***PP v SSWP (UC)* [2020] UKUT 109 (AAC)**

THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. CUC/1389/2019

PARTIES

Mr P P (Appellant)

and

The Secretary of State for Work and Pensions (Respondent)

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

First-tier Tribunal:	**In chambers**
Date:	**15 February 2019**
File reference:	**not available**

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

I give permission to appeal.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 2, 5, 21 & 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the First-tier Tribunal dated 15 February 2019 (made under no file reference) involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's original decision dated 14 May 2018 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be heard by a new First-tier Tribunal.

(2) The new First-tier Tribunal should proceed on the basis that the Appellant lodged a valid appeal, which did not need a mandatory reconsideration notice, against the Secretary of State's decision dated 14 May 2018 on his claim for universal credit dated 10 January 2018.

(3) The Appellant should produce a copy of his 2017/18 tax return and any business accounts for 2017/18 and send them to the HMCTS regional tribunal office in Sutton within one month of the issue of this decision.

(4) If the Appellant has any further written evidence to put before the tribunal this should be sent to the HMCTS regional tribunal office in Sutton within one month of the issue of this decision.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The Upper Tribunal's decision in summary and what happens next

1. In this decision I both:
   (i) give the Appellant permission to appeal; and also
   (ii) allow the Appellant's appeal to the Upper Tribunal.

This is because the decision of the First-tier Tribunal involves a legal error. For that reason, I set aside the Tribunal's decision. There will need to be a re-hearing of the Appellant's appeal.

An outline of the Appellant's difficulties

2. The Appellant has experienced personal tragedy as well as other challenges. His wife died in August 2017, leaving him with two young children to raise on his own, including a son with epilepsy and requiring round the clock care. He is also facing possession proceedings in relation to his home. The Appellant describes himself as having "learning disabilities and short-term memory syndrome". Elsewhere he refers to dyslexia. He says that as a result he "requires emailed digital text format … enabling me to copy and paste the text into my decoding software" (letter to DWP dated 27 September 2017, p.136). He repeatedly complains that official bodies do not make the appropriate reasonable adjustments for him. He has not produced to the Upper Tribunal any supporting evidence of his physical and/or mental health problems, but he plainly has some difficulties. In addition, it appears that English may not be his first language.

A confused case about universal credit

3. The background to this universal credit case is confused.

4. This confusion is partly because – unsurprisingly, given the difficulties he faces – the Appellant has not set out clearly and precisely what he objects to about the DWP's decision. Instead, he has adopted a scattergun approach, raising a host of different grievances. I accept, of course, that setting out clear grounds of appeal may prove problematic for a litigant in person at the best of times. But the Appellant has e-mailed the Upper Tribunal office a large and disorganised bundle of papers, not all of which are directly relevant to the matters over which the Upper Tribunal currently has jurisdiction (i.e. the legal power to change things).

5. To take just one example, the Appellant complains that he has received no bereavement support from the DWP following the sad loss of his wife. He may or may not have a legitimate grievance in that regard. I simply do not know on the evidence before me. However, the present appeal is concerned only with his claim to universal credit. What is clear is that there is no appeal before the Upper Tribunal relating to bereavement benefits.

6. But this confusion is compounded by the way that the DWP's universal credit online system intersects with the legislative framework for its officers deciding claims and for claimants making appeals relating to social security benefits. It is not immediately obvious that the former was designed with an eye to the latter.

7. To take just one example, which is central to the present appeal, the DWP sent the Appellant an electronic notification in his universal credit Journal on 14 May 2018, stating starkly that "Your claim has been closed", together with a one-line explanation reading: "Reason for closure: You didn't book your appointment" (p.70). The concept of "case closure" is jurisprudentially highly suspect. Over the years the former Social Security Commissioners and now the Upper Tribunal Judges have done their best to

try and eliminate this usage (see *CJSA/2327/2001* at paragraph 12 and *CE/747/2017* at paragraph 4).

8. Unfortunately, the notion of case closure, so beloved of frontline benefits administrators, has proven resistant to all such judicial attempts at erasure. As the written submission by the Secretary of State's representative on the present appeal frankly concedes:

> "On the contrary, [the DWP's] training material and operational guidance for the new benefit ubiquitously describe both the termination of an award and any disposal of a claim as the 'closing' of a 'claim'. As a result, any attempt to understand the legal nature of any given instance of 'claim closure' is obliged to have recourse to informed inference (or desperate guesswork)."

The First-tier Tribunal's proceedings and its decision

9. The Appellant did not appeal in the usual way by sending a Form SSCS1 (notice of appeal) to the HMCTS central office for social security appeals in Bradford. Instead, on 16 October 2018 he sent an e-mail direct to the HMCTS FTT regional office in Sutton, which had been dealing with his late wife's appeal in relation to her claim for personal independence payment. The FTT administration, being uncertain as to the status of the case (there being no mandatory reconsideration notice (MRN)), did not log it on its computer system (hence the absence of a case registration number) and dealt with the matter offline and on paper, referring the file to a judge.

10. On 16 November 2018 the District Tribunal Judge issued directions to the DWP to produce copies of any decision to refuse the Appellant universal credit and any associated MRN (p.75). The DWP responded by sending a copy of its notification of 14 May 2018, described at paragraph 7 above, about the Appellant's case being "closed".

11. On 30 January 2019 the District Tribunal Judge issued directions to the Appellant, stating it was assumed he was seeking to appeal against the case closure decision of 14 May 2018, and asking him to produce a copy of any universal credit MRN (p.67). The Appellant replied by way of a lengthy and detailed e-mail on 6 February 2019, stating (amongst many other matters) that the DWP would not provide him with an MRN and, in any event, given his disabilities, the onus was on the Department to provide him with one (p.15).

12. On 15 February 2019 the District Tribunal Judge issued a ruling refusing to admit the appeal, finding that the Appellant had not provided a copy of the MRN with his appeal (p.12). This is the decision now under appeal to the Upper Tribunal and it prompted a further lengthy e-mail from the Appellant on 29 February 2019 (p.8).

13. On 25 March 2019 the District Tribunal Judge issued a statement of reasons (p.6), essentially in the same terms as the original ruling of 15 February 2019. The Appellant replied again at length, for the most part complaining about the way that he had been treated by the DWP and HMCTS in relation to his disabilities (p.2).

14. On 22 May 2019 the District Tribunal Judge refused the Appellant's application for permission to appeal to the Upper Tribunal (p.167). She concluded as follows:

> "If the Appellant has been though the mandatory reconsideration process in relation to his appeal against a Universal Credit decision, then he may lodge an

appeal. However, it is not the Tribunal's role to complete on his behalf the formalities required to make a valid appeal."

15. Whilst that statement may be true as a general proposition, the position is not quite as straightforward as that in the circumstances of the present case.

The background to this appeal to the Upper Tribunal

16. In some initial Case Management Directions on this application for permission to appeal, I set out the background as follows (in this version I have removed references to the Appellant by name to protect his privacy, and have referred to him simply as Mr P):

> *"The background to the application*
> 4. The First-tier Tribunal (FTT) decided on 15 February 2019 to strike out Mr P's appeal. The basis for this decision was that he had not been through the required mandatory reconsideration process.
>
> 5. The FTT District Tribunal Judge then refused permission to appeal on 22 May 2019.
>
> 6. Mr P has (unspecified) verbal, language and learning difficulties. He tried to claim tax credits but was told he had to claim universal credit (UC). He was unable to complete the online process and it seems his UC claim was closed. As noted above, his appeal to the FTT was then rejected because of the lack of any mandatory reconsideration notice (MRN).
>
> 7. It is difficult to follow the sequence of events given the confusing state and sequencing of the FTT file (which includes several documents of no apparent relevance to the UC claim and any subsequent appeal). However, I can find no trace on the file of either a specific request for an MRN or an MRN decision itself.
>
> *Preliminary thoughts*
> 8. Mr P's case in part seems to be that he could not use the online procedure to make his UC claim. That may account for the absence of a request for an MRN or an MRN decision itself. The FTT refused to admit the appeal – but should it have admitted the appeal to decide whether it had jurisdiction to deal with the appeal?
>
> 9. Several questions arise from a preliminary review of the file, namely:
>
> (i) Did the DWP ever actually make a decision on the UC claim?
> (ii) If the DWP made a decision, was it properly notified to Mr P?
> (iii) What type of assistance does Mr P need?
> (iv) Did Mr P's attempts to explain why he could not manage the online system provide sufficient information for the DWP to look at an alternative way for him to make his claim?
> (v) Why did the DWP not treat the FTT's directions dated 16 November 2018 as a reason to treat his potential appeal as a MR request? In that context I note that regulation 7(5) of the UC (Decisions and Appeals) Regulations 2013 provides that a purported appeal may be treated as an MRN request.
>
> *Conclusion*

10. The confused state of the file means that it is not ready for a ruling. Instead, the Secretary of State's representative is directed to make a written submission on the matters identified above and on the application more generally."

17. It now appears that not all aspects of that summary were correct. For example, in the opening paragraph, I should have referred to the appeal as being not admitted by the FTT, rather than having been struck out. The practical result may be the same, but the legal processes are conceptually different. Where relevant, I correct any other errors in the analysis that follows below.

The proceedings before the Upper Tribunal

18. Mr Wayne Spencer, the Secretary of State's representative, has made a very helpful written submission on the application for permission to appeal (pp.177ff). He proposes that I should (i) grant the Appellant permission to appeal; (ii) set aside the FTT's decision; and (iii) remit (or send back) the case to be re-heard by a new Tribunal. I agree with most of that proposed course of action, although I differ from Mr Spencer on some of the details of point (iii).

19. I must stress Mr Spencer's support for the present appeal does not mean that he agrees that the Appellant is necessarily entitled to universal credit. Rather, he accepts that the FTT was wrong in law to refuse to admit the Appellant's appeal.

The five questions initially raised by this appeal to the Upper Tribunal

20. As noted above, I identified five questions as arising from this appeal. I agree with Mr Spencer's analysis of each of those questions and for the reasons he gives. I therefore summarise in turn each of those five points here.

(1) Did the DWP ever actually make a decision on the universal credit claim?

21. Contrary to what I surmised from reading the papers, it seems the Appellant did in fact complete the online claims process for making an application for universal credit. The evidence now available (which was not before the FTT or before me when I issued the earlier Directions) is that the Appellant completed an online universal credit claim at 22:30 on 10 January 2018 (p.182); that being so, presumably the application could not have been made at a jobcentre or public library. According to the relevant DWP work coach, who had been assigned to the Appellant, "at this same time this particular customer also verified themselves online using the Gov verify service. (I don't know if you have ever done thus but it is not an easy thing to do if you have no online knowledge or access, in fact it is probably impossible)." I am inclined to agree.

22. However, and as already noted, on 14 May 2018 the DWP decided the Appellant was not entitled to universal credit. This was described by the DWP (erroneously, as a matter of terminology – see above) as "closing" the claim (see p.70). In fact, what seems to have happened – deploying Mr Spencer's powers of 'informed inference' – is that the Appellant's claim for universal credit was disallowed as he had not shown that he met the income-related condition of entitlement to universal credit (see section 5(1)(b) of the Welfare Reform Act 2012). This, in turn, was because he did not book an appointment to answer questions from the DWP about his self-employment (see further below).

(2) If the DWP made a decision, was it properly notified to Mr P?

23. In my initial Observations on the application for permission, I noted that the Appellant "was unable to complete the online process and it seems his UC claim was closed." In the light of the above, that reasoning was somewhat compressed and open to misunderstanding. The true position appears to be as follows (see also

above). The Appellant did complete the online process of making a universal credit claim. That claim for benefit then had to be determined by the Secretary of State (see section 8(1)(a) of the Social Security Act 1998). In the event the DWP "closed the claim" on 14 May 2018, purportedly because of the Appellant's failure to book an appointment to answer questions about his self-employment – see the documents at pp.70-72 of the file and the helpful explanation provided by the DWP work coach at pp.182-183. So, the DWP did make a decision on the Appellant's claim for universal credit. The practical effect and substance of that decision was to find that the Appellant was not entitled to universal credit.

24. The question then (at least as I have posed it) is whether that decision was properly notified to the Appellant. It was notified online in the Journal part of the Appellant's online universal credit account. Regulation 4 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381; "the 2013 Decisions and Appeals Regulations") certainly allows the Secretary of State to use electronic communications for that purpose. This is reinforced by paragraph 1 of Schedule 2 to the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380; "the 2013 Claims and Payments Regulations"). So, the mode of notification, by sending or rather posting the decision electronically, was not itself a problem. But what about the content of the notification?

25. The usual position is that a mandatory reconsideration (a revision by another name) must be undertaken before a claimant's right of appeal can be exercised. This was certainly (and understandably) the thinking behind the First-tier Tribunal's approach, as summarised above. But the legal position is not that straightforward. Regulation 7 of the 2013 Decisions and Appeals Regulations provides as follows:

> "**Consideration of revision before appeal**
> **7.**—(1) This regulation applies in a case where—
> (a) the Secretary of State gives a person written notice of a decision under section 8 or 10 of the 1998 Act (whether as originally made or as revised under section 9 of that Act); and
> (b) that notice includes a statement to the effect that there is a right of appeal in relation to the decision only if the Secretary of State has considered an application for a revision of the decision.
> (2) In a case to which this regulation applies, a person has a right of appeal under section 12(2) of the 1998 Act in relation to the decision only if the Secretary of State has considered on an application whether to revise the decision under section 9 of that Act.
> (3) The notice referred to in paragraph (1) must inform the person—
> (a) of the time limit under regulation 5(1) (revision on any grounds) for making an application for a revision; and
> (b) that, where the notice does not include a statement of the reasons for the decision ("written reasons"), the person may, within one month of the date of notification of the decision, request that the Secretary of State provide written reasons.
> (4) Where written reasons are requested under paragraph (3)(b), the Secretary of State must provide that statement within 14 days of receipt of the request or as soon as practicable afterwards.
> (5) Where, as the result of paragraph (2), there is no right of appeal against a decision, the Secretary of State may treat any purported appeal as an application for a revision under section 9 of the 1998 Act."

26. The posting on 14 May 2018 of the "case closure" decision – or disallowance decision, properly so called – appears to fall within the terms of regulation 7(1)(a). However, the requirement for a mandatory reconsideration to be undertaken as a necessary prelude to an appeal only applies if regulation 7(1)(b) also applies (see regulation 7(2)). There are strict requirements as to the type of notice required for the purposes of regulation 7(1)(b) – see regulation 7(3). There was no such informative notice attached to the notification of the decision in the Appellant's Journal, as reproduced at p.70. The notification said no more than is reproduced at paragraph 7 above. Nor is there any evidence on file that any further decision letter was issued to the Appellant. It follows logically that the Appellant had the right of appeal to the First-tier Tribunal unencumbered by the (usual) need to apply for a mandatory reconsideration.

(3) What type of assistance does Mr P need?

27. The Appellant made an application for universal credit. He completed the online stages of making the claim itself, late in the evening, and apparently without assistance. The difficulties he encountered arose after he had made his claim, when the DWP wished to check his entitlement by asking him questions about his self-employment. It follows, it seems, that he did not require assistance with the actual process of making the claim for universal credit in the first place.

(4) Did Mr P's attempts to explain why he could not manage the online system provide sufficient information for the DWP to look at an alternative way for him to make his claim?

28. This question does not need an answer, given that an application for universal credit was successfully lodged online.

(5) Why did the DWP not treat the FTT's directions dated 16 November 2018 as a reason to treat his potential appeal as a MR request? In that context I note that regulation 7(5) of the UC (Decisions and Appeals) Regulations 2013 provides that a purported appeal may be treated as an MRN request.

29. Mr Spencer notes that none of the Appellant's communications have been understood as disputing the decision that disallowed his universal credit claim. He accepts, however, that there are no formal requirements for a request for a mandatory reconsideration. In any event, my reference to regulation 7(5) may be misplaced, as it now appears that the Appellant's right of appeal was not contingent on an MRN having been obtained in the first place (see regulation 7(1)(b) and (2)).

The error of law in the First-tier Tribunal's decision

30. Mr Spencer argues that the FTT's decision involves an error of law because it made no finding as to the applicability of regulation 7(1)(b) of the 2013 Decisions and Appeals Regulations. I agree. I would also add that if there was no such MRN statement, as required by regulation 7(1)(b), then the Appellant's right of appeal could not be subject to a prior mandatory reconsideration (as this was not a case to which the regulation applies: see regulation 7(2)). Given that agreed error of law, I therefore grant the Appellant's application for permission to appeal and furthermore allow his appeal. I also set aside the First-tier Tribunal's decision of 15 February 2019 as involving an error of law.

31. Mr Spencer suggests that I remit the case to be re-heard by a new FTT. However, I do not consider it fair or just to leave open the issue as to the admissibility of the Appellant's appeal to the First-tier Tribunal. For the reasons explained above, I consider that the Appellant's appeal was not subject to prior mandatory reconsideration. It follows that the Appellant's appeal should have been admitted. I direct the new Tribunal accordingly (Tribunals Courts and Enforcement Act 2007,

section 12 (2)(b)(i)). I therefore remit the substantive appeal to a new FTT with that direction. The focus of the new FTT hearing should accordingly be on the substantive appeal relating to the Appellant's entitlement, if any, to universal credit.

32. In the remainder of this decision I deal with two issues. The first is to clarify further the nature of the decision taken by the DWP on 14 May 2018. The second is to identify briefly an issue that will need to be explored in advance of (and at) the FTT re-hearing.

The DWP's "case closure" decision of 14 May 2018

33. As we have seen, the DWP's electronic notification, sent to the Appellant's universal credit Journal on 14 May 2018 (at 5:22 p.m.), stated that "Your claim has been closed", together with a one-line explanation reading: "Reason for closure: **You didn't book your appointment**" (p.70, original emphasis). The only other explanation shown on this screenshot is an entry reading "Closed date: **10 January 2018**" (which was also the date of the claim). However, accompanying this screenshot is a print-out of two pages of Journal entries. These show that there was a total of nine attempts by the DWP work coach to make contact with the Appellant over a period of some three months.

34. The first was on 24 January 2018, when the work coach explained that they needed to set up an interview to discuss the Appellant's self-employment. It was stated that this could be conducted by telephone if the Appellant was unable to come into the jobcentre. This was followed by a series of further messages from the work coach to which the Appellant (apparently) did not respond. In the last such message, on 9 March 2018, the work coach suggested using the universal credit online Journal as a medium for going through the necessary questions about self-employment. This message concluded:

> "If you do not agree to using the journal as a method of communication then due to the fact that this information must be gathered in order to move forward on Universal Credit, we will have no alternative but to close your claim.
>
> If we do not hear from you by the 16th of March 2018 at close of business 16:00pm via a journal message then again I'm afraid we will have no alternative other than claim closure."

35. In the event the matter was left open for another two months until the claim closure message was sent on 14 May 2018.

36. So, what then was the legal status of the DWP's electronic notification about case closure on 14 May 2018? The answer to that question involves retracing one's steps through the process of a claim being made and decided.

37. Section 1(1) of the Social Security Administration Act 1992 makes it a condition of entitlement to universal credit (as for other benefits) that a claim is made for it in the manner prescribed by regulations. The DWP's evidence is that the Appellant's claim for universal credit was made on 10 January 2018 (see paragraph 21 above; on the process of actually making such a claim online, see my decision in another universal credit appeal in *GDC v Secretary of State for Work and Pensions (UC)* [2020] UKUT 108 (AAC)). The DWP was then under a duty to make a decision on that claim for benefit (see section 8(1)(a) of the Social Security Act 1998 and *R(H) 3/05* at paragraphs 73-74).

38. What then of the official explanation given for the "case closure"? This was that "**You didn't book your appointment**". However, as Mr Spencer correctly argues, there is nothing in the 2013 Claims and Payments Regulations that makes attending an interview about self-employment a part of the process of claiming universal credit in the prescribed manner. This is in contrast, for example, to the requirement in regulation 4(6)(a) of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968; "the 1987 Claims and Payments Regulations") on claims for jobseeker's allowance.

39. It is true there are more detailed requirements for claiming universal credit in Schedule 2 to the 2013 Claims and Payments Regulations (see further my decision in *GDC v Secretary of State for Work and Pensions (UC)*). So, for example, paragraph 2(3)(c) allows the Secretary of State to make the use of an electronic communication for applying for universal credit conditional on the claimant using "an approved method of […] authenticating any claim or information delivered by means of an electronic communication." However, paragraph 2(7) of the Schedule provides that, in this context, "approved" means "approved by means of a direction given by the Secretary of State for the purposes of this Schedule." The Secretary of State's directions governing such electronic communications for universal credit claims can be found online at https://www.gov.uk/government/publications/the-social-security-electronic-communications-directions. As amended, Article 4 of the Social Security (Electronic Communications) Consolidation and Amendment Directions 2011 provides that the approved method of the authenticating any claim or information delivered by means of an electronic communication method is "the method […] set out on the gov.uk website." However, there is nothing on that website that stipulates that "authentication" of a person's self-employment (or the level of their self-employed earnings) falls to be done by way of an interview as a condition of making a claim electronically (see for example https://www.gov.uk/universal-credit/how-to-claim?step-by-step).

40. In effect, therefore, a claim for universal credit in the prescribed manner is made before the question of the claimant's self-employment is fully explored. Any interview regarding self-employment that is felt to be necessary is then requested as part of the Secretary of State's investigation of the claimant's entitlement under a claim that has already been properly made. In effect, the request that the claimant arrange and attend an interview about self-employment is no more and no less than a demand for information or evidence under regulation 37(2) of the 2013 Claims and Payments Regulations. Regulation 37(1)-(3) provide as follows:

> "**Evidence and information in connection with a claim**
> **37.**—(1) Subject to regulation 8 of the Personal Independence Payment Regulations, paragraphs (2) and (3) apply to a person who makes a claim for benefit, other than a jobseeker's allowance, or on whose behalf a claim is made.
> (2) The Secretary of State may require the person to supply information or evidence in connection with the claim, or any question arising out of it, as the Secretary of State considers appropriate.
> (3) The person must supply the Secretary of State with the information or evidence in such manner as the Secretary of State determines within one month of first being required to do so or such longer period as the Secretary of State considers reasonable."

41. This approach is supported by the analysis of Mr Commissioner Howell QC in his joint decision in the two unreported cases under file references *CIS/51/2007* and *CIB/52/2007*. Dealing with regulation 7 of the 1987 Claims and Payments

Regulations – in effect in equivalent terms to regulation 37 – the Commissioner held as follows (at paragraphs 10-11):

> "10. … At the risk of stating the blindingly obvious, this [regulation 7] is a provision that applies in relation to *claims* once they have been made in a procedurally effective manner so that they have got to be processed: it enables the Secretary of State to require any additional or confirmatory information or evidence to ensure that they are processed properly, so that claimants are awarded the benefit to which they are shown to be entitled, and not awarded benefits to which they are not.
>
> 11. The provisions of regulation 7(1) thus apply only to persons who have made something that can be identified as a procedurally effective *claim*. They are separate and distinct from the provisions earlier in the same regulations that define what amounts to such a claim, and set out the procedural requirements for making claims if they are to be recognised as such and require the claims adjudication process to be put in motion at all."

42. In this context the decision of the House of Lords in *Kerr v Department for Social Development* [2004] UKHL 23 is significant. This position was helpfully explained by the Tribunal of three Social Security Commissioners in *R(H) 3/05* at paragraphs 78-80:

> "78. The position on a claim for benefit was recently considered by the House of Lords in *Kerr* … Whilst there are striking similarities between a claim for benefit and (say) a civil claim, there are also differences arising primarily from the fact that the process in benefits claims is inquisitorial rather than adversarial. In *Kerr* (at [63]), Baroness Hale (with whom the rest of their Lordships agreed) approved the approach of Mr Commissioner Henty in *CIS/5321/1998*, when he said in relation to the provision of information by a claimant:
>
> > '[A] claimant must to the best of his or her ability give such information to the [adjudication officer] as he reasonably can, in default of which a contrary inference can always be drawn.'
>
> 79. An administering authority is therefore required to inform a claimant of the information and evidence he should provide and it is for the claimant to supply such information or evidence as best he can. Where a claimant fails to provide information or evidence he can reasonably be expected to provide, there is no express sanction – but an inference may be taken against him and the case or the relevant issue may as a result be determined against him. Where the claimant is unable to supply information or evidence, the duty to obtain it may pass to the administering authority (under the principles expounded in *Kerr*). The authority must, of course, always act not only in accordance with the regulations governing the benefit but also reasonably. However, where the administering authority has done all that can reasonably be expected of it in seeking information and evidence, it will always be open to it to make a decision on the claim, making such adverse inferences against a claimant for any failure to disclose that are reasonable and proper. If the information and evidence are insufficient to show that the relevant conditions of entitlement have been satisfied, then the claim will be refused. All of this is well established in Commissioners' jurisprudence, but helpfully and succinctly confirmed in *Kerr* (see especially Lord Hope at [13]–[17] and Baroness Hale at [56]–[63]).

> 80. However, because of the inquisitorial nature of its function, it may not be possible for the administering authority reasonably to determine a claim until it has required the claimant to provide the relevant information or evidence that it reasonably supposes to be within his knowledge or his ability to obtain. Regulation 73(1) provides a mechanism for such a request. An authority could not reasonably make a decision adverse to the claimant during the currency of such a request but, if the claimant fails to comply with all reasonable requests and the authority has exhausted the other lines of investigation it is bound to explore under the principles set out in *Kerr*, it will be in a position to decide the claim. Therefore, the consequence of a failure to comply with a requirement to provide information or evidence may be delay in the making of an award (whilst other lines of investigation are explored) or an adverse inference being drawn against the claimant, but it is not an inability to determine the claim at all."

43. It follows that it was overly simplistic to say that the Appellant's case was closed because he had failed to attend an interview about his self-employment. On a proper legal analysis, his universal credit claim was disallowed because he had not shown that he satisfied the financial condition of entitlement for a single person (see section 5(1)(b) of the Welfare Reform Act 2012). That was a decision under section 8(1)(a) of the Social Security Act 1998 ("the 1998 Act") on his claim for universal credit that gave rise to a right of appeal to the First-tier Tribunal (section 12(1)(a) of the 1998 Act). As already noted, the usual statutory requirement that he apply for a mandatory reconsideration of that decision (see section 12(3A) of the 1998 Act) did not bite on the Appellant as the notification was inadequate. He indicated his dissatisfaction with the Department's handling of his universal credit claim in his letter of 4 June 2018 (p.87), which was within one month of the decision of 14 May 2018. It follows the Appellant's appeal was validly made and should have been admitted.

An issue that will need to be explored in advance of, and at, the FTT re-hearing

44. The main issue that needs to be explored at the FTT re-hearing is the Appellant's income from self-employment at the time of his claim in January 2018. As indicated above, the onus is on the Appellant to show what his self-employed income was at the material time. He cannot rely on assertions but must produce evidence. The Appellant should produce a copy of his 2017/18 tax return and any business accounts for 2017/18 before the FTT re-hearing. The District Tribunal Judge responsible for making re-listing directions may require the Appellant to produce further relevant documents.

What happens next: the new First-tier Tribunal

45. There will therefore need to be a fresh hearing of the Appellant's appeal before the First-tier Tribunal. Although I am setting aside the previous Tribunal's decision, and directing the Appellant's appeal should be admitted, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the claimant is entitled to universal credit. That is a matter for the good judgement of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

Conclusion

46. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

47. This decision was written during the extraordinary circumstances of the coronavirus crisis. Mrs Justice Farbey, as Chamber President of the Upper Tribunal (Administrative Appeals Chamber), has issued a general stay (i.e. postponement of any action with all cases 'put on hold') for 21 days on all proceedings (General Direction dated 25 March 2020). Given the special circumstances of this case, and the delays already experienced by this Appellant, I lift the general stay insofar as it applies to this appeal, as it is fair and just to do so, and so as to permit this decision to be issued.

Postscript

48. On any reckoning, this has been a difficult and complex appeal involving a vulnerable claimant. Whether or not the case eventually arrives at a satisfactory resolution from his perspective, his appeal has only got so far as it has because of the actions of three individuals, each of whom in their own way has scrutinised the case file and the relevant online records in the best traditions of the inquisitorial approach adopted in social entitlement appeals before the Upper Tribunal. Those three individuals are the Upper Tribunal registrar who first carefully reviewed the application for permission to appeal, the Secretary of State's representative, Mr Wayne Spencer, who responded in detail to that application, and the DWP work coach who helpfully provided a full account, many months after the relevant events, of the steps taken on the Appellant's claim for universal credit.

49. I highlight the contribution of those three individuals as I am acutely aware that many other claimants who are faced with a "case closure" communication in the online universal credit system and wish to appeal such a decision may not be so fortunate.

Signed on the original
on 6 April 2020

Nicholas Wikeley
Judge of the Upper Tribunal