



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CH/550/2021

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Mr J.S.

Appellant

- v -

Wirral Metropolitan Borough Council

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 25 August 2021
Decided on consideration of the papers

Representation:

Appellant: In person
Respondent: Mr M Bailey, Senior Appeals Officer, Wirral MBC

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 17 September 2020 under number SC062/20/00231 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

- 1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing (this may be a remote or virtual hearing, e.g. by telephone or CVP).**
- 2. The new First-tier Tribunal should not involve the tribunal judge previously involved in considering this appeal on 17 September 2020 or on any of the previous three appeals (on 20 March 2012 (Judge Flanagan), 9 November 2012 (Judge Anderson) and 17 February 2015 (Judge McMahon)) – see pp.92-94.**

- 3. If the Appellant has any further written evidence to put before the tribunal (e.g. medical evidence or evidence from Gamblers Anonymous), this should be sent to the HMCTS regional tribunal office in Liverpool within one month of the issue of this decision.**
- 4. A District Tribunal Judge should review the file with a view to directing that a copy of the Appellant's GP medical records be obtained (e.g. for the period from 2005 to 2015).**
- 5. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal(s). Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal(s).**

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

This appeal to the Upper Tribunal: the result in a sentence

1. The Appellant's appeal to the Upper Tribunal succeeds; but there will need to be a fresh hearing of the original housing benefit appeal before a new and differently constituted First-tier Tribunal.

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

2. I allow the Appellant's appeal to the Upper Tribunal. The decision of the First-tier Tribunal involves a legal error. For that reason, I set aside the Tribunal's decision.
3. The case now needs to be reheard by a new and different First-tier Tribunal. I cannot predict what will be the outcome of the re-hearing. So, the new tribunal may reach the same, or a different, decision to that of the previous Tribunal (and earlier Tribunals). It all depends on the findings of fact that the new Tribunal makes.
4. The Appellant complains that he knows "this is a complete waste of time". It is not. The new Tribunal will approach the appeal with a fresh mind. It will decide the case on the evidence it hears and reads. The Appellant is therefore encouraged both to provide further evidence for the new Tribunal and to attend the hearing himself.

The background to this appeal to the Upper Tribunal

5. The short version is as follows. The Appellant had a benefit fraud conviction from 2011, having pleaded guilty in the magistrates' court to the offences of dishonestly making a false statement or representation and dishonestly failing to give prompt notification of a change in circumstances. The offences related to failures to declare savings. The local authority repeatedly refused claims for housing benefit on the basis that the Appellant still held capital assets in excess of £16,000. The Appellant claimed he had lost his savings in gambling debts. Three successive appeal tribunals dismissed his appeals.

6. On 16 September 2019 the Appellant made a further claim for housing benefit, stating he had just £1,000 in capital. The local authority again decided he had no entitlement due to having excess capital. On 17 September 2020 a further First-tier Tribunal dismissed the Appellant's appeal.

7. When giving permission to appeal to the Upper Tribunal, I explained the background as follows, addressing the Appellant:

“5. On the face of it, the First-tier Tribunal has seemingly provided a detailed explanation by way of a statement of reasons for its decision. Your grounds of appeal by themselves probably do not justify giving permission to appeal. For example, while distressing, your medical conditions and their effects are not necessarily relevant to the issue of whether you still held the £20,000 in actual capital, as alleged by the Council.

6. However, the Upper Tribunal is an inquisitorial tribunal. This means that Upper Tribunal judges recognise that many (or most) appellants do not have a legal background and may not be able to identify an arguable point of law by themselves. Accordingly, Upper Tribunal judges consider whether there are any further points which might be made on an appellant's behalf.

7. Having reviewed the file, there is one point which you make which I consider can be developed into an arguable point of law. You say in your reasons for appealing that “I had paper tribunal because of Covid not to hide”. This was a reference to the First-tier Tribunal's reasoning at paragraph [29]:

“[The Appellant] has provided very little detail to this tribunal about the circumstances in which he claimed to have disposed of the sum of £20,000 in 2010. His account is that he paid it out to clear gambling debts, but there is no detail as to, for example, how those debts arose, what was the nature of the gambling, how the payment was made, or to whom it was made, for example, was it to one person or several or to a business such as a bookmaker. [The Appellant] had chosen to have a paper hearing so had not made himself available for questioning on these points. He had not provided any documentary evidence relating to the alleged debts, although the tribunal did not put any sufficient weight on this in view of the alleged nature of the debts.”

8. The First-tier Tribunal also noted that you had returned a hearing enquiry form on 20 April 2020 indicating you did not want a hearing and indeed that neither party had asked for an oral hearing. The Tribunal decided a fair decision could be reached on the papers and it was just and proportionate to proceed in that manner (statement of reasons, paragraph [2]).

9. However, it may be this involved the First-tier Tribunal jumping unfairly to conclusions. The Tribunal drew an inference from the Appellant's choice of a paper hearing that he had something to hide. But the dates are potentially significant. The first national lockdown began on 23 March 2020 and was still very much in force when the Appellant completed the hearing enquiry form on 20 April 2020. The file made it clear that you were aged 74 at the time and had serious medical conditions including the loss of an eye and PTSD. On that basis surely the natural and obvious inference was that you were staying at home for your own safety and security (and indeed in accordance with official government advice). It may be the tribunal has not done enough here to justify its reasons for

proceeding under rule 27 (see e.g. *FY v Secretary of State for Work and Pensions (ESA)* [2017] UKUT 501 (AAC)).

10. There are two further reasons why it might have been unfair for the First-tier Tribunal to proceed with a paper hearing.

11. First, as the pandemic spread, the First-tier Tribunal office began arranging virtual hearings by using telephone hearings or video-platform hearings. The hearing enquiry form issued here implies the choice was either a face to face hearing or a paper hearing and nothing in between. If the Appellant had been offered a telephone hearing, it is entirely possible that he may have accepted, but he was not given any such opportunity. Case law shows that a tribunal which fails to consider the option of adjourning for a telephone hearing may (not necessarily will) have erred in law: see e.g. *LO'K v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 10 (AAC); [2016] AACR 31.

12. Second, it was obvious on reading the papers on file that the credibility of the Appellant's account was critical. The Council understandably pointed to the fact that there was a prior criminal conviction for dishonest non-disclosure of capital assets and that three previous tribunals had refused similar appeals brought by the Appellant. Certainly, the fact that a claimant has been found to have lied in the past may indicate a propensity to lie (see e.g. *SR (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 460). However, being an inveterate liar does not necessarily mean that the person concerned is not telling the truth on this occasion: see *KM (Somalia) v Secretary of State for the Home Department* [2009] EWCA Civ 466. Arguably, the central importance of credibility meant that the Tribunal needed to hear at first hand from the Appellant so his account could be properly tested. It is also unclear whether he had ever been advised as to the type of evidence that he might bring forward to support his case (e.g. Was there evidence of any counselling for gambling addiction? Had he discussed the problem with his GP? Was there evidence that family members could provide about his gambling addiction and debts?)

13. In the circumstances, it therefore seems to me right to grant permission to appeal to the Upper Tribunal. This is no indication whatsoever as to the likely outcome of this appeal. All I have decided at this stage is that it is arguable that the First-tier Tribunal may have erred in law, not that it did go wrong in law."

The proceedings before the Upper Tribunal

8. Mr Michael Bailey, Senior Appeals Officer, and the local authority's representative in these proceedings, very fairly supports the appeal to the Upper Tribunal on the procedural point. He argues that given the lack of detail in the Appellant's notice of appeal to the First-tier Tribunal, it was not appropriate for the appeal to be dealt with at a paper hearing. This was against the background that the Appellant was shielding when he completed the hearing enquiry form and the first national lockdown was in place. It would have been possible to have held a telephone hearing by the time the appeal was heard. Mr Bailey also recognises that it was for the latest Tribunal to make its own decision on the facts, notwithstanding the outcome of the three previous appeals. However, there was no statement of reasons for any of those tribunal hearings (the decision notices are on file at pp.92-94 of the file).

9. It is also right to point out that although Mr Bailey supports the appeal to the Upper Tribunal on a point of law, the local authority remains of the view that the Appellant holds capital in excess of £16,000.
10. I am satisfied that the First-tier Tribunal erred in law for the reasons set out above. In a nutshell, it was not fair to proceed with a paper hearing. I therefore allow the Appellant's appeal to the Upper Tribunal, set aside (or cancel) the Tribunal's decision and remit (or send back) the original appeal for re-hearing to a new tribunal, which must make a fresh decision. I formally find that the Tribunal's decision involves an error of law on the ground as outlined above.
11. I understand the Appellant's sense of despair that this matter will never be resolved. However, I urge him to attend the next oral hearing (which may be a video hearing or a telephone hearing). He may also wish to try and obtain evidence from Gamblers Anonymous to support his claim that he attended sessions. As he also says that he attended counselling at his GP surgery, a District Tribunal Judge may wish to consider making a direction for the production of GP medical notes covering e.g. the period from 2005 to 2015.

What happens next: the new First-tier Tribunal

12. There will therefore need to be a fresh hearing of the appeal before a new First-tier Tribunal. Although I am setting aside the previous Tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the claimant is entitled to housing benefit. 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. It is in no way bound by the findings of the previous four tribunals.

Conclusion

13. 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 and guidance above (section 12(2)(b)(i)). My decision is also as set out above.

Signed on the original: Nicholas Wikeley
Judge of the Upper Tribunal

Date: 25 August 2021