

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INCOME SUPPORT

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 16 June 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

- 1 This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Craigavon.
- 2 An oral hearing of the application has been requested. However, in all the circumstances of the case, which involves a discrete point of law, I consider that the proceedings can properly be determined without an oral hearing.
- 3 For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(a)(ii) of the Social Security (NI) Order 1998.
- 4 As there is no factual dispute and as I am as well placed to decide the issues myself, I make findings of fact and decide the appeal.
- 5 I allow the appeal. The appellant satisfied the conditions of entitlement to IS from 5 November 2009 to 25 September 2013. The sum of £408.60, representing income support paid between 5 November 2009 and 25 September 2013, is not recoverable from the appellant.

REASONS

Background

- 6 The appellant claimed income support (IS) from the Department for Social Development (the Department) from 2 November 2009 to 25 September 2013. In March 2016, after the appellant had ceased to be an IS claimant, the Department requested information from the appellant's bank about accounts held by the appellant. The bank provided relevant information from the period between 2009 and 2016. On 19 August 2016 the Department decided on the basis of all the evidence that the appellant did not satisfy the conditions of entitlement to IS from 5 November 2009 to 25 September 2013, as during that period, he had capital in excess of the prescribed statutory limit.
- 7 On 21 September 2016 the Department decided that an overpayment of £408.60 in respect of the period from 5 November 2009 to 25 September 2013 was recoverable from the appellant on the ground that he had failed to disclose the material fact that he had capital in excess of the prescribed limit. The appellant requested a reconsideration of the entitlement and overpayment decisions, but neither was revised. The appellant appealed in time, specifically referring to the overpayment decision, but on grounds that applied more directly to the entitlement decision.
- 8 The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone. After a hearing on 16 June 2017 the tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 10 August 2017. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal, but leave to appeal was refused by a determination issued on 8 September 2017. On 15 November 2017 the appellant applied to a Social Security Commissioner for leave to appeal.
- 9 The application was late. However, the Chief Social Security Commissioner decided that the late application should be admitted for special reasons on 31 October 2018. Some considerable time has since elapsed in the determination of this appeal and I am grateful to the appellant and the Department for their patience.

Grounds

- 10 The appellant submits that the tribunal erred in law on the basis that the Department's representative obtained material criminally and proceeded to use the material "illegally" in order to do him harm, contrary to Articles 8, 9, 10, 13 and 14 of the European Convention on Human Rights (ECHR).

- 11 He proceeded to allege bias, fraud and religious discrimination “by a cabal of fundamentalist Christians working within the department funded by ghost claimants”, making various offensive remarks about the Department and the tribunal.
- 12 The Department was invited to make observations on the appellant’s grounds. Mr Smith of Decision Making Services (DMS) responded on behalf of the Department. Mr Smith did not support the appellant’s grounds. However, he submitted that the tribunal had erred in law by failing to ascertain the amount of capital the appellant actually possessed in his bank accounts as of 7 August 2013. He indicated that the Department supported the application on this basis, and asked me to set aside the decision and refer it back to a new tribunal.

The tribunal’s decision

- 13 The LQM has prepared a statement of reasons for the tribunal’s decision. From this I can see that the tribunal had documentary material before it consisting of the Department’s submission and a record of previous proceedings in the appeal. Among the documents appended to the Department’s submission were the IS claim form dated 4 November 2009; a statement signed on 1 March 2016 by the appellant stating that he did not have over £6,000 in savings and indicating that he had signed a form of authority allowing the Department to obtain bank statements from July 2013 to date; a consent form signed on 1 March 2016 permitting the Department to obtain information from Santander bank in order to “assess” his savings; a letter from Santander dated 19 April 2016 setting out details of balances in certain accounts from 2009 to 2016 along with copies of statements and transaction records; and a further letter from Santander dated 17 June 2016. The appellant attended the hearing and gave oral evidence, along with his son. The Department was represented by Mr McMillan.
- 14 The tribunal found that the appellant had claimed IS on 4 November 2009, following the death of his wife on 22 October 2009. On 6 November 2009, the proceeds of a life insurance policy amounting to £22,654 were paid to the appellant. The tribunal found that the appellant had been given an INF4 form, which specified a requirement to notify the Department of any change of circumstances. It found that the capital was in excess of the permitted statutory limit and that a claimant was required to notify the Department if holding capital above the limit. It found that he did not notify the Department of this.
- 15 The tribunal found that the applicant had given a qualified consent to the Department to obtain information from his bank, but that the Department and the bank had exceeded the restricted terms of this consent. Nevertheless, it considered NI Commissioner’s decision C53/98(DLA) and on the basis of that decision decided that the tribunal could take into account evidence that was improperly or illegally obtained.

- 16 The tribunal found that the appellant transferred the money to a number of accounts. It had been used in part to pay for the purchase of the appellant's NIHE house in August 2013. The appellant maintained that his late wife, who had not left a will, directed him to keep the money on trust for the couple's three children. The tribunal declined to accept this account, as the property was held exclusively by him and he used it for his own purpose of buying a property. The tribunal found that he had been overpaid IS in the sum of £408.60 and that this was recoverable from him on the basis that he had failed to disclose the fact that he held capital in excess of the statutory limit.

Relevant legislation

- 17 The legislation governing recoverability of overpaid benefit appears principally at section 69(1) of the 1992 Act, which provides:

69.—(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—

(a) a payment has been made in respect of a benefit to which this section applies; or

(b) any sum recoverable by or on behalf of the Department in connection with any such payment has not been recovered,

the Department shall be entitled to recover the amount of any payment which the Department would not have made or any sum which the Department would have received but for the misrepresentation or failure to disclose.

...

(5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above ... unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under article 10 or superseded under article 11 of the Social Security (NI) Order 1998.

18. The requirement to disclose is connected to regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 (the Claims and Payments Regulations). In so far as relevant, this provides:

32.—(1) 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

furnish in such manner as the Department may determine and within the period applicable under regulation 17(4) of the Decisions and Appeals Regulations such information or evidence as it may require for determining whether a decision on the award of benefit should be revised under Article 10 of the 1998 Order or superseded under Article 11 of that Order.

(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Department may determine such information or evidence as it may require in connection with payment of the benefit claimed or awarded.

(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).

Submissions

19. The appellant, while he employs language that is not particularly helpful or appropriate in the circumstances, essentially submitted that the Department breached his rights under Article 8 and other provisions of the ECHR. The appellant submitted that the evidence considered by the tribunal was obtained "illegally" and therefore should not have been admitted or accepted by the tribunal.

20. The Department opposed that submission. Mr Smith for the Department nevertheless offered the Department's support for the application. The basis for this was that the evidence before the tribunal establishing the amount of the appellant's capital on 7 August 2013 indicated that he no longer had capital in excess of the statutory limit at that date. He asked me to set aside the decision of the appeal tribunal and to refer the matter to a newly constituted tribunal for determination.
21. The period in issue in this appeal runs from 5 November 2009 to 25 September 2013. The Department's concession had the potential to affect entitlement only during the period from 7 August 2013 to 25 September 2013. This accounted for 7 weeks entitlement out of a period of almost 4 years, and the sum involved in the adjustment conceded by Mr Smith was £9.45, leading to an amended overpayment figure of £399.15. Whereas I have the discretion to set aside the appeal tribunal's decision under Article 15(7) of the Social Security (NI) Order 1998, I considered that it was expedient that I should deal with all issues myself rather than set the decision aside on this basis.
22. I issued a direction to the Department asking for further submissions on matters of law and fact. Mr Smith responded, clarifying some issues.
23. Firstly, Mr Smith accepted that the Department had no authority to require a third party such as a bank to disclose information concerning the accounts held by a benefit claimant, except in cases where an authorised officer may reasonably suspect fraud - in which case banks are obliged to give information under sections 103A and 103B of the Social Security Administration (NI) Act 1992. However, fraud action was not considered or undertaken in the present case.
24. Secondly, Mr Smith clarified that a claimant was not obliged to sign a form of authority, such as that signed by the appellant, under the duty arising from regulation 32 of the Claims and Payments Regulations.
25. Thirdly, Mr Smith accepted that the authority given by the appellant was intended to extend only to the period from July 2013 forwards, and that the material from 2009 onwards was obtained either by a misunderstanding or by the Department exceeding its powers. However, he submitted that, whereas a claimant might have a legitimate expectation that only the information authorised would be obtained, once it was in the Department's possession there was no rule preventing it from being considered, relying on the decision of Mrs Commissioner Brown in C53/98(DLA).
26. Fourthly, I asked Mr Smith to address the issue of the effect of the Human Rights Act 1998, which came into operation after the decision in C53/98(DLA) and which enabled direct reliance on the provisions of the ECHR. He addressed Article 8, but found no relevant case law. He further addressed Article 1 of Protocol 1, submitting that there was no

interference with it where a claimant does not satisfy the legal conditions laid down in domestic law for the grant of such benefits.

27. Finally, Mr Smith resiled from his previous submissions relating to the period from 7 August 2013 to 25 September 2013, on the basis of new evidence that was not before the tribunal, no longer conceding that the tribunal had erred in law.
28. In response, the appellant accused Mr Smith of robbery and submitted that the Department had perverted the course of justice.
29. I considered that there was a need for legal submission on the issue of the admissibility of improperly obtained evidence under the Human Rights Act 1998. As the appellant was not legally represented, I requested him to consent to his papers being shared with the Northern Ireland Human Rights Commission (NIHRC) for the purpose of providing written submissions in his case as an *amicus curiae*. The appellant agreed to this. The NIHRC instructed Ms Leona Askin of counsel, who provided a considered and careful overview of the relevant law. I am grateful to the appellant and to the NIHRC for facilitating this and to Ms Askin for her helpful submissions.
30. Ms Askin was specifically asked to address the issue of whether a tribunal can take into account evidence that has been improperly obtained, in particular relating to the engagement of Articles 6 and 8 of the ECHR. Ms Askin reviewed the position in terms of domestic and European Court of Human Rights (ECtHR) jurisprudence, distinguishing the position in criminal and civil cases.
31. She observed the approach of the Upper Tribunal in the cases of *JG v Secretary of State for Work and Pensions* [2019] UKUT 25 and *BS v Secretary of State for Work and Pensions* [2016] UKUT 73, and if the courts in *Jones v Warwick University* [2003] 1 WLR 954 and *Immerman v Immerman* [2009] EWHC 3486, noting that there was a broad discretion in civil proceedings as to what evidence should be admitted, with a presumption in favour of admission of evidence.
32. She reviewed the jurisprudence of the ECtHR with particular reference to *Schenk v Switzerland* (1991) 13 EHRR 242, *Khan v UK* (2001) 33 EHRR 45, *Bykov v Russia* (43378/02) and *Allan v UK* (2003) 36 EHRR 12. She advised that the admission of evidence obtained in breach of Article 8 does not automatically render proceedings contrary to Article 6. However, she observed that the case law does not consider whether the use of evidence in proceedings constituted a breach of Article 8, but rather Article 6.
33. She noted that Article 6 does not lay down rules on the admissibility of evidence as such, but that the question remained whether the proceedings as a whole were fair. She indicated that this involves an

examination of the “unlawfulness” in question and where a violation of another Convention right is concerned, the nature of the violation found. She noted that the fact that evidence is obtained in breach of Article 8 does not mean that its admission at a subsequent trial is contrary to Article 6, but rather the court should take it into account in the exercise of its discretion as to whether admission would lead to a violation of Article 6.

- 34 As this was a neutral submission on the law, provided for my assistance by an *amicus curiae*, I did not consider that I needed to seek responding submissions from the applicant. However, I afforded an opportunity to the Department to comment on submission. The Department indicated that it was content with the analysis of the authorities and was of the view that the conclusions drawn were persuasive and well-reasoned.

Assessment

Determination on leave

- 35 An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
- 36 Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
- 37 An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
- 38 Certain submissions made by the appellant are vexatious in tone and do not raise any arguable point of law. Nevertheless, a serious issue arises in his case as to whether the circumstances in which information was obtained by the Department render it inadmissible before a tribunal on human rights grounds.
- 39 The appellant’s own submissions refer to Articles 8, 9, 10 13 and 14 of the ECHR. I do not consider that the right to freedom of religion (Article 9) or freedom of expression (Article 10) can arise on the factual background of this case. I observe that the right to an effective national remedy (Article 13) is not implemented into domestic law, but arises from it in the form of these proceedings, and therefore I do not accept that an arguable error of law arises in the context of Article 13. I observe that the right to freedom from discrimination in respect of protected convention

rights (Article 14) is not freestanding and I do not consider that it arises on the factual background of this case.

- 40 Nevertheless, it appears arguable that there has been a breach of the right to a fair hearing (Article 6) and/or a breach of the right to private and family life (Article 8). Article 6 was not raised by the appellant himself, but it appears to me that it is potentially engaged by the question of whether improperly obtained evidence was admissible before the tribunal. As Commissioner I have an inquisitorial jurisdiction and an obligation to address clearly arguable matters, even where they are not raised by a party. Article 8 is concerned directly with the right to private life and also appears to be engaged in circumstances where the appellant's private bank statements for the period from November 2009 to June 2013 were obtained by the Department without his consent. I am satisfied that the present case involves an arguable error of law in terms of whether the tribunal decision potentially violates Article 6 or Article 8 of the ECHR and I grant leave to appeal on those grounds only.

The decision in issue

- 41 Turning to the matters requiring decision in the present case, any overpayment case involves two distinct questions. The first is whether the claimant should have been entitled to benefit, or benefit at a particular rate, during a specified period on the facts of the case. The second is whether the claimant has misrepresented or failed to disclose any material fact and benefit has been incorrectly paid as a result. In this case, the Department submits that the appellant was overpaid benefit because he claimed IS during a period when he was in possession of capital in excess of the prescribed limit of £16,000.
- 42 The Department characterised the present case solely as an overpayment appeal and presented it to the tribunal on that basis. However, the principal issue raised by the appellant in his grounds of appeal, namely whether the Department lawfully obtained the evidence against him, bears on both the entitlement and the overpayment decisions. In fact, it is more directly relevant to the entitlement issue, as it concerned the process by which the tribunal obtained the evidence that was crucial to the Department superseding the appellant's entitlement to IS on the basis of ignorance of material facts.
- 43 It is also evident from the file before the tribunal that, following the appellant's reconsideration request, the entitlement decision was reconsidered on 25 October 2016 and the overpayment decision on 26 October 2016. It would appear that the appeal received on 16 November 2016 was in time and validly brought against both the entitlement and the overpayment decision, and I shall proceed to address matters on that basis.

The factual background in more detail

- 44 The evidence before the tribunal on entitlement showed that the appellant was credited with sum of £22,654 from Standard Life on 6 November 2009, representing a payment of life insurance upon the death of his wife. This was credited to a Santander Everyday Current Account and brought the balance in that account to over £25,000. A sum of £15,000 was then transferred to a fixed rate bond on 10 November 2009. On maturity, this held £15,436.87 on 1 December 2010. £436.87 was credited to the current account on 1 December 2010. It appears that £15,000 from this account was then transferred to a variable rate bond which matured on 1 December 2011 holding £15,336.60. £336.60 was credited to the current account on 1 December 2011. It appears that £15,000 was then transferred to another fixed rate bond which matured on 1 December 2012 holding £15,360.76. There was a transfer of the full amount of £15,360.76 back into the current account on 1 December 2012, with a subsequent transfer of £13,006 to the appellant on 7 August 2013.
- 45 It can be seen that further sums – two payments of £2000 and one of £5100 - totalling £9,100 were transferred to other accounts in the appellant's name on 10 November 2009. The two amounts of £2000 were credited to an Everyday Saver account. The Everyday Saver account had a balance of £4009.98 on 11 November 2011, reducing over time with various transfers of money out to the appellant and falling as low as £50 on 18 June 2012, but being credited with £13,006 on 7 August 2013. The Cash ISA was opened on 10 November 2009 with a deposit of £5,100 and, despite some withdrawals, never fell below £5,000, holding £5124.92 at 2 October 2013.
- 46 The Department has furnished a schedule totalling the sums held in the various accounts in the appellant's name, adjusting this to remove payments by way of benefit income. I consider that these figures are an accurate representation of the actual capital possessed by the appellant. It cannot be disputed that the appellant has held over £16,000 in capital in a variety of bank accounts from November 2009 to October 2013. In particular, the sum of money held in two particular accounts – the ISA and the various bond accounts – did not fall below £20,000 between 10 November 2009 and 13 August 2013. It is also evident that the appellant did not hold this on trust for anybody else, but was the beneficial owner. I am satisfied that the tribunal was entitled to reach those conclusions on the evidence before it.
- 47 In relation to the disclosure of the applicant's bank records, the tribunal considered two relevant documents. The first, at Tab 4, was a statement signed on 1 March 2016 which included the sentence, "I have signed a form of authority allowing the Department to obtain bank statements from July 2013 to date". The second, at Tab 5, was a form of authority headed "Consent to get financial information". This contained an

explanation that the Department wanted this information because “we need to assess your savings in order to pay you the correct amount of benefit”. The consent was in the form of a ticked box, indicating the answer “Yes” to the question “Do you agree that: we may contact the third party for this information, **and** the named party can give us this information?” The third party was identified as Santander Plc. This form of consent was signed by the appellant on 1 March 2016, and it is clear that this was done contemporaneously with signing the statement that qualified the period of the consent, since the statement itself made reference to that consent. I also observe that the appellant was no longer claiming IS at this stage, and that the assessment of savings in order to pay the correct amount of benefit in 2016 would have referred to a different benefit claim entirely.

- 48 The tribunal proceeded on the basis that the general consent form at Tab 5 was qualified by the appellant’s instruction in the statement at Tab 4, which time limited its scope. While the Department’s presenting officer at the tribunal hearing sought to argue that the consent in Tab 5 stood alone, I consider that the tribunal was correct to reject this somewhat disingenuous assertion and to find that the evidence was improperly obtained. However, as indicated above, the tribunal elected to follow the approach of Mrs Commissioner Brown in C53/98(DLA) and decided that, although the evidence was improperly obtained, it was not inadmissible.

C53/98(DLA)

- 49 At the time when Mrs Commissioner Brown gave her decision, the Human Rights Act was not in force and the ECHR was not directly applicable to the actions of public authorities in the UK. Mrs Commissioner Brown’s decision was also not on all fours with the present case. It addressed a past provision of DLA adjudication (section 30(4) of the 1992 Act) that protected a life award from review unless an adjudication officer had reasonable grounds for believing that entitlement should cease. The question was whether the fact that evidence had been obtained before reasonable grounds existed prevented the adjudication officer, from a jurisdictional point of view, reviewing the DLA award. The question of admissibility of evidence was touched on, *obiter*, in this context at paragraph 13. Mrs Commissioner Brown said:

“In my view neither section 30(4) nor section 31(6) has anything to say about the admissibility or otherwise of evidence. The admissibility of evidence must therefore be dealt with on much more fundamental legal principles. The rules of evidence are relaxed before Tribunals. However, even in a situation of a civil action in a court, evidence is not inadmissible merely because it was improperly obtained. As stated in paragraph 12 of Volume 17 of the Fourth Edition of Halsbury’s Laws of England “Relevant evidence may be improperly or illegally obtained, but that

does not render it inadmissible". I can see no rule of evidence which means, at least in non-criminal matters, that evidence improperly or illegally obtained is not, for that reason, admissible. The Adjudication Officer here was not using improper practices as that term would normally be understood. He merely exceeded his powers. I conclude that the same applies in the context of a Tribunal and that the evidence obtained by the Adjudication Officer in excess of his powers is not inadmissible by a Tribunal for that reason".

- 50 Mrs Commissioner Brown's statement of the law, as relied upon by the tribunal, appears perfectly sound in the context of the pre-Human Rights Act common law. However, it is clear that the position is potentially affected by the commencement of the Human Rights Act and that the actions of public authorities – which includes the Department and the tribunal - require to be viewed in that context.

Article 8 ECHR

- 51 It appears to me that the first issue that I should address is whether there has been any violation of Article 8 ECHR. This provides:

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

- 52 In *Funke v France* (1993) 16 EHRR 297 the European Court of Human Rights treated the French customs authorities' efforts to obtain details of personal assets held abroad as an interference with the Article 8 right to respect for private life (para.48). By analogy, it appears to me that the appellant's personal banking matters are an aspect of his private life.
- 53 It is long recognised in domestic law that banks owe a duty of confidence to their customers. In the case of *Tournier v National Provincial and Union Bank of England* [1924] 1KB 461, the Court of Appeal in England and Wales held that there was an implied right to confidentiality, subject to interference on one of four grounds, namely where the bank was compelled to make disclosure by (1) law, (2) public duty, (3) the interest

of the bank, or (4) where the client had consented, even implicitly, to disclosure.

- 54 The issues of public duty and the interests of the bank do not arise here. Equally, in this case the Department did not exercise any legal power to compel the bank to provide the appellant's bank details. The Department had statutory powers where possible benefit fraud was being investigated – under sections 103A and 103B of the Social Security Administration (NI) Act 1992 and section 3 of the Social Security Fraud Act (NI) 2001. Nevertheless, these powers were not used. Rather it relied on the applicant's consent. In this context, I consider that the appellant had a legitimate expectation that the Department would accurately represent the limits of his consent to the bank.
- 55 I directed the Department to produce a copy of the letter sent to Santander, but the Department has not been able to produce a copy of the letter it sent. It is not clear to me why a copy of that letter is not on the applicant's file. In the absence of a copy of the relevant letter enclosing the applicant's authority, it appears to me to be most likely that the Department did not clarify to Santander that it was qualified to a specific period.
- 56 The applicant had signed two documents on 1 March 2016. In a written statement he had indicated qualified consent to disclosure by expressly time-limiting it to bank statements for the period from July 2013. He had then signed a more general consent form on which the Department stated that it was seeking information to assess his savings in order to pay him the correct amount of benefit. However, the implication of the wording of the consent form is that the Department was seeking information relevant to the applicant's present ESA claim and not his past IS claim. As indicated above, Mr Smith accepted that the consent was clearly qualified and it is not disputed that the applicant did not consent to the release of the material given to the Department by the bank.
- 57 It is not clear to me whether the misleading terms of the applicant's consent were sent to Santander deliberately or carelessly. In either situation the disclosure by the bank to the Department amounted to an interference with the appellant's right to respect for his private life.
- 58 Article 8 is a qualified right, which means that there can be no interference with the exercise of this right by a public authority except such as is in accordance with the law, The interference must also be demonstrably necessary in a democratic society for one of a number of legitimate purposes. In the particular context of social security benefits, I consider that the relevant question is whether the interference was "necessary ... in the interests of ... the economic well-being of the country".

59 While the Department possessed considerable statutory powers of investigation, it chose not to exercise its own statutory powers of investigation in the circumstances of this case. Whereas the applicant on signing the Department's consent forms had given a qualified waiver of his right to private life, he had a legitimate application that the terms of this would be respected. As the Department was not exercising statutory powers and as the terms of the applicant's waiver of his rights were exceeded, it seems to me that the interference with the applicant's right to privacy had no lawful basis. As I do not consider that the actions of the Department were in accordance with law, any further justification is not arguable and the facts of the situation amount to a violation of the applicant's Article 8 rights.

Upper Tribunal jurisprudence on admissibility

60 The particular situation that arises has not been addressed by the Social Security Commissioners or Upper Tribunal. However, some broadly related argument has been considered in the Upper Tribunal.

61 Before addressing those, it should be noted that the statutory regime is different. The procedural rules in the equivalent tribunal in Great Britain (the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008) permit exclusion of evidence under rule 15 on a variety of grounds. Specifically, under rule 15(2)(b)(iii) this includes "where it would be otherwise unfair to admit the evidence". However, the procedural rules governing the tribunal that I am concerned with are the Social Security (Decisions and Appeals) Regulations (NI) 1999. Unlike the procedural rules of the Great Britain First-tier Tribunal, these make no provision for admissibility of evidence, merely confirming at regulation 49(11) that "any person entitled to be heard at an oral hearing may address the tribunal, may give evidence, may call witnesses and may put questions directly to any other party called as a witness".

62 In the Upper Tribunal, in *BS v Secretary of State for Work and Pensions* [2016] AACR 32 Judge Lane considered an argument that in the absence of a document certifying that surveillance of a claimant under the Regulation of Investigatory Powers Act 2000 was authorised, a tribunal must find the surveillance unlawful. Judge Lane noted the position at common law that unlawfully obtained evidence is admissible, but held that a tribunal should decide whether disputed evidence had been obtained lawfully in a context of ensuring the overall fairness of the proceedings. In any event, Judge Lane found that the tribunal was entitled to accept the assurance of a presenting officer that proper authorisation had been obtained – and indeed the authorisation was later produced to her. The authorisation meant that the surveillance was not in breach of Article 8 of the ECHR, which is a qualified right, and no breach of Article 6 was evident.

- 63 In *JG v Secretary of State for Work and Pensions* [2019] UKUT 25, Judge Wikeley addressed an argument that a record of an interview with a profoundly deaf claimant at her home without a British Sign Language (BSL) interpreter was unlawful and inadmissible. He noted the procedure rules in Great Britain permitted evidence to be excluded on a discretionary basis, inter alia, if it would be unfair to admit it. He found that the tribunal was entitled to admit it.
- 64 I do not disagree with either case in principle or on the outcome, but I do not find them of assistance in the present case.

General jurisprudence

- 65 In each of the Upper Tribunal cases, reference was made to *Khan v UK* (2001) EHRR 45. In *Khan*, the European Court of Human Rights (ECHR) addressed Article 6 and Article 8 ECHR in the context of criminal proceedings. It held that there had been a violation of Article 8 of the Convention where surveillance in the form of a covert listening device was used by police. The use of such a device was not unlawful as such in English criminal law prior to the Police Act 1997 and there was no general right to privacy in English law. However, in the absence of any statutory system of regulation, the relevant guidelines were not binding and not publicly accessible. It followed that the interference with Article 8 rights was not in accordance with the law.
- 66 When it came to addressing Article 6 in the same case, however, the ECtHR found that there had been no violation. It held that its role was to determine whether the proceedings as a whole, including the way in which evidence was obtained, were fair. It found that it was not its role to determine whether particular types of evidence – for example unlawfully obtained evidence – may be admissible. Determining fairness involved an examination of the unlawfulness in question and where violation of another Convention right had occurred, the nature of that violation. The ECtHR held that because the domestic courts had addressed the effect of the evidence on the fairness of the trial at each stage, although the defendant was unsuccessful, the courts' discretion to exclude it meant that the proceedings were fair.
- 67 *Khan* predated the coming into force of the Human Rights Act 1998. The implications of the coming into force of the Act were addressed in civil proceedings in *Jones v Warwick University* [2003] 1 WLR 954. In that case, an agent for the defendant's insurer entered the plaintiff's home and used a hidden camera to film her without her knowledge. The Court of Appeal in England and Wales found that this constituted trespass and a violation of Article 8 ECHR. It recognised that the judge had discretion to exclude the evidence and held that the court should try to give effect to two conflicting public interests – namely that in litigation the truth should be revealed on the one hand and that the courts should not acquiesce in, let alone encourage, a party to use unlawful means to obtain evidence.

While seeking justice between the parties, the judge should consider the effect of a decision on litigation generally and should seek to deter improper conduct by costs orders.

68 In family proceedings in the High Court of England and Wales in *Imerman v Imerman* [2009] EWHC 3486, a wife had obtained financial information, including privileged information, through a relative gaining irregular access to her husband's business computer. The husband sought an order for delivery up of the confidential information. Refusing that application, Moylan J held that a court had power to control the use of information irregularly obtained for the purposes of proceedings if it is necessary to effect a fair trial under Article 6 and/or to protect one party's rights under Article 8 ECHR. The court had a discretion which must be exercised by balancing a number of principles or considerations with reference to the particular circumstances of the case. At paragraph 140, Moylan J said:

"They include:

(a) the interests of the public that in litigation the truth should be revealed, coupled in this case with the statutory duty placed on the court to determine an application for ancillary relief by reference to all the circumstances of the case;

(b) the interests of the public that the courts should not acquiesce in, let alone encourage, a party (or anyone on their behalf) to use irregular means to obtain information;

(c) the effect on litigation generally of the conduct of the parties;

(d) the wife's right to a fair trial, in particular to have her application determined by reference to the true position;

(e) the husband's right to respect for his private life and correspondence and his right not to have them excessively and unfairly invaded through, for example, self-help;

(f) the husband's right to a fair trial by ensuring, so far as practicable, that the parties are on an equal footing and that the wife does not gain an unfair advantage

through the use of irregularly obtained information.

The weight to be attached to these respective factors will depend upon the circumstances of each case balancing, in particular, each party's right to a fair trial and the article 8 rights of the party from whom the information has been obtained.”

69 At paragraph 141, he said:

“...Each case will depend on its own facts and will often, if not usually, depend on balancing the public interest in the court having available to it all relevant evidence with the manner in which the information has been irregularly obtained. The more extreme the nature of the irregularity the greater the likely interference with that party's article 8 rights and the greater the need to justify such interference as being proportionate and, further, the greater the duty on the court to ensure that that party's right to a fair trial is not thereby unduly prejudiced and that the proceedings as a whole are fair. I will return to this latter point shortly. Conversely, the lesser the nature of the irregularity the less likely the court will consider it necessary or appropriate to be engaged in any preliminary consideration of whether the information obtained in this manner should be used...”

70 I observe that the outcome of this case was varied on appeal by the Court of Appeal in England and Wales in *Imerman v Imerman* [2010] EWCA Civ 908, which addressed an important issue presaged in the High Court decision around the so-called “*Hildebrand* rules”, but consider that this was without significant discussion or criticism of the principles set out by Moylan J in relation to the admissibility of evidence and Article 8 of the Human Rights Act.

71 The *obiter* remarks of Mrs Commissioner Brown in C53/98(DLA) correctly state that illegally or improperly obtained evidence is not inadmissible for that reason alone. However, she does not address the effect of admissibility on the fairness of the proceedings. Her decision, as indicated previously, predated the coming into effect of the Human Rights Act 1998 and must be approached cautiously for that reason. Further, the decisions of the Upper Tribunal are promulgated within a system where an express provision in the tribunal procedure rules deals with admissibility of evidence, which is not the case in Northern Ireland. In that context, it appears to me that the applicable principles that emerge from the post-Human Rights Act jurisprudence in the UK should be applied to tribunal proceedings in Northern Ireland.

Article 6 rights

- 72 It is not disputed that Article 6 applies to tribunal proceedings (see, for example, *Feldbrugge v Netherlands* (1986) 8 EHRR 425; *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405).
- 73 When considering the relevant Strasbourg jurisprudence relevant to the particular case, such as *Khan v UK*, the key issue arising, it seems to me, is whether the admission of improperly obtained evidence renders the proceedings unfair. In *Khan v UK*, the ECtHR held that because the domestic courts had addressed the effect of the evidence on the fairness of the trial at each stage, although the defendant was unsuccessful, the courts' discretion to exclude it meant that the proceedings were fair. The ECHR in *Khan* was addressing the issue before the UK courts in a reviewing capacity. Post-Human Rights Act the UK courts themselves have developed relevant principles further as their status as public authorities requires them to act in ways which are compatible with Convention rights. All of the general case law that has been introduced in this case relates to *inter partes* adversarial proceedings, whether civil or family law cases. A key principle through the cases is whether the proceedings can remain fair as a whole, on the individual facts of each case, despite the use of irregularly obtained evidence.
- 74 In the present case, the tribunal was dealing with a statutory appeal against a decision of the Department, which was then itself a party to the inquisitorial proceedings, and which had obtained the disputed evidence in breach of Article 8 ECHR. As a tribunal, there was no facility to penalise improper conduct by a costs order. Paraphrasing some of the relevant principles and adapting them where the context requires, it appears to me that the main relevant principles to be balanced in addressing whether the admissibility affect the fairness of the tribunal proceedings are:
- a) the interests of the public that decisions in benefit appeals are based on all relevant information, that benefit fraud is detected and that accurate entitlement decisions are made in order to avoid unnecessary expenditure from the public purse;
 - b) the interests of the public that the tribunals should not acquiesce in, let alone encourage, the Department to use irregular means to obtain information;
 - c) the applicant's right to respect for his private life and correspondence, with the principle that the greater the irregularity the greater the duty on the court to ensure that that party's right to a fair trial is not thereby unduly prejudiced;

d) the applicant's right to a fair hearing, ensuring, so far as practicable, that the Department does not gain an unfair advantage through the use of irregularly obtained information.

Conclusion

- 75 The tribunal in the present case placed reliance on the dictum of Mrs Commissioner Brown in C53/98(DLA). For the reasons I have given above, it was insufficient to rely on that dictum to the effect that illegally and improperly obtained evidence was not, for that reason alone, inadmissible. The tribunal has not addressed itself to the key issue identified in the relevant jurisprudence, namely whether admission of the improperly obtained evidence would affect the fairness of the proceedings. As it has not addressed itself to that issue at all, I must conclude that it has erred in law. Therefore, I allow the appeal and I set aside the decision of the appeal tribunal.

Disposal

- 76 It is open to me to refer the appeal to a newly constituted tribunal for determination. However, that tribunal would consist of a single legally qualified member sitting alone. I also have the discretion to decide the appeal myself. It appears to me that it is preferable to decide the appeal myself in order to avoid further delay. I therefore set aside the decision of the appeal tribunal under Article 15(8)(a)(ii) of the Social Security (NI) Order 1998 and make findings of fact and decision as follows.

Decision

- 77 The facts are not in dispute and I generally adopt the findings outlined in the decision above at paragraphs 44-47.
- 78 The Department, in making the decision superseding the applicant's entitlement to IS, relies entirely on evidence consisting of information obtained from his bank.
- 79 The Department had investigatory powers to obtain information from the applicant's bank. If benefit fraud was suspected in relation to his IS claim from 2009 to 2013, the Department had power to compel access to the applicant's bank statements. It did not exercise those powers.
- 80 The Department requested consent from the applicant to access his bank statements in order to assess his entitlement to ESA in March 2016. It obtained a qualified consent, given in two documents signed on the same day, to access bank statements from July 2013 to March 2016.
- 81 The Department does not retain a copy of the letter requesting information sent to the applicant's bank. However, in the absence of that

letter from the applicant's file, I find it likely that when the Department passed its request for bank statements to the applicant's bank, it did not accurately reflect the terms of the consent that the applicant had given to it. The alternative is that the bank misunderstood the terms of the consent. On the basis of my judicial knowledge of banking culture and Departmental culture respectively, I conclude that the former is more likely.

82 It appears possible that the applicant had a particular motive for time limiting the consent to disclosure. It is evident that he had disposed of capital in excess of the statutory limit for claiming ESA in and around August 2013. Nevertheless, he authorised the disclosure of bank statement from July 2013 and those would have revealed possession of excess capital to August 2013. Therefore I cannot assume any deliberate intention to deceive on the part of the applicant. What is certain is that, had the Department known the true position, it would not have overpaid the applicant £408.60 in IS.

83 On the principles I have set out above:

a) I observe that the loss to the public purse at £408.60 is relatively minor, and much less costly than the proceedings which have ensued to address it. I cannot ascribe deliberate fraudulent intent to the applicant. The protection of the public purse is therefore a matter that I give relatively small weight to;

b) the public is entitled to be protected from irregular access by the Department to their private information. If the relevant powers of the Department were generally considered inadequate for the purpose of verifying benefit claims, the legislature would be expected to address that. While the use of unlawfully obtained information by the Department should be discouraged, I judge that the particular case does not represent a pattern of conduct by the Department, but rather a one-off untoward event. I therefore give relatively small weight to the general protection of the public;

c) there has been a breach of the individual applicant's Article 8 rights. The Department's conduct is not clearly explained by the documents retained on the applicant's file and in particular by the absence from the file of the letter it sent to Santander. While it appears likely that inadvertent misrepresentation of the applicant's consent was involved, I cannot rule out the possibility of deliberate misrepresentation; if deliberate misrepresentation occurred, the irregularity involved in the individual case would be a matter of very considerable weight. In the

absence of the Department's letter from the file this cannot be established conclusively. As it remains a possibility, I nevertheless consider that the individual applicant's Article 8 rights should be afforded significant weight;

d) in considering whether the Department has obtained an unfair advantage in the proceedings, I observe that the only evidence against the applicant in the appeal is the irregularly obtained material. I consider that the fact that the irregularly obtained material is decisive should be afforded significant weight.

84 Addressing all these issues, I conclude that the unlawfully obtained evidence should not be admitted as the Department's reliance on unlawfully obtained material would render the proceedings unfair.

85 In the absence of any other admissible evidence I must find that the appellant satisfied the conditions of entitlement to IS from 5 November 2009 to 25 September 2013, I allow the appeal.

(signed): O Stockman

Commissioner

8 September 2020