by the Department that the requirement to provide information was made to the claimant. That proof may be in the form of receipt of an information leaflet such as Form INF4 or instructions in an order book. It will not be enough, however, for the information leaflet or order book to be produced. The wording of the relevant instructions will have to be looked at in close detail to ensure that the instructions to disclose were clear and unambiguous.

42. In the case of the second duty, the requirement is that the change of circumstances is which the claimant might reasonably be expected to know would affect his entitlement to benefit.

In her letter of appeal (the claimant) stated,

“I disagree with this decision as I informed the DHSS of the change back in 2006. This is the first letter I have received (dated 24-11-14) I would like to see the wrong information that I allegedly gave and I am very distressed over all this.”

In the “Record of Proceedings” of the adjourned hearing on 25-8-15 (the claimant) is recorded as stating,

“told `Bureau` in 2000 that was starting work. Told them when signed off. Agrees that started to do more hours about 2006.”

I would submit that if (the claimant) reported the material fact in 2000 that she had started working and again informed “the DHSS” of the change back in 2006 i.e. the increase in her wages, and she was not instructed to report these changes then she must have reasonably expected these changes to have an effect on her entitlement otherwise she would not have reported them.

I would submit that by not considering if regulation 32(1B) was applicable in this case the tribunal have erred in law.

Finally in the "Record of Proceedings" page 2 paragraph 2 the Chairman has noted,

"...and at Tab 13 a specimen of the DS849 information notes issued to (the claimant) when benefit was first paid in 1999".

I would submit that Tab 13 is form DS849 (Direct Payment) which would have been issued when (the claimant) started to receive payment of her Carer's Allowance directly into her bank account, which occurred in early 2005. The version enclosed as Tab 13 has a publication date of 11/05 (November 2005) which although not available in January 2005 would have been similar to the version in place at that time.

The DS849 states on page 2,

**Important changes you must tell us about**

You must tell us **straightaway** if anything changes about yourself or the disabled person you are looking after.

- If you have already told us that you are working, you must tell us if your earnings go up or any expenses already claimed change. You must also tell us if you work any overtime or receive a bonus.

While the tribunal has stated that the Department was not able to provide any proof of the issue of the uprating letters to (the claimant) it has not made any mention of either why it was accepting or rejecting the evidence of the DS849.

I would also highlight that the DS849 although stated by the tribunal as being issued when (the claimant) was first paid Carers' Allowance in 1999 was in this instance issued in January 2005 when (the claimant) first received payment of her Carers' Allowance via direct payment into her bank account. The form itself is noted as being DS849 (Direct Payment).

This is corroborated by the form DP Gen (NI) which is held in the tribunal appeal papers and has been signed by (the claimant) on 31-12-04. This form requests details of the bank account into which Carers' Allowance will be paid.

This DP Gen (NI) was date stamped back into the branch on 6-1-05.'

14. In the Case Summary prepared on behalf of the claimant, Mr Black made the following submissions:

***'The Department submits that the tribunal erred as its decision gives no indication as to how the material evidence contained in the letter of appeal was assessed whether it was accepted or rejected.'***

It is submitted on behalf of the (the claimant) that the reasons given by the tribunal for its decision are adequate and that there is no error of law in respect of its duty under Reg 53 (4) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999.

The tribunal summary decision states that the overpayment "is not recoverable under the provisions of section 69 of the Social Security Administration (NI) Act 1992."

The Statement of Reasons for the tribunal's decision demonstrates the tribunal understood and applied the law correctly to the facts before it.

The tribunal recorded at para 6 of its decision that "(the claimant) at first wrote that she had reported her earnings but at hearing she stated that she was not aware of the limit and honestly did not remember receiving an annual updating letter." The tribunal clearly notes this as recorded evidence and weighed it in making its decision.

***Adequacy of reasons – the Department asserts that the tribunal has given no reasons as to whether reg 32 (1B) of the Social Security (Claims and Payments) Regulations (NI) 1987 was considered or found to be applicable***

The tribunal correctly identified that the burden of proof in the case rested with the Department.

The decision of the Department which is the subject of this appeal fails to set out whether the Department asserts a breach of statutory duty under either reg 32 (1A) or (1B). The decision simply states that "an overpayment has occurred for this period because the Department were not aware on 01/05/2006 that your earnings had exceeded the weekly permitted limit of £84." The tribunal identifies in its findings that the Department has relied on grounds of



failure to disclose. The Department makes no reference to reg 32 (1B) grounds in its submission or before the tribunal. I note that the Department was represented by a Presenting Officer at the hearing on 11/01/2016, the tribunal having adjourned an earlier hearing on 26/06/2015 to request that the Department attend and prove its case.

The Department now seeks to introduce arguments in relation to reg 32 (1B), which it did not raise before the tribunal. The tribunal has not erred in failing to address arguments which the Department did not raise at the appeal hearing. The decision of the appeal tribunal that the Department had not discharged the burden of proof was a decision the tribunal was entitled to make. The Department adduced no evidence to the tribunal that could form the basis of a decision that a recoverable overpayment had occurred.

In any event it is submitted that the tribunal's decision demonstrates that it understood and correctly applied the legislation set out in section 69 of the Social Security Administration (NI) Act 1992 and reg 32 of the Social Security (Claims and Payments) Regulations (NI) 1987.

The tribunal gave due weight to the onus and standard of proof in this appeal. The onus of proof to establish a recoverable overpayment had occurred in accordance with the legislation lay with the Department. The tribunal's finding that it was not satisfied "on the balance of probabilities that (the claimant) had been made aware of her duty to report the material fact that her earnings had increased and exceeded the limit" was relevant to both reg 32 (1A) and (1B). It is not reasonable to expect (the claimant) to report a fact that she was not advised was material to entitlement.

The Department seeks to introduce a new argument at Commissioner level that the tribunal should have considered that the questions on the Invalid Care Allowance form in 1999 should have put (the claimant) on notice as to the link between payment of benefit and work/earnings making it reasonable to expect her to report any such change.

Having carefully considered the questions and information referred to in the 1999 claim form I would make the following comments:

- No reference is made to the earnings limit for Invalid Care Allowance

- No reference is made to duty to report commencement of employment to the ICA Branch
- The collection of information in relation to employment and self-employment may be interpreted as showing that it is possible for a person to work and claim benefits
- The form states that **Remember, any benefit you get may be delayed if you do not send us all the documents we have asked for.** This statement does not indicate that the rate of benefit may be affected or that earnings beyond a limit may end entitlement.

Further, the Department makes reference to a sample form DS849 dated 11/05 which was included in the appeal papers marked Tab 13. The tribunal considered and weighed this pro forma document in reaching its decision. The tribunal was entitled to reach its decision that (the claimant) had not been made aware of duty to report the change in her earnings. The tribunal was entitled to find that the inclusion of this pro forma document in the appeal papers and the assertion of the Department that a similar version would have been issued to the appellant at the relevant time do not discharge the burden of proof in this matter.'

### **Errors of law**

15. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
16. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:
  - “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
  - (ii) failing to give reasons or any adequate reasons for findings on material matters;
  - (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
  - (iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings;...

Each of these grounds for detecting any error of law contains the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

## Analysis

17. As was noted above, in the first ground of appeal Mr McGrath challenges the rigour of the appeal tribunal's assessment of certain of the evidence which was before it. In particular he has submitted that the appeal tribunal has failed to address an apparent conflict in the evidence.
18. I remind myself that in *Quinn v Department for Social Development* ([2004] NICA 22), the Court of Appeal emphasised that assessment of evidence and fact-finding role is one for the appeal tribunal. At paragraph 29, the Court stated:

'It is clear that the Tribunal considered Dr Manley's report since they refer to it in their findings and describe it as being less than helpful. The challenge to the Tribunal's attitude to the report cannot proceed on the basis that they ignored it; rather it must be either that they misconstrued it or they failed to give it sufficient weight. As to the latter of these two possibilities it is of course to be remembered that a view of the facts reached by a tribunal can only be interfered with by the Court of Appeal in limited and well-defined circumstances.

Carswell LCJ described those circumstances in *Chief Constable of the RUC v Sergeant A* [2000] NI 261 at 273f as follows: -

"A tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless—

(a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the tribunal (*Fire Brigades Union v Fraser* [1998] IRLR 697 at 699, per Lord Sutherland); or

(b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36.”

19. At paragraph 4 of *R(DLA) 3/04*, Mrs Commissioner Brown had made similar remarks:

‘I should state at the outset that the weight to be given to any evidence is completely a matter for the Tribunal. The weight to be given to an item of evidence is a matter of fact. That means that I can disturb it only if that conclusion as to weight is one which no reasonable Tribunal could have reached. Having examined Dr M...’s report I do not consider that the Tribunal’s conclusions as to the weight to be given to it are such as no reasonable Tribunal could have reached.’

20. I also observe that in *C14/02-03(DLA)*, Commissioner Brown, at paragraph 11, stated:

‘... there is no universal rule that a Tribunal must always explain its assessment of credibility. It will usually be enough for a Tribunal to say that it does not believe a witness.’

21. Additionally, in *R3-01(IB)(T)*, a Tribunal of Commissioners, at paragraph 22 repeated what the duty is:

‘We do not consider that there is any universal obligation on a Tribunal to explain its assessment of credibility. We disagree with *CSIB/459/97* in that respect. There may of course be occasions when this is necessary but it is not an absolute rule that this must always be done. If a Tribunal makes clear that it does not believe a claimant’s evidence or that it considers him to be exaggerating this will usually be sufficient. The Tribunal is not required to give reasons for its reasons. There may be situations when a further explanation will be required but the only standard is that the reasons should explain the decision. It will, however, normally be a sufficient explanation for rejecting an item of evidence, including evidence of a party to an appeal, to say that the witness is not believed or is exaggerating.’

22. This reasoning was confirmed in *CIS/4022/2007*. After analysing a series of authorities on the issue of the assessment of credibility, including *R3-*

01(IB)(T), the Deputy Commissioner (as he then was) summarised, at paragraph 52, as follows:

'In my assessment the fundamental principles to be derived from these cases and to be applied by tribunals where credibility is in issue may be summarised as follows: (1) there is no formal requirement that a claimant's evidence be corroborated – but, although it is not a prerequisite, corroborative evidence may well reinforce the claimant's evidence; (2) equally, there is no obligation on a tribunal simply to accept a claimant's evidence as credible; (3) the decision on credibility is a decision for the tribunal in the exercise of its judgment, weighing and taking into account all relevant considerations (e.g. the person's reliability, the internal consistency of their account, its consistency with other evidence, its inherent plausibility, etc, whilst bearing in mind that the bare-faced liar may appear wholly consistent and the truthful witness's account may have gaps and discrepancies, not least due to forgetfulness or mental health problems); (4) subject to the requirements of natural justice, there is no obligation on a tribunal to put a finding as to credibility to a party for comment before reaching a decision; (5) having arrived at its decision, there is no universal obligation on tribunals to explain assessments of credibility in every instance; (6) there is, however, an obligation on a tribunal to give adequate reasons for its decision, which may, depending on the circumstances, include a brief explanation as to why a particular piece of evidence has not been accepted. As the Northern Ireland Tribunal of Commissioners explained in R 3/01(IB)(T), ultimately "the only rule is that the reasons for the decision must make the decision comprehensible to a reasonable person reading it".

23. Depending on the context, I am not so sure that the contradiction identified by Mr McGrath is as apparent as he submits. I have noted, in addition, that there was a Departmental Presenting Officer in attendance at the oral hearing of the appeal and that he did not raise the evidential issue of a conflict in the evidence requiring resolution by the appeal tribunal. It is arguable that the contents of the letter are somewhat ambiguous and that the indistinctness represents a degree of confusion on the part of the appellant. The appeal tribunal had the opportunity of seeing and hearing from the appellant across two oral hearings and found her evidence to be honest and credible. I am satisfied that the appeal tribunal has given a sufficient explanation of its assessment of the evidence, explaining why it took the particular view of the evidence which it did.
24. I turn to the second substantive ground of appeal which is that the appeal tribunal has failed to address the second duty the second duty in regulation 32 (1B) of the Social Security (Claims and Payments) Regulations

(Northern Ireland) 1987. At the oral hearing before me, Mr McGrath conceded that the appeal tribunal had addressed the first duty in regulation 32(1A).

25. There is no doubt that the two duties in regulation 32 (1A) and (1B) are cumulative – see the comments of Mr Commissioner Jacobs (as he then was) in paragraph 20 of *CDLA/2328/2006*. In addition, an adjudicating authority, including an appeal tribunal, when finding that the duty in either paragraph is not satisfied is not in error of law because it makes no finding in respect of the other duty.
26. Turning to the instant case, in the record of proceedings for the appeal tribunal hearing, the LQPM has noted:

‘Will allow appeal. Is not satisfied on the balance of probabilities that (the appellant) was made aware of the earnings limit and failed to comply with her responsibility under Regulation 32 of the Social Security (Claims and Payment) regulations to report relevant changes, including the amount of her earnings.’

27. That this statement is included in the record of proceedings is strongly suggestive of the fact that the statement was made by the LQPM before the parties to the appeal tribunal proceedings. One of those parties was the Departmental Presenting Officer and it is arguable that if he was of the view that the appeal tribunal had failed to consider the cumulative effect of regulation 32 (1A) and (1B) then he ought to have challenged that at the time. In my view the reasons for the decision of appeal tribunal are clear and combined with the statement contained in the record of proceedings, I am satisfied that the appeal tribunal has addressed regulation 32 in an adequate and reasonable manner.
28. The third and final ground of appeal is not, in reality, a ground at all and is an assertion in connection with certain of the evidence. Further it is clear that there is no evidence that the form in question was ever received by the appellant. At the oral hearing before me, Mr McGrath conceded that he was not relying on this as a significant ground of appeal.

### **Disposal**

29. The decision of the appeal tribunal dated 11 January 2016 is not in error of law. Accordingly, the appeal to the Social Security Commissioner does not succeed.

(signed): K Mullan

Chief Commissioner

2 April 2019